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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

Case No. **ADJ8399668**
 (Bakersfield District Office)

SUGUEY MORENO,

Applicant,

vs.

**KERN COUNTY SUPERINTENDENT OF
SCHOOLS; Permissibly Self-Insured;
administered by SELF-INSURED SCHOOLS
OF CALIFORNIA,**

Defendant.

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

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

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

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

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

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

5 Statement of Material Facts

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

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

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

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

1 occurred on 3/13/12 with the onset of bowel and bladder dysfunction the following day could be
2 explainable on the basis of the strain event that occurred in the lifting that she had been doing. This would
3 therefore suggest that the lifting or straining act that occurred while working did not cause syringomyelia
4 or a Chiari malformation, but potentially could have contributed to it. Again, I believe this opinion on the
5 basis of causation, should be determined by an appropriate neurosurgeon rather than me." (Jt. Exh. 1,
6 2/22/13 Dr. Previte AME Report.) He further stated:

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

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

21 Chiari Malformation 1 (CM1) is the simplest and most prevalent type. CM2
22 and CM3 are severe, congenital malformations which cause complex defects
23 of the brain and spinal cord. CM1 may be present at birth, may remain
24 asymptomatic, may become symptomatic due to trauma, and may occur as
25 an acquired disorder as opposed to congenital.

26 CM1 causes the rounded lobules on the undersurfaces of the cerebellum
27 called the cerebellar tonsils to become herniated or to be moved or pressed
28 away from their usual position inside of the skull downward through the
29 large opening in the base of the skull (foramen Magnum) into the spinal
30 canal. The herniated tissue (cerebellar tonsils) then block the circulation of
31 cerebrospinal fluid in the brain and can lead to the formation of a cavity
32 (Sinx) within the spinal cord.

33 Chiari 1 is generally considered to be congenital, although acquired cases
34 from trauma do occur. Congenital Chiari Malformation may be completely
35 asymptomatic and only become symptomatic after a traumatic brain or
36 spinal cord injury. The action of a whiplash, coup-contre-coup injury or
37 direct blow to the head can cause Chiari to develop or become symptomatic
38 in a person who did not have it previously. Certain types of trauma cause or

1 accentuate cerebellar tonsillar impaction in the foramen magnum or result in
2 destabilization of a marginally compensated cerebrospinal fluid system.

3 The most recent scientific evidence indicates that Chiari 1 Malformation
4 occurs in individuals who have an underdeveloped posterior cranial fossa
5 and are therefore susceptible to hindbrain overcrowding and herniation. A
6 traumatic brain injury can cause the herniation to occur with the resultant
7 cerebrospinal fluid disturbances which are responsible for direct
8 compression of nervous tissue.\

9 Victims of Chiari Malformation experience severe headaches, neck pain and
10 chronic pressure in the neck and head. Other common symptoms are
11 dizziness, vertigo, disequilibrium, visual disturbances, ringing in the ears,
12 difficulty swallowing, palpitations, sleep apnea, insomnia, depression,
13 muscle weakness, impaired fine motor skills, chronic fatigue and painful
14 tingling of the hands and feet.

15 Here, Ms. Moreno sustained a minor trauma, causing her to hyperextend her
16 person in an effort to extract captured right foot from the weight of a wooden
17 dresser. Initial low back and right foot discomfort emerged, followed by
18 cervical symptoms the same evening and upon awakening next morning,
19 central nervous conditions as discussed supra surfaced, within the course of
20 24 hours from the initial accident. Therefore, it is within a reasonable degree
21 of medical certainty that given her congenital abnormality, Ms. Moreno
22 underwent an uneventful life until the day of accident, which triggered
23 constellation of manifestations as anticipated with symptomatic patients
24 diagnosed with Chiari Malformation.

(Jt. Exh. 6, 5/15/14 Dr. Wang QME Report, p. 12-13.)

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

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

After reviewing necessary documents, the apportionment for Mr. Moreno's
industrial diagnosis of Trigger of Chiari Malformation symptom is amended
to 60% industrial and 40% nonindustrial.

(Jt. Exh. 7, 6/18/19 Dr. Wang Supplemental QME Report.)

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

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

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

10 With regard to apportionment, he stated:

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

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

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

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

1 rehabilitation, stating:

2 The patient is not a candidate for vocational rehabilitation.

3 Vocational rehabilitation is not recommended at this time.

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

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

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

19 **After careful assessment and evaluation regarding Ms. Moreno's**
20 **vocational feasibility, as it relates to her employability and ability to**
21 **compete in the open labor market given her industrial injury, the**
22 **undersigned makes the following findings:**

23 1. The client has not engaged in substantial gainful activity since 03/13/2012.

24 2. The client's subjective complaints and objective disability conclusively
25 indicate severe impairment that affect her quality of life.

26 3. The client does not have the residual functional capacity to perform the
27 requirements of her past relevant work.

 4. The client is unable to do any work considering her residual functional
capacity and work experience.

 Furthermore, it is this counselor's opinion that Ms. Moreno would not be
qualified to return to any unskilled sedentary occupation. Therefore, Ms.

1 **Moreno is 100% permanently and totally disabled.**

2 (App. Exh. 3, Gonzales Vocational Report, 8/21/17, p. 1. Emphasis in
3 original.)

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

9 Ms. Moreno exercised due diligence in her attempt to obtain employment in
10 the national economy, both in jobs that are reflective of her previous
11 employment, or similar jobs, including marketed reduced jobs. As of the date
12 of this assessment, no employer has provided an offer of employment given
13 her current functional capacity.

14 (App. Exh. 3, Gonzales Vocational Report, 8/21/17, p. 47.)

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

17 This counselor has reviewed all of the medical information provided in this
18 case in order to maintain a clear assessment of Ms. Moreno's medical
19 condition. The medical reports provided some insight into Ms. Moreno's
20 quality of life prior to her industrial injury and the quality of life she now
21 faces on a daily basis. In reviewing the medical reports, it was also
22 determined that both the client's and the physicians' assessment are
23 moderately in line with each other, as it relates to Ms. Moreno's injury,
24 physical/psychological conditions, pain, medications, and side effects. This
25 medical information was used to assist the vocational counselor in making
26 comparisons between Ms. Moreno's medical condition and the vocational
27 factors that affect her employability.

28 . . . the vocational counselor took into consideration Ms. Moreno's
29 employment background over the past fifteen years, information such as
30 medical work limitations and other medical factors, including
31 physical/psychological conditions, pain, medications, and side effects.
32 Following this logical sequence, it was concluded, under impairments based
33 on medical records, that Ms. Moreno's medical condition is severe, physical,
34 and cognitive in nature. This includes pain and medication side effects,
35 which would greatly interfere with or prevent, any return to her old job
36 position. Therefore, this limits her functional capacity to perform the
37 requirements of her past relevant work nor any occupation that is DOT
38 classified as sedentary level work.

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

1 that applicant was incapable of performing any work and is permanently totally disabled. (Jt. Exh. 4,
2 12/10/17 Dr. Previte Supplemental Report.) Dr. Previte noted that Mr. Gonzales concluded “through a
3 series of complex tests and assessments over multiple visits that Ms. Moreno would not be qualified to
4 return to any unskilled sedentary occupation.” He further indicated his agreement with Mr. Gonzales’s
5 findings, stating:

6 Mr. Gonzales has utilized complex tools and methodology for assessing Ms.
7 Moreno beyond the realm of musculoskeletal or orthopedics. By the usage
8 of these criteria he has appropriately determined her 100% permanently and
9 totally disabled. Upon my review of the information he has compiled, I
would agree with his opinion and conclusions.

(Jt. Exh. 4, 12/10/17 Dr. Previte Supplemental Report, p. 2.)

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

14 This patient is totally permanently disabled and is not fit to be engaged in
15 vocational rehabilitation training. As I have recommended earlier, Ms.
16 Moreno needs a caregiver at least 10 to 12 hours a day. She also needs an
ongoing supportive psychological treatment.

(App. Exh. 2, Dr. Chang Supplemental Report 12/7/17, p. 4.)

18 In a supplemental report dated July 30, 2019, Mr. Gonzales considered Dr. Wang’s letter of June
19 18, 2019, in which he stated that his apportionment of applicant’s diagnosis of Chiari Malformation was
20 60% industrial and 40% non-industrial.

21 Mr. Gonzales stated:

22 Based on my review of PQME Dr. Wang’s 06/18/2019 Supplemental
23 Report, I still maintain my original opinion that Ms. Moreno has sustained
24 100% loss to the open labor market, which is 100% industrial in nature. It is
still my opinion that ***Ms. Suguey Moreno is 100% permanently and totally***
disabled.

(App. Exh. 4, 7/30/19 Gonzales Supplemental Report, p. 1. Emphasis in
26 original.)

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

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

10 Discussion

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

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

21 Apportionment

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

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

3 More substantively, defendant contends the WCJ erred in rejecting Dr. Wang's apportionment of
4 40% of applicant's permanent disability to the established diagnosis of a non-industrial congenital
5 condition, Chiari Malformation. Defendant argues that Dr. Wang's opinion is substantial medical evidence
6 that mandates apportionment under Labor Code sections 4663 and 4664.

7 "Apportionment of permanent disability shall be based on causation," and "[t]he employer shall
8 only be liable for the percentage of permanent disability directly caused by the injury arising out of and
9 occurring in the course of employment." (Lab Code, §§ 4663 and 4664; *Escobedo v. Marshalls* (2005) 70
10 Cal.Comp.Cases 604 (Appeals Board en banc).) A defendant has the burden of proving a basis for
11 apportionment, including in cases involving 100% permanent disability. (*Escobedo, supra; E.L. Yeager*
12 *Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases
13 1687].)

14 In order to meet its burden of proof to establish apportionment of permanent disability, defendant
15 must present substantial medical evidence that establishes "what approximate percentage of the permanent
16 disability was caused by the direct result of the industrial injury arising out of and occurring in the course
17 of employment and what approximate percentage of the permanent disability was caused by other factors
18 both before and subsequent to the industrial injury, including prior industrial injuries." (Labor Code section
19 4663, subd. (c).)

20 In *Escobedo*, the Appeals Board held that for a medical opinion on apportionment to constitute
21 substantial evidence, the opinion must be framed in terms of "reasonable medical probability, it must not
22 be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must
23 set forth reasoning in support of its conclusions." (*Escobedo*, 70 Cal.Comp.Cases at 621-622. accord:
24 *Andersen v. Workers' Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369, 1381-1382 [72 Cal.Comp.Cases
25 389]; *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922.
26 927-928 [71 Cal.Comp.Cases 1687]; *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906,
27 917, fn. 7 [70 Cal.Comp.Cases 787].)

1 To constitute substantial evidence on apportionment,

2 . . . a medical opinion must be framed in terms of reasonable medical
3 probability, it must not be speculative, it must be based on pertinent facts
4 and on an adequate examination and history, and it must set forth reasoning
5 in support of its conclusions.

6 For example, if a physician opines that approximately 50% of an
7 employee's back disability is directly caused by the industrial injury, the
8 physician must explain how and why the disability is causally related to
9 the industrial injury (e.g., the industrial injury resulted in surgery which
10 caused vulnerability that necessitates certain restrictions) and how and
11 why the injury is responsible for approximately 50% of the disability.

12 And, if a physician opines that 50% of an employee's back disability is
13 caused by degenerative disc disease, the physician must explain the nature
14 of the degenerative disc disease, how and why it is causing permanent
15 disability at the time of the evaluation, and how and why it is responsible
16 for approximately 50% of the disability.
17 (*Escobedo*, 70 Cal.Comp.Cases at 621-622.)

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

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

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

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

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

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

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

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

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

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

1 As explained in *Escobedo*, a medical opinion on apportionment must set forth reasoning in support
2 of its conclusions. The physician “must explain how and why the [non-industrial factor] is causing
3 permanent disability at the time of the evaluation, and how and why it is responsible for approximately
4 50% of the disability.” (*Escobedo*, 70 Cal.Comp.Cases at 621-622.)

5 The WCJ correctly concluded that Dr. Wang’s June 18, 2019 letter is not substantial evidence to
6 support apportionment, as he does not provide an explanation of how and why the injury is responsible for
7 60% of her disability and how and why the Chiari Malformation is responsible for 40% of her disability.
8 His one sentence discussion is not adequate for defendant to meet its burden of proof to establish
9 apportionment of applicant’s permanent disability based upon substantial medical evidence. In both *Lindh*
10 and *Rice*, the physicians who made apportionment determinations provided detailed explanations for their
11 conclusions. While Dr. Wang’s initial report provides an understanding as to why applicant’s disability
12 may have increased as a result of her pre-existing congenital condition, there is nothing in his reporting
13 that supports his actual apportionment determination.

14 Defendant’s petition references limitations on its ability to conduct appropriate discovery,
15 presumably to explain its failure to take Dr. Wang’s deposition in order to meet its burden of proof. The
16 record discloses that applicant filed a Declaration of Readiness to which defendant objected on March 22,
17 2019, citing ongoing discovery and a need to obtain a follow-up report or cross-examination of Dr. Wang.
18 At a hearing on June 4, 2019, the matter was continued for another MSC on July 30, 2019, and defendant
19 was provided an opportunity to obtain the discovery it requested. Discovery closed on July 30, 2019, and
20 the only additional discovery defendant obtained from Dr. Wang was his June 18, 2019 supplemental
21 report. Defendant listed a pending deposition with Dr. Wang, but that deposition did not take place.

22 Defendant asserts in its Petition for Reconsideration that discovery was not complete at the July
23 30, 2019 MSC because it had not taken Dr. Wang’s deposition, but the WCJ ordered the matter set for trial.
24 (Petition, 7:19-21.) Applicant states in its verified Response to defendant’s Petition for Reconsideration
25 that defendant unilaterally cancelled Dr. Wang’s deposition. (Response, 7:16-19.) In any event, there is no
26 record of an objection to setting the matter for trial at the MSC on July 30, 2019, after defendant obtained
27 Dr. Wang’s supplemental report. Further, the Minutes of Hearing from the trial on October 11, 2019 do

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

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

9 Permanent Total Disability

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

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

20 Labor Code section 4660 provides that permanent disability is determined by consideration of
21 whole person impairment within the four corners of the AMA Guides to the Evaluation of Permanent
22 Impairment, Fifth Edition (AMA Guides), the proper application of the PDRS in light of the medical record
23 and the effect of the injury on the worker's future earning capacity. (*Brodie v. Workers' Comp. Appeals*
24 *Bd.* (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565] ["permanent disability payments are intended
25

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

1 to compensate workers for both physical loss and the loss of some or all of their future earning capacity”];
2 *Department of Corrections & Rehabilitation v. Workers’ Comp. Appeals Bd. (Fitzpatrick)* (2018) 27
3 Cal.App.5th 607, 614 [83 Cal.Comp.Cases 1680]; *Almaraz v. Environmental Recovery Service/Guzman v.*
4 *Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) as affirmed by
5 the Court of Appeal in *Milpitas Unified School Dist. v. Workers’ Comp. Appeals Bd. (Guzman)* (2010) 187
6 Cal.App.4th 808 [75 Cal.Comp.Cases 837] (*Almaraz/Guzman*). It may also be shown by rebutting the
7 diminished future earning capacity factor supplied by the PDRS. (*Ogilvie v. Workers’ Comp. Appeals Bd.*
8 (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] (*Ogilvie*); *Contra Costa County v. Workers’*
9 *Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119]; c.f. *LeBoeuf v. Workers’*
10 *Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587].)

11 To rebut a scheduled permanent disability rating, applicant must establish that her future earning
12 capacity is actually less than that anticipated by the scheduled rating. The court in *Ogilvie, supra*, addressed
13 the question of: “What showing is required by an employee who contests a scheduled rating on the basis
14 that the employee’s diminished future earning capacity is different than the earning capacity used to arrive
15 at the scheduled rating?” (*Ogilvie*, 197 Cal.App.4th at p. 1266.) The primary method for rebutting the
16 scheduled rating is based upon a determination that the injured worker is “not amenable to rehabilitation
17 and, for that reason, the employee’s diminished future earning capacity is greater than reflected in the
18 scheduled rating.” The employee’s diminished future earnings must be directly attributable to the
19 employee’s work-related injury and not due to nonindustrial factors such as general economic conditions,
20 illiteracy, proficiency in speaking English, or an employee’s lack of education. (*Ogilvie*, 197 Cal.App.4th
21 at pp. 1274–1275, 1277.) The evidence in the record here is sufficient to rebut the scheduled rating.

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

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

1 The first step in any *LeBoeuf* analysis is to determine whether a work-related
2 injury precludes the claimant from taking advantage of vocational
3 rehabilitation and participating in the labor force. This necessarily requires
4 an individualized approach...It is this individualized assessment of whether
5 industrial factors preclude the employee's rehabilitation that *Ogilvie*
6 approved as a method for rebutting the Schedule.
7 (*Dahl*, 80 Cal.Comp.Cases at 1128.)

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

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

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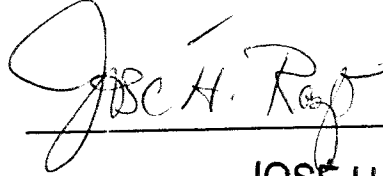
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1 For the foregoing reasons,

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

3
4 **WORKERS' COMPENSATION APPEALS BOARD**

5 

6
7 **JOSE H. RAZO**

8 **I CONCUR,**

9
10 **CHAIR**

11 

12 **KATHERINE ZALEWSKI**

13
14 

15 **CRAIG SNELLINGS**



16
17 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

18 **FEB 28 2020**

19
20 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**
21 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

22 **SUGUEY MORENO**
23 **GOLDBERG & IBARRA**
24 **HANNA BROPHY ET AL** 

25 **SV/pc**