

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

GILBERT LOPEZ, *Applicant*

vs.

**HARTNELL PACKING, INC.; CLARENDON NATIONAL INSURANCE COMPANY;
LIBERTY MUTUAL INSURANCE COMPANY; WAUSAU UNDERWRITERS
INSURANCE COMPANY; CALIFORNIA INSURANCE GUARANTEE
ASSOCIATION (CIGA), by TRISTAR RISK MANAGEMENT, INC., for CAL COMP, in
liquidation; STATE COMPENSATION INSURANCE FUND (SCIF); CALIFORNIA
INDEMNITY INSURANCE COMPANY; and SUBSEQUENT INJURIES BENEFITS
TRUST FUND, *Defendants***

**Adjudication Number: ADJ3543979 (SAL 0115479)
Salinas District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

Defendant Hartnell Packing Inc., by and through its insurer, Wausau Underwriters Insurance Company/Liberty Mutual, seeks reconsideration of the December 28, 2020 Findings, Award and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant Gilbert Lopez sustained five industrial injuries, specific and cumulative, to his bilateral shoulders, back, psyche, heart/cardiovascular, sleep and internal while employed as a dock supervisor on July 5, 1996, December 1, 2001, and cumulatively over the periods ending December 31, 2002, October 14, 2003, and June 9, 2005, resulting in permanent total disability. The WCJ determined that though applicant sustained five separate injuries, he was entitled to a single joint award of permanent total disability in the absence of substantial medical evidence to apportion disability between the dates of injury.

Defendant contests the award of a single joint award of 100% permanent disability, contending that applicant sustained multiple dates of injury, including separate periods of cumulative trauma, each of which should have received separate awards of permanent disability. Defendant further contends that if applicant is entitled to a single award of permanent disability, it

should be based on the formal DEU permanent disability rating of 84%, as applicant's vocational expert failed to account for applicant's retirement.

We have received applicant's Answer to the Petition for Reconsideration. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations and arguments of the Petition for Reconsideration, as well as the Answer thereto, and have reviewed the record in this matter and the WCJ's Report and Recommendation on Petition for Reconsideration of February 4, 2021, which considers, and responds to, each of the defendant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate as the decision of the Board, we will affirm the WCJ's December 28, 2020 Findings, Award and Order, and deny the Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the December 28, 2020 Findings, Award and Order is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 18, 2021

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

**GILBERT LOPEZ
SPRENKLE & GEORGARIOU
LAW OFFICES OF SANTANA AND VIERRA
STATE COMPENSATION INSURANCE FUND
HANNA, BROPHY
PATRICO HERMANSON
MULLEN & FILIPPI
OFFICE OF THE DIRECTOR LEGAL**

SV/pc

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

Defendant, Liberty Mutual Insurance Company, has filed a timely, verified petition for reconsideration which contends that (1) applicant sustained multiple dates of injury pursuant to Labor Code Section 5412; (2) applicant sustained multiple cumulative trauma injuries pursuant to Labor Code Section 5500.5; (3) pursuant to Labor Code Section 4664 the several injuries must be apportioned and applicant is not 100% disabled to one date of injury; and (4) if there is one overall rating applicant's permanent disability is 84%.

II

BACKGROUND

Applicant, Gilbert Lopez was hired by defendant Hartnell Packing, Inc., on approximately January 1, 1983 and he worked continuously for this employer until his last day of work on June 9, 2005. Applicant sustained a specific injury on 7/5/96 to his bilateral shoulders, lumbar spine, and psyche, heart (cardiovascular system) and gastrointestinal (GI) (constipation) which is the subject of ADJ2757855 Defendant's workers compensation insurer was California Compensation Insurance, in liquidation, now CIGA, administered by Tristar.

Applicant sustained a second injury on 12/1/01 while employed by Hartnell Packing, Inc., to his bilateral shoulders, lumbar spine, psyche, heart/cardiovascular system and GI (constipation). The employer's workers' compensation carrier was Clarendon Insurance Company (administered by Enstar) which is the subject of ADJ1356533.

Applicant also filed three cumulative trauma injury claims as follows: (1) for a CT period ending on 10/14/03, (ADJ1449786) with the following insurance carriers: State Compensation Insurance Fund with coverage from 7/1/03 through 8/1/03; and Liberty Mutual Insurance from 8/1/03 through 10/14/03; (2) for a CT period ending on 6/9/05, the insurance carrier during the last year of employment was Liberty Mutual Insurance Company (ADJ3543979MF); (3) for a CT period ending 12/31/02 (ADJ3582126) for an injury to right shoulder, back, psyche, heart/cardiovascular system, left shoulder, sleep disorder and GI (constipation). The insurance carriers were: Clarendon National Insurance Company 7/1/00 through 7/1/01, California Indemnity Company 7/1/02 through 7/1/03. Applicant elects to proceed against California Indemnity Company.

The parties utilized the following physicians to resolve disputed issues, including permanent disability and apportionment. Perry Segal, MD, is the agreed medical examiner for psyche for all dates of injury. Lucy Lin, MD, acted as applicants QME for the orthopedic injury for all cases except ADJ3543979MF. Patrick McCreesh, MD, is the PQME for the orthopedic injury in ADJ3543979MF. Paul Anderson, MD, is applicant's PQME for the internal injuries except ADJ3543979. Richard Levy, MD, is the PQME for the internal injuries in ADJ3453979MF.

Applicant utilized Scott Simon as his vocational expert. Defendant utilized Alejandro Calderon as the defense vocational expert.

Perry Segal, MD, concludes that applicant sustained a 12% whole person impairment as a compensable consequence of his musculoskeletal injuries and that 95% of the impairment was apportioned to the industrial injury. (Exh. J-1) the rating string for the psychiatric injury is: .95 (14.01.00 – 12 [8] – 17 – 360E – 15 – 19) 18%.

Richard Levy, MD, concludes that applicant has an 8% WPI caused by the hypertension injury with 50% of the impairment caused by the work injury (Exh. A-10). The rating string is:

.5 (04.01.00.00 – 8 [5] – 10 – 360G – 12 – 15) 8%

Dr. Levy also found an 8% WPI for sleep disorder with 75% apportioned to the industrial injury. The rating string is:

.75 (12.03.00.00 – 8 [6] 11 – 360E – 10 – 13) 10%

Dr. Levy concludes that applicant has a 5% WPI for the constipation injury with 100% apportioned to the industrial injury:

.06.02.00.00 – 5 [6] – 7 – 360F – 7 – 9%

Lucy Lin, MD, determined that applicant sustained a 25% whole person impairment related to his low back injury with 80% of the disability to applicant's industrial injuries (Exh. A-24):

.8 (15.03.02.00 – 25 [5] – 32 – 360G – 35 – 42) 34%

Dr. Lin also concludes that applicant sustained a 23% WPI for his right shoulder injury and 18% WPI for his left shoulder injury with 100% apportioned to the industrial injuries:

16.02.01.00 – 23 [7] – 31 – 360G – 34 – 41%

16.02.01.00 – 18 [7] – 24 – 360G – 27 – 33%

When the above disability ratings are combined using the Combined Values Chart in the PDRs, the overall rating is as follows:

41C34 = 61C33 = 74C18 = 79C10 = 81C9 = 83C8 = 84%

There appears to be no dispute with regard to the above referenced rating of 84% permanent disability.

Scott Simon concludes that applicant is not amenable for rehabilitation because of the combination of his industrial impairments. Mr. Simon determined that there were a limited number of occupations that applicant could engage in as a result of the orthopedic restrictions. However, when the physical and internal medical factors were taken into account, applicant was not feasible for any of the jobs. (Report, Scott Simon, 11/28/16, p. 32; Exh. A-20.) Mr. Simon concludes applicant's inability to benefit from rehabilitation was based solely on the effects of the industrial injury. (Report, supra, p. 27; Exh. A-20.) Mr. Simon reviewed additional medical records and reports, including reports from Dr. Lucy Lin, Dr. Richard Levy and Dr. Perry Segal. Based on a review of these reports, Mr. Simon again concludes that applicant has sustained 100% loss of labor market access. (Report, 1/11/18, p. 9; Exh. A-19.)

The reports from Alejandro Calderon conclude that applicant is amenable to rehabilitation. The WCJ determined that Mr. Calderon's conclusions were contradicted by the more persuasive opinions of Mr. Simon. Consistent with the opinions in *Ogilvie* and *Dahl*, the WCJ determined that the PDRS has been rebutted and that applicant has sustained 100% permanent total disability as a result of his industrial injuries. The WCJ also determined that defendants failed to meet the burden of proof required to establish apportionment of permanent disability between the various industrial injuries and, therefore, applicant is entitled to an unapportioned award of 100% permanent total disability. It is from this determination that defendant has filed its petition for reconsideration.

III

DISCUSSION

1. **Although applicant sustained multiple injuries, applicant is entitled to an unapportioned award of 100% permanent total disability because defendant failed to meet into burden of proof on apportionment between the various injuries.**

In this matter, applicant has claimed five separate dates of injury, including a specific injury occurring in 1996, a specific injury occurring in 2001 and cumulative trauma injuries for periods ending 12/31/02, 10/14/, 03, and

6/9/05. Dr. Lin and Dr. McCreesh have evaluated applicant's musculoskeletal injuries. Applicant has also been evaluated by Dr. Segal, a psychiatrist, and Dr. Levy, an internal medicine specialist.

Dr. Lin and Dr. McCreesh were able to parcel out causation of disability for the musculoskeletal injuries among the two specific dates of injury and one period of cumulative trauma ending 6/9/05. Dr. Segal, however, was not. In his report dated 7/13/18, Dr. Segal noted that although he originally apportioned 10% of psychiatric impairment to non-industrial sleep apnea, he later changed that apportionment to just 5% since the sleep apnea seemed to be playing a lesser role than it was in 2008. The remaining 95% of psychiatric disability he found attributable to Mr. Lopez's work injuries. (Exh. J-1) In his report dated 6/9/14, Dr. Segal indicated that "truth be, from a psychiatric perspective, the injuries are too inextricably intertwined to separate out and apportion between them." (Exh. J-4) Dr. Segal explained that this determination was based on the fact that he did not have an opportunity to examine applicant until December 2008, "many years" after his industrial injuries and more than three years after his last day of employment.

Dr. Segal suggested in his 7/13/18 report that disability for the psychiatric injuries "should be apportioned along the same lines as the orthopedic disability." He explains that his reason for saying so is that he believes "it medically reasonable to consider the psychiatric symptomatology to have roughly approximated the stepwise deterioration in Mr. Lopez's overall orthopedic status, and , furthermore, that the physical injuries considered greater by the orthopedic examiners to have a greater contribution to Mr. Lopez's reactive depression as well. Dr. Segal continues by saying that his opinion that the psychiatric injuries were too inextricably intertwined to separate out was intended to be limited to the psyche injuries, and that the "orthopedic evaluators may arrive at a different opinion regarding apportionment based upon the severity of the injured body parts." (Exh. J-1)

There are two main problems with Dr. Segal's apportionment opinion as described above. First, Dr. Segal makes clear that he actually does not have adequate information to parcel out disability for Mr. Lopez's psychiatric condition among the separate dates of injury, despite the fact that he subsequently suggests that the psychiatric condition could be apportioned consistent with apportionment for the musculoskeletal injuries. Therefore, his opinion as to apportionment does not meet the requirements of substantial medical evidence.

Second, Dr. Segal overlooks the fact that Mr. Lopez's injuries involve multiple body parts, and the percentage of causation of disability attributable to each date of injury is not the same for each body part. For example, Dr. Lin indicates in her 7/10/13 report that for the lumbar spine, disability should be apportioned 40% to the 7/8/96 injury, 20% to cumulative trauma and specific

work injuries predating the 1996 injury, and 40% to cumulative trauma through 6/9/05. Yet Dr. Lin indicates that disability for the bilateral shoulder should be apportioned 50% to the 7/5/96 injury, 25% to the 12/1/01 injury, and 25% to cumulative trauma through 6/9/05. (Exh. A-24).

Dr. Segal does not attempt to distinguish between psychiatric injury resulting from Mr. Lopez's lumbar spine and psychiatric injury resulting from Mr. Lopez's bilateral shoulders. In fact, he suggests that doing so is not possible. In his 6/9/14 report, Dr. Segal wrote, "From what Mr. Lopez told me, his low back and both shoulders are hurting about in equal amounts. These three body parts are mentioned in all five open claims. Drs. Carson and Lin have attempted to apportion between them, or at least between the two specific injuries and cumulative trauma period. All I can add is that the same ratio should apply to apportionment of Mr. Lopez's psychiatric disability." (Exh. J-4.)

The "ratio" referenced by Dr. Segal has not actually been supplied by any of the evaluators. Certainly both Dr. Lin and Dr. McCreesh provided apportionment opinions for the lumbar spine and bilateral shoulders, but they do not give one "ratio" determining how disability for those body parts is parceled out among the various dates of injury, therefore, the Court would have to create one. Such a determination of apportionment would not be based on the evaluator's opinions as to causation of disability. A determination of apportionment not based on medical evidence would be invalid: "In resolving the apportionment issue, the referee and the board must rely upon expert medical advice; in order to constitute substantial evidence, the experts opinion must rest upon relevant facts and must consist of something more than a legal conclusion." (*Zemke v Workmen's Comp. App. Bd.*, supra, 68 Cal. 2d at p. 798.)" *Avila v. Workers' Comp. Appeals Bd.* (1970) 14 Cal. App. 3d 33, 91 Cal. Rptr. 853, 35 Cal. Comp. Cases 637, 639.

The apportionment determination provided by Dr. Levy is flawed in a similar fashion to that of Dr. Segal. In his report dated 10/7/17, Dr. Levy finds industrial causation for Mr. Lopez's hypertension and provides 8% whole person impairment for same. He indicates that 50% of impairment for hypertension is caused by "endogenous nonindustrial factors," and 50% of his impairment is caused by "orthopedic work-related injuries." Dr. Levy further dictates that as for parceling out disability among multiple dates of injury, he "would follow the dictates of the orthopedist with respect to apportionment between the various work-related and non-work related orthopedic impairments." (Exh. A-11) This opinion is insufficient to allow the Court to actually apportion industrial impairment for hypertension between multiple dates of injury for the same reasons articulated previously with respect to Dr. Segal's apportionment opinion.

Defendant's burden requires that they develop the opinions of the evaluators in order to establish that an apportioned award is appropriate.

Defendants in this matter have not carried their burden. Dr. Segal's opinions regarding apportionment remain unclear, are by his admission not based on adequate information, and are insufficient to allow the Court to determine the appropriate percentages of psychiatric disability to apply to each date of injury. Dr. Levy's opinions regarding apportionment are similarly flawed in that he defers to "the dictates of the orthopedist" but overlooks the fact that such dictates will not suffice absent clarification as to differing apportionment for the lumbar spine and bilateral shoulders.

Based on the uncertainty in the medical record regarding apportionment between the various injuries, the WCJ has elected to order the entire award to be paid by Liberty Mutual subject to its right to reimbursement/contribution from codefendants; jurisdiction is reserved.

2. The well-reasoned opinions of Scott Simon and Lucy Lin, MD support the WCJ's determination that applicant is 100% permanent, totally disabled.

In his report dated 7/10/13, Dr. Lin concludes that "I do not believe that applicant would be able to return to work in any capacity given his current condition." (Report, supra, p. 50; Exh. A-24.) Dr. Lin's opinion is supported by the fact that applicant has undergone four right shoulder surgeries and an MRI of the left shoulder reveals a rotator cuff tear of the supraspinatus and infraspinatus muscles. Applicant has positive impingement signs in the bilateral shoulders. (Report, supra, p. 46; Exh. A-24.) Referable to the lumbar spine, multiple MRI's confirm that applicant has spinal stenosis and decreased active range of motion of the lumbar spine. (Report, supra, p. 46; Exh. A-24.)

As a result of the bilateral shoulder injury, applicant is precluded from work above the bilateral shoulder level and a 50% loss of pre-injury capacity for lifting, pushing, pulling, grasping, holding and torquing. As a result of the lumbar spine injury, applicant has a 75% loss of pre-injury capacity for bending, stooping, lifting, pulling, pushing and climbing (a substantial work restriction). (Report, supra, p. 46, Exh. A-24.)

In his report dated 1/11/18, Scott Simon reviews applicant's extensive medical records and he notes the significant limitations which applicant has experienced as a result of his injuries to multiple body parts including orthopedic, internal and psychiatric injuries. As a result of the combined effects of those injuries, applicant is unable to return to work and he has sustained a 100% loss of labor market access. (Report, 1/11/18, p. 7-8; Exh. A-19.) From an apportionment perspective, Mr. Simon concludes that the injuries are too inextricably intertwined to apportion between them. (Report, supra, p. 8; Exh. A-19.)

In his report dated 11/28/16, Mr. Simon noted the following physical tolerances:

“Sitting – up to 45 minutes in his easy chair, not repeatedly; Standing – fatigues easily – he tries to avoid standing, His lower back increases due to stationary standing; Walking – short distances only, he is unable to climb stairs; Pushing/pulling – very limited, he can only push or pull with his left upper extremity, not his right; driving – limited; twisting – avoids; lifting – limited. (Report, 11/28/16, p. 13; Exh. A-20.)

Mr. Simon performed a transferable skills analysis which utilized the OASYS Software based on applicant’s orthopedic restrictions and his internal limitations. Based on his review of the requirements of the appropriate jobs, Mr. Simon concludes “Based on the physical and internal medical factors combined, Mr. Lopez would not be feasible for these kinds of jobs.” Furthermore, when the psychological factors are combined with the physical and internal medicine issues, Mr. Lopez is not amenable for a return to work. (Report, 11/28/16, p. 22-24; Exh. A-20.)

Mr. Simon then considered whether applicant is a candidate to benefit from rehabilitation based on the four avenues of return to work vocational counselors consider when assisting injured workers: (1) direct placement; (2) educational retraining; (3) on-the-job training, and (4) self-employment. Based on his physical/medical limitations, applicant was not a feasible candidate for any of these areas. (Report, 11/28/16, pp. 24-25, Exh. A-20.)

Mr. Simon considered home based employment and even with the provision of various assistive strategies he concludes that Mr. Lopez would not be able to function effectively in this type of work environment. (Report, 11/28/16, p. 26; Exh. A-20.)

The opinions of Alejandro Calderon were not persuasive because the potential jobs identified by Mr. Calderon are inconsistent with the physical restrictions imposed on applicant as a result of the industrial injuries. Mr. Simon reviewed Mr. Calderon’s report and Mr. Simon points out that applicant cannot perform work as a cashier, counter/rental clerk, office clerk, answering service phone operator, information clerk and telephone solicitor because of Dr. Carson’s limitations which preclude repetitive neck motions. (Report, Scott Simon, 10/22/18, p. 8; Exh. A-18.)

Defendant contends from Mr. Simon’s report is not substantial evidence because he glossed over one of the main “Montana Factors” regarding applicant: he retired on June 9, 2005. (Petition for Reconsideration, p. 9: 4-5.) Mr. Simon did not ignore or gloss over applicant’s retirement because applicant retired – or stopped work – because of the industrial injuries and not because he chose to voluntarily retire: In a report dated 7/5/07, Dr. Robert Carson, MD, the agreed

medical examiner, reviewed applicant's history as set forth in applicant's deposition dated 5/18/06:

"Of interest, on page 23, the patient acknowledged in response to a question that he finally left work in (June) of 2005 because the pain required so much medication that he was goofy and "looked like hell." (Report, Dr. Carson, 7/5/07, p. 9; Exh. J-13.)

Mr. Simon's opinions, along with the opinions of Dr. Lucy Lin, constitute substantial evidence in support of the WCJ's conclusion regarding 100% permanent, total disability.

IV RECOMMENDATION

It is recommended that the petition for reconsideration be denied.

Respectfully submitted,

STUART R. CRYMES
Workers' Compensation Administrative Law Judge