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

CASE NUMBER: ADJ9910337

RAFAEL SANDOVAL **-vs.-** **THE CONCO COMPANIES and ZURICH INS. CO., adjusted by ATHENS ADMINISTRATORS CONCORD;**

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE: **James Griffin**

DATE: **September 21, 2017**

OPINION ON DECISION

Background

At trial, applicant testified credibly that he currently lives in Pittsburg, California with his wife, his 8-year-old son and his 11-year-old daughter, and that he last worked on approximately January 23, 2016. His typical day now starts when he gets up at the same time as his children before they go to school. He does his exercises/therapy in the morning, then has to lay down because of pain. He can shower by himself, but needs help afterwards putting on his socks. He can manage to put on his shoes on his own.

He is right handed, and now cannot extend the fingers on his right hand fully. (*He has demonstrated for the Court that he is able to move his middle knuckle to approximately 50 percent of what would be expected.*) He needs to massage his hands, as they have spasm when he extends them too much. He also has leg spasms every morning, in the back and in the front. He needs help to

massage the spasms in his legs. This occurs throughout the day. He cannot put weight on his right leg when it is spasming. The Judge noted that he is using a cane at the time of the trial.

Applicant has difficulty with urination and defecation. He gets a feeling like "butterflies" in his stomach regarding his bladder issues. He cannot feel if he has completely urinated or not, when he attempts to do so. He does not have full control of his bladder. He has been using a catheter for approximately the past two months, which he can use on his own. He does not have to have a bag for the catheter yet. Regarding defecation, he has constipation from the medication he is taking. He is unable to fully clean himself after defecating and needs to go into the shower in order to do so after each defecation. In order to work, he would need to have a job which had a bathroom with a shower as part of the facility. He has soiled his pants due to his defecation issues.

His pain on a scale of one to ten is a six at a minimum and goes up to nine even with his medication. He is currently taking only one Norco pain pill per day, as he has to pay for this on his own. His most recent treating physician has denied him any further pain pills.

After his kids leave for school, he goes from the bed to the chair to the floor, where he has to lie down as this is the only way to control his pain. He is unable to make his own lunch, and one occasion recently he burned his hand on a small oven when he tried to make his own sandwich. He also has spasms in his left hand and in his neck. After lunch, he goes from the floor to his bed. In the evening, he will lie on the floor in order to control the pain. He goes to bed at approximately 9:00 p.m. and is able to sleep seven or eight hours.

He testified on one recent incident when he went to Costco, he had to use one of the electric carts or scooters that they provided. He cannot cook his own dinner.

He can drive from his home as far as his children's school, which is approximately five miles away. He does not want to drive any further because of spasms in his foot, and his foot falling asleep.

He cannot do chores inside or outside of the house due to his pain. When his pain is eight or nine, he will then be on the floor in order to decrease the pain. He will sometimes have to be there on the floor for three or four hours in order to decrease the pain. He has not attempted to ride a bus in the past 30 years.

He can walk two blocks, but then needs to sit on his walker, which has a built-in bench and hand breaks. He can walk at home without the use of a cane or walker, because he is able to hold on while he is moving around his house.

He was seen by his vocational expert (Mr. Van de Bittner), as well as the defense vocational expert (Mr. Linder), and answered truthfully regarding questions posed by both of the vocational experts. He does not believe that he can hold a job at this point for numerous reasons, including difficulty with driving, inability to walk more than two blocks and his mouth getting dry. (*He had to stop testimony at this point in order to get water to continue testifying.*) He cannot perform activity without getting exhausted, his need to lie down, the fact that getting up from a seated or lying down position is extremely difficult, problems with the toilet and his increasing pain with activity.

He also related that recently he attempted to hook up his cable, but was unable to do so because of his condition. His children had to complete the work for him. (*Minutes of Hearing and Summary of Evidence [MOH/SOE]*, June 21, 2017 at pp. 5-7.)

On cross-examination, he stated that, regarding his bladder and bowel issues, he does not recall being asked about this by Dr. Mandell. He noted that he believed that there were records of him having these problems at the time of the examination by Dr. Mandell. (*The Court's attention*

was then brought to page 3 of Dr. Mandell's August 18, 2016 report (Joint Exhibit 101) at paragraph 3, where Dr. Mandell indicated that his bladder and bowel problems were not as extensive as applicant's testimony at trial.)

Applicant was then asked about the Functional Capacity Evaluation from Rachel Feinberg (Exhibit B). He did not talk with her about the test results.

In applicant's job as an iron worker, he would go all over the Bay Area. All of his work as an iron worker was physical work, and he was not a supervisor. In a prior job at Bechtel, he was a supervisor where he managed employees, did paperwork and worked on a computer. He had 30 days of computer training. He worked on site, but had an office. He does not have a computer degree or certification.

He taught himself English, which is not his native language. He only finished a sixth grade education. He met with his vocational expert in the expert's office in Walnut Creek.

He was then asked about records from his prior family physician, Dr. Kassel. There is an entry at page 20 of these records on November 3, 2014 (Exhibit A) which is a massage therapy note. He recalled receiving massage, but did not recall if it was to his low back, as the note indicates. He believes that the notes from Dr. Kassel would be correct. At page 34 of the records of Dr. Kassel, an entry of November 22, 2011 indicated that he had low back pain in 2011. Applicant agrees with the statement in Dr. Kassel's report, although he could not recall it specifically.

Applicant has not looked for work since the date of injury, due to his disability and his focus on getting better. He knows how to use the Internet.

Applicant's wife drove him today. He did not bring a walker with him to trial, just his cane. (*MOH/SOE, supra,* at pp 7-8.)

DISCUSSION

Permanent Disability

The AME, Dr. Peter Mandell, states in his August 18, 2016 report (Exh. 101) at page 8 that applicant's injury caused a 27% whole person impairment (WPI) to his cervical spine (with 10% non-industrial apportionment) and a 12% WPI (with no apportionment). Dr. Mandell also notes at pages 8-9 that his injury limits him to sedentary work, *and* to work which does not require a high amount of dexterity with his upper limbs or the ability to be on his feet very long because of his lower limbs. Under *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District (Almaraz/Guzman)* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board En Banc), Dr. Mandell stated that applicant has a 50% WPI for his bilateral arms and a 30% WPI for his lower limbs, without any provision for apportionment. Dr. Mandell reasons that the higher rating is appropriate under *Almaraz-Guzman* because the lower rating is inaccurate because it does not take into account the range of motion, diagnosis, effects of the surgery, and the significant neurologic compromise of the spinal cord, nor his station and gait disorders. At page 12 of this April 7, 2017 deposition, Dr. Mandell confirmed that the *Almaraz-Guzman* rating is more accurate.

Applicant was also evaluated by two vocational experts, Eugene Van de Bittner and Tom Linder. Mr. Van de Bittner determines at page 46 in his December 23, 2016 report (which I find is admitted as Exhibit 1, as there is no legal no basis for defendant's objection to the admissibility of the report), that applicant is not amenable to vocational rehabilitation. After taking into consideration of all vocational and medical factors, Mr. Van de Bittner concludes at page 51 of his report that applicant has a 100% Diminished Future Earnings Capacity (DFEC). Mr. Linder opines in his May 31, 2017 report (Exh. B) that applicant *is* amenable to rehabilitation, and that he has a DFEC of between 59% - 70% for a full work week, or between 80% - 85% if he is limited to a 20

hour work week.

Although the statutory scheme of rating permanent disability pursuant to the 2005 Permanent Disability Rating Schedule (PDRS) is presumptively correct, it can be rebutted, as determined in *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal. App. 4th 1262 [76 Cal.Comp.Cases 624], which states:

> [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 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 (emphasis added). (*Ogilvie, supra* 197 Cal. App. 4th at p. 1277.)

The *Ogilvie* court derived the method of rebutting the PDRS by demonstrating that due to industrial injury the employee is not amenable to rehabilitation from the California Supreme Courts's opinion in *LeBoeuf v. Workers' Compensation Appeals Board* (1983) 34 Cal.3d 234. This has been referred to as the "LeBoeuf method." The *Ogilvie* case clarified that the LeBoeuf method is only applicable in cases "where the employee's diminished future earnings are 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, supra*, 197 Cal.App.4th at p. 1275.) "This application of *LeBoeuf* hews most closely to an employer's responsibility . . . to 'compensate only for such disability or need for treatment as is occupationally related.'" (*Id.* at p. 1275.)

Ogilvy was further discussed in the *Dahl* decision:

> *Ogilvie* confirmed the Legislature meant what it said, and that claimants may not rebut their disability rating merely by offering an alternative calculation of their diminished future earning capacity. While *Ogilvie* found the 2004 amendments did

> not overthrow certain long-held approaches to calculating earning capacity, it clearly did not intend those approaches to be construed so broadly as to return us to the ad-hoc decision making that prevailed prior to 2004. Following the WCAB's approach in this case would do just that. Claimants could rebut their presumptively correct disability rating merely by presenting an analysis that shows a greater diminished future earning capacity than that determined by applying the Schedule. As *Ogilvie* makes clear, this approach is no longer permissible. (*Dahl, supra,* 240 Cal. App. 4th at 761.)

Turning to the instant case, I find that the 100% permanent disability opinion of Mr. Van de Bittner hews most closely to medical opinion of Dr. Mandell and applicant's unrebutted trial testimony regarding the impact of his injury, including the significant factor that he reasonably needs to be near a toilet at all times, and his constant use of a cane.

Occupational Title

Applicant's testimony appears to support that his job as an iron worker fits within occupational group 480.

Vocational Expert Cost

With respect to the vocational rehabilitation expert fees, pursuant to section 4620, subdivision (c), the medical-legal report must be "capable of proving or disproving a disputed medical fact." (See, *Costa v. Hardy Diagnostic* 2009 Cal. Wrk. Comp. P.D. LEXIS 117 (panel decision) (*Costa III)* [allowing vocational rehabilitation expert's costs because they "are not premised on facts or assumptions so false as to render them worthless ... nor are their conclusion totally lacking in credibility"]; citing to *Penny v. Workers' Comp. Appeals Bd.* (1983) 48 Cal.Comp.Cases 468, 469 [applicant had "willfully misstated the facts regarding her condition to the examining physicians Here, the vocational rehabilitation expert's costs that are "not premised on facts or assumptions so false as to render them worthless," are allowable, especially where, as here,

the cost was reasonable at the time the vocational expert's report was obtained. Therefore, the cost of Mr. Van de Bittner's report is allowed.

Future Medical Care

Dr. Mandell's opinion supports an award of further medical treatment to applicant's neck and low back.

Applicant's Attorney's Fee

Applicant's attorney has performed valuable services on behalf of applicant, and is entitled to a fee of 15% of the permanent disability indemnity awarded herein.

Dated: September 21, 2017

JAMES GRIFFIN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:

ON: **9/21/17** BY: *Lily Acosta*

PARTIES:

APPEL LAW WALNUT CREEK, US Mail
ATHENS ADMINISTRATORS CONCORD, US Mail
RAFAEL SANDOVAL, US Mail
SAMUELSEN GONZALEZ BURLINGAME, US Mail