WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GHENET UKBAMICHAEL, *Applicant*

vs.

ST. JOHN'S WELL CHILD & FAMILY CENTER; ATHENS ADMINISTRATORS, *Defendants*

Adjudication Numbers: ADJ11027585 & ADJ11027586
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Joint Findings and Award (F&A) of March 11, 2024, wherein the workers' compensation judge (WCJ) found in relevant part that: applicant sustained injury arising out of and in the course of employment (AOE/COE) to her lumbar spine, with sacroiliac involvement, psyche, and internal in the form of hypertension, upper GI and lower GI in ADJ11027585 and sustained injury AOE/COE to her cervical spine, psyche, and internal in the form of hypertension, upper GI and lower GI in ADJ11027586; she has been adequately compensated for all periods of temporary disability; the injuries caused permanent disability of 43% equal to 222 weeks of indemnity payable at the rate of $290.00 per week in the total sum of$64,380.00, payable beginning June 18, 2019, less attorney's fees; she is in need of further medical treatment to cure or relieve from the effects of the industrial injury herein to her lumbar spine, cervical spine, psyche, and internal in the form of hypertension, upper GI and lower GI; and she is not precluded from competing in the open labor market. The WCJ awarded applicant permanent partial disability of 43% in the total amount of $64,380.00 payable at the rate of $290.00 per week beginning June 18, 2019, less attorney's fees; further medical treatment for her lumbar spine, cervical spine, psyche, and internal in the form of hypertension, upper GI and lower GI; and reasonable attorney's fee of $9,657.00.

Applicant contends that the evidence does not support the finding that applicant is not entitled to psychiatric permanent disability indemnity; that applicant is entitled to an increase in the impairment rating for her psychiatric injury; that defendant did not meet their burden on apportionment; and that defendant has not proved that applicant is able to compete in the open labor market for employment.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Reconsideration, rescind the F&A, substitute a new Findings of Fact, and return this matter to the WCJ for further proceedings. We will incorporate the Report except that we will not incorporate the discussion as to psychiatric permanent disability (Report, p. 8, ¶¶ 2 and 3).

DISCUSSION

Applicant contends that she is entitled to an increase in the impairment rating for her psychiatric injury because the injury was catastrophic pursuant to Labor Code[1] section 4660.1(c)(2)(B). The issue was raised at trial, and the WCJ concluded that applicant's psychological disability arose out of her compensable physical injury and did not result from an exception in section 4660.1(c)(2). (Report, p. 8.)

In addition to establishing an industrial injury by a preponderance of the evidence, applicant has the burden of proving, by a preponderance of the evidence, both the overall level of permanent disability and that at least some of this permanent disability was industrially caused. (Lab. Code, §§3202.5, 5705; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc).)

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

For injuries occurring after January 1, 2013, the Labor Code provides:

> (a) In determining the percentages of permanent partial or permanent total disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and the employee's age at the time of injury.
>
> (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.

(Lab. Code § 4660.1(a)-(c).)

Section 4660.1(c)(1) only bars an increase in the employee's permanent impairment rating for a psychiatric injury that is a compensable consequence of a physical injury occurring on or after January 1, 2013, but the employee may receive an increased impairment rating for a compensable consequence psychiatric injury if the injury falls under one of the statutory exceptions outlined in section 4660.1(c)(2). (*Wilson v. State Cal Fire* (2019) 84 Cal.Comp.Cases 393, 403 (Appeals Board en banc).) The two exceptions are being a victim of a violent act or direct exposure to a significant violent act; and a catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury. (Lab. Code § 4660.1(c)(2)(A)-(B).)

The inquiry into whether an injury is catastrophic is limited to looking solely at the physical injury, without consideration for the psychiatric injury in evaluating the nature of the injury; the

injury must therefore be deemed catastrophic independent of the psychiatric injury. (*Wilson, supra*, 84 Cal.Comp.Cases at p. 414.) Whether an injury is "catastrophic" under section 4660.1(c)(2)(B) is a factual/legal issue for the WCJ to determine. (*Id.* at p. 414.)

There are factors the trier of fact may consider in determining whether an injury may be deemed catastrophic. These factors include, but are not limited to, the following, as relevant:

> 1. The intensity and seriousness of treatment received by the employee that was reasonably required to cure or relieve from the effects of the injury.
>
> 2. The ultimate outcome when the employee's physical injury is permanent and stationary.
>
> 3. The severity of the physical injury and its impact on the employee's ability to perform activities of daily living (ADLs).
>
> 4. Whether the physical injury is closely analogous to one of the injuries specified in the statute: loss of a limb, paralysis, severe burn, or severe head injury.
>
> 5. If the physical injury is an incurable and progressive disease.
>
> (*Wilson, supra*, 84 Cal.Comp.Cases at p. 415.)

"The WCJ, after considering all the medical evidence, and other documentary and testimonial evidence of record, must determine whether the injury is 'catastrophic' under section 4660.1(c)(2)(B)." (*Wilson, supra*, 84 Cal.Comp.Cases at p. 414.)

Here, the WCJ stated in the Opinion on Decision that:

> Applicant sustained a psychological industrial injury which arose out of physical injury to her lumbar spine and cervical spine and is entitled to further psychiatric medical treatment to cure and relieve from the effects of both injuries.
>
> Applicant is not entitled to an increase in permanent disability for her psychiatric disorder pursuant to Labor Code 4660.1(c)(1) as her psychological disability arises out of compensable physical injury and did not result from the exceptions listed under Labor Code 4660.1(c)(2).
>
> Applicant has failed to provide evidence to establish entitlement to an increase based on the exceptions codified in Labor Code Section 4660.1(c)(2).

Thus, it is apparent that her decision failed to include a discussion of the factors as outlined in *Wilson, supra*.

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on a threshold issue. (Lab. Code, §§ 5701, 5906; *Nunes (Grace) v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 752; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; *McDonald v. Workers' Comp. Appeals Bd., TLG Med. Prods.* (2005) 70 Cal.Comp.Cases 797, 802.) The Appeals Board has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403.)

Sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141-143 (Appeals Bd. en banc).) The Appeals Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall, supra*, 79 Cal.App.4th at p. 404.) Therefore, upon return to the WCJ, we recommend that the record be developed so that the WCJ can determine whether applicant's injury was catastrophic pursuant to section 4660.1(c)(2)(B).

Accordingly, we grant applicant's Petition for Reconsideration, rescind the F&A, substitute new Findings of Fact, and return this matter to the WCJ for further proceedings consistent with this opinion, including a proper analysis pursuant to the factors in *Wilson*, *supra*.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the March 11, 2024 Joint Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the March, 11, 2024 Joint Findings and Award is **RESCINDED,** the following new Findings of Fact is **SUBSTITUTED** in its place, and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion:

JOINT FINDINGS OF FACT

1. In ADJ11027585, Ghenet Ukbamichael, while employed on October 14, 2015, as a physician's assistant, Occupational Group Number 212, at Los Angeles, California, by St. John's Well Child & Family Center, Permissibly Self-Insured, administered by Athens Administrators sustained injury arising out of and in the course of employment to her lumbar spine, with sacroiliac involvement, psyche, and internal in the form of hypertension, upper GI and lower GI.

2. In ADJ11027586, Ghenet Ukbamichael, while employed on December 31, 2015, as a physician's assistant, Occupational Group Number 212, at Los Angeles, California, by St. John's Well Child & Family Center, Permissibly Self-Insured, administered by Athens Administrators sustained injury arising out of and in the course of employment to her cervical spine, psyche, and internal in the form of hypertension, upper GI, and lower GI.

3. As stipulated by the parties, Applicant has been adequately compensated for all periods of TD. Specifically, Applicant was paid temporary disability compensation at the weekly rate of $1,172.57 for the period of June 17, 2017 through June 17, 2019 for a total of 104 weeks in the total amount of $126,800.25.

4. The issue of permanent disability is deferred.

5. The exception outlined in *Benson v. Workers' Comp. Appeals Bd.* (2009) 74 Cal.Comp.Cases 113 applies and results in a joint award for both dates of injury because some aspects of the industrially caused permanent disability from Applicant's two injuries couldn't be parceled out because the disability for the hypertension, upper GI, and lower GI was inextricably intertwined.

6. Applicant is in need of further medical treatment to cure or relieve from the effects of the industrial injury herein to her lumbar spine, cervical spine, psyche, and internal in the form of hypertension, upper GI, and lower GI.

7. Applicant is not precluded from competing in the open labor market.

8. St John's Well Child & Family Center, Permissibly Self-Insured administered by Athens Administrators is ordered to administer the award.

9. The issue of attorney's fees is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 28, 2024

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

GHENET UKBAMICHAEL
MOORE AND ASSOCIATES
GOLDMAN MAGDALIN STRAATSMA, LLP

JMR/mc

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION
(FILED BY APPLICANT'S ATTORNEY ON MARCH 29, 2024)

INTRODUCTION

Applicant filed a timely, verified, Petition for Reconsideration on March 29. 2024, challenging the Findings and Award (F&A) that issued on March 11, 2024 in the above- referenced matters.

Ghenet Ukbamichael (hereinafter "Applicant") worked as a physician's assistant, Occupational Group Number 212, at Los Angeles, California, by St. John's Well Child & Family Center, Permissibly Self-Insured, administered by Athens Administrators. While so employed she sustained two industrial injuries: a specific injury on October 14, 2015, assigned ADJ11027585, to her lumbar spine, with sacroiliac involvement, psyche, and internal in the form of hypertension, upper GI and lower GI; and, a specific injury on December 31, 2015, assigned ADJ11027586, to her cervical spine, psyche, and internal in the form of hypertension, upper GI and lower GI.

On May 3, 2023 the parties initially tried this case before the undersigned Workers' Compensation Judge, the stipulations and issues were framed, applicant provided testimony, and after time for submission of post-trial briefs the matters were jointly submitted on June 2, 2023. The issues included parts of body injured, permanent disability, apportionment, need for future medical treatment, attorney fees, whether applicant is permanently and totally disabled pursuant to Labor Code section 4662(b), whether applicant is entitled to psychiatric permanent disability alleged as a compensable consequence of her physical injuries based upon Labor Code section 4660.1, and whether the applicant's injuries were catastrophic as per Labor Code section 4660.1(c)(2).

Thereafter the Appeals Board issued two en banc decisions in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal. Comp. Cases 741 (Appeals Board en banc opinion) ("*Nunes I*") and 88 Cal. Comp. Cases 894 (Appeals Board en banc opinion) ("*Nunes II*"). The *Nunes* decisions had an effect on the matters herein and thus on August 9, 2023 the undersigned WCJ issued an Order Vacating the previous submission and placed the matters back on calendar for Trial on September 6, 2023.

At the September 6, 2023 Trial discovery was "REOPENED SOLELY AS TO THE VR REPORTING AND PARTIES WERE PERMITTED TO OBTAIN ONE SUPPLEMENTAL FROM EACH OF THEIR RESPECTIVE VR CONSULTANTS ADDRESSING THE ISSUES RAISED/SET FORTH IN THE RECENT NUNES EN BANC DECISION[S]."

The matter came back on the Trial calendar on December 13, 2023 at which time the parties each offered a supplemental vocational rehabilitation report[1] in support of their respective positions and the reports admitted into evidence without objection, no further testimony was offered, and the matter was once again submitted.

Thereafter, the undersigned Judge issued the joint F&A finding Applicant sustained two industrial injuries: in ADJ11027585 for the October 14, 2015 specific to her lumbar spine, with sacroiliac involvement, psyche, and internal in the form of hypertension, upper GI and lower GI; and in ADJ11027586 for the December 31, 2015 specific to her cervical spine, psyche, and internal in the form of hypertension, upper GI and lower GI; that, based upon the findings of the internal PQME who finds the applicant's industrial internal injuries are inextricably intertwined, and thus all permanent disability resulting from both industrial injuries are inextricably intertwined as per *Benson v. Workers' Comp. Appeals Bd*. (2009) 74 Cal. Comp. Cases 113, the permanent disability for both industrial injuries totals 43%, further medical care is necessary, the reasonable value of services rendered by applicant's attorney is $9,657.00 which shall be commuted from the final weekly payments of the award to the extent necessary to pay as one lump sum, that Applicant has failed to meet her burden in sustaining a finding that she is permanently and totally disabled as per Labor Code 4662(b), that pursuant to Labor Code 4660.1(c)(1) as applicant's psychological injury is a compensable consequence of the orthopedic injuries to the lumbar and cervical spine injuries and did not result from the exceptions listed under Labor Code 4660.1(c)(2), and that applicant has failed to provide evidence to establish entitlement to an increase based on the exceptions codified in Labor Code Section 4660.1(c)(2) as applicant has failed to prove that applicant's injuries were catastrophic.

[1] Although each party obtained a supplemental report from their respective vocational rehabilitation experts, neither party requested and they both specifically rejected the WCJ's offer (made off the record at the September and December Trials) for the parties to obtain a medical review of the VR reporting (as non-industrial apportionment was provided by all of the reporting physicians and, as set forth in *Nunes II*, vocational evidence must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment).

Applicant now asserts the following three questions challenging the decision set forth in the F&A: (1) did the defendants prove that the applicant is barred from an Award of psychiatric permanent disability; (2) did the defendant prove apportionment; and, (3) did the defendant prove that the applicant is capable of competing for employment in the open labor market? (Petition for Reconsideration, 5:10-14).

STATEMENT OF RELEVANT FACTS

Applicant sustained industrial injury to her lumbar spine while assisting a patient during an examination on October 14, 2015 and to her cervical spine and left upper extremity on December 31, 2015 when a child tripped the applicant within an examination room (though the applicant never provided any testimony as to the mechanism of this second injury). The applicant had lumbar decompression surgery and thereafter required a revision surgery. (Minutes of Hearing/Summary of Evidence 9:22-10:10, EAMS ID# 77455273). Applicant had worked from the date of the first injury until the first surgery in 2017 and has not returned to work since. (Id., at 9:19-21, 10:11-20) Applicant attempted but did not pass a recertification examination to keep her PA license after the second surgery in 2019. (Id., at 10:17-20, 12:4-11).

DISCUSSION

Applicant contends, based upon the stipulations set forth in the Minutes of Hearing/Summary of Evidence dated May 2, 2023, that: (1) the burden to prove entitlement to (or that applicant is barred from) an Award of psychiatric permanent disability is with the defendant; (2) defendant failed to prove apportionment; and, (3) the burden to prove that applicant is capable of competing for employment in the open labor market is with the defendant.

RECONSIDERATION OR REMOVAL

Is Applicant's Petition filed on March 29, 2024 a Petition for Reconsideration or a Petition for Removal? Removal is an extraordinary remedy that may be requested to challenge interim and non-final orders issued by a workers' compensation judge. (*Cortez v. Workers' Compensation Appeals Board* (2006) 136 Cal. App. 4th 596, 600, fn 5; *Kleeman v. Workers' Compensation Appeals Board* (2005) 127 Cal. App. 4th 274, 281, fn 2). The petitioning party must demonstrate that substantial prejudice or irreparable harm will result if removal is not granted (8 CCR

10955(a)) and that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. A Petition for Reconsideration on the other hand is the appropriate mechanism to challenge a final order, decision, or award. (Labor Code Section 5900). An order that resolves or disposes of the substantive rights and liabilities of those involved in a case is a final order. (*See Maranian v. Workers' Compensation Appeals Board* (2000) 81 Cal. App. 4th 1068; Safeway Stores, Inc. v. Workers' Compensation Appeals Board (Pointer) (1980) 104 Cal. App. 3d 528).

The instant Petition involves Applicant's objection to this WCJ's Findings & Award and Opinion on Decision specifically relating to the issues of psychiatric permanent disability, apportionment, and permanent total disability. The Findings & Award is a final order and therefore Reconsideration is the proper mechanism to challenge this Court's Findings & Award and Opinion on Decision

Did The Defendants Prove That The Applicant Is Barred From An Award Of Psychiatric Permanent Disability / Is Applicant Is Entitled To An Increase In The Impairment Rating For Her Psychiatric Injury

Applicant misstates the stipulations and issues entered into the parties in these matters. Specifically Applicant's Petition for Reconsideration asserts that the parties stipulated "that the applicant sustained psychiatric permanent disability in varying amounts per the opinions of Cynthia Mothersole and Matthew Ryan Depending on which psychologist's opinion is adopted, the applicant's psychiatric permanent disability is either 41 % PD or 47% PD." (Petition for Reconsideration, 5:24-28 EAMS ID# 51180760).

Applicant fails to state the entirety of the Stipulations (specifically those numbered 10-12 in ADJ11027585 and 11-13 in ADJ11027586) nor accurately cites to the issues raised, specifically as to the claim for entitlement to psychiatric permanent disability (as set forth in numbered 7-9 in both ADJ11027585 and ADJ11027586). (Minutes of Hearing/Summary of Evidence 2:9-5:19, EAMS ID# 77455273)

There is in fact no stipulation by the parties that the applicant sustained psychiatric permanent disability. Such question was specifically set as a triable issue: whether the psychiatric industrial injury results in compensable psychiatric permanent disability when raised as a compensable consequence of the physical injuries with the applicant asserting entitlement and defendant denying entitlement. Applicant raised but also failed to support her claim that she would

be entitled to an Award of psychiatric permanent disability under any of the variously alleged mechanisms. (*Id*., issues 7-9 at 4:8-14 and 5:18-19).

In her Petition for Reconsideration Applicant argues that the burden of proof on whether the award of psychiatric permanent disability is with the defendant despite a correct citation that the party with the affirmative, as per Labor Code 5705, has the burden. The starting point as set forth in Labor Code 4660.1(c)(2) is not that the applicant has psychiatric permanent disability but applicant must support that she is entitled to same, when alleged as a compensable consequence of a physical injury, as a result of an exception.

Applicant asserts that "[o]nce the applicant satisfied her burden of proof regarding the existence of psychiatric permanent disability through the stipulation of the parties to the ratings of the two psychologists' opinions offered as evidence, without rebuttal of any sort, the burden shifts to the defendants to prove any affirmative defenses." (Petition for Reconsideration, 6:8-12 EAMS ID# 51180760) However, notwithstanding assertion to the contrary, Applicant has not satisfied her burden of proof regarding the existence of psychiatric permanent disability as, as noted above, though Applicant asserts that the parties stipulated to the psychiatric findings that each side relies upon, and the respective ratings of such reports, the Stipulations and Issues set forth by the parties and read into the record do not provide that the parties are in agreement and stipulate to the Applicant's entitlement psychiatric permanent disability.

The employee bears the burden of establishing the approximate percentage of permanent disability caused by the industrial injury. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc).) As Applicant’s injury occurred in 2015, her permanent disability must be determined pursuant to the law as set forth in Labor Code section 4660.1, which is applicable to injuries on or after January 1, 2013.

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[ ]

[ ]

The Applicant's assertion that Labor Code 4660.1(c)(1) results in psychiatric permanent disability without applying the 1.4 modifier was discussed at length with the parties at the Trial date before the matter proceeded on the record during our all day discussions reviewing the PTCS and again the morning that the matter first proceeded on the record. During both of those conversations between A/A, D/A and the WCJ, the WCJ specifically asked A/A if these positions had ever before proceeded to trial and decision on the merits issue. A/A specifically advised that it had not. During this WCJ's research into the issues between submission and vacating the initial submission, this WCJ became aware of the Order denying A/A's petition for writ of review issued by the Court of Appeal regarding the Appeals Board's decision addressing these issues and upholding WCJ Holmes' finding that the applicant's argument in his matter was unsupported. (See WCAB file ADJ11024874 *Sosa v Race Engineering, Inc*).

A/A failed to disclose the decisions of WCJ Holmes, the Appeals Board, and the Court of Appeal all of which predated this matter proceeding on the record and the A/A in the current matters is the same A/A who raised the issues in *Sosa*. It was not until the undersigned specifically referenced the Sosa case with the parties at the time of the September 6, 2023 Trial that A/A acknowledged same. As noted in those MOH, A/A was Ordered to serve the previous filings in the *Sosa* matter to D/A in these matters as they had not been previously disclosed by A/A.

A/A's failure to provide this WCJ with the information as to the outcome of a prior proceeding asserting the same issues that were denied as a matter of law coupled with A/A's failure to provide any distinction as to the WCAB's application of the law in the *Sosa* case versus the matters at hand, violates an attorney's duty to "be truthful at all times, including never to mislead a judge or judicial officer by false statement of fact or law" as set forth within subdivision d of the Business and Professions Code section 6068 as well as in Rule 3.3(1) of the California Rules of Professional Conduct.

Applicant's argument that the "increase" referred to in Labor Code 4660.1(c)(1) refers to the 1.4 multiplier was addressed at length within the Appeals Board's *Sosa* decision. Specifically the Board in *Sosa* confirmed that

> The statutory interpretation advocated by applicant would mark a substantive change in how permanent impairment is treated for sleep dysfunction, sexual dysfunction, or psychiatric disorders for injuries subject to section 4660.1. This construction contradicts both the digest's express characterization of the statutory amendments as "nonsubstantive" and the lack of any legislative history in AB 991 indicating that the Legislature intended to permit compensability for permanent impairment for these conditions, but without application of the 1.4 adjustment. Applicant's interpretation also conflicts with the Legislature's intent in enacting section 4660.1(c) as outlined in *Wilson*. (See *Wilson, supra*, 84 Cal.Comp.Cases at pp. 408-409 [the Legislature's intent in enacting SB 863 was to limit "add-ons" for sleep disorders, sexual disorders and, to a limited extent, for psychological disorders].) In the absence of legislative history indicating that the 2019 amendment to section 4660.1(c)(1) was more than a non substantive change or intended to reinstate compensability for permanent impairment for these conditions, applicant's contentions regarding the statutory amendment are unpersuasive. (emphasis added)
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> (*Sosa v. Race Engineering, Inc.*, 2022 Cal. Wrk. Comp. P.D. LEXIS 152 (Appeals Board noteworthy panel decision), writ den. sub nom. *Sosa v. Workers' Comp. Appeals Bd*. (2022) 88 Cal. Comp. Cases 127 (writ den.))

As this legal issue has previously been addressed on the Trial level in the *Sosa* matter, confirmed by the Appeals Board, and Writ was denied by the Court of Appeal, no further discussion is necessary as to the merits of the applicant's claim for psychiatric permanent disability based upon the record at hand as no legal or factual distinction has been made from the trial and Appeals Board opinions in *Sosa*.

Defendant Failed To Prove Apportionment

Applicant asserts that Defendant has failed to prove apportionment. As to the orthopedic aspects of the matter, the parties proceeded to Jeffrey Berman, MD as Agreed Medical Examiner in this matter. The opinions of an AME are entitled to substantial weight absent a showing that they are based on an incorrect factual history or legal theory, or are otherwise unpersuasive in light of the entire record. (See, e.g., P*ower v. Workers' Comp. Appeals Bd*. (1986) 179 Cal.App.3d 775; *Siqueiros v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 150 (writ denied).)

Though off-handedly asserted by Applicant without any specificity, legal, or factual argument or support, that the opinions of AME Berman do not constitute substantial evidence, no assertion of same was made at the time of Trial nor any time before the Petition for Reconsideration. (Petition for Reconsideration 16:6-11, EAMS ID# 51180760). Moreover, Applicant and Defendant did in fact Stipulate without any qualification to the rating of the AME reporting including the applicable apportionment. (Minutes of Hearing/Summary of Evidence 2:4-6 and 5:6-9 EAMS ID# 77455273)

As to the assertion first raised in Petition for Reconsideration that the reporting of Dr. Omrani does not constitute substantial evidence, no specific argument has been made as to what issues Applicant has with such reporting, including cross-examination testimony. Although the WCJ noted the scrivener's error in the Omrani reporting, the Decision finds such error supports the Applicant's offered rating of the Omrani reporting and not the Defendant's offered rating. Other than the scrivener's error wherein Dr. Omrani failed to include in his hypertension impairment summary at the bottom of page 55 the additional 3% WPI that he had analyzed and fully discussed two paragraphs above for a total 6% WPI, Applicant has set forth no support for her assertion that the reporting is not substantial, either on a legal or factual basis. (See Exhibit K, Bahman Omrani, DO dated 5/24/2019 EAMS ID# 45021031) This WCJ opines that the reporting constitutes substantial medical evidence despite the scrivener's error which was addressed by the WCJ in the Permanent Disability section of the Opinion on Decision.

The Burden To Prove That Applicant Is Capable Of Competing For Employment In The Open Labor Market Is With The Defendant

Labor Code 4662(a) provides for permanent disabilities that shall be conclusively presumed to be total in character none of which are applicable in this matter. Labor Code 4662(b) provides that "[i]n all other cases, permanent total disability shall be determined in accordance with the fact." It is subsection b of Labor Code section 4662 that is the basis for Applicant's assertion that she is permanently totally disabled though Applicant never specifies same in their argument.

Applicant's Petition for Reconsideration asserts that the support for her claim for permanent total disability is the opinion of vocational expert Nick Corso, Applicant's testimony, and Defendant's failure to disprove the opinions of Mr. Corso. (Petition for Reconsideration, 16:12-20:20 EAMS ID# 51180760)

Applicant's argument and evidence offered fails to comply with the law, even after the undersigned vacated submission and provided the parties the opportunity to obtain additional evidence in compliance with the Appeals Board's en banc *Nunes I and Nunes II* decisions. *(Supra*.). En banc decisions of the Appeals Board are binding precedent on

all Appeals Board panels and WCJs. (citations omitted)." *(Nunes (Grace) v. State of California, Dept. of Motor Vehicles,* (2023) 88 Cal. Comp. Cases 894, 896 (en banc) ("*Nunes II*").

> Turning to applicant's stated contentions, we begin with our holding that vocational evidence must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment. (Opinion, at p. 13.) Applicant contends our use of the term "valid" to describe the apportionment that must be considered by the vocational expert presupposes a prior legal determination as to the validity of the medical apportionment. (Petition, at p. 3:21.) **However, in order to constitute substantial evidence the opinions of both the evaluating physician as well as the vocational expert must detail the history and evidence in support of their respective conclusions, including "how and why" a condition or factor is causing permanent disability.** (Opinion, at p. 11; *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 611 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc) (*Escobedo*); s*ee also E.L. Yeager v. Workers' Comp. Appeals Bd*. (*Gatten*) (2006) 145 Cal. App. 4th 922 [71 Cal. Comp. Cases 1687].) (emphasis added)
>
> (*Nunes II* at 896)

As set forth in the Opinion on Decision in these matters, no unapportioned award is supported by the record offered. Each of the medical legal evaluators provided apportionment to non-industrial causation: as to Applicant's orthopedic injuries AME Berman opined that Applicant's lumbar spine disability is apportioned 10% to nonindustrial causation and Applicant's cervical spine disability is apportioned 25% to nonindustrial causation; Applicant's internal permanent disability is apportioned 50% to nonindustrial causation; and Applicant is not entitled to psychiatric permanent disability.

There are no claims for permanent disability that have not been opined by the medical experts to be due, in at least some part, to non-industrial causation.

As to the work restrictions provided by the medical legal examiners relied upon by the WCJ in her Decision in these matters: AME Berman opines that Applicant is precluded from heavy work activities (as to the lumbar spine) and very heavy lifting activities (as to the cervical spine) with heavy work activities being more restrictive than very heavy lifting activities (Exhibit Y at 13 EAMS ID# 45021018); PQME Ryan opined that "[d]espite her depression, [Applicant] retains the mental and emotional capability of working if her physical condition allows it" and that there have been no periods of temporary total or temporary partial disability (Exhibit O at 67-68 EAMS ID# 45021028); and, PQME Omrani opined that with respect to her internal injuries, "[n]o specific work restrictions or preclusions are identified from an internal medicine standpoint. Generally, the Applicant should avoid exposure to undue emotional and physical stress as this can exacerbate/aggravate many internal conditions in the susceptible individual" (Exhibit K at 54 EAMS ID# 45021031).

Notwithstanding the most restrictive preclusion provided by any of the medical legal evaluators in this matter is that of no heavy work, Applicant relies upon the findings of a vocational expert who opined that applicant is not amenable to vocational rehabilitation. Further, no medical legal evaluators were provided the vocational expert reporting so as to be able to review the findings though parties were afforded such opportunity to do so as per the en banc decisions in *Nunes II*.

As the opinions that the applicant is not feasible, "in accordance with the fact" offered by Applicant pursuant to Labor Code 4662(b), is an opinion solely by a vocational expert and not reviewed by nor addressed by any medical experts despite being provided the opportunity to obtain same necessarily results in the undersigned's opinion that Applicant has failed to meet her burden to prove that she is permanently and totally disabled.

RECOMMENDATION

For the reasons stated above, it is respectfully requested that Applicant's Petition for Reconsideration be denied and thereafter these matters be remanded back to the trial Court for proceedings pursuant to Labor Code 5813 based upon various misrepresentations contained within the Petition for Reconsideration coupled with the Applicant Counsel's failure to inform the Court of relevant legal decisions especially after specifically asked.

Dated: 4/19/2024

HON. ELISHA LANDMAN
Workers' Compensation Judge