WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MAURICIO GARCIA, ***Applicant***

vs.

CITY AND COUNTY OF SAN FRANCISCO, Permissibly Self-Insured, administered by INTERCARE, ***Defendants***

Adjudication Number: ADJ10480060
San Francisco District Office

OPINION AND ORDER DENYING PETITIONS FOR RECONSIDERATION

We have considered the allegations of the Petitions 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.

For the foregoing reasons,

IT IS ORDERED that the Petitions for Reconsideration are **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 14, 2022

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

MAURICIO GARCIA
CHELVAM LAW FIRM
OFFICE OF THE CITY ATTORNEY
EMPLOYMENT DEVELOPMENT DEPARTMENT

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

Elizabeth Dehn, Workers' Compensation Judge, hereby submits her report and recommendation on the two Petitions for Reconsideration filed herein.

Introduction

On January 11, 2022, defendant filed a Petition for Reconsideration following the issuance of my December 21, 2021 Findings of Fact, Award and Order and Opinion Decision in this matter. Defendant asserts that by my Opinion on Decision and Findings of Fact, Award and Order I acted without, or in excess of, my powers; that the evidence does not justify the Findings of Fact; and that the Findings of Fact do not support the Opinion on Decision and Award and Order in this matter.

On January 18, 2022, applicant also filed a Petition for Reconsideration of my December 21, 2021 Findings of Fact, Award and Order and Opinion Decision in this matter. Applicant also asserts that by my Opinion on Decision and Findings of Fact, Award and Order I acted without, or in excess of, my powers; and that the Findings of Fact do not support the Opinion on Decision and Award and Order in this matter.

Both petitions were timely filed and accompanied by the verifications required under Labor Code section 5902. To date, I am not aware of an answer having been filed by either party.

Facts

Applicant sustained an admitted injury while employed by Defendant City and County of San Francisco as a transit operator during a period through April 24, 2016. Although applicant did sustain an admitted injury, defendant would not stipulate that the injury affected any body parts. The matter proceeded to trial on October 25, 2021 on the issues of which body parts were injured, with applicant claiming injury to the left arm, left shoulder, left hand, left fingers and back; permanent disability; defendant's request for reimbursement by applicant of any overpayment of permanent disability in this matter; applicant's request for payment of the invoices of his vocational expert, Frank Diaz; the lien of EDD; and whether or not applicant was in need of further medical care on an industrial basis.

On December 21, 2021, after carefully considering the documentary evidence submitted by the parties, the testimony of the applicant, and the trial briefs submitted by the parties, I found that the applicant sustained injury arising out of and in the course of employment to his left shoulder, left arm, left hand, and left fingers, and did not sustain injury to his back; that applicant's injury

caused permanent disability of 15%, that defendant was not entitled to reimbursement from applicant for any overpayment of permanent disability in this case, that applicant was in need of further medical care to the left shoulder, left arm, left hand, and left fingers to cure or relieve from the effects of the industrial injury, that EDD was not entitled to recovery on its lien, and that applicant was entitled to reimbursement of medical legal costs payable by defendant to applicant's vocational expert, Frank Diaz, pursuant to Labor Code section 5811 in an exact amount to be adjusted by and between the parties, with jurisdiction reserved.

Applicant's Contention

In his petition, applicant contends that I erroneously applied existing case law when I found that the applicant did not rebut the permanent disability rating schedule through the use of vocational expert evidence.

Defendant's Contentions

In its petition, defendant makes the following contentions:

1. The medical-legal costs of applicant's vocational expert, Frank Diaz, were not reasonable and necessary at the time they were incurred, and
2. I erred in excluding from evidence defendant's proposed exhibit of the February 13, 2020 Declaration of Readiness to Proceed and its attachments.

Discussion

1. Applicant did not rebut the permanent disability rating schedule with the report of his vocational expert.

Permanent disability is determined by consideration of whole person impairment within the four corners of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Labor Code section 4660.1). An employee may challenge the presumptive scheduled percentage of permanent disability "by demonstrating that due to industrial injury the employee *is not amendable to rehabilitation* and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating." (*Ogilvie v. Workers' Comp. Appeals Bd.*, (2011) 197 Cal. App. 4th 1262, 1277 (emphasis added.) A determination that an injured worker "cannot be retrained for any suitable gainful employment may adversely affect a worker's overall ability to compete [in the open labor market]. Accordingly, that factor should be considered in any determination of a permanent disability rating. (*LeBouef v. Workers' Comp. Appeals Bd.* (1983) 34 Cal. 3d 234, 243.) The first step in any *LeBoeuf* analysis is to determine whether a work-related injury precludes the claimant from taking advantage of vocational rehabilitation and participating in the labor force.

(*Contra Costa County vs. Workers' Comp. Appeals Bd.* (*Dahl*), (2016) 240 Cal. App. 4th 746, 758.)

There is no statutory framework for the rebuttal of the permanent disability schedule through a vocational expert when there is evidence that an injured worker can both return to work, and benefit from vocational rehabilitation.

> Most work-related injuries that qualify an employee for workers' compensation benefits reduce earning potential to some degree. Thus, allowing a claimant to rebut his or her permanent disability rating through a showing of some diminished future earning capacity would render the statutory formula virtually meaningless. Nothing in *Ogilvie* or any of the case law on which it relies suggests departure from the statutory rating system is permissibly whenever an employee cannot be returned to his or her pre-injury earning capacity. (*Dahl*, supra, 759.)

Applicant's expert opined that the number of jobs that the applicant can perform has been reduced because of his injury, and attempts to rebut the permanent disability schedule by substituting the percentage of permanent disability with the applicant's percentage of reduced access to the labor market. (Applicant's Exhibit F, Report of Vocational Expert Frank Diaz dated September 30, 2020, Pages 9 and 23.) However, neither *Ogilvie* or *Dahl* provide a method for rebutting the permanent disability schedule based on reduced access to the labor market.

Applicant's vocational expert, Frank Diaz, found that applicant retains the ability to work. (Applicant's Exhibit F, Report of Vocational Expert Frank Diaz dated September 30, 2020, Page 12.) Mr. Diaz opined that the applicant retained the capacity to benefit from both direct placement and on-the-job training. (Id. at Page 15.) He listed specific suitable occupations, including information clerk, front desk clerk, cashier, sales clerk, security guard, and restaurant host that the applicant could perform. (Id. at Page 16.) He also states that in all vocational probability, the applicant can complete training which would enhance his employability. (Id.) As applicant's expert opined that the applicant was employable, and could benefit from vocational rehabilitation, I found that Mr. Diaz's opinions did not rebut the scheduled permanent disability in this case.

2. The report of Frank Diaz is not substantial evidence.

Any decision must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal. 3d 274, 280.) The term "substantial evidence" means evidence "which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support the conclusion… It must

be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. WCAB* (*Bolton*) (1982) 48 Cal. Comp. Cases 566, 568.

In formulating his opinions regarding the applicant's functional limitations, Mr. Diaz used work restrictions outlined by applicant's prior treating physician, Dr. Barber, as well as the panel Qualified Medical Evaluator, Dr. Gordon. (Applicant's Exhibit F, Report of Vocational Expert Frank Diaz dated September 30, 2020, Pages 7, 9, 10, 12, 22.) Mr. Diaz testified that the work restrictions used in formulating his opinions were largely based on the limitations on lifting taken from Dr. Barber's report. (Joint Exhibit AA, Deposition of Frank Diaz dated March 4, 2021, pages 36-38.) He opined that the functional limitations outlined by Dr. Barber in her November 20, 2017 work status report limited the applicant to a light level of physical functioning based on the Dictionary of Occupational Titles. (Applicant's Exhibit F, Report of Vocational Expert Frank Diaz dated September 30, 2020, Page 10.) It was based on this assumption that the applicant was limited to light work occupations that Mr. Diaz opined that the applicant sustained a 96% loss of labor market access. (Id. at Page 9.) However, these work restrictions were from a work status report, and were not permanent work restrictions. (Id. At Pages 10 and 32). At the time that Dr. Barber provided the November 20, 2017 work status report, applicant had been diagnosed with a left frozen shoulder which was not yet permanent and stationary. It was not until 2019 that the applicant's condition was determined to be permanent and stationary. (Applicant's Exhibit N, Report of Leonard Gordon, M.D. dated September 24, 2019, Page 8.) Since Mr. Diaz's vocational expert opinions were based in large part on temporary work restrictions recommendations made two years before the applicant's condition reached a permanent and stationary plateau, his report is not substantial evidence.

3. Defendant is liable for the costs of applicant's vocational expert.

If vocational expert evidence is otherwise admissible, the evidence shall be produced in the form of written reports. (Labor Code section 5710(j).) The costs of vocational evidence obtained to rebut a permanent disability rating are properly allowable under Labor Code section 5811. (*Costa v. Hardy Diagnostic*, (2007) 72 Cal. Comp. Cases 1492., *Barr v. Worker's Comp. Appeals Board* (2008) 164 Cal. App. Fourth 173) The cost must be "reasonable and necessary at the time they were incurred . . .and may be reimbursable even if the applicant is unsuccessful in his or her claim." (Id at 1498.) If the vocational rehabilitation costs have the potential to affect the permanent disability rating than the costs are recoverable. (*Hennessy v Compass Group*, 184 Cal. Comp. Cases 756, 763.) This is true even if the report is not substantial evidence. (Id.)

At the time Frank Diaz prepared his September 30, 2020 report, the applicant's condition had been found to be at maximum medical improvement by the panel qualified medical evaluator, Dr. Gordon with permanent work restrictions that precluded him from returning to his usual and customary

employment. Defendant did not offer the applicant alternative or modified work. The applicant was not working, and had not since August, 2017. (Applicant's Exhibit F, Report of Vocational Expert Frank Diaz dated September 30, 2020, Page 4.) Even though applicant was not successful, I found that it was reasonable for applicant to retain a vocational expert to attempt to rebut the permanent disability rating outlined by Dr. Gordon.

Defendant argues that it should not be liable for the cost of applicant's expert because, among other things, the ultimate level of permanent disability awarded was 15% and the vocational expert's costs was disproportionate to the dollar value of the amount of permanent disability awarded in this case. Neither of those are factors used to determine if the costs were reasonable when they were incurred. Defendant's other arguments that it should not be liable for the expert costs, such as Mr. Diaz' not adopting the apportionment outlined by the PQME, allegedly having insufficient medical records to perform his evaluation, and that the evaluation included work performed, in part, by his assistant, affect the weight of the evidence. However, they do not affect the determination of whether or not the costs were reasonable at the time they were incurred.

4. Defendant's proposed Exhibit 8 was properly excluded from evidence.

At the time of trial, defendant sought to introduce into evidence a copy of its Declaration of Readiness to proceed with attachments. At the time of the trial, defendant argued that the settlement demand supported their claim for reimbursement from the applicant. (Minutes of Hearing from October 25, 2021 trial, page 6.) I sustained applicant's objection to the proposed Exhibit 8 as one of the attachments to the DOR was a prior written settlement demand from applicant attorney that was being submitted into evidence to support a claim against the applicant. Evidence Code section 1154 states:

> Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.

Defendant argued in its petition for reconsideration that Exhibit 8 should have been admitted at the time of trial to support their claim that the costs of the report of Frank Diaz were not reasonable and necessary at the time they were incurred. This argument was not made at the time of trial. It is also not clear from defendant's petition how they believe applicant's settlement demand supports this contention. In addition, although defendant raised this as an issue in the petition for reconsideration, it made no argument as to why the exhibit is admissible. It appears that defendant is arguing that applicant's settlement demand letter, which included his rating of the report of Dr. Gordon, is evidence

that it was unreasonable to obtain vocational evidence to rebut the report. However, even if the argument was made at trial, my ruling would have been the same. To the extent that defendant seeks to introduce a written settlement demand to attempt to prove that applicant is liable for the costs of his vocational expert, Evidence Code section 1154 precludes it from being admitted into evidence.

Recommendation

For the foregoing reasons, I recommend that applicant's January 18, 2022 and defendant's January 11, 2022 petitions for reconsideration be denied.

DATE: January 25, 2022
Elizabeth Dehn
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE