

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

RUBY FREEMAN, *Applicant*

vs.

**THE HERTZ CORPORATION; ACE AMERICAN INSURANCE COMPANY,
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ10715566
Oakland District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to allow us time to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.¹

Applicant seeks reconsideration of the Findings & Award (F&A) issued on September 13, 2022, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant sustained industrial injury while employed by defendant on March 19, 2014 to her low back, resulting in 51% permanent disability.

Applicant contends that the WCJ erred in rejecting the opinion of Vocational Expert (VE) Frank Diaz, CDMS, who concluded that applicant sustained 100% permanent disability due to lack of amenability to vocational rehabilitation. In addition, applicant contends that the apportionment finding was legally erroneous because defendant failed to carry its burden of proof, as the opinion of Panel Qualified Medical Evaluator (PQME) Wayne E. Anderson, D.O., was not substantial medical evidence.

We have received an Answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending we deny reconsideration.

¹ Commissioner Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been appointed in her place.

We have considered the allegations in the Petition and defendant's Answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and the reasons discussed below, as our Decision After Reconsideration, we amend the F&A to reflect that applicant sustained 100% permanent disability and defer the issue of attorney fees. We otherwise affirm the F&A.

BACKGROUND

Applicant, while employed by defendant as transporter on March 19, 2014, sustained industrial injury to her low back.

The parties jointly submitted into evidence the Functional Capacity Evaluation (FCE) report of Rachel Feinberg, PT, DPT, dated November 30, 2020. (Joint Ex. 100.) Applicant submitted into evidence the PQME reports of Dr. Anderson (App. Exs. 1-5) and the VE reports of Mr. Diaz. (App. Exs. 6-11.) Defendant submitted into evidence the VE reports of Lisa Suhono, M.S. (Def. Exs. B-C.)

In his report dated January 10, 2018, PQME Dr. Anderson, after evaluating applicant, took a history that applicant fully recovered from prior motor vehicle accidents and had no residual symptoms when she sustained an industrial injury on March 19, 2014. On that date, while driving a company vehicle and exiting a freeway in Richmond, she was rear-ended. The impact caused her vehicle to spin and block a lane. (App. Ex. 1, pp. 15.)

PQME Dr. Anderson reviewed and summarized applicant's medical records. The records reflected that, following the March 19, 2014 rear-end motor vehicle accident, applicant immediately reported neck, thoracic spine, lumbar spine, right shoulder, and right leg pain and received diagnoses of multiple cervical, thoracic spine, and lumbar spine strains. Despite conservative treatment, including medications, physical therapy, chiropractic care, acupuncture, and multiple lumbar epidural steroid injections, she continued to experience significant low back pain with right-sided radiculopathy, weakness, and limited tolerance for standing and walking. (*Id.* at p. 22.) Imaging studies revealed L4-L5 spondylolisthesis, disc bulges, spinal stenosis, and nerve root compression, particularly affecting the right L4 and L5 nerve roots. (*Id.* at pp. 24-25.) Her symptoms progressively worsened and, on April 9, 2015, Michael David Tseng, M.D., performed a bilateral L4-L5 posterior spinal fusion, right L5-S1 laminectomy, and right L4-L5 transforaminal lumbar interbody fusion. (*Id.* at pp. 32-33.) Postoperatively, although

she initially showed improvement, she continued to report intermittent low back pain, right leg pain, weakness, and episodes of her right leg “giving out.” (*Id.* at pp. 39-42.) Follow-up CT and MRI imaging confirmed solid fusion at L4-L5 but demonstrated ongoing degenerative changes, foraminal stenosis at L5-S1 with contact of the right L5 nerve root, and multilevel disc bulging. (*Id.* at pp. 39-40.)

With respect to permanent disability, PQME Dr. Anderson opined that applicant has 28% whole person impairment (WPI) based on DRE Lumbar Category V under Table 15-3 on page 384 of the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides). She underwent a lumbar fusion, resulting in loss of motion segment integrity that places her in DRE Lumbar Category IV, and developed recurrent radiculopathy with motor weakness supported by MRI findings, placing her in DRE Lumbar Category III. Because both Categories III and IV are present, the AMA Guides directly place her in DRE Lumbar Category V, which allows up to 28% WPI based on limitations in activities of daily living (ADLs). (*Id.* at p. 48.)

Alternatively, PQME Dr. Anderson outlines a transition from the DRE method to the Range of Motion (ROM) method for evaluating the lumbar spine involving multiple-level pathology and bilateral radiculopathy. To reach the final 30% WPI, he followed a multi-step computational process pursuant to the AMA Guides. Under step one, in the “physical examination,” he documented specific inclinometer readings: 60° flexion (or 2% WPI) and 25° extension (or 3% WPI), which he applied to Table 15-8 on page 407, 20° left/right lateral bending (or 2% WPI), and Table 15-9 on page 409. (*Id.* at p. 20.) Summing the results from these motion tables produced a 7% WPI for mobility. Next, he assessed neurologic deficits using Table 15-18 on page 424. Citing “4/5” and “4-/5” strength in plantar flexion and dorsiflexion, he assigned a Grade 4 motor deficit. Despite Table 15-2 on page 376 mapping plantar flexion to the S1 nerve root, he elected to rate all the findings under the L5 nerve root. By multiplying the observed deficits against the maximum L5 motor value (37%), rather than the S1 nerve root (20%), and maximum sensory value (5%) under Table 15-18 on page 424, he calculated 11% WPI for motor loss and 3% WPI for sensory loss. He then added these three exam-based components (7% + 11% + 3%) to reach a subtotal of 21% WPI. Under step two, utilizing Table 15-7 on page 404 under Section IV (D), he assigned 12% WPI based on a single-level spinal fusion with residual symptoms. To conclude the rating, he utilized the combined values chart (CVC) to merge the 21% WPI with the 12% WPI to arrive at 30% WPI. (*Id.* at pp. 48-50.)

PQME Dr. Anderson finally determined impairment based on gait derangement as an analogous approach under *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) (*Almaraz/Guzman II*) assigning 40% WPI under Table 17-5 on page 529 of the AMA Guides, reflecting moderate severity requiring routine use of two canes or two crutches. He explained that the strict ROM rating of 30% WPI does not fully capture the true functional impact of the lumbar spine condition because that methodology relies in part on subjective assessments of sensory loss and motor strength and may undervalue the degree to which the lumbar pathology affects the lower extremities. Although the strict method accounts for some radicular symptoms, it does not adequately reflect applicant's significant functional limitation, particularly the persistent abnormal gait and the regular need for a walker, functionally equivalent to two canes. Because these objective gait abnormalities demonstrate substantial impairment in ambulation caused by the lumbar spine condition and its bilateral radiculopathy, PQME Dr. Anderson concluded that the gait derangement methodology, resulting in a 40% WPI, more accurately reflects the overall severity of applicant's disability than the strict ROM rating. (*Id.* at pp. 51-52.)

With respect to apportionment, PQME Dr. Anderson explained that recent imaging showed mild degenerative changes, which slightly affect future disability and medical needs, but their impact is limited. Accordingly, he assigned 90% of the lumbar spine impairment to the industrial injury and 10% to preexisting degenerative changes. (*Id.* at p. 45.)

In his supplemental report dated September 4, 2018, PQME Dr. Anderson opined that applicant's objectively documented abnormalities significantly limit standing, walking, and sitting and preclude activities such as climbing, forward bending, kneeling, and crawling. Although she retains the ability to perform upper extremity tasks, such as keyboarding, gripping, and pushing or pulling with the hands and arms, these would likely need to occur in a seated position. PQME Dr. Anderson further noted that applicant experiences significant pain that interferes with function and would require unscheduled breaks and likely result in increased absenteeism. As a result, PQME Dr. Anderson concluded that applicant would likely be unable to compete in the open labor market and would be limited to highly sedentary work that allows her to sit most of the time, take breaks as needed, and maintain a flexible schedule that permits her to come and go as her symptoms dictate. (App. Ex. 2, p. 3.)

In his supplemental report dated September 6, 2019, with respect to apportionment, PQME Dr. Anderson determined that, after reviewing additional medical records, he determined that applicant experienced lumbar radiculopathy as early as 2009, likely following a prior motor vehicle accident, which indicates the presence of underlying structural and degenerative changes in the lumbar spine before the industrial injury. Although the records from 2010 through 2014 do not document ongoing symptoms and applicant maintained functional employment during that period, the documented radiculopathy in 2009 demonstrates that degenerative processes and structural vulnerability already existed and likely contributed to the MRI findings observed in 2014. In light of this evidence, PQME Dr. Anderson concluded that the preexisting degenerative condition played a greater role in her residual disability than previously recognized. Therefore, while the industrial injury remains the primary cause of applicant's impairment and need for surgery, PQME Dr. Anderson increased the apportionment to nonindustrial degenerative factors from 10% to 20%, with the remaining 80% attributed to the March 19, 2014 industrial injury. (App. Ex. 4, pp. 32-34.)

In her report dated November 30, 2020, Dr. Feinberg, after evaluating applicant, determined that her functional capacity is limited to a semi-sedentary work level, characterized by a slow, non-competitive pace and a reliance on a single-point cane for balance (Joint Ex. 100, pp. 2-3, 10). Clinical findings reveal a chronic pain syndrome with an antalgic gait and high fall risk, though variable effort and fear-avoidance behaviors complicated the evaluation. (*Id.* at pp. 2, 7, 9.) Her specific physical restrictions include a maximum occasional lift of 10 pounds from waist to shoulder and 5 pounds from floor to waist. (*Id.* at p. 3.) Postural limitations prohibit kneeling or traversing uneven ground, while stooping, twisting, and climbing stairs are restricted to an infrequent or occasional basis. (*Id.* at pp. 3-4.) Regarding tolerances for sustained positions, she is limited to sitting for 30 minutes (maximum 5 hours daily), standing for 20 minutes, and walking for 15 minutes at a time, always requiring periodic sitting breaks to manage radiating low back and leg pain. (*Id.* at pp. 10-11.)

In his supplemental report dated August 4, 2021, PQME Dr. Anderson concluded that applicant retains limited physical capacity for sedentary or semi-sedentary activities but cannot compete in the open labor market. The FCE by Dr. Feinberg shows applicant can perform some restricted tasks, including limited sitting, standing, and lifting, but she moves at a slow, noncompetitive pace and has reduced endurance. (App. Ex. 5, pp. 4-5.) PQME Dr. Anderson

explained that chronic pain syndrome and its psychological effects further impair concentration, persistence, and reliability. (*Id.* at pp. 5-6.) These factors would likely cause decreased productivity, unscheduled breaks, and absenteeism. As a result, although applicant can perform some isolated physical activities, her overall functional limitations would prevent her from competing with other job applicants. (*Id.* at p. 6.) Her capacity for work remains limited to highly restricted sedentary activity with significant functional limitations. (*Id.* at p. 7.)

Given that applicant's expert VE Mr. Brodzinsky retired, she subsequently retained VE Mr. Diaz to provide further vocational reporting. In his report dated January 5, 2022, VE Mr. Diaz, after evaluating applicant, opined that her physical limitations prevent her from competing in the open labor market. She graduated from high school in 1970, earned "A" grades, reported no learning disabilities and can speak, read, and write English, demonstrating basic educational competency. (App. Ex. 6, p. 6.) Testing shows that she can sit for only about 30 minutes at a time, stand about 20 minutes in a 30-minute period, with a daily maximum of roughly 90 minutes, and walk about 15 minutes in a 30-minute period, also up to about 90 minutes per day. She cannot bend, squat, kneel, crawl, or walk on uneven ground, and she can lift, carry, push, or pull no more than about 10 pounds. She also exhibited chronic low back pain radiating into the right leg, impaired balance, use of a cane, and reduced endurance, all of which slowed her pace during testing and prevented her from maintaining a competitive work speed. (*Id.* at p. 7.)

VE Mr. Diaz concluded that applicant has lost all access to the labor market, effectively rendering her unemployable. He contends that, even if she retains minor physical capabilities, she cannot satisfy fundamental employer requirements such as meeting production demands, hitting deadlines, or maintaining consistent customer service. He specifically highlights that her chronic pain syndrome and "unpredictable flares" would cause excessive absenteeism and frequent productivity breaks. PQME Dr. Anderson notes that her slow movements and the psychological impact of her pain make her non-competitive against other applicants while Dr. Feinberg describes applicant's "noncompetitive work pace" and heavy reliance on a cane. Ultimately, VE Mr. Diaz asserts that no realistic occupations exist for applicant in the open labor market. (*Id.* at pp. 49-50.)

With respect to apportionment, VE Mr. Diaz attributes 100% of applicant's labor market loss to her industrial injury on March 19, 2014. He explicitly rejects any vocational apportionment to preexisting or subsequent factors, whether industrial or nonindustrial. He contends that applicant likely would have continued working in her usual and customary occupation if this specific injury

had never occurred. Consequently, he concludes that the March 19, 2014 industrial injury served as the sole cause for her total loss of access to the labor market. (*Id.* at p. 50.)

In her report dated August 15, 1999, VE Ms. Suhonmo, after evaluating applicant, concluded that she has effectively completed her work life and is retired, noting that she is not seeking a return to competitive employment. (Def. Ex. B, pp. 21, 36, 41.) VE Ms. Suhonmo supports this conclusion by determining that applicant's case does not meet the strict legal criteria for rebutting a scheduled disability rating because her inability to benefit from vocational rehabilitation is due, at least in part, to preexisting nonindustrial factors rather than being solely attributable to her March 19, 2014 industrial injury. (*Id.* at pp. 35-36.) Furthermore, VE Ms. Suhonmo highlights that applicant's residual work life expectancy is very limited at a mean of 1.01 years and that she is already receiving Social Security disability benefits and a small private retirement pension, which reinforces her status as retired. (*Id.* at pp. 18, 20-21, 36.)

In her supplemental report dated April 25, 2022, VE Ms. Suhonmo concluded that applicant, having retired from the open labor market, failed to meet the legal criteria to rebut her permanent disability rating because her industrial injury was not the sole cause of her vocational incapacity. (Def. Ex. C, pp. 2, 18.) VE Ms. Suhonmo supports this conclusion by noting that medical evidence, including a FCE by Dr. Feinberg, indicates applicant retains the physical ability to perform sedentary to light-demand work, yet she has expressed no intent to return to the workforce and is already receiving Social Security Disability and pension benefits. (*Id.* at pp. 7-8, 10.) Furthermore, VE Ms. Suhonmo emphasizes that nonindustrial factors such as preexisting degenerative disk disease and nonindustrial bilateral knee surgeries, which accounts for a substantial portion of her overall disability, influenced significantly applicant's inability to participate in vocational rehabilitation. (*Id.* at pp. 8-9.) Finally, during physical testing, applicant demonstrated "variable effort," suggesting her functional abilities may be greater than she reported, which further reinforces VE Ms. Suhonmo's opinion that applicant's lack of employment is due to retirement rather than a total loss of earning capacity caused exclusively by the industrial injury. (*Id.* at pp. 10-11.) VE Ms. Shuonmo concluded that applicant's unpredictable flares of pain would result in frequent absenteeism and productivity breaks, creating a significant barrier to gainful employment but dismissed them as subjective and difficult to measure objectively. (*Id.* at pp. 8-9.)

The parties proceeded to trial on July 26, 2022 where applicant testified, in pertinent part, that she worked as a transporter for defendant for 14 years. She sustained an industrial injury on March 19, 2014, when, while driving, another vehicle sideswiped her vehicle. She has not worked since her industrial injury. (Minutes of Hearing / Summary of Evidence (MOH/SOE, 07/26/2022, 6:24-27.) Prior to this injury, she had no work restrictions or symptoms, and she had successfully returned to work following bilateral knee replacement surgeries in 2003 and 2009. (MOH/SOE, 07/26/2022, 6:42-47.) Following her industrial injury, she underwent spinal surgery, which involved the placement of screws. (MOH/SOE, 07/26/2022, 6:29-32.) She experiences chronic back and leg pain, right-sided weakness, and sleep disturbances, for which she currently treats with Timothy Lowe, M.D. (MOH/SOE, 07/26/2022, 7:11-16.) Due to prior kidney damage from naproxen, she relies only on Tylenol to manage her symptoms. (MOH/SOE, 07/26/2022, 7:33-35.) She uses a cane prescribed in 2014 whenever she leaves her house, can only sit for up to 30 minutes at a time, and requires in-home assistance from her daughter for cooking, cleaning, and transportation, care she did not require before the accident. (MOH/SOE, 07/26/2022, 7:21-24, 7:45-57 to 8:1, 8:35-37.) She loved her job, had no interest in retiring, and her employer was unable to accommodate her with an alternative position. (MOH/SOE, 07/26/2022, 7:8-9, 8:20-21.)

Kurt Norton, a private investigator with 25 years of experience, testified on behalf of defendant to authenticate a sub-rosa surveillance video. He conducted sub-rosa on April 10 and April 13, 2019, but only obtained footage on April 13, 2019. Mr. Norton confirmed the footage was an accurate and unaltered presentation of events. (MOH/SOE, 07/26/2022, 9:7-14.) The surveillance captured applicant walking in a parking lot outside a state prison using a cane in her right hand at 10:00 a.m. (MOH/SOE, 07/26/2022, 10:18-24.) At 14:35 military time, she walked to her vehicle and opened the trunk. She was not using her cane but was using the car for balance. She then got into the driver's seat, utilizing a cell phone, and drove away. (MOH/SOE, 07/26/2022, 10:26-42.) On cross-examination, Mr. Norton stated he had already purged his handwritten notes regarding the investigation, as it had been over three years. (MOH/SOE, 07/26/2022, 9:25-30.)

Applicant was recalled for cross-examination and further testified as follows. When presented with medical records from 2009 detailing a prior motor vehicle T-bone collision, back pain, and prescriptions for Vicodin, she could not recall the accident or the treatments, though she noted that, if it is in the Kaiser Permanente records, it happened. (MOH/SOE, 07/26/2022, 11:8-21.) She also could not recall a 42-day hospitalization in 2017 for leg swelling but similarly

acknowledged the accuracy of the medical records. (MOH/SOE, 07/26/2022, 12:28-31.) Regarding the April 13, 2019 sub-rosa video, she recalled driving herself to San Quentin in April 2019, noting she stopped to rest at a service station. She testified she can drive short distances. She further testified she does not recall meeting with VE Ms. Suhono, nor does she recall telling her she was retired. (MOH/SOE, 07/26/2022, 13:8-17.) On redirect examination, applicant reiterated that she had returned to full duty after her total knee replacement and currently has no knee restrictions. She confirmed she did not seek any medical treatment from 2010 to 2014. (MOH/SOE, 07/26/2022, 13:23-28.)

On September 13, 2022, the WCJ issued her F&A, awarding applicant 51% permanent disability. The decision was based on PQME Dr. Anderson's findings of 40% WPI with 20% apportionment and rejecting the opinion of VE Mr. Diaz. The WCJ rated the permanent disability as follows:

LUMBAR SPINE – GAIT DERANGEMENT
80% (17.01.07.00 - 40 - 56 - 250F - 56 - 64%) 51%

It is from this F&A that applicant seeks reconsideration.

DISCUSSION

I. PERMANENT DISABILITY

Permanent disability refers to the lasting, irreversible effects of an injury. It includes conditions that impair earning capacity, limit the normal use of a body part, or create a competitive disadvantage in the labor market. Permanent disability payments compensate workers for both physical loss and the reduction, partial or total, of their future earning potential. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565].)

In addition, while the AMA Guides function as advisory frameworks, they are not strict texts subject to rote or literal application. Instead, an evaluating physician may use their experience and expertise to interpret and apply any portion of the entire AMA Guides. Pursuant to *Almaraz/Guzman II*, the Appeals Board held that:

[W]hile the AMA Guides often sets forth an analytical framework and methods for a physician in assessing WPI, the Guides do not relegate a physician to the role of taking a few objective measurements and then mechanically and uncritically assigning a WPI that is based on a rigid and standardized protocol and that is devoid of any clinical judgment. Instead, the AMA Guides expressly contemplates that a

physician will use his or her judgment, experience, training, and skill in assessing WPI.

(*Almaraz/Guzman II*, *supra*, 74 Cal.Comp.Cases. at pp. 1103-1104; affirmed by *Milpitas Unified School District v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] (*Guzman III*).)

The overarching goal of rating permanent impairment is to achieve accuracy (*Guzman III*, *supra*, 187 Cal.App.4th at p. 822) and the standard for calculating WPI is to determine the most accurate reflection of impairment as measured by any chart, table, or methodology contained within the entire AMA Guides. Thus, the proper application of *Almaraz/Guzman II* requires a physician to provide a strict AMA Guides rating, explain why that strict rating does not accurately reflect the injured employee's functional limitations, and, with reasoned explanation, support an alternative rating derived from within the AMA Guides that more accurately reflects the employee's level of disability. (*Id.* at p. 828-829; *Leiva v. Webcor Construction* [2025 Cal. Wrk. Comp. P.D. LEXIS 390, *29-30]; *Linstad v. City of Richmond* [2025 Cal. Wrk. Comp. P.D. LEXIS 5, *9]; *Martin v. Cox Castle & Nicholson, LLP* [2024 Cal. Wrk. Comp. P.D. LEXIS 212, *17]; *Kelley v. Lawrence Berkeley National Laboratory* [2024 Cal. Wrk. Comp. P.D. LEXIS 115, *11].)²

In *Fitzpatrick*, the court also acknowledged that it is permissible to depart from the scheduled rating based on a VE opinion that an injured employee has a greater loss of future earning capacity than reflected in a scheduled rating. (*Fitzpatrick v. Workers' Comp. Appeals Bd.* (2018) 27 Cal.App.5th 607, 613-614 and 618-620 [83 Cal.Comp.Cases 1680]; see *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1274 [76 Cal.Comp.Cases 624]; *Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746, 758 [80 Cal.Comp.Cases 1119]; *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 245-246 [48 Cal.Comp.Cases 587, 594] (*LeBoeuf*).)

In *LeBoeuf*, the Supreme Court applied a standard of labor market reality stating that, "A permanent disability rating should reflect as accurately as possible an injured employee's

² 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 considered a similar issue.

diminished ability to compete in the open labor market. The fact that a worker has been precluded from vocational retraining is a significant factor to be taken into account in evaluating his or her potential employability.” (*Ibid.*) The court concluded, “This is to ensure that the permanent disability rating upon which an award is based accurately reflects both the permanent medical and vocational disabilities.” (*Id.* at p. 243.)

To rebut the PDRS and establish permanent total disability, applicant must prove the following:

- 1) Applicant has received 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.

(*Valdovinos v. Universal Site Services, Inc.* [2025 Cal. Wrk. Comp. P.D. LEXIS 76, *14] (*Valdovinos*.)

Finally, the law requires the Appeals Board to base its decisions on substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen’s 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]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence, a medical or vocational opinion must state its conclusions in terms of reasonable probability, avoid speculation, rely on pertinent facts and an adequate examination and history, and explain the reasoning supporting its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Medical or vocational reports and opinions do not constitute substantial evidence when they contain known errors or rely on facts that are no longer germane, inadequate medical histories or examinations, or incorrect legal theories. Likewise, a medical or vocational opinion cannot support the Board’s findings if it rests on surmise, speculation, conjecture, or guesswork. (*Hegglin v. Workmen’s Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) Accordingly, the Board may reweigh the evidence and reach a decision different from the WCJ’s

determination when other evidence of substantial probative value supports a contrary conclusion. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.2d 312, 318-319 [35 Cal.Comp.Cases 500].)

Here, upon independent review of the record, we conclude that PQME Dr. Anderson adequately addressed *Almaraz/Guzman II* with respect to the low back by providing strict WPI ratings pursuant to the DRE and ROM but ultimately finding gait derangement to be a more accurate assessment of applicant's condition and functional limitations, thereby increasing the WPI from 30% to 40%.

We also conclude that VE Mr. Diaz's opinion on permanent disability is substantial vocational evidence pursuant to *Fitzpatrick*, *LeBoeuf* and *Valdovinos* because it provides a detailed, individualized assessment of applicant's amenability to rehabilitation and her ability to compete in the open labor market, grounded in the medical findings of PQME Dr. Anderson and Dr. Feinberg. VE Mr. Diaz's analysis was not speculative. Rather, he meticulously integrated the physical limitations identified by PQME Dr. Anderson and Dr. Feinberg, such as applicant's inability to sit for more than 30 minutes, her non-competitive work pace, and her regular use of a cane, to conclude that she cannot meet the fundamental productivity and attendance requirements of any realistic occupation. (App. Ex. 6, pp. 7, 49). By addressing applicant's specific educational background, age, and objective physical restrictions, VE Mr. Diaz's reporting met the legal framework needed to explain how the medical disability translated into a vocationally driven total loss of earning capacity.

In contrast, VE Ms. Suhonmo's vocational reports fail to constitute substantial evidence as her opinion relies on speculation. Her conclusion that applicant has "effectively retired" lacks a grounded factual basis, as the report fails to provide a "how and why" analysis to demonstrate that her withdrawal from the workforce was voluntary rather than a direct consequence of her industrial physical limitations. VE Ms. Suhonmo's opinion on employability also fails the *LeBoeuf* standard of labor market reality by suggesting that applicant could maintain sedentary work despite medical restrictions requiring unscheduled "absenteeism" and "breaks in work productivity," accommodations which are virtually non-existent in the competitive unskilled labor market. Because VE Ms. Suhonmo improperly substitutes her own medical and credibility judgments regarding "variable effort" for the objective findings of PQME Dr. Anderson and Dr. Feinberg, the vocational opinions are logically inconsistent and legally insufficient.

II. APPORTIONMENT

Apportionment is the process utilized to segregate permanent disability or the residuals caused by an industrial injury from those attributable to other industrial injuries or to nonindustrial factors, to allocate legal responsibility fairly. (*Brodie, supra*, 40 Cal.4th at p. 1321; *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 911 [70 Cal.Comp.Cases 787].)

The mere fact that a medical report assigns approximate percentages of industrial and nonindustrial causation does not make the report reliable medical evidence by itself. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 927-928 [71 Cal.Comp.Cases 1687].) Instead, apportionment of permanent disability is “based on causation” and the “employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.” (Lab. Code, §§ 4663(a) and 4664(a).) “The plain reading of ‘causation’ in this context is causation of the permanent disability.” (*Escobedo, supra*, 70 Cal.Comp.Cases at p. 611.) Apportionment now includes pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions, provided there is substantial evidence establishing that these other factors have caused permanent disability. Pursuant to *Escobedo*, a physician’s opinion must rely on reasonable medical probability, cannot be speculative, must rely on pertinent facts and/or an adequate examination and history, and must set forth the reasoning in support of its conclusions. (*Id.* at p. 621.) That is, a physician must explain the “how and why” of their apportionment opinion (*Ibid.*) and consider all potential causes of disability, whether from a current, prior or subsequent industrial or nonindustrial injury or condition. (*Benson v. Permanente Med. Group* (2007) 72 Cal.Comp.Cases 1620, 1622 (Appeals Board en banc).)

The burden of proof to establish apportionment falls on defendant. (*Pullman Kellogg v. Workers' Comp. Appeals Bd. (Normand)* (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170]; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].) In other words, an employee does not have the burden of disproving apportionment while defendant remains passive. (*Alcantar v. Martinez* [2025 Cal. Wrk. Comp. P.D. LEXIS 231, *9]; *Moraido v. County of San Diego* [2024 Cal. Wrk. Comp. P.D. LEXIS 375, *13, fn. 3]; *Arias v. William Roofing Co.* [2024 Cal. Wrk. Comp. P.D. LEXIS 29, *5]; *Matias v. Naturipe Berry Growers* [2024 Cal. Wrk. Comp. P.D. LEXIS 52, *4]; *Herrera v. Maple Leaf Foods* [2018 Cal. Wrk. Comp. P.D. LEXIS 430, *15].)

In reviewing the medical reports of PQME Dr. Anderson, it is clear that, while he provides an extensive clinical history and a complex rating of permanent disability, his apportionment opinions fail to meet the legal standard for substantial medical evidence. Following the March 19, 2014 industrial rear-end motor vehicle accident, applicant immediately reported neck, thoracic spine, lumbar spine, right shoulder, and right leg pain, eventually leading to a bilateral L4-L5 posterior spinal fusion and right L4-L5 transforaminal lumbar interbody fusion. (App. Ex. 1, pp. 15, 22, 32-33.) PQME Dr. Anderson ultimately determined that applicant suffered 40% WPI based on an analogous gait derangement rating under *Almaraz/Guzman II*. However, PQME Dr. Anderson's apportionment of this impairment is not legally sufficient because he failed to frame his opinion in terms of reasonable medical probability and failed to provide specific "how and why" reasoning behind his conclusion rather than speculate. In his January 10, 2018 report, PQME Dr. Anderson assigned 10% to preexisting degenerative changes simply by noting that they "play a role in . . . resulting future medical needs," an assertion that lacks any explanation of how "mild" changes contribute to the current level of impairment. (App. Ex. 1, at p. 45.) He then increased this to 20% in his September 6, 2019 supplemental report based on a 2009 record of radiculopathy, despite acknowledging that the records from 2010 through 2014 do not document ongoing symptoms and it remains unknown if she had fully recovered. (App. Ex. 4, pp. 32-34.) Attributing a percentage of disability to degenerative causes without elaboration, specifically without describing how and why the degenerative process or the industrial injury resulted in a specific portion of the current permanent disability, renders his opinion a bare conclusion. Because he failed to provide a detailed factual basis or a clear line of reasoning connecting these past findings to the current 40% WPI, his apportionment findings are speculative and do not constitute substantial medical evidence.

Accordingly, as our Decision After Reconsideration, we amend the F&A to award 100% permanent disability and defer attorney fees. We otherwise affirm the F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings & Award dated September 13, 2022 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. Applicant's injury caused permanent disability of 100%, entitling applicant to \$188.94 per week (subject to reduction for an attorney's fee) during the period April 4, 2016 to present and continuing, less monies previously paid during that period, less stipulated third-party credit and less reasonable attorney fees.

6. Attorney fees are deferred.

* * *

AWARD

AWARD IS MADE in favor of **RUBY FREEMAN** against ACE American Insurance Company, administered by Sedgwick Claims Management Services, Inc. as follows:

- a. Permanent disability in accordance with Finding of Fact 5, with attorney fees deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 19, 2026

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

**RUBY FREEMAN
BOXER & GERSON, LLP
MANNING & KASS, ELLROD, RAMIREZ, TRESTER LLP**

DLP/cs

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