

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

JAMES FRASER, *Applicant*

vs.

**GEIL ENTERPRISES, INC.; U.S. FIRE INSURANCE COMPANY, administered by
CRUM & FORSTER, *Defendants***

**Adjudication Number: ADJ8918710
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 and the opinion on decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report and opinion, both of which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

MARGUERITE SWEENEY, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 9, 2021

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

**JAMES FRASER
BRADFORD & BARTHEL
GOODCHILD & DUFFY
SAGASER ASSOCIATES**

PAG/bea

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

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INTRODUCTION

James Fraser, 59 year old Sales Representative while employed on December 29, 2010 at Fresno, California, by Geil Enterprises, Inc. whose workers' compensation insurance carrier was U.S. Fire Insurance Company administered by Crum & Forster, sustained injury arising out of and in the course of employment to his left clavicle, skull, left shoulder, and left ribs (first and fourth). Applicant further claimed to have sustained injury to his ears (hearing loss), psyche, hypertension, head and brain. Applicant was injured when he fell 8-10 feet off a ladder and struck his head on pavement.

Defendant has filed a timely, verified Petition for Reconsideration from the Findings of Fact, Award dated December 23, 2020 alleging that:

1. the evidence does not justify the Findings of Fact;
2. the Findings of fact do not support the Order, Decision or Award, and
3. the trial Judge acted in excess of his powers.

11.

FACTS

Petitioner sustained an injury as the result of falling off a ladder and striking his head. He was admitted to Community Regional Medical Center. A CT scan showed right frontal hemorrhagic contusions, right frontal subdural hematoma, right frontal subarachnoid hemorrhage, small epidural in the left cerebellar space and small intraventricular hemorrhage. He was also found to have a left temporal bone fracture and left mastoid fracture. He did not undergo any surgery. No seizures were noted. He was transferred to Leon S. Peters Rehabilitation on January 5, 2011, then admitted to Centre for Neuro skills for rehabilitation on January 29, 2011, discharged on February 28, 2011 (see Discharge Conference Summary, Centre for Neuro Skills, Exhibit 18, page 1).

Applicant then came under the care of John F. Kirby, M.D., closer to his home. Dr. Kirby released the applicant to return to work, half-time, effective on or

about May 16, 2011 (PR-2 report dated 5/9/2011 - Exhibit 11). Applicant did return to half-time work at the employer and did so until on or about April 17, 2012 (ibid, PR-2 report dated 4/17 /2012). Applicant was terminated at that time due to "deficient performance" (report of Frank Cantrell, M.D. dated April 17, 2012, page 2, Exhibit 9). Dr. Kirby referred the applicant to Dr. Cantrell for neurological evaluation and treatment.

Following completion of the Panel Qualified Medical Evaluator process, the applicant was evaluated by Steven L. McIntire, M.D. in the medical specialty of neurology. In report dated April 3, 2014 (Exhibit C), Dr. McIntire found the applicant permanent and stationary. He found a 28% WPI related to the traumatic brain injury and altered mental status per the AMA Guides, Table 13-6, plus 20% WPI for vertigo and deficits in vestibular function per Table 13-13. He further stated that "he will not be able to return to any form of gainful employment" (ibid, page 2).

Dr. Cantrell referred the applicant to Fernando Gonzalez, Ph.D. for evaluation in the medical specialty of neuropsychology. Applicant complained of cognitive processing problems, memory issues, dizziness and problems with balance, hearing loss, vision problems and depression (report dated January 22, 2013, Joint Exhibit 1, page 3). Applicant's spouse and son were also interviewed and noted increased irritability and obsessive-compulsive behavior including hoarding (ibid, page 4). A number of neuropsychological tests were administered. IQ was noted to be average, verbal intellectual abilities in the high average range, low average in perceptual reasoning and average in processing speed (ibid, pages 14-15). His scores varied as to language functioning and mental control. Verbal memory scores were low average to average. In summary, Dr. Gonzalez stated that the applicant has suffered "significant losses in terms of both intellectual ability and emotional control, and suffers from frequent headaches, visual difficulty, dizziness, and tinnitus, all of which negatively affect and limit his ability to function (ibid, Page 19).

Dr. Gonzalez found the applicant permanent and stationary. Applying the AMA Guides he found a 15% WPI for Clinical Dementia under Class 2. In addition

he found a 29% WPI per page 325 of the Guides, emotional disturbances originating in verifiable neurologic impairment per Table 13-8, Class 2 (ibid, page 21).

On February 18, 2014, applicant's attorney wrote a letter to Dr. Gonzalez asking him address Labor Code Section 4662(d) (Exhibit D).

On July 25, 2014, Dr. Gonzalez submitted a supplemental report (Joint Exhibit 2). His statements above and rating remained the same. He adds: "The likelihood that he will be able to find comparable employment is very small, especially in light of his various limitations and emotional control issues. It is possible that he may find employment in a supportive or family-oriented environment" (ibid, page 39). In response to applicant's attorney's inquiry he states:"... I would agree and am of the opinion that the applicant is 100% totally disabled a result of the injury to his brain. As such, Mr. Fraser meets the definition of the code which describes "an injury to the brain resulting in incurable mental incapacity or insanity" (ibid, page 41).

Trial of the matter took place on May 27, July 15, and September 2, 2015. Findings & Award and Order of Commutation issued on October 27, 2015 finding that applicant sustained injury to his left clavicle, skull, left shoulder, left ribs (first and fourth), head, brain and psyche and awarding applicant 85% permanent disability. Injury in the form of hypertension and hearing loss was not found.

Applicant filed a Petition for Reconsideration. On September 12, 2016 the WCAB issued its Opinion and Decision after Reconsideration, rescinding the F&A and issued a new F&A, finding injury AOE/COE to include hypertension and hearing loss and deferring the issues of the extent of permanent disability and attorney fees, remanding the matter for further development of the record.

The parties completed the panel QME process and Paul Michaels, M.D. was selected in the medical specialty of psychiatry (Court Exhibit 1). He diagnosed applicant with Depressive Disorder, Cognitive Disorder, traumatic brain injury with multiple residual neurological and cognitive deficits, multiple non-industrial conditions including thyroid, hypertension, prostate and high cholesterol, psychosocial stressors, serious traumatic brain injury with residual neurological and

cognitive impairments, untreated depression, unemployment with some financial limitations and a current GAF of 65 (at page 12). Dr. Michaels notes that: "The injury caused the examinee a massive loss of function, health, self esteem, job, income and sense of self worth that led to the examinee becoming depressed because of multiple losses. The examinee to this day continues to have difficulties accepting his new self or accepting his limitations or learning how to live with what he has, not with what he does not have, the examinee has to learn how to cope with his deficits-and how to utilize what he has left in order to become more self-sufficient and becoming involved in some future projects. At this point, the examinee sees himself as being unemployable and his doctors feel he is totally and permanently disabled" (at pages 14-15). He did not feel that Mr. Fraser had reached maximum medical improvement and recommended psychotherapy.

The parties also obtained a PQME report from James M. Schmitz, M.D. dated 12/14/2017 in the specialty of internal medicine (Court Exhibit 2). Dr. Schmitz found that applicant's hypertension was non-industrial, contrary to the finding of the Board.

A supplemental report from the QME in otolaryngology, Dr. May was submitted (Court Exhibit 3, full report found at EAMS Doc ID# 31847023). Dr. May found a 28% WPI related to traumatic brain injury per Table 13-6 of the AMA Guides, 10% WPI for Class 2 impairment per Table 11-4 Vestibular disorder and 3.13% WPI for left sensorineural hearing loss.

A supplemental report from neuropsychologist Fernando Gonzalez, Ph.D. dated 12/8/16 (Court Exhibit 7). It is Dr. Gonzalez's opinion that the applicant suffers from Major Neurocognitive Disorder due to traumatic brain injury, Mood Disorder secondary to Traumatic Brain Injury, Personality Change, Male Hypoactive Sexual Desire Disorder and GAF of 50. His condition has deteriorated since his prior finding of MMI status. He will require monitoring and supervision for the rest of his life. Citing the *Almaraz-Guzman* decision he further states at page 18:

"Given the nature of Mr. Fraser's deficits and limitations, his deficits are synergistic, where one area of difficulty becomes greater or exacerbated when combined with another area of difficulty. His deficits are therefore additive. For

example, when his reduced threshold for frustration is combined with his reduced working memory or processing speed, he is easily overwhelmed by simple stressors or pressure (e.g., being asked a question and he starts to stammer and then becomes agitated). Similar examples can be noted with his balance issues, such that when he starts to lose his balance it triggers anxiety causing him to become more off balance."

For Clinical Dementia Rating (Table 13-6) he finds Class 1, 49% WPI.

Per Table 13-8 (Emotional and Behavioral Disorders) he finds Class 2, 29% WPI.

For voice/speech impairment, Table 11-8, he finds Class 4, 21% WPI.

He then reviews the WCAB's Opinion and Decision after Reconsideration and states per Labor Code 4662(d) he believes applicant is 100% permanently and totally disabled (at page 20) and goes on to state:

"Given the severity of his difficulty, Mr. Fraser would be unable to function independently in any competitive work environment. His combination of impaired cognition with impaired verbal and visual memory, speech impairment, poor frustration tolerance, emotional dyscontrol and depression place him at high risk for self- injury or injury of others. He is completely unable to compete in the open labor market, requires supervision in all environments, is unsafe to operate any motorized vehicle, and is at risk for falls when walking. Given his difficulty with interpersonal interactions, he is at high risk for physical altercations with even slight provocation. The testing, interview, collateral interviews and the medical record all support that Mr. Fraser is severely impaired as a result of his industrially-related brain injury. It is also readily apparent that if each of the areas affected by his brain injury are rated using the AMA guides, he is well above the hundred percent threshold."

Further trial took place of January 8, 2020. Formal rating issued for dementia (28% WPI), psyche (30% WPI), vertigo (10% WPI), hearing loss (3% WPI) and voice/speech (21% WPI) which yielded 90% permanent disability after application of the combined values chart. Applicant attorney objected to the formal rating instructions but waived cross- examination of the rater at hearing.

Following further review of the arguments of both parties, the undersigned issued further formal rating instructions based upon the same WPI findings and instructed the rating specialist as follows: "Please consider duplication/overlap. Please add disabilities; do not combine (Kite)". This resulted in a rating of 197% permanent disability. Defendant objected to the rating instructions and further

hearing was held on 10/6/2020. At that hearing Defendant waived cross-examination of the rater (see Minutes of Hearing, EAMS Doc 10#73359527).

Findings of Fact, Award and Order issued finding that applicant was 100% permanently and totally disabled. It was found that applicant had successfully rebutted the Permanent Disability Rating Schedule by application of the reasoning found in *Athens Administrators v. WCAB* (Kite) (2013) 78 CCC 213.

III.

DISCUSSION

Petitioner argues that the 2018 decision of the Court of Appeal in *Department of Corrections and Rehabilitation v. WCAB* (Fitzpatrick), 83 CCC 1680 supports its position that the Award be overturned. Petitioner's allegation that "Although not directly referenced in the WCJ's opinion, it is clear that the award is premised on Labor Code section 4662(b)... " is incorrect. The decision was clearly stated with reliance on the Kite decision and not Labor Code Section 4662(b). Further, the decision is also supported by other longstanding legal precedent.

The *Kite* decision noted that although the 2005 Permanent Disability Rating Schedule provides that impairments are generally combined by using the CVC reduction formula, the AMA Guides describe several methods of combining impairments, that a rigid application of multiple disabilities table is not mandated and that the scheduled impairment rating is rebuttable. The WCAB held that the WCJ did not err in combining permanent disability stemming from injury to each of applicant/forklift operator's hips by using simple addition, rather than by using the combined values chart or the reduction method, based on the panel qualified medical evaluator's opinion, when WCAB found that, although the 2005 Permanent Disability Rating Schedule provides that impairments are generally combined by using reduction formula, the AMA Guides describe several methods of combining impairments, that rigid application of the multiple disabilities table is not mandated, that the scheduled impairment rating is rebuttable, and that in that case the panel qualified medical evaluator appropriately determined that impairment resulting from applicant's left and right hip injuries was most accurately combined by using simple addition rather than by using the combined values formula.

Petitioner concedes that since the case of *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal. Comp. Cases 1084 (en banc), aff'd sub nom. *Milpitas Unified School Dist. v. W.C.A.B.* (Guzman) (2010) 187 Cal. App. 4th 808, 115 Cal. Rptr. 3d 112, 75 Cal. Comp. Cases 837, the strict application of the AMA Guides and the PDRS may be rebutted with a goal of producing the most actual depiction of the applicant's actual impairment.

In *ACE American Insurance Company v. WCAB (Botto)* (2020) 85 CCC 590 (writ denied), the WCAB noted that on the issue of PD, although the AMA Guides ratings are presumed to be correct pursuant to Labor Code § 4660, they may be rebutted by a showing that the scheduled rating does not accurately reflect the extent of an injured employee's disability. The WCAB cited *Almaraz/Guzman*, noting that a reporting physician may find impairment using a different table or measurement that more accurately reflects WPI or PDAs long as the physician's opinion remains within the four corners of the AMA Guides and insubstantial evidence.

The WCAB in *Holgersen v. State of California*, 2020 Cal. Work. Comp. P.O. Lexis 138, upheld the WCJ when he added impairment ratings from different body parts, because it more accurately reflected the applicant's permanent impairment.

Petitioner goes on they argue that the individual impairment ratings utilized in the rating instructions are not substantial medical evidence. Dr. Gonzalez and Dr. May both reference specific sections of the AMA Guides for their opinions, which it should be noted are unrebutted. Such use of impairments within the four corners of the AMA Guides has been upheld on a number of occasions. For example, in the recent and *post-Fitzgerald* matter of *JG Boswell Company v. WCAB* (2020) 2020 Ca. Wrk. Comp. Lexis 108 (writ denied), the WCJ's application of Table 15-19 and Kite was upheld in rating applicant's lumbar spine impairment, where the medical evaluator explained that adding impairments more accurately reflected the applicant's actual disability due to the synergistic effect between the function of the different body parts.

Regarding Petitioner's argument regarding duplication and overlap in the ratings, as noted above those issues were included to the rating specialist in the form al request for rating. Defendant objected to the rating instructions and had the opportunity to cross- examine the ratings specialist yet declined to do so.

Petitioner argues that the addition of permanent disability violates Labor Code Section 4660. As *Kite* and other case law cited herein hold, that is not the current view. Cases cited by Petitioner each rely on their own facts and the evidence presented with the framework of existing case law.

Not to be overlooked are the opinions of Dr. McIntyre and Dr. Gonzalez stating that the applicant is unable to return to any form of gainful employment. Although applicant declined to obtain a vocational rehabilitation expert in this case, *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [129 Cal.Rptr.3d 704, 76 CCC 624 allows deviation from the rating schedule where the disability reflected in the rating schedule is inadequate in light of the effects of the employee's industrial injury, referencing *LeBoeuf v. WCAB* (1983) 34 Cal. 3d 234. Here, it is the opinion of at least two of the medical evaluators that the applicant has sustained a total loss of earning capacity as he is unemployable.

IV.

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

David Brotman
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

DATE: FEBRUARY 2, 2021

OPINION ON DECISION

In its Opinion and Decision After Reconsideration dated December 12, 2016, the WCAB found that applicant sustained injury to his left clavicle, skull, left shoulder, left ribs, head, brain, psyche, hearing loss and internal systems in the form of hypertension, among other findings including temporary disability, the lien of EDD and credit. The Board further remanded the matter to the trial level on the issue of permanent disability, apportionment (other than head, brain and psyche) and attorney fees.

PERMANENT DISABILITY

The factors of permanent disability set forth in the rating instructions are based upon applicant's testimony with due consideration to his credibility as a witness and the medical reports of Fernando Gonzalez, Ph.D. , and Steven McIntire, M.D. which are well reasoned and persuasive, Cross-examination of the disability evaluation specialist having been waived, in accordance with the recommendation of the disability evaluation specialist, it is found that a strict rating would yield a permanent disability award of 90%, equivalent to 753.25 weeks of indemnity payable at the rate of \$270.00 per week, in the total sum of \$203,377.50.

Notwithstanding, based upon the medical report of Dr. Gonzalez dated 12/8/2016 it is found that applicant is 100% permanently and totally disabled, entitling applicant \$702.88 per week payable for life, subject to Labor Code Sections 4658 and 4659(c).

Although applicant originally alleged permanent and total disability pursuant to Labor Code Section 4662(a)(4), it is found that the Permanent Disability Rating Schedule has been successfully rebutted by application of the reasoning found in *Athens Administrators v. WCAB (Kite)* (2013) 78 CCC 2 13. Although the PDRS generally provides that impairments be combined, the AMA Guides describe other methods of combining impairments, and that rigid application of the Combined Value Chart is not mandatory, and confirmed prior authority finding that the PDRS itself is rebuttable.

Here, Dr. Gonzalez found that:

"...the physician is charged with providing a whole person impairment

(WPI) rating utilizing any chapter, table, or method in the AMA Guides 5th Edition that most accurately reflects the injured employee's impairment. The AMA Guides state that "Impairment percentages or ratings developed by medical specialists are consensus-derived estimates that reflect the severity of the medical condition and the degree to which the impairment decreases an individual's ability to perform common activities of daily living (ADL), excluding work." Given the nature of Mr. Fraser's deficits and limitations, his deficits are synergistic, where one area of difficulty becomes greater or exacerbated when combined with another area of difficulty. His deficits are therefore additive. For example, when his reduced threshold for frustration is combined with his reduced working memory or processing speed, he is easily overwhelmed by simple stressors or pressure (e.g., being asked a question and he starts to stammer and then becomes agitated). Similar examples can be noted with his balance issues, such that when he starts to lose his balance it triggers anxiety causing him to become more off balance."

Mr. Fraser indeed has suffered impairments in several regions of his body, as those regions are found in the AMA Guides. His rating involves dementia, psyche, vertigo, hearing, voice and speech, and he suffers other deficits for which a final rating was not obtained. It is reasonable that these impairments would interact (act "synergistically") to produce a disability greater than each combined separately. Other reporting physicians likewise found impairments in multiple functions of the body. B. Chandler May, M.D., diagnosed applicant with left temporal bone fracture, vertigo; traumatic brain injury with loss of consciousness, rib fractures, clavicle fracture, pulmonary contusion, tinnitus, hearing loss, and vestibular disorder. Dr. Michaels described the applicant as a "severe case" suffering from a depressive disorder, cognitive disorder, "serious" TBI with residual neurological and cognitive impairments, untreated depression, with additional non-industrial conditions.

On that point, it is felt that notwithstanding Dr. Michael's finding that the applicant was not at maximum medical improvement, and in need of psychiatric treatment, applicant chose to forego further discovery and proceed forward to trial.

There is sufficient substantial medical evidence to support the finding of permanent and total disability.

Further, both Dr. Gonzalez and Dr. McIntire opine that the applicant is more likely than not unable to compete in the open labor market. Fernando Gonzalez, Ph.D., neuropsychologist, re-evaluated the applicant on 11/11/2016 (report dated 12/8/2016). The applicant had not worked since his prior evaluation in 2014. He had applied for and was awarded Social Security Disability benefits. His overall condition had deteriorated. Applicant's current complaints included cognitive difficulties, memory issues, increasing vertigo, hearing loss, vision problems, and increased depression. Dr. Gonzalez diagnosed a Major Neurocognitive Disorder, Mood Disorder, Personality Change and Male Hypoactive Sexual Disorder. At page 20, Dr. Gonzalez notes that "Given the severity of his difficulty, Mr. Fraser would be unable to function independently in any competitive work environment. His combination of impaired cognition with impaired verbal and visual memory, speech impairment, poor frustration tolerance, emotional dyscontrol and depression place him at high risk for self-injury or injury of others. He is completely unable to compete in the open labor market..."

Based on the foregoing, it is found that applicant is permanently and totally disabled, which most accurately reflects applicant's level of disability.

APPORTIONMENT

There being no persuasive evidence supporting apportionment in accordance with correct legal principles, applicant is entitled to an unapportioned award.

ATTORNEY FEES

Based on the Title 8, California Code of Regulations § 10844 and the guidelines for awarding attorney fees found in Policy and Procedural Manual Index No. 140, it is found that this matter is one of above average complexity and that a reasonable attorney fee is \$146,117.13 which is to be commuted by uniform reduction from the weekly payments of the award. A copy of the commutation calculations, applying a commutation date of 1/15/2021, is attached hereto as a benefit to the parties and is not binding. Per the representation by Mr. Goodchild at

trial, the attorney's fees are to be paid jointly to Goodchild & Duffy and the Law Offices of Jeffrey DeNicholas, and paid to Goodchild to be held in trust pending resolution of the attorney fee division, with Goodchild solely responsible for the lien of DeNicholas.

DATE: DECEMBER 23, 2020

David Brotman
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE