WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CRAIG HANUS, ***Applicant,*** **vs.** **URS/AECOM CORPORATION; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA; administered by SEDGWICK CLAIMS MANAGEMENT SERVICES,** ***Defendants.***	**Case No.** **ADJ9911872** **(Anaheim District Office)** **OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION**

Defendant, URS/AECOM, by and through its insurer, National Union Fire Insurance Company of Pittsburgh, PA, seeks reconsideration of the Findings and Award, issued May 8, 2018, in which a workers' compensation administrative law judge (WCJ) found applicant Craig Hanus sustained 100% permanent disability, without apportionment, as a result of his admitted November 15, 2014 industrial injury to his left shoulder, neck, low back and neurological system while employed as a heavy equipment mechanic by URS/AECOM Corporation.

Defendant contests the WCJ's finding that applicant is permanently totally disabled, contending applicant cannot rebut the 2013 permanent disability rating schedule using methods approved for rebutting the 2005 rating schedule. Defendant further argues that the vocational evidence does not rebut the rating schedule, since the vocational expert used impermissible factors, failed to consider the apportionment determination of the orthopedic Qualified Medical Evaluator and made unsubstantiated assertions that applicant was incapable of sedentary work. Defendant further argues that the WCJ erred in finding the apportionment determination of Dr. Doty was not substantial evidence.

Applicant has filed an Answer to defendant's petition, and the WCJ has prepared a Report and Recommendation on Petition for Reconsideration, in which he recommends that reconsideration be denied.

We have considered the allegations and arguments of the Petition for Reconsideration, as well as

the answer thereto, and have reviewed the record in this matter and the WCJ's Report and Recommendation on Petition for Reconsideration dated June 5, 2018, which considers, and responds to, each of the defendant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate as the decision of the Board, except as discussed below, we will affirm the WCJ's Findings and Award, and deny the petition for reconsideration.

To the extent the WCJ's finding that applicant is permanently totally disabled is based upon applicant's work restrictions, as the WCJ discusses in the last paragraph of page 5 of his Report, we note that the rating of permanent disability is not determined by measuring work restrictions, but rather, by reference to the rating of the whole person impairment under the appropriate sections of the AMA Guides. Here, we find the descriptions of the extent of applicant's impairments which are caused by his industrial injury in the medical reports of Dr. Doty, Dr. Patrick and Dr. Germanovich, as referenced and considered by the vocational expert, Mr. Stoneburner, support the WCJ's finding that applicant is permanently totally disabled. Dr. Doty, in his discussion of applicant's activities of daily living, found applicant "has difficulty with almost all his activities of daily living of housework, climbing stairs, walking, standing and sitting." In his review of applicant's physical condition, Dr. Doty noted applicant's complaints with regard to his head and neck, of:

> aching neck pain and constant headaches, dizziness, nausea and vomiting. He states he loses his balance when arising from a sitting position due to dizziness. At times he will get shooting pain in the neck that goes into the ear and he loses vision in the left eye. He rates the neck and head pain as a 9 on a pain scale from 0 to 10. The symptoms are aggravated with just waking up in the mornings. The symptoms are alleviated with nothing. Since the time of his last evaluation, his symptoms have become worse.

Similar complaints are described for applicant's bilateral upper and lower extremities and his back, with his symptoms unalleviated by treatment and are worsening. These complaints and symptoms were properly considered within the analysis of applicant's vocational impairments by Mr. Stoneburner.

Additionally, in finding that applicant is entitled to an unapportioned award, the WCJ concluded that Dr. Doty's apportionment determination did not meet the requirements set forth in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 (en banc). For a medical report to constitute substantial medical evidence to support apportionment, the reporting physician must provide an explanation for "how

and why" the identified non-industrial condition is responsible for causing a percentage of the disability.

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

In his June 13, 2017 report, Dr. Doty apportioned 25% of applicant's disability to "degenerative changes in the cervical and lumbar spine as well as the left shoulder," without providing an explanation for how these degenerative changes are responsible for the level of disability found. The WCJ's conclusion that defendant failed to meet its burden of proof to establish legal apportionment is justified. However, we do not adopt the WCJ's discussion on page 6 of his Report, wherein he discusses the absence of evidence that pre-existing degenerative pathology caused disability prior to applicant's industrial injury. The issue is not whether the pathology would have caused disability absent the industrial injury. Clearly, there can be apportionment to pre-existing degenerative pathology, if substantial medical evidence shows that such pathology is causing the existing level of disability. But, as discussed, the medical evidence fails to substantiate a legal basis for apportionment due to the insufficiency of Dr. Doty's medical analysis.

Finally, we also note that we do not find the WCJ citation and reference to *Hikida v. Workers' Comp. Appeals. Bd.* (2017) 12 Cal.App.5th 1249, to be pertinent to this case and we do not incorporate the final paragraph on page 7.

Accordingly, we will affirm the WCJ's Findings and Award and will deny defendant's Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration, filed May 23, 2018, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

JOSÉ H. RAZO

I CONCUR,

DEPUTY

ANNE SCHMITZ

DEIDRA E. LOWE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUL 20 2018

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

CRAIG HANUS
LAW OFFICES OF ROBERT G. JOHNSON, JR.
ROY J. PARK & ASSOCIATES

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

CASE NUMBER: ADJ 9911872

CRAIG HANUS	**-vs.-**	**URS / AECOM CORP.; NUFICO admin. by SEDGWICK CMS**

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE: **Hon. PAUL DeWEESE**

DATE: **June 5, 2018**

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

Date of Injury:	November 15, 2014
Age on DOI:	58
Occupation:	Heavy Equipment Mechanic
Parts of Body Injured:	Left shoulder, neck, low back and neurological system
Identity of Petitioner:	Defendant, National Union Fire Insurance Company of Pittsburgh PA, administered by Sedgwick Claims Management Services
Timeliness:	The petition was timely filed on May 23, 2018
Verification:	The petition was verified
Date of Findings & Award:	May 8, 2018
Petitioner's Contentions:	Petitioner contends the WCJ erred by: 1) finding applicant to be 100% permanently totally disabled because defendant contends the applicant did not (and cannot as a matter of law) rebut the non-existent "2013 Permanent Disability Rating Schedule"; 2) finding applicant to be 100% permanently totally disabled based on a vocational evaluation report that defendant contends is not substantial evidence; and 3) failing to apportion some of applicant's permanent disability to non-industrial causes.

II
FACTS

The parties stipulated that applicant Craig Hanus sustained injuries to his left shoulder, neck, low back and neurological system on November 15, 2014 while employed as a heavy equipment mechanic by URS / AECOM Corporation (Minutes of Hearing and Summary of Evidence (MOH/SOE) 2/26/2018 at 2:4-7) (all MOH/SOE references are in page:line format). He was released to return to work with restrictions on or about December 10, 2014, and was ordered returned to regular duties on December 15, 2014. He continued working because he was told he would lose his job if he did not, but his "body shut down" on April 21, 2015 and he had to stop (*Id.* at 8:20 – 9:5). He again tried to return to work on April 28, 2015, but only lasted a day and a half before he was taken off work again (*Id.* at 9:7-9).

On or about July 6, 2015, applicant obtained a job at Northrup Grumman as a painter. He spent three weeks in training and then several weeks doing "easy work" until his security clearance came through in September 2015 (*Id.* at 9:9-13). However, when he received his clearance and began doing the painting work for which he had been hired, he only lasted six hours before his "body shut down" as it had previously (*Id.* at 9:13-15).

Applicant testified that when he stopped working for Northrup Grumman, he had pain in his hands, arms, shoulders, back, legs, headaches, and "shooting pain in his ears" that would sometimes go to his eyes and affect his eyesight (*Id.* at 9:17-19). He currently has pain "everywhere," has balance problems, and uses a cane to prevent falling (*Id.* at 10:6-9). Following left shoulder surgery, he cannot raise his left arm above shoulder level (the court observed his left hand shaking when he lifted it that far) and cannot grip or grasp things in his left hand (*Id.* at 10:22-23).

Applicant was seen by a vocational evaluator, Roderick Stoneburner, in October 2017. Mr. Stoneburner's evaluation is discussed in detail below. Applicant testified that he could not focus or concentrate well during the evaluation, and Mr. Stoneburner told him he was untrainable and 100% disabled (*Id.* at 11:7-9).

The matter was heard and submitted for decision on February 26, 2018. On May 8, 2018, the court issued its Findings and Award, finding *inter alia* that applicant is 100% permanently totally disabled and that he is entitled to an unapportioned award. Defendant's

timely and verified petition for reconsideration followed.[1] Applicant has filed an answer.

III
DISCUSSION

At the outset, this judge notes that applicant was a credible witness at trial. Based on the court's observation of his demeanor while testifying, the court accepts applicant's testimony regarding his attempts to return to work after his injury and his current symptoms as true and accurate. Applicant's credible and unrebutted testimony (which defendant does not directly challenge on reconsideration), in conjunction with additional evidence in the record as discussed below, supports the court's finding of permanent total disability.

A. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE FINDING OF 100% PERMANENT TOTAL DISABILITY.

1. There Is No 2013 Schedule For Rating Permanent Disabilities. Defendant's first contention is that "no case law currently exists allowing rebuttal of the 2013 Permanent Disability Rating Schedule" (pet. for recon., 3:13). However, that is a "straw man" argument, since no "2013 Permanent Disability Rating Schedule" exists. Permanent disability is currently calculated using the AMA Guides in conjunction with the 2005 Schedule for Rating Permanent Disabilities. Labor Code section 4660.1(d), which applies to injuries occurring on or after January 1, 2013, provides that "the administrative director *may* formulate a schedule for the determination of the age and occupational modifiers and *may* amend the schedule for the determination of the age and occupational modifiers in accordance with this section. .... *Until the schedule of age and occupational modifiers is amended, for injuries occurring on or after January 1, 2013, permanent disabilities shall be rated using the age and occupational modifiers in the permanent disability rating schedule adopted as of January 1, 2005.*" (emphasis added). To date, the administrative director has not amended the rating schedule and permanent disabilities continue to be rated pursuant to the 2005 schedule. As

[1] Applicant's counsel pointed out in his answer that defendant failed to serve counsel at the correct address of record, using an incorrect city. However, applicant's counsel did receive the petition after taking the initiative to check whether one had been filed, and was able to file a timely answer. The same cannot be said for lien claimant and real party in interest Employment Development Department, on whom defendant failed to serve its petition. Defendant also failed to serve prior applicant's counsel/lien claimant as well as counsel for the employer on the bifurcated issue of serious & willful misconduct.

acknowledged by defendant, case law has made it clear that the 2005 schedule is *prima facie* evidence of the percentage of permanent disability and can be rebutted. For that matter, even if a 2013 schedule existed, there is no doubt that such a schedule could also be rebutted, since the language of section 4660.1(d) regarding the *prima facie* nature of the schedule (and thus its ability to be rebutted) tracks the language of section 4660(c) applicable to injuries prior to January 1, 2013.

The only difference in the way permanent disability is currently rated for injuries on or after January 1, 2013 involves the modifier for diminished future earning capacity (DFEC). For injuries before January 1, 2013, section 4660(b)(2) established a fairly complicated method to account for DFEC that was incorporated into the 2005 schedule and was the subject of much litigation shortly after it was enacted (see, e.g., *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal. App. 4th 1262 [76 Cal. Comp. Cases 624] and subsequent decisions). For injuries on or after January 1, 2013, section 4660.1(b) essentially did away with the complicated DFEC modifier by providing that all whole person impairments would be multiplied by an adjustment factor of 1.4. While it is true that this change eliminated much of the uncertainty and litigation surrounding the impact of an injured worker's DFEC on the final rating of permanent disability, it did not create a new schedule and it did not eliminate a party's ability to rebut the 2005 schedule.

2. Defendant's Reliance on *Dahl* Is Misplaced. Defendant cites *Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal. App. 4th 746 [80 Cal. Comp. Cases 1119] for the proposition that applicant cannot rebut the permanent disability calculated via the AMA Guides and the 2005 schedule through a showing of DFEC. However, that is not exactly what the *Dahl* Court said. While that Court held that the DFEC modifier set forth by statute in the rating schedule cannot be rebutted using some alternative methodology for calculating DFEC, it also held that an "individualized assessment" (not a "competing empirical methodology") can show whether a work-related injury precludes an injured worker from taking advantage of vocational retraining and participating in the labor force. The Court further held that if such a showing is made, that factor should be considered in any determination of a permanent disability rating.

The *Dahl* Court's analysis is perhaps most succinctly summarized in section 4660.1(g): "Nothing in this section shall preclude a finding of permanent total disability in accordance

with Section 4662." In turn, section 4662(b) provides that "permanent total disability shall be determined in accordance with the fact."

3. The Finding Of 100% Permanent Total Disability Was Based On An Individualized Assessment of Applicant's Limitations As A Result Of The Work Injury Supported By Medical And Vocational Evidence. Defendant contends that vocational evaluator Mr. Stoneburner "utilize[d] numerous cursory metrics" in order to conclude that applicant is unemployable, including an analysis of similarly situated workers. This judge agrees with defendant that, pursuant to *Dahl*, an analysis of similarly situated workers is irrelevant. That is why the court's finding of permanent total disability was not based on that analysis at all.

Instead, the court's finding was based on specific evidence relating to this applicant. As set forth in the court's Opinion on Decision:

> "In his report dated June 13, 2017 [Ex. D, p. 10], Panel QME David Doty, M.D. opined that applicant is limited to sedentary work; minimal use of his left hand; no repetitive gripping and grasping; no repetitive side-to-side motion of the head; and is required to use a cane throughout the work day. Another Panel QME, Selwyn Patrick, M.D., noted that applicant is also precluded from working at heights and on ladders [Ex. F, p. 17].
>
> In reports from June to December of 2017 [Ex. 3 through 11], primary treating physician Andrew Germanovich, D.O. documented very high pain levels throughout those six months, most commonly described as 9 out of 10 and occasionally reaching 10.
>
> Vocational evaluator Roderick Stoneburner issued a report dated October 31, 2017 [Ex. 1] in which he carefully and thoroughly described applicant's vocational difficulties in light of the numerous medical restrictions placed upon him by the QMEs. In essence, Mr. Stoneburner found the following: 1) applicant's medical restrictions severely limit the number of jobs he could do on the open labor market; 2) applicant has no transferable skills that would enable him to obtain one of the few jobs within his restrictions; and 3) applicant's pain levels make him unfeasible for vocational training because "he is incapable of sustained work activity at the sedentary work level for even one day." As a result, Mr. Stoneburner concluded that applicant is not employable and has no earning capacity."

The permanent work restrictions imposed by Dr. Doty and Dr. Patrick, standing alone, document a diminished work capacity that would support a finding of permanent disability in excess of the whole person impairments described by the physicians pursuant to the AMA Guides. Adding to those limitations (which by themselves severely limit the number of jobs available to applicant in the open labor market, according to Mr. Stoneburner), applicant's pain levels (as documented by treating physician Dr. Germanovich, applicant's credible and

unrebutted testimony, and Mr. Stoneburner's findings on vocational evaluation) make him unfeasible for vocational training which might otherwise enable him to obtain one of the few jobs available on the open labor market within his medical restrictions.

The medical restrictions and resulting high pain levels are directly attributable to applicant's industrial injuries. Those factors combine to render applicant unfeasible for vocational retraining; his age and educational level have nothing to do with it. Because applicant is unfeasible for vocational retraining and cannot compete in the open labor market as a result of his medical limitations and constant high pain levels, it was found that applicant is 100% permanently totally disabled in accordance with the fact.

B. APPLICANT IS ENTITLED TO AN UNAPPORTIONED AWARD

Defendant contends that whatever applicant's overall level of permanent disability, some of it should be apportioned to non-industrial degenerative changes in his neck, low back and left shoulder as opined by Dr. Doty (Ex. D, p. 10). Defendant asserts that both Mr. Stoneburner and this judge have disregarded pre-existing, non-industrial "disabilities." There is no evidence in the record that any pre-existing degenerative pathology caused any disability prior to the industrial injury; there was no pre-existing disability to disregard. While Dr. Doty opined that applicant's current disability is due in part to pre-existing degenerative pathology, Dr. Doty failed to explain how and why, within reasonable medical probability, that pathology would have resulted in some level of permanent disability at this time absent the industrial injury, as required by *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604 (Appeals Board en banc). As a result, Dr. Doty's report does not constitute substantial medical evidence that applicant would have some level of permanent disability at this time as a result of previously non-disabling pathology absent the industrial injury. Because it was defendant's burden to prove the existence of non-industrial apportionment (pursuant to *Escobedo*), no apportionment was found.

Applicant testified that he had no prior problems with his neck, low back or left shoulder (MOH/SOE 10:12). Mr. Stoneburner concluded that, in his expert opinion, applicant would still be working at his usual and customary employment were it not for the industrial injury (Ex. 1, p. 15). Even if his degenerative pathology had begun to be symptomatic (and again, there is no substantial medical evidence explaining whether that would have happened yet, or ever, absent the industrial injury), there is no evidence that it would have precluded

applicant from his regular work, much less rendered him unemployable. Thus, Mr. Stoneburner concluded that there was no apportionment from a vocational standpoint.

Finally, it should be noted that Mr. Stoneburner also cited the consequences of medical treatment as contributing to applicant's current cognitive impairment and inability to meet the exertional demands of employment (Ex. I, p. 13). Disability resulting from medical treatment provided as a result of an industrial injury is not apportionable, even if the underlying condition causing the need for treatment has both industrial and non-industrial causes (*Hikida v. Workers' Comp. Appeals Bd*) (2017) 12 Cal. App. 5th 1249 [82 Cal. Comp. Cases 679].

IV
RECOMMENDATION

It is respectfully recommended that defendant's Petition for Reconsideration be denied in its entirety.

DATE: June 5, 2018

Paul DeWeese

PAUL DeWEESE
WORKERS' COMPENSATION JUDGE

SERVICE: