

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

DOUGLAS SCHAAN, *Applicant*

vs.

JERRY THOMPSON & SONS; LIBERTY MUTUAL, *Defendants*

**Adjudication Number: ADJ9898989
Santa Rosa District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in this case.¹ This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on April 29, 2021. By the F&A, the WCJ found that applicant's injury caused 74% permanent disability. No permanent disability was awarded for applicant's psychiatric condition because the WCJ concluded that he did not sustain a catastrophic injury per Labor Code² section 4660.1(c)(2)(B). (Lab. Code, § 4660.1(c)(2)(B).)

Applicant contends that the evidence supports a finding that he is 100% permanently disabled. Applicant also contends that his injury is catastrophic and he is entitled to an increase in his permanent disability for the impairment caused by his psychiatric condition.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Reconsideration (Report) recommending that we grant reconsideration solely to admit the December 1, 2017 report of the internal medicine qualified medical evaluator (QME), Dr. Peter Chang-Sing, but otherwise deny the Petition.³

We have considered the allegations of applicant's Petition for Reconsideration, defendant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the

¹ Commissioner Lowe was previously on the panel in this matter and is no longer a member of the Appeals Board. Another panelist has been assigned in her place.

² All further statutory references are to the Labor Code unless otherwise stated.

³ It is unnecessary to comply with the WCJ's recommendation since Dr. Chang-Sing's December 1, 2017 report was already admitted into evidence as a joint exhibit at a previous trial conducted on August 23, 2018. (Minutes of Hearing and Summary of Evidence, August 23, 2018, pp. 2-3.) It is thus already part of the evidentiary record. (See e.g., *Mantel v. Workmen's Comp. Appeals Bd.* (1974) 37 Cal.App.3d 739 [39 Cal.Comp.Cases 223].)

record and for the reasons discussed below, we will affirm the F&A.

FACTUAL BACKGROUND

Applicant claims injury to his bilateral shoulders, gastroesophageal reflux disease (GERD), psyche, sleep, sexual dysfunction, hypertension and digestive system through January 8, 2015 while employed as a painter by Jerry Thompson & Sons.

Manijeh Ryan, M.D. evaluated applicant as the physical medicine and rehabilitation QME. She found applicant's bilateral shoulders to have reached maximum medical improvement as of April 3, 2017. (Applicant's Exhibit No. 11, Report of PQME Manijeh Ryan, M.D., May 10, 2017, p. 22.) The right shoulder was assigned 21% whole person impairment (WPI) with 23% WPI for the left shoulder and an additional 3% add-on for pain for the left shoulder. (*Id.* at pp. 23-24.) There was no apportionment to other factors besides applicant's cumulative trauma injury. (*Id.* at p. 24.) Dr. Ryan gave the following work restrictions:

No overhead activities, No lifting more [*sic*] 10 pounds, No pushing/pulling more than 10 pounds. No hammering, No going up ladders, No repetitive bilateral arm motion.

(*Id.* at p. 22.)

Dr. Chang-Sing conducted an internal medicine evaluation of applicant as the panel QME. His diagnoses included GERD, sleep disorder, sexual dysfunction and hypertension. (Joint Exhibit J1, Report of Panel QME Peter Chang-Sing, December 1, 2017, pp. 16-17.) The sleep disorder and sexual dysfunction were considered "derivative" of the industrial injury. (*Id.* at p. 17.) Dr. Chang-Sing assigned a 6% WPI rating for the GERD, which he apportioned 10% to non-industrial causes and 90% to the injury. (*Id.* at p. 18.) He also provided a 3% WPI rating each for applicant's sexual dysfunction and sleep disorder. (*Id.* at p. 17.) Dr. Chang-Sing did not specify work restrictions related to the internal medicine conditions.

Anish Shah, M.D. evaluated applicant as the psychiatric QME. Dr. Shah diagnosed applicant with a major depressive disorder. (Applicant's Exhibit No. 20, Report of PQME Anish Shaw, M.D., February 4, 2019, p. 32.) Applicant's psychiatric condition was considered predominantly caused by the cumulative trauma injury. (Applicant's Exhibit No. 21, Report of PQME Anish Shaw, M.D., January 3, 2020, p. 51.) Dr. Shah attributed applicant's depression to pain from his orthopedic injury. Applicant was given a GAF score of 58, which translates to 18%

WPI. (*Id.* at p. 52.) Apportionment was 5% to non-industrial factors. (*Id.*) With respect to impairment to activities of daily living (ADLs), Dr. Shah reported:

The applicant denied any issues with non-specialized hand activities, including grasping, lifting, and tactile discrimination. He is able to do self-care and personal hygiene: however, he is very slow. He has difficulty wiping his rectum, and that really demoralizes him. Sometimes he cries when he is in pain, and he has difficulty with this hygiene-related task. He generally needs to use the shower at those times. He denied having any problem with communication except typing. When he types for more than 20 minutes, he has pain. When he walks for 20 to 30 minutes, he has arm pain. He reported that his arms get numb if he uses them for a long time. This is difficult for him. He can only lift five to ten pounds, and his shoulders and arms hurt very frequently with activities. He is not sexually active because of motivation and erection problems. As described previously, he has sleep problems. He is able to sweep the floor, and he does the cooking and cleaning. He manages money. He tries to do most of the things in house; however, he feels his ego is hurt because of that he has to do these things as opposed to working and making money like most men of his generation. He feels like a house-husband, and he has a low self-esteem from this.

(*Id.* at p. 34.)

Dr. Shah did not provide specific work restrictions for applicant's psychiatric condition.

Both parties obtained reporting from vocational experts. Mr. Thomas Linder, applicant's expert, "looked at the vocational rehabilitation options reasonably available to him in light of his unique education, work history, transferable skill set and permanent industrial work restrictions." (Applicant's Exhibit No. 18, Report of VR Expert Thomas Linder, June 14, 2019, p. 15.) He concluded in relevant part:

In the course of my vocational evaluation with Mr. Schaan, it became obvious to me that Mr. Schaan is very depressed and angry about the devastating impact which his bilateral upper-extremity impairments have exerted upon his quality of life. Prior to his injury in 2015, he was a very strong and active person; now, he is extremely limited in his ability to perform even simple chores around his home. Given the nature and extent of his physical and psychiatric impairments, I cannot envision him being able to obtain any work on his own. In addition, no professional counseling services are available to him from his SJDB benefit or his local EDD, DOR offices or other private or public sources which will enable him to obtain competitive work; therefore, he is not placeable.

...

California Labor Code Section 4660(b)(2) states, "An employee's diminished future earning capacity shall be a numeric formula based on empirical data and

findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated workers.”

Mr. Schaan informed me that he was earning \$35.00/hr. when he last worked as a union painter for Jerry Thompson and Sons in 2015. He said that he was a member of Local 83 (Petaluma) of the Painter’s and Taper’s union. I reviewed the current contract for this union entitled “Norther California Painters Master Agreement” and found that the current journeyman wage is \$42.67/hr. I will take this wage, therefore as representing his current adjusted wage for DFEC calculation purposes.

As explained above, it is my vocational opinion that Mr. Schaan is unable to obtain and maintain any competitive work in the open labor market due to the direct effects of his orthopedic and psychiatric impairments. In addition, I found that he was not amenable for vocational rehabilitation both in narrow and broad interpretations of the Dahl decision; therefore, the 2005 PDRS is subject to rebuttal in his case and he experiences a DFEC of 100%.

(Id.)

Mr. Linder further noted that applicant’s bowel accidents related to his GERD “will interfere with ability to perform any work” and his daily use of opiate medication “precludes him from driving work.” *(Id. at pp. 17-18.)*

Ms. Jill Moeller, defendant’s vocational expert, opined that applicant’s “diminished future earning capacity” based on the physician’s work restrictions and “the vocational factors is 54% for direct job placement options.” (Defendant’s Exhibit A, Report of VR Expert Jill Moeller, July 14, 2020, p. 19.)

The matter proceeded to trial on February 1, 2021 on the following issues as relevant herein: parts of the body injured for psyche, sleep, sexual dysfunction, hypertension and digestive system, permanent disability with applicant claiming permanent total disability per Mr. Linder, and whether there could be permanent disability for psyche, sleep or sexual dysfunction. (Minutes of Hearing and Summary of Evidence, February 1, 2021, pp. 3-4.) Applicant’s trial testimony included the following:

He has had a total of seven surgeries on his shoulders, four surgeries on the left shoulder and three on the right. Since the last time he saw QME Dr. Ryan, his condition has deteriorated.

He is less able to engage in activities of daily living. His pain levels are escalating and he has more limitations every day. His injuries continue to affect his mood and concentration.

...

He cannot lift his arms more than two to three minutes at a time, making it impossible to paint. Due to injuries in both shoulders he can't even wipe his "ass". He also has difficulty washing dishes which he washes resting them on a pot in the sink. He has difficulty wiping counters. The act of wiping down counters for two to three minutes can lead to hours of pain.

...

His sleep, sexual function and GERD symptoms have remained the same since he saw Dr. Chang-Sing. He's had no improvement and those symptoms have gotten a little bit worse.

...

He was treated by Dr. Weil from 2016 until November of 2020. He changed treating doctors because he was required to do so by the insurance company. He would drive to those appointments one hour from his residence in Napa and one and a half hours from his current residence in Santa Rosa. His new treating doctor is only three minutes from his house.

He drives to the grocery store but has not been to the grocery store in several months. He considers himself a "foodie."

He has not considered employment as a driver. The furthest he's driven is to Bodega Bay, approximately one hour. He doesn't always drive. He has driven one time to Fort Ross.

...

He occasionally does yard work. He recently planted one hundred bulbs over a week and a half, a job which he estimated would have only required two hours previously. He cleans up dog poop every third day.

...

He does not have a lawn. He does weeding as necessary.

...

He plans on going for a week to Hawaii in March. He has no other plans. Everything else is day to day.

(*Id.* at pp. 4-5, 6-8.)

The WCJ issued the resulting F&A as outlined above.

DISCUSSION

I.

The employee bears the burden of establishing the approximate percentage of permanent disability caused by the industrial injury. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604,

612 (Appeals Board en banc).) Applicant's injury occurred in 2015. Section 4660.1 governs how to determine permanent disability for injuries occurring on or after January 1, 2013 and provides as follows in relevant part:

(c)(1) Except as provided in paragraph (2), the impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury shall not increase. This section does not limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury.

(2) An increased impairment rating for psychiatric disorder is not subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following:

(A) Being a victim of a violent act or direct exposure to a significant violent act within the meaning of Section 3208.3.

(B) A catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury.

(Lab. Code, § 4660.1(c).)

As stated in *Wilson v. State of CA Cal Fire* (2019) 84 Cal.Comp.Cases 393 (Appeals Board en banc):

[S]ection 4660.1(c) does not apply to psychiatric injuries directly caused by events of employment. 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. However, 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, supra*, 84 Cal.Comp.Cases at p. 403.)

Therefore, in order to receive an increased impairment rating for his psychiatric injury, applicant "bears the burden of proving his psychiatric injury was directly caused by events of employment, or, alternatively, if the psychiatric injury is a compensable consequence of the physical injury, applicant must show that the psychiatric injury resulted from either: 1) being a victim of a violent act or direct exposure to a significant violent act, or 2) a catastrophic injury." (*Id.*)

Applicant's psychiatric injury was deemed a compensable consequence of the orthopedic

injury by the psychiatric QME Dr. Shah. He consequently must show that his injury qualifies for one of the statutory exceptions in section 4660.1(c)(2) in order to receive an increased impairment rating for his psychiatric condition.⁴

In *Wilson*, the Appeals Board determined that whether an injury is catastrophic “focuses on the *nature of the injury*” and is “a fact-driven inquiry.” (*Wilson, supra*, 84 Cal.Comp.Cases at p. 414, emphasis in original.) “Whether an injury is ‘catastrophic’ under section 4660.1(c)(2)(B) is therefore a factual/legal issue for the WCJ to determine.” (*Id.*) 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.” (*Id.*) The *Wilson* decision outlined the following (non-exhaustive) factors for the trier of fact to consider in determining whether an injury may be deemed catastrophic:

1. The intensity and seriousness of treatment received by the employee that was reasonably required to cure or relieve from the effects of the injury.
2. The ultimate outcome when the employee’s physical injury is permanent and stationary.
3. The severity of the physical injury and its impact on the employee’s ability to perform activities of daily living (ADLs).
4. 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.
5. If the physical injury is an incurable and progressive disease.

(*Id.* at p. 415.)

Applicant has undergone multiple surgeries to his shoulders including a replacement on both sides. However, the intensity and seriousness of applicant’s treatment is not akin to the “serious and life-threatening” treatment that Mr. Wilson underwent. (*Id.*) Applicant’s injury caused permanent disability to both shoulders and from his industrially-related GERD, but his injury did not result in permanent impairment to multiple body parts as Mr. Wilson’s did. ADLs per the AMA Guides include: 1) self-care, personal hygiene, 2) communication, 3) physical

⁴ Applicant has not alleged that his injury resulted from being a victim of a violent act or direct exposure to a significant violent act per section 4660.1(c)(2)(A) and we thus do not consider whether he qualifies for that statutory exception.

activity, 4) sensory function, 5) nonspecialized hand activities, 6) travel, 7) sexual function, and 8) sleep. (American Medical Association Guides to the Evaluation of Permanent Impairment (5th ed. 2001) (AMA Guides), Table 1-2, p. 4.) The medical reporting and applicant's testimony indicate that the impact of the physical injury has been fairly severe on his sexual functioning and sleep, but applicant remains quite capable in the other ADLs. Dr. Shah reported that he has no issues with communication (except typing), nonspecialized hand activities and he is able to do self-care and personal hygiene, although slowly. Applicant can perform physical activities including walking, lifting, chores around the house and yard work. His testimony reflected an ability to drive at least an hour and plans to travel to Hawaii. Applicant's injury is not closely analogous to one of the statutorily specified injuries and cannot plausibly be characterized as an incurable and progressive disease. The record does not reflect other factors that would support a finding that the injury was catastrophic.

Therefore, we agree with the WCJ's conclusion that applicant did not sustain a catastrophic injury and may not receive an increased impairment rating for his psychiatric condition.

II.

As outlined above, the employee bears the burden of establishing the approximate percentage of permanent disability caused by the industrial injury. The scheduled rating is prima facie evidence of an employee's level of permanent disability resulting from an injury. (Lab. Code, § 4660.1(d).) However, an employee may challenge the scheduled percentage of permanent disability "by demonstrating that due to industrial injury the employee is not amenable to rehabilitation." (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1277 [76 Cal.Comp.Cases 624].) A determination that an injured worker "cannot be retrained for any suitable gainful employment may adversely affect a worker's overall ability to compete [in the open labor market]. Accordingly, that factor should be considered in any determination of a permanent disability rating." (*LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 243 [48 Cal.Comp.Cases 587].) "The first step in any *LeBoeuf* analysis is to determine whether a work-related injury precludes the employee from taking advantage of vocational rehabilitation and participating in the labor force." (*Contra Costa County vs. Workers' Comp. Appeals Bd. (Dahl)* (2016) 240 Cal.App.4th 746, 758 [80 Cal.Comp.Cases 1119].) This necessitates an "individualized approach," which, pursuant to *Ogilvie*, looks at the impact of only the industrial

injury without consideration for nonindustrial factors on the employee's amenability to vocational rehabilitation. (*Id.*) Nonindustrial factors include "general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education." (*Ogilvie, supra*, 197 Cal.App.4th at p. 1275.)

Applicant contends that the reporting of QME Dr. Ryan, QME Dr. Shah and his vocational expert, Mr. Linder, support a finding that he is permanently totally disabled pursuant to *Ogilvie, LeBoeuf* and section 4662(b). (Lab. Code, § 4662(b) ["permanent total disability shall be determined in accordance with the fact" in all cases where permanent disability is not presumed total]; see also Lab. Code, § 4660.1(g) [this section does not preclude a finding of permanent total disability in accordance with section 4662].) We agree with the WCJ that the medical and vocational evidence do not show that applicant is 100% permanently disabled as a result of his injury.

Although Dr. Ryan did not believe applicant could return to his previous job and provided permanent work restrictions, she did not opine that applicant is totally precluded from working due to his orthopedic injury. None of the reporting physicians in this matter concluded that applicant is completely unable to return to work due to his industrial injury. Applicant's vocational expert, Mr. Linder, incorrectly cites to and discusses section 4660 although applicant's injury must be rated pursuant to section 4660.1. Mr. Linder acknowledges that lack of education is not a permissible factor in determining amenability to vocational rehabilitation, but his conclusions regarding applicant are partially premised on applicant's limited education. As noted by the WCJ, Mr. Linder also appears to adopt work restrictions related to applicant's GERD and use of opiates that were not supplied by the medical experts.

The WCJ declined to follow the analysis of either party's vocational expert since both had considered applicant's psychological issues in determining his amenability to vocational rehabilitation. (Opinion on Decision, April 29, 2021, p. 6.) As discussed above, applicant's permanent disability rating may not be increased for his compensable consequence psychiatric condition since his injury is not catastrophic. Thus, we agree with the WCJ that the impairment caused by his psychiatric condition was improperly considered in evaluating his amenability to vocational rehabilitation.

Lastly, the record does not show that Mr. Linder's reporting was provided to and commented on by Dr. Ryan or the other medical experts. There is thus no medical evidence in the

record addressing Mr. Linder's conclusion that applicant is not amenable to vocational rehabilitation and is permanently totally disabled.

Applicant did not meet his burden of rebutting the scheduled rating of his injury. Therefore, we will affirm the F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued by the WCJ on April 29, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 20, 2022

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

DOUGLAS SCHAAN
LUNA & SUTHERLAND
SANTANA & VIERRA

AI/pc

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