Refining a Vocational Methodology for Evaluating Employability and Addressing Medical Apportionment: Analysis of Post-*Nunes* Court Decisions

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Abstract. Court decisions following *Nunes v. State of California* (*Nunes I* and *Nunes II*, 2023a, 2023b) are summarized from a vocational perspective, including recommended methods for evaluating employability and addressing medical apportionment as set forth by workers' compensation judges and commissioners. Twenty-five court decisions are reviewed and, among other things, describe the need for medical evaluators to provide opinions on work restrictions for each portion of permanent disability and vocational experts to conduct an individualized pre-injury and post-injury analysis of an applicant's employability while considering all medical and vocational factors. Refinements to existing methodologies for evaluating employability and addressing medical apportionment from a vocational perspective are described.

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History

Agreed and panel qualified medical evaluators are required by Labor Code sections 4663 and 4664 (McCaleb, 2025) to provide opinions on apportionment of permanent disability; the percentage of permanent disability that is attributed to the work injury and the percentage that is attributed to any pre-existing or non-industrial medical factors. *Nunes v. State of California* (*Nunes I* and *Nunes II*, 2023a, 2023b) require vocational experts to address medical apportionment and to explain how and why vocational factors such as employability, earning capacity, and amenability to rehabilitation may be impacted by physicians' opinions on medical apportionment. *Nunes I* and *Nunes II* also describe how physicians can use vocational opinions to finalize their opinions on medical apportionment. Court decisions issued following *Nunes I* and *Nunes II* have provided additional guidance to physicians and vocational experts. Among other things, they provide guidance to physicians regarding the need to provide opinions on work restrictions and to specify work restrictions for each portion of permanent disability. The court decisions also provide guidance to vocational experts regarding appropriate ways to evaluate employability and address medical apportionment from a vocational perspective.

Van de Bittner and Oemcke (2024) presented mathematical formulas for analyzing diminished labor market access and addressing medical apportionment from a vocational perspective. They explained how these formulas can be used by vocational experts in their efforts to identify the ratio between pre-injury and post-injury labor market access and develop opinions regarding how and why medical factors, such as work restrictions, can impact vocational factors, such as employability, earning capacity, and amenability to rehabilitation for each portion of permanent disability: the portion that is attributed solely to the current work injury and the portion that is attributed solely to any pre-existing work injury or non-industrial medical factor.

The Diminished Medical Labor Market Access (DMLMA) Formula was described by Van de Bittner and Oemcke as a method for evaluating employability, as follows (2024, pp. 30-31):

$$\text{DMLMA} = \left[\frac{\text{PRE - POST}}{\text{PRE}} \right]$$

where:
LMA = labor market access
MLMA = medical LMA
PRE = pre-injury MLMA
POST = post-injury MLMA
DMLMA = diminished MLMA

The formula has been revised to be consistent with the post-*Nunes* court decisions. The revised title and formula are:

Diminished Labor Market Access (DLMA) Formula:

$$DLMA = \left[\frac{PRE - POST}{PRE} \right]$$

where:
LMA = labor market access
PRE = pre-injury LMA
POST = post-injury LMA
DLMA = diminished LMA

The Vocational Analysis of Apportionment (VAA) Formula was described by Van de Bittner and Oemcke (2024) as a method for addressing medical apportionment as follows (p. 32):

$$A1 = \left[\frac{DMLMA1}{SDMLMA} \right]$$

$$A2 = \left[\frac{DMLMA2}{SDMLMA} \right]$$

Continue for additional injuries.

where:
MLMA = medical labor market access
DMLMA = pre-injury MLMA – post-injury MLMA ÷ pre-injury MLMA
SDMLMA = sum of DMLMA for all injuries
A1 = apportionment to the first injury
A2 = apportionment to the second injury

This formula has been revised and the name of the formula has been changed to be consistent with *Nunes I* and *Nunes II* and the post-*Nunes* court decisions as follows:

Addressing Medical Apportionment (AMA) Formula

$$A1 = \left[\frac{DLMA1}{SDLMA} \right]$$

$$A2 = \left[\frac{DLMA2}{SDLMA} \right]$$

Continue for additional injuries.

where:

LMA = labor market access
DLMA = pre-injury LMA – post-injury LMA ÷ pre-injury LMA
SDLMA = sum of DLMA for all injuries
A1 = apportionment of employability, earning capacity, and amenability to rehabilitation for the first injury
A2 = apportionment of employability, earning capacity, and amenability to rehabilitation for the second injury

Court Decisions Following *Nunes I* and *Nunes II*

Twenty-five court decisions will be summarized in this section. The first two were issued before *Nunes v. State of California* (*Nunes I*; 2023a) and are included since significant portions are referenced in the court decisions following *Nunes I*. As a note of caution, the court decisions are analyzed as of this writing. They may be under appeal. Many of the decisions may have no precedential value because most are panel decisions. Nevertheless, these decisions are instructive in that they provide guidance related to vocational expert methodologies and analyses.

The 25 court decisions are the following:

1. *Wilson v. Kohls Department Store, New Hampshire Insurance Co.* (2021).
2. *Soormi v. Foster Farms* (2023).
3. *Gunnoe v. Best Buy, XL Insurance* (2023).
4. *Gonzales v. Team Infinity, Public Service Mutual Insurance Co.* (2023).
5. *Fisher v. Enloe Drilling and Pumps, Inc., Midwest Employers Casualty Company* (2023).
6. *Mejia v. J.B. Critchley, Inc.* (2023).
7. *Rose v. Los Angeles Dodgers, ACE American Insurance/Chubb* (2024).
8. *Havanis v. California Department of Transportation, State Compensation Insurance Fund* (2024).
9. *Vernon v. Kaweah Delta Health Care District* (2024).
10. *Xiong v. Linvatec/Conmed, Travelers Property Casualty Co.* (2024).
11. *American Claims Management ex rel. Manufacturers Alliance Insurance Co. v. Workers' Compensation Appeals Board (Mejia*) (2024).
12. *Fiore v. Los Angeles Community College District* (2024).
13. *Nelson v. Workers' Compensation Appeals Board, Human Resources Consultants, Inc., ProCentury Insurance Co.* (2024).
14. *Pantoja v. Jack in the Box/SBF Foods, LLC, CIGA ex rel. Sedgwick for Castlepoint National Insurance Co.* (2024).
15. *Moraido v. County of San Diego* (2024).
16. *Baltrip v. AC Transit, Athens Administrators* (2024).
17. *Vons, Albertsons Holding v. Workers' Compensation Appeals Board (Yarmolenko)* (2024).
18. *Vazquez v. Valley First Credit Union, Cypress Insurance, Administered by Berkshire Hathaway Homestate Companies* (2024).
19. *Avakian v. City of Baldwin Park, PSI, administered by Adminsure* (2024).

20. *Faustina v. County of Los Angeles, PSI* (2025).
21. *Nunes v. State of California, Department of Motor Vehicles; administered by State Compensation Insurance Fund* (2025).
22. *Valdovinos v. Universal Site Services, Inc., Wesco Insurance Company, administered by AmTrust North America* (2025)
23. *Rebar International, Inc. v. Workers' Compensation Appeals Board (Haynes)* (2025).
24. *Wang v. 6 Stars Construction, LLC; insured by Norgard Insurance Company* (2025).
25. *Happeny v. State of California, California Institute for Women, legally uninsured, administered by State Compensation Insurance Fund* (2025)

In *Wilson v. Kohls Department Store, New Hampshire Insurance Company* (2021), a panel decision (involving three of the seven commissioners), it was determined that the applicant's work injury resulted in a disability of 87%, without apportionment when considering a combination of medical and vocational opinions. The court ruled as follows regarding a claim for permanent total disability (p. 11):

> A finding of permanent total disability in accordance with the fact (that is complete loss of future earnings) can be based upon medical evidence, vocational evidence, or both. Medical evidence of permanent total disability could consist of a doctor opining on complete medical preclusion from returning to work. For example, in cases of severe stroke, the Appeals Board has found that applicant was precluded from work based solely upon medical evidence. (See i.e., *Reyes v. CVS Pharmacy*, (2016) 81 Cal. Comp. Cases 388 (writ den.); see also *Hudson v. County of San Diego*, 2010 Cal. Wrk. Comp. P.D. LEXIS 479.)
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> A finding of permanent total disability can also be based upon vocational evidence. In such cases, applicant is not precluded from working on a medical basis, per se, but is instead given permanent work restrictions. Depending on the facts of each case, the effects of such work restrictions can cause applicant to lose the ability to compete for jobs on the open labor market, which results in total loss of earning capacity. Whether work restrictions preclude applicant from further employment requires vocational expert testimony.

In *Soormi v. Foster Farms* (2023), a panel decision, the commissioners adopted and incorporated the findings of the workers' compensation judge (WCJ), while denying a petition for reconsideration filed by the defendant. While considering medical and vocational opinions, the commissioners concluded that the applicant was 100% disabled, without apportionment. The analysis and opinions by the applicant's vocational expert were accepted while those of the defense vocational expert were rejected by the court. The above findings from *Wilson* (2021) were repeated regarding the standards for finding permanent total disability. Additional guidance on this topic was provided as follows (pp 9-10):

> When you analyze permanent total disability, you are first looking at the industrial injury and the work preclusions assigned to applicant. You then analyze

> whether those work preclusions were caused by the industrial injury. You then determine whether those work preclusions prevent applicant from gainful employment on the open labor market, which includes an analysis of whether applicant can be rehabilitated to a new career. Where applicant is not capable of rehabilitation and employment, and absent apportionment, applicant is permanently totally disabled.

Additionally, the court explained that a vocational expert cannot use vocational factors such as ethnic origin, lack of education, and inability to speak English as the reason for reducing a permanent disability rating. The focus needs to be on medical factors, primarily the vocational effects of permanent work restrictions.

In *Gunnoe v. Best Buy, XL Insurance* (2023), a panel decision, the commissioners returned the case to the WCJ for further proceedings regarding permanent disability, apportionment, and other issues. The WCJ relied on the opinions of the applicant's vocational expert to conclude that the applicant was 100% disabled. Among other things, the applicant's vocational expert had relied in part on psychiatric disability to conclude that the applicant was 100% disabled. However, the WCJ had not determined whether the applicant's psychiatric claim was compensable. Additionally, the applicant's vocational expert relied heavily on the effects of orthopedic pain to conclude that the applicant was 100% disabled while the orthopedic agreed medical evaluator had found 33% pre-existing orthopedic apportionment. The court found this inconsistent with the applicant's vocational expert's contention that the applicant was 100% disabled with no apportionment based solely on her other impairments. The court added that the applicant's vocational expert was apparently substituting his own vocational apportionment in place of valid medical apportionment found by the orthopedic agreed medical evaluator. This was contrary to the recent *Nunes I* (2023a) en banc decision.

The next court decision, which was issued after *Nunes I*, was summarized previously by Van de Bittner and Oemcke (2024) as follows (p. 29):

> In *Gonzales v. Team Infinity and Public Service Mutual Insurance Company* (2023), the commissioners wrote that the applicant's vocational expert's opinion on apportionment was not substantial evidence since it disregarded the factors of apportionment described by the medical evaluator. The opinion of the defense vocational expert was not found to represent substantial evidence since it was based on speculation and conjecture regarding the applicant's medical condition. The applicant's vocational expert wrote that while none of the applicant's impairments by themselves would preclude him from working in the open labor market, the combination of his separate issues would make him not amenable to rehabilitation. Additionally, he would be precluded from working based on his non-industrial impairments alone. No empirical analysis was described that supported these opinions. The court found these opinions to be inconsistent with the findings of the medical evaluators. By contrast, the defense vocational expert wrote that the applicant had pre-existing medical conditions that would have led to the current industrial condition. The pre-existing medical conditions might have progressed absent the industrial injury. The court found this conjecture regarding applicant's medical condition to be outside the role of a vocational expert.

In *Fisher v. Enloe Drilling and Pumps, Inc., Midwest Employers Casualty Company* (2023), a panel decision, the commissioners affirmed the decision of the WCJ that the applicant was permanently and totally disabled based on the findings of the neurological agreed medical evaluator and the applicant's vocational expert with respect to the impact of the applicant's headaches on his employability and ability to benefit from vocational rehabilitation. The applicant sustained a serious injury to his head and other body parts when an object fell off a drilling rig and struck him in the head. He was knocked off a platform and fell about six feet onto the ground.

The parties retained agreed medical evaluators in orthopedic surgery, neurology, neuropsychology, and ophthalmology. Each side retained a vocational expert. The ophthalmological agreed medical evaluator found no work-related vision impairment. The applicant's vocational expert concluded that the applicant was limited to part-time sedentary to light work based on the opinions of the orthopedic agreed medical evaluator. The neuropsychological agreed medical evaluator precluded the applicant from job duties requiring memory for detailed instructions and tasks requiring rapid processing speed and sustained concentration. He was also precluded from work requiring more than minimal social interactions or exposure to excessive emotional stress. The applicant's vocational expert concluded that the applicant had access to 1% of jobs in the open labor market when considering the opinions of the orthopedic and neuropsychological agreed medical evaluators. The applicant's vocational expert then considered the effects of the applicant's headaches on his employability. Uncontradicted medical evidence and testimony from the applicant and his wife indicated that the applicant had debilitating headaches four to five times a week. The applicant testified that the headaches occurred 4 to 5 days a week at pain level 9 to 10. The neurological agreed medical evaluator determined that the applicant had a significant headache disorder, with the headaches lasting from a few hours to all day. The orthopedic, neuropsychological, and neurological agreed medical evaluators concluded that apportionment was 100% to the work injury.

The applicant's vocational expert opined that the applicant would be unemployable since he could not maintain a regular work schedule, either full- or part-time for reasons related to the work injury alone. He cited research regarding employer allowances for absenteeism to support his opinion. When considering the opinions of the agreed medical evaluators on apportionment, he concluded that apportionment of employability, earning capacity, and amenability to rehabilitation was 100% to the work injury. The court found the analysis and opinions of the applicant's vocational expert to represent substantial evidence. By contrast, the court determined that the opinions of the defense vocational expert did not meet the requirements of substantial evidence since she relied on an incomplete medical history. Additionally, a report by a functional capacity evaluator was determined to be admissible. However, the opinion of the functional capacity evaluator that the applicant could not benefit from vocational rehabilitation was not substantial evidence since that opinion was beyond the scope of his role as a functional capacity evaluator.

The defendant filed a petition for writ of review to the Court of Appeal in *Midwest Employers Casualty Company v. Workers' Compensation Appeals Board (Fisher)* (2023). The petition for writ of review was denied, which means that the panel decision by the commissioners is conclusive.

The next court decision was previously summarized by Van de Bittner and Oemcke (2024) as follows (pp. 29-30):

> In *Mejia v. J.B. Critchley, Inc.* (2023), a panel decision, the commissioners affirmed the WCJ's decision that the applicant was 100% disabled, without apportionment. The orthopedic agreed medical evaluator found a 28% whole person impairment for the cervical spine with 20% apportionment and work restrictions of no heavy lifting, no repetitive bending, stooping, flexion, extension, and rotation with the neck, and avoidance of prolonged neck flexion or extension. A neurological qualified medical evaluator found 2% whole person impairment for headaches, without apportionment. An otolaryngology qualified medical evaluator found 1% whole person impairment for binaural hearing loss, without apportionment. A psychology qualified medical evaluator found a global assessment of functioning of 52, with moderate impairment in activities of daily living, without apportionment. There was a moderate impairment in sleep and social functioning, and an inability to test further due to problems with focus, concentration, and memory. An internal medicine qualified medical evaluator found a 30% whole person impairment for heart issues and a 9% whole person impairment for concentration and sleep issues, with no apportionment. Internal medicine restrictions included 1 or 2 hours per day for activities involving standing, walking, sitting, climbing, forward bending, kneeling, crawling, twisting, keyboarding, grasping, pushing, and pulling. The primary treating physician reported that the applicant was unable to return to gainful employment, without apportionment. Work restrictions included standing for 5 minutes per hour, walking 10 minutes per hour, no lifting over five pounds, and a need to lie down or recline about 10-15 minutes every hour. The applicant's vocational expert concluded that the applicant was unable to perform competitive work and was not amenable to vocational services based on the opinions of the orthopedic agreed medical evaluator and the internal medicine and psychological qualified medical evaluators. The defense vocational expert, who apparently did not personally interview or test the applicant, wrote that the applicant had a diminished future earning capacity of 37%. The primary treating physician reviewed the reports of both vocational experts and rejected the reporting by the defense vocational expert. The WCJ considered all of the medical and vocational evidence while deciding the applicant was 100% disabled, without apportionment. The judge's findings were affirmed by the commissioners.

The panel decision by the commissioners was appealed to the Court of Appeal in *American Claims Management ex rel. Manufacturers Alliance Insurance Co. v. Workers' Compensation Appeals Board (Mejia)* (2024). The petition for writ of review was denied, which means the panel decision by the commissioners is conclusive.

In *Rose v. Los Angeles Dodgers, ACE American Insurance/Chubb* (2024), a panel decision, the commissioners returned the case to the trial level for further development of the record since the applicant's vocational expert's analysis and report did not meet the standard of substantial evidence and because his findings were inconsistent with *Nunes I* (2023a). Specifically, the applicant's vocational expert's report misinterpreted medical evidence and,

therefore, was not substantial evidence. Additionally, the vocational expert impermissibly discounted non-industrial apportionment identified by the medical evaluators and substituted vocational apportionment in place of otherwise valid medical apportionment. As a result, the vocational expert's report did not constitute substantial evidence and the record required further development in relation to *Nunes I* (2023a).

In *Havanis v. California Department of Transportation, State Compensation Insurance Fund* (2024), a panel decision, the commissioners returned the case to the trial level for further development of the record both medically and vocationally. The applicant sustained an injury to his shoulders, knees, wrists, psyche, heart, and hips. There was additional injury in the form of psoriatic arthritis and sleep disorder. The WCJ awarded 80% permanent partial disability.

The dermatology qualified medical evaluator restricted the applicant to using cotton liners and not using green gloves while working, with 30% industrial causation. The internal medicine agreed medical evaluator restricted the applicant to no excessive stress and no heavy lifting, with 30% non-industrial apportionment. The psychology agreed medical evaluator found a slight to moderate impairment on all eight work functions on the work function impairment form, with 45% non-industrial apportionment. The orthopedic agreed medical evaluator found work restrictions for the left shoulder that included a preclusion from very heavy lifting and repetitive use of the right upper limb above the shoulder or head level for activities like pushing, pulling, reaching, or lifting. Regarding the bilateral hips, the applicant was precluded from prolonged weight bearing or walking, attempts at kneeling or squatting, and heavy lifting. There were no work restrictions for the right shoulder, wrists, hands, and knees. The rheumatology agreed medical evaluator deferred to the orthopedic agreed medical evaluator regarding any work restrictions for the applicant's psoriatic arthritis. The rheumatology agreed medical evaluator opined that all of the whole person impairments should be added rather than combined.

The applicant's vocational expert wrote that the applicant was not amenable to rehabilitation and that his diminished future earning capacity was 100% because of the work injury. She wrote that the applicant was not employable based on the sum of the whole person impairments (132 – 140%) and the synergistic effect of the combination of the applicant's injured body parts, impairments, and work restrictions, even when considering the dermatology, internal medicine, and psychology non-industrial apportionment. The defense vocational expert found that the applicant was amenable to rehabilitation and was capable of light to sedentary work.

The court determined that the applicant's vocational expert's report did not constitute substantial evidence since she "inconsistently and improperly interjected her own medical opinions into the case regarding apportionment" (p. 13). The court then described the proper way to analyze apportionment.

The court provided specific guidance where an applicant seeks to rebut a scheduled rating and prove permanent total disability, as follows (pp. 14-15):

> As explained in section 2, above, the purpose of the AMA *Guides* is to assign impairment based upon a person's loss of ADLs. Most workers' compensation cases do

not involve total disability. Most cases involve assignment of partial disability via the AMA *Guides*. Thus, by habit, doctors assign medical apportionment based on the causation of the rated impairment in the AMA *Guides*. Here the parties' stipulation to 80% permanent disability after apportionment reflects the causation of disability under the AMA *Guides*.

What appears to be a point of confusion in many cases is that the focus of apportionment changes when using *Ogilvie* rebuttal because the defined impairment changes.

When applicant is seeking to rebut the Permanent Disability Rating Schedule using *Ogilvie*, disability is no longer rated as an impairment under the AMA *Guides*. Instead, the impairment is now the *work restrictions* assigned to applicant from the industrial injury. The disability is the effect of those work restrictions on applicant's ability to rehabilitate and compete in the open labor market. Accordingly, medical apportionment, when analyzed under an *Ogilvie* rebuttal, must focus on the cause of the work restrictions. As applicant is seeking an award of 100% disability, the cause of the work restrictions contributing to applicant's inability to work must be 100% industrial, without apportionment.

Where applicant seeks to rebut the PDRS and prove permanent total disability, applicant must prove the following:

1) Applicant has been assigned a work restriction(s), which requires substantial **medical** evidence.
2) The work restriction(s) precludes applicant from rehabilitation into another career field, which requires **vocational** expert evidence.
3) The work restriction(s) precludes applicant from competing on the open labor market, which requires **vocational** expert evidence.
4) **The cause of the work restriction(s) is 100% industrial**, which requires substantial **medical** evidence.

To be clear, we are focused only on those restrictions that contribute to the vocational expert's findings. An applicant can have multiple work restrictions, some of which are non-industrial. If the industrial work restrictions, standing alone, preclude applicant from rehabilitation and preclude applicant from competing on the open labor market, applicant has met their burden on causation of disability. If applicant's preclusion from rehabilitation and work is caused or contributed by either non-industrial work restrictions or partially industrial work restrictions, applicant fails their burden on causation of disability.

Here, applicant failed to prove that the work restrictions assigned are 100% industrial because no party asked that question to any of the doctors. This requires medical evidence. As we are clarifying this issue for the first time and keeping with our duty to accomplish substantial justice, the prudent course is to return this matter to the trial level for further discovery.

In *Vernon v. Kaweah Delta Health Care District* (2024), a panel decision, the case was returned to the trial level for further development of the record. The applicant was employed as an HR analyst and educator when she sustained an injury to her right knee at work on December 9, 2013. The orthopedic agreed medical evaluator wrote that she was limited to sedentary work and that apportionment was 100% industrial. The internal medicine panel qualified medical evaluator found a whole person impairment of 9% for upper digestive tract disorder and 12% for sleep disturbance. He assigned no work restrictions. The applicant's vocational expert wrote that the applicant was unable to work or complete training because of the effects of chronic pain and fatigue. The defense vocational expert wrote that the applicant was amenable to rehabilitation and had a 39% diminished future earning capacity. The court found that the applicant's vocational expert's report did not constitute substantial evidence since he "improperly interjected his own medical opinions into the case regarding applicant's functional limitations" (p. 4). Additionally, the court wrote, "The vocational expert must rely upon expert medical evidence. If insufficient medical evidence exists, the vocational expert must inform the parties, who may then proceed to obtain the needed evidence" (p. 4). The court also wrote that approval of SSDI does not establish permanent total disability on an individual basis. "SSDI does not analyze the cause of disability in determining whether applicant qualifies" (p. 5).

In *Xiong v. Linvatec/Conmed, Travelers Property Insurance Co.* (2024), a panel decision, the court awarded permanent partial disability, without apportionment. The applicant had a specific injury to her head and in the form of sleep disorder. She also had a cumulative trauma claim to her bilateral wrists and hands in the form of carpal tunnel syndrome, thoracic outlet syndrome, bilateral upper extremities, neck, and in the form of sleep disorder. There was reporting from panel qualified medical evaluators in neurology, ophthalmology, and orthopedic medicine, and from the primary treating physician. The commissioners rejected the apportionment findings of the neurology medical evaluator since he did not explain how and why the applicant's non-industrial medical factors were presently responsible for the applicant's residual permanent disability.

The applicant petitioned that she was permanently totally disabled pursuant to the reporting of the applicant's vocational expert. The commissioners wrote that the applicant's vocational expert relied on work restrictions and functional limitations that were beyond those of the panel qualified medical evaluators and the primary treating physician to create an adjusted post-injury vocational profile. Additionally, the commissioners wrote that the applicant's vocational expert did not persuasively explain how and why the applicant's permanent work restrictions precluded her from returning to the labor market in any capacity. The expert did not adequately explain why the applicant was not feasible for vocational rehabilitation. Therefore, the scheduled rating was not rebutted.

In *Fiore v. Los Angeles Community College District* (2024), a panel decision, the commissioners returned the case to the trial level for further proceedings. The applicant sustained impairment to his lumbar spine, right shoulder, bilateral upper extremities, and bilateral lower extremities. He was evaluated by orthopedic, internal medicine, and rheumatology specialists. Orthopedic work restrictions included no repetitive overhead reaching or overhead work with the right arm; no climbing; no standing, walking, forward bending, and

twisting no more than 2 to 4 hours a day; and lifting no more than 30 pounds. Internal medicine restrictions included a preclusion from undue emotional stress/stressful work environment outside the usual course and scope of employment. A regular physician was appointed to address rheumatology issues after the rheumatology medical evaluator's reports were determined not to be substantial medical evidence. The regular physician did not assign work restrictions but wrote that the applicant was unable to perform his usual and customary occupation.

The applicant's vocational expert interviewed the applicant and concluded that he was effectively limited to sedentary work. However, he also concluded that the applicant was not able to benefit from vocational rehabilitation and was unable to compete in the open labor market. Additionally, he wrote that the disabilities should be added rather than combined. This last opinion was rejected by the WCJ since it was a medical opinion offered by a vocational expert. The defense vocational expert agreed that the applicant was limited to sedentary work. He found the applicant to be amenable to rehabilitation and capable of competing in the open labor market.

The court reiterated its prior guidance in *Havanis* (2024) for attempting to rebut a scheduled rating as summarized above. The court then provided additional guidance as follows (pp. 10-11):

> We would further note that the record in this matter requires a significant amount of clarification upon return. The parties must provide the vocational expert with applicant's present work restrictions. To the extent that there is disagreement between the primary treater and the QME as to work restrictions, the parties, or ultimately the WCJ, must determine whose opinion on work restrictions constitutes substantial medical evidence so that the vocational expert can properly evaluate applicant's vocational feasibility. In the alternative, and particularly in cases where there is disagreement as to applicant's functional capacity, the parties may consider obtaining a functional capacity evaluation.
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> If different doctors assign different work restrictions, the vocational expert cannot take it upon themselves to determine whose restrictions to follow. They may offer alternative opinions dependent upon whose medical opinion is found most accurate. For the same reasons they cannot provide expert medical testimony, a vocational expert cannot take upon themselves the role of trier of fact.

In *Nelson v. Workers' Compensation Appeals Board, Human Resources Consultants, Inc., ProCentury Insurance Co.* (2024), a panel decision was appealed to the Court of Appeal, which denied a petition for writ of review. The applicant reported injuries to her shoulders, upper extremities, and hands while working as a human resource assistance/clerical worker. The WCJ determined that the applicant's vocational expert did not rebut the presumptively correct rating in the rating schedule. The decision by the WCJ was appealed. In a panel decision, the commissioners determined that the applicant's vocational expert improperly applied his own analysis under *Athens Administrators v. Workers' Compensation Appeals Board (Kite)* (2013) by considering synergy as a factor in his analysis of the applicant's bilateral shoulder condition and applied an invalid vocational apportionment analysis that conflicted with a legally valid medical

apportionment analysis by a medical evaluator. For these and other reasons, the applicant had not rebutted the scheduled rating. An appeal to the Court of Appeal was denied.

In *Pantoja v. Jack in the Box/SBF Foods, LLC, CIGA ex rel. Sedgwick for Castlepoint National Insurance Co.* (2024), a 68% permanent partial disability award by the WCJ was increased to 100% permanent total disability in a panel decision. A psychological agreed medical evaluator wrote that the applicant had a GAF of 56 and was unable to return to her prior employment or to work in any capacity. Apportionment was 100% industrial. The applicant's vocational expert wrote that the applicant was not able to compete in the open labor market. The defense vocational expert wrote that the applicant might be able to benefit from training and that she might have the capacity to become marketable to access certain occupations. She also faced the general economic condition of living in a small community with few job opportunities.

The commissioners reiterated their guidance in *Havanis* (2024) and *Fiore* (2024) as summarized above regarding an attempt to rebut a scheduled permanent disability rating. The commissioners explained that the psychological agreed medical evaluator and the prior psychological panel qualified medical evaluator agreed that the applicant's untreated psychological impairments effectively precluded her from gainful employment. Next, the reporting by the defense vocational expert was not substantial evidence since his opinions were equivocal. Additionally, the commissioners explained that the applicant's lack of formal education and her lack of English as a native language do not obviate the permanent total disability of 100% when considering the opinion of the psychological agreed medical evaluator that the applicant is unable to return to her prior employment or to work in any capacity.

In *Moraido v. County of San Diego* (2024), a panel decision, the commissioners affirmed, with revisions, and returned to the trial level one section of the decision by the WCJ. Specifically, the WCJ's findings regarding permanent disability and apportionment were deferred pending further proceedings and a new determination by the WCJ.

The applicant worked as an HHSA administrator III and sustained an injury to his bilateral upper extremities, gastroesophageal reflux (disease), and psyche. The medical conditions were evaluated by agreed or panel qualified medical evaluators in orthopedics, internal medicine, and psychology. The applicant's claim that he should be presumed permanently and totally disabled under Labor Code section 4662(a) was rejected by the court. However, the opinions of the medical evaluators needed to be further developed to determine the applicant's most accurate permanent disability rating and any apportionment.

Vocational experts were retained by the applicant and the defendant. The court ruled that both experts needed to revisit and supplement their opinions in light of *Nunes I* (2023a) and *Nunes II* (2023b) since they provided an analysis of "vocational apportionment" in their reports. In particular, the applicant's vocational expert's opinion was rejected because he wrote that there was no apportionment since there was no vocational disability before the industrial injury. The defendant's vocational expert's opinion on apportionment was rejected because his analysis was incomplete and because he offered various legal conclusions, which were deemed to be beyond his level of expertise. The court also ruled that the medical evaluators should review the

supplemental reports by the vocational experts and determine whether the applicant is not feasible for vocational rehabilitation.

In *Baltrip v. AC Transit, Athens Administrators* (2024), a panel decision, the commissioners affirmed the findings of the WCJ that the applicant was 100% disabled due to cumulative trauma injury to his bilateral upper extremities while employed as a bus driver. The opinions of the agreed medical evaluator resulted in a 97% impairment under the AMA *Guides*, according to the disability evaluation unit. In terms of work restrictions, the agreed medical evaluator wrote that in an 8-hour workday, the applicant could write for 1 hour (21-30 minutes at a time), keyboard for 2 hours (21-30 minutes at a time), mouse for 2 hours (21-30 minutes at a time), and drive up to an hour. Lifting, pushing, and pulling were limited to 10 pounds. The agreed medical evaluator also described difficulties with activities of daily living such as dressing, brushing teeth, bathing, combing hair, and opening and closing bottles. The applicant also had difficulty with touching and fine manipulation. He had a tendency to drop items. The WCJ accepted the opinion of the applicant's vocational expert that the applicant was not employable because of his difficulties with his hands. The WCJ rejected the contention of the defendant's vocational expert that the applicant could perform clerical work because he could barely use his hands.

In *Vons, Albertsons Holding v. Workers' Compensation Appeals Board (Yarmolenko)* (2024), a panel decision was appealed to the Court of Appeal, which denied a petition for writ of review. Both vocational experts concluded that the applicant was not able to work and unable to participate in vocational rehabilitation. The WCJ determined that while the defense vocational expert commented on "vocational apportionment," his opinion was consistent with Nunes I (2023a) since he followed the opinions of the medical evaluators that there was no basis for apportionment. The commissioners upheld the decision by the WCJ that the applicant was 100% disabled with no basis for apportionment. The defendant's appeal to the Court of Appeal was denied.

In *Vazquez v. Valley First Credit Union, Cypress Insurance, Administered by Berkshire Hathaway Homestate Companies* (2024), a panel decision, the commissioners returned the case to the trial level for further development of the medical and vocational record. The applicant was employed as a department manager and sustained an industrial injury to her left knee, low back, and psyche. She also developed complex regional pain syndrome in her left lower extremity. The parties relied on the opinions of an agreed medical evaluator in physical medicine and rehabilitation, a consultant in physical medicine and rehabilitation, and qualified medical evaluators in orthopedic medicine and psychology. Vocational experts were retained by the applicant and the defendant.

The WCJ determined that the reporting of the applicant's vocational expert was more comprehensive and persuasive. The WCJ wrote that the psychiatric effects of the injury should be considered in the vocational analysis of feasibility for rehabilitation and employability even though there might not be compensable psychiatric permanent disability. The commissioners concluded that the issue of whether psychiatric disability can be considered as part of a vocational rehabilitation analysis for dates of injury after January 1, 2013, was not fully addressed in the current record. However, the applicant's vocational expert considered the

applicant's psychiatric sequelae in concluding that the applicant was not feasible for vocational rehabilitation. The commissioners explained that it is unclear whether the use of psychiatric sequelae by a vocational expert in determining whether an applicant is feasible for vocational rehabilitation is consonant with the proscription from rating impairment for psychiatric sequelae injuries absent the catastrophic injury or violent act exemptions.

Additionally, the physical medicine and rehabilitation agreed medical evaluator found 100% apportionment to the industrial injuries for the left lower extremity, knee, and complex regional pain syndrome impairments and 75% industrial apportionment for the lumbar spine. The psychological panel qualified medical evaluator found 70% apportionment of the psychiatric injury to industrial factors. Despite these medical opinions, the applicant's vocational expert concluded that the applicant was not feasible for vocational rehabilitation solely based on industrial factors without consideration of the apportionment opinions of the medical evaluators. The commissioners wrote at page 11:

> …However, a conclusory statement that factors of apportionment were considered is insufficient. The analysis must identify the factors of apportionment and explicate the methodology and/or reasoning employed by the vocational expert to exclude nonindustrial factors from the analysis of feasibility…We therefore conclude that the current vocational reporting does not adequately address nonindustrial apportionment.

In summary, the WCJ determined that the applicant was permanently and totally disabled without apportionment. The defendant appealed the decision of the WCJ and the commissioners concluded that several issues needed to be developed further. First, the psychological qualified medical evaluator needed to clarify whether the psychological impairment, which occurred after January 1, 2013, was compensable, specifically whether it was catastrophic or the result of a violent act or exposure to a violent act. The second issue related to the applicant's vocational expert's consideration of psychiatric factors in providing an opinion on vocational feasibility and employability. Related to this, an applicant's permanent disability rating cannot be increased for a psychiatric injury that is a compensable consequence of a physical injury, unless the psychiatric injury is catastrophic or the result of a violent act or exposure to a violent act. The issue that requires resolution is whether a vocational expert may consider psychiatric impairment that is not subject to the catastrophic or violent act exemptions in assessing an applicant's vocational feasibility or employability. The third issue addressed the need for a vocational expert to explain the methodology and/or reasoning used in addressing medical apportionment. Specifically, if the vocational expert concludes that, despite valid medical apportionment, the applicant is not feasible for rehabilitation solely on an industrial basis, the vocational expert must explain why the apportioned disability was excluded from the analysis of feasibility.

In *Avakian v. City of Baldwin Park, PSI, administered by Adminsure* (2024), a panel decision, the commissioners rescinded the decision of the WCJ that the applicant, a police officer, was permanently and totally disabled either by adding the applicant's multiple disabilities or as a result of the applicant's inability to compete in the open labor market. The commissioners wrote that the agreed medical evaluators needed to clarify their opinions on adding impairments by explaining whether activities of daily living impacted by each impairment to be added either do not overlap or overlap in a way that increases or amplifies the

impact on overlapping activities of daily living, as required by *Vigil v. County of Kern* (2024). Additionally, the analysis and opinions of the applicant's vocational expert did not constitute substantial evidence since the expert applied "vocational apportionment" to conclude that the applicant was 100% disabled, which is contrary to the findings of *Nunes I* and *Nunes II* (2023a, 2023b). Specifically, the expert argued that there was no apportionment since the applicant, who had diminished labor market access based on pre-existing disabilities, was not prevented from working as a police officer. The commissioners also explained that a finding of permanent and total disability does not preclude subsequent employment "because a finding of permanent and total disability is a *metric* of applicant's disability and does not bar future employment that conforms to applicant's residual functional capacity" (p. 12).

In *Faustina v. County of Los Angeles, PSI* (2025), a panel decision, the commissioners affirmed the decision that the applicant, a firefighter, was permanently and totally disabled without apportionment. Through the Alternative Dispute Resolution Program, the parties retained agreed upon independent medical evaluators (IMEs) in orthopedic medicine, neurology, ophthalmology, and internal medicine. The WCJ determined that the applicant was permanently and totally disabled because the neurology and ophthalmology IMEs both opined that the applicant was permanently and totally disabled without apportionment. The orthopedic IME found 10% apportionment for the left shoulder and 10% apportionment for the low back. Each party retained vocational experts. The applicant's vocational expert wrote that the applicant was not employable and could not benefit from vocational rehabilitation. The expert also wrote that there was no "vocational apportionment" since the applicant had no pre-existing or non-industrial impairment that resulted in a work-disabling condition and was able to perform his regular work without limitations prior to his work injuries. The WCJ determined that this opinion was not substantial evidence since it was inconsistent with *Nunes I* (2023a). This issue became moot when the WCJ determined that the orthopedic IME's opinions on apportionment were rejected since he did not explain how and why either the left shoulder or the low back condition was currently causing permanent disability. The WCJ found the analysis and opinions of the applicant's vocational expert on employability and amenability to constitute substantial vocational evidence.

In *Nunes v. State of California, Department of Motor Vehicles, administered by State Compensation Insurance Fund* (2025), a panel decision, the commissioners affirmed the WCJ's decision ordering the parties to obtain updated analysis and reporting by the panel qualified medical evaluator and the vocational experts for each party to perform additional discovery as required by *Nunes I* and *Nunes II* (2023a, 2023b). The parties submitted no new documents or testimonial evidence. The commissioners wrote that they were "not persuaded that the WCJ erred in determining that the record must be developed" (p. 8). Additional discovery was necessary to determine whether there is valid medical apportionment and whether the vocational experts appropriately accounted for any valid medical apportionment in their analysis of feasibility for vocational training.

In *Valdovinos v. Universal Site Services, Inc., Wesco Insurance Company, administered by AmTrust North America* (2025), a panel decision, the commissioners rescinded the WCJ's decision that the applicant was permanently and totally disabled based on the opinions of the applicant's vocational expert. The applicant was employed as a street sweeper and sustained an

industrial injury to his neck, left shoulder, bilateral ears/hearing, gastrointestinal system, ribs, and psyche, and in the form of headaches and a sleep disorder. He was evaluated by panel qualified medical evaluators in physical medicine and rehabilitation, neurology, internal medicine, otolaryngology, and psychiatry.

The physical medicine and rehabilitation evaluator did not assign any specific orthopedic work restrictions, while reporting that the applicant was unable to perform sedentary activities for any job. The neurology evaluator reported that headaches and excessive daytime sleepiness were 100% industrial, but did not provide an opinion on work restrictions. Instead, he recommended that the parties obtain a functional capacity evaluation, which did not occur. The internal medicine evaluator diagnosed acid reflux and constipation, but did not provide an opinion on work restrictions. The otolaryngology evaluator diagnosed binaural sensorineural hearing loss, which was 100% industrial. A work restriction was assigned which involved wearing hearing protection when exposed to sound in excess of 85 decibels. The psychiatry evaluator reported that psychiatric complaints were 100% industrial, with a Global Assessment of Functioning (GAF) score of 50. Specific work restrictions on a psychiatric basis were not provided.

Vocational experts were retained by both parties. The applicant's vocational expert reported that the multiple impairments interacted synergistically to cause total disability for the applicant. The defense vocational expert reported that the applicant could benefit from vocational rehabilitation and could compete in the open labor market. The court ruled that neither vocational expert's report constituted substantial evidence since each vocational expert interjected their own medical opinions into the case regarding work restrictions. Additionally, the court concluded that the medical evaluators did not adequately define the applicant's work restrictions. The orthopedic medical evaluator's opinion that the applicant was permanently and totally disabled and unable to perform any sedentary jobs was insufficient. A specific opinion on work restrictions and the cause of the work restrictions is necessary. Also, the psychiatric evaluator's opinion that the applicant has a GAF score of 50 is insufficient. Again, a specific opinion on work restrictions and the cause of work restrictions is necessary. The court added that a vocational evaluator should not create medical facts in a case. The applicant's work restrictions are medical issues, which requires medical evidence. A vocational expert cannot opine on vocational feasibility without an adequate medical opinion on work restrictions. In this case, the medical evaluators need to clarify the applicant's work restrictions.

The court explained that under *Ogilvie* (2009a, 2009b, 2011), the applicant's impairment is the work restrictions that result from the work injury. Permanent disability is the effect of the work restrictions on the applicant's ability to benefit from vocational rehabilitation and compete for jobs in the open labor market. The focus must be on the cause of the work restrictions. The court then reiterated its prior advice in *Havanis* (2024) and *Fiore* (2024) regarding the need for physicians to provide substantial medical opinions on work restrictions and the cause of work restrictions, and for vocational evaluators to use the work restrictions in evaluating an applicant's ability to benefit from vocational rehabilitation and to compete in the open labor market. Additionally, the court explained that the applicant must obtain any missing medical opinions on work restrictions. Finally, the court noted that the defendant should develop the record regarding apportionment.

In *Rebar International, Inc. v. Workers' Compensation Appeals Board (Haynes)* (2025), a petition for writ of review denied decision, the commissioners determined that the applicant was 100% disabled without apportionment after rejecting 10% apportionment by the medical evaluators, who did not explain how and why the apportionment factors were contributing to the applicant's permanent disability. The commissioners found the applicant's vocational expert's opinions regarding employability and amenability to rehabilitation to be more persuasive than those of the defense vocational expert.

In *Wang v. 6 Stars Construction, LLC; insured by Norguard Insurance Company* (2025), a panel decision, the commissioners denied the defendants' petition for reconsideration. The WCJ determined that the applicant was permanently and totally disabled without apportionment, based on the applicant's credible testimony, the opinions of the secondary treating physician, and the opinions of the applicant's vocational expert. The applicant was a construction laborer/carpenter who lost nearly all of the vision in his left eye when a metal staple flew into his eye. The secondary treating physician assigned the following work restrictions at page 21:

> The applicant should avoid occupation using cutting tools, welding tools, machines that allow extremity exposure. He should not climb on ladders or scaffolding. Any type of occupational [*sic*] that uses tools or machine[s] with the potential for a hand or extremity injury should be prohibited.

The physician also wrote that the applicant will require more time to complete work tasks. Additionally, the applicant would need to be provided work breaks with the length and frequency based upon the applicant's symptomology. The applicant's vocational expert concluded that with these restrictions, the applicant would not be able to meet the performance, productivity, and attendance demands of competitive employment. The applicant was unsuccessful in his attempts to return to work with his employer and with another employer. He was able to do part-time self-employed construction repair jobs at his own pace and with extra breaks. The applicant's vocational expert wrote that the applicant's earnings for this work were below the poverty level and that the work did not rise to the level of gainful employment. The applicant's vocational expert found no grounds for apportionment from a vocational perspective since the applicant was not employable based on his vision limitations alone and the secondary treating physician, an ophthalmologist, and the panel qualified medical evaluator, also an ophthalmologist, each found medical apportionment to be 100% to the work injury.

The WCJ did not follow the opinions of the defense vocational expert since she did not adequately consider the opinions of the secondary treating physician that the applicant would work slowly and need to take breaks at will. Regarding apportionment, the defense vocational expert conceded that the applicant was not amenable to rehabilitation and that he would be amenable but for his inability to speak English and lack of education. The WCJ explained that this argument was rejected in *Soormi* (2023) and *Pantoja* (2023). The WCJ agreed with the analysis in *Soormi* and noted that permanent and total disability in this case derives from medical limitations, without apportionment.

The WCJ emphasized the need for vocational experts to conduct an individualized vocational analysis rather than an analysis of similarly situated individuals in response to *Contra Costa County v. Workers' Compensation Appeals Board (Dahl)* (2015). At pages 15 to 16, the WCJ wrote:

> Applicant had an individual labor market available to him. Within that labor market, he had an excellent employment history as established by Mr. Ramirez' report and applicant's credible testimony. If non-industrial factors such as language and education are introduced, we are comparing applicant to similarly situated employees with average language skills and education. Rehabilitation is an individualized assessment. Otherwise, we are creating skilled fictional workers for comparison. According to Ogilvie *(Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 76 Cal.Comp.Cases 624) and *Dahl*, the analysis post-injury must focus on the damages caused by the injury. For example, if an unskilled applicant has pre-injury access to 20% of the labor market and 15% post-injury, he or she cannot claim benefits for a loss of 85% access to the labor market. An award of 85% permanent disability would be inappropriate in such a case. The labor market loss must be individually focused. In the above example, applicant would have only lost access to 25% of her individual labor market due to the industrial injury.
>
> The proper analysis for calculating the industrial loss of earnings/job market access post-injury is as follows:
>
> 1. What was applicant's labor market access/earnings capacity pre-injury including all non-industrial factors (i.e. economic conditions, education, skill, literacy)?[3]
> 2. What is applicant's labor market access/earnings capacity post-injury including all non-industrial factors (i.e. economic conditions, education, skill, literacy)?
> 3. What is the [ratio] of the above?
>
> Ramirez correctly used an individualized approach in analyzing applicant's amenability to rehabilitation and disability. Ramirez determined applicant's labor market access pre-injury (1,067 job matches) to his post-injury labor market access (zero job matches) (Applicant exhibit 8, Ramirez November 23, 2023 report, at page 9). Applicant had an individualized labor market available to him pre-injury. Now, due to the effects of the industrial injury, applicant has no labor market available. Ramirez' report applied the correct legal analysis. I appropriately relied on Ramirez' opinions in finding applicant permanently totally disabled.
>
> [3] No person has access to 100% of the labor market. As pointed out in *Dahl*, we must start the analysis with an individual approach and calculate how much access applicant had [to] the labor market pre-injury with applicant's individual traits, skills and characteristics. From there, we calculate how much labor market access applicant lost and how much loss of earnings capacity has resulted from the effects of his or her industrial injury.

In *Happeny v. State of California, California Institute for Women, legally uninsured, administered by State Compensation Insurance Fund* (2025), a panel decision, the commissioners affirmed the decision of the WCJ that the applicant was permanently and totally disabled without apportionment. The applicant worked as a correctional officer and sustained injuries to multiple body parts related to a cumulative trauma injury and two specific work injuries. The parties selected agreed medical evaluators (AMEs) in cardiology, internal medicine, orthopedic medicine, and psychiatry. The opinions of a pain management physician were also considered. There were three applicant's vocational experts and a defense vocational expert.

All four AMEs and the pain management specialist wrote that the applicant was not able to work in the open labor market. The WCJ ruled that the opinions of the AMEs on apportionment did not meet the standard of substantial medical evidence. Therefore, the applicant was deemed 100% disabled without apportionment. The WCJ found the opinions of the applicant's vocational experts to be more persuasive than that of the defense vocational expert. The WCJ relied heavily on the opinions of the first applicant's vocational expert who determined that the applicant was not feasible for vocational rehabilitation based in part on the applicant's unsuccessful attempt at vocational rehabilitation at the California Department of Rehabilitation. Finally, the WCJ determined that it was not necessary to rule on the defendant's petition regarding adding or combining impairments since the applicant was 100% disabled based on his inability to benefit from vocational rehabilitation.

Vocational Significance of Court Decisions

Recent California workers' compensation court decisions have reshaped and clarified the role of vocational experts through guidance on analytical methodologies, reporting, and testimony, particularly regarding evaluating employability and the integration of medical apportionment findings. The en banc *Nunes I* and *Nunes II* (2023a, 2023b) decisions served as the cornerstone of this systematic change by establishing that vocational experts cannot independently apportion disability through "vocational apportionment" methodologies that disregard or supersede valid medical apportionment determinations by agreed or qualified medical evaluators and treating physicians.

The medical foundation for this change was established prior to the *Nunes* decisions in *Wilson* (2021), which emphasized the importance of work restrictions in determining the most accurate permanent disability rating and provided the conceptual framework that would later require vocational experts to focus on the vocational impact of medical factors. Building upon this foundation, subsequent decisions established clear boundaries for vocational expertise. *Soormi* (2023) clarified that vocational factors such as ethnic origin, lack of education, and inability to speak English cannot be used as reasons for reducing a permanent disability rating, thereby indicating that the focus should remain on medical factors and the vocational impact of permanent work restrictions.

Primacy of Work Restrictions

The post-*Nunes* decisions have emphasized the importance of medical opinions regarding work restrictions in a vocational analysis. *Havanis* (2024) provided critical guidance for rebutting a scheduled rating by establishing that "when applicant is seeking to rebut the PDRS using *Ogilvie*, disability is no longer rated as an impairment under the AMA *Guides*. Instead, the impairment is now the *work restrictions* assigned to applicant from the industrial injury" (pp. 14-15). The court also provided a specific framework required for an applicant to prove permanent and total disability when seeking to rebut the PDRS. The four-step framework requires substantial medical evidence of work restrictions, vocational evidence of labor market preclusion, vocational evidence of amenability to rehabilitation preclusion, and medical evidence that work restrictions are 100% industrial. This principle was reinforced in *Fiore* (2024), *Pantoja* (2024), and *Valdovinos* (2025) with additional practical applications that will be discussed below.

Wang (2025) also exemplified the practical application of the work restriction focus by providing a three-step methodology for evaluating labor market access that can be used in conjunction with the DLMA Formula presented above. The WCJ emphasized that "the proper analysis for calculating the industrial loss of earnings/job market access post-injury" requires determining pre-injury labor market access including all non-industrial factors, post-injury labor market access with those same factors, and the ratio between them (p. 15). This guidance provides judicial validation of the need for vocational experts to conduct an empirical and quantifiable analysis while avoiding comparisons to hypothetical similarly situated individuals.

Valdovinos (2025) reinforced the fundamental requirement for specific medical evidence regarding work restrictions by rejecting vocational analyses where medical evaluators provided inadequate foundational opinions. The commissioners determined that a medical evaluator's conclusion that the applicant was "unable to perform sedentary activities for any job" was insufficient without accompanying specific work restrictions. Additionally, they found that a psychiatric evaluator's GAF score of 50 was inadequate absent corresponding work limitations. The court emphasized that vocational experts must have proper medical foundations and that a vocational expert cannot opine on vocational feasibility without an adequate medical opinion on work restrictions.

In *Baltrip* (2024), the commissioners affirmed findings of 100% disability based on detailed work restrictions that severely limited the applicant's ability to use his hands, with the WCJ accepting the applicant's vocational expert's opinion that these restrictions rendered the applicant unemployable. Similarly, in *Pantoja* (2024), the commissioners increased a 68% award to 100% disability after determining that psychological work restrictions precluded the applicant from any gainful employment. These decisions demonstrate how vocational evidence can be used to successfully challenge scheduled ratings when the vocational expert's analysis properly accounts for the full impact of medically established work restrictions.

Prohibition of Vocational Apportionment

Since *Nunes I* and *Nunes II*, multiple decisions have explicitly rejected "vocational apportionment" analyses that conflict with or ignore valid medical apportionment. In *Gonzales* (2023), the commissioners determined that both parties' vocational experts failed to provide substantial evidence; the applicant's expert disregarded medical apportionment factors, and the defense expert engaged in speculation and conjecture regarding the applicant's medical condition. Furthermore, the court found that conjecture regarding whether pre-existing medical conditions might have progressed absent the industrial injury was "outside the role of a vocational expert" (p. 29).

Similarly, *Gunnoe* (2023) addressed a vocational expert who relied heavily on orthopedic pain effects to conclude 100% disability despite the orthopedic agreed medical evaluator's finding of 33% apportionment to pre-existing, non-industrial factors. The commissioners determined that the vocational expert was "apparently substituting his own vocational apportionment in place of valid medical apportionment," contrary to *Nunes I*.

Rose (2024) further clarified these boundaries when the commissioners returned the case to trial level because the vocational expert "impermissibly discounted non-industrial apportionment identified by the medical evaluators and substituted vocational apportionment in place of otherwise valid medical apportionment" (p. 15). This principle was reinforced in *Moraido* (2024), where both vocational experts' opinions on apportionment were rejected; the applicant's vocational expert claimed that no apportionment existed because there was no vocational disability before the industrial injury, and the defense vocational expert offered an incomplete analysis and legal conclusions beyond the expertise of a vocational expert.

The trend was continued in *Avakian* (2024) and *Faustina* (2025) where the commissioners explicitly stated that analyses applying "vocational apportionment" to conclude 100% disability were "contrary to the findings of *Nunes I* and *Nunes II*." In *Faustina*, although the vocational expert's apportionment analysis was deemed not substantial evidence, the issue became moot when medical apportionment was rejected because the medical evaluator failed to explain "how and why" conditions were presently causing permanent disability. However, in *Yarmolenko* (2024), affirmed by the Court of Appeal's denial of writ, the defense vocational expert's discussion of apportionment was found consistent with *Nunes I* and *Nunes II* because the medical evaluators had determined there was no basis for apportionment, and the vocational expert's opinion aligned with that medical finding.

Substantial Evidence and Methodological Requirements

The courts have established increasingly stringent standards for what constitutes substantial vocational evidence. In *Vernon* (2024), the applicant's vocational expert's report was rejected for "improperly interjecting his own medical opinions into the case regarding applicant's functional limitations" (p. 4). The court in *Vernon* emphasized that vocational experts must rely upon expert medical evidence and inform the parties when insufficient medical evidence exists.

Xiong (2024) raised the evidentiary bar by rejecting vocational opinions that failed to "persuasively explain how and why the applicant's permanent work restrictions precluded her from returning to the labor market in any capacity" and failed to adequately explain why the applicant was not feasible for vocational rehabilitation. This "how and why" standard was further refined in *Vazquez* (2024), where the commissioners explicitly stated that "a conclusory statement that factors of apportionment were considered is insufficient. The analysis must identify the factors of apportionment and explicate the methodology and/or reasoning employed by the vocational expert to exclude nonindustrial factors from the analysis of feasibility" (p. 11).

Fisher (2023) provided a positive example of meeting these standards when the applicant's vocational expert supported opinions with research regarding employer allowances for absenteeism, demonstrating how vocational experts can strengthen their analyses through empirical evidence. Conversely, in *Nelson* (2024), the applicant's vocational expert's analysis was rejected for improperly applying synergy factors under *Athens Administrators v. Workers' Compensation Appeals Board (Kite)* (2013) and using an invalid vocational apportionment analysis.

The *Happeny* (2025) decision recognized the evidentiary value of actual rehabilitation outcomes as the WCJ relied partly on the applicant's unsuccessful attempt at vocational rehabilitation through the California Department of Rehabilitation as substantial evidence in support of the vocational expert's conclusion that the applicant was not feasible for vocational rehabilitation.

The importance of a proper medical foundation was also emphasized in *Gunnoe* (2023), where reliance on psychiatric disability without determination of compensability and pain effects inconsistent with medical apportionment findings led to rejection of the vocational analysis. *Mejia* (2023), affirmed in *American Claims Management (Mejia)* (2024), demonstrated that comprehensive medical and vocational evidence, when properly integrated, can support findings of total disability. Additionally, in this case, the defense expert's failure to personally interview or test the applicant contributed to the rejection of his opinions.

Special Considerations and Evolving Issues

Several decisions have addressed complex issues that continue to evolve in the post-*Nunes* landscape. *Vazquez* (2024) raised an unresolved question regarding whether vocational experts may consider non-compensable psychiatric impairments (those not meeting catastrophic or violent act exemptions) when assessing vocational feasibility for post-January 1, 2013 injuries. The commissioners noted that "it is unclear whether the use of psychiatric sequelae by a vocational expert in determining whether an applicant is feasible for vocational rehabilitation is consonant with the proscription from rating impairment for psychiatric sequelae injuries" (p. 11).

Nunes (2025) demonstrated the ongoing need for development of both medical and vocational evidence to properly address apportionment issues, with the commissioners affirming that the record in this case must be developed to determine whether valid medical apportionment exists and whether vocational experts appropriately accounted for such apportionment. *Haynes* (2025) affirmed that medical experts must also continue to explain how and why apportionment

factors contribute to permanent disability, with inadequate explanations leading to rejection of apportionment findings.

Implications for Practice

This analysis of post-*Nunes* court decisions establishes specific guidelines for vocational experts to consider when evaluating employability and addressing medical apportionment. These changes affect fundamental aspects of vocational rehabilitation evaluation methodology, vocational expert reporting and testimony, and professional collaboration with medical evaluators, treating physicians, and referring attorneys.

Obtaining Appropriate Medical Evidence

As seen in the *Havanis* (2024) decision, the shift from the AMA *Guides* impairments to work restrictions as the central focus when rebutting scheduled ratings creates an immediate practical requirement for vocational experts to obtain medical evidence regarding work restrictions. The standard for medical opinions has been increased to include greater specificity and causation determinations regarding work restrictions. Vocational experts should request that medical evaluators and treating physicians provide not only clear and quantifiable opinions on work restrictions, but separate opinions on permanent work restrictions attributed to each portion of permanent disability. This approach is supported by *Vernon* (2024) and *Fiore* (2024) and would prevent the failures identified in *Gunnoe* (2023), *Rose* (2024), and *Valdovinos* (2025) where vocational expert opinions were rejected on the basis of an insufficient medical foundation.

Applying the DLMA Formula for Employability Analysis

The DLMA Formula provides vocational experts with an empirical method for implementing the *Wang* (2025) requirement to evaluate employability through an individualized analysis. The formula operates through three steps that directly align with the court's mandated methodology. First, calculate pre-injury labor market access using resources such as the *McCroskey Vocational Quotient System*, *Job Browser Pro*, or the *Occupational Employment Quarterly* to determine the percentage of jobs accessible based on not only the physical demands of jobs in the applicant's work history, but also the skill levels of those jobs which address education and English proficiency. Second, calculate post-injury labor market access for the appropriate county or other geographical area by applying current work restrictions to the applicant's pre-injury profile. Multiple scenarios for determining post-injury labor market access may be required where conflicting opinions on work restrictions are present. Third, apply the formula where DLMA = pre-injury labor market access – post-injury labor market access ÷ by pre-injury labor market access. This calculation of the ratio yields a percentage representing the proportional loss of labor market access while avoiding impermissible comparisons to hypothetical workers.

Implementing the AMA Formula for Apportionment

The AMA Formula enables vocational experts to meet the *Vazquez* (2024) requirement to "identify the factors of apportionment and explicate the methodology and/or reasoning employed" (p. 11). When medical evaluators and treating physicians provide separate opinions on work restrictions for each portion of permanent disability, the AMA Formula can be used to systematically quantify the vocational impact of each portion. The process requires calculating DLMA for each set of work restrictions for each injury separately, summing these percentages, then determining the proportional vocational impact by dividing the DLMA for each portion of permanent disability by the total sum. This mathematical approach provides transparency and objectivity while respecting the primacy of medical apportionment determinations established in *Nunes I* and *Nunes II* (2023a, 2023b).

Documentation and Reporting Requirements

These recent court decisions highlight the need for vocational experts to include clear and detailed explanations as to how any medical opinions on work restrictions translate to vocational limitations. Conclusory statements are insufficient; vocational experts must provide step-by-step explanations linking specific work restrictions to labor market access calculations. When presenting alternative analyses based on conflicting medical opinions, each scenario and its medical foundation should be clearly labeled. Vocational experts should also include supportive research and statistics from primary sources where available, as demonstrated in *Fisher* (2023), such as employer tolerances for work limitations.

Professional Practice Boundaries

Vocational experts must maintain strict boundaries by adhering to their professional scope. Vocational experts should refrain from providing medical opinions on pain effects, disability combination methods, or causation of work restrictions. When medical evidence is insufficient or unclear, the vocational expert should request clarification through the parties rather than making assumptions. The vocational expert cannot substitute vocational apportionment for valid medical apportionment and should perform analyses within the framework of medical determinations regarding work restriction causation.

The DLMA and AMA Formulas provide structured methodologies that satisfy the emerging judicial standards while maintaining appropriate professional boundaries. These refined methodologies enable vocational experts to produce transparent, empirical analyses that meet the standards for substantial evidence as identified through this review of post-*Nunes* court decisions.

Conclusion

These recent court decisions reaffirm that vocational expert evidence remains essential for rebutting a permanent disability rating under *LeBoeuf v. Workers' Compensation Appeals Board* (1983) and *Ogilvie v. Workers' Compensation Appeals Board* (2009a, 2009b, 2011). The twenty-five court decisions analyzed establish that vocational experts must now operate within a

more structured framework that respects the primacy of medical evidence regarding work restrictions and apportionment while demonstrating how industrial and non-industrial work restrictions affect employability, earning capacity, and amenability to rehabilitation.

The DMLA Formula provides an empirical methodology for quantifying labor market access while considering all medical and vocational factors. The AMA Formula extends this analysis by providing a transparent methodology for addressing how medical apportionment affects vocational outcomes. Together, these formulas provide a structured approach for vocational experts to meet the emerging judicial standards for quantifying diminished labor market access while properly addressing apportionment in vocational rehabilitation evaluations involving claims for permanent and total disability.

Further, this evolution ultimately strengthens the workers' compensation system by ensuring that permanent disability determinations rest on comprehensive, methodologically sound integration of medical and vocational evidence. The path forward requires vocational experts to embrace empirical methods while maintaining clear professional boundaries and collaborating effectively with the involved parties.

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