WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ARTURO DIAZ, *Applicant*

vs.

E&F DEMOLITION; and BENCHMARK INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ11432893
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant E&F Demolition, Inc., by and through its insurer, Benchmark Insurance Company, seeks reconsideration of the January 26, 2021 Findings, Orders and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a laborer, sustained 50% permanent disability as a result of an industrial injury to his right foot and right toes (second, third and fourth) on January 17, 2018. The WCJ awarded permanent partial disability indemnity at the rate of $290.00 per week for 271.25 weeks, in the total sum of $78,662.50, less credit for an overpayment of temporary disability indemnity. Defendant was ordered to pay the bill for applicant's vocational expert.

Defendant contests the award of 50% permanent disability, contending the WCJ erred in relying upon the vocational evidence to find applicant had rebutted the scheduled rating of his industrial injury. Defendant contends that applicant's permanent disability should be determined by the reporting of the Agreed Medical Examiner, but that the WCJ's rating of his report contains a clerical error such that applicant's permanent disability rating is 21%, not 22%. Defendant further argues that it should not be liable for the cost of applicant's vocational expert because his report does not constitute substantial evidence.

We have received applicant's Answer to the Petition for Reconsideration, and the WCJ's Report and Recommendation on Petition for Reconsideration (Report), wherein she recommends that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer and the WCJ's Report, and have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Reconsideration and amend the Findings and Award to award applicant 21% permanent disability for his admitted industrial injury.

FACTS

Applicant sustained an admitted industrial injury to his right foot and toes on January 17, 2018, when a piece of a 1000 pound drill hammer accidentally fell on his right foot, causing an open comminuted fracture of the second, third and fourth toe, requiring three surgeries including the amputation of his second toe. Applicant testified at trial that his remaining toes do not work well and are painful. His middle toe has no mobility.

In his job at E&F Demolition, applicant worked as a laborer and supervised his fellow laborers, performing heavy work using machines to cut cement and metal beams, to knock down buildings. He has not returned to any employment since his injury.

As a result of his injury, he has difficulty walking all the time. He testified that he can only walk two to three miles. He climbs ladders with a lot of difficulty, and has difficulty putting pressure on his foot. Any kind of movement involving his toes causes pain. He takes pain medication but has tried to reduce his use because it was making him feel anxiety.

The parties selected Dr. Alfredo Fernandez to evaluate applicant's industrial injury as an Agreed Medical Examiner in orthopedics. Dr. Fernandez first evaluated applicant on June 26, 2019, at which time he found him to be permanent and stationary. (Ex. B. 6/26/19, Dr. Fernandez AME Report, p. 5.)

Dr. Fernandez noted applicant's subjective complaints of discomfort, stiffness and pain with difficulty climbing, crouching, kneeling and walking. He found applicant was precluded from "repetitive climbing, repetitive crawling, repetitive crouching and other activities requiring similar efforts." (Ex. B. p. 5.) Dr. Fernandez rated applicant's impairment under the AMA Guides:

> Using the AMA Guidelines to most accurately reflect the injured worker's true level of impairment due to anatomic loss and impacts on activities of daily living, and based in my experience, training and skill, he has a permanent impairment best described going to Chapter 17, page 530, severe thigh atrophy of 5% and moderate calf atrophy of 4%, bringing the grand total to 9% whole person impairment.

> Furthermore, because of pain causing difficulties with activities of daily living, another 3% is given, bringing the grand total of whole person impairment of 12%.
>
> Guzman III has been considered and the impairment calculated above is appropriate.
> (Ex. B. p. 6.)

In a supplemental report, he explained that his impairment rating provided a higher rating than a rating based on applicant's toe amputation.

> The problem, however, is that on Chapter 17, page 526, Table 17-2, I cannot use amputation together with muscle atrophy and as you can tell, the reason I gave him the 9% whole person impairment for thigh and calf atrophy and the extra 3% for pain is because that gave Mr. Diaz-Haro a greater degree of permanent impairment - disability.
> (Ex. C. 10/8/19, Dr. Fernandez AME Supplemental Report, p. 1.)

Dr. Fernandez examined applicant again on July 9, 2020, after he had surgery on February 10, 2020, to remove a keratotoic lesion on the plantar aspect of his right foot. Dr. Fernandez reported that applicant felt that his walking had improved as a consequence of the surgery, and that applicant had a period of temporary disability ending on the date of the evaluation. Dr. Fernandez made no changes to applicant's work restrictions or his rating of a 12% whole person impairment. (Ex. E. 7/9/20, Dr. Fernandez AME Report, p. 4-5.)

Applicant's treating physician, Dr. Woodcox, reported applicant was permanent and stationary in a June 22, 2019 report. He placed work restrictions similar to Dr. Fernandez, limiting his standing, walking, pushing and pulling, to half-time, and limiting his squatting, standing on tiptoes and climbing to occasional, 1 to 3 hours per day. (Ex. A. 6/22/19 Dr. Woodcox Report, p. 3.)

Dr. Woodcox provided a 10% whole person impairment rating based on nerve damage, the amputation, DRE, with a 2% add-on for pain, stating that this rating "is an accurate reflection of his overall permanent disability." (Ex. A. 6/22/19 Dr. Woodcox Report, p. 3.)

Applicant obtained a vocational evaluation from Mr. P. Steve Ramirez, to determine the effect the industrial injury had on his employability and future earning capacity. Mr. Ramirez noted that applicant had seven years of education in Mexico, and his testing of applicant's reading comprehension scored 2% when compared to the general productive population. The testing was

limited to a single 5-minute test due to applicant's pain. Mr. Ramirez reviewed applicant's reported physical limitations and the work restrictions placed by Dr. Woodcox and Dr. Fernandez.

He noted Dr. Woodcox's impairment rating was 10% WPI, while Dr. Fernandez's rating was 12% WPI.

While noting applicant's foot pain interfered with the vocational testing he performed, Mr. Ramirez indicated that applicant was amenable to vocational rehabilitation through vocational training, on the job training and direct placement.

> According to Mr. Diaz, he attended school through the 7., grade, in Mexico. Given his education and last occupation held, he is considered amenable for formal classroom vocational training, if he passed the Ability to Benefit testing, and rehabilitation through on-the-job training and direct placement for some light and sedentary work only.
> (Ex. 2. 4/29/20 Ramirez Vocational Report, p. 8.)

Mr. Ramirez opined that applicant could rebut the scheduled rating of his disability using the third method provided in *Ogilvie*, notwithstanding *Dahl*'s limitation on vocational experts providing alternative ratings, because applicant experienced injuries to more than one body part, i.e., injuries to separate toes.

> While the *Dahl* decision prohibits vocational experts from offering a DFEC as an alternative to the permanent disability rating, it is important to note this decision does not apply to all injured workers. The current permanent disability rating schedule was formulated based, in part, on the RAND Institute study. The RAND Institute primarily studied individuals with single body part impairments and their earning capacity post injury. **However, this study did not sufficiently account for individuals with injuries to more than one body part, and as a result, individuals like Mr. Diaz are not fully represented by the study**. As such, the *Dahl* decision does not apply to Mr. Diaz, under the *Ogilvie III's* 3rd method for rebuttal of the schedule, as he experienced injuries to include phalangeal fractures, of the right foot, and amputation of the second toe of the right foot.
> (Ex. 2. 4/29/20 Ramirez Vocational Report, p. 8. Emphasis added.)

Mr. Ramirez then calculated applicant's diminished future earning capacity to be 50.1%, based upon the difference between his pre-injury and post-injury capacity, using 3 clerical type occupations available within his work limitations in the geographic area. Noting that applicant was precluded from working in the construction industry, Mr. Ramirez indicated applicant would need to participate in vocational rehabilitation to obtain new job skills.

On the medical record, the WCJ calculated the scheduled permanent disability rating to be 22%, based on the formula: 17.08.06.00 – 13 – [1.4]18 – 480H- 22 - 22%. However, she relied on the 50.1% diminished future earning capacity calculated by Mr. Ramirez to rate applicant's permanent disability. In the Opinion on Decision, the WCJ explained the basis for finding the vocational expert opinion rebutted the scheduled rating:

> A permanent disability rating should reflect as accurately as possible an injured worker's diminished ability to compete in the open labor market and a scheduled rating can be rebutted by a rating derived from the opinions of vocational rehabilitation and labor market experts where such evidence more accurately describes a worker's diminished future earning capacity and ability to compete in the labor market. (*LeBoeuf* v. *Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal. Comp. Cases 587, 597]; *Gill* v. *Workers' Comp. Appeals Bd.* (1985) 167 Cal.App.3d 306 [50 Cal. Comp. Cases 258, 260]; (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1271 [76 Cal.Comp.Cases 624, 634]; *Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119)
>
> Based on my review of the evidence and the relevant law, I find the opinions and report of Mr. Ramirez constitute substantial evidence and the opinion of Mr. Ramirez that applicant's sustained a 50.1 loss of future earning capacity rebuts the scheduled permanent disability rating. Based on the evidence at trial, including the credible testimony of applicant, the relevant law, and the above analysis, I therefore find that applicant's injury to his right foot and right toes (second, third, and fourth) caused permanent partial disability of 50 percent partial permanent disability.

DISCUSSION

Defendant contends the record does not support the 50% permanent disability rating, arguing that because applicant is amenable to vocational rehabilitation, he has not rebutted the scheduled rating of his permanent disability. Defendant argues that because the vocational evidence establishes applicant's amenability, he cannot rely upon *Ogilvie* and *Dahl* to argue that his diminished future earning capacity is greater than reflected in the scheduled rating.

Further, defendant argues that Mr. Ramirez's calculation of applicant's diminished future earning capacity is impermissible to establish a loss of earnings greater than reflected in the scheduled rating, citing *Dahl*'s prohibition on such alternative calculations.

Defendant also argues that Mr. Ramirez's contention that applicant has rebutted the scheduled rating based on the third method described in *Ogilvie* is inapplicable.

Labor Code section 4660 provides that permanent disability is determined by consideration of whole person impairment within the four corners of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, the proper application of the permanent disability rating schedule in light of the medical record and the effect of the injury on the worker's future earning capacity. (*Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565] ["permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity"]; *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd*. (*Fitzpatrick*) (2018) 27 Cal.App.5th 607, 614 [83 Cal.Comp.Cases 1680]; *Almaraz v. Environmental Recovery Service/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) as affirmed by the Court of Appeal in *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd*. (*Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].)

The scheduled rating is not absolute. (*Fitzpatrick*, *supra* at 1685.) A rating obtained pursuant to the permanent disability rating schedule may be rebutting by showing the diminished future earning capacity is greater than the factor supplied by the schedule. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624]; *Contra Costa County v. Workers' Comp. Appeals Bd*. (*Dahl*) (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119].) The court in *Ogilvie, supra,* addressed the question of: "What showing is required by an employee who contests a scheduled rating on the basis that the employee's diminished future earning capacity is different than the earning capacity used to arrive at the scheduled rating?" (*Ogilvie*, 197 Cal.App.4th at p. 1266.) The primary method for rebutting the schedule rating is based upon a determination that the injured worker is "not amenable to rehabilitation and, for that reason, the employee's diminished future earning capacity is greater than reflected in the scheduled rating." The employee's diminished future earnings must be directly attributable to the employee's work-related injury and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education. (*Ogilvie*, 197 Cal.App.4th at pp. 1274–1275, 1277).

As the Ogilvie Court acknowledged:

> [C]ases have long recognized 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. This is the rule expressed in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [193 Cal. Rptr. 547, 666 P.2d 989].

We concur with defendant that applicant cannot rebut the scheduled rating of his permanent disability under a *LeBoeuf* theory, where the vocational evidence establishes he is amenable to participate in vocational rehabilitation. As the court in *Dahl* stated: "The first step in any *LeBoeuf* analysis is to determine whether a work-related injury precludes the claimant from taking advantage of vocational rehabilitation and participating in the labor force." (*Dahl*, 240 Cal.App.4th 746, 758.) The evidence here establishes applicant's industrial injury does not prevent him from benefiting from vocational rehabilitation programs to enable him to return to the labor market.

However, applicant also argues that Mr. Ramirez's analysis meets the third method described in *Ogilvie* to rebut the scheduled rating, where in "certain rare cases" the rating schedule fails to " capture the severity or all of the medical complications of an employee's work-related injury." As stated in *Ogilvie*:

> In certain rare cases, it appears the amalgamation of data used to arrive at a diminished future earning capacity adjustment may not capture the severity or all of the medical complications of an employee's work-related injury. After all, the adjustment is a calculation based upon a summary of data that projects earning losses based upon wage information obtained from California's Employment Development Department for a finite period and comparing the earnings losses of certain disabled workers to the actual earnings of a control group of uninjured workers. (Working Paper, at p. 3.) **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.** For example, a claimant who sustains a compensable foot fracture with complications resulting from nerve damage may have greater permanent effects of the injury and thereby disprove the scheduled rating if the sampling used to arrive at the rating did not include any workers with similar complications. In such cases, the scheduled rating should be recalculated taking into account the extent to which the claimant's disability has been aggravated by complications not considered within the sampling used to compute the adjustment factor. In this way, the employee's permanent disability rating gives "consideration" to an employee's diminished earning capacity that remains based upon "a numeric formula based on empirical data and findings … prepared by the RAND institute." (§ 4660, subds. (a) & (b)(2).)
> (*Ogilvie v. Workers' Comp. Appeals Bd*. (2011) 197 Cal.App.4th 1262, 1275-1276. Emphasis added.)

Mr. Ramirez states in his report that the RAND Institute study that underlies the rating schedule "did not sufficiently account for individuals with injuries to more than one body part, and as a result, individuals like Mr. Diaz are not fully represented by the study." Though he makes this assertion of fact, nowhere in his report does Mr. Ramirez provide evidence to "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." The fact that applicant had an injury to his right foot and toes, leading to the amputation of his second toe, does not establish that the scheduled rating based upon Dr. Fernandez's impairment rating fails to account for the severity of applicant's injury. In fact, Dr. Fernandez utilized a rating methodology chosen because it provided applicant with a higher whole person impairment rating, higher than the rating provided by applicant's podiatrist, Dr. Woodcox.

Accordingly, we will amend the award to reflect the rating of applicant's permanent disability as provided in the permanent disability rating schedule. In that regard, defendant contends that the correct rating of applicant's permanent disability is 21%, not the 22% rating cited in the WCJ's Opinion on Decision. We concur with defendant that applying the appropriate age adjustment for his age on the date of injury, age 33, adjusts the 22% rating down to 21%. We will amend the award of permanent disability accordingly.

Finally, defendant contests the order to pay for the cost of Mr. Ramirez' vocational rehabilitation report, contending that because we should not rely upon his opinion, his report is not substantial evidence.

The cost of a vocational expert may be allowed under Labor Code section 5811, if the cost was reasonable and necessary at the time it was incurred, even if the vocational evidence does not successfully affect the permanent disability rating. (*Costa v. Hardy Diagnostic* (2007) 72 Cal. Comp. Cases 1492 [Appeals Board en banc].) Mr. Ramirez was the only vocational expert to report in this case, and at the time he was retained, it was reasonable and necessary to determine applicant's vocational feasibility. We will therefore affirm the WCJ's order to pay the cost of the vocational rehabilitation report.

Accordingly, we will grant reconsideration and amend the Findings, Order and Award to find applicant sustained 21% permanent disability as a result of his industrial injury, but will otherwise affirm the WCJ's determination.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the January 26, 2021 Findings, Orders and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the Findings, Orders and Award is **AMENDED** as follows:

FINDINGS OF FACT

1. The stipulations as set forth in the minutes of hearing on 11/30/2020 are adopted and incorporated herein as findings of fact.
2. Applicant, Arturo Diaz, while employed as a laborer (occupational group number 480) in California, by E&F Demolition, Inc., insured and adjusted by Benchmark Insurance Company on 01/17/2018 sustained injury arising out of and in the course of his employment to his right foot and right toes (second, third, and fourth).
3. Applicant is not entitled to total temporary disability for the period of 05/25/2019 to 02/09/2020 at the weekly rate of $1,156.58.
4. Applicant's injury to his right foot and right toes (second, third, and fourth) caused permanent partial disability of 21 percent.
5. Applicant requires further medical treatment to cure or relieve from the effects of the injury to his right foot and right toes (second, third, and fourth).
6. Attorney for applicant has earned a reasonable fee.
7. Defendant is entitled to a credit for a temporary disability overpayment from 07/09/2020 through 07/18/2020 in the amount of $1,652.27.
8. Defendant did not engage in conduct supporting a finding of penalties or attorney's fees under Labor Code sections 5813 or 5814.
9. Defendant is liable for payment of Mr. Ramirez's bill of $3,912.95.

ORDERS

IT IS ORDERED that defendant's Exhibit J be and is received into evidence.

IT IS FURTHER ORDERED that defendant shall pay Mr. Ramirez's bill of $3,912.95.

AWARD

AWARD IS HEREBY MADE in favor of **ARTURO DIAZ** against **E&F DEMOLITION, INC.,** insured and adjusted by **BENCHMARK INSURANCE COMPANY** of:

a) Permanent partial disability indemnity as set forth in Finding of Fact No. 4, in the amount of $23,345.00 payable for 80.50 weeks at a

weekly rate of $290.00 beginning on the date following the last date for which temporary disability indemnity was paid, less credit for any permanent partial disability indemnity advanced heretofore on account thereof, subject to proof, less defendant's credit for a temporary disability overpayment in the amount of $1,652.27 subject to proof, less an attorney's fee of fifteen percent of the permanent partial disability indemnity awarded herein, payable to Christina Lopez, Esq.

b) All further medical treatment reasonably required to cure or relieve from the effects of the injury to right foot and right toes (second, third, and fourth) as set forth in Finding of Fact No. 5.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 9, 2021

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

ARTURO DIAZ
LAW OFFICE OF CHRISTINA LOPEZ
COLEMAN, CHAVEZ & ASSOCIATES

SV/*pc*

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