WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SHERYL WILSON, ***Applicant***

vs.

KOHLS DEPARTMENT STORE;
NEW HAMPSHIRE INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ10902155
Sacramento District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate as quoted below, we will grant reconsideration, amend the WCJ's decision as recommended in the report, and otherwise affirm the September 15, 2021 Findings and Award.

We adopt and incorporate the following quote from the WCJ's report:

> Applicant filed a timely and verified Petition for Reconsideration from the Findings and Award issued on September 15, 2021, which found, in pertinent part, that applicant did not sustain a complete loss of future earnings capacity as a result of her industrial injury and awarded applicant permanent partial disability of 78% after apportionment. I further found that applicant did not sustain injury arising out of and in the course of employment to her face, jaw, in the form of headaches, or in the form of CRPS to the upper extremities and right lower extremity. I found in applicant's favor on the issues of occupational group number and application of *Almaraz-Guzman*.
>
> Applicant alleges that I acted in excess of my powers in denying permanent total disability in accordance with the fact per Labor Code[1], sections 4660 and

[1] All future references are to the Labor Code unless noted otherwise

4662(b). Applicant alleges that she is permanently and totally disabled. In the alternative, applicant argues that her permanent partial disability should be increased to 93% based upon her loss of future earning capacity. Applicant further alleges that she has suffered new and further disability after the date this matter was submitted. Lastly, applicant alleges that I incorrectly applied 10% non-industrial apportionment due to a fall as the parties had stipulated at trial that the fall was a compensable consequence injury.

Having thoroughly reviewed the contents of the Board's file and the Petition for Reconsideration, I respectfully recommend that applicant's Petition for Reconsideration be **GRANTED**. As the decision after reconsideration, I recommend that Finding of Fact number three and the award of 78% permanent disability be **VACATED** and that a new Finding of Fact and award of 87% permanent disability issue without apportionment. I further recommend that the issue of whether applicant sustained new and further disability be **DEFERRED**. I otherwise recommend that all other findings of fact be affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Applicant worked for Kohls Department Store as a retail sales clerk, when she sustained an admitted industrial injury to her lumbar spine, left ankle, and in the form of Complex Regional Pain Syndrome (CRPS) of the left ankle on September 20, 2016. (Minutes of Hearing and Summary of Evidence (MOH), June 24, 2021, p. 2, lines 10-19.) Applicant claimed further injury to her face, jaw, in the form of headaches, and in the form of CRPS to the upper and lower extremities. (*Ibid*.) Applicant was injured while pushing a rack of clothes, when she developed pain in the left ankle. (Joint Exhibit 101, Report of AME Mark Anderson, M.D., November 8, 2018, p. 4.)

The primary issue for trial was applicant's level of permanent disability. (MOH, supra at p. 3, lines 3-10.) The secondary issues were body parts injured and applicant's occupational group number. (Ibid.) Applicant has not sought reconsideration of the findings as to body parts injured or the occupational group number. Only applicant's level of permanent disability is raised as an issue.

1. Medical Evidence

Applicant was evaluated by agreed medical evaluator ("AME") Mark Anderson, M.D., who authored nine reports in evidence and was deposed twice.[2] (Joint Exhibits 101 through 111.) Dr. Anderson took a history of initial injury, including a prior injury to the same body part, as follows:

> I asked about the injury in August 2015 and she describes just walking down the aisle at work when she developed pain in her left foot and ankle

[2] Joint Exhibits 110 and 111 are mistakenly listed as reports on the minutes of hearing, when they are actually deposition transcripts.

> area. I was able to find an entry in the Kaiser records on August 1, 2015 and the patient is placed in a walking boot. It looks as if that episode subsequently resolved by the end of the year as there was an entry on November 30, 2015 having to do with right neck and shoulder pain. The patient states that this situation remained normal until the next event.
>
> The patient states that she continued in her regular duty position until September 20, 2016. She describes pushing a rack of clothes when she developed pain in the left ankle. There was no particular "pop" associated with this event.
> (Joint Exhibit 101, p. 4.)

The initial reporting of applicant's injury diagnosed issues with her foot tendons indicating Achilles tendonitis and a Haglund deformity. (*Ibid*.) Applicant underwent surgical repair of the tendons on March 9, 2017. (*Ibid*.)

After surgery, applicant had a fall at a Panera, which resulted in further pain of the left ankle, including a fever. (*Id*. at p. 5.) Applicant underwent additional surgery on March 27, 2017, to remove a clot. (*Ibid*.) Following a return to her primary treater, applicant was referred to a chronic pain specialist. (*Ibid*.)

Dr. Anderson noted that applicant had two surgeries to the left ankle resulting in atrophy of the left calf and thigh, and loss of motion of the ankle and subtalar joints. (*Id*. at p.12.) For applicant's complex regional pain syndrome, Dr. Anderson assigned 13% whole-person impairment (WPI) to the left ankle using a strict AMA Guides analysis. (*Id*. at p. 13.) He opined that due to applicant's part time use of a wheelchair, her disability would be better described by using Table 17-5, page 529 of the AMA Guides. (*Ibid*.) He assigned 60% WPI as applicant fell partway between moderate and severe categories of gait derangement. (*Ibid*.)

Dr. Anderson deferred causation of CRPS to a pain management specialist and noted that onset of CRPS one year post-surgery is unusual. (*Id*. at p. 12.) However, he also opined that 100% of the permanent disability to the ankle was industrial in origin. (*Id*. at p. 13.)

Dr. Anderson assigned work restrictions as follows: "[A] position where she can sit 8 hours a day and limited ambulation to 15 minutes/hour as well as 4-pound lifting limit." (*Id*. at p. 12.)

As to the lumbar spine, Dr. Anderson assigned 5% WPI per Lumbar DRE II. (*Id*. at p. 14.) He assigned 50% apportionment as non-industrial pre-existing condition and 50% as a consequence of the left ankle injury. (*Ibid*.) Applicant had no work restrictions due to her lumbar spine. (*Ibid*.)
In supplemental reporting Dr. Anderson made clear that he is not an expert in CRPS and has no training in pain management. (Joint Exhibit 102, Report of

Mark Anderson, M.D., December 22, 2018, p. 2) Again, Dr. Anderson deferred to the parties to use an AME / QME in the field of pain management to determine causation of CRPS. (*Ibid*.)

Dr. Anderson reviewed additional records, but did not change his initial opinions on causation and apportionment. (Joint Exhibit 104, Report of Mark Anderson, M.D., April 13, 2019.) He reviewed more detailed records regarding applicant's subsequent fall at Panera in 2017. He commented as follows:

> Dr. Ghalambor did visit with the patient on March 17, 201 7, which would have been two days after her fall. On page 1 of his report, he states, "Since then, her symptoms have escalated". It looks as if she developed increased swelling in her left ankle and had difficulty wearing her boot and in fact had left the boot off for the last three days. By way of comment, this would indicate a worsening as the result of her fall at Panera.
> (Id. at p. 3.)

Dr. Anderson modified his prior left ankle apportionment opinion and apportioned 10% of applicant's left ankle impairment to the fall at Panera. (Id. at p. 4.)

Applicant was evaluated by qualified medical evaluator (QME) Anuj Gupta, M.D., for comment upon causation of CRPS. Dr. Gupta issued four reports in evidence. (Joint Exhibits 112 through 115.)

Dr. Gupta took a history of complaints of pain to the jaw, teeth, loss of hearing in the left ear, constant neck pain radiating to her hands, bilateral shoulder and arm pain, and pain throughout the back. (Joint Exhibit 112, Report of Anuj Gupta, M.D., August 16, 2019, pp. 5-6) Applicant has constant pain bilaterally in the knees, ankles, and feet. (*Ibid*.) Applicant complains of high heart rate, shortness of breath, chest pain, and dizziness. (*Ibid*.) Applicant has constant pain in her kidney area, abdomen, and groin. (*Ibid*.) She complains of urinary incontinence. (*Ibid*.)

Applicant denied a prior history in industrial accidents. (*Id*. at p. 6.) Dr. Gupta required applicant's medical file for review prior to opining on causation and other issues. (*Id*. at p. 15.)

Dr. Gupta reviewed applicant's medical file and issued a supplemental report. (Joint Exhibit 113, Report of Anuj Gupta, M.D., November 19, 2019.) Dr. Gupta noted a history of applicant fracturing her right wrist as a child. (*Id*. at p. 6.) Applicant has had chronic knee pain since childhood. (*Ibid*.)

Dr. Gupta assigned work restrictions as follows:

> The patient should be precluded from running, jumping, prolonged weight bearing and from climbing ladders and repetitively negotiating stairs and/ or uneven terrain from the effects of this left lower extremity industrial injury. She is in need of other restrictions for the non-industrial conditions she continues to experience.
> (*Id*. at p. 58.)

Dr. Gupta commented on diagnosis and impairment as follows:

> Based on the AMA Guides to the Evaluation of Permanent Impairment, 5th edition, the patient has 40% whole person impairment.
>
> She presents in a wheelchair. She has complaints throughout her entire body. She does not fit the criteria of complex regional pain syndrome per the AMA Guides but meets the Budapest criteria. The Budapest criteria is an accepted criteria method to diagnose complex regional pain syndrome.
>
> The patient has a combination of a chronic fibromyalgia condition further complicated by a mild left lower extremity CRPS condition. Based on AMA Guides, and solely for the left lower extremity chronic pain and complex regional pain syndrome, and Table 13-15, page 336, her current condition is consistent with a Class 2 level of impairment and 19% Whole Person Impairment in that she rises to standing position, walks some distance with some difficulty and without assistance, but is limited to level surfaces. I believe this is the most appropriate way to rate her overall condition. I do not believe the other body parts have developed the CRPS condition as a compensable consequence to this industrial injury or by way of simply spreading to these other areas. The patient may have additional impairment for the fibromyalgia condition that is not rated here. The patient does not require the wheelchair or any other assistive devise as a result of this industrial injury.
> (*Ibid*.)

Dr. Gupta went on to state:

> Based on review of these voluminous records, and given the lack of current unilateral objective findings, I do believe most of the symptoms experienced throughout her body are preexisting and have been chronic for some time leading up to this industrial injury. She has provided an inaccurate medical history as compared to and as documented by the records reviewed. Her current physical examination revealed minimal CRPS in the left lower extremity and her examination was quite unremarkable for complex regional pain syndrome throughout her body. I believe most of these symptoms are systemic symptoms and complaints secondary to nonindustrial fibromyalgia or possible autoimmune rheumatological disorders. I remain of the opinion the patient would

> benefit from a rheumatology evaluation and appropriate labs on a non-industrial basis.
> (*Id*. at p. 62.)

Dr. Gupta opined that applicant's CRPS to the left ankle and distal left lower extremity were industrial and caused by a combination of her strain injury, industrial surgery, and non-industrial surgery. (*Id*. at pp. 59-60.)

Dr. Anderson reviewed Dr. Gupta's reporting and issued a supplemental report, in essence, deferring to the rater / trier of fact as to harmonizing the difference between his and Dr. Gupta's ratings. (Joint Exhibit 106, Report of Mark Anderson, M.D., May 29, 2020.)

Dr. Gupta reviewed Dr. Anderson's opinions and opined as to no change of opinion. (Joint Exhibit 114, Report of Anuj Gupta, M.D., November 20, 2020.) Dr. Anderson noted in deposition that applicant uses a wheelchair because she cannot ambulate safely on her left foot. (Joint Exhibit 111, Deposition of Mark Anderson, M.D., September 29, 2020, p. 10, lines 12-16.)

In another supplemental report, Dr. Anderson reaffirms the work restrictions assigned in his initial report. (Joint Exhibit 107, Report of Mark Anderson, M.D., June 28, 2020.)

Dr. Anderson reviewed the reporting of applicant's vocational expert. He opined that applicant's medications would interfere with her ability to concentrate and focus. (Joint Exhibit 108, Report of Mark Anderson, M.D., January 28, 2021, p. 2) Applicant would require extra rest breaks due to the medications. (*Ibid*.) Dr. Anderson noted:

> The major new piece of information provided is that the patient currently takes Dilaudid which is a significant increase in her prior level of pain medication. I would continue to feel that the patient would have difficulty completing a voc rehab program and that may well fulfill the request by Mr. Ramirez as to her lack of capabilities in that endeavor and hence ending up at 100% precluded from competing in the open labor market.
> (*Ibid*.)

Dr. Anderson reviewed the reporting of defendant's vocational expert and opined as follows:

> I can only say that Ms. Tincher's report will be reviewed by the trier of fact and a decision will be made. From an orthopedic standpoint, Ms. Tincher clearly outlines the fact that the patient is in a wheelchair and has difficulty standing and cannot even wear shoes/socks at times. She then goes ahead and provides a number of alternative work activities that require the patient to be engaged in meeting the public. These

> recommendations are also made with the knowledge that the patient states that she sleeps most of the day and that she is on a number of medications. I had outlined the patient's current medication use in my January 28, 2021 supplemental report and it included the use of hydromorphone, hydrocodone, and methocarbamol. That represents a consideration amount of medication and I believe would interfere with the patient's ability to perform many cognitive activities and especially those that would include calculations and attentions to detail as would be required by a loan office.
> (Joint Exhibit 109, Report of Mark Anderson, M.D., April 26, 2021, p. 2)

Dr. Gupta reviewed the reporting of defendant's vocational evaluator and noted that he had requested the parties obtain a functional capacity evaluation, not a vocational evaluation. (Joint Exhibit 115, Report of Anuj Gupta, M.D., May 26, 2021, p. 3.) Dr. Gupta opined:

> [Ms. Tincher] states [applicant] is best suited for jobs that are mostly communication and telephone oriented and where there is light lifting or lifting involved of no more lifting than four pounds, I believe this is reasonable. She did go into depth regarding different job options. I would defer to her own expertise.
> (*Ibid*.)

In deposition, Dr. Anderson clarified that applicant's fall at Panera was the sole cause of applicant's second surgery. (Joint Exhibit 110, Deposition of Mark Anderson, M.D., September 29, 2020, p. 12, lines 3-24.) Applicant requires use of a wheelchair because she is medically unable to bear weight on her left foot at times. (*Id*. at p. 10, lines 20-22.)

Dr. Anderson opined on applicant's ability to retrain as follows:

> Q. All right. And do you think she's amenable to vocational rehabilitation?
> A. In my opinion not at the present time.
> Q. And why is that?
> A. The amount of pain medication she's taking coupled with her inability to get around I believe would preclude her from actively participating in any voc rehab program.
> (*Id*. at p. 19, lines 11-18.)

Dr. Anderson further testified the basis for his Almaraz-Guzman opinion in that he split the level of impairment between the use of wheelchair between moderate and severe as applicant's condition fell somewhere in between. (Joint Exhibit 111, Deposition of Mark Anderson, M.D., September 29, 2020, p. 12, lines 3-24.) He did not add on three percent for pain because it was the pain that was causing the use of the wheelchair. (*Id*. at p. 13, lines 5-11.)

Dr. Anderson commented upon applicant's ability to work as follows:

> In reality, I don't believe she would be able to compete in the open labor market because of her chronic pain, see, slash CRPS situation. And I've also recommended that if that is a significant problem, then she would require a vocational rehabilitation evaluation.
> (*Id*. at p. 14, line 24, through p. 15, line 4.)

Dr. Anderson believed that applicant would have difficulty working an 8-hour shift. (*Id*. at p. 15, lines 9-13.) He did not modify the prior work restrictions imposed in his November 8, 2018 report, but opined that applicant would likely need a sheltered work environment. (*Id*. at p. 15, line 18, through p. 16, line 1.) Dr. Anderson also noted the effects of applicant's medications on her ability to work as follows:

> I would also remind the parties that at the time that I saw her back in -- back on October 24, 2018, she was taking hydrocodone, 7.5 milligrams, and six tablets a day in addition to Robaxin, in addition to Cymbalta and in addition to Topamax. So that amount of medication may well interfere with her ability to function on a day-to-day basis.
> (*Id*. at p. 17, lines 4-11.)

Dr. Anderson was of the opinion that the CRPS was a result of applicant's industrial surgery, and thus, pursuant to *Hikida*, he did not assign apportionment. (*Id*. at p. 18, line 18, through, p. 19, line 7.)

Applicant has a history of taking a multitude of medications prior to her industrial injury. Dr. Gupta noted refills of hydrocodone in 2008. (Joint Exhibit 113, supra at p. 3.) Applicant refilled hydrocodone again in 2011. (*Id*. at pp. 9-10.) Applicant continued with hydrocodone prescriptions in 2014. (*Id*. at pp. 16-17; 24.) She refilled hydrocodone in 2015. (*Id*. at p. 25.) Finally, two months prior to her industrial injury, applicant was prescribed Norco. (*Id*. at p. 30.)

Applicant took Robaxin for years prior to her industrial injury. In 2014, the medical file notes: "Patient complains of one week of neck pain and upper back pain, some radiation to back of head. Taking her regular pain medications, also tried Robaxin 3-4 times a day with little help." (*Id*. at p. 17.) Applicant noted to her doctors that Robaxin helped "in the past". (*Ibid*.) Applicant continued taking Robaxin in 2015. (*Id*. at p. 24.) In November 2015, her history noted: "Also takes Norco and Robaxin regularly for chronic low back pain." (*Id*. at pp. 28-29.)

Applicant was prescribed Cymbalta in 2015. (*Id*. at p. 27.)

The medical record indicates that applicant was first prescribed Dilaudid in 2011. (*Id*. at pp. 7-8.) This was in connection with pain to her hip. (*Ibid*.) The record notes that "[applicant] has already been taking Motrin and Vicodin for years." (*Ibid*.)

2. Vocational Evidence

Applicant obtained reporting from vocational expert P. Steve Ramirez, who authored two reports in evidence. (Applicant's Exhibits 1 and 2.)

Applicant was employed with Kohls from May 2015 through December 27, 2016. (Applicant's Exhibit 1, Report of P. Steve Ramirez, April 17, 2020, at p. 2.) She worked for IHSS caring for her two autistic sons from 2005 through 2018.

Applicant uses a wheelchair, but primarily outside the home. (*Id*. at p. 4.) Inside the home, applicant uses a cane and walker. (*Ibid*.)

Applicant has not participated in a vocational rehabilitation program. (*Id*. at p. 2.)

Mr. Ramirez opined on vocational apportionment as follows:

> Dr. Anderson, in the report of 11/20/2018, concluded medical apportionment was 100% to the industrial injury. Dr. Gupta, in the report of 11/2019, found 75% her ankle and related pain condition is industrial and 25% in due to non-industrial factors. Dr. Anderson addressed Ms. Wilson's prior left ankle injury of 08/2015. He reported Ms. Wilson had recovered from that injury, without work limitations, prior to the industrial injury of 09/20/2016. As no medical records address prior work restrictions for Ms. Wilson, vocational apportionment is, therefore, viewed as 100% industrial. This is supported by Target v. Estrada (2016). (*Id*. at p. 9.)

Mr. Ramirez conducted a vocational analysis and found that applicant had pre-injury access to 47.6% of the labor market. (*Id*. at pp. 10-11.) Post-injury applicant has 6.9% access to the labor market. (*Ibid*.) Mr. Ramirez did not comment upon applicant's loss of future earnings capacity. (See generally, *id*.)

Mr. Ramirez issued a supplemental report reviewing the deposition of Dr. Anderson. (Applicant's Exhibit 2, Report of P. Steve Ramirez, June 26, 2020.) Mr. Ramirez raised several questions about applicant possibly being precluded from all work. (*Id.* at p. 4.)

> As noted at the beginning of this report, Dr. Anderson, in his deposition transcript of 09/2019, is quoted as having said the following: "The amount

of medication she's taking coupled with her inability to get around I believe would preclude her from actively participating in any 'voc' rehab program."

• Does this mean she presently does not have the capability of concentrating, staying focused, and paying attention to detail?

• If working, due to reported fatigue from the medication, does she need extra rest breaks? Of what duration and frequency?

• Is she expected to have difficulties completing tasks, accurately, and within deadlines?

As previously concluded, Ms. Wilson has at least a 93.1% diminished ability to compete in the open labor market. However, **if the above questions are clarified**, she may be considered 100% non-competitive and non-employable in the open labor market.
(*Ibid*.)

Defendant obtained vocational expert reporting from Emily Tincher, who issued one report in evidence. (Defendant's Exhibit A, Report of Emily Tincher, December 21, 2020.) Ms. Tincher took a thorough history of injury and summarized the medical records. (*Id*. at pp. 3-25.)

Ms. Tincher noted that applicant's IQ and cognitive aptitude placed her in the 50th percentile. (*Id*. at p. 28.)

Ms. Tincher noted that applicant has an occupational history as an underwriter for the Small Business Association around 2006. (*Id*. at p. 27.) She also worked as a loan underwriter for many years around 1997. (*Ibid*.)

DISCUSSION

Applicant does not disagree with my discussion and analysis of the law as to properly finding permanent and total disability in accordance with the fact. That analysis follows.

To analyze whether applicant is permanently and totally disabled, I must first clarify what the correct legal standard is for finding permanent and total disability. That is because there are two recent opinions of the District Courts of Appeal…. (*Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd., (Fitzpatrick)*, (2018) 27 Cal. App. 5th 607; *Applied Materials v. Workers' Comp. Appeals Bd*., (2021) 64 Cal. App. 5th 1042.)

As a workers' compensation judge, I am an expert in workers' compensation law and that job includes properly and adequately informing any reviewing court

the basis for any decisions. (*Brodie v. Workers' Comp. Appeals Bd*., 40 Cal. 4th 1313 , 1331, ["[T]he Board has extensive expertise in interpreting and applying the workers' compensation scheme."].)

> In interpreting the workers' compensation statutes, [higher courts] give great weight to the construction of the WCAB, unless it is clearly erroneous or unauthorized. (Citation.) Ultimately, of course, our fidelity must be to the legislative intent as best shown by the Legislature's use of clear and unambiguous statutory language. (Citation.)
> (*Honeywell v. Workers' Comp. Appeals Bd*., (2005) 35 Cal. 4th 24, 34 [internal citations omitted].)

….

D. Applicant is not permanently and totally disabled.

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

Applicant failed to meet her burden of proof as her own vocational expert opined that applicant may return to work.

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

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

This case is different from both *Fitzpatrick* and *Applied Materials*. A doctor is permitted to opine that applicant is medically precluded from returning to work.

If such an opinion constitutes substantial evidence, the board is bound to follow it. The difference here is that the AME's opinions are not based on complete medical preclusion. When partial work restrictions are applied, the question of whether such restrictions preclude employment requires a vocational analysis.

Although the AME does opine that applicant is precluded from working, this does not appear to be a medical preclusion and is instead reflective of the AME engaging himself in vocational feasibility opinions outside his area of expertise. While a doctor is permitted to completely preclude applicant from return to work on a medical basis, the AME did not make such a preclusion and instead opined only as to limited work restrictions. While these restrictions limited applicant's employment opportunities, applicant's vocational expert did not feel these restrictions precluded applicant from gainful employment. Accordingly, she failed her burden to rebut the scheduled rating.

The AME's opinion as to applicant's ability to participate in rehabilitation is also outside the expertise of a doctor. The doctor may medically preclude applicant from participating in vocational rehabilitation; that did not happen here. The doctor may describe what the effects of a medication are, and the vocational expert may then transfer that to rehabilitation and employability. That did not happen here. Applicant failed her burden of proof on this issue.

I would also note that per *Ogilvie* and as described further in *Dahl*, the non-amenability to vocational rehabilitation must be due to industrial factors. (*Contra Costa County v. Workers' Comp. Appeals Bd., (Dahl)* 240 Cal. App. 4th 746.) Many of the prescriptions that the AME believe were impacting applicant's ability to rehabilitate were being prescribed long before applicant's industrial injury. The AME failed to offer any opinion on causation of such prescriptions and improperly assumed that the prescriptions were industrial. The AME's opinions on this matter are both outside his area of expertise and not persuasive given the medical record.

E. Applicant's argument as to an increase of permanent partial disability to 93% is not supported in law.

Applicant argues, in the alternative, that her award of permanent partial disability should be 93% as that is exact percentage of loss of labor market access sustained by applicant. Except in cases of permanent total disability, applicant cannot rebut the PDRS based upon her diminished future earnings capacity under Labor Code section 4660.1.

The standard for statutory interpretation has been stated in multiple opinions of the California Supreme Court:

> The objective of statutory construction is to determine the intent of the enacting body so that the law may receive the interpretation that best

> effectuates that intent. [Citation.] We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context. [Citations.] If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls. [Citation.] We consider extrinsic aids, such as legislative history, only if the statutory language is reasonably subject to multiple interpretations.
> (*City of Alhambra v. County of Los Angeles*, (2012) 55 Cal. 4th 707, 718-719 [internal citations and quotations omitted].)

One of the most significant changes enacted in SB-863 modified the way permanent partial disability is calculated. For injuries occurring prior to January 1, 2013, section 4660 calculated permanent disability as follows:

> (a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity.
> (§ 4660(a), [emphasis added].)

Following SB-863, a new section 4660.1 was drafted to redefine permanent disability for injuries occurring on or after January 1, 2013. Section 4660.1 modified the language in subsection (a) above to state as follows:

> (a) In determining the percentages of permanent partial or permanent total disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and the employee's age at the time of injury.
> (§ 4660.1(a).)

Under both 4660 and 4660.1, "the nature of the physical injury or disfigurement" is defined in subsection (b) via adoption of the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (2001) (AMA Guides). However, in 4660.1, the whole-person impairment assigned under the AMA Guides is increased by a factor of 1.4. (§ 4660.1(b).)

The Legislature removed the line "consideration being given to an employee's future earning capacity" from the factors to consider in determining permanent disability for dates of injury post-January 1, 2013. This action appears clear and unambiguous. With regard to the permanent disability rating schedule, applicant cannot rebut a scheduled partial disability rating by arguing a disproportionate impact upon DFEC, as DFEC is no longer included as a factor to consider in assigning such permanent disability.

Multiple panel decisions[11] have found that applicant is still able to rebut the PDRS due to diminished future earnings capacity under section 4660.1. (See *Sandoval v. The Conoco Companies*, 2019 Cal. Wrk. Comp. P.D. LEXIS 299; *McReynolds v. Graniterock*, 2020 Cal. Wrk. Comp. P.D. LEXIS 109.)

As to *Sandoval*, that case is distinguishable because it involved an award of permanent total disability in accordance with the fact. Section 4660.1 expressly states: "(g) This section does not preclude a finding of permanent total disability in accordance with Section 4662." (§ 4660.1(g).) As permanent total disability in accordance with the fact requires a finding that applicant has lost the ability to work, it necessarily requires an analysis of diminished future earnings. Accordingly, *Sandoval* is correct that applicant may continue to rebut the scheduled rating under section 4660.1 where she is unable to work and thus, permanently and totally disabled.

While I agree with the outcome of *McReynolds*, I respectfully disagree with the reasoning. In *McReynolds*, the board denied defendant's petition for removal from the WCJ's order taking the matter off calendar for further discovery. Defendant requested an order precluding the procurement of vocational reporting on the grounds to such reporting is inadmissible under section 4660.1. The WCAB reasoned:

Briefly, on the merits of Defendant's contention that the SB 863 reform bill eliminated loss of future earning capacity as a component of PD, Defendant has attached an excerpt from an Assembly Insurance Sub-Committee commentary on the purpose of the SB 863. The language does suggest that DFEC was eliminated as a factor. However, Defendant has overlooked commentary by the Senate Committee on Labor and Industrial Relations dated 8/31/2012. Under the heading, "Permanent Disability," on page 5, item 4, the author states that the legislation "Eliminates the diminished future earnings capacity (DFEC) from the determination of permanent disability, *and instead provides that all permanent disability awards are increased by a multiplier of 1.4 for the loss of future earnings, comparable to the top available DFEC modifier*." (Emphasis added) I interpret this language to evidence a legislative intent to include loss of future earnings as a component of a PD award. [See also, *The Conco Companies et al. v. WCAB (Sandoval)*, writ denied, 11/20/19, 84 CCC 1067]. Furthermore. Defendant's argument that 863's removal of DFEC from Labor Code § 4660.1(a) eliminates the need for a VR evaluation is ill-founded. VR experts can comment on numerous issues relevant to employability and potentially rebutting the

[11] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citeable authority and one may consider these decisions to the extent that their reasoning is found persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].) The panel decisions discussed herein are referred to because they considered a similar issue and because this area of law is not settled.

PDRS, including inability to benefit from vocational rehabilitation [*Contra Costa County v. WCAB (Dahl)* (2015) 80 CCC 1119]. (*McReynolds, supra* at *6-7.)

I agree with the outcome of *McReynolds* as applicant is permitted under any circumstance to consult with a vocational expert. Such reports remain admissible. (§ 5703(j).) In addition to addressing employability, vocational experts may potentially assist in other areas of litigation such as rebuttal based upon other factors found in the PDRS.[12] The only issue before the WCAB is whether applicant can recover the costs of the vocational report, which is an issue of whether the procurement of the report is reasonable. The facts of each case will decide whether procurement of a report was a reasonable cost.

I respectfully disagree with the *McReynolds* decision to the extent that it construes the 1.4 modifier as evidencing legislative intent to allow continued rebuttal of DFEC in all cases. While the 1.4 modifier was adopted from the former DFEC table in the PDRS, it is not a DFEC modifier. The specific statutory analysis language relied upon in *McReynolds, supra*, was the following: "**Eliminates the diminished future earnings capacity (DFEC) from the determination of permanent disability**, and instead provides that all permanent disability awards are increased by a multiplier of 1.4 for the loss of future earnings, **comparable to** the top available DFEC modifier." (*Id*. at p.2 [emphasis added].) It is clear that the while the Legislature adopted the number "1.4" from the former DFEC table, it did not intend to keep DFEC as part of the analysis. Instead, the Legislature expressly intended to eliminate any DFEC analysis in partial disability cases.

As the Senate Floor analysis states:

> There are numerous ways that a permanent disability system can be structured. At one end of the spectrum, there can be relatively broad guidelines, and every injured worker could be entitled to prove to the workers' compensation courts his or her individual circumstances. This approach, of course, would have little predictability, and would have tremendous frictional costs and delays in delivering benefits. At the other end of the spectrum, there can be a total formulaic approach where there is no opportunity to bring in individualized proof. Employers have argued that the current system operates too close to the former, and this bill moves in the direction of the latter, while retaining key rights for limited individual proof of unique circumstances.

[12] The PDRS remains rebuttable under the first two prongs of *Ogilvie* and for those factors considered under section 4660.1(a), which includes consideration of age, which was discussed by Mr. Diaz in a very interesting section of his report. However, Mr. Diaz never reached any conclusion regarding rebuttal of the PDRS based upon improper consideration of applicant's age. Furthermore, applicant does not argue rebuttal due to her age; thus, I have not addressed it.

> Employees have agreed to these changes in exchange for increased benefits for all classes of employee, and increased certainty and speed in the delivery of the benefits.

(Off. of Sen. Floor Analyses, Sen. Bill No. 863, August 31, 2012, p. 15.)

The Senate clearly intended to eliminate the DFEC analysis in partial disability cases.

> Existing law: . . . 14. Allows an injured worker to present evidence to rebut a permanent disability rating derived from the basic permanent disability rating formula, and to present evidence of a diminished future earning capacity.
>
> * * *
>
> This bill: . . . 27. Eliminates the diminished future earnings capacity from the determination of permanent disability, and limits the definition of permanent disability to include only a consideration of how occupation affects the overall classification of employment of the injured worker, rather than the individual injured worker's ability to compete in the open labor market or reduction of future earnings.
> (*Id*. at pp. 3; 7.)

The purpose of SB-863 was to move away from individualized rebuttal and the fictional costs associated with such rebuttal and to move closer to a formulaic permanent disability analysis. The Legislature did this by eliminating permanent partial disability rebuttal based upon DFEC.

The words of the statute, along with the legislative history and additions to the Labor Code make it clear that the Legislature intended to preclude a traditional *Ogilvie* rebuttal in cases of permanent partial disability, while preserving applicant's ability to do so in cases of permanent total disability. However, section 4660.1 should not be read alone in coming to this conclusion. We should look at other provisions enacted under SB-863 to determine the intent of the legislative scheme.

One of the primary goals of the Legislature in enacting SB-863 was to reduce frictional costs in the workers' compensation system. (Sen. Com. Labor and Ind. Rel., analysis of Sen. Bill No. 863 (2011-2012 Reg. Sess.), Sept. 1, 2012, p. 1.) One such frictional cost was the repeated attempts to rebut the PDRS via *Ogilvie*. The Legislature understood that the traditional analysis in *Ogilvie* was going to be affected by passage of SB-863, as California Applicant Attorneys Association specifically raised this concern:

> CAAA argues that the bill alters the existing statutory description of permanent disability and may undermine or reverse fifty years of California Supreme Court case law allowing injured workers to recover

> compensation for their lost ability to earn a living, citing the Court of Appeal decision *in Ogilvie v. Workers' Compensation Appeals Board* and the 2007 Supreme Court Decision in *Brodie v. Workers' Compensation Appeals Board*.
> (Assembly Legis. Analyst, analysis of Sen. Bill No. 863 (2011-2012 Reg. Sess.) Sept. 1, 2012, p. 11.)

In order to address the concern of the applicant's bar, the Legislature took further steps. First, the Legislature directed the Commission on Health and Safety and Workers' Compensation (CHSWC) to "conduct a study to compare average loss of earnings for employees who sustained work-related injuries with permanent disability ratings under the schedule, and shall report the results of the study to the appropriate policy and fiscal committees of the Legislature no later than January 1, 2016." (§ 4660.1(i).) The Legislature would have little purpose in directing a study, if the effect of the statute had no change on applicant's ability to rebut the schedule based upon a disproportionate loss of earnings.

Next, the Legislature created the Return-to-Work Fund contained within section 139.48, which states:

> (a) There is in the department a return-to-work program administered by the director, funded by one hundred twenty million dollars ($120,000,000) annually derived from non-General Funds of the Workers' Compensation Administration Revolving Fund, for the purpose of making supplemental payments to workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss. Moneys shall remain available for use by the return-to-work program without respect to the fiscal year.
>
> (b) Eligibility for payments and the amount of payments shall be determined by regulations adopted by the director, based on findings from studies conducted by the director in consultation with the Commission on Health and Safety and Workers' Compensation. Determinations of the director shall be subject to review at the trial level of the appeals board upon the same grounds as prescribed for petitions for reconsideration.
>
> (c) This section shall apply only to injuries sustained on or after January 1, 2013.
> (§ 138.48.)

If applicant could continue to rebut the scheduled permanent partial disability table per *Ogilvie*, then the Return-to-Work fund has no purpose. The creation of the Return-to-Work fund further evidences the statutory scheme, which was to eliminate rebuttal via *Ogilvie* in cases of permanent partial disability. The

Legislature eliminated that frictional cost and instead directed applicant's to proceed via the Return-to-Work fund.
Lastly, there is the language in section 4660.1(g), which preserves findings of permanent and total disability in accordance with the fact. If the intent of the Legislature was to have no effect upon rebutting the scheduled rating via DFEC, the language in subsection (g) is superfluous. The reason that language is there is to preserve the traditional analysis for permanent total disability cases, which requires consideration of DFEC.

The correct interpretation of law regarding DFEC rebuttal for dates of injury on or after January 1, 2013 is as follows:

> 1. Applicant cannot rebut the permanent partial disability schedule using a DFEC analysis. (§ 4660.1(a).)
>
> 2. Applicant may continue to rebut the schedule to show complete loss of earning capacity, and thus, she is permanently totally disabled in accordance with the fact. (§§ 4660.1(g); 4662(b).)
>
> 3. Applicant may continue to obtain vocational expert consultations in all cases and may continue to recover the costs of such evaluations where the procurement of the report is reasonable. (§ 5703(j).)

Accordingly, applicant is not entitled to an award of 93% permanent partial disability. I would further note that applicant's vocational expert never actually opined on applicant's diminished future earning capacity. He only opined as to her diminished job market. Without any evidence of DFEC in the record, applicant's argument fails her burden of proof under a traditional Ogilvie analysis.

F. The Findings of Fact improperly included apportionment due to a compensable consequence injury.

Applicant correctly points out that the parties stipulated to applicant sustaining a compensable consequence injury at the Panera restaurant one week after her industrial surgery. Accordingly, it was not proper to include the 10% apportionment that the AME awarded. An amended award should issue to correct that error. My apologies to the parties.

G. Issues related to applicant's petition to reopen should be deferred.

Applicant alleges new and further disability via a stroke and psychological injury that occurred after this matter was submitted for decision. Applicant has filed a timely petition to reopen the matter. Any issues related to new and further disability should be deferred.

CONCLUSION

The petition for reconsideration correctly points out my error in assigning apportionment to a compensable consequence injury.

I recommend that Finding of Fact number three be vacated with the following Finding of Fact substituted in its place:

> 3. Applicant's injury resulted in her sustaining a permanent partial disability of 87% without apportionment.

I recommend that the Award of permanent partial disability be vacated with the following substituted in its place:

AWARD

AWARD IS MADE in favor of SHERYL WILSON and against NEW HAMPSHIRE INSURANCE COMPANY as follows:

a) Permanent partial disability of 87% payable at the rate of $290.00 per week beginning October 30, 2016, and continuing for 705.25 weeks, for a total of $204,522.50, less attorney's fees of $30,678.38 payable to Eason & Tambornini, and less permanent disability advances paid on account thereof, and thereafter a life pension of $208.73 per week, subject to adjustment per Labor Code, section 4659, less attorney's fees of 15%.

b) Attorney's fees are to be held in trust pending resolution of the attorney fee lien. Commutation of attorney's fees is deferred pending a request for such commutation, which may be submitted after this award becomes final.

Finally, I recommend that all other Findings of Fact be affirmed and that this matter be returned to the trial level for discovery and further proceedings on applicant's petition to reopen, the determination of which is deferred.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the September 15, 2021 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the September 15, 2021 Findings and Award is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

3. Applicant's injury resulted in her sustaining a permanent partial disability of 87% without apportionment.

AWARD

AWARD IS MADE in favor of **SHERYL WILSON** and against **NEW HAMPSHIRE INSURANCE COMPANY** as follows:

a) Permanent partial disability of 87% payable at the rate of $290.00 per week beginning October 30, 2016, and continuing for 705.25 weeks, for a total of $204,522.50, less attorney's fees of $30,678.38 payable to Eason & Tambornini, and less permanent disability advances paid on account thereof, and thereafter a life pension of $208.73 per week, subject to adjustment per Labor Code, section 4659, less attorney's fees of 15%.

b) Attorney's fees are to be held in trust pending resolution of the attorney fee lien. Commutation of attorney's fees is deferred pending a request for such commutation, which may be submitted after this award becomes final.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 6, 2021

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

SHERYL WILSON
EASON & TAMBORNINI
ALBERT & MACKENZIE
COMPENSATION LAW, ATTN: M. HOLLIE RUTKOWSKI, ESQ.

PAG/abs

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

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

SHERYL WILSON, *Applicant,* vs. **KOHLS; SEDGWICK ROSEVILLE;** *Defendants.*	**Case No. ADJ10902155** **REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION**

Applicant filed a timely and verified Petition for Reconsideration from the Findings and Award issued on September 15, 2021, which found, in pertinent part, that applicant did not sustain a complete loss of future earnings capacity as a result of her industrial injury and awarded applicant permanent partial disability of 78% after apportionment. I further found that applicant did not sustain injury arising out of and in the course of employment to her face, jaw, in the form of headaches, or in the form of CRPS to the upper extremities and right lower extremity. I found in applicant's favor on the issues of occupational group number and application of *Almaraz-Guzman*.

Applicant alleges that I acted in excess of my powers in denying permanent total disability in accordance with the fact per Labor Code[1], sections 4660 and 4662(b). Applicant alleges that she is permanently and totally disabled. In the alternative, applicant argues that her permanent partial disability should be increased to 93% based upon her loss of future earning capacity. Applicant further alleges that she has suffered new and further disability after the date this matter was submitted. Lastly, applicant alleges that I incorrectly applied 10% non-industrial apportionment due to a fall as the parties had stipulated at trial that the fall was a compensable consequence injury.

Having thoroughly reviewed the contents of the Board's file and the Petition for Reconsideration, I respectfully recommend that applicant's Petition for Reconsideration be **GRANTED.** As the decision after reconsideration, I recommend that Finding of Fact number three and the award of 78% permanent disability be **VACATED** and that a new Finding of Fact and award of 87% permanent disability issue without apportionment. I further recommend that the issue of whether applicant sustained new and further disability be **DEFERRED**. I otherwise recommend that all other findings of fact be affirmed.

[1] All future references are to the Labor Code unless noted otherwise.

FACTUAL AND PROCEDURAL BACKGROUND

Applicant worked for Kohls Department Store as a retail sales clerk, when she sustained an admitted industrial injury to her lumbar spine, left ankle, and in the form of Complex Regional Pain Syndrome (CRPS) of the left ankle on September 20, 2016. (Minutes of Hearing and Summary of Evidence (MOH), June 24, 2021, p. 2, lines 10-19.) Applicant claimed further injury to her face, jaw, in the form of headaches, and in the form of CRPS to the upper and lower extremities. (*Ibid*.) Applicant was injured while pushing a rack of clothes, when she developed pain in the left ankle. (Joint Exhibit 101, Report of AME Mark Anderson, M.D., November 8, 2018, p. 4.)

The primary issue for trial was applicant's level of permanent disability. (MOH, *supra* at p. 3, lines 3-10.) The secondary issues were body parts injured and applicant's occupational group number. (*Ibid*.) Applicant has not sought reconsideration of the findings as to body parts injured or the occupational group number. Only applicant's level of permanent disability is raised as an issue.

1. Medical Evidence

Applicant was evaluated by agreed medical evaluator ("AME") Mark Anderson, M.D., who authored nine reports in evidence and was deposed twice.[2] (Joint Exhibits 101 through 111.) Dr. Anderson took a history of initial injury, including a prior injury to the same body part, as follows:

> I asked about the injury in August 2015 and she describes just walking down the aisle at work when she developed pain in her left foot and ankle area. I was able to find an entry in the Kaiser records on August 1, 2015 and the patient is placed in a walking boot. It looks as if that episode subsequently resolved by the end of the year as there was an entry on November 30, 2015 having to do with right neck and shoulder pain. The patient states that this situation remained normal until the next event.
>
> The patient states that she continued in her regular duty position until September 20, 2016. She describes pushing a rack of. clothes when she developed pain in the left ankle. There was no particular "pop" associated with this event.

(Joint Exhibit 101, p. 4.)

The initial reporting of applicant's injury diagnosed issues with her foot tendons indicating Achilles tendonitis and a Haglund deformity. (*Ibid*.) Applicant underwent surgical repair of the tendons on March 9, 2017. (*Ibid*.)

After surgery, applicant had a fall at a Panera, which resulted in further pain of the left ankle, including a fever. (*Id*. at p. 5.) Applicant underwent additional surgery on March 27, 2017, to remove a clot. (*Ibid*.) Following a return to her primary treater, applicant was referred to a chronic pain specialist. (*Ibid*.)

Dr. Anderson noted that applicant had two surgeries to the left ankle resulting in atrophy of the left calf and thigh, and loss of motion of the ankle and subtalar joints. (*Id*. at p.

[2] Joint Exhibits 110 and 111 are mistakenly listed as reports on the minutes of hearing, when they are actually deposition transcripts.

12.) For applicant's complex regional pain syndrome, Dr. Anderson assigned 13% whole-person impairment (WPI) to the left ankle using a strict AMA Guides analysis. (*Id*. at p. 13.) He opined that due to applicant's part time use of a wheelchair, her disability would be better described by using Table 17-5, page 529 of the AMA Guides. (*Ibid*.) He assigned 60% WPI as applicant fell partway between moderate and severe categories of gait derangement. (*Ibid*.)

Dr. Anderson deferred causation of CRPS to a pain management specialist and noted that onset of CRPS one year post-surgery is unusual. (*Id*. at p. 12.) However, he also opined that 100% of the permanent disability to the ankle was industrial in origin. (*Id*. at p. 13.)

Dr. Anderson assigned work restrictions as follows: "[A] position where she can sit 8 hours a day and limited ambulation to 15 minutes/hour as well as 4-pound lifting limit." (*Id*. at p. 12.)

As to the lumbar spine, Dr. Anderson assigned 5% WPI per Lumbar DRE II. (*Id*. at p. 14.) He assigned 50% apportionment as non-industrial pre-existing condition and 50% as a consequence of the left ankle injury. (*Ibid*.) Applicant had no work restrictions due to her lumbar spine. (*Ibid*.)

In supplemental reporting Dr. Anderson made clear that he is not an expert in CRPS and has no training in pain management. (Joint Exhibit 102, Report of Mark Anderson, M.D., December 22, 2018, p. 2) Again, Dr. Anderson deferred to the parties to use an AME / QME in the field of pain management to determine causation of CRPS. (*Ibid*.)

Dr. Anderson reviewed additional records, but did not change his initial opinions on causation and apportionment. (Joint Exhibit 104, Report of Mark Anderson, M.D., April 13, 2019.) He reviewed more detailed records regarding applicant's subsequent fall at Panera in 2017. He commented as follows:

> Dr. Ghalambor did visit with the patient on March 17, 201 7, which would have been two days after her fall. On page 1 of his report, he states, "Since then, her symptoms have escalated". It looks as if she developed increased swelling in her left ankle and had difficulty wearing her boot and in fact had left the boot off for the last three days. By way of comment, this would indicate a worsening as the result of her fall at Panera.

(*Id*. at p. 3.)

Dr. Anderson modified his prior left ankle apportionment opinion and apportioned 10% of applicant's left ankle impairment to the fall at Panera. (*Id*. at p. 4.)

Applicant was evaluated by qualified medical evaluator (QME) Anuj Gupta, M.D., for comment upon causation of CRPS. Dr. Gupta issued four reports in evidence. (Joint Exhibits 112 through 115.)

Dr. Gupta took a history of complaints of pain to the jaw, teeth, loss of hearing in the left ear, constant neck pain radiating to her hands, bilateral shoulder and arm pain, and pain throughout the back. (Joint Exhibit 112, Report of Anuj Gupta, M.D., August 16, 2019, pp. 5-6) Applicant has constant pain bilaterally in the knees, ankles, and feet. (*Ibid*.) Applicant complains of high heart rate, shortness of breath, chest pain, and dizziness. (*Ibid*.) Applicant has constant pain in her kidney area, abdomen, and groin. (*Ibid*.) She complains of urinary incontinence. (*Ibid*.)

Applicant denied a prior history in industrial accidents. (*Id*. at p. 6.) Dr. Gupta required applicant's medical file for review prior to opining on causation and other issues. (*Id*. at p. 15.)

Dr. Gupta reviewed applicant's medical file and issued a supplemental report. (Joint Exhibit 113, Report of Anuj Gupta, M.D., November 19, 2019.) Dr. Gupta noted a history of applicant fracturing her right wrist as a child. (*Id*. at p. 6.) Applicant has had chronic knee pain since childhood. (*Ibid*.)

Dr. Gupta assigned work restrictions as follows:

> The patient should be precluded from running, jumping, prolonged weight bearing and from climbing ladders and repetitively negotiating stairs and/ or uneven terrain from the effects of this left lower extremity industrial injury. She is in need of other restrictions for the non-industrial conditions she continues to experience.

(*Id*. at p. 58.)

Dr. Gupta commented on diagnosis and impairment as follows:

> Based on the AMA Guides to the Evaluation of Permanent Impairment, 5th edition, the patient has 40% whole person impairment.
>
> She presents in a wheelchair. She has complaints throughout her entire body. She does not fit the criteria of complex regional pain syndrome per the AMA Guides but meets the Budapest criteria. The Budapest criteria is an accepted criteria method to diagnose complex regional pain syndrome.
>
> The patient has a combination of a chronic fibromyalgia condition further complicated by a mild left lower extremity CRPS condition. Based on AMA Guides, and solely for the left lower extremity chronic pain and complex regional pain syndrome, and Table 13-15, page 336, her current condition is consistent with a Class 2 level of impairment and 19% Whole Person Impairment in that she rises to standing position, walks some distance with some difficulty and without assistance, but is limited to level surfaces. I believe this is the most appropriate way to rate her overall condition. I do not believe the other body parts have developed the CRPS condition as a compensable consequence to this industrial injury or by way of simply spreading to these other areas. The patient may have additional impairment for the fibromyalgia condition that is not rated here. The patient does not require the wheelchair or any other assistive devise as a result of this industrial injury.

(*Ibid*.)

Dr. Gupta went on to state:

> Based on review of these voluminous records, and given the lack of current unilateral objective findings, I do believe most of the symptoms experienced throughout her body are preexisting and have been chronic for some time leading up to this industrial injury. She has provided an inaccurate medical history as compared to and as documented by the records reviewed. Her current physical examination revealed minimal CRPS in the left lower extremity and her examination was quite unremarkable for complex regional pain syndrome throughout her body. I believe most of these symptoms are systemic symptoms and complaints secondary to nonindustrial fibromyalgia or possible autoimmune rheumatological disorders. I remain of the opinion the patient would benefit from a rheumatology evaluation and appropriate labs on a non-industrial basis.

(*Id*. at p. 62.)

Dr. Gupta opined that applicant's CRPS to the left ankle and distal left lower extremity were industrial and caused by a combination of her strain injury, industrial surgery, and non-industrial surgery. (*Id*. at pp. 59-60.)

Dr. Anderson reviewed Dr. Gupta's reporting and issued a supplemental report, in essence, deferring to the rater / trier of fact as to harmonizing the difference between his and Dr. Gupta's ratings. (Joint Exhibit 106, Report of Mark Anderson, M.D., May 29, 2020.)

Dr. Gupta reviewed Dr. Anderson's opinions and opined as to no change of opinion. (Joint Exhibit 114, Report of Anuj Gupta, M.D., November 20, 2020.)

Dr. Anderson noted in deposition that applicant uses a wheelchair because she cannot ambulate safely on her left foot. (Joint Exhibit 111, Deposition of Mark Anderson, M.D., September 29, 2020, p. 10, lines 12-16.)

In another supplemental report, Dr. Anderson reaffirms the work restrictions assigned in his initial report. (Joint Exhibit 107, Report of Mark Anderson, M.D., June 28, 2020.)

Dr. Anderson reviewed the reporting of applicant's vocational expert. He opined that applicant's medications would interfere with her ability to concentrate and focus. (Joint Exhibit 108, Report of Mark Anderson, M.D., January 28, 2021, p. 2) Applicant would require extra rest breaks due to the medications. (*Ibid*.) Dr. Anderson noted:

> The major new piece of information provided is that the patient currently takes Dilaudid which is a significant increase in her prior level of pain medication. I would continue to feel that the patient would have difficulty completing a voc rehab program and that may well fulfill the request by Mr. Ramirez as to her lack of capabilities in that endeavor and hence ending up at 100% precluded from competing in the open labor market.

(*Ibid*.)

Dr. Anderson reviewed the reporting of defendant's vocational expert and opined as follows:

> I can only say that Ms. Tincher's report will be reviewed by the trier of fact and a decision will be made. From an orthopedic standpoint, Ms. Tincher clearly outlines the fact that the patient is in a wheelchair and has difficulty standing and cannot even wear shoes/socks at times. She then goes ahead and provides a number of alternative work activities that require the patient to be engaged in meeting the public. These recommendations are also made with the knowledge that the patient states that she sleeps most of the day and that she is on a number of medications. I had outlined the patient's current medication use in my January 28, 2021 supplemental report and it included the use of hydromorphone, hydrocodone, and methocarbamol. That represents a consideration amount of medication and I believe would interfere with the patient's ability to perform many cognitive activities and especially those that would include calculations and attentions to detail as would be required by a loan office.

(Joint Exhibit 109, Report of Mark Anderson, M.D., April 26, 2021, p. 2)

Dr. Gupta reviewed the reporting of defendant's vocational evaluator and noted that he had requested the parties obtain a functional capacity evaluation, not a vocational evaluation. (Joint Exhibit 115, Report of Anuj Gupta, M.D., May 26, 2021, p. 3.) Dr. Gupta opined:

> [Ms. Tincher] states [applicant] is best suited for jobs that are mostly communication and telephone oriented and where there is light lifting or lifting involved of no more lifting than four pounds, I believe this is reasonable. She did go into depth regarding different job options. I would defer to her own expertise.

(*Ibid*.)

In deposition, Dr. Anderson clarified that applicant's fall at Panera was the sole cause of applicant's second surgery. (Joint Exhibit 110, Deposition of Mark Anderson, M.D., September 29, 2020, p. 12, lines 3-24.) Applicant requires use of a wheelchair because she is medically unable to bear weight on her left foot at times. (*Id*. at p. 10, lines 20-22.)

Dr. Anderson opined on applicant's ability to retrain as follows:

> Q. All right. And do you think she's amenable to vocational rehabilitation?
>
> A. In my opinion not at the present time.
>
> Q. And why is that?
>
> A. The amount of pain medication she's taking coupled with her inability to get around I believe would preclude her from actively participating in any voc rehab program.

(*Id*. at p. 19, lines 11-18.)

Dr. Anderson further testified the basis for his Almaraz-Guzman opinion in that he split the level of impairment between the use of wheelchair between moderate and severe as applicant's condition fell somewhere in between. (Joint Exhibit 111, Deposition of Mark Anderson, M.D., September 29, 2020, p. 12, lines 3-24.) He did not add on three percent for pain because it was the pain that was causing the use of the wheelchair. (*Id*. at p. 13, lines 5-11.)

Dr. Anderson commented upon applicant's ability to work as follows:

> In reality, I don't believe she would be able to compete in the open labor market because of her chronic pain, see, slash CRPS situation. And I've also recommended that if that is a significant problem, then she would require a vocational rehabilitation evaluation.

(*Id*. at p. 14, line 24, through p. 15, line 4.)

Dr. Anderson believed that applicant would have difficulty working an 8-hour shift. (*Id*. at p. 15, lines 9-13.) He did not modify the prior work restrictions imposed in his November 8, 2018 report, but opined that applicant would likely need a sheltered work environment. (*Id*. at p. 15, line 18, through p. 16, line 1.)

Dr. Anderson also noted the effects of applicant's medications on her ability to work as follows:

> I would also remind the parties that at the time that I saw her back in -- back on October 24, 2018, she was taking hydrocodone, 7.5 milligrams, and six tablets a day in addition to Robaxin, in addition to Cymbalta and in addition to Topamax. So that amount of medication may well interfere with her ability to function on a day-to-day basis.

(*Id*. at p. 17, lines 4-11.)

Dr. Anderson was of the opinion that the CRPS was a result of applicant's industrial surgery, and thus, pursuant to *Hikida*, he did not assign apportionment. (*Id*. at p. 18, line 18, through, p. 19, line 7.)

Applicant has a history of taking a multitude of medications prior to her industrial injury. Dr. Gupta noted refills of hydrocodone in 2008. (Joint Exhibit 113, *supra* at p. 3.) Applicant refilled hydrocodone again in 2011. (*Id*. at pp. 9-10.) Applicant continued with hydrocodone prescriptions in 2014. (*Id*. at pp. 16-17; 24.) She refilled hydrocodone in 2015. (*Id*. at p. 25.) Finally, two months prior to her industrial injury, applicant was prescribed Norco. (*Id*. at p. 30.)

Applicant took Robaxin for years prior to her industrial injury. In 2014, the medical file notes: "Patient complains of one week of neck pain and upper back pain, some radiation to back of head. Taking her regular pain medications, also tried Robaxin 3-4 times a day with little help." (*Id*. at p. 17.) Applicant noted to her doctors that Robaxin helped "in the past". (*Ibid*.) Applicant continued taking Robaxin in 2015. (*Id*. at p. 24.) In November 2015, her history noted: "Also takes Norco and Robaxin regularly for chronic low back pain." (*Id*. at pp. 28-29.)

Applicant was prescribed Cymbalta in 2015. (*Id*. at p. 27.)

The medical record indicates that applicant was first prescribed Dilaudid in 2011. (*Id*. at pp. 7-8.) This was in connection with pain to her hip. (*Ibid*.) The record notes that "[applicant] has already been taking Motrin and Vicodin for years." (*Ibid*.)

2. Vocational Evidence

Applicant obtained reporting from vocational expert P. Steve Ramirez, who authored two reports in evidence. (Applicant's Exhibits 1 and 2.)

Applicant was employed with Kohls from May 2015 through December 27, 2016. (Applicant's Exhibit 1, Report of P. Steve Ramirez, April 17, 2020, at p. 2.) She worked for IHSS caring for her two autistic sons from 2005 through 2018.

Applicant uses a wheelchair, but primarily outside the home. (*Id*. at p. 4.) Inside the home, applicant uses a cane and walker. (*Ibid*.)

Applicant has not participated in a vocational rehabilitation program. (*Id*. at p. 2.)

Mr. Ramirez opined on vocational apportionment as follows:

> Dr. Anderson, in the report of 11/20/2018, concluded medical apportionment was 100% to the industrial injury. Dr. Gupta, in the report of 11/2019, found 75% her ankle and related pain condition is industrial and 25% in due to non-industrial factors. Dr. Anderson addressed Ms. Wilson's prior left ankle injury of 08/2015. He reported Ms. Wilson had recovered from that injury, without work limitations, prior to the industrial injury of 09/20/2016. As no medical records address prior work restrictions for Ms. Wilson, vocational apportionment is, therefore, viewed as 100% industrial. This is supported by Target v. Estrada (2016).

(*Id*. at p. 9.)

Mr. Ramirez conducted a vocational analysis and found that applicant had pre-injury access to 47.6% of the labor market. (*Id*. at pp. 10-11.) Post-injury applicant has 6.9% access to the labor market. (*Ibid*.) Mr. Ramirez did not comment upon applicant's loss of future earnings capacity. (See generally, *id*.)

Mr. Ramirez issued a supplemental report reviewing the deposition of Dr. Anderson. (Applicant's Exhibit 2, Report of P. Steve Ramirez, June 26, 2020.) Mr. Ramirez raised several questions about applicant possibly being precluded from all work. (*Id*. at p. 4.)

> As noted at the beginning of this report, Dr. Anderson, in his deposition transcript of 09/2019, is quoted as having said the following: "The amount of medication she's taking coupled with her inability to get around I believe would preclude her from actively participating in any 'voc' rehab program."
>
> • Does this mean she presently does not have the capability of concentrating, staying focused, and paying attention to detail?

> • If working, due to reported fatigue from the medication, does she need extra rest breaks? Of what duration and frequency?
>
> • Is she expected to have difficulties completing tasks, accurately, and within deadlines?
>
> As previously concluded, Ms. Wilson has at least a 93.1% diminished ability to compete in the open labor market. However, **if the above questions are clarified**, she may be considered 100% non-competitive and non-employable in the open labor market.

(*Ibid*.)

Defendant obtained vocational expert reporting from Emily Tincher, who issued one report in evidence. (Defendant's Exhibit A, Report of Emily Tincher, December 21, 2020.) Ms. Tincher took a thorough history of injury and summarized the medical records. (*Id*. at pp. 3-25.)

Ms. Tincher noted that applicant's IQ and cognitive aptitude placed her in the 50th percentile. (*Id*. at p. 28.)

Ms. Tincher noted that applicant has an occupational history as an underwriter for the Small Business Association around 2006. (*Id*. at p. 27.) She also worked as a loan underwriter for many years around 1997. (*Ibid*.)

DISCUSSION

Applicant does not disagree with my discussion and analysis of the law as to properly finding permanent and total disability in accordance with the fact. That analysis follows.

To analyze whether applicant is permanently and totally disabled, I must first clarify what the correct legal standard is for finding permanent and total disability. That is because there are two recent opinions of the District Courts of Appeal that have significantly confused this analysis. (*Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd*., (*Fitzpatrick*), (2018) 27 Cal. App. 5th 607; *Applied Materials v. Workers' Comp. Appeals Bd*., (2021) 64 Cal. App. 5th 1042.)

As a workers' compensation judge, I am an expert in workers' compensation law and that job includes properly and adequately informing any reviewing court the basis for any decisions. (*Brodie v. Workers' Comp. Appeals Bd*., 40 Cal. 4th 1313 , 1331, ["[T]he Board has extensive expertise in interpreting and applying the workers' compensation scheme."].)

> In interpreting the workers' compensation statutes, [higher courts] give great weight to the construction of the WCAB, unless it is clearly erroneous or unauthorized. (Citation.) Ultimately, of course, our fidelity must be to the legislative intent as best shown by the Legislature's use of clear and unambiguous statutory language. (Citation.)

(*Honeywell v. Workers' Comp. Appeals Bd*., (2005) 35 Cal. 4th 24, 34 [internal citations omitted].)

A. Per the Permanent Disability Rating Schedule permanent total disability must be found where there is a total loss of future earning capacity.

The standard for determining permanent total disability is found in Labor Code, section 4662, which states:

> (a) Any of the following permanent disabilities shall be conclusively presumed to be total in character:
>
> > (1) Loss of both eyes or the sight thereof.
> > (2) Loss of both hands or the use thereof.
> > (3) An injury resulting in a practically total paralysis.
> > (4) An injury to the brain resulting in permanent mental incapacity.
>
> (b) In all other cases, permanent total disability shall be determined in accordance with the fact.

Since the enactment of workers' compensation over 100 years ago, permanent total disability in accordance with the fact has meant the same thing: the injured worker can no longer work.[3] (See *Postal Tel. Cable Co. v. Industrial Acci. Com*., 213 Cal. 544, 547 (1931) [Wherein the Supreme Court clearly defines permanent and total disability as follows: "The statute is plain, and recovery is allowed for total disability because the employee is unfitted by his injury to follow any occupation."]

The concept of permanent total disability in accordance with the fact is common sense to a workers' compensation expert. It is clearly defined in our ratings schedule. The Permanent Disability Rating Schedules (PDRS) is issued pursuant to section 4660.1 to rate disability for injuries occurring on or after January 1, 2013. (§ 4660.1.) The PDRS was created by the Administrative Director pursuant to section 4660.1(e) and expressly defines the term "permanent total disability" as follows:

> A permanent disability rating can range from 0% to 100%. Zero percent signifies no reduction of earning capacity, while 100% represents permanent total disability. A rating between 0% and 100% represents permanent partial disability. **Permanent total disability represents a level of disability at which an employee has sustained a total loss of earning capacity**. Some impairments are conclusively presumed to be totally disabling. (Lab. Code, §4662.)

(2005 PDRS, pp. 1-2 to 1-3 (emphasis added).)

Per section 4660.1(c), the PDRS ". . . shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." Thus, per the 2005 PDRS, where an injury causes total loss of earning capacity, applicant is permanently and totally disabled. We use the definitions of disability contained within the PDRS to assist in finding permanent and total disability in accordance with the fact under section 4662. This

[3] This concept is not limited to permanent disability, but also includes temporary disability. (See *Pacific Employers Ins. Co. v. Industrial Acc. Com*., (1959) 52 Cal.2d 417 [noting that where temporary partial disability results in complete loss of wages, the disability is deemed total].) As discussed *infra*, I realize this statement is a generalization and does not encompass the many nuances of finding total disability.

analysis has been used by the Supreme Court as early as 1953. (See *Thompson v. Long Beach*, (1953) 41 Cal.2d 235 [using the definitions of disability within the PDRS to reach conclusions of permanent total disability under section 4662].)

The ratings schedule is not a new concept to workers' compensation. The ratings schedule has been in existence since 1917. (Stats 1917 ch 586 § 9.) Even prior to SB-899, the rating schedule defined permanent total disability as loss of ability to work:

> A rating can range from 0% to 100%. Zero percent signifies no reduction of ability to compete in an open labor market while 100% represents legal total disability. **Total disability does not mean that the employee cannot work, but rather represents a level of disability at which an employee would not normally be expected to be able to successfully compete in an open labor market**.

(1997 PDRS, p. 1-3 (emphasis added).)

To the extent that any ambiguity could arguably exist in section 4662, such ambiguity was always resolved by the rating schedule, which clearly defined permanent total disability in accordance with its common sense understanding.

In *Smith v. Industrial Acci. Com.*, the Supreme Court held that for purposes of determining permanent total disability when applying for Subsequent Injury Benefits Trust Fund benefits:

> We conclude, nevertheless, for the reasons hereinafter explained, that it is permissible and desirable to distinguish between a formula or rule-established "100 per cent disability" rating purposes, and actual total disability insofar as productive work or compensated employment is concerned.

(44 Cal.2d 364, 367-368.)

By definition within the PDRS and as the concept has always been used throughout the history of workers' compensation, permanent total disability means that applicant is not able to go back to work.

Although the ratings schedule is clear, we could look at the expressed intent of the Legislature. The Legislative Counsel Digest[4] for SB-863 further lends support to the fact that the Legislature understood that section 4660 only applies to permanent partial disability. In passing SB-863, the Legislature redefined permanent partial disability in section 4660, creating a new section 4660.1 to define permanent partial disability for all injuries occurring on or after January 1, 2013.

> (8) Existing law provides certain methods for determining workers' compensation benefits payable to a worker or his or her dependents for purposes of temporary disability, permanent total disability, permanent partial disability, and in case of death.

[4] "Legislative records may be looked into to determine legislative intention. [Citation.]" (*Maben v. Superior Court of Los Angeles County*, 255 Cal. App. 2d 708, 712 (internal citations omitted); see also, *Ontario v. Superior Court of San Bernardino County*, 2 Cal. 3d 335.)

> This bill would revise the method for determining benefits for purposes of **permanent partial disability** for injuries occurring on or after January 1, 2013, and on or after January 1, 2014.

(Legis. Analyst Digest, SB-863, (emphasis added).)

The concept of permanent total disability in accordance with the fact is not unique to California. Of the 49 other states, 47 of them define permanent total disability as being disabled from gainful employment.[5] Of particular note would be our neighboring state of Nevada, which has very similar language as reflected in section 4662. The Supreme Courts of Nevada analyzed permanent total disability in accordance with the fact as follows:

> The State of Nevada, like most other states, recognizes two types of cases in which a worker may be eligible for permanent total disability benefits. The first situation is where the worker has suffered a "scheduled" injury. The second situation is where the worker qualifies under the "odd-lot" doctrine.
>
> "Scheduled" injuries are referred to as such because they are contained in a schedule of enumerated injuries in a statute or regulation. The Nevada "scheduled" injuries are listed in NRS 616.575(1), which provide that in the absence of evidence to the contrary certain named injuries, such as loss of both eyes or loss of both legs, shall be deemed permanent total disabilities. As a general rule, the determination of permanent total disability based on a scheduled injury requires reference only to the physical impairment of the worker.
>
> On the other hand, a worker may qualify for permanent total disability benefits under the "odd-lot" doctrine even if the worker's injury is not found in the statutory schedule. The doctrine is generally recognized by use of a residuary catch-all clause following the list of scheduled injuries. In Nevada, "odd-lot" situations are recognized by NRS 616.575(2) which provides that the list of scheduled injuries is not exclusive, and that "in all other cases permanent total disability must be determined by the insurer in accordance with the facts presented."
>
> In determining whether a worker with a nonscheduled injury qualifies for permanent total disability benefits under the odd-lot doctrine factors in addition to the physical impairment of the worker must be taken into account. This is because, as Professor Larson has stated, the odd-lot doctrine permits:
>
> > [T]otal disability [to] be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which

[5] My original decision included a 28-page endnote citing the law of permanent total disability as it exists in each other state. I have omitted the end note from this report for purposes of brevity, and instead adopt and incorporate it herein by reference.

> claimant can sell his services in a competitive labor market. . . . 2 A. Larson, The Law of Workmen's Compensation, section 57.51 (1981).
>
> Larson has also stated that the worker need not be in a state of "utter and abject helplessness" to be considered permanently and totally disabled under the odd-lot doctrine. *Id*.
>
> As noted above, consideration of factors other than physical impairment is necessary to determine whether a nonscheduled injury qualifies the worker for permanent total disability benefits under the odd-lot doctrine. Such factors may include, among others, the worker's age, experience, training and education. [Citations.] The focus of the analysis, in considering the various factors, is on the degree to which the worker's physical disability impairs the worker's earning capacity or ability to work. [Citation.]

(*Nevada Indus. Comm'n v. Hildebrand*, 100 Nev. 47, 50-51.)[6]

B. The *Fitzpatrick* and *Allied Materials* decisions cannot be followed.

Section 4662, in existence since 1913, specifies certain conditions that are conclusively presumed to constitute permanent total disability.[7] (§ 4662(a).) The section goes on to allow the Appeals Board to issue a finding of permanent total disability in accordance with the fact in those cases where the conclusive presumption does not apply. (§ 4662(b).)

In *Fitzpatrick*, the Third District Court of Appeal held that section 4662(b) does not provide an independent path to rebuttal of the rating provided for under the PDRS. (*Fitzpatrick*, *supra* at 622.) In sum, the court found that section 4660 is not limited to permanent partial disability. I have no reason to disagree with this legal holding; however, for

[6] California courts have generally used the odd-lot doctrine to apply to temporary total disability benefits:

> The "odd lot" doctrine applies when the worker's capacity for gainful employment is so reduced by temporary partial disability that the worker is fit only for very special uses, leaving the worker as an "odd lot" on the labor market. The burden is then on the employer to show that such special work is available to the employee. When the evidence indicates that no work of a sort that the partially disabled employee was able to do was available to him or her during the period of disability, disability for all practical purposes is total. Consequently, the wage loss is treated as total, and the award is, therefore, the same as for total temporary disability.

(1 CA Law of Employee Injuries & Workers' Comp § 7.02(c).)

Until reading the Nevada Supreme Court's decision, I had never considered application of the principles of the odd-lot doctrine to a claim of permanent total disability. It is interesting, because in practice that is in essence the basis to find permanent total disability in accordance with the fact. The only difference between temporary total disability and permanent total disability is time.

[7] Although section 4662 was enacted in 1937, it existed in a different form prior to that date. As noted in the *Fitzpatrick* holding: "For our purposes, section 4662 has remained substantively unchanged since its adoption in 1913." (*Fitzpatrick*, *supra* at 614.)

reasons discussed below, it would appear that the factual analysis in *Fitzpatrick* was not complete. Furthermore, the opinion contains inherent logical contradictions, which makes its result self-contradictory.

In *Fitzpatrick*, applicant's strict rating per the AMA Guides rated to 99% permanent partial disability. The Appeals Board upheld the finding of the WCJ, who issued an award of permanent total disability (100%) based upon the medical conclusion that applicant was completely precluded from returning to work and lost all future earning capacity. (See generally, *Fitzpatrick*.) It appears that as a matter of fact, the injured worker in *Fitzpatrick* was precluded from returning to work. (§ 5953 ["The findings and conclusions of the appeals board on questions of fact are conclusive and final and are not subject to review."].) Notwithstanding this fact, the Third District overturned the award of permanent total disability and instead found that the injured worker was only entitled to an award of 99% permanent partial disability. (See generally *Fitzpatrick, supra*.)

The apparent legal holding in *Fitzpatrick* is that the Appeals Board must follow the PDRS in assigning permanent total disability, unless it is rebutted. The factual oversight in *Fitzpatrick* is that the PDRS expressly defines a complete loss of earnings capacity as constituting permanent total disability. The portion of the PDRS defining permanent total disability was not discussed by the *Fitzpatrick* court in reaching its conclusion[8]; thus, it would appear that the holding is a factual anomaly.

To clarify, the Appeals Board must generally follow the PDRS in assigning permanent disability, unless it is otherwise rebutted. When assigning permanent total disability in accordance with the fact, per section 4662(b), the Appeals Board looks directly to the PDRS and the definition of permanent and total disability contained therein. Where applicant has lost all future earning capacity (and absent apportionment), the Appeals Board issues an award of permanent total disability. Such an award may reference section 4662, but in fact issues per the PDRS, which is created under section 4660. The *Fitzpatrick* holding is not persuasive and is limited to the analysis of facts therein.

The legal conclusions reached in *Fitzpatrick* are in direct conflict with binding published authority by other Courts of Appeal and by the Supreme Court. Given the direct conflict in authority presented, I choose to follow over 100 years of published case law and the common sense understanding of permanent total disability and the authority that the Appeals Board has to issue such awards that has existed since the beginnings of the workers' compensation system: if you cannot return to work because of your injury, you are permanently totally disabled.[9]

Perhaps most directly in conflict with *Fitzpatrick* is the decision in *Ogilvie*. (Compare *Fitzpatrick*, supra, with *Ogilvie v. Workers' Comp. Appeals Bd*., (2011), 197 Cal.App.4th 1262.) Pursuant to the holding in *Ogilvie*:

> [A]n 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

[8] The court defines permanent and total disability early in the opinion per the PDRS, but that definition is conspicuously absent from any further discussion. (*Fitzpatrick, supra* at 612.)

[9] I realize that this statement generalizes the legal and factual analysis, which includes many nuances and arguments that are raised in issuing a permanent and total disability award. For example, such a finding is subject to apportionment. (§ 4663(e); see also, *Acme Steel v. Workers' Comp. Appeals Bd*. (*Borman*), 218 Cal.App.4th 1137; 78 Cal. Comp. Cases 751.) The purpose of the statement is to provide clarity as to overarching purpose in awarding permanent and total disability.

> formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is **not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating**.

(*Ogilvie v. Workers' Comp. Appeals Bd*., (2011), 197 Cal.App.4th 1262, 1277 (emphasis added))

This same conclusion was reached by the Second District in *Borman*: "Here, we do not take issue with the WCALJ's conclusion that Borman could rebut the rating schedule's DFEC by offering vocational expert testimony showing 100 percent loss of earning capacity." (*Acme Steel v. Workers' Comp. Appeals Bd*., (*Borman*) (2013) 218 Cal. App. 4th 1137, 1142.) The holding in *Fitzpatrick* appears in conflict with the holding in *Borman*. I will not construe the opinion in a manner that would create direct conflict between other published opinions.

C. The PDRS is automatically rebutted where applicant proves permanent total disability.

In order to explain the most significant logical fallacy in *Fitzpatrick* and by association *Allied Materials*, we must first understand who constituted the sampling of injured workers that established the Future Earning Capacity (FEC) chart within the PDRS.

The FEC adjustment table was created within the 2005 PDRS by statutory command:

> For purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. The administrative director shall formulate the adjusted rating schedule **based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report** (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies.

(§ 4660(b)(2), (emphasis added).)

The RAND Study referenced in the above statute is what created the FEC tables within the PDRS. The RAND study expressly excluded consideration of total disability cases:

> In a series of studies for the California Commission on Health and Safety and Workers' Compensation (CHSWC) the ICJ has examined the adequacy of permanent partial disability (PPD) benefits, the workers' compensation court system, and medical fee schedules.
>
> In this study, we focus on the system for evaluating permanent disabilities in California, the permanent disability rating schedule. **The rating schedule, which is used to determine eligibility for PPD benefits** as well as the amount of benefits, is

> at the center of legislative debates to reduce the costs of the workers' compensation system.

(Reville, Robert, et. al., Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), available at https://www.dir.ca.gov/CHSWC/Reports/PermanentDisabilityRatingSchedule-InterimReport.pdf (emphasis added).)[10]

Now having established that the PDRS is based only on data from partial disability cases, let's look at the discussion in *Fitzpatrick* regarding PDRS rebuttal.

> In *Ogilvie*, the court addressed "'whether, in light of the amendments to section 4660 enacted in Senate Bill No. 899 (2003–2004 Reg. Sess.), it is permissible to depart from a scheduled rating on the basis of vocational expert opinion that an employee has a greater loss of future earning capacity than reflected in a scheduled rating.' [Citation.] Giving consideration to the purpose behind and the language of the amendments, the *Ogilvie* court answered this question with a qualified 'yes.' It held that there are three permissible methods by which the scheduled rating could be rebutted." (*Contra Costa County v. Workers' Comp. Appeals Bd*., supra, 240 Cal.App.4th at p. 751.) "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.' [Citation.] Second, the Legislature also left intact the cases, including [*LeBoeuf v. Workers' Comp. Appeals Bd*. (1983) 34 Cal.3d 234 [193 Cal. Rptr. 547, 666 P.2d 989]], 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.' [Citation.] 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.' [Citation.] 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.'"** (*Contra Costa County v. Workers' Comp. Appeals Bd*., *supra*, 240 Cal.App.4th at p. 751.)
>
> Accordingly, by proceeding under section 4660, Fitzpatrick would have had the opportunity to rebut the 99 percent scheduled disability rating to show the appropriate rating is permanent total disability.

(*Fitzpatrick*, *supra* at 619-620.)

[10] "The appeals board may . . . use as proof of any fact in dispute . . . (f) All official publications of the State of California and United States governments." (§ 5703.)

The sampling of disabled workers used to compute the FEC adjustment factor in the PDRS did not include totally disabled workers. When applicant is permanently and totally disabled, applicant by default rebuts the scheduled rating because the PDRS did not consider such injured workers in the adjustment factors.

The *Fitzpatrick* holding states that permanent total disability determinations under section 4662 are subject to section 4660. The holding also states that section 4660 is rebuttable. **Per *Fitzpatrick*, the basis for rebuttal necessarily exists in all permanent total disability determinations.** The holding is illogical, self-contradictory, not based upon an adequate understanding of the PDRS or the law, and contrary to the holdings of other District Courts of Appeal. For these reasons, it cannot be followed.

By definition contained within the PDRS and as used throughout workers' compensation for time immemorial, and as used in nearly every state of our nation, a complete loss of ability to work is permanent total disability. This is the factual point misanalysed in *Fitzpatrick*. The Third District does not appear to understand that complete preclusion from returning to work is expressly defined as permanent total disability by the PDRS. You are not rebutting the PDRS at that point; you are following it.

Applied Materials is equally as perplexing an opinion to understand. Within the same opinion, the District Court states that we are compelled to follow the PDRS, while ignoring the definition of permanent total disability contained therein. The District Court reasons that because the definition is contained within the introduction, we may simply ignore it. The District Court cannot compel a lower court to follow the PDRS while also ignoring the PDRS within the body of the same opinion. To follow such a holding would lead to capricious and arbitrary applications of the law. The opinion cannot be followed.

By failing to recognize the inherent logical flaws contained in *Fitzpatrick*, the court in *Applied Materials* has created another opinion that cannot be followed. If the PDRS is rebutted where the nature or severity of the claimant's injury is not captured within the sampling of disabled workers, and the PDRS did not sample any workers who were totally disabled, it is rebutted in all cases of permanent total disability.

I cannot follow *Fitzpatrick* or *Applied Materials* due to their inherent logical inconsistencies and due to binding precedent from our Supreme Court, which neither opinion discussed or had the ability to overturn. I do not take such a position lightly. I have absolute respect for the rule of law and I routinely follow opinions of higher courts that I personally disagree with. I do not simply disagree with the conclusions of *Fitzpatrick* and *Applied Materials*. These opinions have so poorly analyzed and understood the law that they contain inherent logical fallacies that make their holdings impossible to enforce.

The ratings schedule has been in existence since 1917. The board's ability to find permanent total disability in accordance with the fact has been in existence since 1913. These two provisions existed side by side for over 100 years without issue. I will continue to interpret permanent disability in accordance with the fact the same way it has been interpreted throughout the history of workers' compensation: when applicant has shown complete loss of earnings due to the industrial injury, and absent apportionment, she is permanently and totally disabled.

D. Applicant is not permanently and totally disabled.

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

Applicant failed to meet her burden of proof as her own vocational expert opined that applicant may return to work.

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

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

This case is different from both *Fitzpatrick* and *Applied Materials*. A doctor is permitted to opine that applicant is medically precluded from returning to work. If such an opinion constitutes substantial evidence, the board is bound to follow it. The difference here is that the AME's opinions are not based on complete medical preclusion. When partial work restrictions are applied, the question of whether such restrictions preclude employment requires a vocational analysis.

Although the AME does opine that applicant is precluded from working, this does not appear to be a medical preclusion and is instead reflective of the AME engaging himself in vocational feasibility opinions outside his area of expertise. While a doctor is permitted to completely preclude applicant from return to work on a medical basis, the AME did not make such a preclusion and instead opined only as to limited work restrictions. While these restrictions limited applicant's employment opportunities, applicant's vocational expert did not feel these restrictions precluded applicant from gainful employment. Accordingly, she failed her burden to rebut the scheduled rating.

The AME's opinion as to applicant's ability to participate in rehabilitation is also outside the expertise of a doctor. The doctor may medically preclude applicant from participating in vocational rehabilitation; that did not happen here. The doctor may describe what the effects of a medication are, and the vocational expert may then transfer that to rehabilitation and employability. That did not happen here. Applicant failed her burden of proof on this issue.

I would also note that per *Ogilvie* and as described further in *Dahl*, the non-amenability to vocational rehabilitation must be due to industrial factors. (*Contra Costa County v. Workers' Comp. Appeals Bd*., (*Dahl*) 240 Cal. App. 4th 746.) Many of the prescriptions that the AME believe were impacting applicant's ability to rehabilitate were being prescribed long before applicant's industrial injury. The AME failed to offer any opinion on causation of such prescriptions and improperly assumed that the prescriptions were industrial. The AME's opinions on this matter are both outside his area of expertise and not persuasive given the medical record.

E. Applicant's argument as to an increase of permanent partial disability to 93% is not supported in law.

Applicant argues, in the alternative, that her award of permanent partial disability should be 93% as that is exact percentage of loss of labor market access sustained by applicant. Except in cases of permanent total disability, applicant cannot rebut the PDRS based upon her diminished future earnings capacity under Labor Code section 4660.1.

The standard for statutory interpretation has been stated in multiple opinions of the California Supreme Court:

> The objective of statutory construction is to determine the intent of the enacting body so that the law may receive the interpretation that best effectuates that intent. [Citation.] We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context. [Citations.] If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls. [Citation.] We consider extrinsic aids, such as legislative history, only if the statutory language is reasonably subject to multiple interpretations.

(*City of Alhambra v. County of Los Angeles*, (2012) 55 Cal. 4th 707, 718-719 [internal citations and quotations omitted].)

One of the most significant changes enacted in SB-863 modified the way permanent partial disability is calculated. For injuries occurring prior to January 1, 2013, section 4660 calculated permanent disability as follows:

> (a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, **consideration being given to an employee's diminished future earning capacity**.

(§ 4660(a), [emphasis added].)

Following SB-863, a new section 4660.1 was drafted to redefine permanent disability for injuries occurring on or after January 1, 2013. Section 4660.1 modified the language in subsection (a) above to state as follows:

> (a) In determining the percentages of permanent partial or permanent total disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and the employee's age at the time of injury.

(§ 4660.1(a).)

Under both 4660 and 4660.1, "the nature of the physical injury or disfigurement" is defined in subsection (b) via adoption of the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (2001) (AMA Guides). However, in 4660.1, the whole-person impairment assigned under the AMA Guides is increased by a factor of 1.4. (§ 4660.1(b).)

The Legislature removed the line "consideration being given to an employee's future earning capacity" from the factors to consider in determining permanent disability for dates of injury post-January 1, 2013. This action appears clear and unambiguous. With regard to the permanent disability rating schedule, applicant cannot rebut a scheduled partial disability rating by arguing a disproportionate impact upon DFEC, as DFEC is no longer included as a factor to consider in assigning such permanent disability.

Multiple panel decisions[11] have found that applicant is still able to rebut the PDRS due to diminished future earnings capacity under section 4660.1. (See *Sandoval v. The Conoco Companies*, 2019 Cal. Wrk. Comp. P.D. LEXIS 299; *McReynolds v. Graniterock*, 2020 Cal. Wrk. Comp. P.D. LEXIS 109.)

As to *Sandoval*, that case is distinguishable because it involved an award of permanent total disability in accordance with the fact. Section 4660.1 expressly states: "(g) This section does not preclude a finding of permanent total disability in accordance with Section 4662." (§ 4660.1(g).) As permanent total disability in accordance with the fact requires a finding that applicant has lost the ability to work, it necessarily requires an analysis of diminished future earnings. Accordingly, *Sandoval* is correct that applicant may continue to rebut the scheduled rating under section 4660.1 where she is unable to work and thus, permanently and totally disabled.

While I agree with the outcome of *McReynolds*, I respectfully disagree with the reasoning. In *McReynolds*, the board denied defendant's petition for removal from the WCJ's order taking the matter off calendar for further discovery. Defendant requested an order precluding the procurement of vocational reporting on the grounds to such reporting is inadmissible under section 4660.1. The WCAB reasoned:

> Briefly, on the merits of Defendant's contention that the SB 863 reform bill eliminated loss of future earning capacity as a component of PD, Defendant has attached an excerpt from an Assembly Insurance Sub-Committee commentary on the purpose of the SB 863. The language does suggest that DFEC was eliminated as a factor. However, Defendant has overlooked commentary by the Senate Committee on Labor and Industrial Relations dated 8/31/2012. Under the heading, "Permanent Disability," on page 5, item 4, the author states that the legislation "Eliminates the diminished future earnings capacity (DFEC) from the determination of permanent disability, *and instead provides that all permanent disability awards are increased by a multiplier of 1.4 for the loss of future earnings, comparable to the top available DFEC modifier*." (Emphasis added) I interpret this language to evidence a legislative intent to include loss of future earnings as a component of a PD award. [See also, *The Conco Companies et al. v. WCAB (Sandoval),*

[11] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal. App. 4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citeable authority and one may consider these decisions to the extent that their reasoning is found persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].) The panel decisions discussed herein are referred to because they considered a similar issue and because this area of law is not settled.

> *writ denied, 11/20/19*, 84 CCC 1067]. Furthermore. Defendant's argument that 863's removal of DFEC from Labor Code § 4660.1(a) eliminates the need for a VR evaluation is ill-founded. VR experts can comment on numerous issues relevant to employability and potentially rebutting the PDRS, including inability to benefit from vocational rehabilitation [*Contra Costa County v. WCAB (Dahl)* (2015) 80 CCC 1119].

(*McReynolds, supra* at *6-7.)

I agree with the outcome of *McReynolds* as applicant is permitted under any circumstance to consult with a vocational expert. Such reports remain admissible. (§ 5703(j).) In addition to addressing employability, vocational experts may potentially assist in other areas of litigation such as rebuttal based upon other factors found in the PDRS.[12] The only issue before the WCAB is whether applicant can recover the costs of the vocational report, which is an issue of whether the procurement of the report is reasonable. The facts of each case will decide whether procurement of a report was a reasonable cost.

I respectfully disagree with the *McReynolds* decision to the extent that it construes the 1.4 modifier as evidencing legislative intent to allow continued rebuttal of DFEC in all cases. While the 1.4 modifier was adopted from the former DFEC table in the PDRS, it is not a DFEC modifier. The specific statutory analysis language relied upon in *McReynolds*, *supra*, was the following: "**Eliminates the diminished future earnings capacity (DFEC) from the determination of permanent disability**, and instead provides that all permanent disability awards are increased by a multiplier of 1.4 for the loss of future earnings, **comparable to** the top available DFEC modifier." (*Id*. at p.2 [emphasis added].) It is clear that the while the Legislature adopted the number "1.4" from the former DFEC table, it did not intend to keep DFEC as part of the analysis. Instead, the Legislature expressly intended to eliminate any DFEC analysis in partial disability cases.

As the Senate Floor analysis states:

> There are numerous ways that a permanent disability system can be structured. At one end of the spectrum, there can be relatively broad guidelines, and every injured worker could be entitled to prove to the workers' compensation courts his or her individual circumstances. This approach, of course, would have little predictability, and would have tremendous frictional costs and delays in delivering benefits. At the other end of the spectrum, there can be a total formulaic approach where there is no opportunity to bring in individualized proof. Employers have argued that the current system operates too close to the former, and this bill moves in the direction of the latter, while retaining key rights for limited individual proof of unique circumstances. Employees have agreed to these changes in exchange for increased benefits for all classes of employee, and increased certainty and speed in the delivery of the benefits.

[12] The PDRS remains rebuttable under the first two prongs of *Ogilvie* and for those factors considered under section 4660.1(a), which includes consideration of age, which was discussed by Mr. Diaz in a very interesting section of his report. However, Mr. Diaz never reached any conclusion regarding rebuttal of the PDRS based upon improper consideration of applicant's age. Furthermore, applicant does not argue rebuttal due to her age; thus, I have not addressed it.

(Off. of Sen. Floor Analyses, Sen. Bill No. 863, August 31, 2012, p. 15.)

The Senate clearly intended to eliminate the DFEC analysis in partial disability cases.

> Existing law: . . . 14. Allows an injured worker to present evidence to rebut a permanent disability rating derived from the basic permanent disability rating formula, and to present evidence of a diminished future earning capacity.
>
> * * *
>
> This bill: . . . 27. Eliminates the diminished future earnings capacity from the determination of permanent disability, and limits the definition of permanent disability to include only a consideration of how occupation affects the overall classification of employment of the injured worker, rather than the individual injured worker's ability to compete in the open labor market or reduction of future earnings.

(*Id*. at pp. 3; 7.)

The purpose of SB-863 was to move away from individualized rebuttal and the fictional costs associated with such rebuttal and to move closer to a formulaic permanent disability analysis. The Legislature did this by eliminating permanent partial disability rebuttal based upon DFEC.

The words of the statute, along with the legislative history and additions to the Labor Code make it clear that the Legislature intended to preclude a traditional *Ogilvie* rebuttal in cases of permanent partial disability, while preserving applicant's ability to do so in cases of permanent total disability. However, section 4660.1 should not be read alone in coming to this conclusion. We should look at other provisions enacted under SB-863 to determine the intent of the legislative scheme.

One of the primary goals of the Legislature in enacting SB-863 was to reduce frictional costs in the workers' compensation system. (Sen. Com. Labor and Ind. Rel., analysis of Sen. Bill No. 863 (2011-2012 Reg. Sess.), Sept. 1, 2012, p. 1.) One such frictional cost was the repeated attempts to rebut the PDRS via *Ogilvie*. The Legislature understood that the traditional analysis in *Ogilvie* was going to be affected by passage of SB-863, as California Applicant Attorneys Association specifically raised this concern:

> CAAA argues that the bill alters the existing statutory description of permanent disability and may undermine or reverse fifty years of California Supreme Court case law allowing injured workers to recover compensation for their lost ability to earn a living, citing the Court of Appeal decision in *Ogilvie v. Workers' Compensation Appeals Board* and the 2007 Supreme Court Decision in *Brodie v. Workers' Compensation Appeals Board*.

(Assembly Legis. Analyst, analysis of Sen. Bill No. 863 (2011-2012 Reg. Sess.) Sept. 1, 2012, p. 11.)

In order to address the concern of the applicant's bar, the Legislature took further steps. First, the Legislature directed the Commission on Health and Safety and Workers' Compensation (CHSWC) to "conduct a study to compare average loss of earnings for employees who sustained work-related injuries with permanent disability ratings under the

schedule, and shall report the results of the study to the appropriate policy and fiscal committees of the Legislature no later than January 1, 2016." (§ 4660.1(i).) The Legislature would have little purpose in directing a study, if the effect of the statute had no change on applicant's ability to rebut the schedule based upon a disproportionate loss of earnings.

Next, the Legislature created the Return-to-Work Fund contained within section 139.48, which states:

> (a) There is in the department a return-to-work program administered by the director, funded by one hundred twenty million dollars ($120,000,000) annually derived from non-General Funds of the Workers' Compensation Administration Revolving Fund, for the purpose of making supplemental payments to workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss. Moneys shall remain available for use by the return-to-work program without respect to the fiscal year.
>
> (b) Eligibility for payments and the amount of payments shall be determined by regulations adopted by the director, based on findings from studies conducted by the director in consultation with the Commission on Health and Safety and Workers' Compensation. Determinations of the director shall be subject to review at the trial level of the appeals board upon the same grounds as prescribed for petitions for reconsideration.
>
> (c) This section shall apply only to injuries sustained on or after January 1, 2013.

(§ 138.48.)

If applicant could continue to rebut the scheduled permanent partial disability table per *Ogilvie*, then the Return-to-Work fund has no purpose. The creation of the Return-to-Work fund further evidences the statutory scheme, which was to eliminate rebuttal via *Ogilvie* in cases of permanent partial disability. The Legislature eliminated that frictional cost and instead directed applicant's to proceed via the Return-to-Work fund.

Lastly, there is the language in section 4660.1(g), which preserves findings of permanent and total disability in accordance with the fact. If the intent of the Legislature was to have no effect upon rebutting the scheduled rating via DFEC, the language in subsection (g) is superfluous. The reason that language is there is to preserve the traditional analysis for permanent total disability cases, which requires consideration of DFEC.

The correct interpretation of law regarding DFEC rebuttal for dates of injury on or after January 1, 2013 is as follows:

1. Applicant cannot rebut the permanent partial disability schedule using a DFEC analysis. (§ 4660.1(a).)

2. Applicant may continue to rebut the schedule to show complete loss of earning capacity, and thus, she is permanently totally disabled in accordance with the fact. (§§ 4660.1(g); 4662(b).)

3. Applicant may continue to obtain vocational expert consultations in all cases and may continue to recover the costs of such evaluations where the procurement of the report is reasonable. (§ 5703(j).)

Accordingly, applicant is not entitled to an award of 93% permanent partial disability. I would further note that applicant's vocational expert never actually opined on applicant's diminished future earning capacity. He only opined as to her diminished job market. Without any evidence of DFEC in the record, applicant's argument fails her burden of proof under a traditional *Ogilvie* analysis.

F. The Findings of Fact improperly included apportionment due to a compensable consequence injury.

Applicant correctly points out that the parties stipulated to applicant sustaining a compensable consequence injury at the Panera restaurant one week after her industrial surgery. Accordingly, it was not proper to include the 10% apportionment that the AME awarded. An amended award should issue to correct that error. My apologies to the parties.

G. Issues related to applicant's petition to reopen should be deferred.

Applicant alleges new and further disability via a stroke and psychological injury that occurred after this matter was submitted for decision. Applicant has filed a timely petition to reopen the matter. Any issues related to new and further disability should be deferred.

CONCLUSION

The petition for reconsideration correctly points out my error in assigning apportionment to a compensable consequence injury.

I recommend that Finding of Fact number three be vacated with the following Finding of Fact substituted in its place:

3. Applicant's injury resulted in her sustaining a permanent partial disability of 87% without apportionment.

I recommend that the Award of permanent partial disability be vacated with the following substituted in its place:

AWARD

AWARD IS MADE in favor of SHERYL WILSON and against NEW HAMPSHIRE INSURANCE COMPANY as follows:

a) Permanent partial disability of 87% payable at the rate of $290.00 per week beginning October 30, 2016, and continuing for 705.25 weeks, for a total of $204,522.50, less attorney's fees of $30,678.38 payable to Eason & Tambornini, and less permanent disability advances paid on account thereof, and thereafter a life pension of $208.73 per week, subject to adjustment per Labor Code, section 4659, less attorney's fees of 15%.

b) Attorney's fees are to be held in trust pending resolution of the attorney fee lien. Commutation of attorney's fees is deferred pending a request for such commutation, which may be submitted after this award becomes final.

Finally, I recommend that all other Findings of Fact be affirmed and that this matter be returned to the trial level for discovery and further proceedings on applicant's petition to reopen, the determination of which is deferred.

DATE: 10/18/2021

Eric Ledger
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

ON: October 18, 2021
BY: Wendi DuBose

10-18-2021