WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANGEL VALENZUELA, ***Applicant,*** **vs.** **STATE OF CALIFORNIA – DEPARTMENT OF CORRECTIONS, legally uninsured,** ***Defendant.***	**Case Nos. ADJ1415058 (FRE 0192009) MF** **ADJ4686427 (FRE 0193449)** **OPINION AND DECISION AFTER RECONSIDERATION**

We earlier granted defendant's petition for reconsideration of the December 10, 2012 Findings Of Fact And Award of the workers' compensation administrative law judge (WCJ) who found that applicant is permanently totally disabled "within the meaning" of Labor Code section 4662, and that apportionment as described in the decision of the Court of Appeal in *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113] (*Benson*) "is not applicable in this case."[1]

Defendant contends that total permanent disability found pursuant to section 4662 is subject to apportionment between industrial injuries in accordance with the holding in *Benson*, and that the WCJ's decision is not supported by substantial evidence.

An answer was received from applicant. The WCJ provided a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied, but also purporting to amend the December 10, 2012 decision to add a Finding of Fact #3 that "The medical reports in file, most especially the reports and the depositions of [Agreed Medical Examiner] AME Gerald Windler

[1] Further statutory references are to the Labor Code. Section 4662 provides in full as follows: "Any of the following permanent disabilities shall be conclusively presumed to be total in character: (a) Loss of both eyes or the sight thereof. (b) Loss of both hands or the use thereof. (c) An injury resulting in a practically total paralysis. (d) An injury to the brain resulting in incurable mental incapacity or insanity. *In all other cases*, permanent total disability shall be determined in accordance with the fact." (Emphasis added)

M.D. are found to constitute substantial medical evidence," and to amend his December 10, 2012 Opinion on Decision to state as follows:

> "After due consideration [of] the medical reports in [the] file the Court finds that they are not stale and due [*sic*] constitute substantial medical evidence. The reports of the multiple AME's are still valid in that there has been no suggestion or inference that applicant's condition has in any way improved or changed since the matter was submitted for decision in 2010 for decision by [the prior] WCJ Eckl.
>
> "Review of the reports demonstrate[s] that they contain a full and complete review of the medical history, complete and thorough physical and mental examinations of the applicant and a detailed analysis of the facts as they apply to these cases. The Court therefore adopts and incorporates these medical reports and relies upon them in rendering its decision." (Bracketed material added.)[2]

Reconsideration is granted and the December 10, 2012 decision is rescinded as our Decision After Reconsideration. The case is returned to the trial level for development of the record and further proceedings. A finding of total permanent disability "in accordance with the fact" as provided in section 4662 does not preclude apportionment of the permanent disability between industrial injuries as described in *Benson*. However, such apportionment must be supported by substantial evidence in light of the entire record. Here, the medical record is not complete on whether there is such a basis for apportionment and substantial medical evidence should be developed on that issue. When that evidence is available and after further proceedings, the WCJ should issue a new decision that addresses all issues in the case, including apportionment.

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[2] A WCJ has the authority to amend a decision after it issues, but in this case the attempt to do that through the Report is untimely and without effect. Appeals Board Rules of Practice and Procedure, Rule 10859 provides in pertinent part as follows: "After a petition for reconsideration has been timely filed, a workers' compensation judge may, *within the period of fifteen (15) days following the date of filing of that petition for reconsideration*, amend or modify the order, decision or award or rescind the order, decision or award and conduct further proceedings...*After this period of fifteen (15) days has elapsed, a workers' compensation judge shall not make any order in the case nor correct any error* until the Appeals Board has denied or dismissed the petition for reconsideration or issued a decision after reconsideration." (Cal. Code Regs., tit. 8, § 10859, emphasis added.) The Appeals Board's extension of time for the WCJ to file his Report did not extend the 15 day period for amending the decision as provided in Rule 10859.

BACKGROUND

The facts and procedural background are set forth by the WCJ in pertinent part in his Report as follows:

> "The facts of this case are not in dispute. Applicant sustained admitted industrial injuries by way of specific injury ADJ1415058 and cumulative injury ADJ4686427. Treatment was rendered as a result of both injuries and benefits including TTD and permanent disability were also paid. The matters were submitted to Agreed Medical Examiners who filed multiple reports and were subject to deposition.
>
> "The matter initially proceeded to trial before WCJ Eckl who issued rating instructions on August 26, 2010 and subsequently issued his Findings and Awards on September 23, 2010. In those Rating Instructions and Findings and Awards WCJ Eckl followed the rationale of *Benson* and found two separate injuries and apportioned the permanent disability according to the holding in *Benson.* Applicant filed a timely objection to the rating instructions and WCJ Eckl vacated his Findings and Awards and set the matter for cross-examination of the rater. That cross-examination never took place. At the time and place of cross-examination the parties met and conferred and WCJ Eckl instructed the parties to file more detailed briefs addressing the issue of whether *Benson* applied or was overruled by the language of L.C. §4662. The parties filed their respective pleadings; WCJ Eckl retired without making a Finding and the matter then went into limbo.
>
> "The matter was finally reactivated by the filing of a new DOR in 2011 and the matter proceeded to MSC on November 14, 2011 and to trial on June 20, 2012.
>
> "At trial no new witness or testimony was allowed. The parties once again briefed the matter for the Court.
>
> "Applicant continued to argue that L.C. §4662 applied and as such that it precluded the application of ***Benson.*** Defendant argued that none of the medical reports were substantial evidence and that discovery needed to be reopened. Following submission the Court considered the multiple briefs submitted through the course of this case. The Court also considered the Findings and Awards previously issued and vacated by WCJ Eckl and conducted its own research. The Court then issued its Findings of Fact and Award."

In his Report, the WCJ explains that he concluded that the last sentence of section 4662 "was intended to give the Court a broad power to define the meaning of 'permanent total disability,'" and noted that the Court in *Benson* did not consider the provisions of section 4662 in reaching its decision. The WCJ also cites two Appeals Board panel decisions in his Report in support of his reasoning.

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DISCUSSION

In construing section 4662 as it applies in this case it is important to consider that the Legislature describes four specific circumstances where total permanent disability is "conclusively presumed." Each of the four listed disabilities has specific requirements, as follows: "(a) Loss of both eyes or the sight thereof. (b) Loss of both hands or the use thereof. (c) An injury resulting in a practically total paralysis. (d) An injury to the brain resulting in incurable mental incapacity or insanity." A plain reading of section 4662 shows that only those four listed disabilities obtain the conclusive presumption because the last sentence of section 4662 provides that, "*In all other cases*, permanent total disability shall be determined in accordance with the fact." (Emphasis added.) Thus, in "all other cases" where permanent total disability is determined "in accordance with the fact" under section 4662, the permanent disability is not conclusively presumed to be total.[3]

In this case, the determination of permanent total disability was based upon the evidentiary record and was said by the WCJ to be determined "in accordance with the fact" pursuant to section 4662. (See, *Coca-Cola Enterprises v. Workers' Comp. Appeals Bd.* (*Jaramillo*) (2012) 77 Cal.Comp.Cases 445 (writ den.) [Evidence of total loss of earning capacity showed that WCJ found applicant to be permanently totally disabled "in accordance with the fact" pursuant to section 4662 even though that section not cited as basis for finding].) For that reason, the permanent total disability found by the WCJ is *not* "conclusively presumed" to be total pursuant to section 4662. This distinguishes the finding in this case from the cases cited by the WCJ and applicant in urging that the conclusive presumption provided by section 4662 precludes apportionment. (*Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Dragomir-Tremoureux*) (2006) 71 Cal.Comp.Cases 538 (writ den.) [loss of use of both hands conclusively presumed to constitute permanent total disability pursuant to section 4662(b)]; *City of Santa Clara v. Workers' Comp. Appeals Bd.* (*Sanchez*) (2011) 76 Cal.Comp.Cases 799 (writ den.) [brain injury due to stroke conclusively presumed to constitute permanent total disability pursuant to section 4662(d)];

[3] The question of whether apportionment applies to permanent total disability that is conclusively presumed pursuant to one of the four circumstances set forth in sections 4662(a) through (d) is not before us in this case, and we express no opinion on that issue.

Regents of the University of California v. Workers' Comp. Appeals Bd. (*Siegel*) (2011) 76 Cal.Comp.Cases 1237 (writ den.) [loss of use of both hands conclusively presumed to constitute permanent total disability pursuant to section 4662(b)].)

Permanent disability is subject to apportionment based upon its causation, including in cases where the injured worker's overall permanent disability is 100%. (Lab. Code, § 4663(a) ["Apportionment of permanent disability shall be based on causation"]; *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1328 [72 Cal.Comp.Cases 565] ["[U]nder Senate Bill No. 899, the new approach to apportionment is to look at the current disability and parcel out its causative sources--nonindustrial, prior industrial, current industrial--and decide the amount directly caused by the current industrial source"]; *Benson, supra* ["apportionment is required for each distinct industrial injury causing a permanent disability, regardless of the temporal occurrence of permanent disability or the injuries themselves"]; *Acme Steel v. Workers' Comp. Appeals Bd.* (*Borman*) (2013) 2013 Cal. App. LEXIS 638 [78 Cal.Comp.Cases 751] [100% permanent disability is subject to apportionment].)

Thus, apportionment must be addressed regardless of whether the total permanent disability is determined by rating the employee's whole person impairment, or otherwise "in accordance with the fact" pursuant to the last sentence in section 4662. (See e.g. *Ogilvie v. City and County of San Francisco* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624]; but see footnote 3, *supra*, page 4; cf. Lab Code, § 4664(c)(1) ["The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662"].)

If the evaluating physician cannot parcel out with reasonable medical probability the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability, a combined award of permanent disability may still be justified. (*Benson, supra.*) However, in that limited circumstance the physician must provide a reasonable explanation why he or

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she is unable to provide an apportionment opinion. (Lab. Code, § 4663(c)[4]; *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687] [medical opinion must disclose familiarity with concepts of apportionment, describe in detail the exact nature of the apportionable disability and set forth the basis for the opinion]; *Lockheed Martin Aircraft Services v. Workers' Comp. Appeals Bd. (Garcia)* (2009) 74 Cal.Comp.Cases 1385 (writ den.); *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

In this case, the WCJ did not address the evidence concerning the issue of apportionment because he concluded that there is not a basis for apportionment when total permanent disability is determined "in accordance with the fact" under the last sentence of section 4662. That legal conclusion is incorrect, and the case is returned to the trial level for a new decision that addresses the issue of apportionment based upon substantial medical evidence. Once the record is properly developed on that issue and after further proceedings, the WCJ should issue a new decision addressing all issues in the case including apportionment.

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[4] Section 4663(c) provides in pertinent part as follows: "In order for a physician's report to be considered complete on the issue of permanent disability, it must include an apportionment determination...If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination."

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration that the December 10, 2012 Findings Of Fact And Award of the workers' compensation administrative law judge is **RESCINDED** and the case is **RETURNED** to the trial level for development of the record, further proceedings, and a new decision by the workers' compensation administrative law judge in accordance with this decision.

WORKERS' COMPENSATION APPEALS BOARD

ALFONSO J. MORESI

I CONCUR,

RONNIE G. CAPLANE

I CONCUR (SEE SEPARATE CONCURRING OPINION),

MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUG 21 2013

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

ANGEL VALENZUELA
GRAIWER & KAPLAN
STATE COMPENSATION INSURANCE FUND

JFS/abs

SEPARATE CONCURRING OPINION OF COMMISSIONER SWEENEY

I agree with the majority that the issue of apportionment must be addressed in cases where total permanent disability is found "in accordance with the fact" under the last sentence of section 4662, and I agree that this includes the potential apportionment of permanent disability between industrial injuries as described in *Benson*. For that reason, I concur with the decision to rescind the WCJ's December 10, 2012 decision and return the case for development of the record.

However, I do not find that there is a need to develop the record on the question of apportionment between injuries as discussed in *Benson* because the parties' AME in neurology, Lawrence Richman, M.D., has already provided substantial medical opinion that apportionment of applicant's permanent disability among his injuries is not possible. In his February 27, 2008 report, Dr. Richman wrote as follows:

> "Given the persistence of the patient's symptoms as well as the overlap of his symptoms, I am unable to apportion between the specific injuries and the continuous trauma injuries in that both were concurrent and co-contributing to the patient's symptoms and disability."

Instead, I believe that the record requires development with regard to applicant's overall level of permanent disability.

In finding total permanent disability, the WCJ relies primarily upon the reporting of Dr. Windler. However, Dr. Windler's reporting is not substantial evidence that supports the WCJ's finding of total permanent disability "based upon the fact" under section 4662. During his May 15, 2007 deposition, Dr. Windler testified that he is only qualified to provide opinion regarding the disability caused by applicant's psychiatric injury and is not able to expertly address applicant's overall ability to compete in the open labor market, as shown by the following excerpts:

> "Q All right. Last question. Taking into consideration the work function disability that you have given for this man as modified in your last deposition and slightly modified this morning and the opinion of Dr. Sew Hoy, do you think this man is really capable of competing in the open labor market?...
>
> A...Obviously, this is a man who would, if he could work, he will have to be in a very modified situation whereby he will have to have freedom to take breaks. Some days he may not be able to go to work at all during periods of pain exacerbations. And even if he would be working other than

maybe at a desk exclusively, it's not too clear if he could get such a job based on his previous education and lack of transferable skills and so on.

So I do not know what is the legal definition of competing in the open labor market. If being in a sheltered situation is considered the labor market, I would say that perhaps he can still do some limited work. But in the real world where a boss expects certain performances and he's expected to be there every day and he has to, you know, perform to get paid, the answer is probably not.

Q Okay. So your answer is, as I understand it, he may be able to do some activities in a sheltered work environment, but in the real world it's probably unlikely he's going to be able to compete; right?

A Right." (88:17-90:7, emphasis added.)

When questioned further by a different examiner about applicant's ability to compete in the labor market, Dr. Windler elaborated on the limits of his opinion as shown by the following exchange:

"Q Going back to the physical restrictions, Dr. Windler, if a job was found that fell within Dr. Sew Hoy's restrictions, do you feel Mr. Valenzuela would be able to compete in the labor market?

A Well, *from a psychiatric perspective, he's not totally disabled* so that I was asked to consider I imagine the whole person as such rather than as the sum of different parts. But it shows you my ignorance –

Q That's why I'm asking you the same in a different way.

A Yes, you are. *My ignorance in terms of what is the meaning of Dr. Sew Hoy's rating is obvious. So I will have to -- yes, I will think it over again.*

Q Let me ask you this: Would it help you if Dr. Sew Hoy clarified whether or not the conditions worsened versus AMA guidelines in the old regulations?

A That would be helpful. But to tell you the truth, *I don't think I should be deciding whether this man can or cannot compete in the open labor market other than from a psychiatric perspective.*

Q And I agree with you, and I'm actually trying to do it, and maybe I didn't ask you the correct question.

I guess what I was trying to ask is if Mr. Valenzuela can work within the physical restrictions which other doctors have given him, psychiatrically if he's working within these restrictions, do you believe that there is some type of job that he could do from a psychiatric perspective?

A Well, there is, but again there will have to be a very willing employer that will take into account all of those restrictions. So technically I mean from a -- I don't know how to express it. *But from a pure situation in which you only consider each separate preclusion, he might. Whether that*

is from a practical standpoint feasible or not, I cannot tell you right now." (91:24-93:8, emphasis added.)

The WCJ identifies Dr. Windler's reporting as the evidence relied upon to find applicant totally permanently disabled. However, in light of Dr. Windler's equivocation on the issue of applicant's ability to compete in the open labor market and his admitted lack of expertise on that subject, I would return the case to the trial level for development of the record on whether applicant is totally permanently disabled because of his injuries or otherwise "in accordance with the fact" pursuant to the last sentence of section 4662.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUG 21 2013

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

ANGEL VALENZUELA
GRAIWER & KAPLAN
STATE COMPENSATION INSURANCE FUND

JFS/abs

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANGEL VALENZUELA, ***Applicant,*** **vs.** **CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, legally uninsured; STATE COMPENSATION INSURANCE FUND/STATE CONTRACT SERVICES, adjusting agency,** ***Defendants.***	**Case Nos. ADJ4686427 (FRE 0193449)** **ADJ1415058 (FRE 0192009)** **OPINION AND ORDER GRANTING RECONSIDERATION**

Reconsideration has been sought by defendant with regard to a decision filed on December 10, 2012.

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted in order to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration will be granted for this purpose and for such further proceedings as we may hereinafter determine to be appropriate.

For the foregoing reasons,

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

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IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in the above cases, all further correspondence, objections, motions, requests and communications shall be filed in writing only with the Office of the Commissioners of the Workers' Compensation Appeals Board at either its street address (455 Golden Gate Avenue, 9th floor, San Francisco, CA 94102) or its Post Office Box address (PO Box 429459, San Francisco, CA 94142-9459), and shall *not* be submitted to the Fresno District Office or any other district office of the WCAB and shall *not* be e-filed in the Electronic Adjudication Management System.

WORKERS' COMPENSATION APPEALS BOARD

RONNIE G. CAPLANE

I CONCUR,

MARGUERITE SWEENEY

CONCURRING, BUT NOT SIGNING

ALFONSO J. MORESI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 25 2013

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

ANGEL VALENZUELA
GRAIWER KAPLAN
LENAHAN LEE
SCIF INSURED
INTEGRATED HEALTH
MBC SYSTEMS

jmp

CASE ID: ADJ1415058
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STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

WCAB CASE NO: ADJ1415058
ADJ4686427

Angel Valenzuela, **vs.** **Calif. Dept. of Corrections, Legally uninsured, State Compensation Ins. Fund,**

WORKERS' COMPENSATION JUDGE: **THOMAS J. HESLIN**
DATE OF INJURY: September 2, 1998; C.T.-August 25, 2000

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Defendant has filed a timely Petition for Reconsideration from the Findings of Fact and Award which issued on December 10, 2012. Applicant has filed a timely Answer to the Petition for Reconsideration on January 9, 2013. The WCAB has extended time for the WCJ to respond due to the WCJ having been on vacation and also having been ill.

II
FACTS

The facts of this case are not in dispute. Applicant sustained admitted industrial injuries by way of specific injury ADJ1415058 and cumulative injury ADJ4686427. Treatment was rendered as a result of both injuries and benefits including TTD and permanent disability were also paid. The matters were

submitted to Agreed Medical Examiners who filed multiple reports and were subject to deposition.

The matter initially proceeded to trial before WCJ Eckl who issued rating instructions on August 26, 2010 and subsequently issued his Findings and Awards on September 23, 2010. In those Rating Instructions and Findings and Awards WCJ Eckl followed the rationale of ***Benson*** and found two separate injuries and apportioned the permanent disability according to the holding in ***Benson.*** Applicant filed a timely objection to the rating instructions and WCJ Eckl vacated his Findings and Awards and set the matter for cross-examination of the rater. That cross-examination never took place. At the time and place of cross-examination the parties met and conferred and WCJ Eckl instructed the parties to file more detailed briefs addressing the issue of whether Benson applied or was overruled by the language of L.C. §4662. The parties filed their respective pleadings; WCJ Eckl retired without making a Finding and the matter then went into limbo.

The matter was finally reactivated by the filing of a new DOR in 2011 and the matter proceeded to MSC on November 14, 2011 and to trial on June 20, 2012. At trial no new witness or testimony was allowed. The parties once again briefed the matter for the Court.

Applicant continued to argue that L.C. §4662 applied and as such that it precluded the application of ***Benson.*** Defendant argued that none of the medical reports were substantial evidence and that discovery needed to be reopened. Following submission the Court considered the multiple briefs submitted through the course of this case. The Court also considered the Findings and

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Awards previously issued and vacated by WCJ Eckl and conducted its own research. The Court then issued its Findings of Fact and Award.

III
DISCUSSION

The sole issues to be considered are 1) whether L.C. §4662 applies and thus abrogates the holding in ***Benson***, under these facts and 2) whether the medical reports and depositions constitute substantial evidence.

After review of the Findings of Fact and Award of December 10, 2012 the Court notes that it neglected to clearly address issue #2. In order to clarify the record the Court hereby amends the December 10, 2012 Findings of Fact and Award to add the following Finding of Fact #3:

"The medical reports in file, most especially the reports and deposition of AME Gerald Windler M.D. are found to constitute substantial medical evidence."

In addition the Court amends its Opinion on Decision to add the following: "After due consideration the medical reports in file the Court finds that they are not stale and due constitute substantial medical evidence. The reports of the multiple AME's are still valid in that there has been no suggestion or inference that applicant's condition has in any way improved or changed since the matter was submitted for decision in 2010 for decision by WCJ Eckl.

Review of the reports demonstrate that they contain a full and complete review of the medical history, complete and thorough physical and mental examinations

of the applicant and a detailed analysis of the facts as they apply to these cases. The Court therefore adopts and incorporates these medical reports and relies upon them in rendering its decision."

Beyond the above clarification of the record the Court notes that in its review of L.C. §4662 and the holding in ***Benson,*** that the Court reached its own independent opinion that the last sentence of L.C. §4662 was intended to give the Court a broad power to define the meaning of "permanent total disability" The very language of the section speaks for itself: "In all other cases, permanent total disability shall be determined in accordance with the fact."

The Court also noted that the opinion in ***Benson*** did not consider or overrule the language cited above. Benson did not therefore bar the Court from considering the record as a whole and from making a determination of permanent total disability "in accord with the fact".

As set forth in the Findings of Fact and Award of December 10, 2012 the medical record clearly demonstrates that applicant's ability to function in the work place has been reduced to a sheltered work shop. He is not able to hold a job that requires him to adhere to regular work hours. He is not able to perform specified work duties without assistance and without interruption due to his pain and emotional difficulties. Whether applicant's work capacity is measured by the ability to function in the work force or by his ability to carry out the functions of daily living or by his ability to perform the essential elements of any occupation this applicant is permanently totally disabled.

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The WCAB has a addressed this issue in two previous panel decision Jaramillo v Coca Cola 2011 Wrk. Comp P.D. Lexis 538and City of Santa Clara, (PSI) v WCAB, SIF Wrk. Comp Lexis 640. In both cases the panels addressed strikingly similar fact patterns and found that L.C §4662 did apply.

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Dated: January 22, 2013

Respectfully submitted,

THOMAS J. HESLIN
Workers' Compensation
Administrative Law Judge

Filed and Served by mail on
1/22/13
On Parties as listed on the
Official Address Record.
By: RR Cortez