

**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**SEAN WILSON, *Applicant***

**vs.**

**COSTCO WHOLESALE CORPORATION; LIBERTY MUTUAL, administered by  
HELMSMAN MANAGEMENT SERVICES, LLC, *Defendants***

**Adjudication Number: ADJ9349870  
Van Nuys District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

We observe that it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

We have also given the WCJ's credibility determination(s) great weight because the WCJ had the opportunity to observe the demeanor of the witness(es). (*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(s). (*Id.*)

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**July 23, 2024**

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

**SEAN WILSON  
LAW FIRM OF ROWEN, GURVEY & WIN  
EMPLOYER DEFENSE**

**SAR/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**

**I. INTRODUCTION**

1. **Applicant's occupation:** Sales/stocker
2. **Applicant's age at injury:** 34
3. **Date of injury:** 11/20/2012
4. **Part(s) of body injured or alleged to be injured, and the manner in which the injury occurred:** lumbar spine occurring from lifting a large screen TV onto a pallet and neurogenic bladder, sexual dysfunction, bowel dysfunction and psyche as a result of a botched back surgery.
5. **Identity of petitioner(s):** Defendant
6. **Timeliness:** Yes.
7. **Verified:** Yes
8. **Date of Decision:** April 29, 2024
9. **Answer Filed:** Yes – just received.
10. **The petitioner(s)'s contentions:** Petitioner asserts that the undersigned acted in excess of its' power, the evidence does not justify the findings of fact, there are no AME and QME reports that support Permanent and Total Disability; the reporting of Marcia Lamm and Antonio Reyes, M.D. lack substantial medical evidence; there is substantial medical evidence that the applicant can compete and work in the open labor market.

**II. FACTS**

Petitioner, Costco's, facts are incomplete and result in an inaccurate portrayal of this case. The petition sets forth the date of injury as 2021 (Pet. at 4:26) which appears to be a clerical error, however, the rest is misleading. (See Applicant's Answer to Petition on Page 6.)

Applicant, Sean Wilson, injured his back in 2012. That injury caused him to have two back surgeries. The last surgery in 2017 caused a sacral nerve root avulsion resulting in a trifecta of complaints including bowel, bladder and sexual dysfunction. Contrary to defendant's assertion that no medical evidence supports a finding of PTD, the urological PQME, Dr. Kuyt, as well as psyche PTP Dr. Marcia Lamm, found the applicant permanently disabled from the open labor market. However, petitioner relies on the psyche PQME, Dr. Justice. Dr. Justice agrees that the applicant is unable to work outside his home and deems the applicant is able to work in a remote capacity at home. Dr. Justice reasoned that because the applicant is a father to two daughters, he can work remote.

In addition, petitioner mentions a job offer that was not a bona fide offer of work, i.e. the person who prepared that offer was not familiar with the applicant's case nor any type of expert. The offer of telemarketer work required the applicant to work "at their own pace" remotely for 13 hours in a 24 hour day. It was a probationary job as it was performance based. When defendant did not meet their burden to show that the job offer was bona fide, there was nothing for the applicant to rebut. The fact that petitioner's Vocational Expert (VE) Howard Goldfarb, ratified such a job shows the reporting is not substantial. Applicant's VE, Dr. Reyes, pointed out many deficiencies in defendant's VE report. Applicant's testimony was consistent with the medical evidence. The only addition was that the applicant testified that if he saw his psyche PTP, Dr. Marcia Lamm, today, he would tell her much more. As discussed below, the cases cited by defendant, *Dewey* and *Guzman* are not on point and a recent case shows that sheltered work is still a viable concept. To the end of achieving substantial justice, the facts of the applicant's case will be reiterated below.

The trial in this case occurred via videoconference and in person with the applicant testifying over a couple of days Further development of the record transpired regarding applicant's psyche treatment at UCLA and supplemental reports from the Vocational Experts in this case in order to comport with *Nunes I and II (en banc)* in between. There was also a collateral issue involving a conflict of interest. Defendant, Costco, offered the testimony of an out-of-state witness, Renee Wallace, via videoconference regarding a job "offer". The petitioner refers to the witness as an "expert" in their petition but nothing in the record merits that distinction (see MOH/SOE, 5/17/2023, pp. 1-4).

Over the course of the trial, Court Exhibits were received that included, PQME reports and a deposition from urologist, Dr. Fred Kuyt (Court Exhibits X1-X5), PQME reports in psychiatry from Dr. Barbara Justice (Court Exhibits Z1-Z4), orthopedic reports from Dr. Newton (Court Exhibits Y1 and Y2 and Mouradian (Y3-5). The undersigned did not find the reporting of Dr. Justice substantial with reference to the psyche claim and utilized Dr. Lamm in lieu thereof.

Applicant's Exhibits 1-14 included Vocational Reports from Dr. Antonio Reyes, psyche reports from Dr. Lamm, an orthopedic report from PTP Dr. Brian Grossman, UCLA subpoenaed records regarding current psyche treatment.

Defendant's Exhibits included Exhibits (B-L) Dr. Boudakian, their Vocational Reports from Howard Goldfarb, and a one page return to work offer from "Catalyst".

The applicant's injury on 11/20/2012 occurred as a result of lifting a large screen TV from a pallet. Surgery was required and in December, 2015 an L4-5, S1 fusion was performed. Previously, the applicant had an injury to the same region of his body while working for defendant and had an IDET procedure. After the 2015 surgery, the applicant continued to have sciatic nerve pain. A laminectomy was recommended to make space in a compressed nerve. The second surgery performed in March, 2017 was not successful. The applicant never returned to work as the surgery caused a spinal cord injury i.e. a tearing of the nerve root that caused urological, bowel and sexual dysfunction. The applicant testified that he has lost all feeling from his pubic bone to his tailbone, he cannot urinate without a medical device and he has fecal incontinence among other complaints.

After it was learned at trial that the applicant was treating with a UCLA psychiatrist for anxiety and depression, the record was developed so that Drs. Marcia Lamm and Barbara Justice could review those records. The applicant stated that he worries a lot about embarrassing himself with his kids due to his fear of having accidents and is a light sleeper as a result. The applicant's meeting with PQME Dr. Justice necessitated the UCLA treatment and he was prescribed medication for anxiety and depression.

The applicant's wife works as a full time child psychiatrist outside the home and supports him financially. As a result, the applicant did not seek benefits other than TTD. The applicant has acted as a full-time father both before and after working at Costco so his wife could work. He frequently but not daily drives his daughters to and from school, helps out his kids' soccer and basketball teams. He has also taken trips out-of-town.

The applicant did not recall telling Mr. Goldfarb that he could do a home-based job. He said he believed he could do it but added he "did not believe he could do a home-based job with a good level of ability". As far as working outside the home, he worries about the social issues. The applicant did not recall the home-based job offered to him by Catalyst as a telemarketer. They never spoke to him and he thought it was junk mail.

Defense witness, Renee Wallace, testified via videoconference stating that she works for Catalyst, a vocational service that places people in jobs inside and outside her home state of Pennsylvania. The witness admitted she never met the applicant and reviewed one report from Howard Goldfarb dated 11/17/2020 when she made the offer to the applicant. The offer was to work as a home based "market research associate" at Soloman Group. The hours allowed the applicant to work at his own pace and take breaks. The salary would be paid by the carrier for the initial trial 10-20 weeks although the applicant would have been considered an employee of the Soloman Group. Defendant's Exhibit H contains part of the package that was sent to the applicant. That exhibit contains a single page that shows that the telemarketer position required accomplishing 20 calls per hour and 2 completed surveys per hour or 160 calls per day with 16 completed surveys. The job offer states 40 hours however defense witness testified that the job contemplated a 13 hour day from 8:00 am to 9:00 pm (MOH/ SOE, 5/17/203, 3:14). The witness also discussed the trend for home-based employment after COVID-19 and the benefits to the environment etc.

As far as the medical evidence, the final orthopedic AME report from Dr. Newton (Y1), indicated that causation of the injury was in part due to the 1999 injury that was operated on and caused the subsequent need for surgery at the same two levels. Impairment at 30 WPI was based on operated-ROM and stenosis. Under work restrictions, the AME gave work restrictions and did not indicate the applicant was a QIW on a strictly ortho basis although the doctor never reviewed a job description. Under apportionment, 15% of the spine was apportioned to the 1996 injury and IDET procedure at the same levels and 85% apportioned to the current date of injury in 2012. The applicant went through two back surgeries for the 2012 claim and the second surgery resulted in bladder and bowel dysfunction, i.e. a neurogenic bladder and bowel. As stated below, *Hikida* applied to the ill effects of the surgery but *Justice* was used for the lumbar apportionment.

Urologist PQME Fred Kuyt issued two reports and was deposed three times (Court Exhibits X1-X5). Dr.Kuyt's initial report indicated that the applicant suffered from Cauda Equine

Syndrome resulting in lower motor neuron bladder and anorectal disease resulting in urinary and bowel incontinence. Complications arose after the second back surgery for this injury and as such all of the disability was apportioned to this injury per *Hikida*. Dr. Kuyt indicated that the applicant was a QIW and could not effectively compete in the open labor market. The PQME provided impairment for the bladder, anorectal and sexual dysfunction. (Court Exhibit X1 at 4-5.)

As stated in the Opinion, Dr. Kuyt recalled that the applicant told him it would be difficult to work outside his home because of bathroom issues and he “would not be able to think clearly and concentrate on what he was doing.” (Y3, 11:21 – 12:14). He also had problems sleeping because he is up all night urinating and then is exhausted the next day. Thus, the PQME stated, he did not think he could even work at home and “I don’t think he is capable of doing any work.” (Id at 13:10-22; 49:13-50:25, 60:19-23). This was confirmed at Dr. Kuyt’s last deposition (Y5 8:21-9:14, 32:5-22, 33:11-15).

The PQME in psyche, Dr. Justice, indicated that the applicant could work without limitation and was never TTD or TPD. In the initial report, Dr. Justice felt that the applicant was not MMI and needed medical treatment including medication. The PQME’s diagnosis was Major Depressive Disorder, Moderate, with Anxious Distress (Court Exhibit Z1, p. 151). The PQME noted that the applicant became depressed due to the outcome of the March 2017 back surgery (Court Exhibit Z1). Dr. Justice re-evaluated the applicant and issued an additional report (the copy that was uploaded in EAMS contains a blank page for every other page and is difficult to read). The applicant had no pre-existing impairment before the 2012 injury from a psychiatric basis. The final GAF was 62. Even though the applicant had no psychiatric symptoms prior to the 2017 surgery, the PQME apportioned along the lines of Dr. Newton, i.e. 85% to this injury and 15% to the prior injury.

Dr. Justice’ 6/10/2021 report (Court Exhibit Z3) contains a review of additional records and reports from the competing vocational evaluators. In that report, Dr. Justice reiterates her earlier findings and indicated that the applicant is not QIW or PTD from a purely psychiatric perspective. Dr. Justice indicates that her reasoning for this is because of the fact that the applicant is able to perform when taking care of his daughters and his home (*Id.* At p. 75). To that end, Dr. Justice indicated he could work at home, but not outside the home due to potential embarrassment in the workplace (*Id.*). Court Exhibit Z4 was obtained after the record was developed and contains a review of the UCLA records. Dr. Justice did not change her opinion except to add that the applicant also suffers from alcohol abuse (*Id.* At 21).

Psyche PTP, Dr. Lamm issued four reports (Exhibits 4-6, 8, 11). In the P & S report, Applicant’s 4 dated 7/19/2019, Dr. Lamm disagreed with Dr. Justice and deemed the applicant TTD on a psyche basis after the botched back surgery resulted in a trifecta of complaints until the date of P & S/MMI date. Applicant’s GAF was 54 and additional impairments for sleep and sexual dysfunction and pain were also added to reach a WPI of 36%. As far as apportionment, Dr. Lamm apportioned all the PD to the 2012 injury, surgery and its sequelae. Applicant’s 6 illustrates Dr. Lamm’s disagreement with Dr. Justice’s opinion on apportionment, “[a]lthough Dr. Newton may have found basis for apportionment on an orthopedic basis, psychological apportionment does not follow along the same lines...Therefore, it remains my opinion that there is no basis for apportionment to any preexisting condition...” (*Id.* at p. 7). Dr. Lamm indicated the applicant is

disabled from the labor market both before and after reviewing the UCLA records (Applicant's Exhibits, Exhibit 4 at p. 24 and Exhibit 11 at p. 13).

Dr. Lamm did agree with Dr. Justice's opinion regarding the fact that the applicant will require lifelong medical treatment but disagreed with Dr. Justice's opinion that the applicant was able to work full time on a purely psychiatric basis (*Id.*). An additional report from Dr. Lamm was obtained in 2022 after the additional UCLA records were received. To that end, Dr. Lamm indicated that nothing changed except for the additional diagnosis of PTSD (Applicant's Exhibit 8 at p. 13). Applicant testified that if he had seen Dr. Lamm today, he would have expressed even more complaints (MOH/SOE, 2/2/2022, 7:24-8-3).

Defendant's vocational expert, Howard Goldfarb, (Exhibits C-G and J-L) indicated that the applicant could only work remotely. The jobs identified were a 1. survey worker; 2. customer service rep and 3. appointment clerk – all with the proviso – that they are home-based. (Defendant's D, p. 56). "In this counselor's professional opinion, Mr. Wilson can engage in Semi-sedentary and Sedentary home-based work at the semi-skilled level and unskilled work levels. Mr. Wilson is able to engage in this work activity in the current open labor market." (*Id.* at pp. 61-62). Defendant's E ratifies the Catalyst job offer. The applicant was "encouraged" to accept the job offer from Catalyst. (*Id.* at p. 6). Defendant's F reiterates the same opinions that the applicant is limited to home-based work and the applicant is able to do the Catalyst job. The applicant is amenable to retraining (*Id.* at pp.5-6). Defendant's G contains the same opinion after review of additional information (*Id.* at pp. 22-27). Defendant's J contains information about remote work and that more workers are working remotely with studies attached. Defendant's K was issued after a review of additional records and Mr. Goldfarb continued to state that home-based work and the Catalyst job offer are appropriate (*Id.* at p. 15). Defendant's L was issued post-*Nunes I and II*, and reiterates the same opinions (*Id.* at pp. 8-9). The final report is the one petitioner states is more substantial as the VE reviewed the trial testimony. Petitioner ignores the fact that the VE stated nothing changed after he read the testimony (*Id.*)

Applicant's exhibits included, *inter alia*, applicant's vocational reports from Antonio Reyes (Applicant's 1-4, 9, 13-14). Applicant's 1 noted that "Mr. Wilson's neurological, bowel, physical, and psychological problems prevent him from performing any type of work. Even if he were to attempt any type of employment, his symptoms of incontinence, pain, and psychological symptoms would be too disruptive and disabling to allow him to maintain the job over time. Any job, even if it is home-based, has requirements for productivity and timeliness. Mr. Wilson's impairments make him unable to meet the minimum requirements of competitive employment." (*Id.* at p. 4, Applicant's 2 at p. 3).

Applicant's VE reporting also invokes *LeBoeuf*. Reyes initially stated that on the basis of the orthopedic limitations alone, the applicant could do light work and vocational training. "However, Mr. Wilson's problems with incontinence will ultimately prevent him from maintaining any type of competitive employment. Because of his incontinence problems, Mr. Wilson is not able to benefit from vocational services... Given Mr. Wilson's incontinence problems, it is entirely unreasonable to believe that an employer could accommodate him in a workplace. I agree with both Dr. Kuyt and Dr. Lamm who note that the applicant is unable to work given his current impairments. Mr. Wilson should be considered 100% occupationally disabled from the labor market." (Applicant's 3 at pp. 2-3.)

In the last report, Mr. Reyes reiterated the same findings (Applicant's 14, pp. 2-3). "Given that Mr. Wilson is unable to benefit from vocational rehabilitations services and unable to work due to his urological issues alone, and that impairment is 100% industrial per Dr. Kuyt, Mr. Wilson should be considered permanently and totally disabled from the labor market entirely on an industrial basis irrespective of any orthopedic or psychological apportionment. This conclusion is supported by both medical and vocational evidence and is consistent with the *Nunes* decision (*Id.* at p. 2).

The undersigned deemed the applicant credible. Applicant indicated he did not feel he could succeed even at a home based job and testified that he could not do it with any "degree of ability" (MOH/SOE, 10/26/2022, 5-25-6-2). Dr. Kuyt has stated that the applicant is medically 100% from a urological perspective due to the consequences of the applicant's botched 2017 back surgery and the trifecta of complaints thereafter. In addition, applicant's vocational expert Dr. Reyes and psyche Dr. Lamm opinions are more substantial than the PQME Justice and defendant's VE are not substantial. Dr. Lamm found the applicant unable to work on the basis of psyche. The reports were rated per *Blackledge* and apportionment was discussed per *Hikida* and *Justice* due to the detrimental effects of the applicant's 2017 surgery.

The ratings were set forth in the Opinion and will not be republished here other than to state that defendant did not provide their rating strings and based upon the substantial medical evidence, the strict rating in this case is 91%, i.e. utilizing Lamm over Justice for the psyche. The latter report is not substantial. In any event, the undersigned relied on both VE reports, the urological PQME Dr. Kuyt and *LeBoeuf* to find that this applicant sustained a total loss of earning capacity (*Schedule for Rating Permanent Disabilities* at 1-2) and as such is 100% permanently and totally disabled. As stated in the undersigned's Opinion at p. 12. "Both VE reports support a basis for awarding 100% in this case and as such the strict rating is rebutted per *Ogilvie*. Mr. Goldfarb concedes that the applicant is limited to home-based work. Although Mr. Goldfarb's ultimate conclusion is wrong, his reports found that the applicant is limited to home-based work which is a sheltered work environment and is equivalent to a finding of PTD or 100%." This is the current state of the law.

### III. CONTENTIONS

#### A. DEFENDANT ASSERTS THAT THE UNDERSIGNED ACTED IN EXCESS OF HER POWER AND THERE IS NO EVIDENCE TO JUSTIFY THE FINDINGS OF FACT

Please note that defendant has keyed in the wrong letters for their assertions i.e. this is "A" and as such they will be responded to according to the proper alphabetical chronology.

As stated above, there is ample evidence to find the applicant is 100%. On the basis of the applicant's credible testimony, PQME Kuyt, PTP in psyche, Dr. Lamm, applicant's VE Dr. Reyes as well as defense VE, Mr. Goldfarb as well as the non-substantial report from PQME Justice stating the applicant is relegated to remote work. There is substantial evidence to support a finding of 100%. Defendant's VE, ratified the bogus Catalyst job offer for a telemarketer working at home 13 of 24 hours a day and further cemented the undersigned's findings that the conclusions of defense VE expert are not substantial. Telemarketer calls are truly unpopular and the daily expectations seem unattainable even for a person without a disability. Defense' witness did not



review all of the evidence to make an intelligent job offer as she testified that she reviewed one report. Ms. Wallace's testimony was found not substantial. The job was on a trial basis and if the expectations were not met, the job was over. On the other hand, the Applicant's VE expert reviewed the evidence and found the applicant is not amenable to rehabilitation on a urological et. al. basis. The conclusion that the applicant would not benefit from rehab invoked *LeBoeuf* and is consonant with the current state of the law. Mr. Reyes' vocational opinion is substantial to support a finding of 100% PD.

With respect to psyche, Dr. Lamm was deemed better reasoned and more substantial than Dr. Justice. Dr. Lamm did not indicate that the applicant could perform on a psychological basis at work. Dr. Justice's opinion that the applicant can function as a stay at home father demonstrated that the applicant can do remote work only and is not 100% is flawed. Relegating an injured worker to home-based or remote work is not akin to stating they are able to work in the "open" labor market. Dr. Justice's opinion is not substantial (Z3 at pp. 75-76). The evidence established the applicant is 100%.

**B. DEFENDANT ASSERTS THAT THERE ARE NO AME AND PQME REPORTS THAT SUPPORT A FINDING OF PERMANENT AND TOTAL DISABILITY**

Defendant's assertion is incorrect as both Dr. Kuyt and Dr. Justice support a finding of 100%. First, Dr. Kuyt indicated that the applicant is permanently and totally disabled from the open labor market due to the trifecta of complaints from the botched surgery. In addition, Dr. Justice indicated the applicant could only work at home. The open labor market contemplates work outside the home hence the word used is "open", i.e. it is not a closed or remote labor market. Relegating an injured worker to remote work is akin to a finding of 100% as it is a sheltered or protected work environment (see *Thompson v. COLA*, 2023 Cal.Work.Comp P.D. Lexis 217 wherein the record was developed per *LeBoeuf* when the injured worker was relegated to a sheltered or protected environment which may be consistent with PTD).

**C. DEFENDANT ASSERTS THAT THE REPORTINGS OF ANTONIO REYES, PH.D. AND MARCIA LAMM, PHD LACK SUBSTANTIAL MEDICAL EVIDENCE**

As stated above, there was nothing inaccurate about the findings of Dr. Reyes with respect to the applicant's capabilities. Dr. Reyes found the applicant not feasible. Dr. Reyes reviewed all of the medical evidence. The applicant's testimony did not add anything new that was not consistent with what was recorded by any of the evaluators in this case – defendant's VE reviewed it and noted no changes in his last report. Dr. Lamm was also found substantial. Dr. Lamm's reasoning is more persuasive and better reasoned than the reporting of Dr. Justice, i.e. Dr. Justice' assertion that the applicant's ability to be a father demonstrated he could work inside the home on a remote basis does not comport with the law.

**D. DEFENDANT ASSERTS THAT THERE IS SUBSTANTIAL MEDICAL EVIDENCE TO SUPPORT THAT THE APPLICANT CAN COMPETE IN THE OPEN LABOR MARKET AND IS [SIC] NOT PERMANENT TOTAL DISABLED**

Defendant's last assertion is equally flawed. First, the Catalyst offer was not bona fide. Their witness reviewed one report and as such there was nothing for the applicant to rebut when

petitioner failed to meet their burden of proof. Defendant's VE's ratification of that offer did not sanctify it; rather, it contributed to the undersigned's finding that Mr. Goldfarb's reporting was not substantial. Defendant's expert indicated that the applicant was relegated to remote work only as a result of his injury. Remote work – however trendy it may be – is not work in the open labor market. Remote work is sheltered work which is the equivalent of 100%. A recent case discussed the concept of a sheltered or protected work environment and working in a protected environment such as remote work invokes *LeBoeuf* (see *Kim Thompson v. COLA*, 2023 Cal. Wrk. Comp P.D. Lexis 217 wherein the record was developed regarding the issue of a sheltered workshop).

An applicant's ability or inability to function as a parent is not germane as to whether or not they can perform in the open labor market. Defendant ignores the applicant's statements that he wakes up in the middle of the night wondering whether or not he can be an effective father and has a fear of having accidents.

Parenting one's own children is not a job in the open labor market. Petitioner is neither a party nor a third party beneficiary of the applicant's relationship with his family and as such the applicant's ability or inability to parent his children cannot be factored into the ultimate decision as to whether or not the applicant is 100%. Defendant's assertion is also flawed from the standpoint that had the applicant been rendered unable to care for his own children then by defendant's assertion applicant's inability to parent could have been considered compensable wage loss which would have increased applicant's AWW and correspondingly increased the TTD/PTD rate in this case. Defendant would then have asserted that parenting is not relevant but that is in essence what the petitioner is asking to do, i.e. consider an injured worker's parenting their own children as a compensable job in the open labor market. There is no occupation code for "parent", "father" or "mother" in the rating manual for the simple reason that it is not relevant. There is, however, a definition of permanent total disability in the rating manual and that occurs when there is a total loss of earning capacity (See *Schedule* at 1-2). That is what this applicant has sustained in this case.

Petitioner states that no medical indicates the applicant is permanently and totally disabled which ignores the opinions of PQME Dr. Kuyt, Dr. Lamm as well the vocational evidence. Even defendant's VE relegates applicant to a sheltered environment which is PTD.

Defendant cites panel decisions in *Dewey* and *Guzman* and indicates that applicant's case is distinguishable. However, those cases support the applicant. *Guzman* was still deemed 100% despite evidence that he could participate in childcare activities as he was not feasible per *LeBoeuf* – like Sean Wilson. In *Dewey* the injured worker was relegated to a sheltered work environment and ultimately deemed 100%. Defendant asserts that the Catalyst job offered to the applicant distinguishes this applicant's position and it does not. As stated above, the offer was not bona fide. Moreover even if it was bona fide, a remote telemarketer is essentially a sheltered workshop and not work in the open labor market. As the court stated in *Dewey* "It has long been recognized that an injured worker may be found to be 100% permanently disabled when the effects of the industrial injury cause a loss of future earning capacity because the employee is not amenable to vocational rehabilitation and is unable to compete in the open competitive labor market. (Citations omitted). As the Court wrote in *LeBoeuf*, permanent disability is "the irreversible residual of a work-related injury that causes impairment in earning capacity, impairment in the normal use of a member or a handicap in the open labor market." (*Id.*) An injured worker may be totally permanently disabled

even if he or she may be able to perform some limited work in a sheltered and protected work environment, as in this case. (Underline added.) (Citations omitted.)” *Dewey* at p. 6).

In 2023, a recent panel decision, *Thompson, supra*, indicated that sheltered work may equate to permanent and total disability. Remote work is still viewed as an outlier. Based on the evidence in this case and in accordance with the law, the applicant is 100% permanently disabled as a result of his injury and subsequent medical treatment.

#### **IV. CONCLUSION**

It is respectfully recommended that the petition for reconsideration be denied.

**DIANE BANCROFT**

Workers’ Compensation Administrative Law Judge