WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MAGDALENA LLENA, *Applicant*

vs.

MACY'S INC., Permissibly Self-Insured, Administered by SEDGWICK, *Defendants*

Adjudication Number: ADJ4503401 (GOL 0101677)
Santa Barbara District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Award of December 14, 2022, the Workers' Compensation Administrative Law Judge ("WCJ") found that applicant, while employed by the Macy's, Inc. on February 8, 2008, sustained injury arising out of and within the course of employment to her lumbar spine, cervical spine, bilateral knees, bilateral shoulders, elbows, bilateral wrists, bilateral hands, head, psych, left ankle, headaches, asthma, diabetes, hypertension, gastrointestinal system, teeth and mouth. The WCJ also found that applicant had an earning capacity of $520.00 per week, that "based on the level of 100% permanent disability and further applicant is unable to compete in the open labor market, applicant is permanently total disabled and entitled to a lifetime weekly benefit of $346.66 commencing February 21, 2010, less attorney fees," that there is no basis for apportionment, and that "a reasonable attorney fee is $154,675.69, to be held in trust by defendant pending resolution between applicant's two counsels."

Defendant filed a timely petition for reconsideration of the WCJ's decision. Defendant contends that the WCJ erred in finding earnings of $520.00 per week, that the WCJ erred in finding that applicant sustained permanent and total disability, that the WCJ erred in relying upon the medical report of Dr. Butler, that the WCJ erred in rejecting Dr. Smith's opinion on apportionment, and that the WCJ erred in ordering the commencement of permanent and total disability indemnity on a date inconsistent with the recommendation of the Disability Evaluation Specialist.

Applicant filed an answer, which has been considered.

The WCJ submitted a Report and Recommendation ("Report").

We have considered the allegations of defendant's Petition for Reconsideration, the contents of the WCJ's Report with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated below and in the WCJ's Report and Opinion on Decision, which are both adopted and incorporated to the extent indicated in the attachment to this opinion, we will mostly affirm the Findings and Award of December 14, 2022. However, defendant correctly points out that the permanent disability benefit rate requires clarification by the WCJ. Therefore, we will amend his Findings and Award to defer the permanent disability benefit rate and attorney's fees, pending further proceedings and new determination by the WCJ.

In affirming the WCJ's decision, we have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the trial 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*.)

In reference to earnings, defendant contends that the proper measure of applicant's earnings is her actual earnings while employed by Macy's - $382.35 per week. Thus defendant argues for application of Labor Code section 4453(c)(1), which provides that "[w]here the employment is for 30 or more hours a week and for five or more working days a week, the average weekly earnings shall be the number of working days a week times the daily earnings at the time of the injury."

We disagree. We conclude that the WCJ correctly determined applicant's average weekly earnings based not on her actual earnings at Macy's, but on her earning capacity under Labor Code section 4453(c)(4). This provision authorizes the WCAB to determine applicant's average weekly earnings ("AWE") based upon her "earning capacity," if the other three methods for determining AWE under section 4453(c) "cannot reasonably and fairly be applied." In that case, "due consideration…[is] given to his or her actual earnings from all sources and employments." (Labor Code section 4453(c)(4); *Argonaut Ins. Co. v. Ind. Acc. Com. (Montana)* (1962) 57 Cal.2d 589 [27 Cal.Comp.Cases 130].)

In this case, we agree with the WCJ that application of section 4453(c)(1) – taking applicant's average weekly earnings as the number of working days a week times the daily

earnings at the time of the injury – is not fair or reasonable. Rather, consideration of applicant's earning capacity under section 4453(c)(4) is fair and reasonable.

As stated by the WCJ in his Report, applicant testified that in the job immediately prior to her job at Macy's, she was working at Michaels, full time, earning $13.00 per hour. Although applicant's starting pay at Macy's was $10.00 per hour, she testified that Macy's told her it would give her raises so that she would make more money than she had made at Michaels. (Summary of Evidence, 8/16/22, p. 8:9-19.) As noted by the WCJ, he found applicant's testimony credible on this point and the testimony was not rebutted. Accordingly, the WCJ found, based on applicant's earning capacity, that her average weekly wages should be taken at $520.00 at the least ($13.00 per hour for 40 hours per week), because this is what she was earning even before she started at Macy's, and there she was promised even more.

The WCJ's finding is based on substantial evidence and it is legally correct. There is no dispute that shortly before applicant started working at Macy's her earning capacity was $520.00 per week, at Michaels. Macy's evidently promised applicant that even though she would start at $10.00 per hour there, she would get raises and earn more than she had at Michaels. In this factual scenario, it would have been error for the WCJ to limit applicant's earnings to her actual weekly earnings at Macy's. Instead, the WCJ properly applied subdivision (c)(4) of section 4453. As noted before, this provision is for situations in which the first three statutory formulae of section 4453(c) do not yield a fair result and require an estimate of earning capacity from all relevant circumstances, not just past earning history or actual earnings at the time of injury. (*Montana, supra*, 57 Cal.2d at pp. 594–595; *Goytia v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 889, at 894–895 [35 Cal.Comp.Cases 27]; see also, *Gonzales v. Workers' Comp. Appeals Bd.* (1998) 68 Cal.App.4th 843, 847 [63 Cal.Comp.Cases 1477].)

Turning to the issue of permanent disability, the WCJ's Opinion on Decision shows that he found the scheduled permanent disability rating to be 99%, based on applicant's numerous orthopedic disabilities combined with the disabilities caused by her hypertensive cardiovascular disease, asthma, diabetes mellitus, headaches, psyche, and dental problems – all industrial. Contrary to defendant's allegations, the WCJ did identify, in the attached Opinion on Decision, the medical opinions and the ratings he relied upon to determine the scheduled permanent disability rating to be 99%. Additional review of the record discloses that the WCJ examined the following reports in particular to support the rating: Dr. Butler, internal medicine (applicant's

exhibit 36, report of 7/10/22, pp. 5-7); Dr. Gilberg, psychiatry (applicant's exhibit 2, report of 10/23/19, p. 14); Dr. Smith, orthopedic medicine (applicant's exhibit 24, report of 8/19/19, pp. 34-38); and Dr. Solanki, dentistry. (Applicant's exhibit 41, report of 3/1/22, p. 2.)

However, defendant contends that Dr. Butler's medical opinion is not substantial evidence because the doctor failed to obtain a complete history from applicant "as to the effects of stress and other factors on her condition." (Petition for Reconsideration, p. 5:27-28.) This is incorrect. Dr. Butler obtained a complete history of applicant's medical condition by conducting a thorough review of her voluminous medical records. (See applicant's exhibit 40, Dr. Butler's report of 8/16/20, pp. 11-13 & appendix A.) Defendant also alleges that Dr. Butler failed to recognize that "a diagnosis existing prior to [industrial] injury is evidence of ratable impairment prior to the injury." (Petition for Reconsideration, p. 6:21-23.) However, the mere diagnosis of a pre-existing medical condition does not establish that the condition is causing disability, and defendant otherwise does not refer to substantial evidence establishing non-industrial apportionment of applicant's internal disabilities in accordance with *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [Appeals Board en banc].

Defendant further contends that Dr. Smith's medical opinion is substantial evidence of apportionment of applicant's orthopedic disability to non-industrial "other factors" under Labor Code section 4663. We are not persuaded. Defendant has the burden of proof of apportionment yet defendant fails to make specific references to the record in support of orthopedic apportionment, as required by WCAB Rule 10945(b). (Cal. Code Regs., tit. 8, § 10945(b).) The Appeals Board is not required to search the record to determine whether it contains support for defendant's contentions regarding apportionment. (See *Salas v. Cal. Dept. of Transp*. (2011) 198 Cal.App.4th 1058, 1074.)

We also address defendant's contention that the WCJ erred in relying upon applicant's vocational expert, Ms. Wilson, to find that the industrial injury resulted in permanent and total disability. Defendant complains that as a vocational expert, Ms. Wilson cannot reject non-industrial apportionment found by the medical evaluators. Defendant also complains that since Ms. Wilson is a vocational expert, not a medical expert, she is not qualified to opine that applicant's various permanent impairments have a "synergistic effect" upon one another, justifying the addition rather than the combination of disabilities. (See *Athens Administrators v. Workers' Comp.*

Appeals Bd. (Kite) (2013) 78 Cal.Comp.Cases 213 (writ den.).) We address these arguments in turn.

In reference to apportionment, defendant correctly points out that "vocational apportionment" is invalid, and that vocational experts must consider valid medical apportionment found by the reporting physicians. This is confirmed by the Appeals Board's en banc decision in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 2023 Cal. Wrk. Comp. LEXIS 30 (88 Cal.Comp.Cases 741) [en banc] ("*Nunes* I"), wherein the Board held that vocational evidence must address apportionment, but such evidence may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment. An analysis of whether there are valid sources of apportionment is still required, even when applicant is deemed not feasible for vocational retraining and is permanently and totally disabled as a result. In such cases, the WCJ must determine whether the cause of the permanent and total disability includes nonindustrial or prior industrial factors, or whether the permanent disability reflected in applicant's inability to meaningfully participate in vocational retraining arises solely out of the current industrial injury. The Board subsequently re-affirmed these principles in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 23 Cal. Wrk. Comp. LEXIS 46 (88 Cal.Comp.Cases 894) [en banc] ("*Nunes* II").

In this case, Ms. Wilson opined that Dr. Smith's proposed apportionment of applicant's orthopedic disabilities and Dr. Gilberg's proposed apportionment of applicant's psychiatric disability were not "labor disabling factor[s] that…prevented [applicant] from continuing her employment and not until the industrial injury of 02/02/08 was she unable to continue to perform her assigned duties and responsibilities." (Applicant's exhibit 17, Wilson report dated September 1, 2020, p. 26.) Although Ms. Wilson's opinion on this point constitutes vocational apportionment that is invalid under the *Nunes* decisions, it is of no consequence because the WCJ found no basis to apportion disability to "other factors" under Labor Code section 4663. As noted before, defendant has the burden of proof of apportionment and did not meet it here.

However, defendant further alleges that Ms. Wilson's vocational opinion is insubstantial because it is based upon an unqualified medical opinion that applicant's permanent impairments should be added rather than combined.

In the recent en banc case of *Vigil (Sammy) v. County of Kern* (2024) 89 Cal.Comp.Cases 686, the Appeals Board held that the Combined Values Chart ("CVC") in the Permanent Disability

Rating Schedule ("PDRS") may be rebutted, and impairments may be added, where the applicant establishes the impact of each impairment on the activities of daily living (ADLs) and either (a) there is no overlap between the effects on ADLs as between the body parts rated, or (b) there is overlap but the overlap increases or amplifies the impact on the overlapping ADLs. In *Vigil*, the Board also explained that medical expertise (as opposed to vocational expertise) is required: "In determining whether the application of the CVC table has been rebutted in a case, an applicant must present evidence explaining what impact applicant's impairments have had upon their ADLs. Where the medical evidence demonstrates that the impact upon the ADLs overlaps, without more, an applicant has not rebutted the CVC table. Where the *medical evidence* demonstrates that there is effectively an absence of overlap, the CVC table is rebutted, and it need not be used." (89 Cal.Comp.Cases at 692, italics added.)

In light of the Board's holdings in *Vigil*, defendant is correct that Ms. Wilson is not qualified to offer a medical opinion on rebuttal of the CVC table. Under the circumstances of this case, however, we are not persuaded that Ms. Wilson's attempt to do so precludes reliance upon the *vocational* substance of her opinion. There are a couple of reasons for this.

First, in arriving at a scheduled permanent disability rating of 99%, the WCJ did not add but rather combined applicant's permanent impairments. (Opinion on Decision, pp. 2-3.) To the extent Ms. Wilson offered an unqualified medical opinion that applicant's permanent impairments should be added rather than combined, the WCJ evidently disregarded it. Secondly, in offering a final opinion on applicant's amenability to rehabilitation and ability to compete in the open labor market, Ms. Wilson relied upon the opinions of the reporting physicians, not upon her own unqualified medical opinion:

> … [I]t is not the fact of Ms. Llena's ability to work, her age, any non-industrial health problems, willingness and opportunities to work, skills and education, general conditions of the labor market, or employment opportunities for persons in similar situations, that have caused her present inability to engage in vocational rehabilitation or the 100% loss of her ability to compete in the open labor market. Rather it is the sole factor of her industrial injury and the limitations provided by her workers' compensation doctors that she is unable to sustain gainful employment and thus not able to compete in the open labor market.
>
> […]
>
> I was asked as a vocational expert to determine if Ms. Llena can return to work in the current labor market. After careful review and consideration of Ms. Llena's

> physical and emotional work limitations, the dosage of medications that she is currently taking, and its side effects, along with her transferable skills, determined by McCroskey and Volcano 17.0 it is my professional opinion that solely based on her industrial related impairments and her industrial physical limitations that were provided in the medical reports of Agreed Medical Examiner Elmore G. Smith, Qualified Medical Examiner Patricia A. Lipscomb, Dr. Sean Leoni, Dr. Arnold L. Gilberg, Dr. Richard D. Scheinberg, Dr. Michael A. Errico, and Dr. Robert J. Shorr, Ms. Llena is not amenable to vocational rehabilitation. Ms. Llena is not able to sustain gainful employment and therefore she is not able to compete in the open labor market. A direct of her industrial related impairments provided by considering her pre-injury capacity and abilities, Ms. Llena has at present no consistent and stable future earning capacity.
>
> (Applicant's exhibit 17, Wilson report of 9/1/20, pp. 36-37.)

Since the above analysis relies solely upon Ms. Wilson's vocational expertise and her understanding of the medical limitations found by the reporting physicians, we agree with the WCJ that Ms. Wilson's vocational opinion is substantial evidence. In conjunction with the medical record, Ms. Wilson's vocational opinion that applicant is unable to compete in the open labor market justifies the WCJ's finding that the industrial injury sustained by applicant resulted in permanent and total disability. (*LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 243 [48 Cal.Comp.Cases 587].)

Finally, defendant challenges the WCJ's finding that applicant is entitled to a lifetime weekly benefit of $346.66 commencing February 21, 2010, less attorney's fees. The WCJ attached to his Findings and Award a set of commutation calculations performed by the Disability Evaluation Specialist ("DES"). As pointed out by defendant, the final page of calculations indicates that the "*life pension rate* after commutation" is *$319.39*. (Italics added.) In his finding on permanent disability, the WCJ found applicant "permanently [and totally] disabled and entitled to a *lifetime* weekly benefit of *$346.66* commencing February 21, 2010, less an attorney's fee of $154,675.69." Neither the WCJ's Report nor the answer of applicant's attorney is responsive to defendant's questioning of the difference between the DES weekly rate of $319.39 and the $346.66 weekly rate specified in the WCJ's decision. Though we will affirm the WCJ's finding that applicant is permanently and totally disabled, in an abundance of caution we will amend the WCJ's decision to defer the rate or rates at which applicant's permanent disability benefits must be paid (as well as provision for attorney's fees), pending further proceedings and clear determination by the WCJ.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of December 14, 2022 is **AFFIRMED,** except that paragraphs (C) and (E) of the Award are **RESCINDED AND DEFERRED**, and Findings 5 and 8 are **AMENDED** to read as follows:

FINDINGS OF FACT

5. The industrial injury resulted in permanent and total disability. The issue of the rate or rates at which compensation for this disability must be paid is deferred pending further proceedings and determination by the WCJ, with jurisdiction reserved at the trial level.

8. The issue of reasonable attorney's fees is deferred pending further proceedings and determination by the WCJ, with jurisdiction reserved at the trial level.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and new determination by the WCJ on the issues of compensation rate and attorney's fees, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 7, 2024

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

MAGDALENA LLENA
MOISES VAZQUEZ, ATTORNEY AT LAW
FELLMAN & ASSOCIATES

JTL/*ara*

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

OPINION ON DECISION

STIPULATIONS:

The stipulations of the parties as set forth in the Minutes of Hearing are accepted as fact.

PARTS OF BODY

Defendant has admitted industrial injury to her lumbar spine, cervical spine, bilateral knees, bilateral shoulders, elbows, bilateral wrists, bilateral hands, head and psyche.

Applicant is also alleging industrial injury to her left ankle, asthma, diabetes, hypertension, gastrointestinal system, teeth and mouth.

Based on the credible testimony of applicant with due regard for her demeanor as witness, together with the medical reporting of Elmore G. Smith, M.D. in the capacity of an orthopedic agreed medical examiner (AME), Frederick Butler, II, M.D. in the capacity of an internal medicine agreed PQME, Sean Leoni, M.D. and Vivek Solanki, D.D.S the capacity of a dentist PQME, it is found applicant did sustain injury arising out of and occurring within the course of employment (AOE/COE) to her left ankle, asthma, diabetes, hypertension, gastrointestinal system, teeth and mouth.

PERMANENT DISABILITY

The factors of permanent disability are based upon applicant's testimony with due consideration for her credibility and demeanor as a witness and the medical reporting of Frederick Butler, M.D. in the capacity of an agreed PQME, Arnold Gilberg, M.D., in the capacity of a "regular physician", Elmore Smith, M.D. in the capacity of an AME; Vivek Solanki, D.D.S. in the capacity of a PQME and Sean Leoni, M.D. and Laura Wilson as a vocational evaluator rates as follows:

CLASS 3 HYPERTENSIVE CARDIOVASCULAR DISEASE:
04.01.00.00 - 35 - [5]45 - 214G - 48 - 54 PD (A)

CLASS 2 ASTHMA:
05.01.00.00 - 25 - [7]34 - 214F - 34 - 39 PD (A)

CLASS 2 DIABETES MELLITUS:
10.01.00.00 - 10 - [2]11 - 214F - 11 - 13 PD (A)

HEADACHES:
13.01.00.99 - 3 - [6]4 - 214H - 6 - 7 PD (A)
(A) 54 C 39 C 13 C 7 = 78 FINAL PD

PSYCHE
14.01.00.00 - 21 - [8]29 - 214I - 37 - 43 FINAL PD

MASTICATION AND DEGLUTITION: SEMISOLID OR SOFT FOODS:
11.03.02.00 - 16 - [2]18 - 214J - 27 - 32 FINAL PD
2 WP ADD-ON INCLUDED FOR PAIN

CERVICAL DRE II:
15.01.01.00 - 6 - [5]8 - 214F - 8 - 10 PD (A)

LUMBAR SPINE
15.03.02.02 - 24 - [5]31 - 214F - 31 - 36 PD (A)

L ARM
16.01.02.02 - 6 - [4]7 - 214G - 8 - 10 PD (B)

L WRIST
16.04.01.00 - 4 - [4]5 - 214G - 6 - 7 PD (B)\

L THUMB
16.06.01.01 - 1 - [1]1 - 214G - 2 - 3 PD (B)

RIGHT SHOULDER
16.02.02.99 - 6 - [7]8 - 214G - 9 - 11 PD (A)

R ARM
16.01.02.02 - 10 - [4]12 - 214G - 14 - 17 PD (C)

R WRIST
16.04.01.00 - 4 - [4J5 - 214G - 6 - 7 PD (C)

R THUMB
16.06.01.01 - 1 - [1]1 - 214G - 2 - 3 PD (C)

LEFT KNEE TOTAL REPLACEMENT
17.05.10.08 - 30 - [2]34 - 214F - 34 - 39 PD (D)

RIGHT KNEE ARTHRITIS
17.05.03.00 - 8 - [2]9 - 214F - 9 - 11 PD (D)

R ANKLE ARTHRITIS
17.07.03.00 - 6 - [2]7 - 214F - 7 - 9 PD (A)
6.01.00.00 9 [6]12 – 12 15
(B) 10 C 7 C 3 = 19 PD (A)
(C) 17 + 7 + 3 = 27 PD (A)
(D) 39 + 11 = 50 PD (A)
(A) 50 C 36 C 27 C 19 C 11 C 10 C 9 = 86 FINAL PD

86 C 78 C 43 C 32 =
86 C 78 = 97
97 C 43 = 98
98 C 32 = 99
99 c 15 = 99

Given the overall significant permanent disability in this case and applicant's inability to compete in the open labor market, applicant is permanently totally disabled and entitled to a lifetime weekly benefit of $346.66 commencing February 21, 2010, less attorney fees as provided hereinbelow.

APPORTIONMENT

Dr. Smith's apportionment determination lacks specificity and even after attempted clarification in his deposition, Dr. Smith's opinion on apportionment is conclusory and does not constitute substantial medical opinion on apportionment.

Dr. Gilberg's apportionment is not only conclusory… [the doctor] does not explain the how and why as required by [*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).]

Dr. Butler's apportionment is merely conclusory and he does not explain the how and why as required by *Escobedo*. Although he seems to suggest the orthopedic and internal should be added together, the WCJ rejects this and combines the disabilities instead.

NEED FOR FURTHER MEDICAL TREATMENT

Based on the credible testimony of applicant with due regard for her demeanor as witness, together with the medical reporting of Elmore G. Smith, M.D. in the capacity of an orthopedic agreed medical examiner (AME), Frederick Butler, II, M.D. in the capacity of an internal medicine agreed PQME, Sean Leoni, M.D. and Vivek Solanki, D.D.S the capacity of a dentist PQME, there is a need for future medical care to cure or relieve the effects of the industrial injury.

LIABILITY FOR SELF-PROCURED MEDICAL CARE

Reserved and deferred.

LIENS

Reserved and deferred.

ATTORNEY FEES

Based upon Workers' Compensation Appeals Board Rules of Practice and Procedure Section 10775, the guidelines for awarding attorney fees found in Policy and Procedure Manual Index Number 6.8.4, a reasonable attorney fee is found to be $154,675.69 in connection with the PD, to be commuted off of the side of the award.

Attorney fees to be held in trust by defendant pending resolution of attorney's fees between current and former applicant's counsel.

REIMBURSEMENT FOR [VOCATIONAL] EXPERT COSTS

Reserved and deferred.

DATE: December 13, 2022

Scott J. Seiden
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

1.	Applicant's Occupation:	Cashier / retail clerk
	Age of Applicant:	54
	Date(s) of Injury:	February 8, 2008
	Parts of Body Injured:	Lumbar spine, cervical spine, bilateral knees, bilateral shoulders, bilateral elbows, bilateral wrists, bilateral hands, head and psyche.
	Manner in Which Injury Occurred:	Not in dispute
2.	Identity of Petitioner:	Defendant
	Timeliness:	The petition is timely
	Verification:	The petition is verified
	Service:	The petition was served on all parties
3.	Date of Issuance of Order:	December 13, 2022, served on December 14, 2022
4.	Petitioner's Contention:	Defendant contends earnings determination is incorrect, WCJ erred in finding applicant 100% PTD, all of the medical reporting is not substantial evidence; the WCJ erred in failing to submit to DEU for rating order.

II.
FACTS

Applicant was employed by Macy's. Immediately prior to her employment at Macy's, applicant was working at Michaels. Applicant sustained a specific admitted industrial injury while employed at Macy's.

Applicant was evaluated by numerous physicians: Elmore Smith, M.D. in the capacity of an AME; Frederick Butler, M.D. in the capacity of an agreed PQME; Arnold Gilberg, M.D., in the capacity of a "regular physician"; Vivek Solanki, D.D.S. in the capacity of a PQME and Sean Leoni, M.D. in the field of internal medicine. Applicant was also evaluated by Laura Wilson in the capacity of a vocational evaluator.

Each of the reporting physicians found applicant sustained permanent disability and Laura Wilson opined applicant was unable to compete in the open labor market.

Based on applicant testimony together with the medical and vocational record, it was found applicant was 100% permanently totally disabled (PTD). It is from this Findings of Fact and Award that defendant files this petition for reconsideration.

III.
DISCUSSION

[…]

Earnings was raised as an issue and while it was addressed in the Findings of Fact and Award, it was not discussed in the Opinion on Decision. The Opinion did not discuss…what evidence and how the WCJ determined applicant's average weekly wage (AWW) was $520.00.

Applicant testified credibly and [without rebuttal that] she started working at Michaels in 2006. She was earning $13.00 per hour and was working full time. She further testified she left Michaels and went directly to work for Macy's with no time off in between. Her starting pay at Macy's was $10.00 per hour. She left and changed to Macy's because she was told by Macy's she would make more money than at Michaels with the raises they would give her.

Based on that un-rebutted testimony, applicant's AWW based on her earning capacity was $13.00 X 40 hours = $520.00.

Defendant avers the WCJ has to provide rating instructions to the Disability Evaluation Unit (DEU) and the WCJ has violated [*Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 622 (Appeals Board en banc)]. However, a WCJ is considered a rating expert and it is not necessary to submit any formal rating to DEU.

Defendant next contends, it was error to find applicant 100% permanently totally disabled (PTD).

Applicant has industrial internal disabilities including hypertension, asthma, diabetes mellitus, and headaches which result in 78% permanent disability alone. However, applicant also has a separate industrially-related psychological disability of 43%. Also, applicant was found to suffer impairment for mastication and deglutition of 32% permanent disability. Lastly, [her] orthopedic impairments total 86% permanent disability.

… [T]he WCJ relied on the vocational evaluator and various medical physicians and reports to opine applicant is 100% PTD. […] Further, as noted in the Opinion on Decision, the WCJ specifically rejected Dr. Butler's…analysis [under *Athens Administrators v. Workers' Comp. Appeals Bd.* (*Kite*) (2013) 78 Cal.Comp.Cases 213 (writ den.)] opining the orthopedic and internal disabilities should be added together.

Elmore Smith, M.D., reporting in the capacity of an agreed medical examiner (AME), opined the impairment to each knee should be added together and the left upper extremity impairments and the right upper extremity impairments. (Deposition transcript: page 22 line 4 through Page 25, line 13, Exhibit 23)

Given the large amount of permanent disability in various regions of her body and [considering that] combining the disabilities [did not] result in [an] award of 100% under the AMA Guides… based on the high levels of disability in these various regions together with applicant's inability to

compete in the open labor market, [all these factors] support the WCJ's determination of applicant being permanently totally disabled and entitled to an award of 100% permanent disability.

As evidenced by the ratings provided in the Opinion on Decision, applicant's overall disability and testimony which supports her inability to compete in the open labor market applicant is 100% PTD.

IV.
RECOMMENDATION

For the reasons stated, it is respectfully recommended that Defendant petition for reconsideration be denied as to all contentions raised.

DATE: January 23, 2023

Scott Seiden
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE