WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

IGOR YAMPOLSKY, *Applicant*

vs.

CINTAS; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, as administered by SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ10633004
Sacramento District Office

OPINION AND ORDERS DENYING PETITIONS FOR RECONSIDERATION AND CORRECTING CLERICAL ERROR

Applicant and defendant both seek reconsideration of the August 20, 2025 Finding of Fact, Awards and Orders (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as an engineer on October 1, 2016, sustained industrial injury to his head, neck, right shoulder, back, sleep, hypertension, psyche, right upper extremity, headaches, brain and GI/digestive system. The WCJ found that applicant's injury resulted in permanent and total disability.

Defendant's Petition contends that reporting of applicant's vocational expert is not substantial evidence and that the reporting of defendant's vocational expert appropriately identified available positions in the labor market suitable for applicant.

Applicant's Petition contends that he sustained ratable psychiatric injury because his psychiatric injury was a direct injury, a severe head injury, resulted from a violent act, or because applicant suffered a catastrophic injury. Applicant further contends that his cognitive and psychiatric disability should be added to his internal and physical disability ratings.

We have received an Answer from applicant to Defendant's Petition, as well as an Answer from defendant to Applicant's Petition. The WCJ prepared a Report and Recommendation addressing both applicant's and defendant's Petitions for Reconsideration, recommending that we deny both Petitions.

We have considered both applicant's and defendant's Petitions for Reconsideration, both Answers, and the contents of the Report, and we have reviewed the record in this matter. Based on our review of the record, and for the reasons discussed below, we will deny both Petitions and issue an order correcting clerical error in the date of injury in Finding of Fact No. 1.

FACTS

Applicant sustained industrial injury to his head, neck, right shoulder, back, sleep, hypertension, psyche, right upper extremity, headaches, brain and GI/digestive system while employed as an engineer by defendant Cintas on October 1, 2016.

The parties have selected Agreed Medical Evaluators (AMEs) Richard Levy, M.D., in internal medicine, Sandra Klein, Ph.D., in neuropsychology, and Robert Ansel, M.D., in neurology. The parties have also obtained vocational expert reporting from Scott Simon for applicant, and Eugene Van de Bittner, Ph.D., for defendant.

The parties proceeded to trial on July 15, 2025, at which time they framed issues for decision including, in relevant part, permanent disability and whether applicant's injury was presumptively permanent and total pursuant to Labor Code[1] section 4662(b). The parties submitted the matter for decision the same day.

On August 20, 2025, the WCJ issued the F&A, determining that applicant's injuries resulted in permanent and total disability. (Finding of Fact No. 4.) In the accompanying Opinion on Decision, the WCJ explained that applicant was not entitled to psychiatric disability because applicant's injury was not the result of a violent act and was not a catastrophic injury within the meaning of section 4660.1(c). (Opinion On Decision, at pp. 3-4.) The WCJ then rated applicant's permanent disability pursuant to the Permanent Disability Rating Schedule (PDRS), yielding 65 percent permanent partial disability. (*Id.* at p. 7.) However, the WCJ also determined that applicant successfully rebutted his scheduled rating with vocational expert reporting that established that applicant's industrial injuries precluded his meaningful reentry into the labor market. (*Id.* at p. 8.) Accordingly, applicant's disability was determined to be both permanent and total.

Defendant's Petition contends that the reporting of applicant's vocational expert does not properly account for nonindustrial causes of disability and was not based on in-person interview and testing of applicant. (Defendant's Petition, at p. 5:15.) Defendant also observes that its

[1] All further references are to the Labor Code unless otherwise noted.

vocational expert identified employment positions in the open labor market to which applicant would be amenable. (*Id.* at p. 8:6.)

Applicant's Answer to Defendant's Petition responds that the only medical-legal physician identifying nonindustrial apportionment was AME Dr. Levy, who did not provide any work restrictions pertaining to applicant's injuries. (Applicant's Answer, at p. 4:27.)

Applicant's Petition contends that his psychiatric injuries were the direct result of his industrial injury, or in the alternative arose out of a violent act or were catastrophic in nature. (Applicant's Petition, at p. 4:1.) Applicant further contends if there is not a finding of permanent and total disability, the orthopedic, psychiatric and neurological disabilities should be added, rather than combined. (*Id.* at p. 6:23.)

Defendant's Answer to Applicant's Petition endorses the WCJ's exclusion of applicant's claimed psychiatric disability pursuant to section 4660.1and avers that applicant has not successfully rebutted his scheduled ratings under the Permanent Disability Ratings Schedule (PDRS). (Defendant's Answer, at p. 8:2.)

The WCJ's Report first addresses Defendant's Petition and agrees that the Opinion on Decision errantly omitted defense vocational expert Dr. Van de Bittner's identification of employment positions available to applicant in the open labor market. (Report, at p. 2.) However, following a review of the entire record, the WCJ concludes that the information "does not change the undersigned's opinion that the reporting [of applicant's vocational expert] Scott Simon is more persuasive." (*Ibid*.) The WCJ observed that applicant's expert provided "a definitive statement regarding Applicant's permanent total disability based on being excluded from the labor market while Defendant's VRE gives estimates of exclusion from the labor market that are not readily comparable to levels of permanent partial disability or Whole Person Impairment." (*Id.* at p. 3.) The WCJ also observed that the findings of applicant's vocational experts are "supported by the opinion of AME Dr. Klein which found [Mr. Simon's] finding to be accurate and agreed on Applicant's total preclusion from the workforce." (*Ibid*.) With respect to Applicant's Petition, the WCJ observes that applicant's claimed psychiatric impairment was not ratable because the underlying injury was not the result of "physical force, extreme or intense force, or an act that is vehemently or passionately threatening," and because the record did not otherwise support a finding of a severe head injury. (*Ibid.*) Accordingly, the WCJ recommends we deny both petitions.

DISCUSSION

I.

Former section 5909 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) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

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 September 24, 2025, and 60 days from the date of transmission is Sunday, November 23, 2025. The next business day that is 60 days from the date of transmission is Monday, November 24, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on November 24, 2025, 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

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 24, 2025, and the case was transmitted to the Appeals Board on September 24, 2025. 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 September 24, 2025.

II.

Section 4660.1 provides that permanent disability is determined by consideration of whole person impairment within the four corners of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides), as applied by the Permanent Disability Rating Schedule (PDRS) in light of the medical record and the effect of the injury on the worker's future earning capacity. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565] ["permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity"]; *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd.* (*Fitzpatrick*) (2018) 27 Cal.App.5th 607, 614 [83 Cal.Comp.Cases 1680]; *Almaraz v. Environmental Recovery Service/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) as affirmed by the Court of Appeal in *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].)

The scheduled rating is not absolute. (*Fitzpatrick, supra,* 27 Cal.App.5th 607, 619-620.) A rating obtained pursuant to the PDRS may be rebutted by showing applicant's diminished future earning capacity is greater than the factor supplied by the PDRS. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal. App. 4th 1262 [76 Cal. Comp. Cases 624]; *Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119].)

In analyzing the issue of whether and how the PDRS could be rebutted, the Court of Appeal has observed:

> Another way the cases have long recognized that a scheduled rating has been effectively rebutted is when the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating. This is the rule expressed in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [193 Cal. Rptr. 547, 666 P.2d 989]. In *LeBoeuf*, an injured worker sought to demonstrate that, due to the residual effects of his work-related injuries, he could not be retrained for suitable meaningful employment. (*Id.* at pp. 237–238.) Our Supreme Court concluded that it was error to preclude LeBoeuf from making such a showing, and held that "the fact that an injured employee is precluded from the option of receiving rehabilitation benefits should also be taken into account in the assessment of an injured employee's permanent disability rating."

(*Ogilvie, supra*, at 1274.)

Thus, "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, supra,* at 1277.)

"The first step in any *LeBoeuf* analysis is to determine whether a work-related injury precludes the claimant from taking advantage of vocational rehabilitation and participating in the labor force. This necessarily requires an individualized approach…It is this individualized assessment of whether industrial factors preclude the employee's rehabilitation that *Ogilvie* approved as a method for rebutting the Schedule." (D*ahl*, *supra*, 240 Cal.App.4th at p. 758.)

Here, the WCJ has carefully reviewed the reporting of Mr. Simon, reporting on behalf of applicant, and Dr. Van De Bittner, reporting on behalf of defendant. The WCJ's Opinion on Decision observes that both experts have concluded that "[a]pplicant's level of permanent disability exceeds that established by the AMA Guides and the 2005 PDRS … [t]herefore, Applicant has rebutted the presumption by a preponderance of the evidence." (Opinion on Decision, at p. 8.) The WCJ observed that in Mr. Simon's opinion applicant's injuries "permanently preclude him from obtaining and holding employment," while Dr. Van De Bittner

concluded that applicant sustained "an 82.19% diminished labor market access with a 73% diminished future earning capacity." (*Ibid*.) In weighing the two reports, the WCJ concluded:

> Mr. Simon's reasoning is found to be more persuasive because he has given a definitive statement regarding Applicant's permanent total disability based on being excluded from the labor market while Defendant's VRE gives estimates of exclusion from the labor market that are not readily comparable to levels of permanent partial disability or Whole Person Impairment. VRE Simon's findings are also supported by the opinion of AME Dr. Klein which found his finding to be accurate and agreed on Applicant's total preclusion from the workforce. (App. Ex. 4)

(Report, at p. 3.)

Defendant's Petition challenges the WCJ's determination, and in support thereof, directs our attention to the panel[3] decision in *Havanis v. California Dept. of Transp.* (May 3, 2024, ADJ3802146 (LBO0361469)) [2024 Cal. Wrk. Comp. P.D. LEXIS 167]. Therein, applicant sought to rebut their scheduled rating of 80 percent permanent partial disability with the opinions of vocational experts who determined that applicant was precluded from meaningful reentry into the labor market and was thus permanently and totally disabled. We determined, in relevant part, that the record in *Havanis* needed to be developed with respect to issues of causation and apportionment in applicant's work restrictions. In so doing, we differentiated between the focus on impairment under the AMA Guides as integral to scheduled ratings, and work restrictions as relevant to an attempt to rebut the scheduled rating by establishing that "the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating." (*Ogilvie, supra*, at p. 1274.)

In this instance, defendant avers that applicant meets their burden to rebut the PDRS "only if the industrial work restrictions, standing alone, preclude the applicant from rehabilitation and from competing in the open labor market." (Defendant's Petition, at p. 5:20.) Defendant contends that Mr. Simon failed to consider whether applicant's work restrictions, standing alone, precluded reentry into the labor market. (*Id.* at p. 5:25.)

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[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 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].) Here, we refer to these panel decisions because they are cited in defendant's petition as persuasive authority relevant to the issues at bar.

However, Defendant's Petition identifies no work restrictions assigned by Dr. Levy, whether industrial or nonindustrial in etiology. Nor have we, following an independent review of the record, identified any such restrictions. Accordingly, we are not persuaded that Mr. Simon is improperly relying on nonindustrial work restrictions in arriving at his ultimate conclusion that applicant is not amenable to vocational rehabilitation or reentry into the competitive labor market.

Defendant also contends that the remote evaluation accomplished by Mr. Simon during the COVID-19 public health emergency renders the resulting vocational testing unreliable. (Defendant's Petition, at p.7:1.) However, other than a bare assertion that remote testing may engender difficulties in the testing environment, as set forth in a report that the WCJ found to be the less persuasive vocational reporting, defendant cites to no substantive deficiencies in the testing results or the vocational expert's concomitant assessment of applicant's feasibility to reenter the labor market.

It is well-established that the WCJ and the Appeals Board are empowered to choose among conflicting medical and vocational reports and rely on that which is deemed most persuasive. (*Jones v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 476 [33 Cal.Comp.Cases 221]; see also *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 [2023 Cal. Wrk. Comp. LEXIS 30I] (Appeals Board en banc).)

Here, the WCJ has carefully reviewed the evidentiary record and determined that the reporting of Mr. Simon is the most thorough and persuasive based on the facts in evidence. The WCJ has further observed that the vocational expert's opinion that applicant is permanently and totally disabled is shared by the AMEs. (Report, at p. 3.) The WCJ has thus concluded that the applicant has met his affirmative burden and rebutted the PDRS to establish that his disability is permanent and total.

When a WCJ's findings are supported by solid, credible evidence, they are to be accorded great weight by the Board and rejected only on the basis of contrary evidence of considerable substantiality. (*Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [54 Cal.Comp.Cases 349].) Here, we are persuaded that the WCJ's finding are supported by solid, credible evidence. Because our independent review of the entire evidentiary record did not reveal "contrary evidence of

considerable substantiality," we concur with the WCJ's determination that applicant's disability is permanent and total. We will deny defendant's petition, accordingly.

Turning to Applicant's Petition, applicant first contends that the impairment arising out his psychiatric injury is ratable. (Applicant's Petition, at p. 4:4.) Section 4660.1 provides that "impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury shall not increase," except where the compensable psychiatric injury resulted from being a victim of a violent act or direct exposure to a significant violent act within the meaning of Section 3208.3 or a catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury. (Lab. Code, § 4660.1(c).) However, the restrictions described in section 4660.1 are limited to ratable impairment. As we explained in *Wilson v. State of CA Cal. Fire* (2019) 84 Cal.Comp.Cases 393 [2019 Cal. Wrk. Comp. LEXIS 29] (Appeals Bd. en banc), "section 4660.1(c) does not bar an employee from claiming a psychiatric injury or obtaining treatment or temporary disability for a psychiatric disorder that is a compensable consequence of a physical injury occurring on or after January 1, 2013." (*Id.* at p. 403.)

Here, applicant contends his injuries meet the exceptions available under section 4660.1(c)(2) for injuries arising out of violent acts and/or catastrophic injuries. However, insofar as the restrictions of section 4660.1 only apply to ratable impairment arising out of claimed psychiatric injury, and insofar as we affirm the WCJ's determination that applicant has successfully rebutted the PDRS and that applicant's injury has resulted in permanent and total disability, we need not address the question of whether applicant's psychiatric injuries resulted in ratable impairment under the exceptions of 4660.1(c)(2).

Applicant further contends his regularly scheduled and rated impairments should be added rather than combined using the PDRS and the combined values chart, pursuant to the analysis set forth in *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 [2024 Cal. Wrk. Comp. LEXIS 23] (Appeals Board en banc). Again, however, insofar as we affirm the WCJ's determination that applicant has successfully rebutted the PDRS, we need not address the issue of how to combine applicant's scheduled ratings.

We will deny both Petitions, accordingly.

In addition, we note apparent clerical error in Finding of Fact No. 1, which states applicant's date of injury as October 1, 2026, rather than October 1, 2016. We will correct this

clerical error by virtue of this order without granting reconsideration, as such errors may be corrected without further proceedings at any time. (*Toccalino v. Worker's Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 558 [47 Cal.Comp.Cases 145]; see also 2 Cal. Workers' Comp. Practice (Cont. Ed. Bar, March 2018 Update) Supplemental Proceedings, § 23.74, p. 23-76.)

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the decision of August 20, 2025 is **DENIED**.

IT IS FURTHER ORDERED that defendant's Petition for Reconsideration of the decision of August 20, 2025 is **DENIED**.

IT IS FURTHER ORDERED that the clerical error specifying the date of October 1, 2026 as set forth in Finding of Fact No. 1 of the Findings of Fact, Awards & Orders issued on August 20, 2025 is **CORRECTED** to reflect a date of injury of October 1, 2016.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 24, 2025

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

IGOR YAMPOLSKY
EASON & TAMBORNINI
TESTAN LAW

SAR/abs

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