

1 claimed need to be in close proximity to a toilet due to problems with his bowels. Third, defendant contends
2 the reporting of applicant's vocational expert is not substantial evidence because he did not review the
3 deposition of the Agreed Medical Examiner (AME), and thus did not consider the AME's finding that
4 applicant was entitled to the Supplemental Job Displacement Benefit, or his review of applicant's
5 Functional Capacity Evaluation. Defendant asserts that the report of its vocational expert should have been
6 relied upon. Defendant also argues that applicant's vocational expert's report should have been excluded,
7 and defendant should not be required to pay for the report, since applicant failed to provide defendant with
8 advance notice of the vocational evaluation, based upon the notice requirements for QME examinations in
9 Rule 34.

10 Applicant has filed an Answer to defendant's Petition for Reconsideration. The WCJ has prepared
11 a Report and Recommendation on Petition for Reconsideration, in which he recommends that
12 reconsideration be denied.

13 We have considered the allegations and arguments of the Petition for Reconsideration, as well as
14 the answer thereto, and have reviewed the record in this matter and the WCJ's Report and Recommendation
15 on Petition for Reconsideration of November 29, 2017, which considers, and responds to, each of the
16 defendant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's
17 Report, which we adopt and incorporate as the decision of the Board, we will, as our Decision After
18 Reconsideration, affirm the WCJ's Findings, Award and Order.

19 The finding of permanent total disability due to applicant's inability to return to gainful
20 employment or benefit from vocational rehabilitation is based upon the physical limitations described in
21 the medical record, the vocational evidence and applicant's credible and un rebutted testimony, as detailed
22 in the WCJ's Report and Opinion on Decision.

23 Dr. Mandell, the AME in orthopedics, described applicant's injury as severe spinal stenosis and
24 disc herniation in the cervical spine and lumbar disc disease with radiculopathy, requiring four level
25 laminoplasty from C3-C7, with hardware implantation, as well as a subsequent cervical discectomy. Dr.
26 Mandell apportioned 10% of applicant's neck disability to congenital spinal stenosis, and found all of his
27 lumbar disc disability to be industrial. Dr. Mandell reported applicant's subjective complaints of constant

1 neck pain, with stiffness and loss of motion, trapezii and bilateral shoulder pain, and numbness in both
2 upper limbs. Applicant described pain with pushing, pulling, lifting and carrying. He cannot lift anything
3 heavier than a gallon of milk. Applicant also complained of constant low back pain in the right lower back,
4 radiating down the right leg, with pain from the thigh to the knee. He has numbness and weakness in the
5 right leg. Dr. Mandell also reported applicant has a problem with constipation, but no other bowel or
6 bladder problems.

7 However, at trial applicant testified to having problems with urination and defecation, explaining
8 that he lacks full control over his bladder and he cannot feel if he has completed urinating. He has been
9 using a catheter on his own for the previous two months. He also testified to having constipation due to his
10 medications. Because he cannot completely clean himself after a bowel movement, he needs to take a
11 shower each time. He has also soiled his pants due to his problem with defecation.

12 Applicant described limitations in the use of his right dominant hand, as he cannot fully extent his
13 fingers. In his Summary of Evidence, the WCJ indicated that applicant could move his middle knuckle to
14 approximately 50% of what would be expected. He has spasms when he attempts to extend his hands too
15 much. He also reported having leg spasms in the morning and throughout the day, and cannot put weight
16 on his right leg when it is spasms. The WCJ noted that applicant was using a cane at trial.

17 Applicant testified that his pain is at minimum a 6 out of 10, and goes up to 9, even when he is
18 taking his medication. He lies down on the floor, sometimes up to 3 to 4 hours, to relieve his pain. He is
19 unable to do chores at home due to his pain, and he requires assistance putting on socks. According to the
20 WCJ's summary of evidence, applicant testified:

21 He does not believe that he can hold a job at this point for numerous reasons,
22 including difficulty with driving, inability to walk more than two blocks and
23 his mouth getting dry. (He had to stop testimony at this point in order to get
24 water to continue testifying.) He cannot perform activity without getting
exhausted, his need to lie down, the fact that getting up from a seated or lying
down position is extremely difficult, problems with the toilet and his
increasing pain with activity.

25 Mr. Van de Bittner, applicant's vocational expert, evaluated applicant on December 15, 2016, and
26 issued a report on applicant's vocational feasibility, employability and earning capacity. The evaluation
27 considered the AME's medical report as well as the results of a functional capacity evaluation performed

1 in October of 2016. The FCE was consistent with the limitations described by the AME as well as
2 applicant's trial testimony. Applicant had performed heavy to very heavy work as an ironworker, but his
3 functioning was reduced to a semi-sedentary level of physical functioning due to his low tolerance for
4 prolonged activities.

5 Based on the outcome of the functional capacity testing, Mr. Sandoval
6 demonstrated the ability to lift 10 lbs. on an occasional basis. He is unable
7 to perform bilateral hand carry tasks at this time due to his balance issues
8 and dependence on a single point straight cane for ambulation. He is able to
9 unilaterally carry 5 lbs. while using his single point straight cane in the non-
10 active hand on an occasional basis. He is able to sit, stand and walk on a
11 frequent basis throughout the day to build up his physical conditioning and
12 endurance. He requires the use of a single point cane when ambulating and
13 his current walking tolerance is 600 feet. He was able to push/pull 30 lbs. on
14 an occasional basis. He was able to negotiate stairs using the handrail and
15 his single point straight cane with a slow speed. He had moderate difficulty
16 with kneeling and squatting activities. Mr. Sandoval demonstrated mild
17 difficulty with gripping, grasping, reaching, pinching, fine manipulation
18 dexterity and medium motor dexterity. He fatigues quickly and his
19 coordination declined rapidly. Mr. Sandoval is right hand dominant and is
20 significantly weaker on his right upper quarter compared to his left upper
21 quarter.

22 Applicant described his problem with urination, that he has a lack of sensation as to when he has
23 completed urination, such that he will continue to urinate after he gets up from the toilet. This happens
24 about 3 times per day or night, requiring him to change his underwear.

25 Mr. Van de Bittner concluded that applicant was not capable of returning to the labor market due
26 to his physical limitations, noting that he lacked transferrable skills without consideration of non-industrial
27 factors, per the requirements of *Ogilvie*. When considering applicant's vocational feasibility and
amenability to rehabilitation, Mr. Van de Bittner found:

28 In summary, when considering the opinions of Dr. Mandell, Ms. Semplinski,
29 and Dr. Rachel Feinberg in combination, Mr. Sandoval has a very limited
30 medical capacity and functional capacity to benefit from vocational
31 rehabilitation and to be amenable to rehabilitation. However, when
32 considering the opinions of Dr. Mandell, Ms. Semplinski, and Dr. Rachel
33 Feinberg in combination with all of the vocational factors described above,
34 Mr. Sandoval is unable to benefit from vocational rehabilitation services and
35 lacks the capacity to be amenable to rehabilitation for regular jobs in the
36 open labor market either full-time or part-time.

37 On this record, we concur with the WCJ's determination that applicant is permanently totally
disabled based upon his physical restrictions and the vocational evidence that establishes applicant's

1 industrial limitations preclude him from benefiting from vocational rehabilitation. For the reasons
2 discussed in the WCJ's determination and in his Report, we concur that the vocational evidence is
3 admissible to address the issue of applicant's amenability to vocational services. Additionally, there is no
4 requirement that applicant provide notice to defendant prior to scheduling a vocational evaluation, as the
5 rule defendant cites, Rule 34 (Cal. Code Regs., tit. 8, § 34.) is applicable to QME evaluations, not
6 vocational evaluations.

7 Accordingly, we affirm the WCJ's determination.

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1 For the foregoing reasons,

2 **IT IS ORDERED** as our Decision After Reconsideration that the Findings, Award and Order,
3 issued September 21, 2017, is **AFFIRMED**.

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5 **WORKERS' COMPENSATION APPEALS BOARD**

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8 
9 **MARGUERITE SWEENEY**

10 **I CONCUR,**

11 
12 _____

13 **DEIDRA E. LOWE**

14 
15 _____

16 **JOSÉ H. RAZO**



17
18 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

19 **AUG 12 2018**

20
21 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**
22 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

23 **RAFAEL SANDOVAL**
24 **APPEL LAW FIRM**
25 **LAW OFFICE OF VINCENT PURINTON**

26 **SV/pc**


1 violation of this order shall neither be accepted for filing nor deemed filed.

2 All trial level documents not related to the petition for reconsideration shall continue to be e-filed
3 through EAMS or, to the extent permitted by the Rules of the Administrative Director, filed in paper
4 form.¹ If, however, a proposed settlement is being filed, the petitioners for reconsideration should
5 promptly notify the Appeals Board because a WCJ cannot act on a settlement while a case is pending
6 before the Appeals Board on a grant of reconsideration. (Cal. Code Regs., tit. 8, § 10859.)

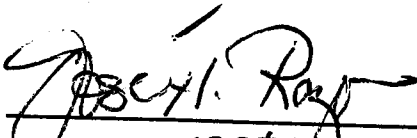
7 **WORKERS' COMPENSATION APPEALS BOARD**

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9
10 **MARGUERITE SWEENEY**

11 **I CONCUR,**

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14 **DEIDRA E. LOWE**

15
16 
17 **JOSÉ H. RAZO**

18
19 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

20 **DEC 11 2017**

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

23 **RAFAEL SANDOVAL**
24 **APPEL LAW FIRM**
25 **SAMUELSEN, GONZALEZ, VALENZUELA & BROWN**

26 **abs**

27 ¹ Such trial level documents include, but are not limited to, declarations of readiness, lien claims, trial level petitions (e.g., petitions for penalties, deposition attorney's fees), stipulations with request for award, compromise and release agreements, etc.)

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

Case No. ADJ9910337

RAFAEL SANDOVAL,

Applicant,

vs.

THE CONCO COMPANIES and ZURICH
INS. CO., administered by ATHENS
ADMINISTRATORS,

Defendants.

**REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION**

INTRODUCTION

By a timely and verified Petition for Reconsideration (Petition) filed on October 13, 2017, defendant seeks reconsideration of my September 21, 2017 Findings and Award and Order, wherein I found, among other things, that applicant, while employed on January 23, 2015 as an iron worker at Sunnyvale, California by The Conco Companies, sustained injury arising out of and occurring in the course of employment to his cervical spine and lumbar spine, causing permanent disability of 100%. I also found that there is no basis for defendant's objection to the admissibility of the report of applicant's vocational expert, Eugene Van de Bittner, and that defendant is liable for payment of Mr. Van de Bittner's report.

Defendant contends: (1) applicant is not entitled to a vocational expert for his 2015 injury because of the legislative changes found in Labor Code section 4660.1, applicable to injuries after January 1, 2013; (2) applicant cannot be found to be 100% permanently disabled because he is amenable to retraining; (3) the WCJ should have relied on the sound report of

defendant's vocational expert, Thomas Linder, and not on the unreliable report of applicant's vocational expert, Mr. Van de Bittner; and (4) defendant should not have to pay for Mr. Van de Bittner's report, which also should not have been admitted into evidence.

I have reviewed defendant's Petition, the Answer, and the entire record in this matter. Based upon my review, I recommend that reconsideration be denied.

FACTUAL BACKGROUND

The factual background of this case, as set forth at pages 1-4 of the Opinion on Decision (Opinion), is as follows (emphasis in original):

At trial, applicant testified credibly that he currently lives in Pittsburg, California with his wife, his 8-year-old son and his 11-year-old daughter, and that he last worked on approximately January 23, 2016. His typical day now starts when he gets up at the same time as his children before they go to school. He does his exercises/therapy in the morning, then has to lay down because of pain. He can shower by himself, but needs help afterwards putting on his socks. He can manage to put on his shoes on his own.

He is right handed, and now cannot extend the fingers on his right hand fully. *(He has demonstrated for the Court that he is able to move his middle knuckle to approximately 50 percent of what would be expected.)* He needs to massage his hands, as they have spasm when he extends them too much. He also has leg spasms every morning, in the back and in the front. He needs help to massage the spasms in his legs. This occurs throughout the day. He cannot put weight on his right leg when it is spasming. *The Judge noted that he is using a cane at the time of the trial.*

Applicant has difficulty with urination and defecation. He gets a feeling like "butterflies" in his stomach regarding his bladder issues. He cannot feel if he has completely urinated or not, when he attempts to do so. He does not have full control of his bladder. He has been using a catheter for approximately the past two months, which he can use on his own. He does not have to have a bag for the catheter yet. Regarding defecation, he has

constipation from the medication he is taking. He is unable to fully clean himself after defecating and needs to go into the shower in order to do so after each defecation. In order to work, he would need to have a job which had a bathroom with a shower as part of the facility. He has soiled his pants due to his defecation issues.

His pain on a scale of one to ten is a six at a minimum and goes up to nine even with his medication. He is currently taking only one Norco pain pill per day, as he has to pay for this on his own. His most recent treating physician has denied him any further pain pills.

After his kids leave for school, he goes from the bed to the chair to the floor, where he has to lie down as this is the only way to control his pain. He is unable to make his own lunch, and one occasion recently he burned his hand on a small oven when he tried to make his own sandwich. He also has spasms in his left hand and in his neck. After lunch, he goes from the floor to his bed. In the evening, he will lie on the floor in order to control the pain. He goes to bed at approximately 9:00 p.m. and is able to sleep seven or eight hours.

He testified on one recent incident when he went to Costco, he had to use one of the electric carts or scooters that they provided. He cannot cook his own dinner.

He can drive from his home as far as his children's school, which is approximately five miles away. He does not want to drive any further because of spasms in his foot, and his foot falling asleep.

He cannot do chores inside or outside of the house due to his pain. When his pain is eight or nine, he will then be on the floor in order to decrease the pain. He will sometimes have to be there on the floor for three or four hours in order to decrease the pain. He has not attempted to ride a bus in the past 30 years.

He can walk two blocks, but then needs to sit on his walker, which has a built-in bench and hand breaks. He can walk at home without the use of a cane or walker, because he is able to hold on while he is moving around his house.

He was seen by his vocational expert (Mr. Van de Bittner), as well as the defense vocational expert (Mr. Linder), and answered truthfully regarding questions posed by both of the

vocational experts. He does not believe that he can hold a job at this point for numerous reasons, including difficulty with driving, inability to walk more than two blocks and his mouth getting dry. *(He had to stop testimony at this point in order to get water to continue testifying.)* He cannot perform activity without getting exhausted, his need to lie down, the fact that getting up from a seated or lying down position is extremely difficult, problems with the toilet and his increasing pain with activity.

He also related that recently he attempted to hook up his cable, but was unable to do so because of his condition. His children had to complete the work for him. (Minutes of Hearing and Summary of Evidence [MOH/SOE], June 21, 2017 at pp. 5-7.)

On cross-examination, he stated that, regarding his bladder and bowel issues, he does not recall being asked about this by Dr. Mandell. He noted that he believed that there were records of him having these problems at the time of the examination by Dr. Mandell. *(The Court's attention was then brought to page 3 of Dr. Mandell's August 18, 2016 report [Joint Exhibit 101] at paragraph 3, where Dr. Mandell indicated that his bladder and bowel problems were not as extensive as applicant's testimony at trial.)*

Applicant was then asked about the Functional Capacity Evaluation from Rachel Feinberg (Exhibit B). He did not talk with her about the test results.

In applicant's job as an iron worker, he would go all over the Bay Area. All of his work as an iron worker was physical work, and he was not a supervisor. In a prior job at Bechtel, he was a supervisor where he managed employees, did paperwork and worked on a computer. He had 30 days of computer training. He worked on site, but had an office. He does not have a computer degree or certification.

He taught himself English, which is not his native language. He only finished a sixth grade education. He met with his vocational expert in the expert's office in Walnut Creek.

He was then asked about records from his prior family physician, Dr. Kassel. There is an entry at page 20 of these records on November 3, 2014 (Exhibit A) which is a massage therapy note. He recalled receiving massage, but did not recall if it was to his low back, as the note indicates. He believes that the

notes from Dr. Kassel would be correct. At page 34 of the records of Dr. Kassel, an entry of November 22, 2011 indicated that he had low back pain in 2011. Applicant agrees with the statement in Dr. Kassel's report, although he could not recall it specifically.

Applicant has not looked for work since the date of injury, due to his disability and his focus on getting better. He knows how to use the Internet.

Applicant's wife drove him today. He did not bring a walker with him to trial, just his cane. (*MOH/SOE, supra*, at pp 7-8.)

DISCUSSION

My review of defendant's Petition does not cause me to change my opinion. In addition to the reasoning and rationale set forth in the Opinion on Decision, I make the following observations.

With respect to defendant contention that the legislative changes for injuries on or after January 1, 2013 mean that applicant is not entitled to a vocational expert, I disagree. The main thrust of defendant position is that Labor Code section 4660.1 (applicable for injuries on or after January 1, 2013) does not refer to either "diminished ability to compete in the open labor market" or "diminished future earning capacity (DFEC)." There is, however, a reference to an "adjustment factor" of 1.4 for all body parts in subsection (b) of Labor Code section 4660.1, which, when read in the context of Labor Code section 4660 and the entire permanent disability scheme premised on the AMA Guides, refers to the DFEC. This was recognized by the Appeals Board in *Robles v. State of California*, 2015 Cal. Wrk. Comp. P.D. LEXIS 697, which states, "For injuries on or after January 1, 2013, section 4660.1 set the DFEC multiplier to 1.4 for all injuries."

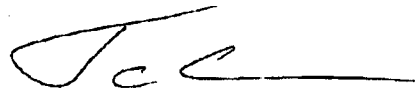
Lastly, I find no support for defendant's contention that notice of a vocational expert appointment should be subject to the same requirements as notice of a QME examination. The

case of *Costa v. Hardy Diagnostic* (2007) 72 Cal. Comp. Cases 1492 (Appeals Board en banc decision), cited by defendant in support of its position, refers to the standard for costs of a vocational expert report, but not to the procedure to obtain such a report. Applicant correctly points out in his Answer that there is no statute, rule or regulation which supports this assertion of defendant.

RECOMMENDATION

Based upon the foregoing, it is respectfully recommended that reconsideration be denied.

Dated: November 29, 2017



JAMES GRIFFIN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:

ON: 11/29/17 BY: *Lily Acosta*

PARTIES:

APPEL LAW WALNUT CREEK, US Mail
ATHENS ADMINISTRATORS CONCORD, US Mail
RAFAEL SANDOVAL, US Mail
SAMUELSEN GONZALEZ BURLINGAME, US Mail