WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

STEVEN HAYNES, ***Applicant***

vs.

REBAR INTERNATIONAL;
ZURICH AMERICAN INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ15505677 [IWADR 00703]
Santa Rosa District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] 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.

Defendant seeks reconsideration of the August 12, 2021 Findings and Award (F&A), wherein the workers' compensation arbitrator (WCA) found that applicant, while employed as an ironworker on October 8, 2018, sustained industrial injury to his neck, mid-back (thoracic spine) and lower back (lumbar spine). The WCA found that applicant successfully rebutted the scheduled rating under the Permanent Disability Ratings Schedule (PDRS) and was permanently and totally disabled without apportionment.

Defendant contends that the percentages of permanent disability identified by the evaluating physicians should be combined, rather than added; that the WCA erred in rejecting the apportionment to nonindustrial factors identified by the evaluating physicians; that the reporting of the evaluating physicians was not substantial medical evidence; and that the reporting of applicant's vocational expert was not substantial because it failed to apply valid medical apportionment.

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[1] Commissioner Sweeney, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been assigned in her place.

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

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 amend the F&A to clarify that applicant's permanent and total disability solely arises out of his inability to meaningfully participate in vocational rehabilitation, and to further remove reference to vocational apportionment, but otherwise affirm the WCA's decision.

FACTS

Applicant sustained injury to his neck, mid-back and low back while employed as an ironworker by defendant Rebar International on October 8, 2018. (Reporter's Arbitration Transcript (Transcript), dated June 14, 2021, at p. 4:20.)

The parties in this matter are subject to the alternative dispute resolution (ADR) program set forth in the Ironworkers Collectively Bargained Workers' Compensation Program agreement. (See Lab. Code, § 3201.5.) Pursuant to the ADR program, applicant selected Vatche Cabayan, M.D., as a Qualified Medical Evaluator (QME) in orthopedic medicine. Defendant has selected Ronald B. Wolfson, M.D., as a QME in orthopedic medicine. Applicant has also obtained medical treatment and reporting from Babak Jamasbi, M.D. Applicant has also offered into evidence reporting from vocational expert Frank Diaz, while defendant has offered reporting from vocational expert Emily Tincher.

On June 14, 2021, the parties proceeded to arbitration of the case in chief pursuant to the terms of the Ironworkers' ADR program. The parties stipulated to injury arising out of and in the course of employment but placed the nature and extent of the injury in dispute. The WCA heard applicant's testimony, and the parties submitted the matter for decision.

On August 12, 2021, the WCA issued his decision. Therein, and in relevant part, the WCA determined that applicant's scheduled permanent disability rated 81 percent based on the reporting of Dr. Cabayan and vocational expert Frank Diaz. (Finding of Fact No. 5.) However, the WCA also determined that applicant had successfully established that he was not feasible for vocational retraining, and as such, had rebutted the scheduled rating and established that he was permanently

and totally disabled. (*Ibid.*) The WCA further determined that there was no valid apportionment, "medically or vocationally" of the applicant's permanent disability.

On August 23, 2021, defendant filed its Petition for Reconsideration (Petition), contending the WCA erred in adding certain percentages of disability rather than combining them, and that the underlying reports of QME Dr. Cabayan are not substantial evidence. (Petition, at p. 11:12.) Defendant also contends that the finding of permanent disability is subject to nonindustrial apportionment as identified by both QME Dr. Wolfson and QME Dr. Cabayan. (*Id.* at p. 11:23.) Defendant asserts the WCA erred in determining permanent and total disability based in part on applicant's sleep disorder, fatigue, concentration problems, depression and medication usage. (*Id.* at p. 16:1.)

On September 2, 2021, the WCA filed his Report, stating that he found the reporting of applicant's QME Dr. Cabayan and applicant's vocational expert Frank Diaz to be the more credible and persuasive, and based thereon, determined that applicant had successfully rebutted his scheduled rating. The Report also reiterates the WCA's assessment that applicant's testimony was fully credible and supported in the evidentiary record.

On September 10, 2021, applicant filed his Answer, responding that in light of the WCA's reliance on applicant's non-feasibility for vocational retraining as the basis for the award of permanent and total disability, the issue of combining or adding the various scheduled permanent disability percentages was moot. (Answer, at p. 3:3.) Applicant also asserted that the apportionment analysis of Dr. Cabayan is speculative and unsupported in the record. The Answer thus concluded that the effects of applicant's medications to cure or relieve from the effects of his industrial injuries were properly considered in the assessment of residual permanent disability. (*Id.* at p. 5:20.)

DISCUSSION

I.

The proceedings herein arise out of an alternative dispute resolution (ADR) program authorized under Labor Code section 3201.5.[2] Pursuant to subdivision (a), the Department of Industrial Relations and the courts of this state shall recognize as valid and binding any provision

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

in a collective bargaining agreement between a private employer or groups of employers engaged in specified construction trades. The statute specifically authorizes the ADR program to provide for arbitration of disputes, provided that "the decision of the arbiter or board of arbitration is subject to review by the appeals board in the same manner as provided for reconsideration of a final order, decision, or award made and filed by a workers' compensation administrative law judge pursuant to the procedures set forth in Article 1 (commencing with Section 5900) of Chapter 7 of Part 4 of Division 4, and the court of appeals pursuant to the procedures set forth in Article 2 (commencing with Section 5950) of Chapter 7 of Part 4 of Division 4, governing orders, decisions, or awards of the appeals board." (Lab. Code, § 3201.5(a).)

Only the Appeals Board is statutorily authorized to issue a decision on a petition for reconsideration. (Lab. Code, §§ 112, 115, 5301, 5901, 5908.5, 5950; see Cal. Code Regs., tit. 8, §§ 10320, 10330.) The Appeals Board must conduct de novo review as to the merits of the petition and review the entire proceedings in the case. (Lab. Code, §§ 5906, 5908; see Lab. Code, §§ 5301, 5315, 5701, 5911.) Once a final decision by the Appeals Board on the merits of the petition issues, the parties may seek review under section 5950, but appellate review is limited to review of the record certified by the Appeals Board. (Lab. Code, §§ 5901, 5951.)

Former section 5909 provided that a petition was denied by operation of law if the Appeals Board did not "act on" the petition within 60 days of the petition's filing. However, the Appeals Board cannot "act on" the petition if it has not received it, and if it has not received the case file. Transmission of the case to the Appeals Board 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." When the Appeals Board does not receive the case file and does not review the petition within 60 days due to irregularities outside the petitioner's control, and the 60-day period lapses through no fault of the petitioner, the Appeals Board must then consider whether circumstances exist to allow an equitable remedy, such as equitable tolling.

It is well-settled that the Appeals Board has broad equitable powers. (*Kaiser Foundation Hospitals v. Workers' Compensation Appeals Board* (1978) 83 Cal.App.3d 413, 418 [43 Cal.Comp.Cases 785] citing *Bankers Indem. Ins. Co.* v. *Indus. Acc. Com*. (1935) 4 Cal.2d 89, 94-98 [47 P.2d 719]; see *Truck Ins. Exchange v. Workers' Comp. Appeals Bd. (Kwok)* (2016) 2 Cal.App.5th 394, 401 [81 Cal.Comp.Cases 685]; *State Farm General Ins. Co. v. Workers' Comp.*

Appeals Bd. (Lutz) (2013) 218 Cal.App.4th 258, 268 [78 Cal.Comp.Cases 758]; *Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1382 [59 Cal.Comp.Cases 96].) It is an issue of fact whether an equitable doctrine such as laches applies. (*Kwok*, *supra* 2 Cal.App.5th at p. 402.) The doctrine of equitable tolling applies to workers' compensation cases, and the analysis turns on the factual determination of whether an opposing party received notice and will suffer prejudice if equitable tolling is permitted. (*Elkins v. Derby* (1974) 12 Cal.3d 410, 412 [39 Cal.Comp.Cases 624].) As explained above, only the Appeals Board is empowered to make this factual determination.[3]

In *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493], the Appeals Board denied applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.) Pursuant to the holding in *Shipley* allowing equitable tolling of the 60-day time period in section 5909, the Appeals Board acts to grant, dismiss, or deny such petitions for reconsideration within 60 days of receipt of the petition, and thereafter issues a decision on the merits.

"[I]t is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley, supra,* 7 Cal.App.4th at p. 1108.) All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635, fn. 22 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd*. (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].)

If a timely filed petition is never acted upon and considered by the Appeals Board because it is "deemed denied" due to an administrative irregularity and not through the fault of the parties,

[3] Section 5952 sets forth the scope of appellate review, and states that: "Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence." (Lab. Code, § 5952; see Lab. Code, § 5953.)

the petitioning party is deprived of their right to a decision on the merits of the petition. (Lab. Code, §5908.5; see *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 754-755 [33 Cal.Comp.Cases 350]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) Just as significantly, the parties' ability to seek meaningful appellate review is compromised, raising issues of due process. (Lab. Code, §§ 5901, 5950, 5952; see *Evans, supra,* 68 Cal.2d 753; see also *Rea, supra,* 127 Cal.App.4th at p. 643.)

On December 11, 2024, the California Supreme Court granted review in *Mayor v. Workers' Compensation Appeals Bd.* (2024) 104 Cal.App.5th 713 [2024 Cal.App. LEXIS 531] ("*Mayor*"). One issue granted for review is the same issue present in this case, i.e., whether section 5909 is subject to equitable tolling. The Supreme Court noted the conflict present in the published decisions of the Courts of Appeal, and in its order granting review of *Mayor*, stated as follows:

> Pending review, the opinion of the Court of Appeal, which is currently published at 104 Cal.App.5th 1297, may be cited, not only for its persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456, to choose between sides of any such conflict. (See *Standing Order Exercising Authority Under California Rules of Court, Rule 8.1115 (e)(3), Upon Grant of Review or Transfer of a Matter with an Underlying Published Court of Appeal Opinion,* Administrative Order 2021-04-21; Cal. Rules of Court, rule 8.1115(e)(3) and corresponding Comment, par. 2.)

(Order Granting Petition for Review, S287261, December 11, 2024.)

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra,* 7 Cal.App.4th at p. 1108.) The touchstone of the workers' compensation system is our constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.) "Substantial justice" is not a euphemism for inadequate justice. Instead, it is an exhortation that the workers' compensation system must focus on the *substance* of justice, rather than on the arcana or minutiae of its administration. (See Lab. Code, § 4709 ["No informality in any proceeding . . . shall invalidate any order, decision, award, or rule made and filed as specified in this division."].) When a litigant is deprived of their due process rights based upon the administrative errors of a third party, for which they bear no blame and over whom they have no control, substantial justice cannot be compatible with such a draconian result.

In keeping with the WCAB's constitutional and statutory mandate, all litigants before the WCAB must be able to rely on precedential authority, and all litigants must have the expectation that they will be treated equitably on issues of procedure and be accorded same or similar access to the WCAB. The Appeals Board has relied on the *Shipley* precedent for over thirty years, by continuing to consider all timely filed petitions for reconsideration on the merits, consistent with due process. Treating all petitions for reconsideration in the same or similar way procedurally promotes judicial stability, consistency, and predictability and safeguards due process for all litigants. We also observe that a decision on the merits of the petition protects every litigant's right to seek meaningful appellate review after receiving a final decision from the Appeals Board.

Consequently, as discussed below, we apply the doctrine of equitable tolling pursuant to *Shipley* to this case. Here, the WCA issued the F&A on August 12, 2021. Defendant timely served its Petition on the WCAB on August 23, 2021. However, for reasons that are not entirely clear from the record, the Appeals Board did not actually receive notice of and review the petition until December 1, 2021. Accordingly, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties. Moreover, according to Events in EAMS, the case was not transmitted to the Appeals Board until December 7, 2021.

On December 7, 2021, defendant filed a Petition for Writ of Review with the Sixth District Court of Appeal, averring that their petition for reconsideration was denied by operation of law, and reiterating the arguments advanced in their August 23, 2021 Petition.

On January 7, 2022, we granted reconsideration, noting that although the Petition was filed on August 23, 2021, the Appeals Board first received notice of the petition on or about December 1, 2021. (Opinion and Order Granting Petition for Reconsideration, dated January 7, 2021.)

On January 10, 2022, the Appeals Board issued a letter brief to the Court of Appeal, averring in relevant part that the Appeals Board had only learned of the existence of the Petition after the statutory time period for reconsideration had passed. The Appeals Board advised the Court of Appeal that on January 7, 2022, it had granted reconsideration of the WCA's finding and had not yet issued a decision after reconsideration, and requested that the defendant's writ petition be dismissed without prejudice as filed prematurely.

On August 15, 2022, the Court of Appeal denied defendant's Petition for Writ of Review "as having been prematurely filed without prejudice to any party filing a petition for a writ of

review in an appropriate District Court of Appeal (Labor Code, § 5950) after the Workers' Compensation Appeals Board issues its decision and order after reconsideration."

Here, our action in granting a petition for reconsideration sent a clear signal to the parties of our intention to exercise jurisdiction and issue a final decision after reconsideration on the merits of the petition. Moreover, here, the Court of Appeal has specifically indicated that the parties may seek appellate review once a final decision issues.

We note that neither party expressed any opposition to this course of action, and it appears clear from the fact that neither party sought judicial review of our grant of reconsideration that both parties have acted in reliance on our grant.

Under the circumstances, the requirements for equitable tolling have been satisfied in this case. Accordingly, our time to act on defendant's petition was equitably tolled until 60 days after December 1, 2021. Because we granted the petition on January 7, 2021, our grant of reconsideration was timely, and we may issue a decision after reconsideration addressing the merits of the petition.

Accordingly, having timely granted reconsideration to further study the legal and factual issues presented herein, we now issue our Decision After Reconsideration.

II.

The WCA relied on the opinion of applicant's vocational expert Frank Diaz that applicant was not feasible for vocational retraining as the basis for a finding that applicant's disability was permanent and total. (Finding of Fact No. 5; Opinion on Decision, at p. 13.) The opinions of applicant's vocational expert were, in turn, based in part on interviews and vocational evaluation of the applicant, and based on a review of the medical opinions of both QMEs Dr. Cabayan and Dr. Wolfson. (Opinion on Decision, at p. 18.) Defendant's Petition challenges the substantiality of the reporting of Dr. Cabayan, and by extension, the findings of applicant's vocational expert to the extent that it applied the medical and vocational determinations of Dr. Cabayan. (Petition, at p. 12:13.)

The WCA's Opinion on Decision reviews both the reporting of Dr. Wolfson and Dr. Cabayan and notes the "wide disparity" in the two bodies of medical reporting. (Opinion on Decision, at p. 4:25.) With respect to the reporting of defense QME Dr. Wolfson, the WCA observes that the reporting is not longitudinally consistent, does not offer updated physical findings

to reflect changes in the physician's assessment of impairment, work restrictions or need for future medical care, and is inconsistent with applicant's credible testimony. (*Id.* at p. 5:4.) Dr. Wolfson reported that applicant's cervical and thoracic sprain had largely resolved, as reflected in Dr. Wolfson's minimal work restrictions. (*Id.* at p. 7:4.)

On the other hand, Dr. Cabayan's initial reporting explained why applicant had injured the three regions of his spine and recommended a treatment plan with concurrent work restrictions. (*Id.* at p. 7:14.) The physician assessed applicant's feasibility for a return to work and noted the need to evaluate applicant's residual functional capacity. (*Ibid.*) In subsequent reporting, Dr. Cabayan reviewed extensive medical records, MRI studies, and applicant's deposition transcript, and noted significant and ongoing symptomatology. Dr. Cabayan's reporting detailed his findings in all three regions of the spine, including the "lumbar spine with radiculitis in the lower extremity, grip loss in the right upper extremity associated with cervical spine conditions, and multiple levels of the thoracic spine with 'exquisite discomfort' that appeared to be roughly at the level of a C6 distribution bilaterally." (*Id.* at p. 8:17.) Dr. Cabayan explained why the neck, midback, and low back injuries were work-related, and why applicant's headaches, depression, and sleep disorder were further related to his chronic pain arising therefrom. The physician ultimately determined applicant's condition to be permanent and stationary, and issued detailed work restrictions, noting applicant to be a qualified injured worker (QIW). (*Id.* at p. 9:11.) Dr. Cabayan also documented ongoing sequelae from the injury, as reflected in applicant's activities of daily living (ADLs), including problems with concentration, fatiguability, pain from the thoracic spine waking him up in his sleep, depression, and migraine headaches related to neck pain. (*Ibid*.)

Defendant's Petition contends the functional capacity analysis of Dr. Cabayan does not constitute substantial medical evidence. Defendant contends the report impermissibly identifies work restrictions without adequate explanation and challenges the conclusions of the QME based on applicant's physical behavior at the arbitration. (Petition, at p. 14.) In support of this assertion, defendant cites to a split panel decision[4] in *Cervantes v. Strategic Restaurant Company*

[4] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

(November 15, 2019, ADJ10278736) [2019 Cal. Wrk. Comp. P.D. LEXIS 485]. Therein, a panel majority affirmed the Workers' Compensation Judge's (WCJ's) finding of 75 percent permanent partial disability and rejected the opinion of applicant's vocational expert. The WCJ's Report, which the panel majority adopted and incorporated, observed that the vocational expert relied upon three separate functional capacity reports authored by evaluating physicians, but that none of the reports explained their conclusions. Moreover, the work restrictions identified by the various evaluating physicians were inconsistent with the physicians' own reports and with the evidence elsewhere in the record. (*Id.* at pp. 10-12.) Because the findings of the three evaluating physicians in the functional capacity evaluations were not adequately explained, and were inconsistent with the physicians' own prior reporting, the WCJ deemed the reports not substantial medical evidence. To the extent that applicant's vocational expert relied on the functional capacity reports, the vocational reporting also was not substantial evidence. (*Id.* at p. 13.) The dissenting Commissioner reviewed the medical evidence and concluded that the record as a whole supported applicant's assertion that her disability was both permanent and total. (*Id.* at p. 3.)

The WCA's Opinion on Decision responds:

> *Ulfracina* [*Cervantes v. Strategic Restaurant Company*] is not controlling authority and it certainly is not convincing in this case where Dr. Cabayan as a QME has evaluated the applicant on two occasions, written multiple reports including a report on May 13, 2020, reported on restrictions and filled out other RFC like forms, and is familiar with the applicant. Furthermore, the reports including the FCE were admitted into the record at the arbitration trial without objection (See Reporter's Transcript, page 7 and page 8 where defense counsel stated he had no objection to them being admitted.) The FCE form asked much more detailed questions about the capacity of the applicant than a Physician's Return to Work and Voucher Report. Also, this document was reviewed by both vocational evaluators and was available to the defense for over a year before the arbitration trial and Dr. Cabayan was available for deposition or questioning. The limitations that Dr. Wolfson has given here are sketchy and are not sufficiently detailed to be of use in a vocational evaluation.
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> (Opinion on Decision, at p. 11:7.)

Based on a careful review of the medical record, the WCA concluded that "having observed the applicant's testimony, reviewed his deposition testimony and the history [applicant] has given physicians, and considering the medical treatment records, I find that the medical reports of

Dr. Cabayan are better reasoned and more accurate as to the effects of the admitted injuries he sustained on October 8, 2018." (*Id.* at p. 12:1.)

We concur with the WCA's analysis. We also note that the WCA described in detail his assessment of witness credibility. The WCA noted he had an unobstructed view of applicant during the arbitration proceedings, and that applicant testified in a manner that was "credible, straightforward, and almost stoic." (Opinion on Decision, at p. 3.) We accord to the WCA's credibility determination the great weight to which it is entitled because the WCA had the opportunity to observe the demeanor of the applicant. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, and following our independent review of the record, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCA's credibility determination. (*Id.*) We therefore agree with the WCA's assessment that the reporting of Dr. Cabayan, including the assessment of functional capacity, constitutes substantial medical evidence.

Based on the reporting of Dr. Cabayan, the WCA determined that applicant's scheduled permanent partial disability rated to 81 percent. (Finding of Fact No. 5.)

However, "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." [5] (*Ogilvie, supra,* at p. 1277.) The court in *Ogilvie* thus affirmed the continued relevance of vocational evidence with respect to the determination of permanent disability. (*Applied Materials v. Workers' Comp. Appeals. Bd. (Chadburn)* (2021) 64 Cal.App.5th 1042 [86 Cal.Comp.Cases 331]; see also *County of Sonoma/Health Services Dept. v. Workers' Comp. Appeals Bd. (Helper)* (2023) 88 Cal.Comp.Cases 309 [2023 Cal. Wrk. Comp. LEXIS 4] (writ den.).)

[5] We further observe that notwithstanding the statutory changes to the calculation of diminished future earning capacity (DFEC) made by section 4660.1, the holding in *Ogilvie*, which provides that vocational evidence may be offered to rebut the permanent disability rating schedule, continues to apply to all dates of injury, including those occurring on or after January 1, 2013. (See *County of Alameda v. Workers' Comp. Appeals Bd. (Williams)* (2020) 85 Cal.Comp.Cases 792 [2020 Cal. Wrk. Comp. LEXIS 64] (writ den.); *The Conco Companies v. Workers' Comp. Appeals Bd. (Sandoval)* (2019) 84 Cal.Comp.Cases 1067 [2019 Cal. Wrk. Comp. LEXIS 112] (writ den.); *Hennessey v. Compass Group* (2019) 84 Cal.Comp.Cases 756 [2019 Cal. Wrk. Comp. P.D. LEXIS 121].)

Here, the WCA has reviewed the reporting of both applicant's vocational expert Mr. Diaz and defendant's vocational expert Ms. Tincher. The WCA explains in detail why he determined the reporting of applicant's expert Mr. Diaz to be the more well-reasoned and persuasive. (Opinion on Decision, pp. 13-21.) The WCA observes that applicant's vocational expert offers a comprehensive review of the medical and vocational record, including an analysis of applicant's amenability to vocational rehabilitation based on "prior work history, the functional limitations, the jobs in his geographical area, and [] entered them into the OASYS program to match his skills and abilities to the demands of jobs in the open labor market." (*Id.* at p. 15.)

Following a review of the relevant work restrictions and their impact on applicant's ability to compete in the labor market, Mr. Diaz concluded that applicant would not be feasible to return to the labor market and could not benefit from vocational rehabilitation. Mr. Diaz opines, "[w]hen considering Mr. Haynes' individualized work history, the functional limitations as set forth by Dr. Cabayan, the results of the transferable skills analysis, accommodations that may be available to Mr. Haynes in the open competitive labor market, I come to the conclusion that Mr. Haynes is not amenable to rehabilitation in that vocational rehabilitation will not restore his access to the open labor market. Overall, based upon my extensive vocational analysis I am of the opinion that Mr. Haynes, in all vocational probability, has incurred a one hundred percent (100%) loss of labor market access." (Ex. 2, Report of Frank Diaz, dated February 5, 2021, at p. 28.)

Pursuant to the holdings in *Ogilvie, supra,* 197 Cal.App.4th 1262 and *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [193 Cal. Rptr. 547, 666 P.2d 989] (*LeBoeuf*), and relying on the medical conclusions of Dr. Cabayan and the vocational opinions of Mr. Diaz, the WCA has concluded that applicant has sustained disability that is both permanent and total. (*Ogilvie, supra,* at p. 1277 ["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"].)

Thus, the WCA has determined that "the applicant is not amenable to vocational rehabilitation services and is, in fact, 100% disabled as a result of the injury of October 8, 2018." (Finding of Fact No. 5.) While we agree with the WCA's conclusion in this regard, we also note that the finding of fact references both applicant's scheduled rating of 81 percent, and applicant's rating based on his rebuttal of the PDRS. In order to clarify the sole basis for the finding of permanent and total disability, we will amend Finding of Fact No. 5 to reflect that applicant has sustained 100 percent permanent and total disability because he is not feasible for vocational

rehabilitation services. We will also delete the reference to applicant's scheduled rating which has been successfully rebutted.

Defendant also contends that the WCA erred in his determination that the individual rating of Dr. Cabayan should be added based on the synergistic effect of applicant's various spinal injuries. Defendant asserts that Dr. Cabayan's permanent impairment ratings should not be added because the QME did not explicitly address the issue, and that in the absence of clear medical opinion on the issue applicant's disabilities should be combined. (Petition, at p. 11.)

However, defendant's challenge to the methodology by which applicant's impairments are combined under the PDRS is relevant only insofar as the award of permanent disability is based on a scheduled rating. In light of the WCA's ultimate determination that applicant has successfully rebutted the scheduled ratings under the PDRS, a determination which we affirm, a judicial determination as to how to combine applicant's scheduled ratings is no longer necessary.

Defendant next contends the WCA erred in declining to apply 10 percent nonindustrial apportionment identified by both Drs. Cabayan and Wolfson to the finding of permanent and total disability. (Petition, at pp. 11-12.) The WCA's Opinion observes however that neither physicians' apportionment opinion describes how or why the identified factors of apportionment are currently contributing to applicant's permanent disability or how the physician identified the appropriate percentage of apportionment. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Bd. en banc) (*Escobedo*).) The *entirety* of Dr. Wolfson's apportionment analysis is a one sentence statement as to the existence of pathology in the spine, without further explication. (Opinion on Decision, at p. 21:20; Ex. A, Report of Ronald B. Wolfson, M.D., dated December 5, 2019, at p. 16.) There is no discussion of how or why the pathology is nonindustrial, how it is currently causing permanent disability, or why the physician quantified the nonindustrial contribution at ten percent of applicant's current permanent disability. Similarly, the WCA notes that Dr. Cabayan's conclusory apportionment discussion fails to reasonably explicate the basis for his opinions, including how or why the factors of identified apportionment are currently contributing to applicant's permanent disability or how the physician identified the percentage of apportionment. (Opinion on Decision, at p. 22:4; Ex. 1, Report of Vatche Cabayan, M.D., dated December 3, 2019, at p. 9.) Based on the foregoing, we are persuaded that neither the reporting of Dr. Cabayan nor that of Dr. Wolfson offers a substantial apportionment analysis. (*Escobedo, supra*, at 620 ["Even 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"].)

Although we concur with the WCA's medical apportionment analysis, we also note that the WCA has determined that there is "no valid apportionment, medically *or vocationally* of the applicant's permanent disability." (Finding of Fact No. 6, italics added.) In *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 751 [2023 Cal. Wrk. Comp. LEXIS 46], we held that while section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment, the Labor Code makes no statutory provision for "vocational apportionment." (*Id.* at p. 743.) We acknowledge that WCA's decision herein significantly antedated our en banc opinion in *Nunes*, and as a result, we will amend Finding of Fact No. 6 to remove the reference to vocational apportionment.

In summary, we concur with the WCA's determination that the reporting of Dr. Cabayan constitutes substantial medical evidence. We further concur with the WCA's reliance on the reporting of applicant's vocational expert to establish that applicant is not feasible for vocational rehabilitation and is thus 100 percent permanently and totally disabled. For the reasons described above, we will amend Finding of Fact No. 5 to reflect that the finding of permanent and total disability is based on applicant's non-feasibility for vocational rehabilitation, and Finding of Fact No. 6 to delete reference to "vocational apportionment." We will otherwise affirm the August 12, 2021 F&A.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the decision of August 12, 2021 is **AFFIRMED**, except that it is **AMENDED**, as follows:

FINDINGS OF FACT

5. Applicant has sustained 100 percent permanent and total disability because he is not amenable to vocational rehabilitation services.
6. Defendant has not met its burden of establishing medical apportionment of applicant's permanent disability.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 30, 2024

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

STEVEN HAYNES
WELTIN STREB & WELTIN
LAW OFFICES OF THOMAS BURNS
LAW OFFICES OF DOUGLAS MACKAY
IRONWORKERS WC ADR PROGRAM
RUSSO MEDIATION AND LAW, ATTN: FRANK RUSSO

SAR/abs

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