

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

RAYTCHELL COSENTINO, *Applicant*

vs.

**EHLEN, SPIESS & HAIGHT, INC.; STATE FARM INSURANCE COMPANY,
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ7316783
Goleta District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board previously granted reconsideration 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 Findings of Fact and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on June 14, 2022, wherein the WCJ found in relevant part that applicant, while employed during the period of January 1, 2005, through October 31, 2009, sustained injury arising out of and within the course of employment to her left shoulder, neck, psyche and TMJ, right shoulder, headaches, psych and cognitive disorder in the form of memory loss and teeth; applicant is permanently totally disabled (100%); and that there is no legal basis for apportionment.

Defendant contends that applicant is not 100% permanently totally disabled; that there is no substantial medical evidence of injury of headaches, memory loss or teeth, and that the WCJ's F&A is not supported by his conclusory Opinion on Decision.

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

We have considered the allegations of the Petition for Reconsideration, the Answer and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration, we will affirm the WCJ's June 14, 2022 F&A except that we amend it to defer the issues of injury in the form of headaches and memory loss (Finding

of Fact 1, Award a) and of permanent disability (Findings of Fact 7, 8, 11; Award c, d, g) and return the matter to the trial level for further proceedings consistent with this decision. We make no other substantive changes to the F&A.

BACKGROUND

We will review the relevant facts.

Applicant sustained injury to left shoulder, neck, psyche and TMJ while employed by defendant as an office manager, during the period from January 1, 2005 to October 31, 2009. (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 13, 2022, at p. 2:14-17.) Applicant claimed further injury to her right shoulder, headaches, memory loss, and teeth. (*Id.* at p. 3: 2-3.)

This matter primarily proceeded to trial on multiple issues including parts of body injured: right shoulder, headaches, memory loss, and teeth, permanent disability with applicant claiming to be 100% disabled per *LeBoeuf*, and apportionment.

In this case, multiple medical-legal experts have served. Initially, Richard Kahmann, M.D., served as panel Qualified Medical Evaluator (QME) in orthopedic surgery, however around 2013, he was replaced by agreed QME, Daniel Ovadia, M.D. Gary Stanwyck, M.D., served as Agreed Medical Evaluator (AME) in psychiatry. William Gabriel, DDS, served as AME in dentistry. James Sherman, M.D., served as QME in internal medicine. Michael Behrman, M.D., served as AME, in orthopedic surgery for elbows and hands. Several consulting/treating physicians' reports are in evidence.

1. Claimed Injury to Headaches, Memory Loss, Teeth

On reconsideration, defendant contends there is no substantial medical evidence of industrial injury to headaches, memory loss or teeth.

a. Headaches and Memory Loss

Concerning headaches and memory loss, applicant underwent a neurologic consultation with David G. N. Frecker, M.D., on October 25, 2010. (Applicant's Exhibit 45.) Dr. Frecker noted that applicant was "seen today regarding memory complaints and headaches that are in relationship to known cervical disease for which she has had a surgical recommendation." (*Id.* at p. 1.) After a neurological examination, Dr. Frecker diagnosed applicant with probable muscle tension headache related to her cervical disease and memory disorder probably related to pain. (*Id.*) Dr. Frecker determined industrial causation in that applicant's "headaches are really related purely to her

cervical condition and muscle tightness, and her memory disturbance more related to her otherwise ongoing medical condition.” (*Id.* at p. 2.)

According to the summary of medical records by QME Dr. Ovadia (Applicant’s Exhibit 1), after the consultation with Dr. Frecker through 2012, applicant underwent several cervical spine procedures including left C5 nerve root block; bilateral cervical median branch blocks at the C4, C5, C6 and C7; bilateral medial branch rhizotomies at C4, C5, C6 and C[7]; and right C6-7 epidural steroid injection. (*Id.* at p. 9.)

On October 23, 2012 QME Dr. Kahmann included applicant’s headaches in his “Diagnoses” and observed applicant had “frequent slight headaches which increase to moderate on occasion.” (Applicant’s Exhibit 18, at p. 2.)

On March 18, 2013, applicant was evaluated by Dr. Ovadia, and applicant reported that her neck symptoms increased postoperatively associated with constant headaches. (Applicant’s Exhibit 9, at p. 4.)

In 2016 and 2017, applicant sought emergency room care for her headaches. (Applicant’s Exhibit 1, at p. 9.) As of 2021, Dr. Ovadia deferred “compensable cervicogenic headaches ... PD and possible apportionment to a neurologist.” (Applicant’s Exhibit 1, at p. 18.)

At an in-person evaluation on March 10, 2017, QME Dr. Stanwyck reported that applicant’s long-term, short-term and immediate memory were “good” and “intact.” (Applicant’s Exhibit 26, at pp. 6, 13.)

Through 2018, applicant complained of ongoing memory loss to Dr. Ovadia. (Applicant’s Exhibit 4, at p. 2.)

b. Teeth

AME Dr. Gabriel evaluated applicant on March 5, 2014. (Applicant’s Exhibit 19.) Dr. Gabriel found applicant’s TMJ to be industrial.¹ (*Id.* at p. 69.) Dr. Gabriel explained how TMJ specifically resulted in damage to applicant’s teeth:

While most patients are not aware of bruxing activity, the presence of significant wear facets seen on the teeth or diagnostic casts alerts the dentist to the habit. It is estimated that about 5% of patients have wear severe enough to require restorative treatment and protective measures. These patients must be informed that they are bruxing, that they are causing destruction of tooth structure, and that no restorative material is available that is stronger than tooth structure.

¹ At trial, defendant stipulated to injury in the form of “TMJ.” (MOH/SOE, January 13, 2022, at p. 2:14-17.)

Teeth that have receive[d] chronic sustained trauma, caused by forceful sleep-bruxism, whether they are fractured or not, are at risk of receiving irreversible pulpal (neural) damage. This damage results in a guarded prognosis as the damaged nerve may not present itself until well after the date of injury. When this damage does present as symptoms or radiological changes, endodontic therapy will be required. This will require a referral to an endodontist for root canal treatment and then this tooth will require prosthetic treatment. In the event that endodontic treatment is not an option, secondary to technical issues, referral for an extraction and probable dental implant is “Standard of Care”. This requires a possible CT Scan Study, possible grafting of bone material, surgical placement of the implant, temporization, re-entry in 4 to 5 months and fabrication of the clinical dental prosthesis.

I also note that the progressive breakdown of dentition is directly aggravated by forceful bruxism and fracturing of teeth is all too common. [Applicant] already presents with tooth #19, which requires a full crown, secondary to the micro fracturing and failure of her dental restoration and surrounding tooth structure.

Therefore, I note that this patient presents with incomplete fractures of the dentition, secondary to the industrial caused pathologies.

(Applicant’s Exhibit 19, at pp. 33, 55-56.)

2. Medical Evidence of Permanent Disability

Dr. Ovadia evaluated applicant in person on March 8, 2013, January 6, 2014, June 2, 2014, July 3, 2018, and January 24, 2020 (Applicant’s Exhibits 9, 7, 6, 4, 3); issued supplemental reports on October 24, 2013, December 24, 2015, March 20, 2020, and January 29, 2021 (Applicant’s Exhibits 8, 5, 2, 1); and underwent deposition on May 9, 2019 and November 12, 2020 (Applicant’s Exhibits 31, 32).

Dr. Ovadia reported a history of injury as follows:

[Applicant] worked uneventfully until sometime in **2006 / 2007** when she describes the gradual onset of symptoms in her **left shoulder, upper back, and neck** after performing repetitive lifting of multiple banker boxes of records and drawings.

(Applicant’s Exhibit 9, at p. 2.)

On an orthopedic basis, Dr. Ovadia diagnosed applicant as follows:

1. S/P ANTERIOR CERVICAL FORAMINOTOMY C4-5 WITH AUTOFUSION & SIGNIFICANT SPONDYLOSIS C5-6
2. LEFT SHOULDER - S/P SUBACROMIAL DECOMPRESSION AND ROTATOR CUFF AND LABRAL DEBRIDEMENT (All capitals in original.)

(Applicant's Exhibit 3, at p. 5.)

In his final report, Dr. Ovadia assigned applicant 28% whole person impairment (WPI) for the cervical spine, 5% WPI and a 3% pain add-on for the left shoulder, and no WPI for the right shoulder complaints which are a compensable consequence injury of the cervical spine injury, and assigned no apportionment to non-industrial causes. (Applicant's Exhibit 1, at p. 18.) Dr. Ovadia believed applicant had some degree of compensable cervicogenic headaches, but he deferred permanent disability and possible apportionment to a neurologist. (*Id.*)

At his November 12, 2020 deposition, Dr. Ovadia was questioned about using the combined values chart (CVC) versus adding the orthopedic and psychiatric impairments, and he seemed to indicate that cervical spine and TMJ impairments "might" or could be added but not the left shoulder. (Applicant's Exhibit 32, at pp. 64:21-67:9.) Dr. Ovadia was unclear as to whether the psychiatric and orthopedic impairments should be added and "defer[red] to the other doctors." (*Id.* at pp. 65:14-18; 67:11-67:23.) Ultimately, due to technical difficulties, it seemed the parties planned to request a report in writing on the issue. (*Id.* at pp. 68:2-69:6.)

In his final report, concerning the CVC, Dr. Ovadia opined:

Re Kite, I would add the shoulder and neck. However, while deferring to Dr. Stanwyck, I would not apply Kite to the addition of the ortho PD and psych PD.

(Applicant's Exhibit 1, at p. 18.)

Initially, on March 18, 2013, Dr. Ovadia declared applicant to be a qualified injured worker eligible for vocational retraining and assigned work restrictions as follows:

Cervical Spine: No heavy work, work performed above head height, work requiring repetitive movements of the head and neck while working, or working with the head in one static position for prolonged periods of time.

Left Shoulder: No heavy lifting or more than occasional work performed at/above shoulder height.

(Applicant's Exhibit 9, at p. 8.)

At his deposition, Dr. Ovadia confirmed that the work restrictions he assigned on March 18, 2013 were still in effect. (Applicant's Exhibit 32, at pp. 63:25-64:20.)

Next, Dr. Stanwyck evaluated applicant in person on August 4, 2011, February 10, 2012, December 28, 2013, December 8, 2014, and March 10, 2017 (Applicant's Exhibits 20, 22, 23, 25, 26); issued supplemental reports on October 3, 2011, February 26, 2014, September 13, 2014, April 13, 2017, April 27, 2017, August 2, 2017, and November 27, 2017 (Applicant's Exhibits 21,

24, 27, 28, 29, Defendant's Exhibit D); and underwent deposition on April 30, 2014 and August 2, 2017, with supplemental answers (Applicant's Exhibits 33, 34, 48).

Dr. Stanwyck reported a history of injury as follows:

[Applicant] began working at [defendant employer] in 2005 as an office manager. She had numerous duties. She states that she did generally well in the workplace until sometime in 2008. At that time, she began experiencing pain in her left shoulder. She had an injection into the shoulder which was somewhat helpful. Subsequently, she required two surgeries to the shoulder and ultimately required surgery to her cervical spine. She reports that because of her symptoms, she was unable to work as of October, 2009.

Subsequent to her orthopedic injuries and her inability to work, [applicant] became increasingly sad, despondent and depressed. Over time, she began to experience multiple symptoms including sleep disturbance, decrease in motivation and energy, poor attention and concentration, weight fluctuations, social isolation and irritability. She also began to experience increased symptoms of anxiety, both in a general fashion and in a more focused, panic-like state.

(Applicant's Exhibit 20, at pp. 2, 18-19.)

Initially, on Axis 1, Dr. Stanwyck diagnosed applicant with major depression, recurrent, severe, without psychotic features; pain disorder associated with both psychological factors and a general medical condition; and anxiety disorder, NOS, with features of both generalized anxiety and panic attacks and found "over 51% causation of the depression is due to the sequelae of her work-related industrial orthopedic injuries and she has, therefore, sustained an industrial psychiatric injury." (*Id.* at pp. 18, 19-20.)

Eventually, applicant's diagnoses expanded to include amphetamine abuse in full remission. (Applicant's Exhibit 25, at pp. 14, 16.)

On March 10, 2017, applicant's GAF was 48 with a corresponding WPI of 34%, and 30% non-industrial apportionment of permanent disability. (Applicant's Exhibit 26, at p. 36.) Dr. Stanwyck indicated that the 70% industrial causation could be caused by orthopedic injury and/or associated pain. (*Id.* at p. 35.)

At his deposition, Dr. Stanwyck confirmed his assignment of WPI of 34% with 30% non-industrial apportionment. (Applicant's Exhibit 34, at pp. 58:23-25.)

Dr. Stanwyck issued a final report on November 27, 2017, after his deposition, and he confirmed his prior assignments of applicant's GAF as 48 with a corresponding WPI of 34%, and 30% non-industrial apportionment of permanent disability. (Applicant's Exhibit 29, at pp. 2, 5.)

Notably, Dr. Stanwyck failed to indicate whether applicant was a qualified injured worker entitled to vocational rehabilitation on a psychiatric basis; failed to address applicant's work restrictions; and although requested to do so by Dr. Ovadia, failed to opine on the appropriateness of combining versus adding orthopedic and psychiatric impairments.

At his August 2, 2017 deposition, Dr. Stanwyck indicated applicant could work with her current impairment with workplace accommodations:

A. Yes, 48 GAF and --

Q. Right.

A. -- 34 percent whole person impairment.

Q. And that would indicate an individual able to work in the open labor market.

A. I would presume so, to some degree --

Q. Okay.

A. -- with accommodations.

(Applicant's Exhibit 34, at pp. 58:23-59:5.)

Two more times, Dr. Stanwyck indicated applicant could work in some capacity with accommodations. (*Id.* at p. 65:12-19; 117:13-23.)

At Dr. Stanwyck's deposition, applicant's attorney provided the doctor and defense counsel with a copy of a two page report from applicant's vocational rehabilitation expert, David Van Winkle, and applicant's attorney requested that Dr. Stanwyck respond to an additional one page of questions purportedly from the 1997 Permanent Disability Rating Schedule (PDRS), to which defendant objected accordingly. (*Id.* at pp. 102:2-4; 107:13-14; 109:23-110:18; 111:13-22; 113:13-16; 114:6-12.) Applicant's attorney read the questions into the record. (*Id.* at pp. 113:24-117:2.)

Dr. Stanwyck issued supplemental reporting answering the questions about applicant's diminished and/or reduced ability to function. (Applicant's Exhibit 48.)

Hence, Dr. Stanwyck did not indicate applicant was a qualified injured worker nor assign any work restrictions, but deferred to a vocational expert as follows:

Q. Doctor, would you defer to a vocational expert in determining whether she's able to resume meaningful, suitable, gainful employment?

A. That's their expertise. And what I take into consideration is the effect that it's had on the psychiatric disability. There are obviously other factors in terms of the orthopedic, the headaches. All those are taken into consideration by a vocational expert.

(Applicant's Exhibit 34, at p. 103:3-11.)

Next, Dr. Gabriel evaluated applicant on March 5, 2019, and diagnosed applicant with the following conditions:

Slight TMJ internal derangement, left joint.
Capsulitis/Synovitis Temporomandibular Joints, bilateral, chronic.
Parafunctional Activities; sleep-bruxism, daytime bruxism, muscle bracing.
Muscle Tension Cephalgia (headache) with additional migraines
Sleep-Bruxism and "Awake bruxism and parafunction"
Sleep disorder by medication history, medical records and patient complaints.
Bilateral Cervicalgia, chronic complaints by history and records
Myofascial pain, facial and cervical pain
Trigeminal Neuralgia, upregulation status w allodynia/hyperalgesia
Cervical and associated facial neuralgia
Tinnitus, ear pain, itching and fullness, bilateral
Xerostomia, industrially prescribed medication induced and maintained.
Dental breakdown secondary to bruxism, gastritis and medication induced and maintained xerostomia hyposalivation status.
Vocal hoarseness, secondary to medication caused dry mouth issues.

(Applicant's Exhibit 19, at p. 19.)

Dr. Gabriel offered the following causation analysis:

I find [applicant's] subjective TMJ/TMD complaints and dysfunctions, consistent with the history, and my evaluation and I find that causation is industrial.

It is my opinion that the orthopedic chronic pain syndrome and the psyche and emotional stressors secondary to the orthopedic pain syndrome, with reasonable medical probability, aggravated, caused and contributed to the TMJ/TMD complaints and dysfunctions, including the parafunction, described as sleep-bruxism and awake-bruxism.

It is my opinion that with reasonable medical probability, this patient's parafunctional activities (bruxism clenching) were aggravated, accelerated, and

“lit-up”, on an industrially related basis, and that these parafunctional activities and the damaged that resulted, were secondary and derivative to the industrially prescribed anti-depressant medications, such as Prozac, Wellbutrin, possibly Abilify, and the side effects of these medications.

It is my opinion that with reasonable medical probability, the patient’s periodontal condition was aggravated on an industrial basis. Parafunctional behaviors and dry mouth, without lubrication, cause excess forces on the supporting tissues of the teeth, which can accelerate the rate which periodontal structures are destroyed.

It is my opinion that this patient’s hyposalivary condition and resulting xerostomic complaints are also secondary to the facial muscular pain issues, the diagnosed major depression and the industrially prescribed medications. The CDA Journal (June 2007) discusses the issues of muscular pain and the resulting interference with the ability to masticate and produce normal flows of saliva. It is with reasonable medical probability that the patient’s painful facial muscle condition contributed to the xerostomia condition.

(*Id.* at pp. 68-69.)

Dr. Gabriel found applicant to be permanent and stationary and assigned her 9% WPI for mastication, a 3% add-on for head and facial pain, and under *Almaraz-Guzman II*, an additional 1% WPI for voice/speech impairment with no apportionment. (*Id.* at pp. 70, 71, 76, 77.) Dr. Gabriel also determined that applicant was not a qualified injured worker for her dental complaints and had no work restrictions. (*Id.*) He did not comment on whether applicant’s TMJ/TMD disability should be added to her cervical spine disability as prompted by Dr. Ovadia.

3. Vocational Evidence

David Van Winkle served as applicant’s vocational expert and he issued two reports on May 9, 2016 and January 5, 2021. (Applicant’s Exhibits 37, 38.) Nick Corso served as defendant’s vocational expert, and he issued a final report on September 16, 2021. (Defendant’s Exhibit K.)

Mr. Van Winkle issued a preliminary, two page report and indicated that:

Based on the information reflected in the medical records available to me, the information obtained from [applicant], the results of testing, and my observations, it is my preliminary opinion that she is not amenable to vocational rehabilitation and experiences a total loss of future earning capacity due to the combination of the physical and psychological impairments resulting from the injuries while employed by [defendant employer].

(Applicant’s Exhibit 37, at p. 1.)

Mr. Van Winkle found that applicant was not amenable to rehabilitation due to her health as follows:

[Applicant] did not report any pre-existing and nonindustrial medical factors that eroded her pre-injury work capacity. The medical record does not reflect any pre-existing and nonindustrial medical factors that erode her work capacity and ability to compete in the open labor market. Based upon the information available, it is this Consultant's finding that [applicant's] work capacity and ability to compete in the open labor market is not eroded by pre-existing and nonindustrial medical factors.

(*Id.* at p. 38-39.)

However, this conclusion includes Mr. Van Winkle's personal opinions as to how applicant's pre-existing psychiatric conditions, and non-industrial conditions including two strokes, impacted her in the workplace. (*Id.* at p. 35.)

Concerning medical apportionment to pre-existing conditions, Mr. Van Winkle indicated:

AME Ovadia attributed 100% of permanent disability regarding the cervical spine, left shoulder, and bilateral hands to the CT period of January 2005 to October 2009 (3/2/2020, 1/24/2020, 5/9/2019, 7/3/2018, and 3/18/2013). In light of AME Ovadia's findings, apportionment to the vocational impact of pre-existing and nonindustrial factors are not at issue.

AME Stanwyck originally apportioned 30% of permanent disability regarding the psychiatric factors to pre-existing and nonindustrial factors (4/13/2017), although subsequently in deposition (8/2/2017, pages 81 and 90) it appears that he indicated his view on apportionment could change according to the final apportionment of the various body parts. AME Stanwyck did not parse out and specify the level of mental work function impairment that he would attribute to the 30% that he apportioned to pre-existing and nonindustrial factors. The record reflects that prior to the CT injuries while employed with [defendant employer], [applicant] worked without an apparent erosion of her work capacity, work restrictions, or accommodation due to psychiatric impairments.

In order to address the issue of apportionment of psychiatric permanent disability following the *VA Process*, this Consultant requires work restrictions or mental work function impairments that AME Stanwyck attributes to the 30% pre-existing and nonindustrial factors. Lacking that information from AME Stanwyck, this Consultant attributes 100% of permanent disability to the vocational impact of the industrial psychiatric factors.

This Consultant reserves the right to reconsider the above opinions if AME Stanwyck or the Trier of Fact determine that pre-existing and nonindustrial medical

factors have produced medical impairments and/or work restrictions that erode [applicant's] work capacity and/or shorten her work life absent the accepted industrial medical factors. This Consultant would welcome the opportunity to readdress the issue vocational apportionment if the opportunity were to arise.

(*Id.* at pp. 47-48.)

Mr. Corso did not conduct his own vocational testing but relied on the testing of Mr. Van Winkle instead. He concluded that applicant's test results were "consistent with pre-injury education and work history." (Defendant's Exhibit K, at p. 20.) Mr. Corso found applicant to be amenable to vocational rehabilitation. (*Id.* at pp. 47-48.) Mr. Corso noted that Mr. Van Winkle failed to account for pre-existing and non-industrial medical conditions. (*Id.* at pp. 50-51.)

Concerning the medical record considered by both vocational experts, applicant was eventually determined to have no industrial injury to wrists/hand in the form of carpal tunnel syndrome, but there is no final report with restrictions related to applicant's industrial headaches and memory loss, if any.

DISCUSSION

I.

Turning to the merits, defendant contends that applicant did not prove injury in the form of headaches and memory loss and to her teeth.

The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a), 3202.5.) The Supreme Court of California has long held that an employee need only show that the "proof of industrial causation is reasonably probable, although not certain or 'convincing.'" (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) "That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].)

In *Wilson v. State of CA Cal Fire* (2019) 84 Cal.Comp.Cases 393 (Appeals Board en banc), the Appeals Board opined as follows regarding causation of a compensable consequence injury:

Causation of an injury may be either direct or as a compensable consequence of a prior injury. More precisely, an injury may be directly caused by the employment. Alternatively, a subsequent injury is a compensable consequence of the first injury where it "is not a new and independent injury but rather the direct and natural consequence of the" first injury. (*Carter v. County of Los Angeles* (1986) 51

Cal.Comp.Cases 255, 258 (Appeals Board en banc).) The “first injury need not be the exclusive cause of the second but only a contributing factor to it...So long as the original injury operates even in part as a contributing factor it establishes liability.” (*State Compensation Ins. Fund v. Industrial Acc. Com. (Wallin)* (1959) 176 Cal.App.2d 10, 17 [24 Cal.Comp.Cases 302].) In other words, if the first injury is a contributing cause of the second injury, the second injury is a compensable consequence of the first injury. Whereas the first injury is directly caused by the employment, a compensable consequence injury is indirectly caused by the employment via the first injury.

(*Id.* at pp. 403-404, footnotes omitted.)

Concerning industrial headaches and memory, defendant argues that Dr. Frecker’s reporting is not substantial medical evidence because he did not review applicant’s medical records and applicant’s use of industrial medication could have caused a lack of focus and/or concentration. However, Dr. Frecker served as a consulting physician. Applicant’s treating physicians and QME Dr. Kahmann, were copied with the reports. Subsequently, Dr. Kahmann, found industrial causation for headaches and included “headaches” in his Diagnoses section. In his final report, current orthopedic QME Dr. Ovadia deferred the final reporting on applicant’s cervicogenic headaches to an appropriate neurological specialist. The lack of final reporting for a neurologist does not render applicant’s headaches non-industrial, it simply highlights the need for additional, clarifying medical-legal reporting on headaches.

Applicant’s memory loss injury is more complicated. Dr. Frecker found it to be industrial, but as of 2017, Dr. Stanwyck, a neurologist, found no evidence of memory issues. Ongoing, in 2018, applicant continued to complain of memory issues. Clearly, final neurological reporting on applicant’s memory injury is also necessary.

Applicant’s injury to teeth is clear. Dr. Gabriel diagnosed applicant with TMJ/TMD, and defendant accepted injury to this body part. Dr. Gabriel carefully explained how individuals with TMJ suffer injury to their teeth. Applicant’s periodontal condition was aggravated on an industrial basis causing an acceleration in the rate which periodontal structure dysfunction. At this juncture, as a compensable consequence to her TMJ, applicant already needs a crown on her tooth #19.

Accordingly, we agree with the WCJ’s finding of industrial causation to applicant’s teeth, but we will defer the issue of whether applicant sustained injury in the form of headaches and memory loss.

II.

Next, defendant contends that applicant is not 100% permanently totally disabled.

To understand the process of finding that an injured worker sustained permanent total disability, we must first understand what constitutes a permanent disability. As our Supreme Court has explained:

Permanent disability is understood as the irreversible residual of an injury. (Citation.) A permanent disability is one which causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market. (Citation.) Thus, permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity.

(*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320.)

Ordinarily, permanent disability is determined by using the AMA Guides in conjunction with the 2005 PDRS. However, the court in *Ogilvie* explained that the PDRS is rebuttable.

Thus, we conclude that an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating.

(*Ogilvie v. Workers' Comp. Appeals Bd.*, 197 Cal.App.4th 1262, 1277.)

In applying the standard for finding permanent total disability via *Ogilvie* rebuttal, we explained that:

The proper legal standard for determining whether applicant is permanently and totally disabled is whether applicant's industrial injury has resulted in applicant sustaining a complete loss of future earning capacity. (§§ 4660.1, 4662(b); see also 2005 PDRS, pp. 1–2, 1–3.) ...

A finding of permanent total disability in accordance with the fact (that is complete loss of future earnings) can be based upon medical evidence, vocational evidence, or both. Medical evidence of permanent total disability could consist of a doctor opining on complete medical preclusion from returning to work. For example, in cases of severe stroke, the Appeals Board has found that applicant was precluded from work based solely upon medical evidence. (See i.e., *Reyes v. CVS Pharmacy*, (2016) 81 Cal. Comp. Cases 388 (writ den.); see also, *Hudson v. County of San Diego*, 2010 Cal. Wrk. Comp. P.D. LEXIS 479.)

A finding of permanent total disability can also be based upon vocational evidence. In such cases, applicant is not precluded from working on a medical basis, per se, but is instead given permanent work restrictions. Depending on the facts of each case, the effects of such work restrictions can cause applicant to lose the ability to compete for jobs on the open labor market, which results in total loss of earning capacity. Whether work restrictions preclude applicant from further employment requires vocational expert testimony.

* * *

... [P]er *Ogilvie* and as described further in *Dahl*, the non-amenability to vocational rehabilitation must be due to industrial factors. (*Contra Costa County v. Workers' Comp. Appeals Bd.*, (*Dahl*) 240 Cal. App. 4th 746, 193 Cal. Rptr. 3d 7.)

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

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

- 1) Applicant has been assigned a work restriction(s), which requires substantial medical evidence.
- 2) The work restriction(s) precludes applicant from rehabilitation into another career field, which requires vocational expert evidence.
- 3) The work restriction(s) precludes applicant from competing on the open labor market, which requires vocational expert evidence.
- 4) The cause of the work restriction(s) is 100% industrial, which requires substantial medical evidence.

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

In the en banc decision in *Nunes v. State of California, Dept. of Motor Vehicles* (June 22, 2023) 88 Cal.Comp.Cases 741 ("*Nunes I*"), the Appeals Board held that Labor Code section 4663

requires a reporting physician to make medical determinations in a case, including determinations on the issue of apportionment. The Appeals Board further held that vocational evidence may be used to address issues relevant to the determination of permanent disability, and that vocational evidence must address apportionment, but that a vocational evaluator may not opine on issues that require expert medical evidence. The Appeals Board affirmed these holdings in *Nunes v. State of California, Dept. of Motor Vehicles* (August 29, 2023) 88 Cal.Comp.Cases 894 (“*Nunes II*”).

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

One element of the PDRS is the Combined Values Chart (CVC). The purpose of the CVC is described within the PDRS, which cites to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (2001) (AMA Guides), which is adopted and incorporated for purposes of rating permanent disability under the 2005 PDRS. (Lab. Code, §§ 4660, 4660.1; Hoch, Andrea, Schedule for Rating Permanent Disabilities, (2005), p. 1-11; AMA Guides, pp. 9-10.) In sum, impairment under the AMA Guides is designed to reflect how a disability affects a person’s activities of daily living (“ADLs”) (self-care, communication, physical activity, sensory function, non-specialized hand activities, travel, sex, and sleep). (AMA Guides, pp. 2-9.) CVC “values are derived from the formula $A + B(1-A)$ = combined value of A and B, where A and B are the decimal equivalents of the impairment ratings.” (AMA Guides, p. 604.)⁵

Impairments to two or more body parts are usually expected to have an overlapping effect upon the activities of daily living, so that generally, under the AMA Guides and the PDRS, the two impairments are combined to eliminate this overlap.

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

The Combined Values Chart (CVC) in the Permanent Disability Ratings Schedule (PDRS) may be rebutted and impairments may be added where an applicant establishes the impact of each impairment on the activities of daily living (ADLs) and that either:

(a) there is no overlap between the effects on ADLs as between the body parts rated;
or

(b) there is overlap, but the overlap increases or amplifies the impact on the overlapping ADLs.

(*Id.* at *13.)

To constitute substantial evidence “...a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and

on an adequate examination and history, and it must set forth reasoning in support of its conclusions.” (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) “When the foundation of an expert’s testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions.” (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

In this case, QME Dr. Stanwyck has failed to assign applicant with any psychiatric work restrictions. In the alternative, Dr. Stanwyck discussed diminished and/or reduced ability to function. Work restrictions are not the same as diminished and/or reduced ability to function.

Furthermore, the medical-legal opinions on CVC rebuttal do not constitute substantial medical evidence. To date, Dr. Ovadia continues to defer to Dr. Stanwyck regarding whether to add or combine the orthopedic and psychiatric impairments, and he seems to continue to defer to Dr. Gabriel as to whether to add or combine the cervical spine and TMJ impairments. Dr. Stanwyck has not offered any opinion on whether to add or combine the orthopedic and psychiatric impairments. Dr. Gabriel has not offered any opinion on whether to add or combine the TMJ and cervical spine impairments.

Next, applicant’s vocational expert’s report does not constitute substantial evidence as the consultant has incorrectly and improperly interjected his own medical opinions into the case regarding applicant’s pre-existing and non-industrial injuries. A vocational expert does not create medical facts in a case. Vocational experts review the medical record created by the doctors and reach conclusions as to applicant’s vocational feasibility based upon that record. Furthermore, with full knowledge that Dr. Stanwyck failed to assign applicant work restrictions, applicant’s vocational expert has chosen to ignore this failing and the medical apportionment assigned by Dr. Ovadia. Finally, neither vocational expert has reviewed any final reporting on applicant’s cervicogenic headaches and memory loss injuries because it does not yet exist.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to “ensure substantial justice in all cases.” (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the

case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

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

Finally, we note that our February 28, 2023 Order to Obtain Transcript was not complied with and thus, upon return the January 13, 2022 and February 24, 2022 transcripts should be prepared absent a resolution of the case by the parties.

Accordingly, as our Decision After Reconsideration, we affirm the WCJ's June 14, 2022 F&A except that we amend it to defer the issues of whether applicant sustained injury in the form of headaches and memory loss (Finding of Fact 1; Award a) and of permanent disability (Findings of Fact 7, 8, 11; Award c, d, g) and return the matter to the trial level for further proceedings consistent with this decision. We make no other substantive changes to the F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the F&A issued on June 14, 2022 by the WCJ is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Raytchell Cosentino, while employed during the period of January 1, 2005 through October 31, 2009 as an office manager, occupational group number 214, at Santa Barbara, California by Ehlen, Spiess & Haight, Inc., sustained injury arising out of and in the course of employment to her left shoulder, neck, psyche and TMJ, right shoulder, and teeth. The issue of whether applicant sustained injury in the form of memory loss and headaches is deferred.

7. The issue of permanent disability is deferred.
8. The issue of apportionment is deferred.

11. The issue of attorney's fees is deferred.

AWARD

AWARD IS MADE in favor of RAYTCHELL COSENTINO, against STATE FARM INSURANCE COMPANY as follows:

- a. Applicant sustained industrial injury to her left shoulder, neck, psyche and TMJ, right shoulder, and teeth per Findings of Fact number 1. The issue of whether applicant sustained injury in the form of memory loss and headaches is deferred.

- c) The issue of permanent disability is deferred.
- d) The issue of apportionment is deferred.

- g) The issue of attorney's fees is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 24, 2026

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

**RAYTCHHELL COSENTINO
LAW OFFICE OF CAROLYN LAYFIELD
LAW OFFICE OF DANIEL K. SIMON
GILSON DAUB**

SL/abs

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