WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LILLIAN FITZGIBBONS, *Applicant*

vs.

TESLA, INC., and AMERICAN ZURICH INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ11089187
San Jose District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

We note that a petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice …." (*Shipley v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied the applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.)

In this case, the Appeals Board failed to act on defendant's timely petition within 60 days of its filing on June 24, 2021, through no fault of defendant. Therefore, considering that the

Appeals Board's failure to act on the petition was in error, we find that our time to act on defendant's Petition for Reconsideration was tolled.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 18, 2022

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

LILLIAN FITZGIBBONS
AVARETTE LAW FIRM
GILSON DAUB

PAG/*pc*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. Applicant's Occupation: Production Associate (370)
   Applicant's Age: 59 years old at time of injury
   Date of Injury: 11/28/2016

2. Identity of Petitioner: **Defendant** filed the petition.
   Timeliness: The petition was timely filed on 06/24/2021
   Verification: The petition was verified.

3. Date of Issuance of Order: 06/04/2021

4. Petitioners Contends:
   Petitioner contends the evidence does not justify the findings of fact, findings of fact do not support the decision or award, and that the undersigned acted without and in excess of her powers.

Applicant filed its response.

II
FACTS

By way of brief background, applicant sustained an admitted lumbar spine injury on 11/28/2016 to her lumbar spine.

Dr. Mark Anderson, M.D. acted as the Agreed Medical Evaluator, authored a report dated 10/27/2018 and had his deposition taken on 2/11/2019. Dr. Michael Newman, D.C. authored a med-legal report as the primary treating physician. Mr. Scott Simon served as applicant's vocational expert and authored 3 reports whereas Ms. Emily Tincher served as defendant's vocational expert and authored 4 reports.

Dr. Anderson opined that under the strict AMA guides, applicant's impairment fell under DRE Category II resulting in 8% WPI with 3% WPI for pain add on, however, given the medical records as well as applicant's limitations of activities of daily living, full time use of cane and unusual subjective symptoms, he opined the most accurate analysis would be altered gait at 20% WPI, combined with the 8% WPI for DRE II and 3% WPI pain add on, or a total of 29% WPI. Dr. Anderson provided work restriction of working no more than 2 hours with minimal lifting of 1 to 2 pounds, limited to 15 minutes of sitting at a time, limited to standing 15 minutes at a time with need to change position as required. Dr. Anderson also opined that he see applicant being able

to function no better than a sheltered work environment in the home. While Dr. Newman agreed with the strict AMA guides opinion of Dr. Anderson, he differed in analogy wherein he provided the higher end of gait disorder of 39% WPI with 3% for pain or a total of 42% WPI. Dr. Newman agreed with Dr. Anderson as to the MMI date of 10/22/2018.

Dr. Newman provided similar work restriction of sitting 1 to 2 hours, stand and walk 15-20 minutes, full time use of cane, limited lifting of 2-3 pounds in left hand when standing and using cane, and lifting up to 5 pounds seated lifting from chest height. While neither doctors found apportionment to non-industrial factors as to the WPI, Dr. Newman did not feel confident that applicant would be able to work in any environment. Dr. Newman suspected significant portion of applicant's chronic pain disorder stemmed from somatoform disorder which was probably from part industrial but also non-industrial components, as expressed by the psychiatric evaluator, Dr. Rizva, whose report was not offered into evidence. Dr. Newman felt that applicant was totally disabled but recommended that applicant be seen by a neuropsychologist to determine apportionment of somatoform disorder between industrial and non-industrial factors, as it was unclear that the industrial injury was the sole cause of applicant's current level of labor disablement.

Mr. Simon opined that solely based on the effects of the industrial injury, applicant was not amenable for rehabilitation and sustained 100% loss of her labor market access whereas Ms. Tincher opined that as Dr. Anderson opined that applicant could potentially improve through desensitization exercise, applicant is amenable and found 49% DFEC.

Matter proceeded to trial on the sole issue of permanent disability, specifically, whether applicant is 100% disabled as alleged by applicant, or 21% under strict AMA Guides or 52% under Guzman, as alleged by the defendant.

Based on the review of the entire records, the undersigned found applicant rebutted the schedule and found applicant to be 100% disabled as a result of her industrial injury. It is from this finding, award and decision that defendant filed its petition for reconsideration.

III
DISCUSSION

Rebutting the schedule

Per LC §4660(c), the rating schedule is rebuttable, and burden falls on the applicant, who is disputing the rating.[1]

[1] *Almaraz v. Environmental Recovery Services* (2009) 74 Cal.Comp.Cases 1084.

Based on review of entire records, the undersigned found that applicant successfully rebutted the rating schedule not only under Almaraz / Guzman[2] based on Dr. Anderson and Dr. Newman's analogy, but applicant also produced sufficient evidence to rebut the scheduled rating pursuant to *LeBoeuf,*[3] *Ogilvie*,[4] and *Dahl*[5] wherein applicant presented vocational expert evidence in addition to medical evidence to prove she is not amenable to rehabilitation, lost 100% of her future earnings capacity and unable to compete on the open labor market due to her industrial injury.

Defendant alleges that evidence does not successfully rebut the rating schedule based on LC Section 4660.1, LeBouef, Ogilvie, and Dahl.

The undersigned found Mr. Simon's reports more persuasive than Ms. Tincher's for a number of reasons.[6] Mr. Simon conducted a thorough vocational evaluation and based on the work restrictions provided by Dr. Anderson and Dr. Newman, including working no more than 2 hours with minimal lifting and limited siting and standing of 15 minutes at a time, and found that applicant's low back injury and profoundly debilitating effects of moderate to severe chronic pain precluded the applicant from taking advantage of vocational rehabilitation and participating in the labor force, and that she sustained a total loss of earnings capacity.

Ms. Tincher, while she did conduct a thorough evaluation, her report was less persuasive. Ms. Tincher opined that applicant is amenable to vocational rehabilitation in the form of transitional return to work method, starting with 2 hours per day and gradually increasing to a full eight hour day as she becomes desensitized from her chronic pain syndrome. This opinion was problematic in that it was not supported by any evidence. She relied on Dr. Anderson's testimony that getting applicant in "some type of self-directed exercise program

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[2] (2009) 74 Cal.Comp.Cases 201 (en banc);

[3] *LeBoeuf v. WCAB* (1983) 48 Cal.Comp.Cases 587. Pursuant to *LeBoeuf,* a worker is deemed 100% disabled if he or she is medically and vocationally precluded from competing in the open labor market.

[4] *Ogilvie v. WCAB* (2011) 76 Cal. Comp. Cases 624. In *Ogilvie,* the Court held that it was permissible to depart from a scheduled rating on the basis of vocational expert opinion that an employee has a greater loss of future earnings capacity than reflected in a scheduled rating by demonstrating (1) a factual error in the calculation of a factor in the rating formula or its application; (2) the omission of medical complications aggravating the employee's disability in preparation of the rating schedule; or (3)the employee is not amenable to rehabilitation due to industrial injury, and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating.

[5] *Contra Costa County v. WCAB* (*Dahl*) (2015) 80 Cal.Comp. Cases 1119. In *Dahl*, the Court found that in order to rebut the Schedule, it must be shown that an individual is not amenable to rehabilitation, that any analysis must determine whether a work related injury precludes the applicant from taking advance of vocational rehabilitation and participating in the labor force rather than similarly situated individuals.

[6] While defense attorney alleged that Ms. Tincher authored four reports as opposed to Mr. Simon's three reports, only three reports were offered into evidence. Further, number of reports do not constitute a more thorough persuasive opinion.

to try to desensitize her pain response to relatively benign stimuli."[7] Dr. Anderson confirmed that he was not a pain management physician, and his use of "could" or "might" improve through desensitization exercise would suggest speculation, not a medical probability standard. Ms. Tincher opined vocational rehabilitation feasibility through gradual increase in activities and introducing new functional capacities slowly for applicant to become desensitized to her pain syndrome, but she failed to provide nor sufficiently explain the how when applicant was not a candidate for functional restoration program. Neither Dr. Anderson nor Dr. Newman opined applicant would be able to gradually increase to full 8 hours a day of employment.

While Ms. Tincher expressed jobs available within applicant's work restrictions, none seemed to apply to Ms. Tincher's so called "part time" of up to 2 hours a day. Ms. Tincher only focused on applicant's physical restrictions but failed to sufficiently address applicant's restriction of working up to 2 hours a day. Ms. Tincher failed to explain the reality of how many employers would be willing to accommodate 2 hours a day work with rather sedentary work restrictions. Ms. Tincher failed to sufficiently establish how this applicant would take advantage of vocational rehabilitation and participate in the labor force wherein applicant is challenged with working only 2 hours a day. While petitioner argues that changing posture every 15 minutes or four times per hour would not be rare or difficult to accommodate, this would not be realistic for an employee with limitation of working up to 2 hours a day.

Petitioner contends that applicant removed herself from the labor market, hence it would be inappropriate to award 100% disability based on diminished future earnings capacity. However, nothing in the evidence suggested that applicant removed herself from the labor market voluntarily. Dr. Newman's report suggests that applicant's physical progressive decline lead to her retirement and filed permanent disability claim with Prudential Group Disability as she was not able to return to work in any capacity.

Petitioner also contends pursuant to Montana factor, Mr. Simon did not discuss applicant's non-industrial vision disability. Quite contrary, Mr. Simon confirmed applicant's vision problem but that applicant worked over 20 years without an eye issue and performed quality control job at Tesla. Further, Mr. Simon opined that applicant was not amenable from her 2016 industrial injury alone. This opinion was based on both Dr. Newman and Dr. Anderson's work restriction as well as the medical opinion that applicant would not be able to return to work in any capacity.

Based on the above mentioned reasons, the undersigned found that applicant successfully rebutted the rating schedule, that she is not amenable to

[7] While Dr. Newman and Dr. Anderson expressed that applicant's subjective complaints and chronic pain syndrome to be unusual, neither doctors discredited applicant's subjective complaints.

vocational rehabilitation and has lost 100% of earnings capacity due to her industrial injury.

V
RECOMMENDATION

It is respectfully recommended that the applicant's Petition for Reconsideration be denied for the reasons stated above.

DATE: 07/07/2021
Pauline H. Suh
Worker's Compensation Judge