

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 **Case No. GRO 0031810**

4 **JOEY M. COSTA,**

5 *Applicant,*

6 **vs.**

7 **HARDY DIAGNOSTIC and STATE**
8 **COMPENSATION INSURANCE FUND,**

9 *Defendant(s).*

10 **OPINION AND DECISION AFTER**
11 **RECONSIDERATION**
12 **(EN BANC)**

13 On February 26, 2007, the Appeals Board granted reconsideration of the en banc decision
14 issued in this matter on December 7, 2006, to further study the factual and legal issues in this
15 case. The following is our Decision After Reconsideration.

16 In the decision issued on December 7, 2006, the Appeals Board held that “on the record
17 before us, the applicant had not met his burden of proving the new PDRS [permanent disability
18 rating schedule] invalid.” We also held that, as under former Labor Code section 4660,¹ current
19 section 4660, as amended by Senate Bill (SB) 899, continues to allow the parties to present
20 rebuttal evidence to a permanent disability rating under the new PDRS, and that the costs of such
21 rebuttal evidence may be allowable. With respect to the rebuttal evidence here, the testimony and
22 report of Ann Wallace, Ph.D., a vocational rehabilitation consultant, and the costs therefor, we
23 rescinded the determination of the workers’ compensation administrative law judge (WCJ)
24 denying reimbursement for such costs, and allowed the parties to adjust them, with jurisdiction
25 reserved at the trial level in event of dispute. More specifically, we stated that Ms. Wallace was
26 entitled to be reimbursed by defendant for the reasonable costs associated with her testimony
27 under section 5811. With respect to her report, although finding that it had been properly
excluded from evidence, we concluded that Ms. Wallace was entitled to reimbursement by

¹ Unless otherwise noted, all further statutory references are to the Labor Code.

1 defendant to the extent that “some of her work in preparing that report may have provided a
2 foundation for her testimony.”

3 Defendant filed a timely petition for reconsideration from our decision of December 7,
4 2006, contending that (1) “[i]t was error for the Appeals Board to make the general holding that
5 [section] 4660 allows the parties to present rebuttal evidence to a permanent disability rating,
6 when defendant’s objections to said testimony were overruled and the (worthless) testimony was
7 admitted into evidence, as the applicant cannot appeal that favorable decision of the [WCJ];
8 therefore, it was not ripe for appeal and there was no jurisdiction for the Appeals Board to decide
9 the issue without prior notice to the parties;” (2) we erred in basing our decision on liability for
10 Ms. Wallace’s testimony on the mistaken belief that no objection was made to her testimony;
11 (3) considering our determination regarding the deficiencies in Ms. Wallace’s testimony, it was
12 inappropriate to find defendant liable for the costs of such testimony; (4) we erred in failing to
13 give great weight to the WCJ’s conclusions regarding Ms. Wallace’s testimony; (5) a vocational
14 rehabilitation counselor such as Ms. Wallace “is not qualified, nor an appropriate witness to
15 testify in an effort to rebut the [PDRS];” (6) “[t]he awarding of fees for a witness testifying guts
16 the impact of the exclusion from evidence of their report, encourages the late filing of reports, and
17 encourages live testimony in court instead of the filing of reports;” and (7) the costs of this expert
18 witness are not costs that are allowed by section 5811.

19 For the reasons discussed below, as well as the reasons stated in our prior decision, we
20 hold that section 4660 continues to allow the parties to present evidence on and/or in rebuttal to a
21 permanent disability rating under the new PDRS, and that the costs of such evidence may be
22 allowable. In addition, the standards for allowing such costs will be by analogy to medical-legal
23 costs, that is, whether they are reasonable and necessary at the time they are incurred. Therefore,
24 we will affirm our prior decision, but will amend it to defer the issue of costs under section 5811
25 for Ms. Wallace’s testimony and report, and return this matter to the trial level for the WCJ to
26 determine the issue in accordance with the standards set forth in this opinion.

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1 **A. The Costs Of Evidence On And/Or In Rebuttal To A Permanent Disability Rating Are**
2 **Properly Allowable Under Section 5811**

3 As stated by the California Supreme Court in *Johnson v. Workers' Comp. Appeals Bd.*
4 (1984) 37 Cal.3d 235, 238 [49 Cal.Comp.Cases 716, 718]: “As a general rule, the WCAB is
5 authorized to award costs. Section 5811 provides in pertinent part: ‘In all proceedings under this
6 division before the appeals board, costs as between the parties may be allowed by the appeals
7 board.’ ”

8 In *Johnson*, the Supreme Court determined that the WCAB could award appellate costs
9 under section 5811 where a petition for writ of review had been summarily denied by the Court of
10 Appeal. Then, more broadly addressing the issue of section 5811 costs, the Supreme Court went
11 on to state:

12 “Article XIV, section 4 of the California Constitution provides, in part: ‘The
13 Legislature is hereby expressly vested with plenary power, unlimited by any
14 provision of this Constitution, to create, and enforce a complete system of
15 workers’ compensation ... [which] includes ... full provision for vesting
16 power, authority and jurisdiction in an administrative body with all the
17 requisite governmental functions to determine any dispute or matter arising
18 under such legislation, *to the end that the administration of such legislation
19 shall accomplish substantial justice in all cases expeditiously, inexpensively,
20 and without incumbrance of any character*; all of which matters are expressly
21 declared to be the social public policy of this State, binding upon all
22 departments of the State government.’ (Italics added.) [Court’s italics.]

19 “This constitutional provision supports petitioner’s contention that the WCAB
20 should have the authority to award appellate costs. If injured workers were
21 not permitted to recover costs incurred in successfully answering a petition for
22 writ of review, the constitutional policy to ensure substantial justice ‘without
23 incumbrance of any character’ would be frustrated. Forcing employees to
24 absorb such costs would diminish the minimal awards obtained under the
25 Workers’ Compensation Act (§ 3200 et seq.) ...

23 ***

24 “This court must construe section 5811 liberally, ‘with the purpose of
25 extending [its] benefits for the protection of persons injured in the course of
26 their employment.’ ([Lab. Code,] § 3202.) As Justice Matthew O. Tobriner
27 stated for the court in *Quinn v. State of California* (1975) 15 Cal.3d 162 [124
Cal.Rptr. 1, 539 P.2d 761], section 3202 ‘requires the courts to view the
[Workers’ Compensation Act] from the standpoint of the injured worker, with

1 the objective of securing for him the maximum benefits to which he is
2 entitled.’ (15 Cal.3d at p. 170.) ...”

3 (*Johnson v. Workers’ Comp. Appeals Bd.*, *supra*, 37 Cal.3d at pp. 240-241 [49
4 Cal.Comp.Cases at pp. 720-721])

5 Therefore, as recognized by the Supreme Court, the WCAB’s authority to award section 5811
6 costs to an injured employee furthers the constitutionally declared “social public policy” of
7 California and it helps ensure that the “minimal awards” employees receive are not “diminished”
8 by “[f]orcing employees to absorb such costs.”

9 Furthermore, under *LeBoeuf v. Workers’ Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 242-
10 243 [48 Cal.Comp.Cases 587, 594] and *Gill v. Workers’ Comp. Appeals Bd.* (1985) 167
11 Cal.App.3d 306, 307 [50 Cal.Comp.Cases 258, 260], in assessing permanent disability, evidence
12 must be considered regarding the preclusion of an employee from participating in vocational
13 rehabilitation, including testimony and reports of rehabilitation counselors. (See also *Grupe Co. v.*
14 *Workers’ Comp. Appeals Bd. (Ridgeway)* (2005) 132 Cal.App.4th 977 [70 Cal.Comp.Cases 1232]
15 [vocational rehabilitation expert witness should have been permitted to testify on injured
16 employee’s behalf at trial because the employee disclosed the vocational rehabilitation expert’s
17 name at the mandatory settlement conference, even though she had not further disclosed the
18 substance or content of the expert’s proposed testimony].) Moreover, notwithstanding defendant’s
19 assertion to the contrary, the reasonable costs of non-medical expert witness fees under section
20 5811 have been awarded in workers’ compensation proceedings. (See *Zenith National Insurance*
21 *Co. v. Workers’ Comp. Appeals Bd. (Smith)* (1978) 43 Cal.Comp.Cases 254 (writ den.) [costs
22 assessed against defendant for the reasonable fee of vocational rehabilitation expert’s testimony];
23 *Los Angeles Unified School District v. Workers’ Comp. Appeals Bd. (Kilgore)* (1984) 49
24 Cal.Comp.Cases 631 (writ den.) [applicant’s attorney awarded costs for fee paid to former
25 disability evaluator called as expert witness to rebut testimony of permanent disability rating
26 specialist]; *Whitley v. Diamond Int. Corp.* (1985) 13 Cal.Workers’Comp.Rptr. 97 [defendant liable
27 for costs of testimony and report of vocational rehabilitation counselor].) In addition, subsequent

1 to the enactment of SB 899, the Courts of Appeal have denied writs challenging the allowance of
2 reasonable costs under section 5811 for the testimony of vocational rehabilitation experts on the
3 issue of permanent disability. (See *Rea v. Workers' Comp. Appeals Bd. (Dabanian)* (2007) 72
4 Cal.Comp.Cases 497 (writ den.); *Rea v. Workers' Comp. Appeals Bd. (Dias)* (2007) 72
5 Cal.Comp.Cases 705 (writ den.); *Rea v. Workers' Comp. Appeals Bd. (Barr)* (2007) 72
6 Cal.Comp.Cases 762 (writ den.); *Rea v. Workers' Comp. Appeals Bd. (Rasmussen)* (2007) 72
7 Cal.Comp.Cases 1035 (writ den.).)²

8 The continued allowance of reasonable expert witness fees under Labor Code section 5811
9 for the presentation of evidence on and/or in rebuttal to a permanent disability rating under the
10 new PDRS, is not inconsistent with SB 899. As stated in our prior decision, while SB 899 made
11 sweeping changes to Labor Code section 4660, including a wholly new PDRS, one of the few
12 things it left intact was that the PDRS "shall be prima facie evidence of the percentage of
13 permanent disability to be attributed to each injury covered by the schedule." (Former subdivision
14 (b), now subdivision (c).) This language historically allowed the introduction of evidence on
15 and/or in rebuttal to the PDRS (see, e.g., *Liberty Mutual Ins. Co. v. Industrial Acc. Com (Serafin)*
16 (1948) 33 Cal.2d 89, 93 [13 Cal.Comp.Cases 267, 270]; *Universal Studios, Inc. v. Workers' Comp.*
17 *Appeals Bd. (Lewis)* (1979) 99 Cal.App.3d 647, 662-663 [44 Cal.Comp.Cases 1133, 1143]; *Glass*
18 *v. Workers' Comp. Appeals Bd.* (1980) 105 Cal.App.3d 297, 307 [45 Cal.Comp.Cases 441, 449]),
19 including evidence the testimony and reports of vocational rehabilitation counselors. (*LeBoeuf,*
20 *supra*, 34 Cal.3d at pp. 242-243 [48 Cal.Comp.Cases at p. 594]; *Gill, supra*, 167 Cal.App.3d at p.
21 307 [50 Cal.Comp.Cases at p. 260].)

22
23
24 ² For example, in *Rasmussen*, the WCAB held that defendant, Subsequent Injuries Benefit Trust Fund (SIBTF), was
25 liable for the cost of applicant's vocational rehabilitation expert witness fees under section 5811, as such testimony
was necessary to show whether applicant's amputation was labor disabling prior to his industrial injuries and to rebut
SIBTF's contention that applicant was not entitled to SIBTF benefits.

26 In *Barr*, not only did the Court of Appeal deny defendant's petition for writ of review contesting the WCAB's
27 reimbursement of costs for vocational rehabilitation expert's preparation for *testimony* under section 5811, which was
found relevant on the issue of applicant's permanent disability, it also granted review with respect to the applicant's
petition from the WCAB's denial of reimbursement for the costs of the vocational rehabilitation expert's *report*,
which matter is still pending (*Jim Barr v. Workers' Comp. Appeals Bd.*, 3rd Civ. No. C054907).

1 Thus, in continuing to permit evidence on and/or in rebuttal to a permanent disability rating
2 under Labor Code section 4660, the WCAB's discretion to allow the reasonable costs of such
3 evidence under Labor Code section 5811 remains intact. While it is undisputed that one of the
4 purposes of SB 899 was an overall reduction in workers' compensation costs (see e.g., *Brodie v.*
5 *Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1329 [72 Cal.Comp.Cases 578], this does
6 not mean that discretionary costs under section 5811, on which SB 899 is silent, should be
7 proscribed by that legislation.³

9 **B. The Standards For Allowing Section 5811 Costs For Evidence On And/Or In Rebuttal**
10 **To A Permanent Disability Rating**

11 We first observe that before costs may be allowed for testimony and/or reports of an
12 expert witness, that person must, of course, qualify as an expert. With respect to qualification as
13 an expert witness, Evidence Code⁴ section 720 provides as follows:

14 “(a) A person is qualified to testify as an expert if he has special
15 knowledge, skill, experience, training or education sufficient to qualify
16 him as an expert on the subject to which his testimony relates. Against the
objection of a party, such special knowledge, skill, experience, training or
education must be shown before the witness may testify as an expert.

17 “(b) A witness' special knowledge, skill, experience, training or education
18 may be shown by any otherwise admissible evidence, including his own
testimony.”

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21 _____
22 ³ There are, however, limitations on the costs that may be reimbursed under section 5811. In addition to the fact that
23 such costs are discretionary (*Sims v. Workers' Comp. Appeals Bd.* (1995) 60 Cal. Comp. Cases 1126 (writ den.),
24 attorney's fees, for example, which are awarded under conditions specified in the Labor Code (see Lab. Code, §§
4903, 5710, 5801, 5813, 5814, 5814.5), are not available as “costs” under section 5811. (*Holzer-Reyes v. Workers'*
Comp. Appeals Bd. (1998) 63 Cal.Comp.Cases 84 (writ den.); *Santa Maria High School District v. Workers' Comp.*
Appeals Bd. (1995) 60 Cal.Comp.Cases 649 (writ den.).)

25 ⁴ While under section 5708, the Appeals Board and WCJs are not “bound by the common law or statutory rules of
26 evidence and procedure,” as stated in *Martinez v. Associated Engineering & Construction Co.* (1979) 44
27 Cal.Comp.Cases 1012, 1018 (Appeals Board en banc), “[t]here are many provisions of the Evidence Code which are
followed routinely in workers' compensation cases. For example, various privileges (Evid. Code §§ 900-1070) may
be a matter of substantive law rather than merely procedural. Other provisions aid the carrying of the constitutional
mandate such as those sections dealing with the proper procedures to be followed during the course of a trial. (See
e.g., §§ 700-791.)

1 With respect to opinion testimony by an expert witness, Evidence Code section 801
2 provides as follows:

3 “If a witness is testifying as an expert, his testimony in the form of an
4 opinion is limited to such an opinion as is:

5 (a) Related to a subject that is sufficiently beyond common experience that
6 the opinion of an expert would assist the trier of fact; and

7 (b) Based on matter (including his special knowledge, skill, experience,
8 training, and education) perceived by or personally known to the witness
9 or made known to him at or before the hearing, whether or not admissible,
10 that is of a type that reasonably may be relied upon by an expert in
forming an opinion upon the subject to which his testimony relates, unless
an expert is precluded by law from using such matter as a basis for his
opinion.”

11 While vocational rehabilitation counselors would appear, in general, to be qualified with
12 respect to diminished future earning capacity (DFEC) issues under the new PDRS, the
13 qualifications of each purported expert must, of course, be determined on a case by case basis.
14 Once a person has qualified as an expert, the costs of the expert’s testimony and/or his or her
15 reports may be allowable under section 5811, as discussed below, similar to the standards for
16 allowing medical-legal costs under section 4621(a).

17 Section 4621(a) provides, in pertinent part:

18 “[T]he employee ... shall be reimbursed for his or her medical-legal
19 expenses reasonably, actually and necessarily incurred The
20 reasonableness of, and necessity for, incurring these expenses shall be
determined with respect to the time when the expenses were actually
incurred.”

21 Thus, the costs of evidence on and/or in rebuttal to a permanent disability rating must be
22 reasonable and necessary at the time they were incurred,⁵ and such determination will also be
23 made on a case by case basis. We further note that as with medical-legal costs, which may be
24 reimbursable even though the applicant is unsuccessful in his or her claim (see, e.g., *Subsequent*
25

26 ⁵ While in *Gill, supra*, 167 Cal.App.3d 306 [50 Cal.Comp.Cases 258], such evidence was presented as part of the
27 applicant’s case in chief and not in rebuttal, as here, the same standards would, of course, apply. However, where
such evidence is merely cumulative of medical evidence already in existence, or not relevant, the costs therefor would
not be reasonable and necessary, and thus, not allowable.

1 *Injuries Fund v. Industrial Acc. Com. (Roberson)* (1963) 59 Cal.2d 842, 844 [28 Cal.Comp.Cases
2 139, 140]; *Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd. (Pinkney)*
3 (1994) 26 Cal.App.4th 789, 802 [59 Cal.Comp.Cases 461, 471]), the expert evidence offered by
4 an applicant does not necessarily have to successfully affect the permanent disability rating to be
5 reimbursable. At the same time, however, the WCAB has the discretion to balance the amount of
6 such costs against the benefit obtained. (See *Jimenez v. San Joaquin Valley Labor* (2002) 67
7 Cal.Comp.Cases 74, 84-85, fn. 18 (Appeals Board en banc).) Moreover, as with medical-legal
8 costs, reimbursement will not be allowed if the report and/or testimony is premised on facts or
9 assumptions so false as to render it worthless. (See *Penny v. Workers' Comp. Appeals Bd.* (1983)
10 48 Cal.Comp.Cases 468 (writ den.); *Pacific Medical Associates, Inc. v. Workers' Comp. Appeals*
11 *Bd. (Rodarte)* (1995) 60 Cal.Comp.Cases 526 (writ den.)) Furthermore, as medical-legal costs
12 are not recoverable with respect to reports, for example, that are incapable of proving or
13 disproving a disputed fact, or whose conclusions are totally lacking in credibility (see *Cal.*
14 *Workers' Comp. Practice* (Cont. Ed. Bar, 4th ed., June 2007 Update) § 3.52, pp. 232-233), reports
15 and testimony of a vocational rehabilitation expert must at least have the potential to affect a
16 permanent disability rating in order for their costs to be recoverable.

17 Accordingly, to allow the parties and the WCJ to address these issues in light of the
18 principles set forth in this opinion, we will amend our prior decision to defer reimbursement for
19 Ms. Wallace's testimony and report, and return this matter to the trial level for further
20 proceedings and decision. It therefore appears that defendant's contentions are now moot in light
21 of this disposition and/or have been addressed by the foregoing, i.e., the costs at issue here may
22 be allowable under section 5811 and vocational rehabilitation counselors, such as Ms. Wallace,
23 may be appropriate expert witnesses to present evidence on and/or in rebuttal to a permanent
24 disability rating under the new PDRS. We wish to note, however, that defendant is correct that
25 contrary to our prior opinion, it did object to Ms. Wallace's testimony. Thus, failure to object
26 may not be a basis for allowing the costs of such testimony in this case.

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1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation
3 Appeals Board (en banc) that the Decision issued on December 7, 2006, is **AFFIRMED**,
4 **EXCEPT** that paragraph (c) of the Award is deleted and Finding of Fact No. 9 is **AMENDED** as
5 set forth below, after which this matter is **RETURNED** to the trial level for further proceedings
6 and decision consistent with this opinion.

7 "9. The issue of reimbursement for the costs for the testimony and report of Ann Wallace,
8 Ph.D., under Labor Code section 5811 is deferred."

9 **WORKERS' COMPENSATION APPEALS BOARD (EN BANC)**

10 /s/ Joseph M. Miller
11 **JOSEPH M. MILLER, Chairman**

12 /s/ William K. O'Brien
13 **WILLIAM K. O'BRIEN, Commissioner**

14 /s/ James C. Cuneo
15 **JAMES C. CUNEO, Commissioner**

16 /s/ Janice J. Murray
17 **JANICE J. MURRAY, Commissioner**

18 /s/ Frank M. Brass
19 **FRANK M. BRASS, Commissioner**

20 /s/ Ronnie G. Caplane
21 **RONNIE G. CAPLANE, Commissioner**

22 /s/ Alfonso J. Moresi
23 **ALFONSO J. MORESI, Commissioner**

24 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**
25 **Nov 13 2007**

26 **SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT**
27 **THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:**

VB/aml