WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MIGUEL GUEDEA, ***Applicant***

vs.

FOLEY FAMILY WINES, INC.;
ZENITH INSURANCE, ***Defendants***

Adjudication Number: ADJ8779374
Santa Barbara District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration[1] of the February 13, 2024 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a warehouseman on May 14, 2012, sustained industrial injury to his neck, back, right shoulder, erectile dysfunction, sleep, cognitive disorder, headaches, urologic system, and psyche. The WCJ determined that applicant's disability was permanent and total, without apportionment.

Defendant contends that the WCJ improperly excluded sub rosa video; that applicant sustained an additional cumulative injury; that applicant's injury has not resulted in permanent and total disability; that applicant's permanent disability should be apportioned to prior industrial and nonindustrial factors; and that the WCJ's opinion does not adequately explain his reliance on applicant's vocational expert reporting.

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

[1] Deputy Commissioner Patricia Garcia, who was previously a member of this panel, is currently unavailable. Another panelist has been assigned in her place.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant reconsideration solely for the purposes of excluding Exhibit H, but otherwise affirm the F&A.

FACTS

Applicant claimed injury to his neck, back, right shoulder, erectile dysfunction, sleep, cognitive disorder, headaches, urologic system, and psyche while employed as a warehouseman by defendant Foley Family Wines on May 14, 2012. Defendant admits injury to the neck, back and right shoulder, but disputes injury in the form of erectile dysfunction, sleep, cognitive disorder, headaches, urologic system, and psyche.

The parties have obtained medical-legal reporting from Qualified Medical Evaluators Timothy Perrin, M.D., in orthopedic medicine, Mark Pulera, M.D., in neurology, Arnold Gilberg, M.D., in psychiatry, and Jeffrey Hirsch, M.D., in internal medicine. Applicant has offered into evidence vocational expert reporting from David Van Winkle, while defendant has offered vocational expert reporting from John C. Meyers.

The parties originally proceeded to trial on December 20, 2022, at which time they framed the issues for decision and identified the trial exhibits. However, the parties also identified a dispute with respect to the admissibility of sub rosa video obtained by defendant after the close of discovery. In response, the WCJ bifurcated all issues save the discovery dispute.

On December 28, 2022, the parties submitted the matter for decision on the sole issue of the admissibility of the disputed sub rosa video.

On January 9, 2023, the WCJ issued his Findings and Award, determining that the sub rosa video was not admissible.

On January 27, 2023, defendant sought Reconsideration or in the alternative, Removal, in response to the Findings and Award.

On March 27, 2023, we denied defendant's Petition.

On May 3, 2023, the WCJ conducted further trial proceedings, at which time both applicant and defense witness Arelid Reynoso testified. The WCJ ordered the matter submitted for decision on June 7, 2023.

However, on June 22, 2023, we issued our en banc decision in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 [2023 Cal. Wrk. Comp. LEXIS 30], which addressed issues of apportionment in workers' compensation proceedings.

On July 21, 2023, the WCJ ordered the submission of the case vacated, and further directed the parties to obtain supplemental reporting from their respective vocational experts responsive to our decision in *Nunes, supra,* 88 Cal.Comp.Cases 741.

On November 16, 2023, the parties returned to trial, at which time defendant stipulated that applicant had sustained injury arising out of and in the course of employment to the neck, back and right shoulder. The parties placed in issue parts of body injured, permanent disability and apportionment, the need for further medical treatment, whether applicant sustained a cumulative injury, and attorney fees. (Minutes of Hearing (Further) and Orders, November 16, 2023, at p. 3:6.) The parties offered additional vocational reporting into evidence, and the WCJ submitted the matter for decision the same day.

On February 13, 2024, the WCJ issued his F&A, finding in relevant part that applicant sustained specific injury to his neck, back, right shoulder, erectile dysfunction, sleep, cognitive disorder, headaches, urologic system, and psyche. (Finding of Fact No. 1.) The WCJ determined that applicant's injuries resulted in permanent and total disability without apportionment. (Findings of Fact Nos. 8 & 9.) The WCJ also determined that applicant did not sustain a cumulative injury. (Finding of Fact No. 13.)

Defendant's Petition for Reconsideration (Petition) avers the WCJ erred in excluding the surveillance video from evidence. Defendant also contends that in addition to the specific injury of May 14,2012, applicant also sustained a cumulative injury following his return to work from July 13, 2012 to December 8, 2012. Defendant disputes the WCJ's determination that there is no legal basis for apportionment to prior industrial and nonindustrial factors. Finally, defendant avers the WCJ's Opinion on Decision does not adequately set forth the reasoning of the WCJ in relying on applicant's vocational expert opinions.

Applicant's Answer asserts that defendant failed to establish why, in the exercise of reasonable due diligence, it could not have obtained surveillance video of applicant prior to the close of discovery pursuant to Labor Code section 5502(d)(3). (Answer, at p. 4:5.) Applicant contends that the case law relied upon in defendant's Petition as supportive of the admissibility of surveillance video after the close of discovery is either inapposite or unpublished. Applicant's

Answer also asserts that the record does not support a separate cumulative injury, and that even if one were identified, it would not alter or diminish a finding of permanent and total disability. (*Id.* at p. 9:24.) With respect to apportionment, applicant contends the WCJ was justified in determining that the medical evidence did not adequately explain the basis for apportionment to nonindustrial and prior industrial factors. (*Id.* at p. 11:20.) In the alternative, applicant avers that even applying the apportionment identified by the QMEs, applicant's permanent disability rating reaches and exceeds 100 percent. (Answer, at p. 16:9.) Finally, applicant contends applicant's post traumatic headaches standing alone would support a finding of permanent and total disability. (*Id.* at p. 18:1.)

DISCUSSION

Defendant first challenges the WCJ's exclusion of surveillance video obtained after the close of discovery. Defendant contends that "[e]xisting case law establishes that if sub rosa video is obtained post-MSC, it should be admitted into evidence and forwarded to Medical Legal physicians to create a competent and substantial medical record." (Petition, at p. 6:6.)

We note at the outset that the WCJ previously excluded defendant's surveillance video in his January 9, 2023 Findings and Award. (Findings and Award, dated January 9, 2023, Order no. "a".) On March 27, 2023, we denied defendant's Petition for Reconsideration and/or Removal, because we were not persuaded that significant prejudice or irreparable harm would result if removal was denied and/or that reconsideration would not be an adequate remedy.

However, following the matter being returned to the trial level, the WCJ appears to have inadvertently included Exhibit H, the surveillance video in question, as among the defendant's trial exhibits that were admitted into evidence. The November 16, 2023 Minutes indicate that "defendant is resubmitting Defendant's A through AA from December 20, 2022, into evidence," and that "the documents are admitted into evidence, marked as indicated by the Court." (Minutes of Hearing (Further) and Orders, dated November 16, 2023, at p. 4:1.) Given the WCJ's prior ruling of the surveillance video as inadmissible, and our subsequent denial of removal with respect to that order, the exclusion of the surveillance video from evidence became a final order. Accordingly, the inclusion of Exhibit H as among the trial exhibits admitted into the record appears to have been inadvertent. Thus, while we address why we are not persuaded as to the merits of defendant's challenge to the exclusion of this evidence below, we will grant reconsideration for

the sole purpose of amending the F&A to exclude Exhibit H, the sub rosa surveillance video, from evidence.

Section 5502(d)(3) provides that "discovery shall close on the date of the mandatory settlement conference." The section further provides, "[e]vidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference." (Lab. Code, § 5502(d)(3).) "The purpose of the disclosure requirement in section 5502 is obvious: 'to guarantee a productive dialogue leading, if not to expeditious resolution of the whole dispute, to thorough and accurate framing of the stipulations and issues for hearing.'" (*San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]), quoting *Zenith Insurance Co. v. Ramirez* (1992) 57 Cal.Comp.Cases 719.)

Defendant asserts, however, that "[a]pplicant did not perform and engage in the activities in the film that refute his claim of total disability until after the MSC," and accordingly, "the video could not have been obtained and served prior to the close of discovery through any exercise of due diligence…." (Petition, at p. 5:19.) Defendant argues that by its very nature, surveillance video that is captured after the closure of discovery depicts activities that did not occur prior to the closure of discovery. As such, the evidence could not have been obtained in the exercise of due diligence because it did not exist prior to the settlement conference and is therefore an exception to the closure of discovery.

We find this argument unpersuasive, however, because such a blanket exemption from the mandatory closure of discovery would effectively vitiate section 5502(d)(3) by providing a broad exception for post-MSC surveillance footage for which the legislature has made no provision. Moreover, additional evidence adduced only after the closure of discovery will require the parties to submit the surveillance footage to the evaluating QMEs for additional comment and supplemental reporting. Indeed, defendant is requesting this outcome herein. (Petition, at p. 6:6.) Thus, defendant's assertions in this regard are incompatible with the contemplated closure of discovery required under section 5502(d)(3). The WCJ's Report observes:

> At the time of the previous trial held solely on the issue of the reason for obtaining the sub-rosa at the last moment, no one testified from Defendant to support or identify the good cause for the late obtaining of the sub-rosa. Likewise, when the issue was re-litigated, no one appeared from the Defense to

> provide the basis for the need to obtain sub-rosa, 10 years after the injury and immediately prior to trial.
>
> As Defendant stated in its Petition or Reconsideration, Applicant has been examined by a plethora of physicians. Applicant has had reported evaluations by physicians in the following specialties: orthopedic, psychological, internal, neurology, and urology.
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> If the sub-rosa is admitted into evidence and it is relevant on the issues presented, then each of these physicians would have to review the sub-rosa to determine if it would impact on their opinion. Further, the parties would then be entitled to further discovery by way of supplemental interrogatories and a deposition conducted for each physician on their opinion; whether they changed any aspect of their previous determinations or not.
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> To further delay a 10-year-old case at the twelfth hour is unreasonable and flies in the face of our constitutional mandate for the expeditious handling of cases. Discovery should remain closed, the sub-rosa should be excluded and the matter should and did proceed to trial.

We concur with the WCJ's analysis. We also note that the "existing case law" to which defendant refers us is either unpublished or irrelevant to the question of the admissibility of surveillance footage after the closure of discovery. (Petition, at p. 6:6; 7:17.) In short, the exception to section 5502 as argued by defendant would swallow the rule, effectively invalidating the closure of discovery mandated by statute. (Lab. Code, § 5502(d)(3).) Accordingly, we discern no error in the WCJ's exclusion of the surveillance video from evidence. (Findings and Award, Finding of Fact No. 4, dated January 9, 2023, at p. 1; Amended Minutes of Hearing, May 3, 2023, at p. 1:15.)

Defendant next contends that in addition to the admitted specific injury of May 14, 2012, applicant sustained a cumulative trauma injury from July 13, 2012 to December 8, 2012, as identified by QME Dr. Perrin. (Petition, at p. 11:5.) Defendant contends that "since the panel QME report of Dr. Perrin was followed by the WCJ in his Findings and Award and relied upon as substantial medical evidence, his Medical Legal reporting should also be followed in relation to the findings of causation." (Petition, at p. 13:16.)

In any given situation, there can be more than one injury, either specific or cumulative or a combination of both, arising from the same event or from separate events. (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1990) 219 Cal.App.3d 1265, 1271 [55 Cal.Comp.Cases 107].) The number and nature of the injuries suffered are questions of fact for the WCJ or the WCAB.

(*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323].)

Here, the orthopedic Qualified Medical Evaluator has addressed issues of causation as follows:

> In regards to reasonable medical probability and substantial evidence, having reviewed most of his medical file (which is still missing some crucial records), I believe he did injure his head and neck from his specific injury, the five months of cumulative trauma he sustained at work, and the two months his treatment was delayed at the request of the carrier (after he was taken off work to have surgery).
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> (Ex. 4, Report of Timothy J. Perrin, M.D., dated July 27, 2015, at p. 35.)

The WCJ's Report observes:

> As the trier of fact, Dr. Perrin's determination of a continuous trauma while waiting for treatment is not legally supportable. Further, his opinion fails to state why this caused a continuous trauma type of injury and on this issue, his opinion did not constitute substantial medical evidence. As the trier of fact, I opined that there was no medical or legal basis to support the finding of a continuous trauma type of injury.
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> (Report, at p. 4.)

We agree. It is well established that in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [33 Cal.Comp.Cases 660].) Also, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Granado v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 399, 407 [33 Cal.Comp.Cases 647].) Here, the reporting of Dr. Perrin offers only his conclusions regarding the existence of a cumulative injury and does not adequately discuss the basis for why a separate cumulative injury was identified, or how and why such an additional injury resulted in present disability. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687, 1691].) Accordingly, the WCJ appropriately determined that applicant sustained a specific injury but did not sustain an additional cumulative injury. (Finding of Fact No. 13.) We therefore decline to disturb the WCJ's findings regarding the

number and nature of the injuries sustained by applicant herein. (*Western Growers Ins. Co. (Austin), supra,* 16 Cal.App.4th at p. 234.)

Our affirmation of the WCJ's determination with respect to there being but one industrial injury herein also disposes of defendant's contention that applicant's disability should be apportioned between the specific and alleged cumulative injuries. (Petition, at p. 16:4.)

Defendant next contends the WCJ erred in finding that defendant did not meet its burden of establishing apportionment. Defendant avers the WCJ should have apportioned applicant's permanent disability to both prior industrial and nonindustrial factors. (Petition, at pp. 14:17; 16:4.) With respect to apportionment to nonindustrial factors, defendant directs our attention to the reporting of orthopedic QME Dr. Perrin, who identified 25 percent of applicant's cervical spine injury as attributable to preexisting spinal stenosis and DISH syndrome. With respect to the right shoulder, Dr. Perrin apportioned 25 percent of the disability to a prior motor vehicle accident, and an additional 25 percent to poorly controlled diabetes mellitus. (Petition, at p. 16:13.) Defendant further observes that neurology QME Dr. Pulera provided for 25 percent apportionment of the cervical spine to "degenerative cervical myelopathy," while 25 percent of applicant's lumbar spine was apportioned to "pre-existing nonindustrial factors including age, genetics, a previous industrial injury and motor vehicle accident." (Petition, at p. 17:6.) Defendant also notes that the urology QME, Dr. Vogel, apportioned 30 percent of applicant's sexual dysfunction to "medical comorbidities of diabetes mellitus, hypertension, dyslipidemia and obesity." (*Id.* at p. 17:21.) Defendant asserts that the WCJ erred in not applying the apportionment identified by the evaluating physicians to the final assessment of permanent and total disability.

Section 4663 provides, in relevant part, that apportionment of permanent disability shall be based on causation. (Lab. Code, § 4663(a).) The statute further requires the evaluating physician to "make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries." (Lab. Code, § 4663(c).)

In order to comply with section 4663, a physician's report in which permanent disability is addressed must also address apportionment of that permanent disability. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc)

(*Escobedo*).) However, the mere fact that a physician's report addresses the issue of causation of permanent disability and makes an apportionment determination by finding the approximate respective percentages of industrial and non-industrial causation does not necessarily render the report substantial evidence upon which we may rely. Rather, the report must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and *set forth the basis for the opinion that factors other than the industrial injury at issue caused permanent disability.* (*Id.* at p. 621.) Our decision in *Escobedo* summarized the minimum requirements for an apportionment analysis as follows:

> [T]o be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, 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.
>
> For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, *how* and *why* it is causing permanent disability at the time of the evaluation, and *how* and *why* it is responsible for approximately 50% of the disability.
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> (*Ibid.*, italics added.)

Here, the WCJ has determined that none of the apportionment opinions in the record adequately explain "how and why" the identified factor of apportionment is responsible for applicant's present permanent disability. The WCJ's Report explains:

> While there were physicians who did find non-industrial apportionment, none of them explained the "how" and "why" so as to render their opinions substantial medical evidence.
>
> Dr. Perrin's apportionment to the CT period is discussed herein above and fails to provide a basis for his apportionment. His apportionment to "pre-existing or non-industrial pathology" without explaining what he is referring to or how it affects applicant's current condition. He apportions to a vehicle accident as if ipso facto, he had a motor vehicle accident there must be apportionment. Again,

he fails to explain how that supports a basis for apportionment at the time of the specific industrial injury.

Likewise, Dr. Pulera is also conclusory in his determination on apportionment. He is overbroad by factoring in apportionment when he wrote,

> "Regarding pre-existing factors of apportionment for the cervical spine impairment/disability these would include, but are not limited to age, genetics, and previous cumulative trauma. There was also a motor vehicle accident in approximately 2000 which involved the cervical and lumbar spine. I would award 23% nonindustrial apportionment to pre-existing factors."

Again, the doctor fails to state how each of these factors; age, genetics, and previous cumulative trauma support his finding of apportionment. Conclusive factors of genetics or age without discussion cannot constitute substantial medical evidence on the issue of apportionment.

(Report, at p. 4.)

Based on the WCJ's analysis, we are persuaded that none of the QMEs reporting in this matter offers a substantial apportionment analysis. As is observed in *Escobedo, supra*, "[e]ven where a medical report 'addresses' the issue of causation of the permanent disability and makes an 'apportionment determination' by finding the approximate relative percentages of industrial and non-industrial causation under section 4663(a), the report may not be relied upon unless it also constitutes substantial evidence." (*Escobedo, supra*, at 620.) None of the apportionment analyses herein adequately explains the mechanism for how the identified factors of apportionment are contributing to applicant's present permanent disability, nor do the apportionment opinions set forth their reasoning with particularity. (*Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 [2023 Cal. Wrk. Comp. LEXIS 46, *5] (*Nunes*) ("In order to constitute substantial evidence the opinions of both the evaluating physician as well as the vocational expert must detail the history and evidence in support of their respective conclusions, including "how and why" a condition or factor is causing permanent disability.").) We therefore agree with the WCJ that defendant has not met its burden of establishing apportionment to nonindustrial factors.

Defendant further avers that the WCJ erred in not applying apportionment to a prior industrial injury of July 24, 1995, that settled by way of Compromise and Release. (Petition, at p. 20:8.) However, as the WCJ has observed, "[t]here is no Labor Code §4664 apportionment,

because while there is a prior Compromise and Release, there is no prior Stipulations with Request for Award or judicially issued Award for permanent disability to support a prior finding of apportionment of permanent disability." (Report, at p. 4.)

The defendant has the burden of proving overlap before apportionment under section 4664 will apply. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099 [48 Cal. Rptr. 3d 618] [71 Cal.Comp.Cases 1229] (*Kopping*).) Under *Kopping*, a defendant must prove both the existence of a prior award and overlap of the permanent disability caused by the two injuries in order to obtain section 4664 apportionment. Overlap is not proven merely by showing that the second injury was to the same body part because the issue of overlap requires a consideration of the factors of disability or work limitations resulting from the two injuries, not merely the body part injured. (*Contra Costa County Fire Protection District v. Workers' Comp. Appeals Bd.* (*Minvielle*) (2010) 75 Cal.Comp.Cases 896 [2010 Cal. Wrk. Comp. LEXIS 144].) Moreover, as we have observed in our en banc decision in *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223 [2006 Cal. Wrk. Comp. LEXIS 35], "the fact that an approved compromise and release agreement generally constitutes an 'award' does not mean that it is an 'award of permanent disability' under section 4664(b), even if the compromise and release agreement resolved the issue of permanent disability." (*Id.* at p. 231.) Here, defendant has not the existence of a prior award of disability, or that any permanent disability arising out of applicant's prior injury can be calculated under the same standard used to calculate permanent disability arising out of applicant's current injury. We therefore agree with the WCJ that defendant has not met its burden of establishing apportionment to prior industrial factors. (*Escobedo, supra*, at p. 612 [defendant has burden of establishing percentage of disability caused by prior industrial and nonindustrial factors].)

We therefore conclude that because there is no evidence that supports valid legal apportionment under either section 4663 or 4664, applicant is entitled to an unapportioned award. (*Escobedo, supra*, at p. 611; *Nunes, supra*, at p. 7 ["if an evaluating physician identifies apportionment, but the WCJ determines that the apportionment analysis does not constitute substantial evidence and that development of the record is not otherwise warranted, applicant is entitled to an unapportioned award."]; see also *Boone v. State of California—Dept. of Transp.* (July 23, 2018, ADJ7974582) [2018 Cal. Wrk. Comp. P.D. LEXIS 348]; *Maverick v. Marriott Int'l* (January 30, 2015, ADJ2034254) [2015 Cal. Wrk. Comp. P.D. LEXIS 50].)

Finally, defendant avers the WCJ failed to adequately explain his reliance on applicant's vocational expert reporting. (Petition, at p. 20:22.) We observe that the WCJ's Opinion on Decision explains that court is relying on "the credible testimony of Applicant together with due regard for his demeanor as a witness," in conjunction with the QME reporting of Drs. Perrin, Pulera, Gilberg, Hirsch and Vogel, and the vocational reporting of Mr. Van Winkle. (Opinion on Decision, p. 2.) The WCJ's determination is thus multifactorial, based on the testimonial evidence, the medical evidence, and the vocational evidence.

And in this regard, we observe that the reporting of Mr. Van Winkle appropriately reviews the medical and vocational reporting contained in the evidentiary record. Mr. Van Winkle's initial report reflects an interview and vocational testing performed on October 29, 2019, a review of the medical record, a review of applicant's deposition testimony, and additional vocational research. (Ex. 25, Report of David Van Winkle, dated April 30, 2020, at p. 1.) Mr. Van Winkle addresses applicant's vocational testing results, as well as the results of applicant's functional capacity evaluation. (*Id.* at pp. 30-31.) Mr. Van Winkle identifies the work restrictions that applicant would encounter in a potential return to the labor market, but ultimately determines that the applicant "does not retain the physical capacity, mental capacity, or psychological capacity to maintain competitive employment and, in turn, benefit from vocational rehabilitation. Mr. Guedea is not amenable to vocational rehabilitation." (*Id.* at p. 37.)

In subsequent reporting of March 25, 2021, Mr. Van Winkle reviewed additional medical records but did not change his opinions regarding applicant's non-feasibility for vocational retraining. (Ex. 26, Report of David Van Winkle, dated March 25, 2021.)

In his December 15, 2021 supplemental report, Mr. Van Winkle summarized his findings with respect to applicant's orthopedic and psychiatric disabilities, and their impact on the applicant's feasibility for vocational retraining. (Ex. 27, Report of David Van Winkle, dated December 15, 2021, at pp. 9-12.) Mr. Van Winkle observed that based on the work restrictions identified by the primary treating physician, as well as the results of the functional capacity evaluation, applicant had "demonstrated exertional and non-exertional limitations in relation to the physical demands of a unskilled and entry-level light and sedentary occupations that exist in his labor market," causing Mr. Van Winkle to conclude that applicant "does not retain the physical capacity to perform work and compete in the open labor market." (*Id.* at p. 9.) Applicant's vocational expert then assessed the work restrictions identified by the orthopedic QME, noting that

the restrictions would profoundly limit, but not eliminate, the potential universe of positions for which applicant could be retrained. (*Ibid.*) Mr. Van Winkle also reviewed the QME reporting in psychiatry and observed that based solely on the reporting of Dr. Gilberg, "separately and apart from any other industrial disability factors, Mr. Guedea retains the mental capacity to perform unskilled work." (*Id.* at p. 11.) However, when combined with the *orthopedic* work restrictions, applicant was deemed unable to compete in the open labor market, and not amenable to vocational rehabilitation. (*Ibid*.)

The opinions and conclusions reached by applicant's vocational expert are based on a longitudinal review of the record and reflect both the medical and vocational record, causing the vocational expert to conclude that applicant is not feasible for vocational retraining. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1274 [76 Cal.Comp.Cases 624]; *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587].) We are thus persuaded that the WCJ's reliance on the reporting of Mr. Van Winkle in conjunction with the applicant's credible trial testimony and the opinions of the evaluating physicians in the medical record was both warranted and appropriate. (*Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [54 Cal.Comp.Cases 349]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal. 3d 627 [35 Cal.Comp.Cases 16]; *Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310].) We further accord to the WCJ's credibility determinations the great weight to which they are entitled, based on the opportunity to observe the demeanor of the witness(es). (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].)

Based on our independent review of the record occasioned by defendant's Petition, we conclude that the WCJ's findings of permanent and total disability are supported by solid, credible evidence, as based on a review of the entire evidentiary record. (*Bracken, supra*, 214 Cal.App.3d 246; *Lamb, supra*, 11 Cal.3d 274.) We further agree with the WCJ's conclusion that defendant has not met its burden of establishing apportionment to nonindustrial or prior industrial factors. (*Escobedo, supra*, 70 Cal.Comp.Cases 604.) Thus, while we concur with the WCJ's determination that applicant has sustained permanent and total disability without apportionment, we will grant reconsideration for the sole purpose of excluding Exhibit H, the sub rosa surveillance video, from evidence. We will otherwise affirm the Findings and Award.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of February 13, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of February 13, 2024 is **AFFIRMED,** except that it is **AMENDED** as follows:

FINDINGS OF FACT

…

14. Exhibit H, entitled "sub rosa surveillance video," is excluded from evidence.

WORKERS' COMPENSATION APPEALS BOARD

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 7, 2024

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

MIGUEL GUEDEA
STOUT, KAUFMAN, HOLZMAN AND SPRAGUE
TOBIN LUCKS

SAR/abs

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