WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE ANAYA, *Applicant*

vs.

SCOTIA TOOL & MACHINE, INC.;
PROCENTURY INSURANCE COMPANY,
adjusted by ILLINOIS MIDWEST, *Defendants*

Adjudication Number: ADJ10361114
Oakland District Office

OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION
AFTER RECONSIDERATION

Defendant seeks reconsideration of the "Amended Findings, Award, and Orders with Opinion on Decision" (F&A) issued on August 20, 2024, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant was 100% permanently totally disabled.

Defendant argues that substantial medical evidence did not establish rebuttal of the Combined Values Chart (CVC) of the Permanent Disability Ratings Schedule (PDRS). Defendant further contends that the reporting of its vocational expert constitutes substantial evidence and shows that applicant is amenable to vocational retraining.

We have received an answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, we will grant reconsideration and as our Decision After Reconsideration we will rescind the WCJ's August 20, 2024 F&A, and substitute a new F&A that defers the issue of permanent disability, and returns the matter to the trial level for further development of the record.

FACTS

Applicant worked for defendant as a machinist when he sustained industrial injury to his left arm, left wrist, left elbow, left hand, left shoulder, and psyche on February 22, 2016. (Minutes of Hearing and Summary of Evidence, April 18, 2024, p. 2, lines 22-25.) Applicant claimed further injury to his truck, legs, low back, and in the form of sleep disorder. (*Id*. at p. 3, lines 1-2.)

This matter primarily proceeded to trial on two issues: disputed body parts, and permanent disability with applicant claiming 100% permanent total disability based upon both CVC rebuttal and vocational reporting. (*Id*. at p. 3, line 20, through p. 4, line 17.) No party challenged the WCJ's findings on body parts and thus, we will not disturb those findings. The sole issue on reconsideration is applicant's level of permanent disability.

1. Medical Evidence

Applicant was seen by two QMEs in the specialties of orthopedic surgery and psychology.

Dr. Warren Strudwick, M.D., evaluated applicant in orthopedic surgery and authored four reports in evidence and was deposed. (Joint Exhibits 101 and 102.)[1] Dr. Strudwick took the following history of injury:

> According to the patient and the medical records reviewed, the patient sustained an injury to his left nondominant extremity while working on an industrial lathe machine as a long-term, full-time employee of Scotia Tool & Machine, Incorporated, as a machinist. According to the patient, his sleeve from his shirt got caught in the lathe and pulled his left upper extremity into the machine. He sustained a severe internal left shoulder injury with an anterior dislocation, a degloving injury of his upper anterior shoulder and a severe mutilating partial to almost full amputation of his mid-forearm with a severe arterial venous and nerve injury. He was initially seen and evaluated as a trauma al Eden Medical Center and received the appropriate microvascular and orthopedic and trauma evaluations.

[1] All four reports authored by QME Dr. Strudwick were admitted as Joint Exhibit 101. In the future, the parties should comply with WCAB Rule 10759, which states, in pertinent part: "Each exhibit listed must be clearly identified by author/provider, date, and title or type (e.g., "the July 1, 2008 medical report of John Doe, M.D. (3 pages)"). Each medical report, medical-legal report, medical record, or other paper or record having a different author/provider and/or a different date is a separate "document" and **must be listed as a separate exhibit**[.]" (Cal. Code Regs., tit. 8, § 10759(c), (emphasis added).) The Appeals Board cannot refer to any of the four documents labeled "Joint Exhibit 101" by exhibit number as that would not direct the reader to any individual document.

(Joint Exhibit 101, Report of QME Warren Strudwick, M.D., August 31, 2020, pp. 2-3.)

Dr. Strudwick diagnosed applicant with the following:

1. Status post degloving/mutilating injury, left upper extremity, followed by multiple reconstructive surgeries with residual weakness left shoulder, forearm, hand, wrist and digits.

2. Marked residual disability, left upper extremity, with functional limitations associated with injury of 02/22/2016.

3. Status post reverse shoulder prosthesis for chronic dislocated left shoulder with shoulder weakness, anterior shoulder tenderness and shoulder girdle atrophy.

4. Progressive/chronic mechanical low back pain.

(Joint Exhibit 101, Report of QME Warren Strudwick, M.D., March 4, 2024, p. 7.)

Dr. Strudwick commented upon applicant's ability to work and application of the CVC as follows:

> It is clear that the patient has had a very significant injury with associated painful symptoms in the extremities including his ankle and leg where grafts were obtained to reconstitute his left forearm.
>
> There is also mention that he has been considered to have a psych injury including the aforementioned posttraumatic stress disorder associated with insomnia and created chronic pain syndrome. This has been rated as a 5% whole person impairment by the QME in the specialty of psychology.
>
> All things considered, it would be difficult for the patient to return to his full and customary duties due to the severe impairment of his left upper extremity and the pain associated with his graft sites, In fact, due to the overlay of his psychiatric condition (PTSD), it is clear, with a degree of medical probability, that the patient will not be able to return to gainful employment.
>
> In this sense then, if one was able to obtain this degree of impairment, we would use an additive formula because of the synergistic effects of all that is going on in his upper extremity plus the pain associated with his graft sites instead of using the Combined Values Chart and simply add all the disabilities, which would, of course, total at least 100% disability.
>
> In the experience of this reviewer, I believe that that is a medically reasonable approach to this particular patient's disability

> considering the severe nature and residuals associated with this injury.

(Joint Exhibit 101, Report of QME Warren Strudwick, M.D., November 15, 2021, p. 2.)

Dr. Strudwick testified further in deposition as follows:

> A. I am aware of the Combined Values Chart. But because I think that there's a lot of synergy here, the Combined Values Chart, number 1, there's some question as to whether you use that for different extremities or opposite extremities, for -- it's really not explained well in the combined's [*sic*] chart how you use and when you use the combined chart. And there's also some exceptions when you use the combined chart. If you think it, and in my experience, I think that this patient's disability is additive and should not fall under the combined charts, as I think, because there's many synergistic effects of all what's going on with the shoulder, the degloving injury, the disability he has relative to the sites that his grafts were taken from. All of this compiled to me to mean that combined values did not apply here and that I would use the additive method –
>
> Q. All right. So referring to synergy and additive method, are you applying the Kite analysis?
>
> A. I don't know what the Kite analysis is. Explain that to me.
>
> Q. Well, I'm asking you, Doctor.
>
> A. I don't know what the Kite analysis is. Explain it to me, and maybe we can come to some agreement.
>
> Q. It's your position that additive is appropriate. Correct?
>
> A. That is correct.

(Joint Exhibit 102, Deposition of QME Warren Strudwick, M.D., January 10, 2022 p. 11, line 15, through p. 12, line 17.)

Dr. Strudwick assigned work restrictions as follows: "I do not believe that the patient can return to his full and customary duties due to the severe impairment of his left upper extremity functionally. He is restricted from pushing, pulling, reaching, grasping and carrying greater than 5 pounds with his left upper extremity." (Joint Exhibit 101, Report of QME Warren Strudwick, M.D., August 14, 2021, p. 4.)

Applicant was seen by QME Grant Hutchinson, Ph.D., for evaluation of psychological injury. Dr. Hutchinson authored one report in evidence. (Joint Exhibit 103.) He diagnosed applicant with post-traumatic stress disorder. (*Id*. at p. 17.) Dr. Hutchinson did not opine on CVC rebuttal. (See generally, *id*.) Dr. Hutchinson assigned the following work restrictions:

> The diagnosis of PTSD, albeit in considerable remission at present, makes it unlikely that he could return to work in his former capacity without risk of aggravating his PTSD and causing recrudescence of his trauma. Thus, Mr. Anaya has a prophylactic permanent work restriction against functioning as a lathe operator or using similarly dangerous machinery. This restriction is necessary in order to prevent undue psychogenic pain, avoid causing an increase in his mental symptoms, avoid causing increased permanent disability, prevent exacerbations or future aggravations that would increase the need for psychiatric psychopharmacologic care. However, he is educated in mechanics and should be able to work in other some capacities, perhaps as a foreman or supervisor. That determination is actually one that is best addressed by a vocational rehabilitation evaluation and I would defer to a VR evaluator's opinion in that area.

(*Id*. at p. 20.)

2. Vocational Evidence

Applicant retained vocational expert Frank Diaz, who authored one report in evidence. (Applicant's Exhibit 5.) Mr. Diaz completed vocational testing which found that applicant scored between the 17th and 68th percentiles across a range of skills. (*Id*. at p. 10.) Mr. Diaz interpreted the results of vocational testing as follows:

> Based upon the results of vocational testing, in all vocational probability, Mr. Anaya would learn well in either a hands-on learning situation or a formal training situation.
>
> However, the results of vocational testing do not take into account the effects that pain, and medication may have upon his abilities to learn. If requested, I can provide detailed information regarding the norms utilized and background information regarding vocational testing administered to Mr. Anaya.

(*Id*. at pp. 10-11.)

Mr. Diaz found that applicant was not amenable to rehabilitation due to his industrial work limitations. (*Id*. at p. 30.) However, this conclusion included Mr. Diaz's personal opinions as to how applicant's pain complaints would impact him in the workplace. (See *id*. at pp. 17-18.)

Furthermore, in reaching his conclusions, Mr. Diaz took into account the "synergistic (additive) effect of the functional limitations as set forth by the medical practitioners[.]" (*Id*. at p. 33.)

> Vocational synergism must also be taken into account in order to obtain an accurate determination regarding Mr. Anaya's loss of labor market access. I must take into account the synergistic (additive) effect of his functional limitations, and how this synergistic (additive) effect will affect his ability to return to the competitive open labor market.

(*Id*. at p. 39.)

Defendant retained vocational expert Kelly Winn, who authored two reports in evidence. (Defendant's Exhibits C and D.) Ms. Winn took a history of applicant who is over 65 years old, Spanish speaking, and right-hand dominant. (Defendant's Exhibit B, Report of Kelly Winn, November 27, 2023, p. 18.) Ms. Winn took the same history of work restrictions as Mr. Diaz. Ms. Winn found that applicant was amenable to vocational retraining, however, Ms. Winn based her conclusions, in part, upon applicant's lack of English language skills and based upon the assumption that applicant's low back injury was non-industrial. (*Id*. at pp. 27-32.)

DISCUSSION

I.

Former Labor Code section 5909[2] provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b) (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

(§ 5909.)

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on November 1, 2024, and 60 days from the date of transmission is Tuesday, December 31, 2024. This decision is issued by or on December 31, 2024, so that we have timely acted on the Petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

According to the proof of service for the Report and Recommendation by the WCJ, the Report was served on November 1, 2024, and the case was transmitted to the Appeals Board on November 1, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 1, 2024.

II.

To understand the process for finding permanent total disability, we must first understand what constitutes a permanent disability. As our Supreme Court has explained:

> Permanent disability is understood as the irreversible residual of an injury. (Citation.) A permanent disability is one which causes impairment of earning capacity, impairment of the normal use of a

> member, or a competitive handicap in the open labor market. (Citation.) Thus, permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity.

(*Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal. 4th 1313, 1320, 57 Cal. Rptr. 3d 644, 156 P.3d 1100 (Brodie).)

The ordinary process for finding a permanent disability is to use the AMA Guides in conjunction with the PDRS. However, the court in *Ogilvie* explained that the PDRS is rebuttable.

> Thus, we conclude that an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable 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*., 197 Cal. App. 4th 1262, 1277, 129 Cal. Rptr. 3d 704.)

The standard for finding permanent total disability via *Ogilvie* rebuttal follows:

> The proper legal standard for determining whether applicant is permanently and totally disabled is whether applicant's industrial injury has resulted in applicant sustaining a complete loss of future earning capacity. (§§ 4660.1, 4662(b); see also 2005 PDRS, pp. 1–2, 1–3.) …
>
> A finding of permanent total disability in accordance with the fact (that is complete loss of future earnings) can be based upon medical evidence, vocational evidence, or both. Medical evidence of permanent total disability could consist of a doctor opining on complete medical preclusion from returning to work. For example, in cases of severe stroke, the Appeals Board has found that applicant was precluded from work based solely upon medical evidence. (See i.e., Reyes v. CVS Pharmacy, (2016) 81 Cal. Comp. Cases 388 (writ den.); see also, Hudson v. County of San Diego, 2010 Cal. Wrk. Comp. P.D. LEXIS 479.)
>
> A finding of permanent total disability can also be based upon vocational evidence. In such cases, applicant is not precluded from working on a medical basis, per se, but is instead given permanent work restrictions. **Depending on the facts of each case, the effects**

> **of such work restrictions can cause applicant to lose the ability to compete for jobs on the open labor market, which results in total loss of earning capacity. Whether work restrictions preclude applicant from further employment requires vocational expert testimony.**
>
> * * *
>
> … [P]er Ogilvie and as described further in Dahl, the non-amenability to vocational rehabilitation must be due to industrial factors. (Contra Costa County v. Workers' Comp. Appeals Bd., (Dahl) 240 Cal. App. 4th 746, 193 Cal. Rptr. 3d 7.)

(*Soormi v. Foster Farms*, 2023 Cal. Wrk. Comp. P.D. LEXIS 170, *11-12, citing *Wilson v. Kohls Dep't Store*, 2021 Cal. Wrk. Comp. P.D. LEXIS 322, *20–23.)

Thus, where applicant seeks to rebut the PDRS and prove permanent total disability, applicant must prove the following:

1) Applicant has been assigned a work restriction(s), which requires substantial **medical** evidence.

2) The work restriction(s) precludes applicant from rehabilitation into another career field, which requires **vocational** expert evidence.

3) The work restriction(s) precludes applicant from competing on the open labor market, which requires **vocational** expert evidence.

4) **The cause of the work restriction(s) is 100% industrial**, which requires substantial **medical** evidence.

To be clear, we are focused only on those restrictions that contribute to the vocational expert's findings. An applicant can have multiple work restrictions, some of which are non-industrial. If the industrial work restrictions, standing alone, preclude applicant from rehabilitation and preclude applicant from competing on the open labor market, applicant has met their burden on causation of disability. If applicant's preclusion from rehabilitation and work is caused or contributed by either non-industrial work restrictions or partially industrial work restrictions, applicant fails their burden on causation of disability.

In the en banc decision in *Nunes v. State of California, Dept. of Motor Vehicles* (June 22, 2023) 2023 Cal. Wrk. Comp. LEXIS 30 [88 Cal.Comp.Cases 741] ("*Nunes I*"), the Appeals Board held that Labor Code section 4663 requires a **reporting physician** to make medical determinations in a case, including determinations on the issue of apportionment. The Board further held that vocational evidence may be used to address issues relevant to the determination of permanent

disability, and that vocational evidence must address apportionment, but that a vocational evaluator may not opine on issues that require expert medical evidence. The Board affirmed these holdings in *Nunes v. State of California, Dept. of Motor Vehicles* (August 29, 2023) 23 Cal. Wrk. Comp. LEXIS 46 [88 Cal.Comp.Cases 894] ("*Nunes II*").

In the en banc decision in *Vigil*, the Appeals Board clarified the process for rebutting the CVC.

> One element of the PDRS is the Combined Values Chart (CVC). The purpose of the CVC is described within the PDRS, which cites to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (2001) (AMA Guides), which is adopted and incorporated for purposes of rating permanent disability under the 2005 PDRS. (Lab. Code, §§ 4660, 4660.1; Hoch, Andrea, Schedule for Rating Permanent Disabilities, (2005), p. 1-11; AMA Guides, pp. 9-10.) In sum, impairment under the AMA Guides is designed to reflect how a disability affects a person's activities of daily living ("ADLs") (self-care, communication, physical activity, sensory function, non-specialized hand activities, travel, sex, and sleep). (AMA Guides, pp. 2-9.) CVC "values are derived from the formula A + B(1-A) = combined value of A and B, where A and B are the decimal equivalents of the impairment ratings." (AMA Guides, p. 604.)5
>
> Impairments to two or more body parts are usually expected to have an overlapping effect upon the activities of daily living, so that generally, under the AMA Guides and the PDRS, the two impairments are combined to eliminate this overlap.

(*Vigil v. County of Kern*, 2024 Cal. Wrk. Comp. LEXIS 23 at *7-8, (Appeals Board en banc).)

> The Combined Values Chart (CVC) in the Permanent Disability Ratings Schedule (PDRS) may be rebutted and impairments may be added where an applicant establishes the impact of each impairment on the activities of daily living (ADLs) and that either:
>
> (a) there is no overlap between the effects on ADLs as between the body parts rated; or
>
> (b) there is overlap, but the overlap increases or amplifies the impact on the overlapping ADLs.

(*Id.* at *13.)

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).) "When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

In this case, the QME's opinion on CVC rebuttal does not constitute substantial medical evidence. Dr. Strudwick did not take a complete history of the impacts of applicant's injury upon each of the ADLs. He did not then compare that with the ADLs impacted by the psychological injury to find either no overlap, or synergistic effect. Accordingly, the opinion is not substantial medical evidence and requires further development.

Next, applicant's vocational expert's report does not constitute substantial evidence as the evaluator has incorrectly and improperly interjected his own medical opinions into the case regarding applicant's pain and regarding the synergistic effect of applicant's injuries. **A vocational evaluator does not create medical facts in a case.** Vocational experts review the medical record created by the doctors and reach conclusions as to applicant's vocational feasibility based upon that record. Applicant's physical restrictions, including any perceived restrictions based upon pain, are a medical issue, which requires medical evidence. Whether applicant's ADLs overlap to create a synergistic impairment is a medical issue. If the vocational expert has cause to disagree with the medical opinions, the parties must return to the medical experts to clarify that disagreement. The Appeals Board cannot rely upon a non-medical expert to establish medical facts.

Next, defendant's vocational expert also does not constitute substantial evidence. First, the evaluator incorrectly assumed that applicant's back injury was non-industrial, when it was found industrial. Next, the expert impermissibly based her opinions upon applicant's ability to speak English, which does not appear to have been caused by any disability. We addressed this issue directly in *Soormi*, *supra*:

> To be abundantly clear, a person's ethnic origin is not a disability. A person's immigration status is not a disability. Whether a person can speak the English language is not generally a disability. A person's lack of education is not a disability. [The vocational

> expert's] focus on applicant's lack of education and lack of English skills is not proper because neither of these factors were caused by a pre-existing disability and [they] did not explain why these factors were the sole cause of applicant's loss of earnings post-injury.
>
> It may be true that an unskilled worker is more susceptible to sustaining permanent total disability because such a person begins the analysis with a limited labor market. However, that is not a basis to discount applicant's level of disability. To be clear, the employer receives a discount in such cases. However, the discount is found, not in the percentage of disability, but in the rate of the permanent total disability award. Defendant will pay the permanent total disability award at a rate that is significantly lower than the state average because applicant was unskilled and paid at or around minimum wage.
>
> The analysis changes if applicant's pre-existing education or language ability is due to a disability. Like many states, California encourages employers to hire disabled workers. The State assures employers that they will not be held liable for pre-existing disabilities through multiple avenues. First, we have apportionment based on causation and apportionment based on prior awards. (§§ 4663, 4664.) Next, we have the Subsequent Injuries Benefits Trust Fund ("SIBTF"), which covers the employer for any increase in permanent disability that was amplified by a prior disability. (§§ 4751, et. seq.)
>
> Here, applicant is simply an unskilled worker. No issue of apportionment exists. The AME found the disability was 100% industrial. The work restrictions were 100% industrial. Defendant failed to show that any prior disability existed. Defendant received the benefit of cheap unskilled labor. Applicant's limitation on the open labor market was a risk that defendant assumed. Defendant must now accept the consequences.

(*Soormi, supra* at *15-17.)[3]

[3] 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 citeable authority and the Workers' Compensation Appeals Board may consider these decisions to the extent that their reasoning is found persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].) The panel decisions discussed herein are referred to because they considered a similar issue. Practitioners should proceed with caution when citing to a panel decision and verify its subsequent history.

To compare non-English speaking applicants to a similarly situated English speakers is the exact same as comparing educated individuals to similarly situated non-educated individuals, which was unequivocally rejected by the court in *Contra Costa County v. Workers' Comp. Appeals Bd*., (*Dahl*) 240 Cal. App. 4th 746, 193 Cal. Rptr. 3d 7. "The focus [is] on the limitations flowing from the claimant's particular condition, not the earning potential of similarly situated individuals who might be subject to different limitations." (*Id*. at p. 758.)

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 [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 [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).)

Although applicant failed to prove rebuttal of the permanent disability rating schedule (PDRS), applicant presents a credible argument that he may be precluded from work on the open labor market due to the industrial injury. As we have very recently clarified the roles of the medical and vocational evaluators as well as the evidentiary standard for CVC rebuttal, it would appear prudent to allow further development of the record on this issue. (See *Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1284.)

Accordingly, we will grant reconsideration and as our Decision After Reconsideration we will rescind the WCJ's August 20, 2024 F&A and substitute a new F&A that defers the issue of permanent disability, and return the matter to the trial level for further development of the record.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the F&A issued on August 20, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Appeals Board, that the F&A issued on August 20, 2024 is **RESCINDED** with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant, Jose Anaya, who was 58 years old on the date of injury, while employed by Scotia Tool & Machine, Inc., on February 22, 2016, as a machinist, occupational group 370, in San Leandro California, sustained injury arising out of and in the course of employment to his left arm, left wrist, left elbow, left hand, left shoulder, and psyche, and also sustained injury AOE/COE to the low back as a direct injury, and to the trunk and legs as a compensable consequence, but did not sustain injury AOE/COE in the form of a sleep disorder.

2. At the time of the injury, the employer was insured by Procentury Insurance Company, administered by Illinois Midwest Insurance Agency.

3. At the time of the injury, Applicant's average weekly earnings were $1,221.61 per week, warranting indemnity rates per statute.

4. There is a need for further medical treatment to cure or relieve from the effects of the industrial injury.

5. All other issues, including the issue of permanent disability, is deferred.

AWARD

AWARD IS MADE in favor of JOSE ANAYA, against PROCENTURY INSURANCE COMPANY as follows:

A) Future medical treatment to cure or relieve from the effects of the industrial injury.

B) All other issues are deferred.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 31, 2024

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

JOSE ANAYA
WELTIN, STREB & WELTIN, LLP
LAUGHLIN FALBO LEVY & MORESI LLP

EDL/mc

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