WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SHANE PERRY, *Applicant*

vs.

MASTEC, INC.;
ACE AMERICAN INSURANCE, ADMINISTERED BY ESIS, *Defendants*

Adjudication Numbers: ADJ10817362; ADJ10814219; ADJ10815251
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Mastec, Inc., insured by ACE American Insurance, administered by ESIS (defendant) seeks reconsideration of the January 19, 2023 Joint Findings, Award and Orders (F&A), wherein the workers' compensation administrative law judge (WCJ) found, in pertinent part, that applicant sustained permanent and total disability.[1]

Defendant contends that a subsequent injury occurring on December 25, 2021 was not adequately considered by the WCJ, that applicant's vocational expert reporting was untimely and inadmissible, that applicant's vocational reporting utilized an incorrect legal standard, and that the defense vocational reporting was improperly excluded from evidence.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition for Reconsideration (Petition) be denied.

We have considered the allegations of the Petition, and the contents of the Report of the 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, and for the reasons below, we will grant

[1] Commissioners Lowe and Sweeney, who previously participated in this panel, no longer serve on the Appeals Board. Other panelists have been assigned in their place.

reconsideration, amend the decision as recommended by the WCJ solely to exclude the rebuttal reporting of applicant's vocational expert, and otherwise affirm the F&A.

BACKGROUND

Applicant has filed three pending applications for adjudication. In ADJ10817362, applicant alleged injury to the back, right shoulder, right arm left leg, and in the form of hernia, while employed as an alarm installer by defendant on May 6, 2015. Defendant admits injury to the back, right shoulder, and hernia, and denies injury to the right arm and left leg.

In ADJ1082109, applicant alleged injury to the back and left leg while employed as an alarm installer by defendant on March 26, 2015. Defendant admits injury to the back and disputes injury to the left leg.

In ADJ10815251, applicant alleged injury to the back and left leg while employed as an alarm installed by defendant on July 18, 2015. Defendant admits injury to the back and disputes injury to the left leg.

The parties have selected Patrick McGahan, M.D., to act as the Qualified Medical Evaluator (QME) in orthopedics, and Robert Noriega, M.D., as the QME in internal medicine. Applicant has further obtained reporting from vocational expert Eugene Van de Bittner, Ph.D., while defendant has obtained reporting from vocational expert Frank Diaz.

The parties previously proceeded to trial on November 9, 2020, framing issues including permanent disability and attorney fees.

On January 19, 2021, the WCJ issued Joint Findings of Fact and Award, determining in relevant part that the record required development "as to the issues of whether the left leg was injured in the course and scope of employment, whether the lumbar condition was at MMI status as of May of 2020, and whether PQME Patrick McGahan is to serve as PQME relative to the hernia condition." (Finding of Fact No. 6, Joint Findings of Fact and Award, dated January 19, 2021, at p. 2.)

Following development of the record, the parties brought this matter to trial on September 12, 2022, at which time issues of permanent disability, attorney fees, and litigation costs were raised and submitted. (Minutes of Hearing and Summary of Evidence, dated September 12, 2022, at 3:24.)

The WCJ issued his F&A on January 19, 2023, finding in pertinent part that based on the reporting of QME Patrick McGahan, M.D., in orthopedics, QME Robert Noriega, M.D., in internal medicine, and based on the reporting of applicant's vocational expert Eugene Van de Bittner, Ph.D., that applicant sustained permanent and total disability. (F&A, Findings of Fact No. 4.) The WCJ further ordered that Defendant's Exhibit E, the reporting of defense vocational expert Frank Diaz, marked for identification only, not be admitted into evidence. (F&A, Order No. 1.)

Defendant's Petition contends that the WCJ failed to adequately consider applicant's subsequent injury occurring on December 25, 2021, that the reporting of applicant's vocational expert was inadmissible and failed to discuss, apply or follow the correct legal standard in his analysis, and that it was error to exclude the reporting of defense vocational expert witness Frank Diaz. (Petition, at 2:20.)

Applicant's Answer avers the award of permanent and total disability is supported by the medical and vocational evidence, as well as applicant's unrebutted lay testimony. (Answer, at 6:18.) Applicant observes that pursuant to the reporting of vocational expert Dr. Van de Bittner, the medical-legal reporting of QMEs Robert Noriega, M.D., and Patrick McGahan, M.D., established that applicant was not feasible for vocational retraining, and was thus permanently and totally disabled. (*Id*. at 9:25.)

The WCJ's Report reviews applicant's medical and surgical history, as well as applicant's trial testimony regarding persistent and debilitating pain. (Report, at pp. 7-9.) In addressing the contention that the WCJ did not adequately consider applicant's December 25, 2021 injury, the WCJ observes that "the unspoken implication in this argument appears to be that the slip and fall resulting in the compression fracture was not and/or could not be industrial, i.e. would not be a compensable consequence injury of the original three injuries, and that any worsening of Applicant's condition as a result of that injury should and cannot be attributed to the defendant for purposes of PD, work restrictions, and/or a vocational analysis." (*Id*. at pp. 12-13.) However, the WCJ observes that defendant offered neither argument nor analysis in support of this contention in trial proceedings, and that defendant's argument is inherently speculative and unfounded in the record. The WCJ further observes that the Opinion on Decision makes clear that he did not rely on a theory of diminished future earnings capacity to find applicant's disability to be permanent and total, and that defendant's argument in this regard reflected a "fundamental misunderstanding" of applicable caselaw. (*Id*. at pp. 15-16.) The Report further observes that the decision to exclude

defendant's reporting was premised on defendant's failure to exercise reasonable diligence in producing the reporting, and because the defense reporting was served for the first time on the final day of trial. (*Id*. at p. 20.) However, the Report also avers error in admitting the rebuttal reporting of applicant's vocational expert into evidence, given that the report was obtained in response to the excluded defense vocational expert reporting. Accordingly, the WCJ recommends we grant reconsideration for the sole issue of excluding the October 3, 2022 report of Dr. Van de Bittner from evidence. (*Ibid.*)

DISCUSSION

Defendant's Petition contends "the evidence demonstrates a subsequent injury occurring on 12/25/2021 in which Applicant sustained a new compression fracture in his lumbar spine, which was not considered by the trier of fact in his 100% PTD finding." (Petition at 2:17.) However, as the WCJ observes in the Report, the record is devoid of specific argument in this regard, and issues raised for the first time on petition for reconsideration are deemed waived. (Lab. Code, § 5904; *Los Angeles Unified Sch. Dist. v Workers' Comp. Appeals Bd. (Henry)* (2001) 66 Cal.Comp.Cases 1220 (writ denied); *Jobity v. Workers' Comp. Appeals Bd.* (1997) 62 Cal.Comp.Cases 978 (writ den.); *Hollingsworth v Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 715 (writ denied).) We also note that applicant's vocational expert Dr. Van de Bittner attributed applicant's non-feasibility for vocational retraining to the three claimed industrial injuries, and the record reflects no further development on this issue by defendant via cross-examination of applicant's vocational expert. (Ex. 90, Vocational report and related invoice from Eugene Van de Bittner, Ph.D., dated February 26, 2022, at p. 54.)

Defendant next contends that applicant's vocational expert failed to address the "correct and current legal standard for 100% PTD" as set forth in the WCAB panel decision in *Wilson v. Kohl's Department Stores* (December 6, 2021, ADJ10902155) [2021 Cal. Wrk. Comp. P.D. LEXIS 322]. Defendant contends under *Wilson*, it is no longer permissible to utilize diminished future earnings capacity (DFEC) to rebut the presumptively correct permanent disability rating schedule.[2] (Petition, at 11:14.) However, as the F&A makes clear, the basis for applicant's

[2] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning

Permanent and Total Disability is not a DFEC analysis, but rather the considered opinion of applicant's vocational expert that applicant cannot be retrained for reentry into the labor market. (Ex. 90, Vocational report and related invoice from Eugene Van de Bittner, Ph.D., dated February 26, 2022, at p. 54; *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624]; *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [193 Cal. Rptr. 547, 666 P.2d 989].) Accordingly, we agree with the WCJ that the reporting of applicant's vocational expert is not predicated on an incorrect legal standard in its assessment of applicant's feasibility for a return to the open labor market.

Defendant's Petition further contends that the WCJ erred in excluding the September 7, 2022 report of defense vocational expert Frank Diaz. (Petition, at 16:15.) However, as is noted in the offers of proof of the parties at trial, a representative from the office of the defense vocational expert interviewed applicant on May 4, 2022. Defendant was thereafter unable to produce and offer the report at the June 2, 2022 status conference, the July 26, 2022 Mandatory Settlement Conference, or the August 2, 2022 Mandatory Settlement Conference. The defense vocational report was provided to the court and the parties for the first time at the September 12, 2012 trial setting. (Minutes, at 18:36.) The Petition offers no persuasive argument for why the reporting could not have been produced prior to the final day of trial, despite multiple continuances afforded defendant. Accordingly, we discern no error in the WCJ's decision to exclude the report of vocational expert Frank Diaz from evidence. (Lab. Code, § 5502(d)(3).)

We note the WCJ's recommendation that we grant reconsideration for the purpose of excluding the October 4, 2022 report of Dr. Van de Bittner, offered in rebuttal to the September 7, 2022 report of the defense vocational expert, which was excluded from evidence. (Report, at p. 20.) The WCJ's report posits, "in no way did I rely on that report in making my finding of PTD. That report did not include any substantive or new vocational opinions from Dr. Van De Bittner, and was limited only to commentary and a critique of the Diaz report." (*Ibid.*) We agree with the WCJ's analysis and rationale for exclusion of the report as not relevant in light of the exclusion of defendant's vocational reporting, and will grant reconsideration solely to amend the decision to exclude the October 4, 2022 report of Dr. Van de Bittner.

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persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

In summary, we concur with the WCJ's analysis that the evidence in the record appropriately supports a finding of applicant's permanent and total disability, that the reporting of applicant's vocational expert applied the correct legal standard in its analysis, and that the WCJ did not err in excluding the defendant's vocational expert reporting. We grant reconsideration solely for the purposes of excluding applicant's vocational rebuttal report, as recommended by the WCJ.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Joint Findings, Award, and Orders with Opinion on Decision, dated January 19, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings, Award, and Orders with Opinion on Decision, dated January 19, 2023 is **AFFIRMED**, except that it is **AMENDED** as follows:

ORDER

Applicant's Exhibit 92, the Supplemental Vocational Report from Eugene Van De Bittner, Ph.D., dated October 4, 2022, is excluded from evidence.

WORKERS' COMPENSATION APPEALS BOARD

/s/ NATALIE PALUGYAI, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 14, 2023

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

PERRY SHANE
APPEL LAW FIRM
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN

SAR/abs

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 DEFENDANT'S PETITION FOR RECONSIDERATION

INTRODUCTION

By a timely and verified Petition for Reconsideration (Petition) dated and e-filed on February 13, 2023, defense counsel seeks reconsideration of the Joint Findings & Award with Opinion on Decision (Joint F&A) dated and served on January 19, 2023, which in relevant part found that Applicant: 1. As a result of the combined effects of the three accepted injuries in this case to Applicant's low back and based on combination of the medical and vocational evidence, the Applicant was found to be permanently and totally disabled at the rate of $493.04 per week, with the Applicant reaching permanent and stationary (P&S) status as of September 12, 2020, with a 15% attorney fee awarded, the specific sum to be determined; 2. The Applicant did *not* sustain injury A OE/COE to his right arm or left leg in ADJ10817362, to his left leg in ADJ10814219, or to his left leg in ADJl0815251; and 3. That defendant's vocational expert report from Frank Diaz, which defense counsel served on Applicant's attorney on the day of trial and long after the close of discovery, was not admitted into evidence on the basis it was late and the defendant was not diligent in obtaining it.

Defendant's Petition alleges and argues that: 1. I erred by failing to "consider the effect of' Applicant's fall on December 25, 2021, which resulted in a lumbar compression fracture (*Id*. at pp. 9-10.); 2. I failed to use the correct legal standard in finding permanent total disability and that the evidence does not support such a finding under the applicable standard (*Id*. at pp. 11-16.); and 3. I improperly excluded/failed to admit the vocational report of Frank Diaz into evidence and improperly admitted the rebuttal report from Applicant's vocational expert, Eugene Van De Bittner, Ph.D. (*Id*. at pp. 16-17.)

Applicant's attorney e-filed a 2-page Answer to the Petition and a related 18-page Memorandum of Points & Authorities in support of that Answer (Memo) on February 21, 2023.[1] That Answer and the related memo argues that the Petition has no merit and/or reasonable basis (Answer at p. 2), and the Memo more specifically argues: 1. The Award is supported by substantial evidence (*Id*. at pp. 5-10); and 2. Defendant's argument that DFEC and/or vocational evidence

[1] I note Rule 10940(d) provides an Answer to a Petition for Consideration shall not exceed 10 pages, "unless allowed by the Appeals Board." To the extent that Applicant attorney's Memo of Points and Authorities exceeds that limit, and is in my judgment a proxy for the Answer, this appears to be to be a circumvention of that Rule.

should not be considered for post January 1, 2013 injuries is without merit. (*Id*. at pp. 11-17.) I apologize to the Board for the delay in this report.

BACKGROUND

The claims in this matter were previously tried on November 9, 2020, before Judge Jeffrey Friedman, where the Applicant testified. On January 19, 2021, Judge Friedman issued Joint Findings of Fact, Award and Opinion on Decision (Joint F&A), which found that all periods of TTD had been adequately compensated, that the Applicant required further medical treatment for the low back and hernia, and that the record required further development in the form of a re-exam with the orthopedic QME, Dr. Patrick McGahan, to determine whether the claimed injury to the left leg was injured AOE/COE, whether the Applicant was P&S/MMI as of May 2020, and whether a new QME in a different specialty was necessary to evaluate the accepted hernia injury, even though Dr. McGahan had done so in his prior reporting.

In response to this decision, defendant filed a timely Petition for Removal dated February 12, 2021, which in essence disputed Judge Friedman's finding that the record needed to be developed. Applicant's attorney filed an Answer dated February 19, 2021, which objected to the Petition and argued it should be denied. Judge Friedman filed a Report and Recommendation recommending the Board deny removal. On January 3, 2022, the Board issued an Opinion and Order granting Petition for Reconsideration, noting the matter required further study before a decision could issue. In response to that order, defense counsel wrote the Board on January 4, 2022, which advised the Petition for Removal was no longer being pursued, and that the further discovery ordered by Judge Friedman was being pursued. In response, the Board issued an Opinion and Decision on Reconsideration dated April 7, 2022, which vacated its grant of reconsideration and dismissed the Petition for Removal.

The resulting additional discovery included an additional QME panel m internal medicine to address the hernia, which ultimately resulted in two reports from Robert Noriega, M.D., dated January 12, 2022 and November 19, 2021. (Joint 101.) It also prompted a new report from the primary QME, Dr. McGahan, dated July 21, 2021 (Joint 102.) After the Board's order vacating the reconsideration grant and dismissing the Petition for Removal, Judge Friedman set the matter for a status conference, which took place on June 2, 2022. As reflected in the related Minutes of Hearing (MOH), defendant sought to go off calendar, and the matter was continued over

defendant's objection, to an MSC on July 26, 2022. At that MSC, as reflected in the MOH, Judge Friedman again continued the MSC to August 2, 2022, over Applicant's objection, noting defendant's vocational expert report was pending. Applicant's attorney had obtained a preliminary "brief' vocational report from Dr. Van de Bitter dated July 26, 2020, which did not involve an interview and/or testing, and was admitted into evidence at the time of the first trial as Applicant's 9. At that trial, it was the only vocational evidence and stood unrebutted, since there was no defense vocational report. That report found reduced labor market access and reduced future earning capacity, but did not find that Applicant was not amenable to vocational rehabilitation.

At the August 2, 2022 MSC, the parties completed the Pretrial Conference Statement (PTCS), and because it was known by then that Judge Friedman would be retiring and would be unavailable to act again as the trial judge, the case was set for trial before the undersigned on September 12, 2022. At that point, defendant still had not obtained its vocational report, and the PTCS at page 1 indicates discovery was ordered closed, with the admissibility of defendant's tardy vocational report, deferred to the trial judge. Interim medical reports and exhibits, including sub rosa video obtained by the defendant, were listed as new trial exhibits.

As noted in Judge Friedman's Joint F&A at pages 3-6, the Applicant was employed as an alarm installer by Mastec, Inc., where he had worked since 2012, and sustained three successive accepted specific injuries. The first was on March 26, 2015, in ADJ10814219, when he rear-ended another driver in a company vehicle while attempting to avoid a collision, resulting in accepted injuries to his back, and claimed injuries to his left leg. He obtained medical treatment and continued to work on modified duty. The second injury was on May 6, 2015, when while installing a camera using a ladder on a roof, he partially fell off the ladder, and grabbed the roof to prevent a fall to the ground and in the process twisted his body and his back. He did not fall to the ground. That injury was reported and ultimately accepted as to the low back and right shoulder. Applicant began treatment with Dr. John Gunderson (Applicant's 14-42) for the two industrial injuries, and continued to work modified duty for the employer. The third injury occurred on July 18, 2015, when while driving to a job, the Applicant's vehicle was rear-ended by a co-worker, resulting in an accepted injury to the low back. Dr. Gunderson provided additional work restrictions after this accident, which evidently could not accommodated, so defendant began to pay temporary total disability at that point. That was the last day Applicant worked in any capacity, and he has not worked since. He was 36 years old at the time.

A lumber MRI dated September 4, 2015, documented degenerative disc disease throughout the low back and a mild left sided disc herniation at LS-SI. On April 27, 2016, the Applicant had a spine surgery consult with Abid Quereshi, M.D. (Applicant's 4), who concluded the Applicant was not then a surgical candidate, recommended the Applicant lose 50 pounds, and noted that he would reconsider the question if and when Applicant lost the weight. (Applicant's 4.) Applicant changed PTP's to spine surgeon Vikram Talwar, M.D., in September of 2016. (Applicant's 44-85.) Dr. Talwar eventually issued a request for authorization (RF A) for low back surgery, which was approved by utilization review (UR), and Applicant underwent a L3-4 left-sided extraforaminal decompression with Dr. Talwar on January 11, 2017. (Applicant's 79.) In March of 2017, Applicant retained current counsel who filed three respective applications on March 27, 2017, at the Oakland Board. The parties thereafter obtained an orthopedic QME with orthopedist, Patrick McGahan, M.D., who issued an initial report dated February 21, 2018, and found Applicant's shoulder and neck issues had resolved, but that he was not yet P&S for his low back, which included radicular symptoms in his left leg. (Applicant's 10.) Dr. Talwar operated for a second time on Applicant's low back on July 12, 2018, and that procedure involved a revision foraminal decompression at L3-4. (Applicant's 65.) Unfortunately, that surgery resulted in a post-op complication of a hematoma with significant fluid build-up, which required a third surgery with Dr. Talwar on July 24, 2018 to address. (Applicant's 62.) Dr. McGahan issued a second report on April 10, 2019 based on a re-exam, which found the Applicant was not yet P&S and that additional surgeries were being considered. (Applicant's 11.)

Over a year later, based on persistent pain and symptoms, Dr. Talwar requested and was authorized to undertake a fourth lumbar surgery, which took place over the course of two days, September 11, 2019 and September 12, 2019, and involved a decompression and lumbar fusion. Unfortunately, there was another complication following this two-day surgery, with the development of large ventral abdominal hernia and related bowel resection that had to be repaired on an emergency basis in a surgery by Dr. Kwan on September 21, 2019. That hernia was later found to be a compensable consequence of the industrial back surgery by internist QME, Dr. Robert Noriega. Dr. Noriega evaluated the Applicant, and issued two reports dated November 19, 2021 and January 12, 2022. (Joint 101.) Dr. Noriega's first report deferred opinions on causation and PD/apportionment pending receipt and review of additional requested records. (Joint 101, report of 11/19/21 at pp. 7-8), but noted a ventral hernia existed prior to any of the injuries in

question and prior to the spine surgeries, as documented in a CT scan of the abdomen dated February 20, 2014. (*Id*. at p. 7.)

In the second report, he found the hernia to be industrial and P&S, and provided impairment ratings. (Joint 101.) Having reviewed additional records, including the various operative reports, Dr. Noriega concluded that the ventral incisional hernia in the small bowel was an operative complication, which was different from the pre-existing CT documented asymptomatic periumbilical hernia dating from at least February 20, 2014, and a second epigastric hernia incidentally encountered upon surgical entry, on September 11, 2019. (Joint 101, Report of 1/12/22 at p. 2.) He concluded the hernia was P&S as of the date of his original exam on November 16, 2021, and found impairment of 13 WPI for the abdominal wall injury and 6 WPI for the small bowel resection, before adjustment for FEC, age, and occupation. (*Id*. at p. 3-4.) This rating was higher than that provided by QME Dr. McGajian, who had also addressed and rated the hernia in his P&S report dated May 8, 2020. (Applicant's 12.) Dr. Noriega apportioned 15% of the hernia PD to non-industrial factors including "anatomic susceptibility [and] preexisting defects in the supporting structures of the abdomen," but did not apportion any of the bowel resection impairment. (*Id*. at p. 5.) He also provided work restrictions for the hernia of no lifting more than 50 pounds, and no lifting of more than 25 pounds on a frequent basis. (*Id*.)

During the course of a February 3, 2020 appointment, the Applicant appears to have had some type of falling out with his then PTP, Dr. Talwar, and stopped treating with him thereafter. (Applicant's 44.) This incident was also referenced in Judge Friedman's Joint F &A. The Applicant does not seem to have had much medical treatment on an industrial basis since, and as stipulated by the parties in the MOH/SOE of September 12, 2022, does not have a current PTP. (MOH/SOE 2 at p. 3, Stipulation No. 7.)

The Applicant testified at both trials as summarized in the respective MOH/SOE, and judicial notice was taken of those summaries. In his testimony at the second trial, I generally found him to be a credible witness. The relevant portions of his September 12, 2022 testimony, which was largely consistent with his trial testimony at the first trial, can be summarized as follows. He currently experiences chronic pain, which has gotten worse over time, including since his the first trial. (MOH/SOE 2 dated 9/12/22 at p. 7.) In addition to the three specific injuries, he sustained a new compression fracture in his low back when he slipped and fell in his house on December 25, 2021. (*Id*.) He currently experiences constant pain at an average level of 8 on a 10-point scale,

which affects his activities of daily living. (*Id*.) He estimates his standing tolerance at 5 minutes and then has to change position, and claims he cannot sit for more than 15-30 minutes before having to change position. (*Id*.) He has numbness in both legs and feet and has to wear sandals because of foot swelling that he attributes to his back surgeries. (*Id*.) The longest he can walk without his cane, is to and from the mailbox at his house. (*Id*. at p. 8.)[2] He sleeps only 3-4 hours a night, and as a result is constantly fatigued and takes multiple naps a day. (*Id*.) He has transitioned from prescription medications and now takes alternative medications to deal with his pain, including shilajit, vitamins, and supplements. (*Id*. at pp. 8-9.) He also takes frequent baths with bath salts. (*Id*.) He cannot take showers because he is unable to stand for extended periods. (*Id*. at p. 9.)

He has not looked for jobs because he does not believe he is employable and although "he would if he could," he cannot work. (*Id*. at p. 10.) He was personally interviewed and tested by Dr. Van de Bittner, was honest with him, and never personally spoke with defense vocational expert, Frank Diaz, whose evaluation was conducted via Zoom. (*Id*. at p. 11.) I noted in the MOH/SOE 2 that during Applicant's trial testimony via LSC video, he frequently stood with the assistance of his cane, and would then sit down, in repeated cycles. (*Id*. at p. 12.) His pain increased after his slip and fall and the resulting compression fracture on December 25, 2021. (*Id*.) He estimates he takes 4 to 6 naps a day and has to take multiple baths a day to address his pain. (*Id*.) He stated that if he could be accommodated and work from home with the necessary baths and naps, he would need to be paid at least $25 to $55 an hour to pay his bills. (*Id*.)

He is in the process of a divorce, which has yet to be finalized, and does not receive alimony from his spouse. (*Id*.) He has an 18-year-old son, who received a track scholarship and is a student at UCLA, and his wife moved out and he now lives alone in a rental house. (*Id*. at p. 13.) After leaving Dr. Talwar, he got some treatment and medications through Kaiser as a dependent on his wife's health insurance. (*Id*. at p. 14.) However, with the pending divorce, he is no longer on her policy and currently does not have any private health insurance or MediCal coverage. (*Id*. at pp. 14-15.) He has gained weight since getting off the prescription medications and has gained 15 pounds in the last 6 months. (*Id*. at p. 15.) The last time he took prescription medication was in January 2021. (*Id*.) He was told he might at some point need another back surgery. *(Id*. at p. 17.)

[2] I note there is a typographical error in the MOH/SOE 2 at page 8, at line 18, where is says he had fusion surgery to his neck, over the course of two days, September 11 and 12, 2019. That should read low back, not neck.

The parties obtained dueling vocational expert reporting with respect to the PTD/*LeBoeuf*[3] issue. Specifically, Applicant has three reports from Eugene Van de Bittner, Ph.D;, including the third 13-page report dated October 3, 2022, that was obtained after trial and after the belated production and service of the defense report from Frank Diaz served *on the day of trial*, that I delayed submission to wait for and admit. (Applicant's 9, Applicant's 90, Applicant's 92, See also MOH/SOE 2 at p 6.) That third report (Applicant's 92), was admitted into evidence in the Supplemental Minutes of Hearing and Summary of Evidence dated January 18, 2023, which also included my summary of the admitted sub rosa video. At the time of trial, defendant's report from Frank Diaz dated September 7, 2022 (Defendant's B), was marked for identification only at the time of trial (See MOH/SOE 2 dated 9/12/22 at p. 6), based on Applicant's objection to its admission on the basis it was not timely obtained, the defendant was not diligent, and the fact that it was served on the day of trial and long after the closure of discovery by Judge Friedman at the August 2, 2022 MSC.

The first vocational report from Dr. Van de Bittner dated July 26, 2020. (Admitted at the first trial as Applicant's 9), was not a complete vocational evaluation and is entitled Brief Vocational Rehabilitation Evaluation, and was based only on a review of Dr. McGahan's QME reports. It did not involve an interview and/or testing, and includes an employability analysis based on the QME's work restrictions, which concluded the Applicant had diminished labor market access of 75.12%, and a diminished future earning capacity of 25%. (*Id*. at pp 6-7.) Dr. Van de Bittner did find and conclude the Applicant would be able to benefit from and was amenable to vocational rehabilitation services. (*Id*. at p. 6.)

However, by the time of his second report, which was based on an in-person evaluation and related testing, Dr. Van de Bittner's opinions had changed significantly. In the 63-page report dated February 26, 2022 (Applicant's 90), he reviewed the two new reports from the internal QME, Dr. Noriega regarding the hernia and related work restrictions (Joint 101), and the orthopedic QME re-exam report from Dr. McGahan dated July 21, 2021 (Joint 102.) Based only on the work restrictions provided by the respective QMEs, he concluded the Applicant had diminished labor market access of 75.13%. (Applicant's 90 at p. 47.) However, he further explained and concluded, "When considering Mr. Perry's vocational labor market access, placeabilty, and sustainability, that is when considering a combination of medical and vocational factors outlined in the ... section[s]

[3] See *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 48 Cal.Comp.Cases 587.

above, *Mr. Perry would have access to 0% of jobs in the open labor market. Therefore, his diminished labor market access is 100%.*" (*Id*. emphasis added.) He further explains and finds that "When considering all of the medical and vocational information collected to this point in a combined, interactive and synergistic manner, *Mr. Perry has no return-to-work options for occupations in the open labor market*." (*Id*., emphasis added.) With respect to amenability to rehabilitation services, Dr. Van de Bittner found that "In summary, when considering the opinions of Dr. McGahan and Dr. Noriega, Mr. Perry retains the medical capacity to benefit from vocational rehabilitation services and to be amenable to rehabilitation. However, *when considering the vocational factors as summarized above*, Mr. Perry is not vocationally feasible and lacks the capacity to be amenable to rehabilitation for regular jobs in the open labor market, either full-time or parttime." (*Id*. at p. 52, emphasis added.)

The defense vocational expert, Frank Diaz, issued one report dated September 7, 2022, (Defendant's E), and did not evaluate or test the Applicant in-person, but rather over Zoom. Mr. Diaz finds and concludes that based on the work restrictions of the two QMEs, Drs. McGahan and Noriega, the Applicant sustained an 84% loss of labor market access. (*Id*. at pp. 12, 22.) Mr. Diaz comments that "the objective findings of Drs. Talwar and McGahan, the observed pain behavior during the vocational evaluation ... results in a significant barrier for Mr. Perry in his efforts to return to competitive employment in the open labor market." (*Id*. at p. 17.) He also observes, "Based on my evaluation with Mr. Perry as well as my review of the medical file, I find that Mr. Perry would have difficulty successfully interviewing for jobs in the open labor market." (*Id*. at 20.) Despite these findings, Mr. Diaz ultimately concludes that with vocational rehabilitation in the form of computer operations training, which he believes the Applicant is amendable to, Mr. Perry *could, if provided with reasonable accommodations consistent with the work restrictions and a sit stand desk, return to work in selective positions* such as "receptionist, customer service representative, order clerk, hotel/motel resort desk clerk, or bank teller." (*Id*. at p. 22, emphasis added.) Dr. Van de Bittner's final report dated October 3, 2022 (Applicant's 92) reviews, comments on and critiques the Diaz report dated September 7, 2022 (Defendant's E), and reaffirms and explains his prior opinions and why he believes Mr. Diaz's report is flawed and/or unreliable. In my Joint F&A dated January 19, 2023, I sustained Applicant attorney's objection to Defendant's E, and it was not admitted into evidence and remains marked for identification only. However, I noted in the related Opinion on Decision that *even if the Diaz report had been admitted into*

evidence, I would have found that Dr. Van De Bittner' s reporting, which I found to be substantial vocational evidence, was more detailed and persuasive would have been followed at the expense of Mr. Diaz' opinions. (Joint F&A at p. 16.)

DEFENDANT'S CLAIMS OF ERROR

Defendant's Petition makes three basic arguments challenging my permanent and total disability finding as a result of the combined effects of the three industrial injuries. Before addressing those in tum, I note that the Petition does not challenge or seek reconsideration of my order that defendant reimburse Applicant's attorney for the invoice of Applicant's vocational expert, Dr. Van De Bittner, which he was forced to pay after the defendant did pay, despite repeated requests, and even though defense counsel had reportedly recommended it be paid. (See MOH/SOE 2 dated 9/12/22 at p. 3, lines 33-39.)

Defendant's first substantive claim of error is that I failed to consider the effect of the December 25, 2021 "compound" lumbar fracture, although the limited evidence on this injury in the record suggests and the Petition later correctly refers to this as a compression fracture. (Petition at pp. 9-10.) The unspoken implication in this argument appears to be that the slip and fall resulting in the compression fracture was not and/or could not be industrial, i.e., would not be a compensable consequence injury of the original three injuries, and that any worsening of Applicant's condition as a result of that injury should and cannot be attributed to the defendant for purposes of PD, work restrictions, and/or a vocational analysis. However, no such argument or analysis is provided, and this argument or contention was never raised as an issue at any of the multiple MSCs, in the Pretrial Conference Statement dating from August 2, 2022, at the time of the second trial on September 12, 2022, or in defendant's Post Trial Brief dated and e-filed on October 13, 2022. For that reason alone, I think the Board can reasonably deem this argument to have been waived by defendant's failure to raise it until the time of the Petition for Reconsideration. Failure to raise objections or issues at a hearing where they may first properly be raised acts as a waiver and they need not be further addressed. (See *U.S. Auto Stores v. Workers' Comp. Appeals Bd*. (*Brenner*) (1971) 4 Cal.3d 469, 36 Cal.Comp.Cases 173; *Los Angeles Unified School Dist. v. Workers' Comp. Appeals Bd*. (Henry) (2001) 66 Cal.Comp.Cases 1220 (writ den.).)

As to the actual merits of the implied argument, it is clear from the Applicant's unrebutted trial testimony, that the reason he slipped and fell on December 25, 2021, while preparing to take

a bath to alleviate his back pain, was because he had to heat the bath water in batches on the electric stove in the kitchen and carry those pots of hot water to the bathtub, because the gas supply to the water heater from PG&E had either failed or been cut off. (MOH/SOE 2 dated 9/12/22, at p. 17-18.) While doing so, he spilled some water on the floor of the bathroom, which caused him to slip and fall on the bathroom tile floor. (*Id*.) It is true that I did not make a finding of whether that injury was a compensable consequence of the original injury, i.e., and therefore industrial, but I was never asked to do so. It is also true that the Applicant testified at the second trial that his back pain worsened over time, and that worsening was "in part" due to that slip and fall and related fracture. (*Id*. at p. 7, lines 22-25, at p. 13 at lines 20-21.) He was told by the doctor at San Ramon Kaiser who treated him for that fall, that it would take "up to a year" to recover from that fall. (*Id*.) This implies to me that injury was expected to resolve and return the Applicant to his baseline condition. I note that the QME reporting of both Dr. McGahan and Dr. Noriega had been completed by that point and was not affected by the residuals, if any, from that fall.

The Petition also asserts that the Applicant's physical condition was "plainly unchanged" between the time of Dr. Van De Bittner's first "Brief' vocational report, dated July 26, 2020, and the time of that slip and fall, and that any worsening thereafter must be attributed to the slip and fall, although that again is by implication only, and not explicitly argued. However, in my judgment that characterization is not factually accurate, and the Petition does not provide any citation to evidence in the record to support that claim. By the Applicant's unrebutted trial testimony at the second trial, his condition was worsening over time and even before the slip and fall and compression fracture on December 25, 2021. The QME reports in evidence also report worsening and increased pain complaints long before the slip and fall in Christmas 2021. (Joint 101, 102.) In my opinion, there is no evidence that Dr. Van De Bittner's final opinions that the Applicant had a 100% loss of labor market access and was not amenable to vocational rehabilitation were dependent upon or in any way based on any increased subjective pain complaints which followed the Christmas fall, and for that reason, I don't see any legal basis to find those opinions to be legally invalid.

Finally, although I do not make any finding on the issue, as it was never previously raised, I think that if the issue of whether the fall and any residuals of the associated injury were a compensable consequence of the original injuries were tried, there is a very good chance it would have been so found based on the applicable and fairly liberal caselaw. The Applicant specifically

testified that it was his constant back pain, which prompted him to take frequent baths to deal with the pain. Since he was in the process of doing what he had to in order to prepare such a bath in his home when he fell, Applicant would have a strong argument that such a fall should be treated as a legal compensable consequence of the original injuries.

Defendant's second substantive claim of error is that the court erred because I failed to apply the correct legal standard when I found the Applicant to be PTD, with the implication that there would have been no such finding under the "proper standard." (*Id*. at p. 11-16.) This one is harder to parse, but from my reading of the Petition, it appears that defendant argues that Labor Code section 4661.1 was "meant to remove DFEC from consideration of PTD" citing the panel decision by Judge Eric Ledger in *Wilson v. Kohl's Department Store* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 322), and that somehow I adopted the DFEC reasoning and/or or opinion of Dr. Van De Bitter in violation of the holding in that case and/or Labor Code section 4660.1. (*Id*. at pp. 11-12.) I reject that charge and/or the defendant's interpretation of the law on this issue, and with respect to the legal significance of *Wilson* in particular. Interestingly; although the Petition characterizes *Wilson* as a "pivotal case" and faults Dr. Van De Bittner for not referencing it, it is only a panel decision and does not constitute binding authority for any judge. That case also did not involve any new and/or novel questions of law or legal interpretation and only found that Applicant had failed to prove permanent and total disability based on the particular medical and vocational evidence in the record, and ultimately found the Applicant to have 87% PD, as recommended by Judge Ledger in his Report and Recommendation.

More to the point, in my view defense counsel · in the Petition fundamentally misunderstands the reasoning and analysis of *Wilson*, which in my judgment in essence distinguishes and constitutes a de facto critique of the Third District Court of Appeal decision and rationale in *Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd*. (*Fitzpatrick*) (2018) 27 Cal.App. 5th 607, 83 Cal.Comp.Cases 1680, and the later Sixth District Court of Appeal decision in *Applied Materials v. Workers' Comp. Appeals Bd*. (2021) 64 Cal. App. 5th 1042, 86 Cal.Comp.Cases 331, which in tum largely relied upon and cited the reasoning in *Fitzpatrick*. Judge Ledger did the same thing in another panel decision, which itself was also cited in the Petition at p. 11, namely *Bagobri v. A.C. Transit* (2019) 2019 Cal.Wrk.Comp. P.D. LEXIS 384. Specifically, as stated in *Wilson*, a large portion of which was adopted and incorporated portions of Judge Ledger's Report and Recommendation, and as seemingly argued in the Petition

itself, the "correct" standard for determining PTD is whether the industrial injury has resulted in the applicant sustaining a complete and total loss of future earning capacity. (See *Wilson* at p. 21, citing Labor Code sections 4660.1 and 4662(b) and the 2005 PDRS at pp. 1-2 and 1-3, Petition at p. 11.) Such a finding can be based on medical evidence, vocational evidence, or both. All such findings are by their nature equivalent to a finding of PTD in accordance with the fact, i.e., the entirety of the record, as referenced in Labor Code section 4662(b).

In this case, I reached my finding of PTD based on a combination of Applicant's significant work restrictions and capacity limitations resulting from the effects of his injury, including pain, and vocational evidence in the form of the reporting and opinions of Dr. Van De Bittner who concluded as quoted above in his report dating from February 26, 2022 (Applicant's 90 at p. 47) that the Applicant has lost 100% of access to the labor market, i.e., has complete and total loss of future earning capacity and for the same reasons "is not vocationally feasible and lacks the capacity to be amendable to rehabilitation for regular jobs in the labor market, either full time or part time." (*Id*. at p. 52.) This second finding is equivalent to PTD under *LeBoeuf*, and as explained in the Opinion on Decision at p. 16, I found that these opinions of Dr. Van De Bittner, constitute substantial vocational evidence and were persuasive, and I therefore applied and followed them. I reject the assertions in the Petition that these opinions were somehow based on Dr. Van De Bittner's previous opinions as to percentage loss of labor market access and DFEC calculations in his first report admitted at the first trial, which were later superseded by these final opinions. Contrary to the claim in the Petition at p. 12, I did not merely adopt the DFEC reasoning of Dr. Van De Bittner, as any reasonable reading of my Opinion on Decision makes clear. A 100% lack of access to the labor market and/or non-amenability to vocational rehabilitation is by definition a complete loss of earning capacity, and constitutes evidence of permanent and total disability that rebuts the nominal less than permanent and total PD rating of the medical evidence, in accordance with the fact under Labor Code section 4662(b).

To the extent that the Petition argues that under the *Fitzpatrick* and *Applied Materials* cases, vocational evidence is no longer proper and/or should not be considered when making any findings under 4662(b), although in my judgment it never quite makes that claim, I note that the *Fitzpatrick* decision, and in tum the *Applied Materials* case which clearly relied upon Fitzpatrick's analysis on this issue, was premised on Labor Code section 4660, which was applicable to the claim in that case. Significantly, given the three 2015 dates of injury in this case, which all post-

date January 1, 2013, the determination of PD is governed by Labor Code section 4661.1. Unlike section 4660, section 4661.1 explicitly provides in subsection (g) that "This section does not preclude a finding of permanent and total disability in accordance with section 4662." In my view, this is a crucial distinction, which in essence limits the application of *Fitzpatrick's* holding and analysis to dates of injury that pre-date January 1, 2013. Likewise, there is significant caselaw which establishes that even after the adoption of Labor Code section 4660.1, vocational evidence can be used to rebut the schedule pursuant to Dahl and other cases such as *LeBoeuf*, to find PTO pursuant to Labor Code section 4662(b), some of which is cited in Applicant's Answer/Memo at pp. 11-16.

The Petition also alleges that Dr. Van De Bittner's final opinion that the Applicant is not amenable to vocational rehabilitation is based on "subjective factors not contained in the medical record." (*Id*. at p. 13.) This is incorrect. Many of the list of such factors cited in the Petition (*Id*.), are not in fact subjective, and there is no evidence that Dr. Van De Bittner, in any way relied upon impermissible non-industrial factors in reaching his vocational opinions that the Applicant had a 100% loss of access to the labor market and was not amenable to vocational rehabilitation. Contrary to the argument in the Petition, vocational experts are not limited to work restrictions provided in the medical reports, only to considerations, work restrictions, and capacity and work limitations *that are the result of the industrial injury*, and not pre-existing health, language, and/or educational type considerations which are included in the impermissible factors discussed by the California Supreme Court in *Argonaut Ins. Co. v. Industrial Acc. Comm*. (Montana) (1962) 57 Cal.2d 589, 27 Cal.Comp.Cases 130. Defense counsel asserts otherwise in the Petition, *but provides no analysis or evidence in support of such a claim or assertion*. In my view, there is more than sufficient objective and permissible evidence with respect to significant work restrictions, capacity limitations, and other considerations that arose from the industrial injuries to warrant and support Dr. Van De Bittner's professional conclusions. His 63-page report dated February 26, 2022, makes clear exactly what factors he relied upon and why in forming his opinions and there is no evidence he relied upon impermissible factors. (Applicant's 90.)

The third and final argument in the Petition at pages 16-17, alleges I erred in improperly excluding the vocational report Frank Diaz dated September 7, 2022 (Defendant's E, ID only) from evidence and/or improperly admitted the 14-page rebuttal report of Dr. Van De Bittner dated October 3, 2022 (Applicant's 92.) Even defendant does not deny that service of the Diaz report on

the day of trial was long after multiple MSCs and Judge Friedman's closure of discovery at the last MSC on August 2, 2022. Although the Petition asserts at page 16, lines 24-25, that defense counsel requested Mr. Diaz produce his report on six separate specific dates between June 2, 2022 and September 7, 2022, the fact remains that the defendant had long had notice Applicant's attorney was pursuing a *LeBoeuf* theory and should have with due diligence obtained and served a vocational report of its own, long before the date of trial. The fact that Applicant had "notice" that such a report would be forthcoming, does not in my judgment excuse the lack of such timely production. I remain convinced that on this record, the Diaz report was not timely and/or diligently procured and served by the defendant and accordingly, should not have been admitted into evidence. To the extent it was painfully evident over the course of multiple MSC's, where Judge Friedman gave the defendant the benefit of the doubt and more time and continued them over Applicant attorney's repeated objections, before eventually closing discovery and setting the case for trial on August 2, 2022, that Mr. Diaz could not or would not timely produce a report, defendant should have obtained a new evaluation with an expert that would. That said, as I explained in the Opinion on Decision at p. 16, if the Board were to find that the Diaz report should be admitted, and/or were to grant reconsideration and do so, I would have found the Van De Bittner reporting to be more persuasive than the Diaz vocational opinions. Accordingly, such error, if found, would have been harmless and made no difference to the outcome of the decision finding PTD.

Finally, with respect to admission of the supplemental Van De Bittner report dated October 3, 2022 (Applicant's 92), on further reflection, I do now find and conclude that it was error to admit that report into evidence. In looking at this retrospectively, part of that process in admitting that report was just a function of timing, as I admitted the rebuttal report in the Supplemental Minutes of Hearing and Summary of Evidence served on January 17, 2023, i.e., before I had made a decision on whether to admit the Diaz report in the Joint F &A. Since the Diaz report was not admitted, I do not believe it is or was fair to admit the supplemental Van De Bittner report, and I recommend the Board grant reconsideration for the limited purpose of finding and ruling that report, Applicant's 92, to be inadmissible. I note that in no way did I rely on that report in making my finding of PTD. That report did not include any substantive or new vocational opinions from Dr. Van De Bittner, and *was limited only to commentary and a critique of the Diaz report*. The key vocational report and that which I relied on in part for my PTD determination was Dr. Van De Bittner's report of February 26, 2022. (Applicant's 90.)

RECOMMENDATION

In sum, for the reasons explained above, I stand by my findings of fact and law and the reasoning as expressed in the Joint F&A and related Opinion on Decision, with the exception of the limited issue regarding the admission of Dr. Van De Bittner's supplemental report dated October 3, 2022. As noted, I now think the Board should grant reconsideration for the limited purpose of finding that report, Applicant's 92, should not be admitted into evidence. In the event that the Board grants reconsideration and admits the report of Frank Diaz as requested in the Petition, I would recommend that under those circumstances, Applicant's 92 remain admitted into evidence. As to the balance of the claims of error and requests for relief in defendant's Petition for Reconsideration dated February 13, 2023, I recommend they be **DENIED**.

Dated: March 15, 2023

Thomas J. Russell, Jr.
Workers' Compensation
Administrative Law Judge