WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SUGUEY MORENO, ***Applicant,*** **vs.** **KERN COUNTY SUPERINTENDENT OF SCHOOLS; Permissibly Self-Insured; administered by SELF-INSURED SCHOOLS OF CALIFORNIA,** ***Defendant.***	**Case No.** **ADJ8399668** **(Bakersfield District Office)** **OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION**

Defendant, Kern County Superintendent of Schools, permissibly self-insured, seeks reconsideration of the Findings and Award, issued December 9, 2019, in which a workers' compensation administrative law judge (WCJ) found applicant Suguey Moreno sustained an industrial injury on March 13, 2012, to her psyche, trunk, lower extremities, urinary/excretory system, gait impairment, neck, and nerve damage (spinal and peripheral), in addition to the admitted body parts of right foot and low back. The WCJ further found that as a result of her industrial injury, applicant sustained permanent total disability and awarded lifetime benefits at the rate of $663.36 per week, plus statutory increases, and further medical treatment.

Defendant contends the WCJ erred in finding applicant to be 100% permanently disabled, arguing first, that the WCJ failed to provide an adequate discussion of the rationale to support this finding. Second, defendant argues that the WCJ failed to follow the neurologist's apportionment determination that 40% of applicant's permanent disability was caused by a pre-existing congenital condition, Chiari Malformation, such that applicant is not entitled to an unapportioned finding of permanent total disability. Defendant further argues that the vocational evidence is not substantial evidence to rebut the scheduled rating because the vocational expert did not appropriately address the medical evidence of non-industrial apportionment.

Applicant has filed an answer to the Petition for Reconsideration, and the WCJ has prepared a

Report and Recommendation on Petition for Reconsideration, in which he recommends that defendant's petition be denied.

Following our review of the record, and for the reasons set forth here, we will affirm the Findings and Award and will deny defendant's Petition for Reconsideration.

Statement of Material Facts

Applicant sustained an admitted industrial injury on March 13, 2012, while employed as a Site Supervisor II, by the Kern County Superintendent of Schools, at the age of 35. She testified that on that date, she and a teacher's assistant were assigned to move furniture between classrooms. As they were moving a dresser, it fell onto her right foot. She lifted the dresser off her foot by herself, and immediately felt pain in her back. Defendant accepted applicant's claim for injury to her right foot and low back. Applicant subsequently amended her claim to include injury to her psyche, trunk, lower extremities, urinary/excretory system, gait impairment, neck, and nerve damage.

According to the history applicant gave to Dr. Previte, reporting in the capacity of an Agreed Medical Examiner (AME) in orthopedics, she was initially evaluated at a clinic that diagnosed a foot contusion and a back sprain, and she was released to modified duty. However, she awoke the following day with bowel and bladder incontinence. An MRI revealed a herniated disk at L5-S1, which led to further MRIs of her thoracic and cervical spine and her brain. She complained of frequent headaches, occasionally occurring three to four times per day, as well as constant low back pain, radiating to her neck. A neurosurgeon performed occipital cervical decompression surgery on September 11, 2012. She was referred for a psychiatric evaluation for her complaints of depression.

In addition to her lumbar injury and incontinence, Dr. Previte also diagnosed "Syringomyelia, cervical spine, with described Chiari malformation and cerebellar ectopia with tethered cord syndrome etiology unclear."

As to the diagnosis of syringomyelia, cervical spine, with described Chiari malformation, Dr. Previte noted that he was not an expert on this condition, but that his literature review "indicates that developmental symptomatology for syringomyelia problems and progressive neurologic deterioration can develop, with coughing or straining. Should this be accurate, the lifting event that is described to have

occurred on 3/13/12 with the onset of bowel and bladder dysfunction the following day could be explainable on the basis of the strain event that occurred in the lifting that she had been doing. This would therefore suggest that the lifting or straining act that occurred while working did not cause syringomyelia or a Chiari malformation, but potentially could have contributed to it. Again, I believe this opinion on the basis of causation, should be determined by an appropriate neurosurgeon rather than me." (Jt. Exh. 1, 2/22/13 Dr. Previte AME Report.) He further stated:

> Once again, I do not posses [sic] sufficient expertise as an orthopedic surgeon to comment on the issue of causation with regard to a straining injury resulting in the rendering a syringomyelia and Chiari malformation as symptomatic. However, my review of the literature as it discusses syringomyelia clearly details two major causes, one being congenital and the other acquired with trauma representing a potential realm of reason for producing symptomatology of syringomyelia in an otherwise asymptomatic individual. Should a neurosurgical specialist confirm this situation, industrial causation would appear to be established.
> (Jt. Exh. 1, 2/22/13, Dr. Previte AME Report, p. 18.)

Applicant was then evaluated on May 15, 2014, by Dr. Wang, a Qualified Medical Evaluator in neurology. Concerning applicant's diagnosis with Chiari Malformation, Dr. Wang discussed the nature of the condition, and concluded that applicant has a congenital condition that became symptomatic, having been triggered by the trauma of her industrial injury. (Jt. Exh. 6, 5/15/14 Dr. Wang QME Report, p. 13.)

> Chiari Malformation 1 (CM1) is the simplest and most prevalent type. CM2 and CM3 are severe, congenital malformations which cause complex defects of the brain and spinal cord. CM1 may be present at birth, may remain asymptomatic, may become symptomatic due to trauma, and may occur as an acquired disorder as opposed to congenital.
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> CM1 causes the rounded lobules on the undersurfaces of the cerebellum called the cerebellar tonsils to become herniated or to be moved or pressed away from their usual position inside of the skull downward through the large opening in the base of the skull (foramen Magnum) into the spinal canal. The herniated tissue (cerebellar tonsils) then block the circulation of cerebrospinal fluid in the brain and can lead to the formation of a cavity (Spinx) within the spinal cord.
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> Chiari 1 is generally considered to be congenital, although acquired cases from trauma do occur. Congenital Chiari Malformation may be completely asymptomatic and only become symptomatic after a traumatic brain or spinal cord injury. The action of a whiplash, coup-contre-coup injury or direct blow to the head can cause Chiari to develop or become symptomatic in a person who did not have it previously. Certain types of trauma cause or

> accentuate cerebellar tonsillar impaction in the foramen magnum or result in destabilization of a marginally compensated cerebrospinal fluid system.
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> The most recent scientific evidence indicates that Chiari 1 Malformation occurs in individuals who have an underdeveloped posterior cranial fossa and are therefore susceptible to hindbrain overcrowding and herniation. A traumatic brain injury can cause the herniation to occur with the resultant cerebrospinal fluid disturbances which are responsible for direct compression of nervous tissue.\
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> Victims of Chiari Malformation experience severe headaches, neck pain and chronic pressure in the neck and head. Other common symptoms are dizziness, vertigo, disequilibrium, visual disturbances, ringing in the ears, difficulty swallowing, palpitations, sleep apnea, insomnia, depression, muscle weakness, impaired fine motor skills, chronic fatigue and painful tingling of the hands and feet.
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> Here, Ms. Moreno sustained a minor trauma, causing her to hyperextend her person in an effort to extract captured right foot from the weight of a wooden dresser. Initial low back and right foot discomfort emerged, followed by cervical symptoms the same evening and upon awakening next morning, central nervous conditions as discussed supra surfaced, within the course of 24 hours from the initial accident. Therefore, it is within a reasonable degree of medical certainty that given her congenital abnormality, Ms. Moreno underwent an uneventful life until the day of accident, which triggered constellation of manifestations as anticipated with symptomatic patients diagnosed with Chiari Malformation.
> (Jt. Exh. 6, 5/15/14 Dr. Wang QME Report, p. 12-13.)

Dr. Wang then concluded that applicant's industrial injury was the direct cause of her neurological symptoms, for which he provided a 15% whole person impairment rating and concluded that: "all conditions apportioned as 100% industrial." (Jt. Exh. 6, 5/15/14 Dr. Wang QME Report, p. 14.)

Dr. Wang provided a supplemental report on June 18, 2019, in response to a request for clarification on apportionment. In his one page letter, he noted that he reviewed "case laws and various court decisions on requirements of industrial versus nonindustrial apportionment (for prior nondisabling conditions) cited by counsel." He then stated the following as his apportionment determination:

> After reviewing necessary documents, the apportionment for Mr. Moreno's industrial diagnosis of Trigger of Chiari Malformation symptom is amended to 60% industrial and 40% nonindustrial.
> (Jt. Exh. 7, 6/18/19 Dr. Wang Supplemental QME Report.)

In addition to treatment for her neurological condition, applicant underwent a lumbar fusion in 2014

to address her low back issues. Dr. Previte noted in an October 2, 2015 report that applicant's fusion improved her back and leg pain, but still has left leg tingling and numbness. "She continues to experience balance disorder and therefore utilizes a cane out of the house and holds onto walls when she is within the house. She wears pull ups due to her bowel and bladder incontinence." (Jt. Exh. 3, 10/2/15 AME Report, p. 3.)

Dr. Previte found applicant to be permanent and stationary as of October 2, 2015, and provided an impairment rating for her lumbar spine of 23% WPI, plus a 3% pain add on, plus Dr. Wang's WPI for the Chiari malformation and the postsurgical residuals. He suggested additional ratings could be offered by a psychiatrist and a urologist.

With regard to apportionment, he stated:

> On the basis of the information available, including the outstanding dissertation provided by Dr. Wang, I find nothing to suggest an issue of apportionment regarding her current disability as described above to any circumstances of either congenital or preexisting and degenerative nature. Consequently, and based on reasonable medical probability, I would apportion her impairment 100% to the 3/13/12 injury.

He found her to be incapable of returning to her usual and customary job duties, and placed the following work restrictions:

> In my opinion, she is precluded from heavy work and limited to light work activities. As such, lifting and carrying should be conducted with objects weighing no greater than 10 pounds. Bending, twisting, and stooping should be avoided, particularly repetitive. She is precluded from prolonged sitting, prolonged standing and prolonged walking. The use of a cane to assist in balance disturbance should be afforded her,

Applicant was also evaluated by Dr. Chang, a QME in psychology, who reported on June 20, 2017, that applicant suffers from Major Depressive Disorder, Single Episode without Psychotic Feature, and has a Global Assessment of Functioning score of 46, for serious symptoms. (App. Exh. 1, 6/20/17 Dr. Chang QME Report, p. 24.) Applicant was assessed with a 38% WPI, with moderate impairment with concentration, moderate to severe impairment with adaptation and social functioning, and severe impairment with activities of daily living. Dr. Chang attributed all of her psychological symptoms to her industrial injury, without apportionment. He also found applicant was not capable of engaging in vocational

rehabilitation, stating:

> The patient is not a candidate for vocational rehabilitation.
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> Vocational rehabilitation is not recommended at this time.
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> Since her self esteem is largely based on her work capabilities, vocational rehabilitation would be very helpful for improving her self-image. However, I feel that the patient is not ready for rehabilitation at this time. (App. Exh. 1, p. 28.)

Dr. Chang noted that applicant was "basically housebound as her balance is so off that she cannot go outside freely. Her urinary and bowel incontinence keep her away from socializing. When she talks for more than 5 minutes, she starts to stutter due to her neck injury. She has problems with swallowing, following her injury." (App. Exh. 1, p. 26.) "She had many complaints ranging from diminished cognitive to emotional discontrol to difficulties in interpersonal relations. The applicant is multiply impaired with the impairments having adverse consequences on multiple levels in her life. She complains of intense and chronic pain, difficulty sleeping, feeling weak and loss of self-confidence." (App. Exh. 1, p. 26-27.) Dr. Chang also recommended that applicant be provided a caregiver to assist her due to her problems with balance and activities of daily living.

Applicant met with Mr. Gene Gonzales, a vocational expert, on seven occasions. (App. Exh. 3, Gonzales Vocational Report, 8/21/17, p. 3.) He performed an assessment of applicant's amenability to vocational rehabilitation, and provided the following conclusions.

> **After careful assessment and evaluation regarding Ms. Moreno's vocational feasibility, as it relates to her employability and ability to compete in the open labor market given her industrial injury, the undersigned makes the following findings**:
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> 1. The client has not engaged in substantial gainful activity since 03/13/2012.
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> 2. The client's subjective complaints and objective disability conclusively indicate severe impairment that affect her quality of life.
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> 3. The client does not have the residual functional capacity to perform the requirements of her past relevant work.
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> 4. The client is unable to do any work considering her residual functional capacity and work experience.
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> Furthermore, it is this counselor's opinion that Ms. Moreno would not be qualified to return to any unskilled sedentary occupation. Therefore, **Ms.**

Moreno is 100% permanently and totally disabled.
(App. Exh. 3, Gonzales Vocational Report, 8/21/17, p. 1. Emphasis in original.)

In reaching his conclusions, Mr. Gonzales reviewed the medical records from Dr. Previte, Dr. Wang and Dr. Chang, and assessed the medical work restrictions placed on applicant. He considered whether applicant retained the residual functional capacity to perform the requirements of her past relevant work. He also noted that applicant sought employment, filing an application with the State of California through the LEAP program, and to eleven other job openings. Mr. Gonzeles noted:

> Ms. Moreno exercised due diligence in her attempt to obtain employment in the national economy, both in jobs that are reflective of her previous employment, or similar jobs, including marketed reduced jobs. As of the date of this assessment, no employer has provided an offer of employment given her current functional capacity.
> (App. Exh. 3, Gonzales Vocational Report, 8/21/17, p. 47.)

Mr. Gonzales further explained the basis for his conclusion that applicant is precluded from returning to the open labor market:

> This counselor has reviewed all of the medical information provided in this case in order to maintain a clear assessment of Ms. Moreno's medical condition. The medical reports provided some insight into Ms. Moreno's quality of life prior to her industrial injury and the quality of life she now faces on a daily basis. In reviewing the medical reports, it was also determined that both the client's and the physicians' assessment are moderately in line with each other, as it relates to Ms. Moreno's injury, physical/psychological conditions, pain, medications, and side effects. This medical information was used to assist the vocational counselor in making comparisons between Ms. Moreno's medical condition and the vocational factors that affect her employability.
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> . . . the vocational counselor took into consideration Ms. Moreno's employment background over the past fifteen years, information such as medical work limitations and other medical factors, including physical/psychological conditions, pain, medications, and side effects. Following this logical sequence, it was concluded, under impairments based on medical records, that Ms. Moreno's medical condition is severe, physical, and cognitive in nature. This includes pain and medication side effects, which would greatly interfere with or prevent, any return to her old job position. Therefore, this limits her functional capacity to perform the requirements of her past relevant work nor any occupation that is DOT classified as sedentary level work.

Dr. Previte, the AME, reviewed Mr. Gonzales's finding in his August 21, 2017 vocational report

that applicant was incapable of performing any work and is permanently totally disabled. (Jt. Exh. 4, 12/10/17 Dr. Previte Supplemental Report.) Dr. Previte noted that Mr. Gonzales concluded "through a series of complex tests and assessments over multiple visits that Ms. Moreno would not be qualified to return to any unskilled sedentary occupation." He further indicated his agreement with Mr. Gonzales's findings, stating:

> Mr. Gonzales has utilized complex tools and methodology for assessing Ms. Moreno beyond the realm of musculoskeletal or orthopedics. By the usage of these criteria he has appropriately determined her 100% permanently and totally disabled. Upon my review of the information he has complied, I would agree with his opinion and conclusions.
> (Jt. Exh. 4, 12/10/17 Dr. Previte Supplemental Report, p. 2.)

Dr. Chang was also asked to review Mr. Gonzales's August 21, 2017 vocational report, "advising whether I agree that applicant is 100% permanently and totally disabled and precluded from competing in the open labor market." (App. Exh. 2, Dr. Chang Supplemental Report 12/7/17.) Dr. Chang agreed with Mr. Gonzales, stating:

> This patient is totally permanently disabled and is not fit to be engaged in vocational rehabilitation training. As I have recommended earlier, Ms. Moreno needs a caregiver at least 10 to 12 hours a day. She also needs an ongoing supportive psychological treatment.
> (App. Exh. 2, Dr. Chang Supplemental Report 12/7/17, p. 4.)

In a supplemental report dated July 30, 2019, Mr. Gonzales considered Dr. Wang's letter of June 18, 2019, in which he stated that his apportionment of applicant's diagnosis of Chiari Malformation was 60% industrial and 40% non-industrial.

Mr. Gonzales stated:

> Based on my review of PQME Dr. Wang's 06/18/2019 Supplemental Report, I still maintain my original opinion that Ms. Moreno has sustained 100% loss to the open labor market, which is 100% industrial in nature. It is still my opinion that ***Ms. Suguey Moreno is 100% permanently and totally disabled.***
> (App. Exh. 4, 7/30/19 Gonzales Supplemental Report, p. 1. Emphasis in original.)

In her trial testimony, applicant described the lasting effects that her injury has caused. Her legs

fall asleep, causing difficulty walking, with gait and balance problems, and she easily falls. She has broken her toes a couple of times as a result of her falls. She also has muscle weakness in her upper body from her lumbar injury, and has pain in her lumbar spine and neck. She has lost control of her urine and bowel movements, and her incontinence requires her to wear a catheter that has to be changed every two hours. She also wears diapers and has to use suppositories twice per day. She testified that she was told that her incontinence and neurological problems will last for the rest of her life. She suffers from psychiatric problems: anxiety, depression. She has problems talking about the incident because it has ruined her life. She now requires home health care, and is provided care for four hours, three days per week. She also receives care from her sister in law while her husband is at work.

Discussion

On this record, the WCJ concluded that applicant is permanently totally disabled and entitled to an unapportioned award of 100% permanent disability. The WCJ found applicant met her burden of proof as to industrial causation of her injury, including her claim for a psychiatric injury, and that defendant failed to establish the affirmative defense of good faith personnel action. The WCJ further found applicant established through the vocational evidence that she is unable to return to the labor market, as she lacks the residual functional capacity to perform any work. As to defendant's burden to establish apportionment to non-industrial factors, the WCJ found Dr. Wang's June 18, 2019 letter was not substantial medical evidence to support apportionment.

Defendant filed a Petition for Reconsideration, contending the WCJ erred in making his determination that applicant is permanently totally disabled, without apportionment.

Apportionment

Defendant first contends the Findings and Award must be reversed because the WCJ did not specify his reasoning in sufficient detail. Defendant asserts that the WCJ only discussed the facts without providing the parties with an explanation as to why he found the evidence he relied upon to be substantial evidence. To the extent the WCJ's Opinion on Decision did not provide a full and complete analysis of the facts and issues and basis for the Findings and Award, the WCJ's more detailed analysis in his Report and Recommendation on Petition for Reconsideration is sufficient to cure any defect. (*City of San Diego v.*

Workers' Comp. Appeals Bd. (1989) 54 Cal.Comp.Cases 57 (writ den.); *Smales v. Workers' Comp. Appeals Bd.* (1980) 45 Cal.Comp.Cases 1026 (writ den.).)

More substantively, defendant contends the WCJ erred in rejecting Dr. Wang's apportionment of 40% of applicant's permanent disability to the established diagnosis of a non-industrial congenital condition, Chiari Malformation. Defendant argues that Dr. Wang's opinion is substantial medical evidence that mandates apportionment under Labor Code sections 4663 and 4664.

"Apportionment of permanent disability shall be based on causation," and "[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." (Lab Code, §§ 4663 and 4664; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) A defendant has the burden of proving a basis for apportionment, including in cases involving 100% permanent disability. (*Escobedo,* supra; *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687].)

In order to meet its burden of proof to establish apportionment of permanent disability, defendant must present substantial medical evidence that establishes "what approximate percentage of the permanent disability was caused by the direct result of the industrial injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries." (Labor Code section 4663, subd. (c).)

In *Escobedo*, the Appeals Board held that for a medical opinion on apportionment to constitute substantial evidence, the opinion must be framed in terms of "reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo*, 70 Cal.Comp.Cases at 621-622. accord: *Andersen v. Workers' Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369, 1381–1382 [72 Cal.Comp.Cases 389]; *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 927–928 [71 Cal.Comp.Cases 1687]; *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 917, fn. 7 [70 Cal.Comp.Cases 787].)

To constitute substantial evidence on apportionment,

> . . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.
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> For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability.
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> And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.
> (*Escobedo*, 70 Cal.Comp.Cases at 621-622.)

Further, as held in *Escobedo*, to constitute legal apportionment, the physician must not apportion to the causation of the industrial injury, but specifically to the cause of the current level of disability. "Thus, the percentage to which an applicant's *injury* is causally related to his or her employment is not necessarily the same as the percentage to which an applicant's *permanent disability* is causally related to his or her injury. The analyses of these issues are different and the medical evidence for any percentage conclusions might be different." (*Escobedo*, 70 Cal.Comp.Cases at 611. Emphasis in original.)

This law was reaffirmed in the recent cases, *City of Petaluma v. Workers' Comp. Appeals. Bd.* (*Lindh*) 2018) 29 Cal.App.5th 1175 [83 Cal.Comp.Cases 1869] and *City of Jackson v. Workers' Comp. Appeals. Bd.* (*Rice*) (2017) 11 Cal.App.5th 109 [82 Cal.Comp.Cases 437]. In *Lindh*, where the applicant sustained a loss of vision in part due to an asymptomatic underlying condition, vascular spasticity, the court held that apportionment to the asymptomatic underlying condition or risk factor is required, even if the condition or risk factor alone might never cause disability, provided there "is substantial medical evidence that establishes that the asymptomatic condition or pathology was a contributing cause of the disability." (*Lindh,* 83 Cal.Comp.Cases at 1882.)

In *Rice,* the court held that apportionment to a pre-existing degenerative condition which is caused

in part by heredity or genetics is required where there is substantial medical evidence to establish that the pre-existing condition played a role in causing the disability. The medical evidence in *Rice* established that genetics or heredity may explain up to 75% of degenerative disc disease in adults, and the court accepted the physician's apportionment of 49% to genetic causation, where she found it to be "the lowest level that could reasonably be stated." (*Rice*, 82 Cal.Comp.Cases at 446.)

The decisions in *Lindh* and *Rice* do not alter the framework for making apportionment determinations, in that all such determinations must be based upon medical evidence that establishes how and why a non-industrial factor caused some portion of the resulting disability. In both cases, substantial discussion of the medical evidence was provided by the medical examiners that established a medical basis for apportionment to non-industrial factors.

The medical evidence here establishes that applicant suffers from a pre-existing congenital condition, Chiari Malformation, which the trauma of her industrial injury triggered into causing greater disability.

However, the WCJ concluded here that Dr. Wang's supplemental report stating a 40/60 apportionment is not substantial medical evidence because he did not apportion applicant's disability, but rather apportioned her diagnosis, where Dr. Wang stated:

> [T]he apportionment for Mr. Moreno's industrial diagnosis of Trigger of Chiari Malformation symptom is amended to 60% industrial and 40% nonindustrial.

We do not need to parse the meaning of his statement, and can assume that Dr. Wang was apportioning the extent of applicant's disability that was caused by Chiari Malformation. However, we cannot assume how he came to determine the actual apportionment numbers, as Dr. Wang offers no insight into his conclusion.

Prior to this apportionment determination, Dr. Wang concluded that all of applicant's neurological symptoms were directly caused by her industrial injury "with all conditions apportioned as 100% industrial." When he was asked to consider legal authorities on apportionment, he provided his new opinion in one sentence, and did not offer an explanation for his change of opinion beyond having considered the law of apportionment.

As explained in *Escobedo*, a medical opinion on apportionment must set forth reasoning in support of its conclusions. The physician "must explain how and why the [non-industrial factor] is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability." (*Escobedo*, 70 Cal.Comp.Cases at 621-622.)

The WCJ correctly concluded that Dr. Wang's June 18, 2019 letter is not substantial evidence to support apportionment, as he does not provide an explanation of how and why the injury is responsible for 60% of her disability and how and why the Chiari Malformation is responsible for 40% of her disability. His one sentence discussion is not adequate for defendant to meet its burden of proof to establish apportionment of applicant's permanent disability based upon substantial medical evidence. In both *Lindh* and *Rice*, the physicians who made apportionment determinations provided detailed explanations for their conclusions. While Dr. Wang's initial report provides an understanding as to why applicant's disability may have increased as a result of her pre-existing congenital condition, there is nothing in his reporting that supports his actual apportionment determination.

Defendant's petition references limitations on its ability to conduct appropriate discovery, presumably to explain its failure to take Dr. Wang's deposition in order to meet its burden of proof. The record discloses that applicant filed a Declaration of Readiness to which defendant objected on March 22, 2019, citing ongoing discovery and a need to obtain a follow-up report or cross-examination of Dr. Wang. At a hearing on June 4, 2019, the matter was continued for another MSC on July 30, 2019, and defendant was provided an opportunity to obtain the discovery it requested. Discovery closed on July 30, 2019, and the only additional discovery defendant obtained from Dr. Wang was his June 18, 2019 supplemental report. Defendant listed a pending deposition with Dr. Wang, but that deposition did not take place.

Defendant asserts in its Petition for Reconsideration that discovery was not complete at the July 30, 2019 MSC because it had not taken Dr. Wang's deposition, but the WCJ ordered the matter set for trial. (Petition, 7:19-21.) Applicant states in its verified Response to defendant's Petition for Reconsideration that defendant unilaterally cancelled Dr. Wang's deposition. (Response, 7:16-19.) In any event, there is no record of an objection to setting the matter for trial at the MSC on July 30, 2019, after defendant obtained Dr. Wang's supplemental report. Further, the Minutes of Hearing from the trial on October 11, 2019 do

not reflect that defendant raised an issue with regard to Dr. Wang's deposition.[1]

Furthermore, we note defendant's argument that we can only apply Dr. Wang's impairment ratings, because Dr. Previte and Dr. Chang are not experts "qualified to comment on the neurological deficit caused by Chiari Malformation." (Petition for Reconsideration at 12:7-10; 12-13.) Defendant fails to consider that applicant suffers from disabilities not related to Chiari Malformation, as Dr. Previte found disability caused by the injury to applicant's lumbar spine, and Dr. Chang found psychological impairment caused by all of the effects of her industrial injury. These physicians appropriately provided their opinions on applicant's impairments based upon their assessment of the injuries within their areas of expertise.

Permanent Total Disability

Defendant next challenges the WCJ's finding that applicant is permanently totally disabled. The WCJ found applicant established through her vocational evidence that, considering her vocational feasibility, she has lost her capacity to do any work in the labor market, and is permanently totally disabled. Both, the AME in orthopedics and the QME in psychology concurred with this vocational assessment. The WCJ relied upon the record that applicant unsuccessfully attempted to return to gainful employment. The WCJ also considered the expert opinions of Mr. Gonzales, AME Dr. Previte and QME Dr. Chang that they found no basis to apportion applicant's disability.

The WCJ correctly determined that applicant is permanently totally disabled, based upon substantial evidence that establishes that applicant is unable to benefit from vocational rehabilitation and return to full time employment in the labor market.

Labor Code section 4660 provides that permanent disability is determined by consideration of whole person impairment within the four corners of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides), the proper application of the PDRS in light of the medical record and the effect of the injury on the worker's future earning capacity. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565] ["permanent disability payments are intended

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[1] We also admonish defendant for referencing evidence outside the record. In its Petition for Reconsideration, defendant discusses the vocational reports of Mr. Remas, which were ordered not admitted into evidence as defendant did not list them as exhibits before discovery closed. (Petition, 6:20-28, 7:14-18.) Citation to exhibits that have been expressly excluded from evidence is improper.

to compensate workers for both physical loss and the loss of some or all of their future earning capacity"]; *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd.* (*Fitzpatrick*) (2018) 27 Cal.App.5th 607, 614 [83 Cal.Comp.Cases 1680]; *Almaraz v. Environmental Recovery Service/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) as affirmed by the Court of Appeal in *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] (*Almaraz/Guzman*). It may also be shown by rebutting the diminished future earning capacity factor supplied by the PDRS. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] (*Ogilvie*); *Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119]; c.f. *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587].)

To rebut a scheduled permanent disability rating, applicant must establish that her future earning capacity is actually less than that anticipated by the scheduled rating. The court in *Ogilvie, supra,* addressed the question of: "What showing is required by an employee who contests a scheduled rating on the basis that the employee's diminished future earning capacity is different than the earning capacity used to arrive at the scheduled rating?" (*Ogilvie*, 197 Cal.App.4th at p. 1266.) The primary method for rebutting the scheduled rating is based upon a determination that the injured worker is "not amenable to rehabilitation and, for that reason, the employee's diminished future earning capacity is greater than reflected in the scheduled rating." The employee's diminished future earnings must be 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*, 197 Cal.App.4th at pp. 1274–1275, 1277.) The evidence in the record here is sufficient to rebut the scheduled rating.

The issue here is whether the vocational evidence constitutes substantial evidence to support the conclusion that applicant was permanently totally disabled due to her inability to benefit from vocational rehabilitation, per *Ogilvie v. Workers' Comp. Appeals Bd.*; *Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) and *LeBoeuf v. Workers' Comp. Appeals Bd.*

In *Dahl*, the Court of Appeal held that to rebut the scheduled rating, applicant must prove that the industrial injury precludes vocational rehabilitation, writing in pertinent part as follows:

> 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…It is this individualized assessment of whether industrial factors preclude the employee's rehabilitation that *Ogilvie* approved as a method for rebutting the Schedule.
> (*Dahl*, 80 Cal.Comp.Cases at 1128.)

The vocational evidence the WCJ relied upon, the reporting of Mr. Gonzales, indicates that applicant is not amenable to vocational training and that applicant is precluded by the medically imposed work restrictions from returning to full time employment. Mr. Gonzales' "individualized assessment" of the vocational factors affecting applicant's ability to return to work shows that the medical restrictions do limit applicant's ability to work. Further, Mr. Gonzales found applicant had attempted to return to work, but her substantial physical and mental limitations prevented her from benefiting from retraining and that there was no labor market for individuals considering her residual functional capacity. Both Dr. Previte and Dr. Chang agreed with Mr. Gonzales' vocational assessment that applicant is permanently totally disabled.

Accordingly, we will affirm the WCJ's determination and deny defendant's Petition for Reconsideration. The WCJ correctly determined that defendant failed to meet its burden of proof to establish apportionment based upon substantial medical evidence. The WCJ also relied upon substantial evidence to conclude applicant rebutted the schedule rating of her permanent disability and that applicant is permanently totally disabled.

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For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration, filed December 30, 2019 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

JOSE H. RAZO

I CONCUR,

CHAIR

KATHERINE ZALEWSKI

CRAIG SNELLINGS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 28 2020

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

SUGUEY MORENO
GOLDBERG & IBARRA
HANNA BROPHY ET AL

SV/*pc*

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ8399668

SUGUEY MORENO	**-vs.-**	**KERN COUNTY SUPERINTENDENT; SELF INSURED SCHOOLS BAKERSFIELD;**

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE: **Christopher Brown**

Recommendation: **DENY**

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

Defendant, Kern County Superintendent of Schools, Permissibly Self-insured, administered by Self-Insured Schools of California, filed a timely, verified and properly served petition for Reconsideration of the Order Amending Issues presented, Rulings on Evidence, Findings of Fact, Awards and Orders; Opinion on Decision filed on December 9, 2019. Petition states the statutory authority is Labor Code Section 5903 and the claimed bases are consistent with Labor Code Sections 5903 (c) and (e). Applicant filed a timely, verified and properly served Response to Petition.

Specifically Petitioner claims the Findings of fact do not support the Award of 100% permanent total disability indemnity because the WCALJ did not specify in detail the reasoning supporting the Award, and the evidence does not justify the Findings of Fact because the medical evidence does not support an unapportioned award of 100% permanent total disability.

FACTS

Applicant Suguey Moreno suffered an admitted specific industrial injury on March 13, 2012. Applicant's industrial injury involved her right foot, low back, neck, trunk, lower extremities, urinary and excretory system, spinal and peripheral nerve damage, and her psyche. The parties submitted reports from William Previte, M.D. along with a transcript of the doctor's deposition, and reports from Jonathan Wang, M.D., Vernon Sorenson, M.D., Sookyung Chang, Ph.D. and Greg Hirokawa, Ph.D. into evidence.

Applicant obtained Vocational Rehabilitation Expert reports from Gene Gonzalez, M.S.W. that were admitted into evidence. Defendant obtained Vocational Rehabilitation expert reports from The Remus Group. Defendant did not list the reports from the Remus group as proposed exhibits on the Pre-Trial Conference Statement. Applicant objected to their admission as evidence on the day of trial. Applicant's objection was sustained and the reports of the Remus Group were not admitted as exhibits.[1] A first Mandatory Settlement Conference was held on June 4, 2019. Applicant's attorney requested the matter be set for trial and defendant requested more time for discovery. The matter was continued to a second Mandatory Settlement Conference on July 30, 2019. On July 30, 2019 the parties indicated discovery was completed and made a Joint request to continue the matter to trial. (MOH 7-30-19) They submitted a Pre-Trial Conference Statement listing the stipulations, issues and proposed exhibits. Workers' Compensation Judge Christopher M. Brown Ordered the exhibits to be filed by August 20, 2019, Discovery was Closed and had the case set for Trial on October 11, 2019. (PTCS 7-30-19 Page 1) Defendant did not file a Petition for Removal of the Order Closing Discovery and setting the matter for trial. Defendant's Petition misstates the procedural record when it states discovery was not complete as of July 30, 2019. (Petition Page 7 Lines19 – 22) The Order Closing Discover became final as of August 20, 2019.

The WCALJ determined there was no legally valid apportionment presented at trial. Dr. Wang was the only medical doctor that indicated there should be apportionment, and he apportioned the diagnosis of the trigger of Chiari Malformation and not the permanent disability that resulted from her industrial injury. (OOD Page 9) The WCALJ determined Dr. Wang's apportionment was invalid because he,

> talks about Applicant's diagnosis, not her permanent disability. The report does not say he has changed his opinion given on May 15, 2014. He does not change his finding that Applicant's symptoms are residuals from her surgery. His apportionment of her diagnosis is invalid because he does not explain the facts or reasoning upon which his analysis is based. (OOD Page 9)

The WCALJ determined Applicant was 100% permanently totally disabled based on the Vocational rehabilitation Expert reports of Gene Gonzalez and Applicant's credible

[1] The Petition for Reconsideration refers to the reports issued by the Remus Group as Defendant's Exhibit J and K. (Petition Page 6 Line 20 through Page 7 Line 18) This part of Defendant's Petition misstates the evidentiary record. Defendant's Proposed Exhibits J & K are not in evidence.

testimony she has attempted to and not been able to find gainful employment since she suffered her specific industrial injury. (OOD Page 8)

DISCUSSION

THE MISSTATEMENT OF THE EVIDENTIARY RECORD IS GROUNDS TO DENY DEFENDANT'S PETITION FOR RECONSIDERATION

Defendant failed to list the reports from the Remus Group as exhibits in the Pre-Trial Conference Statement. Applicant's objection to admission of these reports was sustained and they were not admitted into evidence. (ROE 22 and 23) Petitioner refers to these documents as if they were admitted into evidence as Defendant's Exhibits J and K.[2] The Petition for Reconsideration should be denied based on this misstatement of the evidentiary record.

THE FINDINGS OF FACT SUPPORT THE AWARD OF PERMANENT TOTAL DISABILITY

Petitioner first assertion is the Findings of Fact do not support the Award of Permanent Total Disability Indemnity benefits. The Findings of Fact are as follows:

> 1. Suguey Moreno, born November 21, 1997, while employed on March 13, 2012 as a Site Supervisor II, Occupational group Number 214, at 931 Belle Terrace, Bakersfield, California, by kern County Superintendent of Schools (Defendant) sustained an injury arising out of and in the course her employment to her right foot, low back, neck, trunk, lower extremities, urinary/excretory system, spinal and peripheral nerve damage, and psyche.
>
> 2. Defendant was permissibly self-insured at the time of Applicant's industrial injury. This claim is administered by Self-insured Schools of California.
>
> 3. Applicant was earning $995.04 per week at the time of her industrial injury.
>
> 4. Applicant sustained permanent total disability (100%) as a result of her industrial injury.
>
> 5. Applicant requires further medical care to cure or relieve the effects of her industrial injury.

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[2] Defendant's Proposed Exhibits J & K were not admitted into evidence as Defendant did not list them on the Pre-Trial Conference Statemnt and they were not required for development of the record.

6. Applicant's condition was permanent and stationary on June 20, 2017. (ROE, FOF, A&O Page 3)

The Findings of fact include a finding of industrial injury, a finding of Applicant's average weekly wage, a finding she sustained permanent total disability and a finding of her permanent and stationary date. The Parties Stipulated Applicant is entitled to the 15% permanent disability indemnity increase pursuant to Labor Code Section 4658. (MOH & SOE Page 3 Lines 1 – 3, OOD Page 10) The statutory increase required by Labor Code Section 4659(c) is a statutory requirement. Therefore, the Findings of Fact clearly support Award 1:

1. Applicant is Awarded lifetime Permanent Total Disability Indemnity benefits commencing June 20, 2017 at the weekly rate of $663.36 with statutory increases pursuant to Labor Code Sections 4658(d)(2) and 4659(c) less twelve percent (12%) to be held in trust by Defendant pending resolution of the Applicant's Attorneys' fee liens and less credit for the Permanent Disability Indemnity advanced by Defendant. (ROE, FOF, A&O Page 3)

Defendant's claim the Findings of Fact do not support the Award of 100% permanent total disability because the WCALJ failed to specify in detail the reasoning supporting the Award lacks merit. Therefore, Defendant's Petition should be denied.

SUBSTANTIAL EVIDENCE SUPPORTS THE FINDINGS OF FACT

The WCALJ issued an Opinion and Decision supporting his Findings of Fact and Awards and Orders.[3] The WCALJ determined Applicant proved by a preponderance of the evidence that she is permanently totally disabled as a result of her admitted industrial injury, and that Defendant failed to prove by a preponderance of the evidence that apportionment of Applicant's permanent total disability was appropriate. The determination Applicant is permanently totally disabled was based on the reporting of vocational rehabilitation expert Gene Gonzalez, the reporting of the Agreed Medical examiner William Previte, M.D. and Applicant's credible testimony at trial. (OOD Page 8)

All of the medical examiners and the vocational rehabilitation expert determined Applicant's permanent disability was caused 100% by her industrial injury. Dr. Wang's June 18, 2019 report was expressly found to be insubstantial on the issue of apportionment because:

[3] Response Page 8 Line 18 – Page 14 Line 23

Defendant's claim that Mr. Gonzales did not review the report of Dr. Wang and address apportionment is contradicted by the evidentiary record. (Petition Page 15 Line 14 – 16) Therefore the Petition should be denied.

DATE: JANUARY 13, 2020

Christopher Brown
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE: ON ALL PARTIES AS SHOWN ON THE ATTACHED SERVICE ROSTER

BY:
ON: JANUARY 13, 2020