Permanent Disability

The Doctrines of "Substantial Evidence"

and

"Direct Causation"

The following represents a summary of some of the most recent case decisions issued by the California Supreme Court, California Court of Appeal, and the Workers' Compensation Appeals Board, which the Editor believes will have significance in connection with the practice of Workers' Compensation law. The summaries are only the Editor's interpretation, analysis, and legal opinion, and the reader is encouraged to review the original case decision in its entirety.

Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)].

I. The Role of the Doctor, Rater and WCJ

Cynthia Blackledge v. Bank of America, ACE American Insurance, (2010) 75 CCC 613. (En Banc.)

Applicant sustained an admitted industrial injury to her low back, right wrist, hip and knee on 10/26/05. The AME provided 8% WPI for the lumbar spine and 2% WPI for the right hip and knee. The AME also found no impairment with respect to the Applicant's right wrist.

The WCJ issued formal rating instructions to the DEU using a fill in the blanks template available through EAMS. The WCJ also requested that the rater "consider a 3% add on for pain." The rater issued a formal recommended rating of 0% PD. Applicant made a timely request to cross-examine the rater. The rater testified he exercised his judgment and mechanically applied AMA Guides to find no ratable PD. The rater testified that under AMA Guides, DRE II requires disc disease and radiculopathy, spasm and loss of motion. While he acknowledged the AME had found lumbar disc disease, the rater concluded that the doctor had not found radiculopathy, spasm or loss of motion. Similarly, he found 0% WPI for the right hip and knee indicating that "direct trauma" was required for a patellofemoral pain syndrome used by the AME. The rater testified that in reviewing the report, he could find no evidence of direct trauma.

> *" . . .1) The physician's role is to assess the injured employer's whole person impairment percentage(s) by a report that sets forth facts and reasoning to support its conclusions and that comports with the AMA Guides and case law; 2) in the context of a formal rating, the WCJ's role is to frame instructions, based on substantial medical evidence that specifically and fully described the WPI to be rated. In addition, a WCJ's instructions may ask a rater to offer an expert opinion on what WPI should or should not be rated; 3) in the context of a formal rating, the rater's role is to issue a recommended PD rating based solely on the WCJ's formal rating instructions. . ."*
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> *Blackledge v. Bank of America, 75 CCC at pgs. 615-616.*

The WCJ issued an F&A finding a 10% PD for the low back, right wrist, hip and knee injury. The WCJ explained that he had rejected the raters' rating and had rated the report himself. The Defendant sought reconsideration contending that the WCJ should have accepted the rater's expert opinion and that the rater had inappropriately relied upon a computerized impairment rating that did not truly reflect the AME's opinion. The WCJ filed a Report and Recommendations recommending denial of the petition. The Board granted Reconsideration.

The Board issued its *en banc* decision on the respective roles of the evaluating physician, the workers' compensation administrative law judge and the disability evaluation specialist (rater) in determining the whole person impairment under the

AMA Guides. They held that 1) the physician's role is to assess the injured employer's whole person impairment percentages by a report that sets forth facts and reasoning to support its conclusions and that comports with the AMA Guides and case law; 2) in the context of a formal rating, the WCJ's role is to frame instructions, based on substantial medical evidence that specifically and fully described the WPI to be rated; 3) in the context of a formal rating, the rater's role is to issue a recommended PD rating based solely on the WCJ's formal rating instructions. Unless specifically instructed to do so, a rater has no authority to issue a rating based on the rater's own assessment of whether the WPI referred to in the WCJ's instructions are based on substantial evidence or are consistent with the AMA Guides. A WCJ's instructions may ask a rater to offer an expert opinion on what WPI should or should not be rated.

The Board further held that a WCJ is not bound by a rater's recommended PD rating and a WCJ may elect to independently rate an employee's PD; however, a WCJ's rating still must be based on substantial evidence. In the context of a formal rating, there must be no ex parte communication between the WCJ and the assigned rater.

The Board amended the WCJ's ruling to defer the issues of PD and attorney's fee and remanded those issues to the trial level. The WCJ, in his discretion could further develop the record if he found that the AME's report did not constitute substantial evidence to support the WPI's.

II. Which Rating Schedule Applies? Rating Under Old Guidelines vs. AMA Guides

The 5th Edition of the AMA Guidelines are to be utilized for **all dates of injury post 1/1/05**. For **compensable claims arising before 1/1/05**, the 5th Edition of the AMA Guides shall apply to the determination of permanent disabilities unless prior to 1/1/05 there has been either (1) a comprehensive medical-legal report, or (2) a report by a treating physician indicating the existence of permanent disability, or (3) when the employer is required to provide the notice required by Section 4061 to the injured worker, employee has been declared P&S. *(Labor Code Section 4660(d)*. Although somewhat unsettled, it is clear that where the report of the treater declares the applicant P&S with permanent disability prior to 1/1/05, the rating will be under the old guidelines rather than the AMA Guides.

LC 4660(d) provides, ". . .The schedule . . .shall apply to and govern only those permanent disabilities that result from compensable injuries received or occurring on and after the effective date of the adoption of the schedule [1/1/05], . . .For compensable claims arising before 1/1/05, the [new] schedule shall apply to the determination of permanent disabilities when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker."

LC 4061(a) provides, "Together with the last payment of temporary disability indemnity, the employer shall, in a form prescribed by the administrative director . . .provide to the employer one of the following [notices]. . .

Baglione v. AIG (2007) 35 CWCR 121, 72 CCC 444 (En Banc Decision)

See also Aldi v. Carr, McCellan, et. Al. (2006) 71 CCC 783, which held that the new AMA guidelines apply to injuries occurring on or after 1/1/05, and that in cases of injury occurring prior to that date, the AMA guidelines apply unless one of the exceptions delineated in 4660(d) apply, namely there has been (1) either a comprehensive medical-legal report, or (2) a report by a treating physician indicating the existence of permanent disability, or (3) when the employer has been required to provide the notice required by Section 4061 to the injured worker. (Aldi v. WCAB (2006) 71 CCC 1822.

Applicant sustained injury in June of 2003. On 6/18/04, the applicant had a QME evaluation which failed to discuss PD. Subsequently, the parties agreed to an AME, who in his report of 4/06 determined the applicant to be P&S as of 4/05.

See also, Chang v. WCAB (2007) 153 Cal.App.4th 750, 35 CWCR 209, 72 CCC 921 in which the Court of Appeal held that none of the exceptions contained in LC 4660(d) applied and noted that the clear intent of the Legislature was to cut back costs and expenditures in the comp system via SB 899. Further, the Court stated that it "did not appreciate being preached" to by the applicant's bar, noting it was not a legislative committee but rather a judicial branch of government.

The WCJ at trial applied the new schedule as there was neither a report from a treating physician nor a comprehensive medical legal report indicating the existence of PD prior to 1/1/05.

On reconsideration, the WCAB in a four-to-three decision, indicated that under LC Section 4660(d) the comprehensive med-legal report need not necessarily indicate the existence of PD. There only need be a "comprehensive med-legal report" and therefore the old schedule applied.

After further remand, and a complicated procedural battle, the WCAB issued a second en banc opinion which held that for the old schedule to apply, the comprehensive medical-legal must indicate the existence of PD and that report must be obtained prior to 1/1/05. The WCAB utilized strict construction of LC Section 4660(d) in so holding.

See also, Pendergrass v. SCIF (2007) 35 CWCR 124, 72 CCC 456 (En Banc), in which the WCAB reversed a prior decision holding that the obligation to provide a LC 4061 notice pursuant to LC 4660(d) arises upon the first payment of TD. The WCAB held that the obligation to provide 4061 notice arises upon the last payment of TD. Therefore, in this case it was held that the new PD schedule/AMA Guides applied. See also, Zenith Ins. Co. v. WCAB (Azizi) (2007) 72 CCC 785; Energetic Painting and Drywall v. WCAB (Ramirez) 72 CCC 937.

See also, SCIF v. WCAB (2007) 146 Cal.App. 4th 1311, 35 CWCR 1311, 72 CCC 33, in which a medical report written before the disability was P&S fell under the new schedule.

See also, HSR Inc. v. WCAB (Mariscal)(2007) 35 CWCR 262, 72 CCC 1211, in which a "check the box" report by the treating physician indicated that there would be PD was held by the 6th District Court of Appeal not be constitute substantial evidence since there was no history, facts of the case, diagnosis, or other requirements of WCAB Rule 10606. For a report to be sufficient, it must state the reasoning and provide analysis behind the doctor's opinion. In accord, SCIF v. WCAB (Echeverria) (2007) 146 Cal.App.4th 1311, 35 CWCR 1, 72 CCC 33, letter sent by applicant's counsel to treater confirming existence of PD prior to P&S which was countersigned by treater held to not constitute substantial evidence.

But see also, Zenith Ins. Co. v. WCAB (Cugini) (2008) 159 Cal. App. 4th 483; 71 Cal. Rptr. 3d 724; 2008 Cal. App. LEXIS 140 (Filed 1/29/08) in which the Court of Appeal held the entire medical record should be considered in determining the evidentiary value of the report of the PTP, ie. Whether the report constitutes substantial evidence.

See also, Genlyte Group v. WCAB (Zavala) (2008) 158 Cal. App. 4th 705, 69 Cal. Rptr. 3d 903, 2008 Cal. App. LEXIS 6 (Filed 1/3/08) in which the Court of Appeal followed the decision of Costco v. WCAB (Chavez) (2007) 72 CCC 582 requiring the report to find the applicant P&S with PD prior to 1/1/05 for the old guidelines for rating PD to apply.

Costco Wholesale Corp. v. WCAB (Chavez) (2007, 1st District Court of Appeal) 151 Cal.App.4th 148, 35 CWCR 147, 72 CCC 582.

Applicant sustained injury to right elbow, right hip, and low back on 6/5/04. On 9/24/04, a panel QME determined the applicant not to be P&S. The QME went on to impose some lifting restrictions but noted that the applicant's condition might be upgraded at time of P&S, which was expected within the next 90 to 120 days. The parties subsequently entered into an AME agreement. The AME examined the applicant in September 2005 and determined the applicant to have been P&S.

Labor Code Section 4660(d) provides in pertinent part as follows:

". . .For compensable claims arising before 1/1/05, the schedule as revised pursuant to changes made in legislation enacted during the 2003-2004 Regular and Extraordinary Sessions shall apply to the determination of PD when there has been either no comprehensive medical-legal report, or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker. . ."

Labor Code Section 4061(a) provides in pertinent part as follows:

". . .Together with the last payment of temporary disability indemnity, the employer shall, in a form prescribed by the administrative director pursuant to Section 138.4, provide the employee one of the following: (1) Notice either that no permanent disability indemnity will be paid. . .or notice of the amount of permanent disability indemnity determined by the employer to be payable, or (2) Notice that permanent disability indemnity may be or is payable, but the amount cannot be determined. . ."

The WCJ held that the old schedule applied since prior to 1/1/05 there existed a comprehensive medical report prepared by the Panel QME and made a 52% award of PD. Defendant sought reconsideration arguing that LC Section 4660(d) requires that a medical report must establish the existence of PD prior to 1/1/05. In a split decision, the WCAB held that an exception under LC 4660(d) allowing the use of the old schedule is triggered by "either a comprehensive medical-legal report or a report showing existence of PD prior to 1/1/05." Commissioner Cuneo, in a dissenting opinion, would require the existence of either a comprehensive med-legal report or treating physician's report which indicates the existence of PD.

The Court of Appeal followed the "last antecedent rule" holding that since L C Section 4660(d) contains no comma following the word "physician," the requirement of PD applied to both med-legal reports and reports by a treating physician.

In so holding, the Court upheld the holdings in *Baglione 35 CWCR 121*and *Pendergrass 35 CWCR 124, 72 CCC 456.*

The Court also held that the duty to provide notice pursuant to 4061(a) arises upon the last payment of TD. In the present matter, the applicant was not determined to be P&S until well after 1/1/05, and in the absence of either a report by comprehensive med-legal establishing PD or by treating physician establishing PD, the new schedule applies.

Vera v. WCAB (2007, Court of Appeal, 4th Appellate District) 72 CCC 1115

Applicant sustained injury to neck, back, and right shoulder on 3/14/03. Defendant paid TTD from shortly after the date of injury until 9/05 without interruption. In April of 2004, the treating physician issued a report which stated that the applicant "was not P&S" but there existed PD. The treater did provide a preliminary description of permanent restrictions. The applicant subsequently underwent surgery and was declared P&S in September 2005. At trial applicant argued that the 1997 PDRS applied because (1) the treating physician's report identified factors of PD in existence prior to 1/1/05, and (2) defendant had commenced payment of TD prior to 1/1/05 (*Pendergrass I* argument).

Editor's comment: See infra, contra, Lewis v. WCAB (3rd District Court of Appeal, 2008), 36 CWCR 86, 168 Cal. App. 4th 696, 85 Cal. Rptr. 3d 661; 2008 Cal. App. LEXIS 2340, in which the Court rejected the reasoning in Vera and applied Genlyte. The Court noted that the language of LC § 4660(d), only provides, "indicating the existence of permanent disability" by either a comprehensive medical-legal report or a treating physician -- which the Court argued does not require the injured worker to be P&S.

The WCJ awarded PD under the 1997 schedule. In a split decision, the WCAB on reconsideration reversed holding that the report relied upon by the WCJ did not constitute substantial evidence thereby sidestepping the issue of whether the report of AME/PTP must find applicant P&S with PD or merely find applicant to have PD prior to 1/1/05.

The Court of Appeal affirmed the WCAB holding that "the new schedule can be applied to claims [prior to the] . . . effective date of 1/1/05, unless, as of the effective date of the schedule, one of the three circumstances described in LC Section 4660(d) exists." Here the use of the PTP's report required that "the treating physician's report must indicate that the claimant has a ratable disability that has reached a permanent and stationary status." Accordingly, the Court determined that

a physician's report that does not find the applicant to be P&S cannot serve as an exception to the application of the new schedule.

Lewis v. WCAB (3rd District Court of Appeal, 2008), 36 CWCR 86, (3rd District Court of Appeal, 2008), 36 CWCR 86, 168 Cal. App. 4th 696, 85 Cal. Rptr. 3d 661; 2008 Cal. App. LEXIS 2340.

Applicant's treating physician issued a report on 8/14/04, which indicated that the applicant "could not return to his usual and customary job duties and that vocational rehabilitation efforts are indicated". The WCJ held that the AMA guidelines applied, rejecting the applicant's argument that the old guidelines should be applied. On reconsideration, the WCAB affirmed the WCJ's decision.

Editor's comments: The good news is that this issue with the passage of time is becoming completely irrelevant.

On Writ of Review, the 3rd District Court of Appeal reversed. After a thorough discussion of both the *Vera v. WCAB (2007, Court of Appeal, 4th Appellate District) 72 CCC 1115* and Genlyte Group v. WCAB (Zavala) *(2008) 158 Cal. App. 4th 705, 69 Cal. Rptr. 3d 903, 2008 Cal. App. LEXIS 6 (Filed 1/3/08),* the Court rejected the reasoning in *Vera* and applied *Genlyte*. The issue was whether the applicant must be determined to be determined P&S prior to 1/1/05 with disability, or whether PD, by itself, is sufficient. The Court noted that the language of LC § 4660(d), only provides, "indicating the existence of permanent disability" by either a comprehensive medical-legal report or a treating physician -- which the Court argued does not require the injured worker to be P&S.

III. Two Pillars of Workers' Compensation -- Substantial Evidence & Direct Causation

Direct Causation: The requirement that PD (WPI and resulting disability) be DIRECTLY, CAUSALLY and EXCLUSIVELY resulting from the subject industrial injury. This principle limits the employer's liability by excluding non-industrially caused disability.

Public Policy Conflict: Eggshell Plaintiff/Take the Plaintiff as You Find him/her vs. Rewarding/encouraging employers to hire the disabled, stated alternatively, we shouldn't punish the employer for hiring the disabled by requiring the employer to pay for disabled not directly caused by the subject industrial injury.

Substantial Evidence: This requires the that the opinion, whether medical by the reporting physician or legal by the WCAB be based on medical facts or other evidence and apply those facts to support and reach the opinion or conclusion. The court in explaining substantial evidence have used such phrases and "rational and considered opinion", "connect the dots", "explain the basis for the opinion", "provided detailed analysis".

A. Related Concepts

"COMPENSABLE CONSEQUENCE INJURY" occurs only as a result of (1) Non-Industrial Activities, Events, or Conditions or (2) from industrial medical treatment relating back to the original industrial injury. "Compensable Consequence Injuries" involves not only a potential entitlement to TD and Medical Treatment but also **PERMANENT DISABILTIY**. The careful practitioner must understand the difference between "compensable consequence injuries" and "compensable consequences of injury". While "compensable consequence injury" involves an analysis of entitlement to all benefits including PD, "compensable consequences of injury" is limited to the entitlement and scope of medical treatment and may extend periods of industrial TD, but does not include PD. *(See Laines v. WCAB (1975) 48 Cal.App.3rd 872, 40 CCC 365; Fitzpatrick v. Fid. & Cas. Co. (1936) 7 Cal. 2nd 230; The Emporium v. WCAB (Whitney) (1981) 46 CCC 417 (Writ Denied))*

"COMPENSABLE CONSEQUENCE OF INJURY" applies generally to that situation where a non-industrial condition is treated on an industrial basis increasing the defendant's scope and liability for **medical treatment** and thereby potentially extending the period of TD. In this situation a non-industrial event/injury and resulting condition or pre-existing condition must be treated as part of the industrial treatment. The treatment is said to be a "compensable consequence of injury" as "reasonable and necessary" pursuant to LC 4600. *(See Bell v. Samaritan Medical Clinic Inc. (1976) 60 Cal.App.3rd*

486, 41 CCC 415; Interventional Pain Management et al. v. WCAB (Stratton) 66 CCC 1472 (Unpub. CA-2001); Grom v. WCAB (2004) 69 CCC 1567 (Panel Decision;

"AGGRAVATION vs. EXACERBATION" and **"ACCELERATION"** are legal concepts related to the threshold issues in the analysis and determination of whether the event gave rise to a "compensable consequence injury". This issue is generally resolved on establishing "**PERMANENCY**"; i.e. whether there has been a "temporary exacerbation or permanent aggravation" of the condition and is generally demonstrated by the level or degree of treatment and resulting disability. This analysis will turn on whether or not the subject condition and related need for medical treatment or level of PD has returned to a pre-industrial injury baseline. As a general rule, a return to pre-injury baseline will not evidence permanency, but only a "temporary exacerbation" of the subject condition, and therefor will not constitute a "compensable consequence injury". Where the condition does not return to pre-injury baseline it will be said to have resulted in a "permanent aggravation" and therefore a "compensable consequence injury" is likely to have occurred.

Also under the discussion of **"aggravation"** of a pre-existing non-industrial condition due to the industrial injury or treatment, is the concept of injury due to **"acceleration"** of a non-industrial condition. Where the condition is progressive but the progression is "accelerated" by the industrial injury or related treatment, an injury by way of "acceleration" will have occurred. In this situation, the baseline which was progressing accelerates, i.e. progresses at a more rapid rate as a consequence of the industrial injury. *(See City of Gardena v. WCAB (Moreno) (2000, Second Appellate District) 65 CCC 714, 2000 CWC. Lexis 6348; Gamble v. WCAB (Buckalew) (1995, 3rd Appellate District) 60 CCC 160;)*

"CAUSATION OF INJURY" is that threshold issue which defines the scope of the initial benefits, primarily involving NATURE AND EXTENT OF MEDICAL TREATMENT, and PERIOD OF TEMPORARY DISABILTIY. "Causation of Injury" is often broader that the scope of "causation of disability" since "causation of injury" may involve conditions and parts of body which, after completing treatment, may not produce any residual permanent disability.

The principles of "Causation of Injury vs. Causation of Disability" is discussed and explained at length in the following decisions: Grimaldo v. WCAB (2009, 2nd District Court of Appeal) 74 CCC 324, 37 CWCR 63 (Not Certified for Publication); Rolda v. Pitney Bowes (2001) 66 CCC 241 (En Banc); Sonoma State University v. WCAB (Hunton) (2006) 71 CCC 1059; Reyes v. Hart Plastering (2005) 70 CCC 223.

"CAUSATION OF DISABILTY" deals with the principle of "direct causation" of disability, i.e. the strict legal apportionment of disability pursuant to LC 4663. Generally, this issue arises only after the applicant becomes P&S and is relevant only to the award of PD.

When you are analyzing "Compensable Consequence Injuries" your analysis should also consider strict legal apportionment, apportionment of causation of disability under LC 4663.

> **Apportionment of Causation of Permanent Disability** under LC 4663 requires a medical opinion which constitutes substantial evidence. This requires generally that the medical opinion be (1) based upon a FULL, COMPLETE, and ACCURATE MEDICAL HISTORY, with a PROPER DIAGNOSIS; (2) The medical opinion is expressed in terms of REASONABLE MEDICAL PROBABILITY based upon the reporting physician's EDUCATION, TRAINING AND EXPERIENCE and UNDERSTANDING OF THE FACTS INVOLVED IN THE CASE OR PRESENTED BY WAY OF A HYPOTHETICAL; and (3) last, that the opinion provide the "HOW AND WHY", the considered analysis, connects the dots, explain logically the basis and rationale for the opinion. *(See Escobedo v. WCAB (2004) 70 CCC 604 (En Banc Decision)*.

B. Application of The Doctrines of "Compensable Consequence Injury" and "Compensable Consequence of Injury"

"Compensable Consequence of Injury": Treatment of non-industrial conditions on an industrial basis may occur in one of several situations. First, pursuant to L.C. 4600 where treatment of the non-industrial condition is "reasonable and necessary to cure or relieve" the effects of an industrial condition. Classic examples include treatment to stabilize or improve a pre-

existing non-industrial medical condition such as hypertension, diabetes, or obesity prior to an industrially required course of treatment such as a surgery. In this situation, the non-industrial condition would not be industrial, but the treatment would be provided on an industrial basis. In this scenario, the treatment and potential extension of TD would be a "compensable consequence of injury".

"Compensable Consequence Injury": In a second scenario, the industrial injury causes a direct injury to an alternate part of body or creates a medical condition requiring treatment and/or resulting in disability. In this situation, additional liability is created through the doctrine of "compensable consequence injury" and is established where the condition is found to be a "permanent aggravation", e.g. without return to pre-industrial baseline. The classic examples would be (1) injury to knee causing an altered gait leading to low back injury as a compensable consequence; (2) Injury to back resulting in reduced activity, weight gain, leading to hypertension, or diabetes; Psychiatric disability and need for treatment due to pain resulting from an industrial physical injury (Pre SB 863 *Only*). In this second scenario, the scope of defendant's liability would potentially be extended to include not only treatment and TD but also would include an award of PD.

A third scenario is where an otherwise non-industrial event or activity gives rise to further injury. Classic examples here would include (1) auto or other accident on the way to or from medical treatment/examinations; (2) further injury resulting from physical therapy, examinations or other modality of treatment; or (3) further injury due to fall/twist from industrially caused instability or weakness. In this scenario a "compensable consequence injury" will have occurred.

A. Causation of Injury v. Causation of Disability – Case Authority

Grimaldo v. WCAB (2009, 2nd District Court of Appeal) 74 CCC 324, 37 CWCR 63 (Not Certified for Publication)

Applicant sustained injury when a 60 pound metal grate landed on his foot. The applicant continued to work as the injury appeared minor. About a month later when the injury failed to heal the applicant sought treatment. At the time of injury the applicant suffered from undiagnosed diabetes.

The injury led to an altered gait causing off side pressure in the foot which contributed to the wound being slow to heal which became infected in part due to uncontrolled diabetes.

Subsequently the applicant developed osteomyelitis which ultimately resulted in amputation of the left leg. Defendant admitted injury to foot, but denied the osteomyelitis, amputation and diabetes. Applicant proceeded to trial claiming that the diabetes was "lit up" by the industrial injury to foot.

The WCJ found for the applicant. Consistent with the Applicant's QME, the WCJ held that the work injury "set in motion the events that eventually led to the osteomyelitis and resulting amputation."

The WCJ concluded that the injury "lit up" the applicant's pre-existing asymptomatic diabetes. The WCJ stated that but/for the injury which aggravated the diabetes, the osteomyelitis and resulting amputation of the left leg would not have occurred.

> *"Well established authority holds 'that the acceleration, aggravation or lighting up' of a preexisting disease is an injury in the occupation causing the [injury]. . .the rationale for the doctrine is that the employer takes the employee subject to his medical condition when he begins employment, and that compensation should not be denied because the employee's medical condition caused a disability from an injury that ordinarily would have caused little or no problems to a person who had no such condition. Thus, even though an employee's underlying disease was not caused by his or her employment, the employee's disability or death is compensable as an injury arising out of and in the course of the employee's work. So also, the acceleration or aggravation of a preexisting disease by an industrial injury is compensable as an injury arising out of and in the course of employment, if the aggravation is reasonably attributable to an industrial accident."*
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> *Grimaldo v WCAB 74 CCC at pg. 328.*
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> *Editor's comments: This decision involves the classic battle between "causation of injury" and "causation of disability", two doctrines which are often confused. While permanent disability attributable to complications resulting from the non-industrial diabetes would be apportioned as non-industrial, this would not prevent the medical treatment and TD associated with the non-industrial diabetes from being determined industrial and benefits provided. "Causation of injury" will allow treatment and TD to be determined as compensable where, as in Grimaldo the non-industrial condition is "lit-up" or aggravated by an industrial injury. This should not be confused with "causation of disability", ie. apportionment which would allow the non-industrial condition to be apportioned from the overall PD to result in an award of only that portion of the PD directly caused by the industrial injury.*
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> *See also, accord, Abrego v. Harland Braun & Company, State Compensation Insurance Fund and Everest National Insurance Company, 2016 Cal. Wrk. Comp. P.D. LEXIS 387 (BPD) holding that applicant's toe amputation was compensable industrial injury based on treating physician's opinion that amputation was necessary due to applicant's working throughout day with wet sock resulting in blister on toe which turned gangrenous due to applicant's diabetes, where treater's opinion found more persuasive than opinion of panel qualified medical evaluator that applicant's need for toe amputation was caused by natural progression of his nonindustrial diabetes. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.05[2][a], [d], [3][a], 27.01[1][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.01[4].]*

Defendant sought reconsideration. The WCAB reversed holding that the diabetes was a pre-existing non-industrial condition which merely acted to complicate the healing of the industrial injury, and that the diabetes did not arise out of or occur in the course of employment.

The Court of Appeal reversed reinstating the decision of the WCJ that the industrial injury had "lit up" the diabetes, and combined to cause osteomyelitis and the resulting amputation. The Court of Appeal however was careful to include as part of the industrial injury the resulting amputation. This decision did not address causation of disability, i.e. apportionment to causation under LC section 4663.

SCIF v. WCAB (Dorsett) (6th District Court of Appeal, 2011) 76 CCC 1138

Applicant sustained a specific injury to cervical spine on 3/21/00 while working for South Valley Glass and CT injury to cervical spine for the period ending 6/8/04 while working for A-Tek. Both were insured by SCIF. The AME wrote that in the absence of the specific injury in 2000, the subsequent activities with the second employer would not have been injurious and therefore the subsequent CT would not have occurred. At deposition the AME testified "if the initial [injury] doesn't happen. . .the second [injury] can't happen because there's no indication medically that he would have had any disability in 2004 absent the first injury of 2000." Even so, the AME apportioned the disability equally as between the two injuries. Based upon the opinion of the AME, the WCJ made a 100% award, refusing to apportion, finding only a single injury in that the second injury was a compensable consequence of the original injury. Defendant sought reconsideration and after denial, a Writ of Review.

The Court of Appeal discussed at length whether a subsequent injurious industrial activity can be a compensable consequence of a prior injury for the purpose of avoiding apportionment under LC 4663. In the end the Court reversed holding that separate injuries had occurred and since the AME had been able to apportion as between these injuries the WCJ was compelled to find apportionment. The Court also seemed to stress that it would be a rare situation where apportionment would not exist were successive injuries are involved.

" . . .Employers must compensate injured workers only for that portion of their permanent disability attributable to a current industrial injury, not for that portion attributable to previous injuries or to nonindustrial factors. . .Apportionment is now based on causation. . .the new approach to apportionment is to look at the current disability and parcel out its causative sources – nonindustrial, prior industrial, current industrial – and decide the amount directly caused by the current industrial source. . . Therefore, evaluating physicians, WCJ and WCAB must make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of the [industrial injury]. . .and caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries. . .

There may be limited circumstances. . . when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentage to which each distinct industrial injury causally contributed to the employee's overall permanent disability. In such limited circumstances, when the employer has failed to meet its burden of proof, a combined award may still be justified. . .the burden of proof falls on the employer for it is the employer who benefits from apportionment.

SCIF v. WCAB (Dorsett) 76 CCC at pg. 1144.

See also, Pruitt v. California Department of Corrections, SCIF 2011 Cal. Wrk. Comp, P.D. Lexis 553(Panel Decision) (involving injury to inmate/firefighter jumping 6 feet to flee fire) in which the decision of WJC finding no apportionment was reversed where the finding was based upon the opinion of the PTP who noted "in this case, there is nothing in the medical records that shows that the patient had any problem with her bilateral knees prior to her industrial injury. . .[or that] absent her industrial injury [the applicant would have any disability] . . . Therefore, apportionment to pre-existing or other factors is not warranted." The WCAB in reversing found that the medical opinion relied upon was premised on an incorrect legal theory and did not, therefore, constitute substantial medical evidence.

Editor's Comments: It should be noted that the Dorsett decision is also valuable on the issue of whether the defendant on a subsequent injury may avoid liability arguing that the second injury is merely a compensable consequence of the original injury (prior) industrial injury. Traditionally, the principle of "compensable consequence" has been limited to non-industrial conditions or activities which result in an increase in the need for medical treatment, extend periods of TD or an increased in PD. Where the subsequent activity is industrial, so too is the injury. The rationale for this is that (1) the an employer takes the employee as he find him, and (2) will be only responsible for that portion of PD which is directly and causally related to an injurious industrial activity or exposure. Under Dorsett it does not appear that a subsequent employer may avoid liability through the argument that a subsequent injurious industrial activity is as compensable consequence of a prior industrial injury.

IV. Rating Under Guzman

The application and analysis under *Guzman* requires (1) that the reporting physician provide the STANDARD RATING under the standard method, chapter, or table; Then the physician must (2) address whether the standard rating is ACCURATE, ie. complete; (3) if the standard rating is not ACCURATE, what is it about the standard rating which makes it NOT ACCURATE OR INCOMPLETE; and (4) where the standard rating is not accurate, the reporting physician may utilize an ALTERNATE METHOD, CHAPTER OR TABLE WITHIN THE FOUR CORNERS OF THE 5th Edition of the AMA Guides.

In addressing the *Guzman* issue the analysis by the reporting physician is critical. The focus must be on the OBJECTIVE FINDINGS with appropriate consideration given to subjective complaints. It is the objective findings which will support and validate the subjective complaints ensuring a proper/correct diagnosis. It is that diagnosis which will lead the reporting physician to the proper chapter and table to utilize the correct method for the standard rating.

Editor's Comments and Analysis: The following are 2016 decision involving the Guzman:

Where a significant issues exist regarding the creditability of Applicant's self-reported subjectives, the opinion of AME applying a Guzman analysis to the subjectives without explaining the "how and why" does not constitute substantial evidence. Calvillo v. State of California, CDCR administered by SCIF (2015) 2015 Cal.Wrk.Comp. P.D. LEXIS 583.

Opinion of AME did not constitute substantial evidence where AME failed to explain why standard rating was not accurate, but merely criticized the AMA guides for failing to accurately reflect pain or subjective factors. Constantino v. Queenscare, Alea North America, 2016 Cal. Wrk. Comp. P.D. LEXIS 35(Panel Decision) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4][a], 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.11, 7.12; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 8; Sullivan on Comp, 10.18 Permanent Disability – Rebutting Schedule Under Guzman.]

Ability to Compete in Open Labor Market—Total award of PD based on limitation to in-home work under 1997 PD rating schedule requires applicant to establish (1) industrial causation, (2) and the limitation to work only from home, and (3) the unavailability of in-home work. At that point the burden shifts to the employer to establish the worker's ability to compete in the open labor market, proving that in-home work is available. Hallmark Marketing Corporation v. WCAB (Gannon) 80 Cal. Comp. Cases 1132; 2015 Cal. App. Unpub. LEXIS 6791; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 8.02[3], [4][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.51[1], 7.70, 7.98, 7.99.]

Permanent Disability-Rating-Sexual Dysfunction-Labor Code § 4660.1(c)(1) does not preclude increased impairment rating for sexual dysfunction caused by removal of his prostate to treat his industrial prostate cancer, where sexual dysfunction was direct result from physical injury and not simply a derivative/consequential effect of physical injury noting that impairment should be assessed within four corners of AMA Guides to achieve most accurate rating of injured employee's permanent disability. Montenegro v. City of Los Angeles, PSI, 2016 Cal. Wrk. Comp. P.D. LEXIS 129 (Panel Decision); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4][a], 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.11, 7.12; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 3, 8; Sullivan On Comp, 10.16, Use of 2013 Permanent Disability Schedule.]

Applicant found to be 100% disabled based on opinion of VR expert, Ortho AME, despite the fact that psych AME would apportion 30% to nonindustrial factors where psych AME also clearly concluded that applicant was currently unemployable due to effects of numerous industrial prescribed medications in conjunction with her psychiatric injury. Wright v. Michael's, 2015 Cal. Wrk. Comp. P.D. LEXIS 455 (Panel Decision) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4][a], 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.11, 7.12; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 3, 4, 5, 10.]

On the issue of WHETHER THE STANDARD RATING IS ACCURATE the physician may only focus on the impact the injury has had on Activities of Daily Living, and not work preclusions. Further, under the AMA guidelines OBJECTIVES drive the analysis, but subjectives which are verifiable, reproducible and medically evidenced based may justify an alternate rating under an alternative method, chapter or table determined to be the MOST ACCURATE RATING.

GUZMAN II: Milpitas Unified School District, Keenan Associates v. WCAB (Guzman), (2010, Sixth Appellate District) 187 Cal.App.4th 808.

In *Guzman*, applicant was a secretary who sustained CT injury to bilateral arms where the AME found a 3% WPI but that applicant had "a 25% loss of her … pre-injury capacity for pushing, pulling, grasping, gripping, keyboarding [and] fine manipulation." He further stated that applicant "could not go back to [her] former occupation," because it would "caus[e] a gradual worsening of her condition."The Appeals Board held in substance that: (1) the American Medical Association (AMA) Guides portion of the 2005 Schedule is rebuttable; (2) the AMA Guides portion of the 2005 Schedule is rebutted by showing that an impairment rating based on the AMA Guides would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability; and (3) when an impairment rating based on the AMA Guides has been rebutted, the WCAB may make an impairment determination that considers medical opinions that are not based or are only partially based on the AMA Guides.

> *" . . .that in order to support the case for rebuttal, the physician must be permitted to explain why departure from the impairment percentages is necessary and how he or she arrived at a different rating. That explanation necessarily takes into account the physician's skill, knowledge, and experience, as well as other considerations unique to the injury at issue. Such an explanation should not a priori be deemed insufficient merely because his or her opinion is derived from, or at least supported by, extrinsic resources. . ."*
> *Milpitas Unified School District v. WCAB (Guzman), 187 Cal.App. 4th at pgs. 828-829.*
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> *Editors comments: For the Almaraz/Guzman to apply the evaluating physician must first (1) provide the AMA impairment rating under the standard method, chapter or table; then (2) provide a considered and reasoned analysis why the standard method is not accurate, ie. not complete; then (3) the evaluating physician may utilize an alternate method, chapter or table within the four corners of the 5th Editions of the AME Guides.*
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> *It should be noted that the Almaraz/Guzman holding is limited in its application and should not be used merely to increase disability without more, or merely to increase disability reduced do to apportionment. Also, Almaraz/Guzman should not apply to increase PD based solely on subjectives which are not objectively verifiable, reproducible, nor medically evidenced based. Stated alternatively, this editor believes that subjectives without objectives will continue to rate zero, and Almaraz/Guzman will not change this fact. Objectives with additional objectives not accounted for within the standard method, chapter or table will allow the evaluating physician to utilize an alternate method, chapter or table. The real question is whether this holding will apply to increase the WPI where objectives with additional subjectives are not included within the standard method, chapter or table. In this situation, the issue may well turn on whether the additional subjectives are "subjective/objectives" or purely "subjective/subjective", with the former being reproducible, verifiable, and medically based. This editor continues to believe that pure subjectives may only be used as justification to support a medical opinion for higher level of WPI within a table range, and/or is limited to a 3% add-on.*

In the companion case *Almaraz*, the defendant SCIF petitioned for reconsideration. The WCAB granted the petition and in the interests of consistency, granted reconsideration on its own motion of the *Guzman* case. On 9/3/09, the WCAB issued its final opinion partially reversing its February 3 decision. The majority reaffirmed its prior ruling that an impairment rating under the Guides was rebuttable if those ratings resulted in an inequitable, disproportionate, and inaccurate rating of PD. Under the Board's new holding, an employee or defendant could rebut the percentage of PD under the 2005 Schedule "by successfully challenging any one of the individual component elements of the formula that resulted in the employee's scheduled rating." The person's WPI could be challenged through presentation of evidence that a different chapter, table or method contained in the Guides more accurately described the impairment. Whether in the initial determination of WPI or in rebuttal, a physician could "utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee's impairment" but was not permitted to go outside the four corners of the AMA Guides.

> *See also, Lorenz v. Stowasser Pontiac and Intercare (2010) 2010 Cal. Wrk. Comp. P.D. LEXIS 137 (Writ Denied) where the applicant was held not to have meet his burden of proof under Almarez where AME's opinion was based on conclusory statement, and further it is not up to the WCJ to supplement the record with evidence on this issue.*
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> *Editor's Comments: In applying Guzman both parties as well as the physician should be reminded that LC 4660(d) provides "The schedule shall promote consistency, uniformity, and **objectivity.** "*

The Appellate Court granted the District's petition for writ review. The Appellate Court affirmed the WCAB's ruling. However, it noted that the WCAB did not explain how far the physician may go in relying on the "four corners" when the descriptions, tables, and percentages pertaining to an injury do not accurately describe the injured employee's impairment. The Court held that in order to support the case for rebuttal, the physician must be permitted to explain why departure from the impairment percentages is necessary and how he or she arrived at a different rating. That explanation necessarily takes into account the physician's skill, knowledge, and experience, as well as other considerations unique to the injury at issue. Such an explanation should not be deemed insufficient merely because his or her opinion is derived from, or at least supported by, extrinsic resources. The physician should be free to acknowledge his or her reliance on standard texts or recent research data as a basis for his conclusions, and the WCJ should be permitted to hear that evidence. If the explanation fails to convince the WCJ or WCAB that departure from strict application of the applicable tables and measurements in the Guides is not warranted, the physician's opinion will be properly rejected.

This holding involves the application or interpretation of Labor Code § 4660(c), which continues to state: "This schedule … shall be prima facie evidence of the percentage of permanent disability…." The Appeals Board has previously held in prior en banc decisions in *Costa I* (71 CCC 1797) and *Costa II* (72 CCC 1492) that, pursuant to this section and case law, the percentage of disability resulting from the 2005 Permanent Disability Rating Schedule is rebuttable. This decision discusses how the AMA Guides portion of the schedule can be rebutted.

Barajas v. Fresno Unified School District (2012) 2012 Cal.Wrk.Comp. P.D. Lexis 7 (Board Panel Decision)

Applicant, employed as a school ground keeper/gardener, sustained injury to right wrist, hand, fingers, and shoulder on 7/10/09. The AME first noted the requirements of section 16.8a of the AMA Guides which expressly prohibits loss of grip strength except in "rare case(s)", and may not be used where the loss of grip strength is the result of "decreased motion, painful conditions, deformities, or absence of parts that prevents effective application of maximal force". The AME opined that the strict rating under the AMA guidelines was not accurate in that it only included the applicant's loss of range of motion, and in this particular matter the AME sought to include loss of grip measurements. In doing so the AME noted that "maximal" effort was used by the applicant during grip loss testing, that the loss of grip strength was not due to decreased motion, painful conditions, deformities, or the absence of parts (amputation) that would prevent maximal force. Further, the opinion of the AME was consistent with the opinions from both the treating physician and treating surgeon. The WCJ found for the applicant following the opinion of the AME and making an award which combines loss of range of motion with loss of grip strength.

Defendant sought reconsideration arguing that loss of grip strength may not be combined with loss of range of motion under a standard AMA rating, and the AME had failed to justify the use of an alternate method under *Guzman.*

By Panel decision the WCAB upheld the WCJ. Recon denied.

". . .while the AMA Guides often sets forth an analytical framework and method 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. . .the AMA Guides expressly contemplates that a physician will use his or her judgment, experience, training, and skill in assessing WPI. . ." Barajas v. Fresno Unified School District (2012) 2012 Cal.Wrk.Comp. P.D. Lexis 7 (Board Panel Decision)

Editor's Comments: This decision is particularly troubling in that the Court failed to specifically explain what it was about the standard AMA rating that was not "accurate" thereby allowing application of the Guzman doctrine. It may be that the analysis was not really Guzman, but rather application of a standard rating in a "rare case" under the requirements of section 16.8a with the Board merely citing Guzman in support of their decision.

See also, Wai Chiu Li v. County of LA (2012) 2012 Cal.Wrk.Comp. P.D. Lexis 84, in which a WCAB Panel addressing whether the opinion of the AME allowing grip loss was substantial evidence wrote, "[the AME] fully explained and justified his opinion and provided a logical explanation for his impairment assessment using the chapters for upper extremity and skin. [The AME] explained the reasons he chose to include grip strength and why he thought its inclusion is an accurate assessment of impairment (significant atrophy, etc.). In deposition, [the AME] stated that applicant sustained a serious, significant injury, and as a result 'the grip loss was not an indirect measure of his current problem but directly reflected that. And that's the reason why I included it. . .[at deposition the AME testified] he normally does not give separate ratings for loss of grip strength, but that applicant's particular injury, combined with his surgery, the clinical testing results, and reference to the Guides all warranted such a rating. Thus, he used his clinical expertise and judgment along with the appropriate chapters in the Guides to describe impairment, just as the Guides specifically direct a physician to do in order to assess the impairment most accurately. . ."

But see contra, Llanez v Diamond Holdings of California 2012 Cal.Wrk.Comp.PD Lexis 474, where rating based on grip strength was inappropriate where the grip loss was in the presence of pain preventing application of maximal force, and that the physician had failed to explain his departure from the strict application of the Guides and why the grip loss more accurately reflect the applicant's impairment. Walton v. State of California 2012 Cal.Wrk. Comp. P.D. Lexis 322 increased impairment due to the future need for surgery held inappropriate. Swartz v. Cadence Design Systems 2012 Cal.Wrk.Comp. PD Lexis 442, QME failed to set forth the peculiarities of the case justifying Guzman analysis and never set forth why the strict application of the Guides was not "accurate", but merely "conducted a fishing expedition to achieve a desired result". Rockford v. Long Beach Unified School District 2012 Cal.Wrk.Comp.PD Lexis 435 which held use of work restriction does not justify utilizing the hernia chapter as PTP was merely "attempting to bridge the gap between the old schedule and the AMA guides"; nor did the PTP explain why the hernia chapter provided a more accurate description of the applicant's spinal disability. Miller v. Cal.State University, Fresno 2012 Cal.Wrk.Comp.PD Lexis 589 use of PAP measurements during catheterization as alternate rating rather than findings during echocardiogram was determined not to be substantial evidence because the AME "failed to explain the basis for his opinion as required" by Guzman. Velasco v. County of Santa Barbara Probation 2012 Cal.Wrk.Comp.PD Lexis 161 where PD award was limited to loss of range of shoulder motion and no increase in WPI due to limitations in activities of daily living where applicant's subjective complaints were determined not to be creditable. Gomez v. WCAB (2012) 77 CCC 886 held "deficiencies" in applicant's QME held not substantial evidence on Guzman issue and no requirement under the Guides to use ROM method. Olguin v. WCAB (5/18/12) 77 CCC 585 (Writ Denied) in which use of "activity restrictions" held invalid attempt to utilize "work preclusion" as a basis for application of Guzman.

Western Towing v. WCAB (Steward) 77 CCC 1159, 2012 Cal.Wrk. Lexis 165 (Writ Denied)

Applicant sustained injury to right ankle on 10/30/08 and claimed injury to right shoulder as a compensable consequence of treatment to the right ankle. The WCJ found injury to both right shoulder and ankle and awarded 29% PD based on the opinion of the AME who utilized chapter 17 and table 17-5 Gait Derangement. Defendant sought

reconsideration contending that the AME had failed to explain adequately the basis for his departure from strict application of the guidelines.

The WCJ in his report and recommendations noted that the AME had indicated that "based on his judgment, experience, training and skill," it was his opinion that a *Guzman* analysis was justified and that the applicant's disability limited him to semi-sedentary work and would be considered moderate in severity which is equivalent to 20% WPI under Table 17-5. In further support the AME noted the significance of applicant's injury, that treatment included multiple surgeries which included skin grafts and insertion of hardware into the ankle, and that ankle crepitus, swelling and significant loss of range of motion with a slight limp were present. The AME concluded that given the magnitude of the injury the AMA Guides did not provide an "accurate measure of Applicant's degree of impairment" justifying the use of the "moderate" lower limb impairment due to gait derangement under Table 17-5. Additionally, the WCJ noted that the record included the fact that the applicant was observed using a cane, a requirement of "moderate" within table 17-5.

City of Sacramento v. WCAB (Cannon) (2013, 3rd Appellate District) 222 Cal.App.4th 1360, 2013 Cal.App.Lexis 1078, 79 CCC 1

While employed as a police office the applicant sustained injury to left foot and heel while running during a physical fitness test on October 21, 2008. The injury was diagnosed as left plantar fasciitis. At trial applicant testified to pain, inability to run without pain, sharp pain if he pushes down hard on his left heel, limited to running on treadmill, and can no longer be assigned to bike patrol but now is relegated to driving in a patrol wagon. The applicant's PTP released the applicant to his usual occupation and found no impairment to ADLs, nor WPI referring to table 17-5. However, two years later the applicant complained of continuing heel pain aggravated by weight bearing. Prior to the industrial injury the applicant had been an avid runner and had competed in a number of races. The applicant's x-ray of the left foot was positive for small bone spur which was of questionable relevance. Initially the AME found no WPI, but later when asked to apply Guzman modified his position.

> *"… [in his second supplemental report, AME Dr. Ramsey wrote] the basis for his recommending some impairment due to Cannon's residual heal complaints. . .the heel pain, or for that matter, other aspects of pain that do not have any accompanying objective measureable adnormalities, do not rate anything in the AMA Guides, whether or not these problems interfere with one's activities. Thus, a strict interpretation of the Guides does not always appropriately characterize an injured worker's problems. . .Dr. Ramsey explained because Cannon's heel pain interferes with weightbearing activities, particularly running, her thought that by analogy, it would be similar to an individual with a limp and arthritis, resulting in 7% impairment recommended."*
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> *". . .Impairment is defined in the Guides as a loss, loss of use, or derangement of any body part, organ system or organ function. The impairment ratings provided in the Guides were designed to reflect functional limitations and not disability. They reflect the severity of the medical condition and the degree to which the impairment decreases an individual's ability to perform common activities of daily living excluding work. . . permanent disability, on the other hand causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market. . . the nature of physical injury refers to impairment which is expressed as a percentage reflecting the severity of the medical condition and degree to which the impairment decreases an individual's ability to perform common activities of daily living, excluding work."*
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> *"[Labor Code] section 4660(b)(1) does not mandate that the impairment for any particular condition must be assessed in any particular way under the Guides. Moreover, while the AMA Guides often sets forth an analytical framework and methods for a physician in assessing WPI, the Guides does 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."*

Specifically, the AME discussed the impact of the applicant's industrial injury which resulted in plantar fasciitis and resulting condition on ADLs, but noted that no standard rating existed under the AMA Guides for plantar fasciitis. The AME therefore utilized by analogy the gait derangement table 17-5. Further explaining the basis for his use of table 17-5 the AME stated "this particular individual has a problem with pain in the heel of his foot that interferes with weight bearing activities, particularly running, and I thought by analogy, it would be similar to an individual with a limp and arthritis, resulting in the 7% impairment. I continue to feel that this a reasonable reflection of the applicant's residual problems, despite the fact that using the strict Guidelines, no impairment would result."

The WCJ found for defendant awarding no PD holding that the application of *Guzmam* was not appropriate as the case was not "complex or extraordinary". By a split panel decision the Board reversed. The WCAB explained that "complex or extraordinary" should "not be utilized to restrict a physician's expertise," but should be read "to reflect the ability of a physician to rate an impairment by analogy, within the four corners of the Guides, where a strict application of the Guides does not accurately reflect the impairment being assessed. . .plantar fasciitis does not have a standard rating, with no

specifically applicable chapter, table or method provided in the AMA Guides, and thus can only be rated by analogy to other impairments, and/or by analysis of the injury's impact on activities of daily living."

On review the Court of Appeal affirmed the WCAB on the same rationale as the WCAB.

". . . the AMA Guides provides: 'The physician's role in performing an impairment evaluation is to provide an independent, unbiased assessment of the individual's medical condition, including its effect on function, and identify abilities and limitations to performing activities of daily living. ... Performing an impairment evaluation requires considerable medical expertise and judgment.' [Citation.] Similarly, the Guides states: 'The physician must use the entire range of clinical skill and judgment when assessing whether or not the measurements or tests results are plausible and consistent with the impairment being evaluated. If, in spite of an observation or test result, the medical evidence appears insufficient to verify that an impairment of a certain magnitude exists, the physician may modify the impairment rating accordingly and then describe and explain the reason for the modification in writing.' [Citation.] Further, the Guides recites: 'In situations where impairment ratings are not provided, the Guides suggests that physicians use clinical judgment, comparing measurable impairment resulting from the unlisted condition to measureable impairment resulting from similar conditions with similar impairment of function in performing activities of daily living. The physician's judgment, based upon experience, training, skill, thoroughness in clinical evaluation, and ability to apply the Guides criteria as intended, will enable an appropriate and reproducible assessment to be made of clinical impairment. "Therefore, based upon the physician's judgment, experience, training, and skill each reporting physician (treater or medical-legal evaluator) should give an expert opinion on the injured employee's WPI using the chapter, table, or method of assessing impairment of the AMA Guides that most accurately reflects the injured employee's impairment. [Citation.] This does not mean, of course, that a physician may arbitrarily assess an injured employee's impairment. As stated by the AMA Guides, '[a] clear, accurate, and complete report is essential to support a rating of permanent impairment' and the report should 'explain' its impairment conclusions. [Citation.] In other words, a physician's WPI opinion must constitute substantial evidence upon which the [board] may properly rely, including setting forth the reasoning behind the assessment. . . "A physician's WPI opinion that is not based on the AMA Guides does not constitute substantial evidence because it is inconsistent with the mandate of Section 4660(b)(1).

"Section 4660, subdivision (b)(1), recognizes the variety and unpredictability of medical situations by requiring incorporation of the descriptions, measurements, and corresponding percentages in the Guides for each impairment, not their mechanical application without regard to how accurately and completely they reflect the actual impairment sustained by the patient. To 'incorporate' is to 'unite with or introduce into something already existent ... ,' to 'take in or include as a part or parts' ... , or to 'unite or combine so as to form one body.' [Citation.] Section 4660, subdivision (b)(1), thus requires the physician to include the descriptions, measurements, and percentages in the applicable chapter of the Guides as part of the basis for determining impairment. . .We cannot expand the statutory mandate by changing the word 'incorporate' to 'apply exclusively.' Nor can we read into the statute a conclusive presumption that the descriptions, measurements, and percentages set forth in each chapter are invariably accurate when applied to a particular case. By using the word 'incorporation,' the Legislature recognized that not every injury can be accurately described by the classifications designated for the particular body part involved. Had the Legislature wished to require every complex situation to be forced into preset measurement criteria, it would have used different terminology to compel strict adherence to those criteria for every condition. A narrower interpretation would be inconsistent with the clear provision that the Schedule—which itself incorporates the Guides [citation]—is rebuttable (§ 4660, subd. (c)), and it would not comport with the legislative directive to construe the workers' compensation statutes liberally 'with the purpose of extending their benefits for the protection of persons injured in the course of their employment. . . The court later added as follows: "The Guides itself recognizes that it cannot anticipate and describe every impairment that may be experienced by injured employees. The authors repeatedly caution that notwithstanding its 'framework for evaluating new or complex conditions,' the 'range, evolution, and discovery of new medical conditions' preclude ratings for every possible impairment. The Guides ratings do provide a standardized basis for reporting the degree of impairment, but those are 'consensus-derived estimates,' and some of the given percentages are supported by only limited research data. The Guides also cannot rate syndromes that are 'poorly understood and are manifested only by subjective symptoms.' To accommodate those complex or extraordinary cases, the Guides call for the physician's exercise of clinical judgment to assess the impairment most accurately. Indeed, throughout the Guides the authors emphasize the necessity of 'considerable medical expertise and judgment,' as well as an understanding of the physical demands placed on the particular patient."

". . .The city's argument is not persuasive. ***There is nothing in the 2004 amendment to section 4660 that precludes a finding of impairment based on subjective complaints of pain where no objective abnormalities are found.*** *If the 2004 amendment had required strict compliance with or the mechanical application of the AMA Guides in assessing impairment, then the city might have a valid point because, as Dr. Ramsey explained here, "aspects of pain that do not have any accompanying objective measurement abnormalities, do not rate anything in the AMA Guides, whether or not these problems interfere with one's activities." Thus, under a strict application of the AMA Guides, a condition that has no objective manifestation cannot be considered an impairment. As the Sixth District found in Milpitas Unified, however, if the Legislature had intended to require such an approach to the determination of permanent disability, "it would have used different terminology to compel strict adherence to th[e] criteria [in the AMA Guides] for every condition." (Milpitas Unified, supra, 187 Cal.App.4th at p. 822.) Instead, the Legislature provided only that "the 'nature of the physical injury or disfigurement' shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments ... ." (§ 4660, subd. (b)(1), italics added.) Here, Dr. Ramsey complied with this legislative directive by rating Cannon's condition by analogy to the part of the AMA Guides dealing with a limp and arthritis. The city's argument that he was not allowed to do so because Cannon's condition had no objective manifestation is without merit. . .The city's second argument is that under Milpitas Unified, a rating by analogy under Almaraz/Guzman is permissible only in complex or extraordinary cases. The city asserts, ipse dixit, that "[plantar fasciitis] is neither complex nor extraordinary" and therefore a rating by analogy was improper here. We agree with the board majority that this is an unwarranted interpretation of the Sixth District's decision in Milpitas Unified. What the Sixth District said was this: The Guides ... cannot rate syndromes that are 'poorly understood and are manifested only by subjective symptoms. To accommodate those complex or extraordinary cases, the Guides calls for the physician's exercise of clinical judgment to assess the impairment most accurately." (Milpitas Unified, supra, 187 Cal.App.4th at p. 823, italics added.) Thus, the Sixth District was using the term "complex or extraordinary cases" to describe "syndromes that are 'poorly understood and are manifested only by subjective symptoms,'" which the AMA Guides do not, and cannot, rate. It is undisputed that Cannon's condition—plantar fasciitis—is manifested only by his subjective experience of pain. Thus, his condition appears to fall right into the category of cases the Sixth District was describing in Milpitas Unified, where the AMA Guides "calls for the physician's exercise of clinical judgment to assess the impairment most accurately." (Milpitas Unified, supra, 187 Cal.App.4th at p. 823.) Dr. Ramsey performed that assessment here and determined that Cannon's plantar fasciitis resulted in a 7 percent whole person impairment equivalent to a limp with arthritis. The city has shown no error in that assessment and no error in the board's decision based on that assessment."*

Mrozek-Payne v. SCIF (2012) 40 CWCR 122, 2012 Cal.Wrk.Comp. PD Lexis 147 (Board Panel Decision)

Applicant sustained injury diagnosed as fibromyalgia and involving headaches, and chronic pain arising out of applicant's employment as vice president with an air and ground freight company. The parties agreed to utilize Dr. Seymour Levine as the AME in the matter. In his report, Dr. Levine first noted that the AMA Guides provides no standard method, chapter or rating for fibromyalgia, and therefore after listing the impact which the applicant's condition was having on ADLs which included widespread pain, non-restorative sleep, chronic fatigue, depression, anxiety, cognitive dysfunction, headaches, and joint complaints. Dr. Levine chose to utilize Chapter 13, The Central and Peripheral Nervous System, and Table 13-4 Criteria for Rating Impairment Due to Sleep and Arousal Disorders, placing the applicant within class 2 and applying a 15% WPI within the class range. In addition, Dr. Levine noted the applicant's emotional or behavioral impairment and utilized Table 13-8, Criteria for Rating Impairment Due to Emotional or Behavioral Disorders. Here Dr. Levine noted that the applicant had significant psychiatric/psychological symptoms which included depression and anxiety demonstrating Post Traumatic Stress Disorder and placed applicant in a class 2 within Table 13-8 for an additional 20% WPI. At hearing the applicant also put on VR testimony from Enrique Vega that the applicant was totally disabled. Without a complete explanation the CWCR notes that the WCJ made an award of 78% PD but noted that it was inappropriate to combine tables 13-4 with 13-8.

Editor's Comments: Three points about this decision. First, the importance of selecting the right AME is made clear by this decision. Second, up to this point in time defendants had believed that with the adoption of the AMA Guides that fibromyalgia was no longer ratable as it is a diagnosis though exclusion based on completely subjective complaints. Perhaps this decision merely stands for the proposition that the opinion of the AME will generally be followed "unless good cause exist" that that opinion is not substantial evidence. Last, consider the impact which this decision might have via application of the Guzman principle to LC 4660.1 post SB-863; Might this provided an end run around the preclusion of PD for sleep, sex, and psych under LC 4660.1

As it relates to VR evidence, Mrozek-Payne v. SCIF 40 CWCR 218, returned to the WCAB on the issue of whether VR evidence constitutes substantial evidence where the opinion relies solely on a GAF score to rebut a rating. WCAB held that it does not, noting "the vocational expert must bring something more to the table than just a reading of the medical reports." See also, Rodriques v. WCAB 77 CCC 669 (Writ Denied) in which vocational expert testimony held not substantial evidence where expert did not meet with the injured worker, perform testing, assess impact of limited language skills, or the impact of non-industrial medical conditions. Also see, Dahl v, Contra Costa County 40 CWCR 117 in which unrebutted VR testimony established a diminished earning capacity greater than the rating but less than 100%. Girous Glass v. WCAB 77 CCC 730 (Writ Denied) in which unrebutted VR evidence was utilized to establish an award of total permanent disability without apportionment where the VR testimony was that based solely on industrial factors of disability applicant was precluded from the labor market, despite medical evidence of non-industrial conditions and factors of disability.

Applicant sought reconsideration which was granted. By Panel decision the Board seemed to focus on the fact that Dr. Levine was an AME and that the parties had presumably selected Dr. Levine because of "his neutrality and expertise". Next the Panel determined that Dr. Levine's opinion constituted substantial evidence as he incorporated the description of impairment with impact on ADL's. Noting that the AMA Guides contained no standard rating for fibromyalgia there was no scheduled rating to rebut and the AME was free to utilize an alternate method, chapter or table within the four corners of the Guides provided his methodology was adequately explained. Recon granted with direction.

Frazier v. State of California, Department of Corrections and Rehabilitation (10/13) ADJ8008017 (WCAB Panel Denied)

Applicant sustained a cardiovascular and heart CT injury arising out of his employment with the Department of Corrections. The AME diagnosed the applicant with hypertension with left ventricular hypertrophy. The AME discussed the fact that the condition while presenting certain risks was essentially asymptomatic. Although the 5th Edition of the AMA Guides, Table 4-2 resulted in a 30-49 WPI, the AME applied the low end of this range of 30%. However, the AME went on to discuss the "more accurate" rating would be to apply the 6th Edition of the AMA Guides, resulting in a 24% WPI. The WCJ gave rating instructions for 24% based upon the 6th Edition.

See also, Athens Administrators v. WCAB (Kite) 78 CCC 213 (Writ Denied) which held that under a quasi-Guzman analysis adding rather than combining 20% WPI on each hip was the more "accurate" way to describe WPI.

See also, Garcia v. WCAB 78 CCC 991 (Writ Denied) held that use by PTP of the "inability to compete in the open labor market" was not proper basis to justify application of Guzman to allowing an alternate rating, and a physician may not utilize alternate chapter, table or method in the AMA Guides simply to achieve a desired result. Rather the physician should focus on the impact the industrial injury has had on ADLs and why the standard rating under the standard method, chapter or table is not "accurate", with an emphasis on objective findings.

*See also, Mrozek-Payne v. SCIF (2012) 40 CWCR 122 (Board Panel Decision) which diagnosis of fibr*omyalgia and involving headaches, and chronic pain based arising out of applicant's employment as vice president with an air and ground freight company rateable under Guzman.

Defendant sought reconsideration. The WCAB reversed the WCJ holding that an opinion based upon the 6th Edition can not constitute "substantial medical evidence" because, as a matter of law, the opinion rests on an incorrect legal premise, that being that *Guzman* allows a rating outside the four corners of the 5th Edition of the AMA Guides.

Sanchez v. Washington Mutual Bank 2012 Cal.Wrk.Comp.PD Lexis 487

Applicant alleged successive injuries including a CT for the period ending 8/28/07 to bilateral knees, temporomandibular joint, diabetes, hypertension, psychiatric injury, central nervous system/sleep disorder, shoulders, elbows, hands, and fingers. The opinion of the PTP applied *Guzman* which resulted in a significantly higher level of PD than that of QME, who did not. The WCJ followed the opinion of the PTP in making an award of 39% with respect to the specific injury of 12/28/06 and a 76% award with respect to the CT for the period ending 8/28/07. On reconsideration defendant argued that opinion of the PTP did not constitute substantial evidence.

The Board by panel decision upheld the WCJ noting first that the WCJ may properly rely on either the opinion of the PTP or the QME whichever is determined to be more persuasive, provided the opinion selected constitutes substantial evidence. Focusing on ADLs and particularly self-care activities, the PTP utilized an alternate method under *Guzman.* Recon denied

Costa v. Hardy Diagnostic (SCIF) (2007) 72 CCC 1492 (En Banc Decision)

In *Costa I,* the Board ruled that the applicant did not meet his burden of proof in establishing that the 2005 Permanent Disability Rating Manual was invalid. Applicant was held to be entitled to present expert testimony in attempting to meet this burden of proof. Further, the reasonable expert costs and fees incurred by applicant are to be reimbursed by defendant to applicant pursuant to LC Section 5811. In a complex series of procedural events, defendant sought reconsideration, raising a number of issues. Most important were defendant's assertion that (1) LC Section 4660 does not allow rebuttal evidence to be presented to invalidate the 2005 PDRM; (2) defendant's objection to the admissibility of the applicant's expert testimony should have been sustained; (3) the deficiencies in the expert's testimony exculpated the defendant from reimbursing applicant for the expert witness fees; and (4) that the costs of the rehabilitation expert are not recoverable under LC 5811.

See also, Magana v. Wausau Business Ins. Corp (2007) 35 CWCR 242 where a panel held that the schedule is prima facie evidence of the percentage of PD. Although applicant attacked the FEC through the testimony of a VR expert, that testimony failed to demonstrate that the applicant's diminished future earning capacity was not appropriately reflected by the FEC in the PD rating schedule.

See also, Lyngso Garden Materials, Inc. v. WCAB (2007) 72 CCC 1097 in which VR expert witness fees were awarded as costs under LC 5811 where the applicant presented evidence attacking DFEC which included VR expert testimony.

The Board first held that in all proceedings the costs are allowable under LC 5811 where the expert qualifies as an expert under Evidence Code Section 720. Second, that a VR counselor is qualified to present expert testimony as to diminished future earning capacity. Further, for the expert fees and costs to be reimbursable, they must be based on a correct and accurate set of facts or assumption so that the opinion is of value to the trier of fact and not worthless. Expert fees and costs are reimbursable even where the applicant is unsuccessful is the attempt to invalidate the 2005 PDRM.

Bank of America v. WCAB (Chand)(2014, 1st Appellate District) 79 CCC 1075, 2014 Cal.Wrk. Comp. LEXIS 105

Applicant sustained injury to various parts of body to include left knee, left shoulder, head and psyche as the result of an assault by a customer during her employment as a manager with B of A. Evidence included opinions from AME Fienberg with respect to the physical/orthopedic injury; PQME Alan Kipperman on psychiatric injury; and Maria Toyofuk as defendant's vocational expert. AME Fienberg limited the applicant to semi-sedentary work with use of a cane and although his standard rating under the AMA Guides was a zero, he applied a Guzman analysis and felt the most accurate measure of applicant's disability produced 25 percent WPI utilizing table 13-15, class 3. AME Fienberg went on to note that the high level of disability was the combination of the physical injury with significant psychiatric co-morbidity. PQME Kipperman ultimately determined the applicant to have a GAF of 50 but to also have a sleep disorder which rated 29 percent WPI. PQME Kipperman also opined the applicant appeared to meet the criteria under the Socials Security regulation for mental impairment and therefore should properly be 100% disabled in the worker's compensation system. Last, PQME Kipperman found no apportionment in that even if some level of subtle nonindustrial neurocognitive deficits existed, the industrial psychiatric symptom by themselves rendered the applicant totally disabled. The defendant's VR expert, Maria Toyofuku who conducted a DFEC evaluation and issue a report finding the applicant unemployable and unable to benefit from VR services.

Editor's Comments: This decision should be carefully read and cautiously applied. First, the facts were overwhelming. Recall that it was the defendant's own VR expert felt the applicant was totally permanently disabled. Second, it was the opinion of the AME that the physical injury was significant and legitimate. The PQME Psych also felt theapplicant was totally permanently disabled. Last, the mechanism of injury was a violent assault. However, this editor does not believe that the QME may pass over the standard rating merely by "explaining" an alternate rating. Rather, the careful QME should first provide the standard rating under the standard method, chapter or table, and explain why it is either accurate (complete) or inaccurate (less than complete) focusing on the impact which the injury has had on the ADLs. It is only after doing so that the PQME may proceed to utilize an alternate method, chapter or table explain why the alternative method is more accurate, more complete. An exception to this rule might be where no standard rating within the AMA Guidelines exists. See City of Sacramento v. WCAB (Cannon) (2013, 3rd Appellate District) 222 Cal.App.4th 1360, 2013 Cal.App.Lexis 1078, 79 CCC 1

See also, Reese v. Microdental Laboratores 2014 Cal.Wrk.Comp.P.D. LEXIS 625, where PQME applying Guzman used by analogy Class II cardiovascular impairment for an additionally 10% increase for "loss of exercise capacity/deconditioning" resulting from orthopedic injury as most accurate reflection of applicant's impairment.

At MSC the defense attorney listed the reports of the AME, PQME, and Maria Toyofuku (defendant's VR Expert). At trial defendant sought to withdraw from evidence the report of Maria Toyofuku (defendant's VR Expert). The WCJ found for applicant based on the totality of the evidentiary record awarding a 100% disability award.

Defendant sought reconsideration. Defendant first argued that the WCJ improperly allowed into evidence the VR opinion of Maria Toyofuku after defendant had sought to withdraw it from evidence. The WCAB upheld the WCJ noting that LC 5502 does not limit the use of documentary evidence to the party listing the item of evidence on the pretrial conference statement.

Defendant also argued that the WCJ improperly relied on the opinion of AME Fienberg as Dr. Fienberg had failed to explain why the standard rating under the AMA guidelines was not accurate. In addressing this argument the court noted that AME Fienberg need not explain why the standard rating is inaccurate, but rather merely explain why his rating is accurate focusing on the impact which the injury has on ADL. Dr. Fienberg did so by noting the impact which the applicant's knee injury had on the applicant's ability to get out of bed, walking and the need for "constant use of a cane."

Last, on the issue of apportionment, the fact that PQME Kipperman found no apportionment with respect to the psychiatric injury was supported for two reasons. First, PQME Kipperman had noted the applicant had prior to the industrial injury had both worked at her current job and had been married for over 30 years. The applicant had also raised two high achieving daughters. Second, even assuming some measure of non-industrial cognitive impairment, the industrial psychiatric disability was by itself totally disabling.

Writ Denied.

Davis v. Walt Disney, 2014 Cal Wrk Comp PD LEXIS 52.

Applicant sustained injury to back which resulted two successive back surgeries. The AME first utilized table 15.5 placing the applicant in a category IV finding 26% WPI with a 3% add-on for pain for an overall level of 28% WPI. With a very limited analysis explaining the "how and why" the AME determined the standard rating was not accurate and applying *Guzman* turned to Figure 15.19. The AME also failed to explain his "rating methodology". Nor did the physician adequately explain "how and why" he arrived at his alternate rating. It appeared that the WCJ believed that the physician deemed the injured worker to have a limitation to light work, which would translate to a 50% under the 1997 PDRS. In rejecting the opinion of the AME, the WCJ seem to conclude that the physician was merely using Figure 15-19 to "achieve this desired result." The WCJ held that a physician may not use the Guides "to conduct a fishing expedition…simply to achieve a desired result." WCJ holding for defendant upheld by WCAB.

See also, Powell v. WCAB (City and County of San Francisco) (2014, 1st Appellate District) 79 CCC 1505, 2014 Cal.App.Unpub. LEXIS 8344, which held that in determining applicant's appropriate occupational group, focus should be on applicant's physical work activities, not on characterization of applicant's job duties as "managerial" where the physical activity is an 'integral part of the workers' occupation'. The "dual occupation rule" requires that the "employee is entitled to be rated for the occupation which carries the highest factor in the computation of disability". (See also, Dalen v. WCAB (1972) 26 Cal.App.3rd 497, 37 CCC 393; National Kinney v. WCAB (1980) 113 Cal.App.3rd 203, 45 CCC 1266; LC 3202)

V. Rating Under The Ogilivie Analysis.

> *Editor's Comments and Analysus: The following are 2016 cases involving applicant of the Ogilivie principle.*
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> *Opinion of VR expert not substantial evidence because the opinion was based on analysis of "similarly situated workers" without consideration of "amenability to vocational rehabilitation" in evaluating level of his diminished future earning capacity, citing Contra Costa County v. W.C.A.B. (Dahl) (2015) 240 Cal. App. 4th 746, 193 Cal Rptr. 3d 7, 80 Cal. Comp. Cases 1119. Graham v. Ecolab, 2016 Cal.Wrk. Comp. P.D. Lexis 119 (Panel Decision) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4][a], 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.11, 7.12; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 8; Sullivan On Comp, 10.19, Rebutting Schedule Under Ogilvie].*
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> *Attorney's Fees-Vocational Rehabilitation Evaluations- Applicant attorney not entitled to fees under Labor Code § 5710 for applicant's meeting with defendant's vocational rehabilitation expert. SMITHv. Lee's Concrete Materials, Inc, 2016 Cal. Wrk. Comp. P.D. LEXIS 274 (Panel Decision); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 20.02[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.01; Sullivan On Comp, 10.19, Rebutting Schedule Under Ogilvie.]*

Whereas a rating under the *Guzman* analysis is an attack on the accuracy of the Whole Person Impairment under a standard rating based entirely on expert medical opinion, the analysis under *Ogilivie* is an attack on the accuracy of the DFEC modifier generally through the use of expert vocational evidence. A rating under *Ogilvie* appears to require (1) expert vocational evidence establishing that (2) the impact which the impairment has on injured worker's amenability to rehabilitation and therefore upon the injured worker's Diminished Future Earning Capacity, focusing on establishing that the worker's diminished future earning capacity is greater than the scheduled DFEC. While the focus of the VR evidence/opinion should be on impact on ADL's, the VR opinion may arguably consider the impact on the injured worker's ability to perform work. Where the scheduled DFEC is not an accurate reflection of the extent to which applicant's access to the labor market is limited, the Board may consider VR evidence in making an award of PD based solely on the worker's diminished loss of future earning capacity under a quasi-*Leboeuf* analysis; *"Ogilboeuf"*

However, even under an *Ogilivie* analysis the employer should not be liable for PD which is not the direct and sole cause of the industrial injury. This would exclude the injured worker's DFEC attributable to non-industrial causation such as a lack of education, language deficiencies, and both pre-existing and non-industrial physical disability.

In the end the *Ogilivie* analysis appear to be morphing into *Leboeuf* analysis to rebut the scheduled DFEC.

City and County of San Francisco v. WCAB (Ogilvie) (1st Appellate District, 2011) 197 Cal.App.4th 1262, 76 CCC 624, 2011 Cal. App. LEXIS 988; 76 Cal. Comp. Cases 624

Applicant sustained an admitted injury to right knee, low back and neck on 4/1/04 arising out of her employment as a bus driver. Applicant was 59 years old on the date of injury. Applicant's QME determined the applicant to have a 20% WPI under the AMA Guidelines, but further noted that the applicant was limited due to her right knee condition to semi-sedentary work. With respect to the applicant's spine, applicant's QME also described a 10-13% WPI with respect to the lumbar spine, and 15-18% with respect to the cervical spine. He also stated that the applicant's spine precluded the applicant from substantial work and described additional work preclusion of "a loss of approximately 80% of her pre-injury capacity for performing such activities as bending, stooping, lifting, pushing, pulling, climbing, or other activities involving comparable physical effort".

With respect to apportionment applicant's QME apportioned 20% of the right knee and 66% of the spinal disability to non-industrial causation. Applicant's QME also concluded that the applicant could no longer work in his usual and customary occupation. Defendant's QME found a much lower level of impairment for the combined rating of 10% impairment resulting from the knee and spine injury.

The matter ultimately proceeded to trial on the issue of PD, apportionment and attorney's fees. At trial, the parties stipulated that under the *AMA Guides*, the applicant's disability would rate at 28% for $26,700. This was a compromise as between the reporting QMEs. At trial, applicant sought to rebut the agreed 28% scheduled rating. Applicant testified at trial that she took a service retirement and was receiving Social Security Disability, that she believed she was unable to return her job as a bus driver, and that she was not offered modified or alternative employment by Defendant. Both parties also put on expert VR evidence through reports on the issue of diminished future earnings capacity.

After trial, the WCJ awarded the applicant 40% PD, holding that the applicant had rebutted the 2005 Schedule stating that a 28% award "would not fairly, adequately, and proportionally compensate applicant for her $158,025.92 to $178,562.88 in lost future earnings" as determined by the Vocational Rehabilitation experts. Defendant sought reconsideration.

". . .Employers must compensate injured workers only for that portion of their permanent disability attributable to a current industrial injury, not that portion attributable to previous injuries or to nonindustrial factors. . .An employee effectively rebuts the scheduled rating when the employee will have a greater loss of future earnings than that reflected in a rating because, due to the industrial injury, the employee is not amenable to rehabilitation. . .

. . . A scheduled rating may be rebutted when a claimant can demonstrate that the nature or severity of the claimant's injury is not captured within the sampling of disabled workers that was used to compute the adjustment factor. . .in that it does not accurately reflect that worker's true diminished earning capacity due to an industrial injury. . .

. . .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. . .

. . .to rebut the application of the rating schedule on the basis that the scheduled earning capacity adjustment was incorrect, the employee must demonstrate an error in the earning capacity formula, the data [used in the formula] or the result derived from the data in formulating the earning capacity adjustment. Alternatively, an employee may rebut a scheduled rating by showing that the rating was incorrectly applied or the disability reflected in the rating schedule is inadequate in light of the effect of the employee's industrial injury. . ."

Editor's comments: Although raising more questions than answers provided, I believe we can now conclude the following: First, the Rating Schedule is rebuttable and may be rebutted one of three ways: (1) a factual error in the calculation of a factor in the rating formula or application of the formula; (2) the omission of medical complications aggravating the applicant's disability in preparation of the rating schedule itself, or (3) that , due to the industrial injury, the applicant is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating. Further, as a general rule an increase through application of Ogilvie will require: (1) That medical evidence exist (focusing on the impact which the injury has had on the ADLs) that the applicant is precluded from his usual occupation; (2) That the applicant's individual DFEC is greater than the Schedule FEC demonstrated through VR evidence comparing similarly situated employees with the applicant; (But see Dahl, infra) (3) Evidence that the DFEC is not attributable to impermissible factors (meaning that the DFEC is directly, exclusively, and solely caused by the industrial injury – "direct causation), and last (4) Evidence as to calculation (Again see Dahl, infra.). This last element has the applicant's attorney arguing that the percentage of loss of future earning capacity is merely the award of PD to the applicant without more. The real difficulty for the applicant's bar is the requirement that impermissible factors/Montana factors/Direct Causation which should provide defendants with a significant defense to all claims involving Ogilvie. Such factors might include a weak economy, or where the applicant is illiterate, lacks education, or is not proficient in speaking English. Further, pre-existing physical conditions unrelated to the subject industrial injury claim which are in part responsible for a portion of the applicant's higher than scheduled FEC, would also not support an increased in the FEC modifier and application of Ogilvie. This Editor would suggest the Ogilvie principle is now sounding more and more like the law of apportionment in that because of the "direct causation" requirement the defendant will be seeking to establish that the DFEC is the result of non-industrial factors, rather than the industrial injury. Also noteworthy is the change in the schedule FEC which now requires that the FEC modifier for all injuries post 1/1/13 be 1.4 which makes rebutting the schedule arguably even more difficult for the applicant.

On reconsideration, the WCAB held that although the new schedule was "prima facie evidence of the percentage of

permanent disability. . . the Schedule may be rebutted".

The WCAB went on to hold in summary that: (1) the DFEC portion of the 2005 Schedule is rebuttable; (2) the DFEC portion of the 2005 Schedule ordinarily is *not* rebutted by establishing the percentage to which an injured employee's future earning capacity has been diminished; (3) the DFEC portion of the 2005 Schedule is *not* rebutted by taking two-thirds of the injured employee's estimated diminished future earnings, and then comparing the resulting sum to the permanent disability money chart to approximate a corresponding permanent disability rating; and (4) the DFEC portion of the 2005 Schedule may be rebutted in a manner consistent with Labor Code § 4660 – including section 4660(b)(2) and the RAND data to which section 4660(b)(2) refers.

The DFEC rebuttal approach that is consistent with section 4660 and the RAND data to which it refers in essence, consists of: (1) obtaining two sets of wage data (one for the injured employee and one for similarly situated employees), generally through the Employment Development Department (EDD); (2) doing some simple mathematical calculations with that wage data to determine the injured employee's individualized proportional earnings loss; (3) dividing the employee's whole person impairment by the proportional earnings loss to obtain a ratio; and (4) seeing if the ratio falls within certain ranges of ratios in Table A of the 2005 schedule. If it does, the determination of the employee's DFEC adjustment factor is simple and relates back to the Schedule. If it does not, then a non-complex formula is used to perform a few additional calculations to determine an individualized DFEC adjustment factor.

The WCAB held that the WCJ did not follow the correct method of determining whether and how the DFEC portion of the 2005 Schedule may be rebutted. The WCAB reversed and remanded for further proceedings consistent with their written decision.

Defendant sought review from the First District, Court of Appeal. In reversing the holding of the WCAB, the Court upheld the principle of law, writing *"the terms 'diminished future earning capacity' and 'ability to compete in an open labor market' suggest to us no meaningful difference"*. The Court also noted that the presumption which the rating schedule enjoys is not conclusive but merely rebuttable. Next, citing and extensively discussing *LeBoeuf v. WCAB (1983) 34 Cal.3rd 234* the Court noted that it *"[would] limit [the application of LeBoeuf] to cases where the employee's diminished future earnings are directly attributable to the employee's work related injury, and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency to speak English, or an employee's lack of education."* The Court concluded noting that to rebut the scheduled DFEC, the employee must establish the diminished future earning capacity was solely and directly caused by the industrial injury in that the disability reflected in the rating schedule is inadequate in light of the effect of the employee's industrial injury. Non-industrial factors must be considered in making this determination.

Contra Costa County v. WCAB (Dahl) (2015 First District Court of Appeals) 240 Cal.App. 4th 746, 80 CCC 1119.

Applicant suffered a cumulative trauma injury to her neck and right shoulder. The parties agreed that the strict rating of the AMA *Guides* would be 59 percent permanent disability. However, the employee argued that this rating failed to adequately consider her DFEC. The employee and the employer each retained a vocational rehabilitation expert on this issue. At trial the applicant's VR expert, Jeff Malmuth testified that (1) he had relied on the Medical opinion of AME, Mechel Henry, regarding limitations due to pain; (2) that non-industrial factors affected the applicant's ability to get a job; and (3) that Dahl "cannot compete successfully with uninjured job applicants, given the entire constellation of factors, despite having *some* earning capacity." Although Mr. Malmuth opined that "the most accurate measure of [Dahl's] lost earning capacity" was about 87 percent because the jobs that would use her education were precluded by her injury because of her limitations including her inability to use a computer. However, on cross- examination, he testified that (1) the applicant would be helped by vocational rehabilitation, including voice recognition and other things; (2) He acknowledged that Dahl was a good rehabilitation candidate and could go to school and get a master's degree; and (3) She could employ vocational rehabilitation to have access to more of the labor market, and if she did her earning capacity would rise.

The Court started by summarizing the holding of Ogilvie and discussing LeBoeuf writing:

"First, the court concluded that the Legislature left unchanged the case law allowing "the schedule to be rebutted when a party can show a factual error in the application of a formula or the preparation of the schedule." (Ogilvie, supra, 197 Cal.App.4th at p. 1273.) Second, the Legislature also left intact the cases, including LeBoeuf, recognizing "that a scheduled rating has been effectively rebutted . . . when the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating." (Ogilvie, supra, 197 Cal.App.4th at p. 1274.) The court interpreted LeBoeuf and its progeny as limited in application "to cases where the employee's diminished future earnings are directly attributable to the employee's work-related injury, and not due to nonindustrial factors." (Id. at pp. 1274–1275.) Third and finally, the court held "[a] scheduled rating may be rebutted when a claimant can demonstrate that the nature or severity of the claimant's injury is not captured within the sampling of disabled workers that was used to compute the adjustment factor." (Id. at p. 1276.) . . .And although the parties' "vocational experts determined that Ogilvie's anticipated loss of future earnings will be greater than reflected in a permanent disability award based on the rating schedule," the court remanded for further proceedings because it could "not determine on this record the degree to which the experts may have taken impermissible factors into account in reaching their conclusions." (Ogilvie, supra, 197 Cal.App.4th at p. 1277.). . ."

"The court [in LeBeouf] found this was error, stating: "Just as retraining may increase a worker's ability to compete in the labor market, a determination that he or she cannot be retrained for any suitable gainful employment may adversely affect a worker's overall ability to compete. Accordingly, that factor should be considered in any determination of a permanent disability rating." (Id. at p. 243.)

In Ogilvie, the court concluded the LeBoeuf approach was limited to cases "where the employee's diminished future earnings are directly attributable to the employee's work-related injury, and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education." (Ogilvie, supra, 197 Cal.App.4th at p. 1275.) "This application of LeBoeuf hews most closely to an employer's responsibility . . . to 'compensate only for such disability or need for treatment as is occupationally related.' "

The range of the evidence at trial on PD was as follows: AME – 59%; Defendant's VR expert 30%; Applicant VR expert 87%. The WCJ reviewed the medical and vocational rehabilitation evidence and found that, if there were a viable method of rebuttal under *Ogilvie*, it would have to be the one based on *LeBoeuf*.

Therefore, lacking any "quantitative" measure for less than 100 percent permanent disability,

"The first step in any LeBoeuf analysis is to determine whether a work-related injury precludes the claimant from taking advantage of vocational rehabilitation and participating in the labor force. This necessarily requires an individualized approach. For example, in Gottschalks v. Workers' Compensation Appeals Board (2003) 68 Cal.Comp.Cases 1714, 1716 (writ denied), one of the compensation cases cited in Ogilvie, the WCAB denied an employer's petition for reconsideration of a 100-percent disability rating where Oxycontin, a medication used to treat the claimant's industrial injury, had a " 'severe [e]ffect' " on the claimant's ability to work. The focus was on the limitations flowing from the claimant's particular condition, not the earning potential of similarly situated individuals who might be subject to different limitations. It is this individualized assessment of whether industrial factors preclude the employee's rehabilitation that Ogilvie approved as a method for rebutting the Schedule. The Ogilvie court did not sanction rebuttal of the statutory Schedule by a competing empirical methodology—no matter how superior the applicant and her expert claim it may be.

In this case, the County presented evidence Dahl's injury did not prevent her from taking advantage of retraining opportunities or finding another job. Dahl's medical evaluator has not provided any formal work restrictions. Moreover, Cohen, the County's vocational expert, concluded Dahl had the ability to work in selected occupations in the open labor mark, including sedentary, semi-sedentary and light work positions. Cohen also found Dahl possessed above-average problem solving, reading, spelling and arithmetic skills, commensurate with the college degree she earned in 2003, indicating she has the cognitive ability to perform any of the occupations for which her college degree prepared her.

Malmuth, Dahl's vocational expert, did not present contrary evidence. He testified Dahl had at least some earning capacity, and concluded there was no medical evidence she could not work eight hours per day. When asked if Dahl was an ideal candidate for rehabilitation, Malmuth responded that, with some training, including voice recognition and other things, "she would be helped." Malmuth further testified Dahl performed "very well" on testing, and that her college education could increase her earning capacity. Malmuth also opined that, even with her injury, Dahl could perform certain jobs without retraining. . ."

the WCJ felt constrained to hold that the injured worker had not rebutted the 2005 Schedule, leaving her with a 59 percent permanent disability rating. The WCJ explained that, since the injured worker was not permanently totally disabled, he was not able to consider the *LeBoeuf* rebuttal to the DFEC component as set forth in *Ogilvie*. Applicant sought reconsideration.

On reconsideration, the WCAB discussed the findings and holding of the *Ogilvie* court and reviewed the theory behind the DFEC rebuttal method based on LeBoeuf. When the Supreme Court decided *LeBoeuf* in 1983, Labor Code Section 4660(a) included the same components for determining a permanent disability rating as exist today, except for the DFEC modifier. Instead of today's DFEC component, the former permanent disability rating took into consideration the injured worker's "ability to compete in the open labor market." The *Ogilvie* court suggested that these two terms were interchangeable. Therefore, said the WCAB panel in Dahl, any standard that existed using the old terminology (ability to compete in the open labor market) should continue to be viable under the new terminology (DFEC). Thus, *Dahl* appears to stand for the proposition that the *LeBoeuf* rebuttal method applies in all cases, not merely in cases in which the injured worker is 100 percent disabled.

> *". . . **We are skeptical of WCAB's conclusion that an employee may invoke the second Ogilvie rebuttal method where the inability to rehabilitate results in less than a 100- percent permanent disability. [fn 6] However, we need not decide this issue since the County did not seek a writ from the WCAB decision adopting the partial impairment rule. In any event, even if an employee's ability to rehabilitate need only be impaired (and not eliminated) in order to rebut the schedule, Dahl failed to make such a showing here.** As discussed above, both Dahl and the County's rehabilitation experts agreed Dahl was a good rehabilitation candidate, and the evidence suggests she can increase her earning potential through retraining. There is no evidence that the injury even limited her rehabilitation prospects.*
>
> *Dahl argues she successfully rebutted the scheduled rating because the state ceased providing a vocational rehabilitation program for injured workers as of January 1, 2003. We disagree. As the County points out, section 4658.5 does provide for workers' compensation vouchers that may be used to pay tuition and other expenses required for retraining. Specifically, the statute provides that an injured employee who does not return to work for the employer within 60 days of the termination of temporary disability shall be eligible for a voucher for education-related retraining or skill enhancement at a state-approved or accredited school. (§ 4658.5, subd. (b).) For disability awards between 50 and 99 percent, the voucher may be up to $10,000. (§ 4658.5, subd. (b)(4).) The applicant in Ogilvie was presumably eligible for identical benefits, as this provision was last amended in 2003. Moreover, Ogilvie holds claimants must show they are not amenable to rehabilitation due to their industrial injury, not due to extraneous factors, such as the cessation of certain state-sponsored rehabilitation benefits. (Ogilvie, supra, 197 Cal.App.4th at pp. 1274–1275.) To hold otherwise would mean every employee could now rebut their scheduled rating using a LeBoeuf analysis, turning a limited exception into the general rule. There is no indication Ogilvie intended the second rebuttal method to be so broad and all-encompassing.*
>
> *In sum, we find WCAB's approach in this case flies in the face of Ogilvie and the 2004 amendments to the workers' compensation scheme. Under the 2004 amendments, a claimant's scheduled rating is presumptively correct. Ogilvie confirmed the Legislature meant what it said, and that claimants may not rebut their disability rating merely by offering an alternative calculation of their diminished future earning capacity. While Ogilvie found the 2004 amendments did not overthrow certain long-held approaches to calculating earning capacity, it clearly did not intend those approaches to be construed so broadly as to return us to the ad-hoc decision making that prevailed prior to 2004. Following the WCAB's approach in this case would do just that. Claimants could rebut their presumptively correct disability rating merely by presenting an analysis that shows a greater diminished future earning capacity than that determined by applying the Schedule. As Ogilvie makes clear, this approach is no longer permissible.*
>
> *Fn 6*
>
> *For the same reason as the rule advocated by Malmuth allowing rebuttal whenever an employee shows she cannot be expected to earn the same as she did prior to injury, a partial impairment rule would allow for rebuttal in a wide swath of cases. Many injured employees cannot return to the precise position they held before their injury or to an equally remunerative one. Ogilvie does not appear to contemplate rebuttal of the scheduled rating in this circumstance, since the Schedule's formula for determining diminished future earning capacity takes into account such limitations. Notably, the two cases cited by Ogilvie which found claimants were unable to rehabilitate involved injuries that rendered the claimants unable to return to any type of gainful employment. (See LeBoeuf, supra, 34 Cal.3d at pp. 239–240; Gottschalks v. Workers' Compensation Appeals Bd., supra, 68 Cal.Comp.Cases at p.1716.)"*

Stated alternatively, the WCAB held that (1) the decision in *Ogilvie* does not preclude a finding of permanent disability that accounts for the injury's impairment of rehabilitation and its effect upon injured worker's DFEC where PD is less than total, and (2) application of a *LeBoeuf* type analysis in cases of partial permanent disability may be properly applied in cases such as this where employee has rebutted the 2005 Schedule by a showing that the applicant will have a greater DFEC than reflected in scheduled rating, and (3) that such analysis requires expert opinion on effect of injury's impairment on worker's amenability to rehabilitation and effect of that on DFEC.

At trial after remand Mr. Malmuth again confirmed that Dahl was a good rehabilitation candidate. Nonetheless, he attempted to establish Dahl's future earning capacity based not on her individual assets and detriments, but on those of a theoretical group of similarly situated employees. According to Malmuth, this approach precluded consideration of Dahl's education. He opined that the scheduled rating understated her loss of future earning capacity. Defendant's VR expert adopted a more individualized approach, though he declined to consider Dahl's felony conviction. He concluded that Dahl's scheduled rating actually overstated her loss of future earning capacity. The WCJ followed the opinion of Malmuth's

method as more persuasive than Cohen's because it eliminated from the diminished future earning capacity calculation any impermissible factors not stemming from Dahl's industrial injury. The WCJ assigned Dahl's a total permanent disability of 79 percent.

Defendant sought reconsideration. The WCAB in affirming concluded that "complete lack of amenability to vocational rehabilitation" is not "necessary before a LeBoeuf analysis may be properly applied." The WCAB failed however to discuss what evidence, if any, including Malmuth's computations, demonstrated that Dahl's injury impaired her amenability to rehabilitation, much less that such impairment was the cause of greater loss of earning capacity than the scheduled rating reflected.

Defendant sought review arguing that applicant had failed to rebut her scheduled rating by showing her injury precluded vocational rehabilitation. The First District Court of Appeal reversed in a very pro-defendant/employer decision. The Court held that (1) under the 2004 amendments, a claimant's scheduled rating is presumptively correct; (2) That claimants may not rebut their disability rating merely by offering an alternative calculation of their diminished future earning capacity; (3) That while Ogilvie found the 2004 amendments did not overthrow certain long-held approaches to calculating earning capacity, it clearly did not intend those approaches to be construed so broadly as to return us to the ad-hoc decision making that prevailed prior to 2004; and (4) that to rebut the schedule DFEC the applicant must establish that he/she is not "amenable to vocational rehabilitation" as a direct result of the subject industrial injury and the impact which that has had on future earning capacity for this individual applicant.

Editor's Comments: From my prospective, Dahl should have all defendants filled with holiday cheer well into the new year. Clearly Dahl affirms that it is the applicant who has the burden of proof on the issue of rebutting the DFEC (Ogilvie) and/or establishing an increase in PD based upon VR evidence (Leboeuf) which in part requires that the applicant establish whether or not the applicant is "amenable to rehabilitation"/can benefit from vocational rehabilitation.

*But before the defendants start the celebration a couple of cautionary comments. First, although the First District Court may be "skeptical" of applying Leboeuf to cases less than 100%, we on the defense side should be reminded that Lebouef, as well as subsequent decisions applying the Leboeuf doctrine involved an increase in PD based on VR evidence where less than total disability was awarded. Second, Dahl may be nothing more than perhaps overreaching by the applicant through the use of less than complete VR evidence/data, i.e. applicant's VR expert had no evidence on the issue of whether the applicant was "amenable to rehabilitation", and no data on the impact which vocational rehabilitation might have on the applicant's individualized future earning capacity. A key item of evidence in the Dahl decision was that both VR experts agreed that the applicant would benefit from VR services/was a good VR candidate. Last, note that an Ogilvie/Lebouef/**'Ogilboeuf'** analysis appears to be based upon the individual applicant and not "similarly situated employees". In summary, Dahl probably stands for nothing more than PD may be established on VR evidence provided the applicant has attempted through completion vocational rehabilitation or otherwise, thereby establishing whether or not the applicant is "amenable to rehabilitation"/can benefit from rehabilitation, and thus the impact which rehabilitation has on the applicant's individual FEC. Even so, Dahl certainly is not a win for the applicant's bar, and at best an uncertain win for the defense bar.*

See also, Dreher v. Alliance Residential (2015) 2015 Cal.Wrk.Comp. P.D. LEXIS 345 (Split Panel Decision) which remanded for developments of the record on issue of whether applicant was "unable/able to participate in gainful employment and was or was not a good candidate for vocational rehabilitation" and whether medical opinion of AME constituted "substantial evidence" on this issue.

Barrett Business Services, Inc., PSI v. Workers' Compensation Appeals Board, (Gallagher) (Court of Appeal, 2nd Appellate District) 78 Cal. Comp. Cases 1318; 2013 Cal. Wrk. Comp. LEXIS 187

Applicant suffered an accepted industrial injury to his lumbar spine and psyche on 12/29/2006 while employed as a production manager for Defendant. AME, Dr. Alexander Angerman, evaluated Applicant finding that Applicant had a WPI of 35 percent under the AMA *Guides*. He further concluded that Applicant was unable to compete in the open labor market, based on his narcotics intake.

At deposition the AME, testified that Applicant's total disability was caused by a combination of his spinal impairment and the side effects of his medications rendering Applicant unable to compete in the open labor market. The AME also testified he did not feel that the 35 percent rating in his report was accurate in view of Applicant's failed back syndrome. Dr. Angerman provided an alternative rating using Table 15-19 of the AMA *Guides*, 5th edition, and rated Applicant's WPI "somewhere between 39 percent and 81 percent." The PQME in psychiatry found the psychiatric injury was predominantly caused by the physical industrial injury and resulted in "moderate" symptoms of depression and anxiety producing a GAF score of 60 to 62. Dr. Lee (QME psychiatrist) concurred that Applicant's medications played a major role in his inability to function.

Applicant's vocational expert, after conducting his evaluation, found Applicant was not capable of being retrained, applying an analysis under *LeBoeuf v. W.C.A.B.* (1983) 34 Cal. 3d 234, 193 Cal. Rptr. 547, 666 P.2d 989, 48 Cal. Comp. Cases 587, and *Ogilvie v. W.C.A.B.* (2011) 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624. Defendant's vocational expert did not personally interview Applicant and admitted that it would have been important to know the impact of Applicant's medications on his ability to work. WCJ relying on the medical and vocational evidence found the applicant to be 100% disabled.

Recon denied. Writ denied.

> *"the WCJ explained that the opinions of an AME are entitled to great weight. Here, Dr. Angerman opined that it was the synergistic effect of numerous factors, including Applicant's failed back surgeries and the unlikelihood that further surgery would be beneficial, that ultimately resulted in Applicant's inability to compete in the open labor market. Dr. Angerman did not base his finding solely on the effects of Applicant's pain medication. The WCJ noted that Mr. Broadus' conclusion that Applicant was not feasible for retraining strengthened the AME's opinion that Applicant was unable to compete in the open labor market. Likewise, the WCJ found probative evidence in the psychiatric PQME's conclusions, rendered after reviewing the medical and vocational expert reports, that Applicant sustained a "substantial" orthopedic injury, that Applicant's subjective symptoms of depression and anxiety were justified, based on the severity of the injury, and that Applicant warranted a lower GAF score than had previously been assigned.*
>
> *The WCJ also pointed out that, pursuant to Blackledge v. Bank of America (2010) 75 Cal. Comp. Cases 613 (Appeals Board en banc opinion), a WCJ has the authority to independently rate an employee's PD, provided that the rating is based on substantial medical evidence. Notwithstanding the AME's original finding of 35 percent WPI, here the WCJ concluded that "the medical evidence demonstrated a finding of permanent and total disability. The Almaraz/Guzman rating was rendered moot in view of the **hybrid 'Ogilboeuf'** (Ogilvie III and LeBoeuf) rating per the AME and vocational expert's findings."*
>
> *With regard to the substantiality of Mr. Broadus' opinion, the WCJ reviewed the criteria for rebutting the scheduled DFEC under Ogilvie and LeBoeuf and explained how the principles set forth in these cases differ from those addressed in Almaraz/Guzman: Ogilvie III held that loss of future earning capacity is indistinguishable from the concept of an injured worker's feasibility for rehabilitation. Therefore, by demonstrating that due to the residual effects of an industrial injury the injured worker could not be retrained for suitable meaningful employment and therefore had suffered a greater loss of future earning capacity than reflected in the scheduled rating, a presumptively correct rating could be rebutted. LeBoeuf and Almaraz/Guzman are different concepts. The latter shows why a strict AMA Guides is inapplicable and the former deals with the impact of the injury on future earning capacity.*
>
> *The WCJ opined that only the hybrid "Ogilboeuf" was relevant in this case. Applying an "Ogilboeuf" analysis in light of the vocational expert's opinion, the WCJ found that Applicant had no future earning capacity and was PTD: Applicant's expert stated: "In combination, [applicant's] orthopedic impairments, including three failed back surgeries, his pain issues, and his medication dependence, all make it impossible to perform any of the occupations listed above, or to compete for jobs in the open labor market. As a result, from a vocational standpoint, Mr. Gallagher is 100% disabled."*

Burke, dba Pride and Joy, v. WCAB (Burton), (2014 1st Appellate District) 79 Cal. Comp. Cases 713; 2014 Cal. Wrk. Comp. LEXIS 65 (Writ Denied)

Applicant sustained an admitted cumulative industrial injury to his hearing and alleged psychiatric injury as a consequence of the hearing injury while employed as a bass player by Defendant Coleman Burke dba Pride Joy during a period ending 7/7/2006. Applicant was evaluated for his hearing injury by AME Dr. David Schindler, an otolaryngologist, and the psychiatric sequela by QME Dr. Michael Goldfield. The Ears/Nose/Throat AME concluded Applicant suffered primarily from separate hearing disorders secondary his employment in the rock and roll band for 12 years: (1) tinnitus aurium, and (2) hyperacusis, which the inability to tolerate sounds, even normal environment.

In his final report, Dr. Schindler concluded that Applicant unable to perform the duties of his usual and customary occupation as a musician, and that he would have difficulty performing any work activities required in the open labor market. Dr. Schindler specifically noted that, because of his condition, Applicant suffered from misophonia fear of sound) with an intolerance of sounds in the 60 to 70 decibel range. According to Dr. Schindler, the hyperacusis plus the tinnitus aurium, which was measured with a tinnitus handicap index as high as 98, revealed that Applicant, in all medical probability, was unable to tolerate sound, resulting in psychological factors as described Dr. Goldfield. Dr. Schindler agreed Dr. Goldfield that Applicant was unable to work in any occupation where he would be unable to control the sound levels at his work site. However, based on his audiometric studies, Dr. Schindler opined that Applicant could work in areas where sound was consistently below 60 decibels.

> *"With regard to his finding of PD, the WCJ acknowledged in his Opinion on Decision that the undisputed opinions of Drs. Schindler and Goldfield as to the impairments caused by Applicant's injury warranted a PD rating of 53 percent. However, based on Applicant's credible testimony and Dr. Cottle's expert opinion, the WCJ found that 53 percent impairment did not accurately reflect Applicant's diminished ability to compete in the open labor market as contemplated under LeBoeuf v. W.C.A.B. (1983) 34 Cal. 3d 234, 193 Cal. Rptr. 547, 666 P.2d 989, 48 Cal. Comp. Cases 587, and Ogilvie v. W.C.A.B. (2011) 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624. The WCJ concluded that the scheduled rating was rebutted by a rating derived from the opinion of Dr. Cottle, which the WCJ found to be a more accurate evaluation of Applicant's diminished future earning capacity and ability to compete in the labor market, but that Dr. Cottle's opinion that Applicant was totally disabled overestimated Applicant's disability:*
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> *... Dr. Cottle has not given sufficient consideration to the opinions of the medical expert that applicant is capable of working in an environment where the noise level is consistently, although not always, below 60 decibels and where the sound levels could be usually controlled by applicant. As the defendant employer points out in his post-trial brief, moreover, Dr. Cottle has not given sufficient consideration to part time employment opportunities and the fact that applicant has had some earnings from sporadic part time employment even after his injury.*
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> *Although the WCJ could not find PTD based on Dr. Cottle's opinion, he did find that Dr. Cottle's opinion justified a PD finding of 85 percent, which was a level of disability "well within the range of the expert opinions of Dr. Cottle, Dr. Schindler and Dr. Goldfield ... ."*
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> *". . .that the scheduled permanent disability rating of 53% warranted by the opinions of the reporting medical experts is not an accurate reflection of the extent to which applicant's access to the labor market is limited. Dr. Cottle's citation of the Department of Labor occupational data ... that less than 10% of occupations are performed in acoustic environments of less than 60 decibels justifies the conclusion that applicant is precluded from a substantial portion, if not the complete labor market because of the sound level limitations recommended by Dr. Schindler. Neither reporting medical expert expressed doubt as to the validity of applicant's symptoms. As the trier-of-fact, however, I am not required to accept all of the conclusions of an expert, such as Dr. Cottle, even if I find most of his conclusions persuasive. It does not follow that Dr. Cottle's opinion does not meet the standard of substantial evidence because I do not accept all of his conclusions. Thus, the opinion of Dr. Cottle and applicant's credible testimony as to his continuing symptoms and limitations justifies the finding applicant's limited access to the labor market significantly exceeds the labor market limitations reflected by the scheduled rating and that applicant's injury caused permanent partial disability of 85%."*
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> *Editor's Comments: Noteworthy is the fact that the AMA Guides does not contain a rating method for hyperacusis, which was a significant cause of the applicant's limitations and thus the scheduled rating appeared substantially understated, and was not an accurate reflection of, Applicant's limited ability to compete in the labor market.*

Dr. Goldfield concluded in his final report that Applicant suffered from depressive disorder and panic disorder, as a compensable consequence of his severe hyperacusis and tinnitus. Dr. Goldfield, like Dr. Schindler, found that Applicant suffered from misophonia, and had difficulty being in any environment where he was unable to control the noise. Dr. Goldfield described Applicant as being anxious and extremely irritable, with a low frustration tolerance and a propensity to become enraged if exposed to noise. According to Dr. Goldfield, Applicant had a GAF of 52, which was equivalent to a 27 percent WPI. Dr. Goldfield found that 27 percent WPI adequately described Applicant's disability, considering the severity of his depression and panic disorder. Dr. Goldfield concluded that Applicant was totally incapable of returning to his previous occupation, but noted that Applicant had been working part-time as a painter.

Applicant testified to the severity of his hearing problems, the effect it had on his life which included problems leaving his house because of the noise sensitivity; anger, rage, and even violence as a result of loud noise; loss of his former partner and the mother of his children, and the inability to play music with resulting feelings of isolation and depression; problems sleeping, use of Xanax daily and resulting contemplation of suicide due to the constant ringing in his ears.

Applicant's VR expert found applicant was permanently totally disabled, based on his unemployability, writing that "it is the synergistic effect of his hyperacusis, tinnitus, misophonia, his medication side effects, problems with sleep, his lack of sustainability when it comes to performing consistent, reliable, and productive work, which when coupled with his emotional issues including depression, rage, anger, social withdrawal, isolation, fear, and abandonment of his job, that such combinations of factors are what impact Mr. Burton's ability to meet employer's expectations relative to acceptable work behavior, and render him not employable.

Sutter Medical Foundation, PSI, adjusted by Sutter Health Workers' Compensation, v. WCAB (Moulthrop) (3rd Appellate District) 79 CCC 1570, 2014 Cal. Wrk. Comp. LEXIS 166 (Writ Denied)

Applicant sustained industrial injuries to her lumbar spine, right knee, and left ankle on 4/24/2008 while employed as a medical assistant by Defendant Sutter Medical Foundation. As a result of the injury the applicant was being treated with various medications including Norco and Soma. At trial the applicant testified that these medications produced various side effects including dizziness, lightheadedness, and tiredness. Applicant's selected vocational expert, testified that Applicant had lost 25 to 33 percent of her future earning capacity and had lost 72 percent of employment opportunities in the open labor market, after apportionment of nonindustrial factors and further, was "precluded from most useful functioning and was unable to interact effectively with other people, rendering her unable to compete for work in the open labor market." Applicant's VR expert also found "even absent Applicant's considerable psychiatric impairment, Applicant's usage of heavy opioid medication presented a significant barrier to employment and that her inability to focus and interact with other people could render her 100 percent PD ." The applicant's PTP opined that the applicant "was not employable because of the medications she was taking, which Dr. Weiss stated were necessary to control Applicant's pain and which could not be abruptly stopped". The opinion of defendant's VR expert was that the applicant was employable but "seemingly did not have a correct history regarding Applicant's lack of ability to function because of her pain and due to the side effects from her pain medications."

Editor's Comments: From my prospective defendant in Moulthrop narrowly avoided an even worse catastrophe as these facts might have justified 100% award without apportionment provided the industrial component alone, which included significant side effects due to pain medications, rendered the applicant unemployable thus totally disabled "according to the fact" under LC 4662 and/or having a total loss of earning capacity under Ogilvie and Lebouef.

But see, also, Bank of America v. WCAB (Chand) (2014) 79 CCC 1075 where applicant was allowed to offer into evidence defendant's VR report which determined applicant to 100% disabled which was listed as exhibit by defendant at MSC but withdrawn by defendant at trial citing Dole v. WCAB, (Arguelles), (1998) 63 Cal Comp Cases 698, and LC 5502.

The WCJ determined the applicant to be 100% disabled before apportionment awarding 72% PD after apportionment to the applicant's nonindustrial psychiatric condition. Defendant sought reconsideration asserting that the decision was not supported by substantial evidence. Applicant filed an answer in opposition to Defendant's Petition, asserting in pertinent portion that there was substantial evidence as contemplated in *Ogilvie* and *LeBoeuf v. W.C.A.B.* (1983) 34 Cal. 3d 234, 193 Cal. Rptr. 547, 666 P.2d 989, 48 Cal. Comp. Cases 58, including the medical evidence and reports of Mr. Rehm, to support a finding that Applicant was PTD under Labor Code § 4662 "in accordance with the fact," based on her inability to compete in the open labor market due to pain and the effects of her medication.

Recon denied. Writ denied.

VI. Labor Code 4662 – Total Disability

> *Labor Code* ***§ 4662. Permanent disabilities conclusively presumed to be total***
>
> *Any of the following permanent disabilities shall be conclusively presumed to be total in character:*
> ***(a)*** *Loss of both eyes or the sight thereof.*
> ***(b)*** *Loss of both hands or the use thereof.*
> ***(c)*** *An injury resulting in a practically total paralysis.*
> ***(d)*** *An injury to the brain resulting in incurable mental incapacity or insanity.*
> *In all other cases, permanent total disability shall be determined in accordance with the fact.*

Labor Code 4662(d) has the following requirements: (1) that substantial evidence (medical, VR, or both) establish (2) total disability (3) resulting directly and solely from the subject industrial injury. While the applicant's bar may be correct that strict legal apportionment of disability is no defense to an award of total disability under LC 4662, the requirement of "direct causation" generally has the same effect. While unsettled, it is in the *Benson* situation where the issue of apportionment in the LC 4662 context becomes important. *(See dissenting opinion in Sanchez v. City of Santa Clara (2010) 2010 Cal.Wrk.Comp.P.D. Lexis 640 (Panel Decision)*

> *Editor's Comments and Analysis: The following are 2016 cases involving application of LC 4662.*
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> *WCAB concluded that, although combination of applicant's disabilities rendered him permanently totally disabled "in accordance with the fact" pursuant to Labor Code § 4662(b), conclusive presumption only arises when injury to brain causes severe cognitive impairment, and partial cognitive impairments sustained by applicant as result of his injury were not sufficient to raise Labor Code § 4662(a)(4) presumption and, therefore, applicant's permanent disability was apportionable.* ***WINNINGHAM v. State of California Department of Corrections, 2016 Cal. Wrk. Comp. P.D. LEXIS 251 (Panel Decision****); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[3], 8.07, 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40[1], 7.42[1], [2], [4]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 9.]*
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> *Total award of PD based on limitation to in-home work under 1997 PD rating schedule requires applicant to establish (1) industrial causation, (2) and the limitation to work only from home, and (3) the unavailability of in-home work. At that point the burden shifts to the employer to establish the worker's ability to compete in the open labor market, proving that in-home work is available. HALLMARK MARKETING CORPORATION v. WCAB (GANNON) 80 Cal. Comp. Cases 1132; 2015 Cal. App. Unpub. LEXIS 6791; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 8.02[3], [4][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.51[1], 7.70, 7.98, 7.99.]*

Hertz Corp. v. WCAB (2008 6th Appellate District)169 Cal.App. 4th 232, 73 CCC 1653, 36 CWCR 110

The applicant was born in Mexico in 1955, but had worked for Hertz in California since 1984 without interruption. He was employed as a car washer and regularly worked 80 hours per week. The applicant sustained injury to multiple parts of body in 2000 and a CT ending 1/02. The applicant requested VR services, but was determined non-feasible due in part to the fact that the applicant did not speak, read or write in English. At trial, the VR evidence agreed the applicant was not feasible due to a 60% level of PD and the applicant's inability to speak, read, or write in English. Based thereon, the WCJ determined the applicant to be 100% disabled, stating that "the employer takes the employee as he finds him" and that this "includes all of the worker's shortcomings, including his language limitations, educational background, and skill with English".

> *Editor's comments: The concurring opinion of Justice McAdams expressed concerns that defendant might now be able to use cultural factors, including lack of education, limited intelligence, or limited skills as an issue in every case of nonfeasiblity/Leboeuf.*

Defendant sought reconsideration arguing that that the applicant's illiteracy and lack of academic training may not be considered in determining permanent disability. An award of permanent disability should be limited to factors caused by the employment-related injury, and to hold otherwise was prohibited by the new apportionment provisions. The Board denied reconsideration.

On Petition for Review, the 6th Appellate District reversed holding that a PD award based upon a finding that "the worker is not feasible for vocational rehabilitation because the worker is unable to speak or write English" is error because the new apportionment provision post SB-899 contained in LC § 4663 requires the employer not to be liable for pre-existing factors which are causative of the disability.

Cordova v. SCIF 39 CWCR 291(Panel Decision)

Applicant, employed as a heavy equipment operator, could neither read nor speak English, although he had been employed for the defendant for the preceding 10 years. Applicant sustained an admitted injury on 12/17/03 to his neck when the suspension on the tractor he was operating failed. Defendant accepted liability which ultimately resulted in cervical spinal fusion.

Both the orthopedic and neurological QME limited the applicant to heavy work and precluded the applicant from work at or above shoulder level. Defendants VR expert opined that given the limitations per the evaluating QME's the applicant was employable in food service, packaging, and light housekeeping in "Spanish-speaking enclaves". Providing VR testimony for the applicant, Jeff Malmuth testified that he had successfully returned thousands of monolingual Spanish speakers to work, and that (1) it was the work restrictions resulting from the injury that precluded applicant from returning to his usual and customary occupation, not his inability to speak and understand English; (2) none of the skills that applicant had acquired from his usual occupation was transferable to any job that he would be able to do with his present disability, and (3) applicant was unemployable and even if the defendant VR experts opinion were followed Mr Malmuth believed the applicant would be precluded from 94% of the labor market. WCJ Philip followed the opinion of Mr. Malmuth and awarded 100% disability.

On reconsideration, the WCAB upheld the decision of WCJ. The WCAB discussed LC 4662 which provides in the last sentence of the section that "permanent total disability shall be determined in accordance with the facts". The WCAB Panel observed that the WCJ had thoroughly analyzed the evidence and found PD "in accordance with the facts" in that the sole cause of the applicant's complete loss of earning capacity was the medical condition caused by the injury and not that the applicant was monolingual. The WCAB wrote that the WCJ "correctly interpreted total loss of earning capacity to mean a total loss of the injured worker's pre-injury earning capacity" and that the WCJ had "recognized that everyone has a particular combination of education, experience, intellectual capacity, and physical characteristics that affect earning capacity". The decision of the WCJ was upheld since the WCJ had reviewed all evidence and based thereon determined that the sole cause of the applicant's complete loss of earning capacity was the medical condition caused by the injury and not that the applicant was monolingual.

Editor's Comments: The Cordova decision is subject to criticism for two reasons. First, from the written decision is appears that the defendant did little prior to trial to attack the opinion of Jeff Malmoth, applicant's VR expert. Specifically, Mr. Malmoth was not asked to explain what made this case different from other post cervical fusion cases where the applicant has a limitation to "no substantial work/light work" and yet was not totally disabled. Second, this decision makes it clear that quasi LaBoeuf rationale under LC 4662 survives which appears to be in conflict with the intent of SB 899 to reduce the cost of workers' compensation by bringing greater objectivity into PD awards, and to require through "apportionment" that the employer only be liable for that portion of the PD which is directly and causally resulting from the subject industrial injury.

It should also be noted that 4662 is limited to cases involving "total disability" and thus the Cordova decision would not apply to any award short of 100%. Certainly the Court in Cordova struggled with the obvious conflict between the legal principles that 'an employer takes an employee as he/she find him/her' and that an "employer should only be responsible for that portion of the PD directly and causally resulting from the subject industrial injury".

See also, Hertz Corp. v. WCAB (2008 6th Appellate District 169 Cal.App. 4th 232, 73 CCC 1653, 36 CWCR 110

State of California, Department of Transportation v. WCAB (Edwards) (2012) 77 CCC 1023 (Writ Denied)

Applicant, while employed as a road maintenance worker was struck by a vehicle, which resulted in injury to head, neck, brain, and psyche occurring on 8/22/05. The psychiatric AME found 15% apportionment to previously undiagnosed non-industrial ADHD. The AME also determined the applicant to be totally precluded from the open labor market as a result of the industrial injury. Initially the WCJ found for the defendant awarding the applicant 88% PD which reflected apportionment per the AME. Applicant sought reconsideration contending in the alternative that the applicant was PTD pursuant to Labor Code 4662(d) as "incurable mental incapacity" or PTD should be found "in accordance with the facts" and that PD awarded pursuant to LC 4662 is not apportionable. The WCAB granted the applicant's recon and remanded the matter back to the trial court for a "finding of permanent total disability without apportionment". Upon return the WCJ found the applicant to be 100% disabled without apportionment which prompted defendant to seek reconsideration

See also Cordova v. SCIF 39 CWCR 291(Panel Decision) in which a Spanish speaking/monolingual applicant was held to be totally disabled where the WCJ had thoroughly analyzed the evidence and found TPD "in accordance with the facts" in that the sole cause of the applicant's complete loss of earning capacity was the medical condition caused by the injury and not that the applicant was monolingual. The WCAB wrote that the WCJ "correctly recognized that everyone has a particular combination of education, experience, intellectual capacity, and physical characteristics that affect earning capacity". The decision of the WCJ was upheld since the WCJ had reviewed all evidence and based thereon determined that the sole cause of the applicant's complete loss of earning capacity was the medical condition caused by the injury and not that the applicant was monolingual.

See also, Sanchez v. City of Santa Clara (2010) 2010 Cal.Wrk.Comp.P.D. Lexis 640 (Panel Decision) in which Commissioner Cuneo's concurring opinion would allow apportionment of LC 4662 noting that LC 4664(b) is completely distinct from LC 4664(c)(1) and only LC 4664(c)(1) contains an exception prohibiting apportionment of a total award of disability under LC 4662. Likewise LC 4663 contains no exemption for apportionment of PD awarded pursuant to LC 4662.

In denying Defendant's petition for reconsideration, the WCAB noted that although Dr. Stanwyck had apportioned 15% of the applicant's overall disability to non-industrial ADHD, he had also stated that "applicant's August 22, 2005 industrial injury was, itself, totally disabling. . .However, in a case such as this one, where applicant's industrial traumatic brain injury with resulting dementia was, in itself, totally disabling, apportionment to her pre-existing, non-disabling condition would make sense only if percentages of permanent disability could exceed 100 percent." Here the WCAB noted that the applicant was totally disabled due solely to the results of the industrial injury.

Sutter Medical Foundation, PSI, adjusted by Sutter Health Workers' Compensation, v. WCAB (Moulthrop) (3rd Appellate District) 79 CCC 1570, 2014 Cal. Wrk. Comp. LEXIS 166 (Writ Denied)

Applicant sustained industrial injuries to her lumbar spine, right knee, and left ankle on 4/24/2008 while employed as a medical assistant by Defendant Sutter Medical Foundation. As a result of the injury the applicant was being treated with various medications including Narco and Soma. At trial the applicant testified that these medications produced various side effects including dizziness, lightheadedness, and tiredness. Applicant's selected vocational expert, testified that Applicant had lost 25 to 33 percent of her future earning capacity and had lost 72 percent of employment opportunities in the open labor market, after apportionment of nonindustrial factors and further, was "precluded from most useful functioning and was unable to interact effectively with other people, rendering her unable to compete for work in the open labor market." Applicant VR expert also found "even absent Applicant's considerable psychiatric impairment, Applicant's usage of heavy opioid medication presented a significant barrier to employment and that her inability to focus and interact with other people could render her 100 percent PD ." The applicant's PTP opined that the applicant "was not employable because of the medications she was taking, which Dr. Weiss stated were necessary to control Applicant's pain and which could not be abruptly stopped". The opinion of defendant's VR expert was that the applicant was employable but "seemingly did not have a correct history regarding Applicant's lack of ability to function because of her pain and due to the side effects from her pain medications."

Editor's Comments: From my prospective defendant in Moulthrop narrowly avoided an even worse catastrophe as these fact might have justified 100% award without apportionment provided the industrial component alone, which included significant side effects due to pain medications, rendered the applicant unemployable thus totally disabled "according to the fact" under LC 4662 and/or having a total loss of earning capacity under Ogilvie and Lebouef.

But see, also, Bank of America v. WCAB (Chand) (2014) 79 CCC 1075 where applicant was allowed to offer into evidence defendant's VR report which determined applicant to 100% disabled which was listed as exhibit by defendant at MSC but withdrawn by defendant at trial citing Dole v. WCAB, (Arguelles), (1998) 63 Cal Comp Cases 698, and LC 5502.

The WCJ determined the applicant to be 100% disabled before apportionment awarding 72% PD after apportionment to the applicant's nonindustrial psychiatric condition. Defendant sought reconsideration asserting that the

decision was not supported by substantial evidence. Applicant filed an answer in opposition to Defendant's Petition, asserting in pertinent portion that there was substantial evidence as contemplated in *Ogilvie* and *LeBoeuf v. W.C.A.B.* (1983) 34 Cal. 3d 234, 193 Cal. Rptr. 547, 666 P.2d 989, 48 Cal. Comp. Cases 58, including the medical evidence and reports of Mr. Rehm, to support a finding that Applicant was PTD under Labor Code § 4662 "in accordance with the fact," based on her inability to compete in the open labor market due to pain and the effects of her medication. Recon denied. Writ denied.

Dufresne v. Sutter Maternity & Surgery Center of Santa Cruz (2014) 2014 Cal.Wrk.Comp. P.D. LEXIS 710

Applicant was a registered nurse who sustained successive injuries to thoracic spine on 2/22/99, 4/7/04/ and CT ending 4/7/04. Additionally, applicant had prior nonindustrial injury and resulting surgeries to low back and neck. The applicant did settle via C&R with a co-defendant their liability for injury to thoracic spine. The parties agreed to use AME's for both the physical and psychiatric injury. Dr. Fugimoto, who reported as the AME on the physical component authored numerous reports in addition to being deposed. In the end it was his opinion that due to "(1) a combination of her musculoskeletal injuries (i.e., chronic thoracic, cervical, and low back pain) and her psychiatric issues that preclude applicant from working in the open labor market; (2) her inability to return to the open labor market is 80% caused by the industrial injuries and 20% by the nonindustrial injuries; and (3) it is the "synergistic effect" among her psychiatric and musculoskeletal injuries (industrial and nonindustrial injuries) that render her incapable of employment on the open labor market. . .Dr. Fujimoto said that applicant could compete in the open labor market based upon her thoracic spine symptoms alone. He said, however, that he could not comment on whether the psychiatric issues by themselves would preclude her from competing on the open labor market."

Dr. Alloy, who reported as the psych AME, also authored numerous reports and was also deposed. In the end, AME Alloy found apportionment as follows: 75% industrial/ 25% nonindustrial and of the 75% industrial he would apportion 80% thoracic (which appears to relate to the 1999 industrial injury), 10% low back (non-industrial injury later associated with the August 2003 low back discectomy), and 10% neck (non-industrial injury which appears to be the 2004 injury associated with a fusion in August 2008).

"It is true that apportionment of permanent disability has been held to be impermissible in cases where an industrial injury gives rise to a conclusive presumption of permanent total disability under section 4662. (E.g., City of Santa Clara v. Workers' Comp. Appeals Bd. (Sanchez) (2011) 76 Cal.Comp.Cases 799 (writ den.) (under § 4662(d), employee was conclusively presumed to be permanently totally disabled because he had sustained an "injury to the brain resulting in incurable mental incapacity or insanity"); Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Dragomir-Tremoureux) (2006) 71 Cal.Comp.Cases 538 (writ den.) (under § 4662(b), employee was conclusively presumed to be permanently totally disabled because she had lost the use of both hands).) However, applicant's case does not involve a conclusive statutory presumption of permanent total disability. Moreover, we conclude that apportionment is permissible in cases where permanent total disability has been determined "in accordance with the fact" under section 4662. Section 4663(a) expressly provides that "[a]pportionment of permanent disability shall be based on causation" and section 4664(a) expressly provides that "[t]he 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." Also, in Brodie v. Workers'Comp. Appeals Bd. (2007) 40 Cal.4th 1313, 1327–1328 [72 Cal.Comp.Cases 565], the Supreme Court observed that sections 4663(a) and 4664(b) create a "new regime of apportionment based on causation" and it held that "the new approach to apportionment is to look at the current disability and parcel out its causative sources-nonindustrial, prior industrial, current industrial-and decide the amount directly caused by the current industrial source." (See also, e.g., Acme Steel v. Workers' Comp. Appeals Bd. (Borman) (2013) 218 Cal.App.4th 1137, 1142–1143 [78 Cal.Comp.Cases 751] (Borman); Benson, supra, 170 Cal.App.4th at pp. 1548, 1559.)."

". . ..unless an injured employee's overall permanent total disability is predicated on a conclusive statutory presumption under section 4662, the apportionment to causation language of sections 4663(a) and 4664(a) and the case law interpreting these statutes provide that an employee's permanent disability must be apportioned based on its causative sources, even if the overall disability is 100%. (§§ 4663(a), 4664(a); Brodie, supra, 40 Cal.4th at pp. 1327–1328; Borman, supra, 218 Cal.App.4th at pp. 1142–1143; Benson, supra, 170 Cal.App.4th at pp. 1548, 1559.) The injured employee has the burden of affirmatively establishing the extent of his or her permanent disability. (§§ 3202.5, 5705.) Thereafter, however, the burden shifts to defendant to prove apportionment. (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]; Escobedo v. Marshalls (2005) 70 Cal.Comp.Cases 604, 613 (Appeals Board en banc) (Escobedo).)"

Editor's Comment: Dufresne provides a well written and reasoned opinion on the interplay between burden of proof and direct causation in the context of a Labor Code 4663/4664 analysis. The reader should take away from this opinion the fact that regardless of the theory of establishing a permanent disability award, e.g., "Standard AMA rating, ""Guzman," "Ogilivie/LeBouef," or 4662 the disability award will be limited to the whole person impairment and resulting disability which is solely, exclusively, and directly caused by the subject industrial injury.

The VR expert for applicant opined that the applicant was 100% disabled but provided no opinion on whether this was due to the industrial injury, nonindustrial injury, or a combination of the two.

The WCAB in upholding the WCJ found apportionment applying a LC 4663 analysis holding that LC 4662 requires that the total disability must be entirely the direct cause of the subject industrial injury. However, the WCAB rejected the defendant's argument that apportionment under LC 4664 was appropriate to the C&R settlement with the co-defendant citing *Pasquotto v. Hayward Lumber 71 CCC 223,* but noting that *Pasquotto* does not preclude apportionment under LC 4663. Last, the WCAB upheld the WCJ's determination that defendant had failed to meet their burden of proof in establishing apportionment under *Benson 170 Cal.App.4th 1548* on the issue of apportionment as between successive industrial injuries. Therefore, the overall PD was determined to be apportioned 80% industrial and 20% nonindustrial.