WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERT S. HAPPENY, ***Applicant***

vs.

STATE OF CALIFORNIA, CALIFORNIA INSTITUTE FOR WOMEN, legally uninsured, administered by STATE COMPENSATION INSURANCE FUND, ***Defendants***

Adjudication Numbers: ADJ8240882; ADJ8240881; ADJ8615401
Marina del Rey District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant State of California, California Institute for Women (defendant) seeks reconsideration of the January 21, 2025 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found in Case No. ADJ8240882 that applicant, while employed as a correctional officer from February 24, 1996 to September 26, 2012, sustained industrial injury to his heart, psyche, right wrist, respiratory system, lumbar spine, right shoulder, left shoulder, cervical spine, right knee, and left knee. The WCJ further found in ADJ8240881 that applicant sustained injury on October 4, 2011 to his right wrist, right shoulder, and left upper extremity, and in Case No. ADJ8615401, that applicant sustained injury on September 25, 2012 to his right knee, left lower extremity, and lumbar spine. The WCJ determined that the respective percentages of permanent disability arising out of the three injuries could not be parceled out. The WCJ further determined that either by adding applicant's permanent disability corresponding to the various body parts, or because applicant is not feasible for vocational retraining, applicant's industrial disability was both permanent and total. The WCJ further determined that the apportionment opinions of the evaluating medical-legal physicians did not constitute substantial evidence and thus issued an unapportioned award.

Defendant contends that the WCJ's rationale for adding the various percentages of permanent disability does not comport with our current decisional authority, that the vocational reports the WCJ relied upon to determine that applicant is not feasible for vocational retraining are not substantial evidence, and that the record supports apportionment to nonindustrial factors.

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 insofar as it seeks to disturb the WCJ's findings of applicant's non-feasibility for vocational rehabilitation, but granted to allow for development of the record to include supplemental reporting addressing the propriety of adding the percentages of permanent disability, and to further address issues of apportionment.

We have considered the Petition for Reconsideration, the Answer, 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 affirm the WCJ's analysis but amend and restate the F&A to reflect that applicant's disability is permanent and total based on his inability to participate in vocational retraining.

FACTS

Applicant has three pending cases. In ADJ8240882, applicant sustained admitted injury to his heart, psyche, right wrist, respiratory system, lumbar spine, right shoulder, left shoulder, cervical spine, right knee, and left knee, while employed as a correctional officer by defendant California Institute for Women from February 24, 1996 to September 26, 2012.

In ADJ8240881, applicant claims to have sustained injury to his right wrist, right shoulder, and left upper extremity, while similarly employed on October 4, 2011. Defendant admits injury to the right wrist and right shoulder but denies injury to the left upper extremity.

In ADJ8615401, applicant claims to have sustained injury to the right knee, left lower extremity, and lumbar spine, while similarly employed on September 25, 2012. Defendant admits injury to the right knee but denies injury to the left lower extremity and lumbar spine.

The parties have selected multiple Agreed Medical Evaluators (AMEs), including Richard Hyman, M.D. (cardiology), Arthur Lipper, M.D. (internal medicine), George Watkin, M.D. (orthopedic medicine), and Katalin Bassett, M.D. (psychiatry). Applicant has obtained vocational

expert reporting from Robert Liebman, Laura Wilson, and Halcyon Vocational Advisors, while defendant has obtained vocational expert reporting from Robert Simon.

The parties proceeded to trial on August 21, 2024, framing trial stipulations and issues with respect to applicant's cumulative injury claim in ADJ8240882. The WCJ conducted additional trial proceedings on October 7, 2024, at which time the parties completed framing stipulations and issues relevant to applicant's companion cases in ADJ824088 and ADJ8615401. On December 11, 2025, the parties returned for additional trial proceedings, at which time the WCJ heard testimony from applicant and ordered the matter submitted for decision as of January 8, 2025.

On January 21, 2025, the WCJ issued the F&A. Therein, the WCJ initially determined that pursuant to the opinions of the evaluating physicians, the percentages of disability corresponding to each of applicant's three claimed injuries could not be parceled out. (Findings of Fact in ADJ8240882, Finding of Fact No. 2.) The WCJ next determined that applying an additive method to applicant's various percentages of permanent disability, applicant's aggregate disability met and exceeded 100 percent. (Findings of Fact in ADJ8240882, Finding of Fact No. 4.) In the alternative, the WCJ determined that the reporting of applicant's vocational experts was the more persuasive and well-reasoned, and based thereon, that applicant was not feasible for vocational retraining. (Findings of Fact in ADJ8240882, Finding of Fact No. 3.) Finally, the WCJ determined that defendant had not met its burden of proving apportionment to nonindustrial factors. (Findings of Fact in ADJ8240882, Finding of Fact No. 4.) Accordingly, the WCJ issued an unapportioned award of permanent and total disability.

Defendant's Petition avers the WCJ's addition of the various percentages of permanent disability does not comport with the methodology described in our en banc decision in *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 [2024 Cal. Wrk. Comp. LEXIS 23] (*Vigil*), because much of the reporting in evidence antedated *Vigil*, and because the reporting fails to address issues of overlap of Activities of Daily Living (ADLs). (Petition, at p. 5:17.) Defendant further contends the reporting of applicant's vocational expert Ms. Wilson is not substantial evidence because it relies on a flawed methodology, applies an invalid legal theory of vocational apportionment, and fails to reconcile applicant's activities in raising his grandson with his feasibility to return to the open labor market. (*Id.* at p. 6:18.) Defendant also asserts that there are

ten factors of apportionment described by three AMEs which constitute substantial evidence precluding an unapportioned award. (*Id.* at p. 8:9.)

Applicant's Answer responds that the WCJ's analysis of an additive approach to applicant's permanent disability percentages is supported in the medical record. Applicant asserts the apportionment analyses offered by the various AMEs fail to adequately explain how the identified factors of apportionment are causing applicant's present permanent disability and conflate causation of injury with causation of disability. (Answer, at p. 7:25.)

The WCJ's Report recommends that we grant reconsideration and return the matter to the trial level so that the record may be augmented to bring the AME reporting into compliance with the analysis of required under *Vigil, supra*, 89 Cal.Comp.Cases 686. (Report, at p. 3.) The WCJ further recommends that if development of the record is deemed necessary with respect to the appropriate methodology for combining disability, that the record also be augmented to further address issues of apportionment. Finally, the WCJ recommends we uphold the decision finding applicant not feasible for vocational retraining. (*Id.* at p. 5.)

DISCUSSION

I.

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

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

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 February 18, 2025 and 60 days from the date of transmission is Saturday, April 19, 2025. The next business day that is 60 days from the date of transmission is Monday, April 21, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, April 21, 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 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 February 18, 2025, and the case was transmitted to the Appeals Board on February 18, 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 February 18, 2025.

II.

We begin our discussion with the issue of applicant's feasibility for vocational retraining. Section 4660 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

[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.

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, 1321 [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] (*Fitzpatrick*); *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] (*Guzman*).)

However, the scheduled rating is not absolute. (*Fitzpatrick, supra*, at pp. 619-620.) A rating obtained pursuant to the PDRS may be rebutted by showing an applicant's diminished future earning capacity is greater than that reflected in the PDRS. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] (*Ogilvie*); *Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 1119] (*Dahl*).) 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 p. 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 p. 1277.)

Here, the WCJ writes in his report:

> All of the four AMEs and Dr. Miller, the pain management specialist have spoken with one voice on the question of whether the applicant can work in the open labor market. They have all indicated that he is NOT capable of working in the open labor market. Robert Liebman, applicant's initial vocational specialist, and a vocational evaluator of high reputation, indicated that he felt applicant could NOT return to the open labor market and was NOT feasible for vocational rehabilitation (VR). Because of serious health problems, Mr. Liebman was not able to continue on as the vocational evaluator for the applicant. The applicant's new vocational evaluator was Laura Wilson who also felt the applicant could not work in the open labor market and that he was non-feasible for VR. The defendant's vocational expert did indeed attack some of the methods of Laura Wilson, but he failed to explain why five different doctors all came to the same conclusion about the applicant's inability to work in the open labor market. While the defendant's vocational evaluator was reputable and professional, the WCJ found the applicant's vocational experts and their opinions which aligned with all of the physicians in this case to be more persuasive.

(Report, at p. 2.)

In addition, we also note that applicant's attempts at vocational rehabilitation through the California Department of Rehabilitation were unsuccessful, with the department determining on March 13, 2019 that applicant's "combination of disabling conditions represents a significant impediment to employment, and overall, are deemed too severe for you to benefit from vocational rehabilitation services." (Ex. 5, Report of Robert Liebman & Assoc., dated March 15, 2019, at p. 35.)

The WCJ has carefully reviewed the vocational evidence and has determined that applicant's aggregate vocational reporting best reflects the medical-legal opinions expressed by the various AMEs and is the more persuasive reporting in evidence. Because 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, we discern no error in the WCJ's determination that applicant is not feasible for vocational retraining and is permanently and totally disabled as a result. (*Jones v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 476 [33 Cal.Comp.Cases 221]; *Ogilvie v. Workers' Comp. Appeals Bd., supra,* 197 Cal.App.4th 1262.)

We next address the issue of apportionment. In 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], we observed that "factors of apportionment must be carefully considered, even in cases

where an injured worker is permanently and totally disabled as a result of an inability to participate in vocational retraining." (*Id.* at p. 753.) Where the evaluating physicians have identified valid apportionment, "the WCJ must determine whether the cause of the permanent and total disability includes nonindustrial or prior industrial factors, or whether the permanent disability reflected in applicant's inability to meaningfully participate in vocational retraining arises solely out of the current industrial injury." (*Id.* at p. 754.)

Section 4663 sets out the requirements for the apportionment of permanent disability and provides, in relevant part, as follows:

> (a) Apportionment of permanent disability shall be based on causation.
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> (b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the issue of causation of the permanent disability.
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> (c) In order for a physician's report to be considered complete on the issue of permanent disability, it must include an apportionment determination. A physician shall 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. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.

(Lab. Code, § 4663.)

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 Bd. 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* summed up 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.
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> 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.

(*Ibid.*, italics added.)

Internal medicine AME Dr. Lipper has identified cardiac and respiratory impairment based in part on "environmental exposures." (Ex. 90, Report of Arthur Lipper, M.D., dated September 28, 2014, at p. 2.) Dr. Lipper originally deemed applicant's respiratory issues to be purely industrial in nature but later identified applicant's obstructive sleep apnea as a nonindustrial factor contributing to his pulmonary disease. The AME stated:

> With regard to Mr. Happeny's respiratory status, and in addition to his description of environmental exposures, I also note a history of obstructive sleep apnea. In March 2014 pulmonary function studies demonstrated evidence of an isolated reduction in diffusion capacity. It is also noted that Mr. Happeny had "COPD with use of a BiPAP mask." It is within reasonable medical probability therefore that Mr. Happeny' s pulmonary disease would also be seen to have a nonindustrial component, i.e. obstructive sleep apnea with changes on pulmonary function tests. I previously noted Mr. Happeny's evidence of abnormality due to environmental exposures. At this time I will revise my apportionment considerations herein. I previously stated Mr. Happeny's respiratory impairment would be 100% apportioned to industrial causation. I now amend this to state that 50% of Mr. Happeny' s respiratory impairment is due to each of industrial and nonindustrial causation, absent evidence to the contrary.

(*Ibid*.)

The WCJ's Opinion observed, however, that "Dr. Lipper did not explain the how and why applicant developed sleep apnea nor when it first began to affect the applicant, nor whether the sleep apnea had an industrial component. He failed to explain how sleep apnea affects the lungs. In short, Dr. Lipper's apportionment failed to comport with the *Escobedo* standard." (Opinion on Decision, at p. 14.)

Defendant contends the "ordinary definition" of sleep apnea provides the necessary analysis of the causal relationship between the factor of disability and its relationship to applicant's breathing. (Petition, at p. 10:7.) However, we are not persuaded that defendant's argument raised on reconsideration may be substituted for substantial medical evidence substantively linking the diagnosis with applicant's current permanent disability. We also note that defendant's Petition does not substantively address the multiple other deficiencies in the AME's apportionment analysis that were identified by the WCJ, including uncertainty regarding when the condition arose as opposed to its first diagnosis, and whether the identified factor of apportionment had an industrial component. Nor does the apportionment analysis describe how applicant's sleep apnea is presently manifesting in respiratory impairment, or why the evaluating physician chose to attribute equal percentages to industrial and nonindustrial factors. We thus concur with the WCJ's conclusion that substantial evidence does not support the apportionment of applicant's respiratory disability.

Turning to the apportionment identified by psychiatric AME Dr. Bassett, we note initially the AME has described significant reservations regarding the propriety of identifying any apportionment to nonindustrial factors. In her report of April 15, 2020, Dr. Bassett reviews the reporting of Drs. Lipper and Watkins, and opines:

> Because the overwhelming majority of the applicant's complaints seem to be industrial, and there is a very complex apportionment between the variety of body parts and to the patient's lengthy employment, it is my opinion that the permanent psychiatric impairment caused by the compensable psychiatric consequences of his orthopedic injuries should not be further apportioned.

(Ex. 53, Report of Katalin Bassett, M.D., dated April 15, 2020, at p. 4.)

Nonetheless, the AME describes apportionment wherein applicant's work exposures and industrial orthopedic injuries together account for 70 percent of applicant's impairment. (*Id.* at p. 5.) Applicant's aggregate experiences in the Air Force and personal life stressors each account

for 10 percent impairment, and the combination of applicant's pulmonary and cardiac issues then account for the remaining 10 percent. (*Ibid*.)

Insofar as the AME is apportioning 10 percent of applicant's psychiatric impairment to a combination of pulmonary and cardiac issues, the opinion does not explain why each of these issues is resulting in psychiatric impairment. Further, we have determined that the apportionment described by Dr. Lipper is not substantial evidence, while the cardiac disability described by AME Dr. Hyman is subject to the anti-attribution provisions of section 4663(e). Thus, applicant's cardiac and pulmonary impairments are wholly industrial, and not a valid source of nonindustrial apportionment.

In addition, the apportionment to applicant's life experiences while serving in the Air Force and to multiple stressors in his personal life including the health and substance abuse issues encountered by applicant's parents and children are aggregated to the extent that identification of specific factors and their percentages of resulting disability becomes impossible. Moreover, the impermissible aggregation of factors precludes meaningful analysis of how and why each factor of apportionment is presently manifesting in psychiatric disability.

Finally, as is noted in the WCJ's Opinion, Dr. Bassett's February 6, 2024 reporting appears to fundamentally alter her attribution opinions, noting that "[b]ased upon the data I have today … [i]t is likely that the biggest stressors he is dealing with today is his cardiac condition and the psychological consequences of his orthopedic problems." (Ex. 45, Report of Katalin Bassett, M.D., dated February 6, 2024, at p. 27.) We observe that both of the factors of causation of disability identified by the AME are industrial in nature.

In sum, it is unclear whether the psychiatric AME is endorsing apportionment to nonindustrial factors in the first instance, and whether the opinions expressed in the AME's earlier reporting can be reconciled with the opinions expressed as recently as 2024. Even assuming, *arguendo*, that the apportionment identified by Dr. Bassett is sufficiently consistent, the AME misidentifies industrial cardiac and respiratory impairment as partially nonindustrial and does not describe how and why each individual factor of apportionment is presently manifesting in psychiatric disability. We therefore concur with the WCJ's conclusion that defendant has not met its burden of establishing psychiatric apportionment.

Turning to the orthopedic apportionment identified by Dr. Watkins, the WCJ's Opinion on Decision discusses the issue as follows:

> The orthopedic injuries were addressed by AME Dr. George Watkin. In his reevaluation report of 01-10-2020, set out in Exhibit 33, Dr. Watkin addressed PD levels on pages 15-18. He gave WPI values for each injured orthopedic body part as follows: cervical 5%, right shoulder 7%, left shoulder 7%, right wrist 4%, lumbar 16%, right knee 2% and left knee 3%.
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> For apportionment, Dr. Watkin mentioned on page 19 that "applicant's 30 odd years of playing amateur baseball/softball also played a role in overall disability and would warrant some apportionment." There was no discussion of what position on the baseball team applicant played, no discussion of whether applicant played two games per season or 102 games per season, and no discussion of how in applicant's early 40's he was able to undergo a physical and psychological examination just before starting at the State of California and no limitations were placed on him based on these examinations. (Please see SOE 12-11-2024 2:19-22).
>
> Dr Watkin gave the following levels of pre-existing apportionment for each orthopedic body part with the noted explanations on pages 19-20 of his report in Exhibit 33: Cervical 20% "which includes his years of playing softball," right shoulder "1/3 due to baseball," right wrist "1/3 due to playing softball," left shoulder "20% due to his history of playing softball," lumbar "20% due to pre-existing pathology," right knee "30% would be due to years of playing softball," left knee "… complicated because there is a history of a prior Award. Any disability, if any, above his prior Award would most probably would be due to pre-existing factors which would include playing softball …." The WCJ feels these explanations fall short of the *Escobedo* standard.

(Opinion on Decision, at p. 16.)

Based on this analysis, the WCJ concluded that defendant had not met its burden of establishing orthopedic apportionment to nonindustrial or prior industrial factors. (Finding of Fact in ADJ8240882, Finding of Fact No. 4.)

Defendant's Petition responds that "Dr. Watkin recognized the applicant's athletic career spanning '30-some years of baseball as a pitcher' and conducted a full reevaluation to discuss this very activity with the applicant after stating 'it would be best to reexamine Mr. Happeny in order to get an accurate assessment of his history of playing baseball.'" (Petition, at p. 8:22.)

However, to the extent that the AME interviewed applicant regarding the scope of his softball activities, the information gleaned from that inquiry is not adequately reflected in the medical record. Dr. Watkins' June 5, 2017 report states that applicant "did play fast pitch softball for a period of 30 years, but that he has not played in 20 years," and that "[a]ccording to [applicant], he was pretty good at fast pitch and that he had no problems when he stopped playing, which

would have been in the late 1990s approximately." (Ex. 35, Report of George Watkins, M.D., dated June 5, 2017, at p. 50.) Dr. Watkins also noted that applicant "describes no problems orthopedically from playing softball…." (*Ibid*.)

From our review of the record, very few details relevant to applicant's participation in recreational softball emerge. As the WCJ's Opinion aptly notes, there is no discussion of how much or how often applicant played softball, "no discussion of whether applicant played two games per season or 102 games per season, and no discussion of how in applicant's early 40's he was able to undergo a physical and psychological examination just before starting at the State of California and no limitations were placed on him based on these examinations." (Opinion on Decision, at p. 16.) Nor is there concurrent or retrospective evidence of injuries sustained while playing softball and no contemporaneous medical records of treatment necessitated by softball injuries. Moreover, applicant's softball activities ended some 20 years prior to Dr. Watkins' 2017 assessment. Based on the dearth of information available regarding the nature and extent of applicant's softball activities, coupled with a lack of contemporaneous reports of injury or medical treatment, we agree with the WCJ that Dr. Watkins' apportionment opinions to be speculative and unsupported in the medical record.

We also note that insofar as Dr. Watkins' identifies specific percentages of apportionment applicable to applicant's cervical spine, lumbar spine and right knee, in each instance the AME combines degenerative pathology with applicant's history of playing softball. As we noted with the psychiatric apportionment described above, the aggregation of multiple factors of disability effectively precludes a discussion of how and why each individual factor is currently manifesting in permanent disability. Nor does Dr. Watkins adequately describe how he arrived at the identified percentages of industrial and nonindustrial causation of disability. Similarly, the apportionment of 50 percent of applicant's left knee disability to "pre-existing factors including a history of previous injury, disability, and his history of playing softball," relies on a poorly documented history, and impermissibly aggregates multiple factors without adequate explanation of the etiology and contribution of each factor to applicant's present permanent disability levels.

Thus, and following our independent review of the medical evidence occasioned by defendant's Petition, we agree with the WCJ's conclusion that the apportionment identified in the medical-legal reporting does not constitute substantial evidence. Insofar as defendant bears the burden of establishing such apportionment, that burden has not been met, and applicant is entitled

to an unapportioned award of permanent disability. (*Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 [2023 Cal. Wrk. Comp. LEXIS 46] (Appeals Bd. en banc) ["It is axiomatic that in those instances where the WCJ determines that no evaluating physician has identified valid legal apportionment, applicant is entitled to an unapportioned award."].)

In addition to the analysis of applicant's feasibility for vocational retraining, the WCJ has also determined that applicant's disability is permanent and total by adding the percentages of disability attributable to certain body parts and systems rather than combining them using the Combined Values Chart (CVC). (Findings of Fact in ADJ8240882, Finding of Fact No. 2.) The WCJ refers to the additive approach using a shorthand reference to our decision in *Vigil, supra,* 89 Cal.Comp.Cases 686. Defendant challenges the WCJ's decision as impermissibly based on reporting that does not conform to the standards set forth in *Vigil*.

However, because we affirm the WCJ's determination that applicant is permanently and totally disabled because he is not feasible for vocational retraining, we need not reach the issue of whether applicant's percentages of permanent disability should be added or combined. We will grant defendant's petition for the sole purpose amending and restating the Findings of Fact to delete references to the additive approach embodied in *Kite v. East Bay Municipality Util. Dist.* (December 5, 2012, ADJ6719136) [2012 Cal. Wrk. Comp. P.D. LEXIS 640) (writ den. sub nom. *Athens Administrators v. Workers' Comp. Appeals Bd.* (*Kite*) (2013) 78 Cal.Comp.Cases 213 [2013 Cal. Wrk. Comp. LEXIS 34] (*Kite*)), as unnecessary to the WCJ's finding of permanent and total disability.

In summary, we agree with the WCJ's determination that applicant's disability is permanent and total because applicant is not feasible for vocational retraining. We further agree with the WCJ that defendant has not met its burden of establishing apportionment to nonindustrial or prior industrial factors, and that applicant is entitled to an unapportioned award as a result. We grant reconsideration for the sole purpose of amending and restating the F&A to reflect that our determination is based on the analysis of applicant's feasibility for vocational retraining, rather than by the addition of his permanent disability percentages.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of January 21, 2025 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of January 21, 2025 is **RESCINDED** with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT IN ADJ8240882 (MF)

1. It is found that applicant is entitled to temporary total disability for the period beginning September 26, 2012 to and including December 2, 2014, subject to the 104-week cap, payable at a rate of $945.24 per week, less credit for temporary total disability indemnity paid and less credit for time worked. The defendant will also receive a credit for any overpayment of temporary disability it may have made for the periods through June 3, 2015. Fifteen percent of any net amount owed to applicant for temporary disability (if any) will be paid to Mallery and Stern as temporary disability attorney's fees and the remaining 85 percent will go to the applicant.
2. It is found that for permanent disability and other related purposes these three dates of injury in ADJ8240882 (MF), ADJ8240881 and ADJ8625401 are inextricably intertwined.
3. It is found that the applicant is NOT capable of working in the open labor market and he is NOT feasible for vocational rehabilitation and is therefore permanently and totally disabled (100 percent permanent disability), before applying apportionment from physicians.
4. Defendant has failed in its burden of proof to show apportionment, and thus the applicant is permanently totally disabled with a level of 100 percent permanent disability.
5. It is found the applicant has a totally diminished future earning capacity and is non-feasible for vocational rehabilitation and cannot work in the open labor market which makes him permanently and totally disabled at a level of 100 percent permanent disability, and this is a single award of 100 percent permanent disability for all three cases; the permanent disability award is payable at a weekly rate of $945.24 before commutation of attorney's fees commencing on the agreed start date for permanent disability of December 3, 2014, and to be adjusted by Labor Code Section 4659(c).
6. It is found the applicant is in need of further medical treatment to cure or relieve from the effects of the injuries herein.

7. It is found a reasonable attorney's fee on temporary total disability is 15 percent of the additional temporary total disability awarded to the applicant.
8. It is found that the reasonable value of services rendered by applicant's attorney is 15 percent of the permanent total disability awarded, to be commuted laterally (meaning from the side of the award) from the weekly payments of permanent total disability awarded to the extent necessary to pay as one lump sum by using the Uniform Reduction Method. Per the attached computation by the Disability Evaluation Unit (DEU), the amount of the attorney's fee is $247,706.65, and the weekly deduction from the applicant's permanent total disability to produce this attorney's fee is $479.60.
9. It is found the following disputed items mentioned in the Opinion on Decision are admitted into evidence: none.

* * * * *

AWARD IN ADJ8240882 (MF); ADJ8240881; ADJ8615401

Award is made in favor of the applicant **ROBERT HAPPENY** and against the defendant, **STATE OF CALIFORNIA, CALIFORNIA INSTITUTE FOR WOMEN**, legally uninsured, administered by **STATE COMPENSATION INSURANCE FUND** as follows:

A. For injured body part as set out in Finding Number 1 in ADJ8240881;
B. For injured body parts as set out in Finding Number 1 in ADJ8615401;
C. For Temporary Disability as set out in Finding Number 1 in ADJ8240882;
D. [Deleted.]
E. For Permanent Total Disability based on inability to work in the open labor force and for being non-feasible for VR as set out in Finding Number 3 in ADJ8240882;
F. For Permanent Total Disability because of the lack of non-industrial apportionment in the reporting of Dr. Hyman, and because of the failure of valid and/or substantial evidence of pre-existing apportionment in the reporting of the other three AMEs, as set out in Finding Number 4 in ADJ8240882;
G. For the value of Permanent Total Disability as set out in Finding Number 5 in ADJ8240882;
H. For further medical care as set out in Finding Number 6 in ADJ8240882;

I. For temporary disability attorney's fees as set out in Finding Number 6 in ADJ8240882;

J. For attorney's fees on Permanent Total Disability as set out in Finding Number 7.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 21, 2025

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

ROBERT HAPPENY
MALLERY & STERN
STATE COMPENSATION INSURANCE FUND

SAR/abs

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