WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EDDIE AVAKIAN, *Applicant*

vs.

CITY OF BALDWIN PARK, permissibly self-insured, administered by ADMINSURE, *Defendants*

Adjudication Number: ADJ7037201
Marina Del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant seeks reconsideration of the February 16, 2022 Amended Findings of Fact & Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant sustained his burden of proving new and further disability, and that applicant was permanently and totally disabled as a result of his industrial injuries.

Defendant contends that the evidence does not support the award of permanent and total disability, and in the alternative, that the WCJ erred in awarding permanent and total disability indemnity retroactive to the day following the last payment of temporary disability.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be granted only to amend the start date of increased indemnity, but otherwise denied on the merits.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we

[1] Commissioner Brass and Chairwoman Caplane, who were members of this panel when it granted reconsideration on April 22, 2013, and Commissioner Sweeney, who was a member of this panel when it granted reconsideration on May 12, 2022, no longer serve on the Workers' Compensation Appeals Board. Other panelists have been assigned in their place.

will rescind the F&A and return this matter to the trial level for further proceedings and development of the record.

FACTS

Pursuant to Findings and Award issued on May 22, 2013, applicant sustained injury to his psyche, cardiovascular system (in the form of hypertension), cervical-thoracic spine, lumbar spine, and in the form of sleep disorder and sexual dysfunction while employed as a police officer by defendant City of Baldwin Park from May 13, 2002 to November 20, 2009. Applicant's injuries resulted in temporary total disability from November 20, 2009 to May 13, 2011, and thereafter in permanent partial disability of 83 percent. (Findings and Award and Order Following Remand After Reconsideration, dated May 22, 2013.)

On November 4, 2014, applicant filed a Petition to Reopen for New and Further Disability, alleging applicant's condition had worsened. (Petition to Reopen for New and Further Disability, filed November 4, 2014.)

Thereafter, the parties obtained reporting from Agreed Medical Evaluators (AMEs) Lawrence Richman, M.D., in neurology, Laura Hatch, M.D., in orthopedic medicine, David Sones, M.D., in psychiatry, and Paul Grodan, M.D., in internal medicine. Applicant also solicited supplemental reporting from vocational expert Laura Wilson.

On October 13, 2021, the parties proceeded to trial and stipulated that applicant's Petition to Reopen for New and Further Disability was timely filed. The parties placed in issue the permanent and stationary date, permanent disability, apportionment, and attorney fees. The WCJ heard testimony from applicant and ordered the matter submitted on November 3, 2021. (Minutes of Hearing and Summary of Evidence, date January 25, 2022, at p. 1:22.)

On February 16, 2022, the WCJ issued the F&A, finding in relevant part that applicant had sustained 100 percent permanent and total disability (PTD). The WCJ observed that the medical record included the reporting of AMEs, which the parties had presumably chosen for their expertise and neutrality. (Opinion on Decision, at p. 2.) The WCJ found the reporting of the various AMEs to be substantial evidence supporting new and further disability. (*Id.* at pp. 2-4.) The WCJ also observed that, "Dr. Grodan, Dr. Sones and Dr. Hatch found synergism while Dr. Grodan, Dr. Sones and Dr. Richman found that the additive approach is a more accurate rating of applicant's overall disability," and that "Dr. Hatch did not object to the additive method." (*Id.* at

p. 5.) The WCJ therefore concluded that applicant had sustained his burden of proof to rebut the combination of the various disabilities pursuant to the Permanent Disability Rating Schedule (PDRS) in favor of an additive approach. Applying the additive approach, applicant's disability exceeded 100 percent disability. (*Id.* at p. 6.)

The WCJ further concluded that applicant had rebutted the PDRS by establishing that he was not feasible for vocational retraining. Applicant's vocational expert opined that applicant was not feasible for a return to the open labor market, while the State of California Department of Rehabilitation reporting also indicated that applicant would not benefit from vocational rehabilitation services. (*Ibid.*)

Thus, the WCJ concluded that applicant's disability was both permanent and total. Applying the holding in *Brower v. David Jones Construction* (2014) 79 Cal.Comp.Cases 550 [2014 Cal. Wrk. Comp. LEXIS 69] (Appeals Board en banc) (*Brower*), the WCJ determined that the increased indemnity rate resulting from the PTD determination would commence as of the date after applicant's last payment of temporary disability, or May 13, 2011. (*Id.* at p. 8.)

Defendant's Petition contends that applicant's disability is not total. (Petition, at p. 3:2.) Defendant contends that the opinions of the medical-legal physicians purporting to add the disabilities arising out of injuries outside their respective specialties are not substantial medical evidence. (*Id.* at p. 4:10.) Defendant notes that following the filing of the Petition for New and Further disability, both Dr. Sones and Dr. Grodan increased the percentages of disability identified as nonindustrial. (*Id.* at p. 6:7.) Defendant also challenges the reporting of applicant's vocational expert as cumulative and merely a reiteration of her prior opinions in 2012 which were rejected by the WCJ at the time. (*Id.* at p. 10:25.) In the alternative, defendant challenges the WCJ's finding that any increased permanent disability indemnity pursuant to the finding of PTD is retroactive to applicant's original last date of temporary disability. Defendant argues that by its very nature, disability arising out of a petition for new and further disability cannot antedate a prior Award of disability. (*Id.* at p. 14:1.)

Applicant's Answer submits that evaluating medical-legal physicians are authorized by case law to opine as to the methodology for combining impairment that will most accurately reflect applicant's disability. (Answer, at p. 5:7.) Applicant also notes that the petition for new and further disability "reopens" the issue of applicant's permanent disability, and any indemnity flowing

therefrom is retroactive to the original date of cessation of temporary disability indemnity. (*Id.* at p. 9:15.)

The WCJ's Answer notes that applicant's permanent disability, even after consideration of apportionment, far exceeds 100 percent. (Report, at p. 6.) The WCJ also notes that the applicant's vocational expert's opinion of permanent and total disability is supported by the opinions of AMEs Dr. Richman and Dr. Grodan, who both found applicant to be PTD. (*Ibid*.) With regard to the retroactive award of permanent disability, the WCJ noted that the original 2013 Finding and Award established that applicant was gainfully employed after his injury and had earnings of $1,000 per month. (*Id.* at p. 8.) Because the WCJ felt that such earnings were inconsistent with the retroactive award of permanent and total disability, the WCJ recommended we amend the start date for increased PTD indemnity to May 11, 2020, which was the permanent and stationary date identified by AME Dr. Grodan.

DISCUSSION

The WCJ's F&A determined that applicant's disability was both permanent and total, based on either of two analyses: (1) adding applicant's permanent disabilities percentages, or (2) as a result of applicant's inability to be retrained to reenter the labor market. (Findings of Fact Nos. 5 & 6.)

We first address defendant's contentions that the WCJ erred in adding rather than combining applicant's disabilities herein. The Permanent Disability Rating Schedule (PDRS) is prima facie evidence of an injured employee's permanent disability. (Lab. Code, § 4660; cf. *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1274–1277 [76 Cal.Comp.Cases 624] (*Ogilvie*).) The PDRS provides that the ratings for multiple body parts arising out of the same injury are "generally" combined using the Combined Values Chart (CVC), which is appended to the PDRS. (2005 PDRS, at p. 1-10.) Yet, because it is part of the PDRS, the CVC is rebuttable and a reporting physician is not precluded from utilizing a method other than the CVC to determine an employee's whole person impairment so long as the physician's opinion remains within the four comers of the AMA Guides. (Lab. Code, § 4660; *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808, 818–829 [75 Cal.Comp.Cases 837].)

Accordingly, the use of the multiple disabilities table is discretionary depending upon whether it produces a rating that fully compensates an applicant for the effects of his or her injury. (*Mihesuah v. Workers' Comp. Appeals Bd.* (1976) 55 Cal.App.3d 720, 728 [41 Cal.Comp.Cases 81, 87].)

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*)), applicant underwent industrial bilateral hip replacement surgeries. The evaluating orthopedic QME opined that "there is a synergistic effect of the injury to the same body parts bilaterally versus body parts from different regions of the body," and that "the best way to combine the impairments to the right and left hips would be to add them versus using the combined values chart, which would result in a lower whole person impairment." (*Id.* at p. 5.) Accordingly, the WCJ determined that the most accurate rating of applicant's permanent disability would be achieved by adding the impairment for each hip, rather than by combining the respective impairment percentages under the CVC. Following defendant's petition for reconsideration, we affirmed the WCJ's decision that the "QME has appropriately determined that the impairment resulting from applicant's left and right hip injuries is most accurately combined using simple addition than by use of the combined-values formula." (*Id.* at p. 10.)

Here, the WCJ's Opinion on Decision observes that internal medicine AME Dr. Grodan, psychiatric AME Dr. Sones, and neurology AME Dr. Richman have all endorsed the addition of applicant's various disabilities. (Opinion on Decision, at pp. 4-6.) The WCJ also notes that while orthopedic AME Dr. Hatch "did not specifically opine on the application of the additive method[,] she did opine on the synergistic effect of applicant's various conditions on Page 2 of her April 7, 2021 AME report." (*Id.* at p. 5.) Based on a review of the entire record, the WCJ concluded that "Dr. Grodan, Dr. Sones and Dr. Hatch found synergism while Dr. Grodan, Dr. Sones and Dr. Richman found that the additive approach is a more accurate rating of applicant's overall disability." (*Ibid*.) Accordingly, the WCJ concluded that applicant had met his burden of establishing that the addition of his various disabilities more accurately described his levels of permanent disability.

Defendant asserts, however, that the opinions expressed by the AMEs were not substantial evidence to the extent that they purported to add disabilities outside the physicians' respective

specialties. (Petition, at p. 4:11.) Defendant cites *Applied Materials v. Workers' Comp. Appeals Bd. (Chadburn)* (2021) 64 Cal.App.5th 1042 [86 Cal.Comp.Cases 331] (*Applied Materials*) for the proposition that "a medical opinion that is beyond the physician's expertise is not substantial evidence." (*Id.* at p. 1093.) Defendant further cites our panel decision in *Bradley v. State of California* (February 7, 2022, ADJ10800441) [2022 Cal. Wrk. Comp. P.D. LEXIS 26] wherein we affirmed the WCJ's decision to combine applicant's orthopedic and hearing loss disability using the CVC, rather than add them.

Following our May 12, 2022 grant of reconsideration to further study the legal and factual issues presented, including defendant's arguments with respect to the combination of impairments, we issued our en banc decision in *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 [2024 Cal. Wrk. Comp. LEXIS 23] (Appeals Board en banc). Therein, we discussed the two primary ways in which the *Kite* analysis had been applied to permanent disability disputes:

> In the first approach, the CVC has been rebutted where there was evidence showing no actual overlap between the effects on ADLs as between the body parts rated. In the second approach, the CVC has also been rebutted where there is overlap, but the overlap creates a synergistic effect upon the ADLs.
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> **a. No overlap of ADLs.**
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> The first method for rebuttal of the CVC is to show that the multiple impairments, in fact, have no overlap upon the effects of the ADLs. (See e.g., *Devereux v. State Comp. Ins. Fund*, 2018 Cal.Wrk.Comp. P.D. LEXIS 592; *Guandique v. State of California*, 2019 Cal.Wrk.Comp. P.D. LEXIS 53.) We believe that one significant point of confusion on the issue of overlap is that the analysis should focus on overlapping ADLs, not body parts. Although the formula for the CVC is from the AMA Guides, the chart used to calculate the CVC is from the PDRS.
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> In determining whether the application of the CVC table has been rebutted in a case, an applicant must present evidence explaining what impact applicant's impairments have had upon their ADLs. Where the medical evidence demonstrates that the impact upon the ADLs overlaps, without more, an applicant has not rebutted the CVC table. Where the medical evidence demonstrates that there is effectively an absence of overlap, the CVC table is rebutted, and it need not be used.
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> …

b. Overlapping ADLs with a Synergistic Effect

The next method for rebutting the CVC was first discussed in *Kite*, where applicant was awarded permanent disability by adding the impairment to each hip and not by combining the impairments as ordinarily required by the PDRS under the CVC. (*Kite, supra*, 78 Cal.Comp.Cases 213.) In *Kite*, the CVC was rebutted by substantial medical evidence showing the synergistic effect of the two impairments on applicant.

'Synergy' is "(1) the interaction of two or more agents or forces so that their combined effect is greater than the sum of their individual effects; or (2) Cooperative interaction among groups. . . that creates an enhanced combined effect." (American Heritage Dict. (Fifth Edition, 2022).) In some cases, two impairments overlap with one another in their effect on ADLs to the extent that they amplify one another to cause further impairment than what is anticipated in the AMA Guides. Thus, it is permissible to add impairments where a synergistic amplification of ADLs is shown. For example, if applicant had an impairment in the dominant hand, an evaluator might find that the impairment impacts the ADL of non-specialized hand activities, such as being able to button a shirt. If applicant's impairment was to both hands, one might expect the ability to button a shirt to be even more difficult. The purpose of the CVC, avoiding duplication, does not apply in such cases as the impairments are not duplicative, because the two impairments together are worse than having a single impairment.

We cannot emphasize enough that 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), (emphasis added).) The term 'synergy' is not a "magic word" that immediately rebuts the use of the CVC. Instead, a physician must set forth a reasoned analysis explaining how and why synergistic ADL overlap exists. If parties are searching for a magic word to use during a doctor's deposition, that word is "Why?". Rather than focusing on whether a specific term, including the term synergy, was used, it is imperative that parties focus on an analysis that applies critical thinking based on the principles articulated in Escobedo to support a conclusion based on the facts of the case. Such an analysis must include a detailed description of the impact of ADLs and how those ADLs interact.

(*Vigil, supra*, at pp. 691-693.)

We thus held in *Vigil* that where an applicant seeks to rebut the CVC, they must establish the following:

> 1. The ADLs impacted by each impairment to be added, and
> 2. Either:
>
> a. The ADLs do not overlap, or
>
> b. The ADLs overlap in a way that increases or amplifies the impact on the overlapping ADLs.
>
> (*Id.* at pp. 688-689.)

Our en banc decision in *Vigil* issued on June 10, 2024, and is mandatory authority on all WCJs and WCAB panels. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236]; see also Govt. Code, § 11425.60(b).)

Pursuant to our analysis in *Vigil*, the inquiry herein is not reduced to whether a physician is opining to the addition of disabilities outside their medical specialization. Rather, the more salient inquiry is whether the physician's medical opinion is framed in terms of reasonable medical probability, is not speculative, is based on pertinent facts and on an adequate examination and history, and sets forth reasoning in support of its conclusions. (*Vigil, supra*, 89 Cal.Comp.Cases at p. 693.) This approach is consonant with the requirement that any award, order, or decision of the Board be supported by substantial evidence *in the light of the entire record*. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].)

Accordingly, we are not persuaded that the AME opinions regarding the addition of applicant's disabilities are invalid merely because they address disabilities outside of the physicians' respective specializations. The WCJ's analysis of this issue is appropriately framed in terms of the *substantiality of the medical conclusions* reached by the reporting physicians following their review of the entire medical record. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc) ["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."].)

However, we also observe that our en banc decision in *Vigil* issued only *after* our May 12, 2022 grant of reconsideration to study the legal and factual issues presented in this matter. We further observe that while AMEs Grodan, Richman and Sones all address the issue of overlap to some extent, their analysis is with respect to the overlap of *body parts*, rather than ADLs. The existing record does not conform to the required analysis in *Vigil*, which requires the evaluating physicians to determine whether the ADLs impacted by each impairment to be added either do not overlap or overlap in a way that increases or amplifies the impact on the overlapping ADLs. (*Vigil, supra*, 89 Cal.Comp.Cases at pp. 688-689.) Accordingly, the existing discussion of whether the applicant's disabilities should be added or combined is analytically incomplete, and the record must be augmented to address the required analysis in *Vigil*.

We have also considered the issue of whether applicant's disability is both permanent and total notwithstanding the presence of valid nonindustrial apportionment. Applicant's vocational expert Laura Wilson has opined that notwithstanding the nonindustrial apportionment identified by the AMEs applicant is not feasible for vocational rehabilitation based solely on industrial factors. Ms. Wilson reaches this determination based on the assertion that "there is a difference between medical apportionment and vocational apportionment." (Ex. 85, Report of Laura Wilson, MBA, dated December 16, 2020, at p. 20.) Ms. Wilson opines that applicant's preexisting disabilities did not prevent him from working as a police officer for defendant, but did result in a diminished labor market in which applicant could compete. (*Id.* at p. 21.) Because applicant's current industrial injuries now preclude his participation in this "individualized" labor market, Ms. Wilson concludes that applicant that applicant's disability is total based on her analysis of "vocational apportionment." (*Ibid*.)

However, following our grant of reconsideration in this matter, we addressed the required analysis of apportionment in the context of vocational expert reporting in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 [2023 Cal. Wrk. Comp. LEXIS 30I] (Appeals Board en banc) (*Nunes*). Therein, we held that Labor Code[2] section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment, but that the Labor Code makes no statutory provision for "vocational

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

apportionment." We further held that while vocational evidence may be used to rebut the PDRS, such vocational evidence must nonetheless address apportionment and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment. (*Id.* at pp. 743-744.) Examples of impermissible vocational evidence included assertions that applicant's disability is solely attributable to the current industrial injury because applicant had no prior work restrictions, *or was able to adequately perform their job,* or suffered no wage loss prior to the current industrial injury. (*Id.* at p. 754.) Accordingly, we concluded:

> Therefore, an analysis of whether there are valid sources of apportionment is still required even when applicant is deemed not feasible for vocational retraining and is permanently and totally disabled as a result. In such cases, 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.
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> (*Ibid*.)

Our decision in *Nunes* requires the vocational expert reporting to consider valid nonindustrial apportionment and proscribes "vocational apportionment" as inconsistent with section 4663. Here, the vocational reporting is analytically incomplete, and specifically relies on a legal theory of "vocational apportionment" that is invalid. (*Nunes, supra*, 88 Cal.Comp.Cases at pp. 743-744.)

It is well established that any decision, award or order of the Appeals Board must be supported by substantial evidence in light of a review of the entire record. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310].) Moreover, 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.) Accordingly, the Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals

Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record…the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie, supra*, at p. 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Ibid*.)

Here, we believe a final determination with respect to applicant's levels of permanent disability and nonindustrial apportionment must be supported by substantial evidence in light of a review of the entire record. (*Lamb, supra,* 11 Cal.3d at p. 281.) Accordingly, and following our independent review of the record following our grant of reconsideration in this matter, we conclude that development of the record is consistent with principles of due process of law, and that allowing the evaluating physicians and/or vocational experts to supplement the record will provide the parties and the WCJ with a full and complete basis upon which to adjudicate the issues of permanent disability and apportionment. We further believe development of the record to be appropriate because our en banc decisions in *Vigil, supra*, and *Nunes, supra,* issued only after our May 12, 2022 grant of reconsideration to study the legal and factual issues presented in this matter.

Accordingly, as our decision after reconsideration, we will rescind the F&A and return this matter to the trial level for development of the record and for further proceedings.

Although we do not reach the issue herein, we note the dispute regarding the starting date of increased disability indemnity payments in the event of a finding of permanent and total disability. We offer the following non-binding guidance to the parties. In *Brower v. David Jones Construction* (2014) 79 Cal.Comp.Cases 550 [2014 Cal. Wrk. Comp. LEXIS 69] (Appeals Board en banc), we addressed the relationship between the end of temporary disability payments and the commencement date of permanent disability indemnity. Therein, we held that "[w]hen a defendant stops paying temporary disability indemnity pursuant to section 4656(c) before an injured worker is determined to be permanent and stationary, the defendant shall commence paying permanent disability indemnity based on a reasonable estimate of the injured worker's ultimate level of permanent disability." (*Id*. at 560.) We further held that "[w]hen the injured worker becomes permanent and stationary and is determined to be permanently totally disabled, the defendant shall

pay permanent total disability indemnity retroactive to the date its statutory obligation to pay temporary disability indemnity terminated." We explained that:

> A consequence of advancing permanent disability indemnity to a temporarily disabled injured worker is that an employer's reasonable estimate may not match an injured worker's actual permanent disability. In cases such as this, where an applicant moves from being temporarily totally disabled to permanently totally disabled, the applicant's actual level of disability was and is total. The difference between temporarily and permanently disabled in this case is solely the difference between applicant's condition having the potential for improvement and permanent and stationary status.
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> An injured worker is "entitled to compensation for any permanent disability sustained by him in addition to any payment received by such injured employee for temporary disability." (§ 4661.) Construing sections 4650 and 4661 together, if a defendant paid permanent partial disability payments to an applicant who becomes permanently totally disabled, the defendant must retroactively adjust the permanent disability payments to the correct rate.
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> (*Id*. at 562.)

Accordingly, if an employer advances permanent disability, and applicant's disability is later determined to be total or otherwise payable at an increased rate, the employer must pay the increased indemnity rate retroactive to the final payment of temporary disability. (See *Brazil v. San Mateo County Transit District* (December 22, 2022; ADJ6831983) [2023 Cal. Wrk. Comp. P.D. LEXIS 97], writ den. sub nom. *San Mateo County Transit District v. Workers' Comp. Appeals Bd.* (*Brazil*) (2023) 88 Cal.Comp.Cases 802 [2023 Cal. Wrk. Comp. LEXIS 33]); *Scott v. County of Kern* (December 29, 2022, ADJ9599844) [2022 Cal. Wrk. Comp. P.D. LEXIS 374]; *Collins v. Macro Crane Rigging* (May 18, 2020, ADJ2484312 (SDO 0284449) [2020 Cal. Wrk. Comp. P.D. LEXIS 192]; *Flickinger v. City of El Segundo* (February 10, 2020, ADJ8627969, ADJ9506151) [2020 Cal. Wrk. Comp. P.D. LEXIS 54]; *Furgol v. UCLA Med. Ctr.* (April 12, 2018. ADJ3327542, ADJ7143228) [2018 Cal. Wrk. Comp. P.D. LEXIS 148].)

The en banc holding in *Brower* is binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].)

Additionally, our holding in *Brower* applies to instances when a timely Petition for New and Further disability results in an increased permanent disability rate. (See *Walt Disney Travel*

Co. v. Workers' Comp. Appeals Bd. (*Lazcano*) 89 Cal.Comp.Cases 87 [2023 Cal. Wrk. Comp. P.D. LEXIS 70] (writ den.) [petition for New and Further increased disability to 100 percent, retroactive to last payment of TTD, notwithstanding subsequent employment]; *Valdez v. L.A. County Prob. Dept.* (September 28, 2022, ADJ8566293) [2022 Cal. Wrk. Comp. P.D. LEXIS 283] [petition for New and Further disability increased award to 100 percent, payments of PTD indemnity are retroactive to the day following last payment of TTD]; *Morris v. County of Riverside* (February 15, 2019, ADJ8386503) [2019 Cal. Wrk. Comp. P.D. LEXIS 59] ["[i]f an applicant files a petition to reopen after receiving an award of permanent partial disability and permanent disability is found to be total, the award of permanent total disability is retroactive to the applicant's original permanent and stationary date"]; *Garietz v. Vertis Communs.* (November 19, 2018, ADJ3394569 (OAK 0341726), ADJ1459791 (OAK 0314647)) [2018 Cal. Wrk. Comp. P.D. LEXIS 552] [following Petition to Reopen, applicant's permanent total disability payable retroactive to original date of commencement of permanent disability in 2006, not later P&S date in 2015]; *Villagio Inn & Spa v. Workers' Comp. Appeals Bd.* (2009) 74 Cal. Comp. Cases 987 [2009 Cal. Wrk. Comp. LEXIS 207] (writ den.) [following Petition for New and Further disability, defendant liable for permanent and total disability retroactive to date of last temporary disability indemnity payment in 2002].)

We also note that a finding of permanent and total disability does not preclude subsequent employment. This is because a finding of permanent and total disability is a *metric* of applicant's disability and does not bar future employment that conforms to applicant's residual functional capacity. (See, e.g., *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal. Comp. Cases 587]; *Dickow v. Workmen's Comp. Appeals Bd.* (1973) 34 Cal.App.3d 762 [38 Cal.Comp.Cases 664]; *Maxwell v. Los Angeles Rams* (September 9, 2013, ADJ6855102) [2013 Cal. Wrk. Comp. P.D. LEXIS 498]; cf. *Landmark Education Corp. v. Workers' Comp. Appeals Bd.* (*Anbender*) (2006) 71 Cal.Comp.Cases 288 [2006 Cal. Wrk. Comp. P.D. LEXIS 40] (writ den.).)

In summary, following our grant of reconsideration in this matter, we issued two superseding en banc decisions that directly address the issues advanced in defendant's Petition. Our decision in *Vigil, supra*, 89 Cal.Comp.Cases 686 requires an analysis of applicant's ADLs as relevant to the question of the combination or addition of disabilities. Similarly, our decision in *Nunes, supra*, 88 Cal.Comp.Cases 741, disallows "vocational apportionment" and requires the

vocational expert to address valid medical apportionment under section 4663. In both instances, the present record is analytically incomplete, and we return this matter to the trial level for development, accordingly.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 16, 2022 Amended Findings of Fact & Award is **RESCINDED** and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 6, 2024

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

EDDIE AVAKIAN
MALLERY & STERN
LAW OFFICES OF BRIAN T. RILEY

SAR/abs

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