

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**JESUS NICOLAS GONZALEZ, *Applicant***

**vs.**

**COCA-COLA ENTERPRISES, permissibly self-insured, administered by  
SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ8233431; ADJ8233435  
Salinas District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted reconsideration<sup>1</sup> in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of the April 7, 2020 Findings, Award and Orders (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a loader/unloader on December 27, 2011, sustained industrial injury to his lumbar spine, thoracic spine, psyche, and reproductive system. The WCJ found that applicant sustained 83 percent permanent partial disability and awarded future medical care to cure or relieve from the effect of the industrial injury.

Applicant contends that the medical and vocational evidence supports a finding of permanent and total disability.

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

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.

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<sup>1</sup> Commissioner Sweeney, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been appointed in her place.

Based on our review of the record, and for the reasons discussed below, we will rescind the F&A and return this matter to the trial level for development of the record.

## **FACTS**

Applicant has two pending claims of injury. In ADJ8233435, applicant sustained injury to his left wrist while employed as a loader/unloader by defendant Coca-Cola Enterprises on September 7, 2011. The parties have stipulated that there is no permanent disability arising out of the injury, and no need for medical treatment to the left wrist.

In ADJ8233431, applicant claimed injury to his lumbar spine, thoracic spine, psyche, and in the form of erectile dysfunction, while employed as a loader/unloader by defendant Coca-Cola Enterprises on December 27, 2011.

The parties originally selected Martin Trieb, M.D., to act as the orthopedic Agreed Medical Evaluator (AME). On January 7, 2013, Dr. Trieb issued his initial report detailing his clinical evaluation of applicant and a review of the submitted medical records. Dr. Trieb noted lumbar spine pathology with industrial causation, but opined that applicant was not yet permanent and stationary. (Ex. D-4, Report of Martin Trieb, M.D., dated January 7, 2013 at p. 15.)

On August 5, 2013, Dr. Trieb reevaluated applicant and issued a corresponding report finding that applicant continued to be temporarily totally disabled pending likely surgical intervention in the form of lumbar spine surgery. (Ex. D-3, Report of Martin Trieb, M.D., dated August 5, 2013, at pp. 9-10.)

On September 15, 2014, Dr. Trieb issued an Agreed Medical Reevaluation report, reflecting a clinical examination of applicant and review of interim medical records. Dr. Trieb noted that applicant was eleven months post lumbar spine surgery, adopted the permanent and stationary date of applicant's treating physician of April 30, 2014, and described both permanent disability and apportionment. (Ex. D-2, Report of Martin Trieb, M.D., dated September 15, 2014, at pp. 11, 14-15.)

On February 9, 2017, applicant's vocational expert Scott Simon, M.S., issued a preliminary report, pending receipt of the final reporting of Dr. Trieb, and a pending psychiatric evaluation. (Ex. A-4, Report of Scott Simon, M.S., dated February 9, 2017.)

On February 13, 2017, Qualified Medical Evaluator (QME) Douglas Drucker, Ph.D., issued his report detailing his evaluation of applicant in the field of psychology, including a clinical

evaluation of the applicant and a review of the submitted medical record. Dr. Drucker opined that applicant had suffered significant psychiatric decompensation as a result of his injuries, with that decompensation reflected in applicant's activities of daily living (ADLs). (Ex. J-8, Report of Douglas Drucker, Ph.D., dated February 13, 2017, at p. 53.) Dr. Drucker assigned a GAF score of 45 but noted that applicant's condition was not yet stable in light of a recent implantation of a spinal cord stimulator. (Ibid.)

On May 22, 2017, orthopedic AME Dr. Trieb issued a supplemental report detailing a clinical reevaluation of applicant. Dr. Trieb's review of the medical records reflected applicant's psychiatric decompensation, including continued major depression and suicidal ideation, treated with anti-depressants and individualized therapy. (Ex. D-1, Report of Martin Trieb, M.D., dated May 22, 2017, at pp. 20-21.) Dr. Trieb further noted that despite early success with the trial spinal cord stimulator, applicant was now enjoying less relief and continued debilitating pain. Dr. Trieb opined that applicant had once again reached a permanent and stationary plateau, with increased orthopedic permanent disability. Dr. Trieb also addressed the appropriate mechanism for addressing applicant's orthopedic and psychiatric disabilities as follows:

The combined impairments are 19 percent whole person impairment. This is strictly for the musculoskeletal aspects of his disability and I feel that the major depression is equally as disabling and a psychiatric impairment could be added to the musculoskeletal impairment being a synergistic relationship between the two.

(*Id.* at pp. 23-24.)

On July 10, 2017, psychology QME Dr. Drucker issued a supplemental report addressing, in relevant part, the question of whether applicant's orthopedic and psychiatric percentages of disability should be combined or added. Dr. Drucker opined:

Ms. Wilson is asking about whether the *Kite* opinion applies here, of which I am familiar. Should we use the combined values chart or should we add the impairments, physical and psychiatric, in this case given that there are multiple physical injuries as well as the psychiatric injuries present. In *Kite*, there were two separate body parts that did add a synergistic effect to the rating therefore, the judge ruled that they should be added versus combined. In this case, there is significant impairment from a psychiatric and physical level. It is my opinion that there is a synergistic effect in this case; that the physical adds to the psychiatric and the psychiatric adds to the physical. This is well-documented in the literature in terms of a psychiatric perspective, which is my expertise, and

my addition here to this case; my purview, if you will. It is documented that significant psychiatric distress can add to the level of perception, the perceived pain and that pain is a subjective issue. There are physical issues that are all objective that the doctor of physical medicine, Dr. Shreve, has outlined. There are objective facts that were presented, as presented in his report; however, the perception of pain is a subjective one from a psychiatric perspective. In my opinion, the additional method would be appropriate for Mr. Gonzalez, given my expertise in working with pain injuries for over 30 years, as well as my expertise as a Qualified Medical Evaluator. In the Kite opinion, the addition method made sense because of the two elements being added to each other. This would be true in the Gonzalez case, in my opinion. It is my opinion that the addition method would be more accurate in this case for rating purposes.

(Ex. J-7, Report of Douglas Drucker, Ph.D., dated July 10, 2017, at p. 7.)

On July 13, 2017, applicant's vocational expert Mr. Simon issued a report following a review of the reports of orthopedic AME Dr. Trieb, and psychology QME Dr. Drucker. The report described Mr. Simon's analysis of applicant's transferable job skills, taking into account applicant's work restrictions and impairment descriptions as set forth in the AME and QME reporting. Mr. Simon wrote:

Further, Mr. Gonzalez has marked impairment in Ability to maintain regular attendance and be punctual within customary tolerances; Ability to sustain an ordinary routine without special supervision; and Ability to complete a normal work day and work week without interruptions from psychologically based symptoms. These factors would preclude him from being able to compete in the open labor market with workers who are capable of showing up to work regularly, without special supervision and able to complete their normal work day and work week. When all factors are considered, in my opinion, Mr. Gonzalez does not present as amenable for return to work.

(Ex. A-3, Report of Scott Simon, M.S., dated July 13, 2017, at p. 16.)

On July 14, 2017, the parties undertook the deposition of Dr. Drucker, who testified in relevant part that record reflected "a consistency in the medical records of significant levels of depression, anxiety, dysfunction, cognitive issues." (Ex. J-6, Transcript of the Deposition of Douglas Drucker, Ph.D., dated July 14, 2017, at p. 16:22.) When asked about the possibility of applicant returning to regular employment, Dr. Drucker testified:

So practically speaking, he can't do a job. But from a psychiatric perspective, I'm always very, very concerned about saying someone is impaired and can't do any type of work. So he could do a little bit of something sometimes. He couldn't

do any consistent work of those five days, but he could do some level of very flexible work during those five days. Would he be able to maintain a five-day work schedule on a regular basis? No.

(*Id.* at p. 35:13.)

On December 6, 2017, Mr. Simon issued a supplemental report reviewing additional medical records and addressing applicant's feasibility for vocational rehabilitation. Based on the records reviewed, Mr. Simon affirmed his prior determination and opined that "[w]ith respect to his loss of labor market, as another way of understanding amenability to rehabilitation, following this injury, Mr. Gonzalez has lost 100% of his labor market access." (Ex. A-2, Report of Scott Simon, M.S., dated December 6, 2017, at p. 9.)

On December 19, 2017, psychology QME Dr. Drucker issued a supplemental report reviewing additional medical records but finding no basis to change his prior opinions.

On March 24, 2018, Dr. Drucker issued a supplemental report following a reevaluation of applicant. The reevaluation included updated psychiatric testing and a clinical examination, including an assessment of applicant's current ADL's. The report noted that applicant was experiencing significant and pervasive compromise of his daily functioning:

This patient indicated that he is having serious thoughts about suicide. Immediate professional attention is highly recommended. He reports high levels of depression and anxiety. Recent changes in his health in combination with his characteristically unhappy and pessimistic style contribute to his intensified depression and anxiety.

Feelings of being overwhelmed, unable to cope, and giving up are probably pervasive. Increases in anxiety manifest themselves in distrust and fearfulness which may cause him to delay seeking and maintaining healthcare.

Feelings of frustration, in combination with a diminished coping capacity and a despondent attitude, heighten the possibility for a poor medical prognosis. Family involvement and frequent supportive contact with a few specific members of the healthcare team will help increase his motivation for self-care.

(Ex. J-4, Report of Douglas Drucker, Ph.D., dated March 24, 2018, at p. 15.)

Dr. Drucker further noted that, "[g]iven this patient's profile, there is a high probability that the outcome of a traditional medical program to address his pain will be poor." (*Id.* at p. at 17.) Dr. Drucker opined, however, that applicant had received significant psychiatric treatment

without a likelihood of significant change in the next year, and that applicant was therefore at a point of maximum medical improvement as of March 1, 2018. (*Id.* at p. 23.)

On April 18, 2018, Dr. Drucker issued a supplemental report addressing how best to integrate applicant's orthopedic and psychiatric impairments. The report first addresses applicant's significantly compromised ADLs, noting that applicant's abilities with respect to "physical activity, standing, sitting, reclining, walking and climbing stairs are significantly affected," and that in Dr. Drucker's opinion, "there is significant impairment here." (Ex. J-3, Report of Douglas Drucker, Ph.D., dated April 18, 2018, at p. 3.) Dr. Drucker offers a discussion of the rationale for combining ratings under the PDRS, but also discusses the need for a physician's "judgment based on experience, training, skill, thoroughness and clinical evaluation and ability to apply the Guides' criteria, is intended to enable and appropriate a reproducible assessment made of clinical impairment." (*Id.* at p. 4, quoting the AMA Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Ed., § 2.3, at p. 18.) Dr. Drucker then reviews the existing impairment described in the reports medical record addressing applicant's orthopedic, urological and psychological injuries:

In terms of adding or combining values, I did state in my July 10, 2017 report that the additional method would be appropriate for Mr. Gonzalez, given my expertise and working with pain injuries for up to 30 years, as well as my expertise as a Qualified Medical Evaluator. In the Kite opinion, the addition method made sense because of the two elements being added to each other. This would be true in Mr. Gonzalez's case, in my opinion.

It is my opinion that the addition method would be more accurate in this case for rating purposes. I did state this in a prior report.

Ms. Wilson is asking about the issue of the Combined Values Chart when dealing with multiple injuries or impairments as part as an Almaraz-Guzman II analysis. In my opinion, this would be appropriate.

I did look at the Combined Values Chart and its meanings, combining and reducing rather than the synergistic effect. As I stated previously, there is a synergistic effect between the physical and multiple physical and mental injuries that Mr. Gonzalez suffers and in my most recent report I described this in detail. This would be the report of March 24, 2018.

...

I did not review the *Kite* analysis in my most recent report; however, I am stating that it is my opinion that it would be appropriate to add versus convert for Mr. Gonzalez, as previously stated.

*(Id. at p. 6.)*

On June 18, 2018, urology QME Mark Vogel, M.D., issued a report reflecting his evaluation of applicant's sexual dysfunction. Dr. Vogel identified permanent disability with industrial causation. (Ex. J-10, Report of Mark Vogel, M.D., dated June 18, 2018.)

On August 13, 2018, QME Dr. Vogel opined that he felt "chapter 15 adequately rates [applicant's] separate impairment for erectile dysfunction," but that "[i]f another QME or AME found that the effects of all of the applicant's impairments warrant adding the impairments rather than combining them, I would have no objection." (Ex. J-9, Report of Mark Vogel, M.D., dated August 13, 2018, at p. 2.)

On August 24, 2018, psychology QME Dr. Drucker issued a supplemental report following his review of the reporting of applicant's vocational expert Mr. Simon. Dr. Drucker opined that based on applicant's current condition, "he would miss at least four days or more per month; likely at least 10 days in my estimation." (Ex. J-2, Report of Douglas Drucker, Ph.D., dated August 24, 2018, at p. 6.) Similarly, applicant would "miss at least half of the hours when he would be off task at times during the course of an eight-hour day. He would likely not be able to perform an eight-hour day working; however, he would have difficulty sustaining work activities longer than half an hour in my estimation." *(Id. at p. 7.)*

Following a determination that former AME Dr. Trieb was no longer available, the parties selected Mark Anderson, M.D., to act as the AME in orthopedic medicine. On July 7, 2019, Dr. Anderson issued a report detailing his clinical examination of applicant and review of the medical record. Dr. Anderson found applicant to be permanent and stationary as of the July 2, 2019 evaluation date. (Ex. J-9, Report of Mark Anderson, M.D., dated July 7, 2019, at p. 13.) Dr. Anderson noted that he largely agreed with the conclusions reached by former AME Dr. Trieb, but that applicant's impairment was more accurately described by combining applicant's ratings under a Diagnosis-Related Estimate with the impairment available for usage of a cane for ambulation. *(Id. at p. 15.)* Dr. Anderson concluded that applicant had sustained 41 percent impairment on an orthopedic basis, with industrial causation ascribed solely to the claimed specific injury of December 27, 2011.

On September 8, 2019, Dr. Anderson issued a supplemental report based on a record review but opined to no change in his previously stated opinions.

On September 30, 2019, Dr. Anderson issued a supplemental report addressing the issue of how to combine applicant's orthopedic and psychiatric impairments. Dr. Anderson stated, in relevant part:

Ms. Wilson also asked if the multiple body parts would best be added as opposed to combined given the multiple difficulties and the possible synergistic effect. From the orthopedic standpoint, my rating under the ROM method with the Guzman analysis for the use of a cane came to a 41% WPI. The thoracic spine is a separate segment with a whole different set of circumstances involving the SCS and impulse generator and I do believe that creates the synergistic effect as there are two separate anatomic areas with two separate mechanical difficulties. The 41% WPI should be added to the 15% WPI for the thoracic spine. That also brings up the 40% WPI that had been applied to the patient's psychological issues by Douglas Drucker, Ph.D. It has been my finding, as both a treating physician and a medical legal evaluator, that psychological/psychiatric issues do indeed create a synergistic effect with the underlying orthopedic problems. They act as an amplifier of the anatomic difficulties and so to add the 40% WPI provided by Dr. Drucker would be entirely appropriate. This then all meshes with the opinion of Mr. Simon that the patient has lost 100% of his labor market access. Mr. Simon's reports are grounded in the specifics within his subspecialty and I am in agreement with that opinion.

(Ex. J-12, Report of Mark Anderson, M.D., dated September 30, 2019, at p. 3.)

The parties proceeded to trial on January 21, 2020, framing issues in relevant part of average weekly earnings, temporary and permanent disability. (Minutes of Hearing and Summary of Evidence, dated January 21, 2020, at p. 2:7.) The WCJ heard applicant's testimony, and the parties submitted the matter for decision the same day.

On April 7, 2020, the WCJ issued her F&A, determining in relevant part that applicant had sustained 83 percent permanent disability. In the accompanying Opinion on Decision, the WCJ explained that while AME Dr. Anderson and QME Dr. Drucker opined that applicant's various disabilities should be added, rather than combined, the WCJ found these opinions to be speculative in nature. (Opinion on Decision, p. 4.) Accordingly, the WCJ combined the applicant's various disabilities using the Combined Values Chart (CVC) found in the 2005 Schedule for Rating Permanent Disabilities (PDRS).

Applicant's Petition for Reconsideration (Petition) contends that the opinions expressed by AME Dr. Anderson and QME Dr. Drucker with respect to adding, rather than combining, applicant's percentages of permanent disability constitute substantial medical evidence. In the



alternative, applicant contends the opinions of vocational expert Mr. Simon support a finding that applicant is not feasible for vocational retraining and is therefore permanently and totally disabled pursuant to *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] (*Ogilvie*) and *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [193 Cal. Rptr. 547, 666 P.2d 989] (*LeBoeuf*).

Defendant's Answer contends AME Dr. Anderson and QME Dr. Drucker failed to adequately explain the basis for their opinions that applicant's disabilities should be added rather than combined. (Answer, at p. 3:4.) Defendant further observes that the reporting of applicant's vocational expert does not constitute substantial evidence because it improperly disregards valid medical apportionment. (*Id.* at p. 4:9.)

## DISCUSSION

### I.

To be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, §§ 10605(a)(1), 10940(a), 10615(b).) A petition for reconsideration of a final decision by a workers' compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, § 10940(a).)

The Division of Workers' Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19).<sup>2</sup> In light of the district offices' closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (In re: COVID-19 State of Emergency En Banc (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020.<sup>3</sup>

Former Labor Code<sup>4</sup> section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) Section 5315 provides the Appeals Board with 60 days within which to confirm, adopt, modify or

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<sup>2</sup> The March 16, 2020 DWC Newsline may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-18.html>.

<sup>3</sup> The April 3, 2020 DWC Newsline regarding reopening the district offices for filing may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-29.html>.

<sup>4</sup> All further references are to the Labor Code unless otherwise noted.

set aside the findings, order, decision or award of a workers' compensation administrative law judge. (Lab. Code, § 5315.) On June 5, 2020, the State of California's Governor, Gavin Newsom, issued Executive Order N-68-20, wherein he ordered that the deadlines in sections 5909 and 5315 shall be extended for a period of 60 days.<sup>5</sup> Pursuant to Executive Order N-68-20, the time within which the Appeals Board must act was extended by 60 days. The order granting this case for study on July 20, 2020 issued within 120 days of April 24, 2020, and is therefore timely.

## II.

Section 4660 applies to injuries prior to January 1, 2013, and provides for ratings of permanent disability pursuant to the 2005 Permanent Disability Rating Schedule (PDRS). The PDRS, in turn, provides that the ratings for multiple body parts arising out of the same injury are "generally" combined using the Combined Values Chart (CVC), which is appended to the PDRS. (2005 PDRS, at p. 1-10.)

It has also long been recognized, however, that "a permanent disability rating should reflect as accurately as possible an injured employee's diminished ability to compete in the open labor market." (*LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 245–246 [48 Cal.Comp.Cases 587].)

Pursuant to section 4660, the PDRS is prima facie evidence of an injured employee's permanent disability. (Lab. Code, § 4660; cf. *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1274–1277 [76 Cal.Comp.Cases 624] (*Ogilvie*.) Yet, because it is part of the PDRS, the CVC is rebuttable and a reporting physician is not precluded from utilizing a method other than the CVC to determine an employee's whole person impairment so long as the physician's opinion remains within the four corners of the AMA Guides. (Lab. Code, § 4660; *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808, 818–829 [75 Cal.Comp.Cases 837].)

Accordingly, the use of the multiple disabilities table is discretionary depending upon whether it produces a rating that fully compensates an applicant for the effects of his or her injury. (*Mihesuah v. Workers' Comp. Appeals Bd.* (1976) 55 Cal.App.3d 720, 728 [41 Cal.Comp.Cases

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<sup>5</sup> Governor Newsom's Executive Order N-68-20 may be accessed here:  
<https://www.gov.ca.gov/wp-content/uploads/2020/06/6.5.20-EO-N-68-20.pdf>. (See Evid. Code, § 452(c).)

81, 87] (*Mihesuah*.) Indeed, as is noted in American Medical Association Guides to the Evaluation of Permanent Disability, 5th Edition (AMA Guides) observes:

A scientific formula has not been established to indicate the best way to combine multiple impairments. Given the diversity of impairments and great variability herein in combining multiple impairments, it is difficult to establish a formula that accounts for all situations. A combination of some impairments could decrease overall functioning more than suggested by just adding the impairment ratings for the separate impairments (e.g. blindness and inability to use both hands). When other multiple impairments are combined, a less than additive approach may be more appropriate. ... Other options are to combine (add, subtract, or multiply) multiple impairments based upon the extent to which they affect and individual's ability to perform activities of daily living ...

(AMA Guides, pp. 9-10.)

In *Kite v. East Bay Municipality Util. Dist.* (December 5, 2012, ADJ6719136) [2012 Cal. Wrk. Comp. P.D. LEXIS 640] (writ den. sub nom. *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)*) (2013) 78 Cal.Comp.Cases 213 [2013 Cal. Wrk. Comp. LEXIS 34] (*Kite*), applicant underwent industrial bilateral hip replacement surgeries. The evaluating orthopedic QME opined that "there is a synergistic effect of the injury to the same body parts bilaterally versus body parts from different regions of the body," and that "the best way to combine the impairments to the right and left hips would be to add them versus using the combined values chart, which would result in a lower whole person impairment." (*Id.* at p. 5.) Accordingly, the WCJ determined that the most accurate rating of applicant's permanent disability would be achieved by adding the impairment for each hip, rather than by combining the respective impairment percentages under the CVC. Following defendant's petition for reconsideration, we affirmed the WCJ's decision that the "QME has appropriately determined that the impairment resulting from applicant's left and right hip injuries is most accurately combined using simple addition than by use of the combined-values formula." (*Id.* at p. 10.)

In *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 [2024 Cal. Wrk. Comp. LEXIS 23] (Appeals Board en banc), we discussed the two primary ways in which the *Kite* analysis had been applied to permanent disability disputes:

In our panel decisions, two methods have been used to rebut the CVC to date. In the first approach, the CVC has been rebutted where there was evidence showing no actual overlap between the effects on ADLs as between the body

parts rated. In the second approach, the CVC has also been rebutted where there is overlap, but the overlap creates a synergistic effect upon the ADLs.

**a. No overlap of ADLs.**

The first method for rebuttal of the CVC is to show that the multiple impairments, in fact, have no overlap upon the effects of the ADLs. (See e.g., *Devereux v. State Comp. Ins. Fund*, 2018 Cal.Wrk.Comp. P.D. LEXIS 592; *Guandique v. State of California*, 2019 Cal.Wrk.Comp. P.D. LEXIS 53.) We believe that one significant point of confusion on the issue of overlap is that the analysis should focus on overlapping ADLs, not body parts. Although the formula for the CVC is from the AMA Guides, the chart used to calculate the CVC is from the PDRS.

In determining whether the application of the CVC table has been rebutted in a case, an applicant must present evidence explaining what impact applicant’s impairments have had upon their ADLs. Where the medical evidence demonstrates that the impact upon the ADLs overlaps, without more, an applicant has not rebutted the CVC table. Where the medical evidence demonstrates that there is effectively an absence of overlap, the CVC table is rebutted, and it need not be used.

...

**b. Overlapping ADLs with a Synergistic Effect**

The next method for rebutting the CVC was first discussed in *Kite*, where applicant was awarded permanent disability by adding the impairment to each hip and not by combining the impairments as ordinarily required by the PDRS under the CVC. (*Kite, supra*, 78 Cal.Comp.Cases 213.) In *Kite*, the CVC was rebutted by substantial medical evidence showing the synergistic effect of the two impairments on applicant.

‘Synergy’ is “(1) the interaction of two or more agents or forces so that their combined effect is greater than the sum of their individual effects; or (2) Cooperative interaction among groups. . . that creates an enhanced combined effect.” (American Heritage Dict. (Fifth Edition, 2022).) In some cases, two impairments overlap with one another in their effect on ADLs to the extent that they amplify one another to cause further impairment than what is anticipated in the AMA Guides. Thus, it is permissible to add impairments where a synergistic amplification of ADLs is shown. For example, if applicant had an impairment in the dominant hand, an evaluator might find that the impairment impacts the ADL of non-specialized hand activities, such as being able to button a shirt. If applicant’s impairment was to both hands, one might expect the ability to button a shirt to be even more difficult. The purpose of the CVC, avoiding duplication, does not apply in such cases as the impairments are not duplicative, because the two impairments together are worse than having a single impairment.

We cannot emphasize enough that to constitute substantial evidence “...a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, **and it must set forth reasoning in support of its conclusions.**” (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc) (emphasis added).) The term ‘synergy’ is not a “magic word” that immediately rebuts the use of the CVC. Instead, a physician must set forth a reasoned analysis explaining how and why synergistic ADL overlap exists. If parties are searching for a magic word to use during a doctor’s deposition, that word is “Why?”. Rather than focusing on whether a specific term, including the term synergy, was used, it is imperative that parties focus on an analysis that applies critical thinking based on the principles articulated in *Escobedo* to support a conclusion based on the facts of the case. Such an analysis must include a detailed description of the impact of ADLs and how those ADLs interact.

(*Vigil, supra*, at pp. 691-693.)

We thus held in *Vigil* that where an applicant seeks to rebut the CVC, they must establish the following:

- 1) The ADLs impacted by each impairment to be added, and
- 2) Either:
  - a) The ADLs do not overlap, or
  - b) The ADLs overlap in a way that increases or amplifies the impact on the overlapping ADLs.

(*Id.* at pp. 688-689.)

Here, AME Dr. Anderson opined that applicant’s orthopedic disabilities should be added rather than combined, while QME Dr. Drucker opined that applicant’s psychiatric disability should be added to the orthopedic disability. (Ex. J-12, Report of Mark Anderson, M.D., dated September 30, 2019, at p. 3; Ex. J-3, Report of Douglas Drucker, Ph.D., dated April 18, 2018, at p. 6.) The WCJ declined to follow either opinion because, “both evaluators stated that the impairments add to each other but did not address how; nor did they address whether or not there was any overlap between the body parts.” (Report, at p. 5.)

Following our independent review of the record occasioned by applicant’s Petition, we conclude that the present record does not adequately address the issue of the specific ADLs impacted by each impairment to be added and whether the ADLs do not overlap, or whether the

ADLs overlap in a way that increases or amplifies the impact on the overlapping ADLs. (*Vigil, supra*, 89 Cal.Comp.Cases at pp. 688-689.)

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [72 Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to “ensure substantial justice in all cases.” (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [94 Cal. Rptr. 2d 130, 65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

Accordingly, and based on the foregoing analysis, we will rescind the April 7, 2020 Findings, Award and Orders, and return this matter to the trial level for development of the record. Upon return of this matter to the trial level, we recommend that the WCJ instruct the parties to develop the record in conformity with our en banc decision in *Vigil, supra*, 89 Cal.Comp.Cases 686.

We also observe that the vocational reporting in evidence may need to be augmented in response to any new evidence adduced from the orthopedic and psychiatric medical-legal evaluators, and should conform to the standards for vocational evidence discussed in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 [2023 Cal. Wrk. Comp. LEXIS 30I] (Appeals Board en banc) (*Nunes I*) and *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 [2023 Cal. Wrk. Comp. P.D. LEXIS 46] (Appeals Board en banc) (*Nunes II*).

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the April 7, 2020 Findings, Award and Orders is **RESCINDED**, and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**October 8, 2024**

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

**JESUS NICOLAS GONZALEZ  
WISLER & WILSON  
LAW OFFICES OF RICHARD K. GREEN**

**SAR/abs**

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