WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANNA YARMOLENKO, *Applicant*

vs.

ALBERTSONS/SAFEWAY-VONS,
administered by ALBERTSONS HOLDINGS;
SEDGWICK *Defendants*

Adjudication Number: ADJ11252084
San Diego District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and the Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated below, we will grant reconsideration to amend Findings of Fact number 13 to find that applicant is permanently totally disabled. For the reasons stated below and for the reasons stated in the WCJ's Report and Opinion on Decision, both of which we adopt and incorporate, except as noted below, we will otherwise affirm the April 17, 2024 First Amended Findings and Award (F&A).

We do not adopt or incorporate the Report to the extent it refers to defendant's petition as potentially untimely. In this case, the WCJ issued the First Amended Findings and Award on April 17, 2024, serving it on the parties, including defendant's claim administrator located in Kentucky. There are 30 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address outside California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) In this case, defendant filed a timely Petition for Reconsideration on May 13, 2024, which referred to the decision from which reconsideration was being sought as having issued on November 15, 2023. Defendant then filed an Amended Petition for Reconsideration on May 14, 2024, amending their pleading to note that the decision from which reconsideration was being sought issued on April 17, 2024. Given that

defendant had until May 17, 2024 to file a Petition for Reconsideration, it's petition is timely.[1] In addition, we do not adopt or incorporate the recommendation that we deny reconsideration.

Turning to the merits, we note that the WCJ did not find permanent total disability based on a traumatic brain injury pursuant to Labor Code[2] section 4662(a)(4). While the parties stipulated to injury arising out of and occurring in the course of employment (AOE/COE) to the brain (Minutes of Hearing and Summary of Evidence (MOH/SOE), 7/17/24, at p. 2:9), the WCJ deferred a finding of "traumatic brain injury." (F&A, paragraph 9.) As such, defendant's reliance on the panel decision in *Rose v. L.A. Dodgers*, 2024 Cal.Wrk.Comp.P.D.LEXIS 77 is misplaced. However, even absent a finding of a traumatic brain injury and without application of section 4662(a)(4), the evidence in this case fully supports the WCJ's finding of permanent total disability.

In the case of *Dept. of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd. (Fitzpatrick)* (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680], the Third District Court of Appeal held that a finding of permanent total disability cannot be found solely "in accordance with the fact" under section 4662(b) without following the more specific and detailed framework of section 4660 (which applies to injuries before January 1, 2013; for injuries after that date, such as this case, the applicable section would be 4660.1). This approach is necessary in order to give effect to the legislature's intent to provide a system that is objective and uniform in application, with consistency, uniformity, and objectivity in its results. At the same time, the court in *Fitzpatrick* acknowledged that it is possible to rebut a rating that is calculated using the AMA Guides and the current rating schedule in accordance with section 4660 (or 4660.1). (*Id*.)

The case of *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1269-1276 [76 Cal.Comp.Cases 624] described three methods for rebutting a scheduled rating: (1) by showing a factual error in the application of a formula or the preparation of the rating schedule; (2) when the injury impairs rehabilitation, causing diminished future earning capacity greater than reflected in the scheduled rating (as in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587]); or (3) where the nature or severity of the claimant's injury is not captured within the sampling of disabled workers that was used to compute the adjustment factor. (*Id*.) It is well-settled that for all dates of injury, the presentation of substantial vocational evidence

[1] Given that the Petition for Reconsideration filed on May 13, 2024 clearly sought reconsideration of the April 17, 2024 First Amended Findings and Award in the body of the petition, despite the clerical error in the first paragraph, we would have treated it as timely even without the amended petition or the extra five (5) days.

[2] All further statutory references are to the Labor Code, unless otherwise noted.

offers a legal path to rebuttal of the scheduled permanent disability rating. (*Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 (2023 Cal. Wrk. Comp. LEXIS 30) [Appeals Board en banc], citing *LeBoeuf, supra* 34 Cal.3d 234 and *Ogilvie, supra*, 197 Cal.App.4th 1262.)

In this case, defendant concedes the medical-legal evaluations rate to a combined rating of 85% permanent disability and requests an award at that level. (Petition for Reconsideration, at pp. 4:3 – 5:10; 9:16-22.) However, for the reasons stated by the WCJ in the Opinion on Decision and Report, we agree with the WCJ's reliance on the vocational expert opinion of Mark Remas (applicant's Exhibit 28) to find applicant suffered diminished future earning capacity and is not amenable to vocational rehabilitation as explained in *LeBoeuf*. We further note that Mr. Remas' reporting and opinion of applicant's unemployability was reviewed and adopted by applicant's primary treating physician, Thomas Schweller, M.D., and secondary treater, Lawrence Lyons, Ph.D. (Applicant's Exhibits 1 & 31, respectively.) Moreover, defendant's vocational expert, Keith Wilkinson also found applicant not amenable to vocational rehabilitation. (Joint Exhibit 102.) Accordingly, for the reasons stated in the Report and the Opinion on Decision, we are persuaded that the WCJ's analysis follows the more specific and detailed framework of section 4660.1 as required by *Fitzpatrick.*

Finally, we have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id*.)

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the April 17, 2024 First Amended Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 17, 2024 First Amended Findings and Award is **AFFIRMED**, **EXCEPT** as **AMENDED** below.

FINDINGS OF FACT

* * *

13. Applicant is permanently totally disabled.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 5, 2024

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

ANNA YARMOLENKO
ACOSTA LAW OFFICE
SAMUELSEN, GONZALEZ, VALENZUELA & BROWN

PAG/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Workers' Compensation Administrative Law Judge: Alicia D. Hawthorne

Counsel:

Petition for Reconsideration Filed By: Defendant, Sedgwick

Attorney for Petitioner: Samuel, Gonzalez, Valenzuela & Brown, Gena Strategos, Esq.

Attorney for Applicant: Law Offices of Ray Acosta; Ray Acosta, Esq.

INTRODUCTION

Petitioner, Frontier Communications, by and through their attorney of record, has filed a potentially *untimely*, verified, petition for reconsideration on the following grounds, from the trial court's January 26, 2024, Findings and Award, pleading that:

1. By the Order, Decision, or Award, the Board acted without or in excess of its powers.
2. The evidence does not justify the findings of fact.
3. The findings of fact do not support the Order, Decision, or Award.

BACKGROUND

Applicant, Anna Yarmolenko, while employed on January 10, 2018, as an Assistant Store Director, Occupational Group Number 212, at Carlsbad, California, by Safeway Vons, sustained injury arising out of and in the course of employment to her head, dental, neck, psych, both eyes, vision, and brain. At the time of injury, the employer's workers' compensation carrier was Albertsons Holdings administered by Sedgwick.

This matter proceeded to trial on July 17, 2023, August 30, 2023, and March 13, 2024. A Findings and Award issued on November 15, 2023. A Petition for Reconsideration was timely filed by the applicant attorney as to the Findings of when the first payment of permanent total disability benefits should begin along with the start date of the SAWW increase in this case. The undersigned issued an Order Rescinding the Findings and Award on 12/13/2023. The defendant filed a Petition for Reconsideration against the original Findings and Award on 12/14/2023 seemingly before receiving the Order Rescinding. A First Amended Findings and Award issued on April 17, 2024, finding the applicant to be permanently and totally disabled. Defendant filed a timely Petition for Reconsideration on May 13, 2024, noting that it was against the November 15, 2023, Findings and Award. On May 14, 2024, defendant filed an untimely Amended Petition for Reconsideration noting that the Petition for Reconsideration was against the April 17, 2024, First Amended Findings and Award.

DISCUSSION

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However, if the Appeals Board accepts such filing as timely, this WCJ finds that the First Amended Findings and Award was based on substantial medical evidence such that applicant is permanently, totally disabled and such findings should be upheld.

Defendant contends that the finding of Labor Code §4662(b) is not supported by substantial evidence. As noted in the First Amended Findings and Award, wherein the entirety of the Opinion on Decision will not be reiterated, total permanent disability may be shown by presenting evidence showing total permanent disability "in accordance with the fact" as provided in section 4662(b), or by rebutting a section 4660 scheduled rating. (See *Ogilvie* v. *Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] *(Ogilvie); Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119]; c.f. *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587].) Here, a review of the entirety of the record supports a conclusion that this WCJ properly applied section 4662(b) to find that applicant is, in fact, totally permanently disabled.

It is well established that Findings of the WCAB must be supported by substantial evidence in light of the entire record. *(Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence an expert's opinion may not be based upon an inadequate history, surmise, speculation or conjecture. *(Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525].)

In this case, the reporting physicians had full and sufficient information about applicant's condition and history to form reasonable opinions about the effect of her permanent disability on her activities of daily living, earning capacity and ability to compete in the open labor market. Their certitude in finding total permanent disability is seen in their reporting. Specifically, as noted in the Opinion on Decision, pages 15-16,

> Dr. Sivtsov reported in his Panel QME Re-Evaluation dated April 12, 2021, indicated that at that time, applicant was not ready to join the workforce due to abnormally low GAF score. (Defendant's Exhibit H) Dr. Schweller, in his report dated June 20, 2022, indicated that applicant has a combination of physical and psychiatric impairments, chronic pain disorder and vision impairments that make her unemployable. She is permanently totally disabled from an employment perspective. (Applicant's Exhibit 1) Furthermore, in Dr. Schweller's permanent and stationary report states that applicant has a "Total disability: it appears to me that the combination of physical and psychiatric impairments, chronic pain disorder and vision impairments make this woman unemployable, totally disabled from an employment perspective and she requires assistance in her activities of daily living especially needing someone to help her with activities involving running or maintaining her home, as well as assisting her in activities where she would be likely to provoke episodes of pain or vertigo." Dr. Lyons indicated in his 8/10/2022 report that he reviewed the

Vocational Evaluation Report of Mark Remas and was in complete agreement with his assessment. (Applicant's Exhibit 31)

A person is qualified to testify as an expert if he or she has the knowledge, skill, experience, training, or education sufficient to qualify as an expert, like the physicians in this case. (Evid Code, § 720; *People v. Smith* (1967) 253 Cal.App.2d 711; *Oak River Insurance Co. v. Workers' Comp. Appeals Bd. (Torrez)* (2013) 79 Cal.Comp.Cases 85 (writ den.).) The reporting physicians have extensive experience in evaluating injured workers and understand the concept of total permanent disability. There is no justification to find their determinations unpersuasive.

In addition to the rationale of the doctors to substantiate applicant's permanent and total disability, in the First Amended Findings and Award as well as the Opinion on Decision, the undersigned discussed and addressed the *Nunes* matter as it relates to this case and it will not be reiterated here.

Defendant further contends this WCJ cannot rely on the vocational expert reports to find 100% disability as the reporting is not substantial evidence. Their first argument contends that Mr. Mark Remas, the applicant's vocational expert, cannot be relied upon due to the remote evaluation being performed. Notably missing in this argument is any legal basis for such allegation. Furthermore, emergency CCR 46.3 became effective January 18, 2022 and expired January 18, 2023 due to a global pandemic. Mr. Remas' evaluation occurred May 27, 2022. (Applicant's Exhibit 28) The emergency legislation in effect during that evaluation was created to limit the exposure of COVID 19; specifically providing a mechanism, wherein it was appropriate to conduct remote medical legal evaluations when a hands-on physical examination was not necessary. Although the legislation was intended for QME, AME or other medical-legal evaluations, it is only logical that this would apply to vocational examinations during the same time to ensure the safety of the injured worker, vocational evaluator, and any other individuals involved in the examination so as to slow the spread of COVID 19. Defendant does not give any other reasoning for the undersigned to not rely on Mr. Remas. Mr. Remas found the applicant attempted to return to work but was unable to do so and has not returned to work since March of 2018. He found that the applicant is unemployable and not amenable to vocational rehabilitation. (Applicant's Exhibit 28, page 26) There has been no evidence to contradict these findings.

Defendant argues that their own expert, Mr. Keith Wilkerson is not accurate, is not complete and not substantial evidence. However, despite these allegations, defendant does not attempt to rehabilitate their own evaluator. Furthermore, the defendant does properly apply the principles found in *Nunes* in that the vocational expert should consider valid medical apportionment in their opinions even in cases where the rehabilitation expert finds the injured worker to be permanently and totally disabled due to an inability to participate in vocational training. It is clear from the medical experts in this matter that no medical apportionment existed. Furthermore, the basis of applicant's unemployability found by Mr. Wilkerson was based on his evaluations of the applicant along with the review of the medical records wherein he indicated applicant would meet the criteria for total disability under *LeBouf*, Labor Code 4600 and Labor Code 4662. (Joint Exhibit 102, pg. 5)

Already discussed in the Opinion on Decision is the undersigned's opinion as to why both the vocational experts in this matter have properly followed the determination in *Nunes* and it will not be reiterated here. Furthermore, as defendant has indicated, applicant must show that the injury

prevents her from undergoing vocational rehabilitation per the findings of *LeBouf v. WCAB* ((1983), 34 Cal. 3d 234.) and this WCJ has already determined that applicant met the burden of proof. It is clear from the medical evaluators and the vocational experts in this matter that applicant is permanently and totally disabled and is unable to undergo vocational rehabilitation. While defendant continues to contend that the evidence in this matter is not substantial evidence, they continually have failed to submit evidence to establish the contrary. Although the Appeals Board has the discretionary authority to develop the record (Lab. Code §§ 5701, 5906), if a party fails to meet its burden of proof by obtaining and introducing competent evidence, it is not the job of the Appeals Board to rescue the party by ordering the record to be developed. (Lab. Code, § 5502; San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan) (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; Telles Transport Inc. v. Workers' Comp. Appeals Bd. (2001) 92 Cal.App.4th 1159 [66 Cal.Comp.Cases 1290].)

Finally, defendant objects to the findings of any attorney fee off the side of the award and refers this Court to a case that is not binding on this WCJ. There is no persuasive reasoning supporting this objection. This matter was one wherein the question of whether or not the applicant was permanently and totally disabled was a highly disputed medical issue and the representation of the applicant's attorney resulted in a significantly greater award to the applicant. (See *Wilton Fire Protection District v. WCAB* (*Schneider*)(2008) 73 CC 1380 (writ denied) Taking into consideration the factors delineated in 8 CCR §10844, Labor Code §4906(d), as well as the Policy and Procedure Manual, this WCJ found that the amount of attorney's fees awarded were appropriate and correctly assessed.

RECOMMENDATION

For the reasons discussed above as well as the incorporation of the First Amended Findings and Award into this Report and Recommendation, it is respectfully recommended that the petition for reconsideration be denied.

Date: May 24, 2024

Alicia Hawthorne
Workers Compensation Judge

OPINION ON DECISION

FACTUAL BACKGROUND

Applicant, Anna Yarmolenko, born [], while employed on January 10, 2018, as an Assistant Store Director, Occupational Group Number 212, at Carlsbad, California, by Safeway Vons, sustained injury arising out of and in the course of employment to her head, dental, neck, psych, both eyes, vision, and brain.

At the time of injury, the employer's workers' compensation carrier was Albertsons Holdings administered by Sedgwick.

The employer was permissibly self-insured. At the time of injury, the employee's earnings were $1,168.65 per week warranting indemnity rates of $779.10 for temporary disability and $290.00 for permanent disability.

The carrier/employer has paid compensation as follows: Temporary partial disability from January 11, 2018 through March 5, 2018; temporary disability at a weekly rate of $667.18 from March 6, 2018 through March .11, 2018; temporary total disability at a rate of $778.38 from March 12, 2018 through July 15, 2018; temporary disability at a weekly rate of $651.49 from July 16, 2018 to November 18, 2018; temporary disability at a weekly rate of $778.38 from November 19, 2018 to January 24, 2020; temporary total disability at a weekly rate of $779.10 from January l1, 2018 through January 29, 2018; permanent disability at a weekly rate of $290 from January 25, 2020 to June 27, 2021; permanent disability at a weekly rate of $290 from September 27, 2022 through March 13, 2023 and ongoing.

The employer has furnished some medical treatment. The primary treating physician is Thomas Schweller. The parties stipulated to the following doctors in these capacities; Orthopedic QME, Dr. Fait; Psyche QME, Dr. Sivtsov; Ophthalmologist, Dr. Bokosky; neuropsyche, Dr. Lyons.

PARTS OF BODY

BILATERAL SHOULDERS AND UPPER EXTREMITIES

Applicant alleges industrial injury to her heart, cardiovascular, bilateral shoulders, and upper extremities, traumatic brain injury, sleep loss, internal and digestive. Defendant denied such body parts and the parties presented to Qualified Medical Evaluators (QMEs) on such issues.

Regarding her orthopedic complaints, applicant presented to Dr. Fait in the capacity of a QME. The first evaluation was May 20, 2021. (Defendant's Exhibit B) In this initial evaluation, Dr. Fait evaluated the applicant and performed a physical evaluation. He took measurements during his testing and noted that there was no symptom magnification and applicant put forth full effort. (Defendant's Exhibit B, page 6) Dr. Fait's diagnoses consisted of closed head injury with history of headaches, nausea, vertigo and blurred vision, cervical spine 2mm disc protrusion, symptoms of anxiety and depression, jaw pain and chipped teeth, and left shoulder pain. (Defendant's Exhibit B, page 10) Dr. Fait was given an opportunity to review all of the available medical records as well as some objective testing. Under his DISCUSSION and CAUSATION section of his report, Dr. Fait found there is sufficient medical evidence to indicate that the

applicant sustained an industrially related injury to his cervical spine, but did not find evidence that an injury to the right or left shoulder occurred. Dr. Fait further commented that for the right upper extremity, the complaints are emanating from the neck. However, Dr. Fait did request an EMG/nerve conduction study be performed to further evaluate the right shoulder injury. (Defendant's Exhibit B, page 12)

In this same initial report, Dr. Fait gives a summary of the medicals he reviewed. Of significance are the initial evaluations with Dr. Young. Dr. Young diagnosed the applicant with a closed head injury with concussion with persistent vertigo, photophobia, tinnitus and headaches with notation of development of migraines. Dr. Young referred the applicant to neurology for a consultation. The initial reports from Dr. Young note applicant's persistent symptoms in her neck, which at first were getting better, but then started to increase. (Defendant's Exhibit B, page 3 of Review of Records) By February 5, 2018, applicant asked to be progressed to a full 8-hour workday. However, after her trip in San Francisco, by February 12, 2018, applicant was put back to a 4-hour workday. Dr. Young's first report notes that applicant's complaints were limited to her head, vision issues, headaches, light and hearing sensitivity, anxiousness and slow responses, and right-sided cervical strain. Dr. Young's next reports note persistent vertigo as well as her other issues. For the following PR-2s up and through at least April 2, 2018, there are no complaints to her shoulders.

Per the review of records, applicant did see a neurologist, Dr. Vidya Prabhakar Hawkins, for a consultation on February 27, 2018. (Defendant's Exhibit B, page 5, Review of Records) The neurologist noted depressive symptoms as well as applicant's complaints of insomnia. The neurologist diagnosed applicant with post concussive headaches and suspected coexisting mood disorder.

The Review of Records noted applicant’s continued treatment with Dr. Young, which indicated applicant's reduced hours of modified work back to 4-hour workdays. Dr. Young's reporting was consistent of applicant's neck complaints and need for psychiatric evaluation. It is noted that on April 2, 2018, applicant did decline psychiatric evaluation.

In the review of records, it is noted that on June 6, 2018, applicant presented to Dr. Schweller, a neurologist. During this initial evaluation, applicant complained of head pain over the impact in R frontal area, migraines, and throbbing sensation in the back of her head going into the right side of her neck and above her right ear. Applicant complained of trouble getting to sleep and waking up after 3-4 hours. She noted mood swings. Dr. Schweller noted applicant had issues with word finding problems and trouble with recall. Dr. Schweller diagnosed applicant with a closed head injury with concussion, post-concussion syndrome with cognitive and mood impairment, blurred vision of her right eye and light and noise sensitivity, impaired sleep, ringing in the right ear, and TMJ syndrome. There is no independent complaints of or diagnosis of bilateral upper extremities or bilateral shoulder complaints.

Dr. Fait reviewed the medical-legal report of Dr. Lyons who acted in the capacity of applicant's PTP in psychology. Dr. Lyons diagnosed a chronic pain disorder, depressive disorder NOS, anxiety disorder NOS, and ruled out a cognitive disorder. Dr. Lyons noted that these conditions within reasonable medical probability were predominantly caused by the industrial injury of January 10, 2018. (Defendant's Exhibit B, Review of Records, page 7) It is not until this PTP Comprehensive Med-Legal Eval by Dr. Lawrence Lyons, Ph.D., dated June 23, 2018, that

there is a mention of right shoulder and right arm complaints. (Defendant's Exhibit B, Review of Records, page 7)

The next indication of any issues with applicant's right shoulder is the reporting of Learning Services dated September 1, 2018, which stated applicant reported receiving PT for her neck and R shoulder pain. However, there is still no indication that the right shoulder is industrial. Furthermore, the follow up by Dr. Schweller dated September 5, 2018, does not indicate any complaints of either shoulder.

Dr. Fait reviewed the reporting of Dr. Ramin Raiszadeh dated November 12, 2018. In such review of records, Dr. Raiszadeh gave a consistent history of the injury. In addition, Dr. Raiszadeh noted that applicant developed severe neck and bilateral shoulder pain after the accident. (Defendant's Exhibit B, Review of Records, page 12) Applicant noted current complaints at such time of "90% of pain in neck, stabbing, aching sensation, she has HA associated with it 10% of pain radiates down into both shoulders in trapezial area aching sensation... Dx: 1) chronic neck pain and B/L shoulder pain s/p blunt trauma and closed head injury dated 1/10/2018". However, there is no indication in this review of record that there is a separate injury to her bilateral shoulders or upper extremities.

Dr. Fait reviewed the MRI Brain report with findings of "Unremarkable MRI of brain". Dr. Fait reviewed the records of the Learning Services and noted Dr. Schweller's review of the same records including Dr. Schweller's treatment recommendations in line with the Learning Services. Dr. Fait reviewed dental records from Dr. Hagstrom as well as reporting from Dr. Signer, the psychologist. Dr. Fait noted the UR determination approving applicant's sleep study. Dr. Fait reviewed the findings of Dr. Nudleman regarding the sleep study which found no evidence of significant obstructive sleep apnea. Dr. Fait reviewed the findings of Dr. Haronian.

Under the causation section of his initial report, Dr. Fait found, within reasonable medical probability, there is sufficient medical evidence to indicate applicant sustained an injury to her cervical spine but could not find evidence of injury to any other aspect of the musculoskeletal system. (Defendant's Exhibit B, page 12) Dr. Fait deferred allegations of injuries to psychological system, closed head injury, and dental injuries to experts in their respective fields. He further found that applicant was not maximum medical improvement.

Applicant did present to Dr. Edwin Haronian, M.D., on November 18, 2020. (Applicant's Exhibit 34) Under his present complaints section, applicant does complain of intermittent pain in her shoulder along with stiffness. Her pain increases with reaching, pushing, pulling and with any lifting. Under his examination section of his report, there is nothing noted as to measurements obtained for these body parts. It appears that no examination had been performed on applicant's shoulders. In the discussion section of this report, the description of injury is mostly consistent with prior reporting, but for the first time, there is a notation that after the applicant was struck on the head by a falling weight, it "rebounded to the neck and right shoulder." (Applicant's Exhibit 34, page 7) Applicant reported to Dr. Haronian that she sustained injury to her head, neck, right shoulder, upper back and arm. Applicant reported complaints of neck pain radiating into the left upper extremity and bilateral shoulder pain with decreased range of motion and strength. Dr. Haronian reported that upon physical examination, there was spasm; - tenderness and guarding in the para vertebral musculature of the cervical and thoracic spine. He noted that the bilateral shoulders had impingement and Hawkins signs with range of motion in flexion and abduction to approximately 120 degrees. Dr. Haronian determined that there is reasonable indication of an

industrial injury to the neck and the shoulders. (Applicant's Exhibit 34, page 8) Despite these findings, this WCJ does not find the reporting of Dr. Haronian to be substantial medical evidence as it gives a different history of injury than reported by any other doctor and the applicant's testimony at trial, does not include a review of any other medical records in this case, and he does not review all the objective testing available at the time of the reporting. (See MOH/SOE, dated July 17, 2023, page 9, lines 23-25)

It should be noted that in two medical reports, there is an indication that during the period of applicant's modified work, specifically on either February 14 or 18, 2018, while building a case of champagne displays, she had an acute onset of pain in her left shoulder. The pain is reported to have been so severe that she was unable to lift her left arm anymore. (Defendants' Exhibit B, page 4 and Applicant's Exhibit 34, page 2) This appears to have been a new specific injury, however, this issue is not before this Court at this time and no determination regarding this injury will be made.

Finally, Dr. Fait issued one supplemental report dated October 18, 2021. In such report he reviewed the requested EMG/NCV conducted by Dr. Andrew Bullock. After reviewing the results of the testing, Dr. Fait found applicant to be permanent and stationary with factors of disability. He noted that applicant's neck condition is due to the injury of January 10, 2018. He noted there is no apportionment for her neck condition and gave work restrictions noting that if such restrictions could not be accommodated, applicant is a candidate for vocational rehabilitation. (Defendant's Exhibit A) Despite applicant's complaints to her bilateral shoulders and upper extremities, even with the EMG/NCV performed, Dr. Fait did not find that applicant suffered industrial injuries to these body parts independent of her neck injury. This WCJ now finds that the reporting of Dr. Fait as it pertains to applicant's orthopedic complaints is substantial medical evidence and gives great weight to his findings. Therefore, based on such reports, it is now found that applicant did not meet her burden to establish industrial injury to her bilateral shoulders and upper extremities for the date of injury January 10, 2018.

CARDIOVASCULAR AND HEART

Applicant alleges injury to her heart and cardiovascular issues. Defendant has denied this body part. Applicant looks to her diagnosis of anxiety and panic attacks as documented by her treating psychiatrists, Dr. Takamura and Dr. Signer as well as the PQME Dr. Sivtsov in support of her allegations of industrial injury to her heart and/or cardiovascular issues. Applicant credibly testified to her heart and cardio symptoms. Applicant indicated she suffers from panic attacks and her heart palpitates in her chest with an elevated heartbeat even at rest. (MOH/SOE, 8/30/23, page 5, lines 7-8) Applicant testified that Dr. Schweller did refer her to a cardiologist, however this was not approved. However, despite this denial, there appears to be no other efforts by the parties to procure the proper evaluators regarding applicant's alleged heart or cardio issues. There has been no evidence offered in the form of a panel QME in this specialty. It should be noted that any determinations made must be made within "reasonable medical probability". (See *City of Jackson v. Workers' Comp. Appeals Bd.,* 11 Cal. App. 5th 109, 216 Cal. Rptr. 3d 911, 82 Cal. Comp. Cases 437, 2017 Cal. App. LEXIS 383) Here, there has been no offer of any medical records documenting the industrial causation of any heart or cardiovascular issues. The burden of proving injury AOE/COE rests with the employee. The employer does not have the burden to disprove causation. (See *Mendoza v. Huntington Hospital* (2010) 75 CCC 634,644. See *Bradford v. WCAB* (2018) 83

CCC 1592 (writ denied)) Based on the evidence presented in this matter, applicant has failed to meet her burden of proof " as to an industrial injury to her heart and/or cardiovascular issues.

TRAUMATIC BRAIN INJURY

Applicant has alleged industrial injury to her brain in the form of a traumatic brain injury. It is noted that the parties have stipulated that applicant's brain is an accepted part of her injury. A review of the medical records of Dr. Thomas Schweller, the neurologist, clearly indicates that applicant suffers from a traumatic brain injury. However, as an independent body part, "traumatic brain injury" is not a specified body part, rather it is a diagnosis. (See, for example, Applicant's Exhibit 27, page 4; Applicant's Exhibit 24, page 2; Applicant's Exhibit 29, page 83) Therefore, based on the stipulation of the parties, applicant has met her burden of proof to establish an industrial injury to her brain, but diagnoses shall be deferred to the respective medical experts.

SLEEP LOSS

Applicant alleges she suffers from sleep loss due to her industrial injury. Both parties were given an opportunity to provide post-trial briefs. Although applicant's attorney has addressed the allegation of a sleep disorder, defendant has not addressed this issue at all.

Applicant presented to QME Dr. Sivtsov as the qualified medical evaluator in psychology. (Applicant's Exhibit 29) In his initial report dated 4/20/2020, Dr. Sivtsov indicates testing of the applicant on the Epworth Sleepiness Scale was in the abnormal range, specifically a score of 16, indicating issues with daytime alertness. Dr. Sivtsov had the ability to review the medical records of the applicant, including those of treating psychologists and neurologists. Dr. Sivtsov indicates applicant presents with seriously disturbed sleep. (Applicant's Exhibit 29, page 85) Applicant presented for a re-evaluation with Dr. Sivtsov on April 12, 2012. (Defendant's Exhibit H) At such time, applicant still had complaints of issues with sleep. (Defendant's Exhibit H, page 5) Another Epworth Sleep Scale was performed which again showed a score of 16, which is abnormal and indicated issues with daytime alertness. (Defendant's Exhibit H, page 10) During this evaluation, Dr. Sivtsov updated his review of medical records of the applicant. In such review, specifically in the records of Dr. Schweller, applicant has complaints of sleep disturbance. Due to these complaints, applicant engaged in a sleep study. Dr. Sivtsov reviewed the overnight sleep study. (Defendant's Exhibit H, page 44) The testing indicated the self-reporting of applicant's problems. It further indicated the applicant tolerated the overnight study well. The results of the sleep study indicate no evidence of significant obstructive sleep apnea. The impression of the study further indicated applicant should follow-up with a sleep specialist for evaluation of other sleep disorders. However, there are no conclusions found in either the review of records performed by Dr. Sivtsov or any other doctor addressing causation for any of applicant's sleep disorder/sleep disturbance. Furthermore, applicant's complaints regarding her psychiatric issues, an accepted body part, applicant alleges her symptoms consist of nightmares and sleep disturbances, such that her sleep disturbance does not appear to be an independent body part or system from her psychiatric complaints. (MOH/SOE, 7/17/23, page 15, lines 8-9) This is further substantiated by the reporting of Dr. Signer who indicated applicant suffered from recurrent nightmares consisting of gory and violent dreams. As such, since it is applicant's burden to prove causation, this WCJ now finds that applicant has failed to meet such burden such that applicant's sleep disorder is found non-industrial.

INTERNAL/DIGESTIVE

Applicant is alleging industrial injury to her internal system indicating she suffers from digestive issues. She contributes her digestive issues to the side effects of the medications. She had stomach pain, indigestion and cramps when taking all of her medications, including her pain killers. Applicant credibly testified that in January of 2022 she had sudden, sharp pains in her stomach. The doctors told her this is related to the medications she takes. Dr. Toliver gave her Omeprazole which was much milder and gentler on the stomach, however she still had issues so she has to stay on Omeprazole. (MOH/SOE, 8/30/34, page 5, lines 19-24)

Although applicant has credibly testified to her stomach and digestive system, it appears that applicant has not presented to an internist to address these issues. Again, QME Dr. Sivtsov reviewed prior treating physician and evaluators reports. In such review, it is apparent that applicant was asked by each doctor what her current complaints were at the time of each evaluation. Applicant did not appear to have complaints regarding her internal or digestive issues and never reported such complaints to any of her doctors or evaluators throughout the course of her treatment. Rather the only comment this WCJ could find regarding such complaints is found under the "Discussion and Formulation" section of Dr. Sivtsov's report wherein he comments that applicant discontinued the medications from Dr. Signer mainly due to the lack of improvement in the ensuing five months, as well as the side-effects. (Defendant's Exhibit H, page 53) While it may be that applicant suffered from the side-effects of her medication, there is no substantial medical evidence addressing the causation of any of these issues in which this WCJ may rely upon to make any determination regarding this issue. Again, it is applicant's burden to prove industrial causation and without any substantial medical evidence to establish such causation, the only conclusion on this issue based on the current evidentiary record is that applicant has failed to meet such burden. Therefore, this WCJ now finds applicant has failed to meet her burden of proof to establish industrial injury to her internal/digestive system for this industrial injury.

PERMANENT AND STATIONARY DATE

Applicant claims she became permanent and stationary on January 25, 2020, when she began to receive PDAs as well as the medical record. Defendant contends the proper date of permanent and stationary is October 18, 2021, based on the reporting of Dr. Fait and Dr. Hagstrom.

Applicant argues that the correct date should be from January 25, 2020, because after such date applicant appeared to not have improved regarding her condition despite continued treatment. Furthermore, applicant alleges her condition had already plateaued at the time she presented to Dr. Schweller.

Defendant bases their argument of a date of October 18, 2021, on the reporting of Dr. Fait and Dr. Hagstrom. However, it should be noted that Dr. Hagstrom found applicant permanent and stationary on September 24, 2020.

It should be noted that a proper date for permanent and stationary status is when applicant plateaus for all accepted industrial body parts, not piecemeal. Here, applicant has accepted industrial injuries to multiple body parts. It is apparent from the medical reporting that Dr. Hagstrom, the dentist, in this matter was actively treating the applicant until he found her condition permanent and stationary on September 24, 2020. As for her psychiatric condition, Dr. Signer deferred to her primary treating physician for her work status. Dr. Edwin Haronian indicated that

on an orthopedic basis, applicant was permanent and stationary on November 18, 2020. In his report of April 12, 2021, QME Dr. Sitsov indicated that applicant was found permanent and stationary since the date of such evaluation and was ready to be rated at such time. When Dr. Takamura took over her psychiatric treatment in January of 2022, applicant's psychiatric condition remained permanent and stationary. (Defendant's Exhibit C) Regarding applicant's orthopedic complaints, applicant presented to Dr. Fait in the capacity of a qualified medical evaluator. During his first evaluation, Dr. Fait found applicant on an orthopedic basis was not permanent and stationary. (Defendant's Exhibit B) However, Dr. Fait was given the opportunity to review further medical records including diagnostic testing. He found the applicant, on an orthopedic basis to be permanent and stationary at the time of his supplemental reporting on October 18, 2021. As it pertains to applicant's eyes/vision, applicant presented to Dr. Bokosky in the capacity of a QME for her eye injury. Dr. Bokosky found applicant permanent and stationary for her vision injury on December 8, 2019, but found her vision issues were a result of the traumatic brain injury. After a review of the records from Dr. Gregory Hayes as well as the self-procured medical treatment with Dr. Zelensky, Dr. Bokosky did not change any of his opinions. A review of the reports from applicant's primary treating physician, Dr. Thomas Schweller, indicates applicant became permanent and stationary with regards to her neurological issues on February 8, 2022. (Joint Exhibit 101). Based on a review of the treating doctors as well as the medical-legal evaluations, applicant's final permanent and stationary date is February 8, 2022, where she was found to have plateaued at the time of this evaluation with her primary treating physician.

PERMANENT DISABILITY/APPORTIONMENT

Applicant contends that she is permanently totally disabled in accordance with Labor Code §4662(b). Defendant argues that applicant is not 100% disabled as the medical evaluators' impairments do not add up to such. Furthermore, the defendant indicates that the medical evaluators have not reviewed the vocational rehabilitation reports.

The evidentiary record consists of the reporting of the medical evaluators as well as the rep01iing from two different vocational rehabilitation counselors. Applicant first presented to Mark Remas, vocational consultant on May 27, 2022. (Applicant's Exhibit 28) Mr. Remas noted that applicant attempted to return to work but was unable to do so and has not returned to work since March of 2018. Mr. Remas performed a thorough vocational evaluation, including testing with a transferable skills analysis, conducted labor market research, as well as reviewed the medical reporting. When the applicant underwent this evaluation, the case of *Nunes* had not been issued. In his reporting, Mr. Remas has indicated applicant's work status, including her collection of Social Security Disability benefits, her self-reporting of migraines, and the medications she takes. He noted applicant's limitations in her activities of daily living and reviewed her medical records. Based on the findings in the medical reporting, including the indication from Dr. Schweller and other providers who indicated that applicant is totally disabled, Mr. Remas found that applicant is unemployable and not amenable to vocational rehabilitation. These findings were substantiated by applicant's inability to maintain persistence and pace in a work environment, and her lack of capacity to sustain work or engage in routine work activity. (Applicant's Exhibit 28, page 26)

Although the *Nunes* case issued after the reporting from Mr. Remas in this matter, it appears that such En Banc decision is not relevant in this matter as all medical providers have

determined that any and all permanent impairment in which the applicant currently suffers from is 100% apportioned to this date of injury. The matter of *Nunes* has made it clear that Labor Code §4663 authorizes and requires that apportionment determinations are to be made by *evaluation physicians.* (*Nunes (Grace) v. State of California, Dept. of Motor Vehicles,* 88 Cal. Comp. Cases 894 (Cal. Workers' Comp. App. Bd. August 29, 2023)) Although Mr. Remas does comment on "vocational apportionment", he has followed such apportionment determinations of the medical reports in this matter such that he found that no vocational apportionment is relevant in this case. Furthermore, in conjunction with the findings in *Nunes,* the vocational reporting from Mr. Mark Remas was reviewed and adopted by applicant's primary treating physician, Dr. Thomas Schweller and secondary treater, Dr. Lyons. (Applicant's Exhibits 1 & 31, respectively)

Applicant additionally presented to Mr. Keith Wilkinson in the capacity of a vocational expert for the defendant. (Joint Exhibit 102) Mr. Wilkinson 'indicated that his assig1m1ent was to determine whether the applicant was so disabled by the permanent impairments caused by her injuries that she is not amenable to vocational rehabilitation and cannot compete in the open labor market. Mr. Wilkinson relied on a comprehensive vocational examination of the applicant and a review of the medical file and collateral data. (Joint Exhibit 102, page 4) Based on his consideration of the medical and vocational evidence presented, including his review of Mr. Remas' report, Mr. Wilkinson determined the applicant is so disabled by the permanent neurological and psychiatric impairments caused by the date of injury of 01/10/2018 that she is not amenable to vocational rehabilitation. He further determined that the applicant is incapable of participating in and sustaining part-time or full-time employment in the open labor market, thus meeting the criteria for total disability under *LeBoeuf* and Labor Code §§4660 & 4662. After a review of the medical records as well as his evaluation of the applicant, Mr. Wilkinson determined based on the reporting of Drs. Sivtsov, Zelinsky, Lyons and Schweller, applicant does not retain the neurological or psychological capacity to work. Furthermore, applicant cannot sustain the necessary concentration and pace on a competitive level. Applicant would not be able to maintain the necessary ability to work each day, on time, as scheduled, on the required shift. Applicant also suffers from cognitive slowing, as well as other cognitive issues which, from a vocational perspective, would complicate and prevent her from being able to work on a reliable basis due to the affected productivity, disruption of work continuity, fatigue, pain and issues with presentation. Although applicant may fit into one occupational match, paper-pattern folder, Mr. Wilkinson still determined that this occupational match was not appropriate based on applicant's psychological limitations wherein she suffers from cognitive slowing and mental decline. Furthermore, based on applicant's physical limitations due to her blurred vision, noise, light sensitivity, dizziness, vertigo, fatigue and large muscle spasms. Mr. Wilkinson additionally noted that applicant would be unable to successfully set up a job search plan and would be unable to attend interviews. (Joint Exhibit 102, page 7) Furthermore, applicant would not be able to tolerate on-the-job training, nor would she be able to participate in a lot of the retraining programs due to the fact that most of the trainings occur on a computer, which applicant is severely limited in her ability to work on a computer. Finally, just like Mr. Remas noted, applicant is not a reliable candidate for work in that her condition further limits her reliability to show up to work in a consistent manner.

It should be noted that Mr. Wilkinson's report is dated January 26, 2023. Mr. Wilkinson noted in his report that he must consider medical apportionment and cam1ot disagree with the evaluations for apportionment as documented. His report is dated prior to the *Nunes* case. However, even with the findings of *Nunes* post reporting, Mr. Wilkinson's reporting still complies with current vocational apportionment determinations in that his report states that he cannot

identify vocational apportionment without speculation in this matter as there is no evidentiary foundation for any apportionment as all the medical providers have determined applicant's permanent impairment is 100% apportioned to the 01/10/2018 date of injury. Mr. Wilkinson's report, just like the findings in Mr. Remas' report finds no apportionment, consistent with the determination in the medical records in this matter and consistent with current case law.

Dr. [Sivtsov], in his Panel QME Re-Evaluation dated April 12, 2021, indicated that at that time, applicant was not ready to join the workforce due to abnormally low GAF score. (Defendant's Exhibit H) Dr. Schweller, in his report dated June 20, 2022, indicated that applicant has a combination of physical and psychiatric impairments, chronic pain disorder and vision impairments that make her unemployable. She is permanently totally disabled from an employment perspective. (Applicant's Exhibit 1) Furthermore, in Dr. Schweller's permanent and stationary report states that applicant has a "Total disability: it appears to me that the C combination of physical and psychiatric impairments, chronic pain disorder and vision impairments make this woman unemployable, totally disabled from an employment perspective and she requires assistance in her activities of daily living especially needing someone to help her with activities involving running or maintaining her home, as well as assisting her in activities where she would be likely to provoke episodes of pain or vertigo." Dr. Lyons indicated in his 8/10/2022 report that he reviewed the Vocational Evaluation Report of Mark Remas and was in complete agreement with his assessment. (Applicant's Exhibit 31)

For completeness, defendant has attempted to argue that applicant's testimony at trial regarding her limitations are inconsistent with the symptoms she reported experiencing. Defendant argues that applicant testified in a coherent and concise manner and did not show any signs of difficulty with clear thinking or focus. First, this WCJ finds that applicant is credible and finds no inconsistencies with her testimony and the medical records. Second, applicant credibly testified 1) that her ability to appear at medical appointments came with the caveat that she had missed appointments, 2) she needs assistance in remembering to take her medications, and 3) cannot perform all activities of daily living without assistance. In addition, it was noted that the first day of trial lasted less than one hour and the second day of trial lasted approximately 1.5 hours. Therefore, defendant's contention that applicant's presentation during trial appeared to be inconsistent with the symptoms she reported experiencing is not substantiated.

Cal. Labor Code §4662 states, in relevant part:

(a) Any of the following permanent disabilities shall be conclusively presumed to be total in character:

(1) Loss of both eyes or the sight thereof.
(2) Loss of both hands or the use thereof.
(3) An injury resulting in a practically total paralysis.
(4) An injury to the brain resulting in permanent mental incapacity.

(b) In all other cases, permanent total disability shall be determined in accordance with the fact.

Based on the vocational experts reporting as well as the medical determinations of applicant's treating physicians, this WCJ now finds in accordance with Labor Code §4662(b), applicant is permanently totally disabled.

Furthermore, Cal. Labor Code §4659 states, in relevant part:

(b) If the permanent disability is total, the indemnity based upon the average weekly earnings determined under Section 4453 shall be paid during the remainder of life.

(c) For injuries occurring on or after January 1, 2003, an employee who becomes entitled to receive a life pension or total permanent disability indemnity as set forth in subdivisions (a) and (b) shall have that payment increased annually commencing on January 1, 2004,, and each January 1 thereafter, by an amount equal to the percentage increase in the. "state average weekly wage" as compared to the prior year. For purposes of this subdivision, "state average weekly wage" means the average weekly wage paid by employers to employees covered by unemployment insurance as reported by the United States Department of Labor for California for the 12 months ending March 31 of the calendar year preceding the year in which the injury occurred.

Here, applicant has exhausted 104 weeks of temporary total disability indemnity with the last date of payment being January 24, 2020. Applicant has now been found to be 100% permanently, totally disabled. In accordance with the *En Banc* decision in **Brower v. David Jones Construction** (2014) 79 CCC 550, the PTD benefits should be paid starting from the last date of temporary disability indemnity. Applicant received TTD benefits up and through January 24, 2020. Therefore, the start date for permanent total disability indemnity for the applicant is January 25, 2020.

As for whether or not defendant has met their burden of proof to establish apportionment, it appears that most of the medical evaluators in this case have found that the applicant's disability is 100% apportioned to this industrial injury. This is found in the reporting of Dr. Haronian, Dr. Sivtsov, Dr. Fait, and Dr. Hagstrom. Therefore, defendant has failed to meet their burden of proof to establish apportionment.

ENTITLEMENT TO PSYCHE PERMANENT DISABILITY PER LC §4660.l(b)&(c)

Applicant contends permanent impairment based on Labor Code §4660.1 (b)&(c).Defendant disagrees with this argument, stating applicant is not entitled to an increase in permanent disability.

Cal Labor Code §4660.1 states, in relevant part,

This section applies to injuries occurring on or after January 1, 2013.

(b) For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) with the employee's whole person impairment, as provided in the Guides, multiplied by an adjustment factor of 1.4.

(c)

> **(1)** Except as provided in paragraph (2), the impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury shall not increase. This section does not limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury.

> **(2)** An increased impairment rating for psychiatric disorder is not subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following:
>
> > **(A)** Being a victim of a violent act or direct exposure to a significant violent act within the meaning of Section 3208.3.
> > **(B)** A catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury.

Although it has already been determined that applicant is found to be permanently, totally disabled, this issue has been raised at trial and therefore will be addressed accordingly. When determining whether or not applicant would be entitled to an increase in permanent disability in accordance with Labor Code §4660.l in the current matter, the facts of the case shall be addressed and applied accordingly. Here, applicant's injury is post- January 1, 2013, thus this statute does apply. In order for applicant's permanent impairment to be subject to an increase for her accepted psyche claim, applicant must show that her psychiatric injury resulted from either being a victim of a violent act or direct exposure to a significant violent act or a catastrophic injury, including but not limited to, loss of limb, paralysis, severe burn, or severe head injury. In the case at hand, and in accordance with the medical evidence in this case, applicant has suffered a severe head injury. This is clearly substantiated by the findings of applicant's neurologist, psychologist, dentist, and pain management doctors. Therefore, applicant's impairment for her psychiatric disorder falls within the exception of Labor Code §46601.(c)(2)(B) such that an increase of impairment would apply. However, applicant has already been found to be permanently, totally disabled such that she is at the maximum of 100% disabled.

NEED FOR FURTHER MEDICAL TREATMENT

In accordance with the medical reports of applicant's primary treating physician, secondary treating physicians and the QMEs in this matter, the Court finds that applicant is in need of future medical care to cure or relieve from the effects of the injury herein.

LIABILITY FOR SELF PROCURED MEDICAL TREATMENT

Applicant has produced medical billing and reporting from the treatment she received from Dr. Deborah Zelinsky at The Mind-Eye Institute, LLC in Northbrook, Illinois regarding treatment she received relating to this accepted industrial injury. Defendant has correctly argued that they provided treatment with Dr. Hayes for her ophthalmological injury such that there has been no denial of care such that applicant could procure treatment outside of their valid MPN. Although applicant takes the position that the treatment for her vision was not being addressed by Dr. Hayes, this WCJ disagrees. While the treatment itself may not have been helpful, that is not the standard to allow the applicant to treat outside the MPN. Applicant was not referred to Dr. Zelinsky by any provider in the California Workers' Compensation system, nor was this treatment ever authorized by the defendant in this matter. While the treatment may have been helpful for the applicant, this treatment was not obtained properly through the system, Dr. Zelinsky was not a part of the defendant's MPN, applicant has not established that defendant's MPN was not a valid MPN, nor has applicant established any justifiable exception to why this treatment should be paid by the defendant. Therefore, defendant is not liable for the self-procured medical treatment obtained with Dr. Zelinsky and/or The Mind-Eye Institute, LLC.

ATTORNEY'S FEES

The reasonable value of services of the Applicant's Attorney is 15% of the permanent disability indemnity, which equates to a fee of $334,413.15 to be commuted from the side of the Award and in accordance with the Commutation attached hereto. The Court to maintain jurisdiction over any disputes arising out of the amount of attorney's fees to be awarded.

DATE: April 17, 2024

Alicia Hawthorne
Workers Compensation Judge