

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

GHENET UKBAMICHAEL, *Applicant*

vs.

**ST. JOHN'S WELL CHILD & FAMILY CENTER, permissibly self-insured;
administered by ATHENS ADMINISTRATORS, *Defendants***

**Adjudication Numbers: ADJ11027585 & ADJ11027586
Los Angeles 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 and Opinion on Decision, both of which we adopt and incorporate, we will deny reconsideration.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

(a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.

(b)

(1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on December 17, 2024 and 60 days from the date of transmission is Saturday, February 15, 2025. The next business day that is 60 days from the date of transmission, is Tuesday, February 18, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)¹ This decision is issued by or on Tuesday, February 18, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers’ compensation administrative law judge, the Report was served on December 16, 2024, and the case was transmitted to the Appeals Board on December 17, 2024. Service of the Report and transmission of the case to the Appeals Board did not occur on the same day. Thus, we conclude that service of the Report did not provide accurate notice of transmission under Labor Code section 5909(b)(2) because service of the Report did not provide actual notice to the parties as to the commencement of the 60-day period on December 17, 2024.

No other notice to the parties of the transmission of the case to the Appeals Board was provided by the district office. Thus, we conclude that the parties were not provided with accurate notice of transmission as required by Labor Code section 5909(b)(1). While this failure to provide

¹ WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on December 17, 2024.

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/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 13, 2025

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

**GHENET UKBAMICHAEH
MOORE AND ASSOCIATES
GOLDMAN MAGDALIN STRAATSMA, LLP**

JMR/mc

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION
(FILED BY APPLICANT'S ATTORNEY ON NOVEMBER 22, 2024)

INTRODUCTION

Applicant filed a timely, verified, Petition for Reconsideration on November 22, 2024, challenging the Findings and Award after Remand (F&A 2) dated October 30, 2024 and served on October 31, 2024 in the above-referenced matters.

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

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

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

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

The matter came back on the Trial calendar on December 13, 2023 at which time the parties each offered a supplemental vocational rehabilitation report² in support of their respective positions and the reports admitted into evidence without objection, no further testimony was offered, and the matter was once again submitted.

Thereafter, the undersigned Judge issued the March 11, 2024 joint F&A finding Applicant sustained two industrial injuries: in ADJ11027585 for the October 14, 2015 specific to her lumbar spine, with sacroiliac involvement, psyche, and internal in the form of hypertension, upper GI and lower GI; and in ADJ11027586 for the December 31, 2015 specific to her cervical spine, psyche, and internal in the form of hypertension, upper GI and lower GI; that, based upon the findings of the internal PQME who finds the applicant's industrial internal injuries are inextricably intertwined, and thus all permanent disability resulting from both industrial injuries are inextricably intertwined as per *Benson v. Workers' Comp. Appeals Bd.* (2009) 74 Cal. Comp. Cases 113, the permanent disability for both industrial injuries totals 43%, further medical care is necessary, the reasonable value of services rendered by applicant's attorney is \$9,657.00 which shall be commuted from the final weekly payments of the award to the extent necessary to pay as one lump sum, that Applicant has failed to meet her burden in sustaining a finding that she is permanently and totally disabled as per Labor Code 4662(b), that pursuant to Labor Code 4660.1(c)(1) as applicant's psychological injury is a compensable consequence of the orthopedic injuries to the lumbar and cervical spine injuries and did not result from the exceptions listed under Labor Code 4660.1(c)(2), and that applicant has failed to provide evidence to establish entitlement to an increase based on the exceptions codified in Labor

² Although each party obtained a supplemental report from their respective vocational rehabilitation experts, neither party requested and they both specifically rejected the WCJ's offer (made off the record at the September and December Trials) for the parties to obtain a medical review of the VR reporting (as non-industrial apportionment was provided by all of the reporting physicians and, as set forth in *Nunes II*, vocational evidence must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment).

Code Section 4660.1(c)(2) as applicant has failed to prove that applicant's injuries were catastrophic.

On March 29, 2024 Applicant filed a Petition for Reconsideration challenging the decision set forth in the F&A on three bases. (Petition for Reconsideration 3/29/2024, EAMS ID# 51180760). In the Appeals Board's May 28, 2024 Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration (Opinion and Order), the Appeals Board incorporated the undersigned's Report and Recommendation on Petition for Reconsideration (Report) as to all aspects except as to permanent disability and the matters were returned to the trial level for further proceedings addressing whether applicant's injury was catastrophic pursuant to Labor Code section 4660.1(c)(2)(B).

The matter came back on the Trial calendar on August 2, 2024 at which time Applicant offered additional testimonial evidence in support of her position, and the matter was once again submitted.

Thereafter, the undersigned Judge issued the October 30, 2024 Joint Findings and Award after Remand (F&A after Remand) finding that "Applicant has failed to provide evidence to establish entitlement to an increase based on the exceptions codified in section 4660.1(c)(2)(B). Applicant's claim was not catastrophic and Applicant is not entitled to increased permanent disability to include disability for her psychiatric claim." (Joint Findings and Award after Remand 10/30/2024, Finding 2, EAMS ID# 78534685)

On November 22, 2024 Applicant filed a timely and verified Petition for Reconsideration (Recon 2) asserting that contrary to the findings of the undersigned, the evidence offered by Applicant substantiates her entitlement to psychiatric disability under the catastrophic injury exception set forth in Labor Code section 4660.1(c)(2)(B). (Recon 2, EAMS ID# 55088805.)

Defendant has not filed any response.

STATEMENT OF RELEVANT FACTS

Applicant sustained industrial injury to her lumbar spine while assisting a patient during an examination on October 14, 2015 and to her cervical spine and left upper extremity on December 31, 2015 when a child tripped the applicant within an examination room (though the applicant never provided any testimony as to the mechanism of this

second injury). In June, 2017 Applicant had lumbar decompression surgery, almost 20 months after the October, 2015 industrial injury to her lumbar spine without lost time to that point. (Minutes of Hearing/Summary of Evidence (MOH 1) 5/3/2024 9:19-11:20, EAMS ID# 77455273). Applicant continued having persistent low back pain post-surgery. "On July 9, 2018, she underwent the second low back surgery performed by Dr. Hunt. She states that this was another decompression. There was no fusion. Postoperatively, physical therapy was provided for 22 sessions, with benefit." (AME Berman 1/7/2019 at 3, EAMS ID# 45021019). At the August 2, 2024 Trial, Applicant testified that she has not been seen by any orthopedic doctor in the workers' compensation system since being released by Drs. Berman and Aflatoon in 2019. (Minutes of Hearing/Summary of Evidence (MOH 2) 8/2/2024 at page 5, EAMS ID# 78238300.)

Applicant attempted but did not pass a recertification examination to keep her PA license after the second surgery in 2019. (MOH 1 at 10:17-20, 12:4-11).

Applicant's testimony at the Trial after remand on August 2, 2024, alleged that her current complaints, her inability to return to work, and the subsequent financial ramifications therefrom are due to her physical condition resulting from the industrial injuries. Applicant's direct testimony at Trial on August 2, 2024 addressed at length that as a result of the industrial injuries on October 29, 2023 she lost everything and she had to move back to her country, Eritrea, due to her inability to live in the United States *as she cannot afford same*. Applicant lost her apartment in Los Angeles *due to her loss of income*. She now lives with her brother in Eritrea. She also discussed at length *the psychological ramifications* of her industrial injuries. (emphasis added) (See MOH 2 at pages 2-4).

Contradictorily, since last being evaluated by AME Berman and by PTP Aflatoon (both in 2019), she has not been seen by any workers' compensation doctors for future medical care. (See MOH 2 at 5). Outside of the workers' compensation system, Applicant has been prescribed ibuprofen 800 pain killers by her primary care physician, though she "does not recall the last time that she was evaluated or seen by a doctor regarding the orthopedic aspects of her claim, noting that it's been a while. She does not recall what year it was that she was last seen by a doctor for the orthopedic aspects of this claim. She has not been seen by an ortho regarding this claim in either 2024 or

2023." (*Id.* at 5:8-11). Applicant testified that the radicular pain improved after the 2018 second surgery. However, she again began feeling radicular pain as of June, 2024. (*Id.* at 6:21-23.)

DISCUSSION

Applicant contends that she satisfied her burden of proving that her injuries were catastrophic pursuant to the *Wilson* precedent. (Recon 2, EAMS ID# 55088805.)

RECONSIDERATION OR REMOVAL

Is Applicant's Petition filed on November 22, 2024 a Petition for Reconsideration or a Petition for Removal? Removal is an extraordinary remedy that may be requested to challenge interim and non-final orders issued by a workers' compensation judge. (*Cortez v. Workers' Compensation Appeals Board* (2006) 136 Cal. App. 4th 596, 600, fn 5; *Kleeman v. Workers' Compensation Appeals Board* (2005) 127 Cal. App. 4th 274, 281, fn 2). The petitioning party must demonstrate that substantial prejudice or irreparable harm will result if removal is not granted (8 CCR 10955(a)) and that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues.

A Petition for Reconsideration on the other hand is the appropriate mechanism to challenge a final order, decision, or award. (Labor Code Section 5900). An order that resolves or disposes of the substantive rights and liabilities of those involved in a case is a final order. (See *Maranian v. Workers' Compensation Appeals Board* (2000) 81 Cal. App. 4th 1068; *Safeway Stores, Inc. v. Workers' Compensation Appeals Board* (Pointer) (1980) 104 Cal. App. 3d 528).

The instant Petition involves Applicant's objection to this WCJ's Findings & Award and Opinion on Decision specifically relating to the finding that she did not sustain her burden of proving her injury was catastrophic pursuant to Labor Code section 4660.1(c)(2)(B). The Findings & Award is a final order and therefore Reconsideration is the proper mechanism to challenge this Court's Findings & Award and Opinion on Decision.

Did Applicant provide sufficient evidence to establish entitlement to an increase based on the exceptions codified in Labor Code section 4660.1(c)(2)(B) and *Wilson* that her physical injury was catastrophic,[?]

As set forth in F&A after Remand, "the Opinion and Order has instructed this Court to determine whether the applicant's industrial injury was catastrophic. "The inquiry into whether an injury is catastrophic is limited to looking solely at the physical injury, without consideration for the psychiatric injury in evaluating the nature of the injury; the injury must therefore be deemed catastrophic independent of the psychiatric injury. (*Wilson*, supra, 84 Cal.Comp.Cases at p. 414). Whether an injury is 'catastrophic' under section 4660.1(c)(2)(B) is a factual/legal issue for the WCJ to determine. (*Id.*)" (emphasis added) (Opinion and Order at 3-4, EAMS ID# 78000883.)" (Finding 2 at page 5).

Applicant asserts that she has provided sufficient evidence to support an entitlement to an increase based on the exceptions codified in Labor Code section 4660.1(c)(2)(B) and *Wilson* that her physical injury was catastrophic. The undersigned disagrees. Quite simply, Applicant has not sought any industrial treatment since being released by both the AME and her treating physician in 2019. She has obtained medication from her personal physician, ibuprofen 800, for the industrial injuries, though outside of the workers' compensation system, though she does not recall when, but she confirmed it was before 2023. (MOH 2 at 5:8-11). Applicant testified that the radicular pain improved after the 2018 second surgery and same is confirmed by the findings of AME Berman in his 2019 reevaluation report. However, she testified in August, 2024 that she has again began [sic] feeling radicular pain as of June, 2024. (*Id.* at 6:21-23). Applicant came back to the United States in April, 2024 and was scheduled for total knee replacement surgery on August 19, 2024. (MOH 2 at 4:15-17). Applicant confirmed that the total right knee replacement is being obtained on a nonindustrial basis. (MOH 2 at 7:6-7). As such, it is clear that Applicant has obtained treatment for orthopedic complaints in at least 2024 (when she was recommended to undergo a total knee replacement) and subsequent to being released in 2019, and all such evaluations/treatment, apart from being prescribed ibuprofen medication before 2023, relate to nonindustrial conditions/complaints.

Applicant, however, misstates AME Berman's findings at the time of Maximum Medical Improvement / Permanent & Stationary (MMI / P&S) Applicant asserts that at such time she continued to have sacroiliac joint dysfunction. This is unsupported by the medical evidence. As set forth by AME Berman³ in his September 17, 2019 report, the only mention of such dysfunction is contained within Dr. Berman's review of the January 8, 2019 report of Dr. Hunt who notes that Applicant has developed same. (AME Berman 9/17/2019 at 11, EAMS ID# 45021018). AME Berman's "Discussion" as to sacroiliac involvement is limited to tenderness. He specifically assesses Applicant's condition at the time of MMI/P&S as follows:

I had initially evaluated Ghenet, her condition was not stable, as she was recovering from the revision procedure. ¶ There has been improvement. As I noted previously, the decompression was successful to the extent that objectively there is no longer clinical radiculopathy. She does have persistent axial lumbar findings. She did develop sacroiliac complaints, and she does have some tenderness. I will address future medical care to include this area.

(Id. at 12).

With regards to the lumbar spine, the updated MRI clearly demonstrates improvement. At the levels involved, there is small bulging in the 2-3 mm range. This is better than previous. She does not have any recurrent herniations, but she does have residual bulging. ¶ As noted, she predominantly has residuals to the lumbar spine. I would conclude that she is permanent and stationary/MMI.

...

For the lumbar spine, she is describing a constant level of symptomatology. This is constant and slight, reaching intermittent moderate. ¶ Objectively, there is limited mobility. There are lower back complaints. There is no radiculopathy. She has improved in this regard

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

with the subsequent decompression procedure. There is some sacroiliac tenderness. ¶ With regards to the lumbar spine, I would preclude her from heavy work activities.

(Id. at 13).

Applicant cites to the recommendations/treatment section of PTP Aflatoon in his P&S report dated November 20, 2019, Exhibit 1 at page 5, specifically his notation of Applicant's alleged complaints of "radiating symptoms down the leg." However, same is not confirmed as being current at the time of evaluation within the physical examination section just above on pages 4 and 5. (Exhibit 1 at pages 4-5, EAMS ID# 45021012). It is unclear if the radicular complaints were current at the time of evaluation or historic.

From Applicant's testimony, the undersigned determined that Applicant's ability to perform activities of daily living (ADLs) was not a result of her physical injuries. Her actual complaints and limitations are far in excess of no heavy work opined by the orthopedic AME Dr. Berman and no specific work restrictions were provided by the internal PQME. As Applicant has not been seen by any orthopedist relating to the industrial injuries since being released in 2019, apart from a request for ibuprofen, no medical evidence has been offered supporting a causal connection between the Applicant's physical abilities or inabilities and the industrial injuries. As noted in the October 30, 2024 Opinion on Decision, "the only conclusion that can be reached is that her described difficulties relating to performing ADLs stem from either the psychological aspects of her industrial injuries, which cannot be considered in this analysis, and/or they result from causes unrelated to her industrial injuries." (F&A after Remand OOD at page 7).

With respect to whether Applicant's injuries can be closely analogous to those specified in the statute, even Applicant concedes that they cannot. (Recon 2 at 12). Examples such as a single date of difficulty standing and temporary paralysis when Applicant could not move her legs, and, being advised of a risk of paralysis if she rejects surgical intervention (which she in fact did not reject) does not rise to the level or compare with the injuries contemplated by the statute including the loss of a limb, and paralysis.

The medical evidence presented coupled with Applicant's testimony is clear: looking solely at the physical injury, and removing from consideration the psychiatric aspects, Applicant did not sustain a catastrophic physical injury.

Applicant has failed to provide evidence to establish entitlement to an increase based on the exceptions codified in section 4660.1(c)(2)(B). Applicant's claim was not catastrophic and Applicant is not entitled to increased permanent disability to include disability for her psychiatric claim.

RECOMMENDATION

For the reasons stated above, it is respectfully requested that Applicant's Petition for Reconsideration be denied.

Dated: 12/13/2024

HON. ELISHA LANDMAN
Workers' Compensation Judge

**JOINT OPINION ON DECISION AFTER
REMAND TO FURTHER ADDRESS PERMANENT
DISABILITY**

PERMANENT DISABILITY

Applicant's combined permanent disability in both cases is 43% after non-industrial apportionment, based on the "cannot parcel out" exception outlined in *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1560 [74 Cal.Comp.Cases 113] (*Benson*). Specifically, some aspects of the industrially-caused permanent disability from two or more separate industrial injuries cannot be parceled out because this disability is inextricably intertwined (in this case the upper GI, lower GI, and hypertension disability), then a combined permanent disability award must issue even though other aspects of the industrially-caused permanent disability from those injuries can be parceled out with reasonable medical probability (in this case, the orthopedic disability).

The combined permanent disability is based upon the medical reporting of AME Jeffrey Berman, MD dated January 7, 2019, September 17, 2019, and his deposition testimony of November 10, 2020, and Panel QME Bahman Omrani, DO dated May 24, 2019, March 2, 2020, October 12, 2020, and his deposition testimony of October 1, 2020 as follows:

- lumbar spine which rates as 90% (15.03.01.00-20-1.4-28-212E-26-32) 29% as per the stipulation of the parties;
- cervical spine which rates as 75% (15.01.00-6-1.4-8-212E-7-9) 7% as per the stipulation of the parties;
- upper GI at 50% (06.01-6-1.4-8-212F-8-10) 5% as per the stipulation of the parties;
- lower GI at 50% (06.02-3-1.4-4-212F-4-5) 3% as per the stipulation of the parties; and,
- hypertension at 50% (04.01-6-1.4-8-212G-9-12) 6%. The fact that Dr. Omrani failed to include the additionally found 3% WPI in his summary does not negate that he provided same to Applicant and appears to merely be a scrivener's error.

Applicant is entitled to a permanent disability award of 43%, equivalent to 222 weeks of indemnity payable at the rate of \$290.00 per week, in the total sum of \$64,380.00 commencing on June 18, 2019[,] less credits for sums previously paid, and less reasonable attorney fees in the amount of 15% of applicant's award, which are to be commuted from the far end of the applicant's award.

PSYCHIATRIC PERMANENT DISABILITY

Applicant sustained a psychological industrial injury which arose out of physical injury to her lumbar spine and cervical spine and is entitled to further psychiatric medical treatment to cure and relieve from the effects of both injuries.

Applicant is not entitled to an increase in permanent disability for her psychiatric disorder pursuant to Labor Code section 4660.1(c)(1)¹ as her psychological disability arises out of compensable physical injury and did not result from the exceptions listed under section 4660.1(c)(2), further discussed below.

The Appeals Board remanded the matter back to the undersigned to include a discussion of the factors as outlined in *Wilson* (*Wilson v. State Cal Fire* (2019) 84 Cal.Comp.Cases 393 (Appeals Board en banc).) As set forth in the Appeals Board Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration ("Opinion and Order"), *Wilson* sets forth that " section 4660.1(c)(1) only bars an increase in the employee's permanent impairment rating for a psychiatric injury that is a compensable consequence of a physical injury occurring on or after January 1, 2013, but the employee may receive an increased impairment rating for a compensable consequence psychiatric injury if the injury falls under one of the statutory exceptions outlined in section 4660.1(c)(2). [*Wilson* at 403.]" (Opinion and Order at 3.)

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

The Opinion and Order has instructed this Court to determine whether the applicant's industrial injury was catastrophic. "The inquiry into whether an injury is catastrophic is limited to looking solely at the physical injury, *without consideration for the psychiatric injury in evaluating the nature of the injury; the injury must therefore be deemed catastrophic independent of the psychiatric injury.* (Wilson, supra, 84 Cal.Comp.Cases at p. 414.) Whether an injury is 'catastrophic' under section 4660.1(c)(2)(B) is a factual/legal issue for the WCJ to determine. (*Id.*)" (emphasis added) (Opinion and Order at 3-4, EAMS ID# 78000883.)

Applicant's testimony on August 2, 2024, alleged that her current complaints, her inability to return to work, and the subsequent financial ramifications therefrom are due to her physical condition resulting from the industrial injuries. ²Contradictorily, since last being evaluated by AME Berman and by PTP Aflatoon (both in 2019), she has not been seen by any workers' compensation doctors for future medical care. (See MOH/SOE 8/2/2024 at 5, EAMS ID# 78238300.) Outside of the workers' compensation system, Applicant has been prescribed ibuprofen 800 pain killers by her primary care physician, though she "does not recall the last time that she was evaluated or seen by a doctor regarding the orthopedic aspects of her claim, noting that it's been a while. She does not recall what year it was that she was last seen by a doctor for the orthopedic aspects of this claim.

She has not been seen by an ortho regarding this claim in either 2024 or 2023." (*Id.* at 5:8-11.) Applicant testified that the radicular pain improved after the 2018 second surgery. However, she again began feeling radicular pain as of June, 2024. (*Id.* at 6:21-23.)

As per Wilson, the relevant factors as to the physical aspects to consider are:

The intensity and seriousness of treatment received by the employee that was reasonably required to cure or relieve from the effects of the injury. Applicant first underwent lumbar spinal surgery in June, 2017, almost 20 months after the October, 2015 industrial injury to her lumbar spine without lost time to that point. Applicant continued having persistent low back pain post-surgery. "On July 9, 2018, she underwent the second low back surgery performed by Dr. Hunt. She states that this was another decompression. There was no fusion. Postoperatively, physical

² Applicant's direct testimony at Trial on August 2, 2024 addressed at length that as a result of the industrial injuries on October 29, 2023 she lost everything and she had to move back to her country, Eritrea, due to her inability to live in the United States as she cannot afford same. Applicant lost her apartment in Los Angeles due to her loss of income. She now lives with her brother in Eritrea. She also discussed at length the psychological ramifications of her industrial injuries. (See MOH/SOE 8/2/2024 at 2-4, EAMS ID# 78238300.)

therapy was provided for 22 sessions, with benefit." (AME Berman 1/7/2019 at 3, EAMS ID# 45021019.) Applicant has not been seen by a doctor in the workers' compensation system since being released by Drs. Berman and Aflatoon in 2019.

The ultimate outcome when the employee's physical injury is permanent and stationary. As per the Maximum Medical Improvement / Permanent & Stationary report of AME Berman 8 months later, "the [2018] decompression was successful to the extent that objectively there is no longer clinical radiculopathy. She does have persistent axial lumbar findings. She did develop sacroiliac complaints, and she does have some tenderness." (AME Berman 9/17/2019 at 12, EAMS ID# 45021018.) "With regards to the lumbar spine, the updated MRI clearly demonstrates improvement. At the levels involved, there is small bulging in the 2-3 mm range. This is better than previous. She does not have any recurrent herniations, but she does have residual bulging." (*Id.* at 13.) Her physical complaints for her lumbar spine at the time of AME reevaluation was described as "a constant level of symptomatology. This is constant and intermittent slight, reaching moderate." (*Id.*)

The severity of the physical injury and its impact on the employee's ability to perform activities of daily living ("ADLs"). As set forth in the AME reevaluation, "[o]bjectively, there is limited mobility. There are lower back complaints. There is no radiculopathy. She has improved in this regard with the subsequent decompression procedure. There is some sacroiliac tenderness." (*Id.*) AME Berman precluded Applicant from heavy work activities for the lumbar spine and very heavy lifting activities for the cervical spine. (*Id.*) AME Berman opined that Applicant is unable to return to her regular job duties. However, the more restrictive of the physical limitations, heavy work, as set forth in the 1997 PDRS, describes a loss of approximately 50% pre-injury capacity for performing such activities as bending, stooping, lifting, pushing, pulling, and climbing or other activities involving comparable physical effort. The medical evidence does not objectively support a finding that Applicant's restrictions pose a significant effect on her ability to perform ADLs.

In contrast, Applicant's testimony describes that the result of the industrial injuries has left her such that she is unable to perform any chores (beyond 15 minutes of cooking). (*See* MOH/SOE 5/3/2023 at 10:21-11:1, EAMS ID# 76787348.) The basis for her inability to perform ADLs is entirely unsupported by the medical evidence. AME Berman's (orthopedics) restrictions are no heavy work for the lumbar spine and no very heavy lifting for the cervical spine and PQME

Omrani (internal) has not provided any specific work restrictions or preclusions from an internal medicine standpoint deferring to the med-legal evaluator in orthopedics. (PQME Omrani 5/24/2019 at 54, EAMS ID# 45021031.) As such, the only conclusion that can be reached is that her described difficulties relating to performing ADLs stem from either the psychological aspects of her industrial injuries, which cannot be considered in this analysis, and/or they result from causes unrelated to her industrial injuries.

Whether the physical injury is closely analogous to one of the injuries specified in the statute: loss of a limb, paralysis, severe burn, or severe head injury. There is no objective evidence presented here to support an argument that Applicant's physical injury can be analogized to any such statutory injuries.

If the physical injury is an incurable and progressive disease. There is no objective evidence presented here to support an argument that Applicant's physical injury is an incurable and progressive disease.

The medical evidence presented coupled with Applicant's testimony is clear: looking solely at the physical injury, and removing from consideration the psychiatric aspects, Applicant did not sustain a catastrophic physical injury.

Applicant has failed to provide evidence to establish entitlement to an increase based on the exceptions codified in section 4660.1(c)(2)(B). Applicant's claim was not catastrophic and Applicant is not entitled to increased permanent disability to include disability for her psychiatric claim.

ATTORNEY'S FEE:

Based on the WCAB Rules of Practice and Procedure § 10844 and the guidelines for awarding an attorney's fee set forth in Policy and Procedure Manual § 1.140, a reasonable attorney's fee is found to be \$9,657.00 which shall be commuted from the final weekly payments (far end) of the permanent disability indemnity award as one lump sum.

Date: October 30, 2024

ELISHA LANDMAN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE