WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GUILLERMO ANAYA, ***Applicant,*** **vs.** **BAY AREA CARBIDE; VALLEY FORGE INSURANCE COMPANY,** ***Defendants.***	**Case Nos. ADJ7607362** **(Oakland District Office)** **OPINION AND ORDER DENYING DEFENDANT'S PETITION FOR RECONSIDERATION**

Defendant seeks reconsideration of the April 8, 2016 Findings, Award And Orders of the workers' compensation administrative law judge (WCJ) who found that applicant sustained industrial injury to his lungs, respiratory system, psyche and in the form of diabetes while employed by defendant as a tool handler during the period July 8, 2009 through July 8, 2010, causing a period of temporary total disability, unapportioned 100% total permanent disability "in accordance with the fact" pursuant to Labor Code section 4662(b), and a need for future medical treatment.[1]

Defendant contends that the finding of total permanent disability is not supported by substantial medical evidence and that the date of injury finding does not take into consideration the latency period involved in the development of applicant's lung condition and disability.

An answer was received from applicant.

The WCJ provided a Report And Recommendation On Petition For Reconsideration (Report) recommending that reconsideration be denied.

Having carefully reviewed the record and considered the allegations of the petition for reconsideration, the answer and the WCJ's Report, reconsideration is denied for the reasons below and

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[1] Further statutory references are to the Labor Code. Section 4662 subdivision (a) establishes a presumption of total permanent disability for certain conditions, including loss of both eyes, loss of both hands, total paralysis, and permanent mental incapacity. Section 4662 subdivision (b) further provides: "In all other cases, permanent total disability shall be determined in accordance with the fact."

for the reasons expressed by the WCJ in his Report, which is adopted and incorporated by this reference except as discussed below.[2] The reporting of the examining physicians and other evidence establish that applicant is totally permanently disabled "in accordance with the fact" as described in section 4662(b).

BACKGROUND

As the WCJ sets forth in his Report, applicant was employed by defendant as a tool handler for several years, during which time he was routinely exposed to metal dust. He developed a cough while working for defendant and was ultimately diagnosed with pulmonary fibrosis, a lung disease caused by inhaling metal particles. Applicant's last day of work was July 8, 2010. He has since had a bilateral lung transplant.

Defendant accepted liability for the injury and provided medical care and paid both temporary and permanent disability indemnity. The parties, however, did not agree on the level of applicant's permanent disability and that issue and others were tried before the WCJ on February 3, 2016. The medical evidence received at the trial is detailed by the WCJ in his Report. It shows that applicant continues to have significant ongoing limitations.

Defendant disputes the WCJ's finding of total permanent disability, arguing that the award should instead be based upon the 93% permanent disability rating calculated pursuant to the Permanent Disability Rating Schedule (PDRS) promulgated by the Administrative Director in accordance with section 4660.[3] The WCJ responds in his Report that he relied upon the entirety of the evidence as establishing total permanent disability "in accordance with the fact" pursuant to section 4662(b), writing in pertinent part as follows:

> Defendant argues that I should have found that Applicant sustained a 93% permanent, partial disability based on the mechanical formula of combining six separate and discrete impairments (one of which, by itself, rates 82%) [and that] I should have disregarded the opinions of the AME and [two] PQME that Applicant is totally, permanently disabled, with no

[2] We adopt the WCJ's reasoning in his Report concerning the date of injury finding in Finding of Fact 1, and no further discussion of defendant's contentions concerning the date of injury and latency periods is included herein.

[3] Section 4660 generally provides that the Administrative Director is to promulgate a PDRS abased upon the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition), and which takes into account an employee's diminished future earning capacity. The PDRS is described in section 4660 as "prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule."

basis for apportionment to any non-industrial condition, because the physicians are not experts in the labor market.

I reject the notion that, where the medical evidence reflects a total, permanent disability, the parties must nonetheless go to the expense and delay of obtaining vocational evidence.

Defendant cites Labor Code Section 4660 as laying out the rules for determining extent of permanent disability, including utilization of the descriptions and measurements set forth in the *AMA Guides*, and on that basis claims that the permanent disability must be 93% based on the mechanical formula set forth in the Opinion. This contention misses the point. Labor Code Section 4660 applies only to calculation of permanent, partial disability, not to permanent, total disability. The first subparagraph of the section makes this clear: '(a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity.' The [PDRS] makes plain that a total, permanent disability is not adjusted for either age or occupation. Accordingly, Section 4660 does not apply to cases in which the medical evidence is clear (and, in this case, unanimous) that the injured worker is totally and permanently disabled.

DISCUSSION

We agree with the WCJ's determination that the record and section 4662(b) support a finding of total permanent disability in this case, but we do not endorse or adopt the implication in the Report that section 4660 does not apply in cases involving total permanent disability. Instead, total permanent disability may be shown by presenting evidence showing total permanent disability "in accordance with the fact" as provided in section 4662(b), or by rebutting a section 4660 scheduled rating. (See *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] (*Ogilvie*); *Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119]; c.f. *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587].) Here, the entirety of the record supports a conclusion that the WCJ properly applied section 4662(b) to find that applicant is, in fact, totally permanently disabled.

Findings of the WCAB must be supported by substantial evidence in light of the entire record. (*Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence an expert's opinion may not be based upon an inadequate history, surmise, speculation or

conjecture. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525].)

In this case, the reporting physicians had full and sufficient information about applicant's condition and history to form reasonable opinions about the effect of his permanent disability on his activities of daily living, earning capacity and ability to compete in the open labor market. Their certitude in finding total permanent disability is seen in their reporting.

In conjunction with his May 1, 2014 evaluation of applicant, the initial internal medicine specialist, Revels Cayton, M.D., wrote on pages 26 and 27 of his report that "Mr. Anaya will never work again" and that "Mr. Anaya is not able to return to work of any kind. He is not a good candidate for vocational rehabilitation." (Joint Exhibit 101.)

Following the death of Dr. Cayton, Roger Nacouzi, M.D., provided another evaluation and report, writing on page 28 of his initial April 21, 2015 report, "[applicant] is not expected to live long." (Joint Exhibit 102.) In his May 23, 2015 report, Dr. Nacouzi described the effects of the medications applicant was taking on his ability to work, which is properly considered in evaluating permanent disability. (Joint Exhibit 103; *Gottschalks v. Workers' Comp. Appeals Bd.* (*Widner*) 68 Cal.Comp.Cases 1714 [2003 Cal. Wrk. Comp. LEXIS 548].) Dr. Nacouzi further wrote on page 2 of his May 23, 2015 report as follows:

> I agree with the late Dr. Cayton, M.D., that Guillermo Anaya is totally and permanently disabled from returning to the labor market. I think that Mr. Guillermo Anaya is unemployable. As I said in my prior report dated April 21, 2015 Mr. Anaya does not have many years to live. The pulmonary condition will worsen and will later accelerate downhill. (Joint Exhibit 103.)

Both Dr. Nacouzi and Dr. Cayton reported psychiatric sequela to applicant's industrial pulmonary fibrosis injury. The parties selected Robert Larsen, M.D., to act as their psychiatric Agreed Medical Evaluator (AME). In his August 21, 2014 report, Dr. Larsen confirmed that applicant sustained industrial psychiatric injury, and he assigned a Global Assessment of Functioning (GAF) score of 55 at that time. (WCAB Exhibit X.) He further wrote on page 28 of his August 21, 2014 report as follows:

> I also agree with my colleague Dr. Cayton that Mr. Anaya cannot be expected to return to the open labor market. Combined medical and psychiatric limitations preclude this man from full-time employment...He will not be an attractive candidate to any employer. The applicant should

> be considered 100% permanently disabled though ultimately I defer to vocational experts and the trier of fact...
>
> If there were ever a case in which an individual should be considered to have incurred a catastrophic physical injury at work it would appear that Mr. Anaya's would meet that criteria. (*Id.*)

The opinions of Dr. Cayton, Dr. Nacouzi and Dr. Larsen that applicant is totally permanently disabled as a result of the industrial injury are unrebutted and are entitled to full weight. A person is qualified to testify as an expert if he or she has the knowledge, skill, experience, training, or education sufficient to qualify as an expert, like the physicians in this case. (Evid Code, § 720; *People v. Smith* (1967) 253 Cal.App.2d 711; *Oak River Insurance Co. v. Workers' Comp. Appeals Bd.* (*Torrez*) (2013) 79 Cal.Comp.Cases 85 (writ den.).) The reporting physicians have extensive experience in evaluating injured workers and understand the concept of total permanent disability.

Moreover, the opinion of an AME like Dr. Larsen should ordinarily be followed unless there is good reason to find it unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775 [51 Cal.Comp.Cases 114]; *Siqueiros v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 150 (writ den.).) No good reason is shown here to find the opinion of Dr. Larsen unpersuasive on the question of the level of applicant's permanent disability.

Defendant seeks to discount the value of the physicians' opinions by attacking the substantiality of their reporting and by arguing that they are not vocational experts and cannot rebut a scheduled rating under section 4660. In making this argument, defendant seeks to apply section 4660 standards to a determination of total permanent disability "in accordance with the fact" under section 4662(b). Defendant's reliance upon *Schroeder v. Workers' Comp. Appeals Bd.* (2013) 78 Cal.Comp.Cases 506 [2013 Cal. Wrk. Comp. LEXIS 80] (*Schroeder*) to argue that section 4660 standards apply to section 4662 determinations is misplaced.

In *Schroeder*, the panel considered the separate avenues of proof contemplated by sections 4660 and 4662. The panel first considered whether applicant had sustained a disability that was subject to the total conclusive presumption provided at that time under section 4662 for mental incapacity. It separately considered whether applicant had rebutted the section 4660 scheduled diminished future

earning capacity factor by showing through vocational evidence that he was unable to compete in open labor market as described in *Ogilvie*. The panel determined that the record did not support a finding of total permanent disability under either theory because applicant's mental incapacity disability was not severe enough to trigger the section 4662 conclusive presumption and because applicant did not rebut the section 4660 scheduled rating through the reporting of his vocational expert who relied upon impermissible factors in determining the applicant's vocational feasibility. For those reasons, the panel returned the case to the trial level for a rating of applicant's permanent disability based upon the existing record. In short, *Schroeder* recognized that sections 4660 and 4662 offer different paths to prove total permanent disability, contrary to defendant's contention that the section 4660 standards apply to determinations made pursuant to section 4662.

The different paths provided by sections 4660 and 4662 are more specifically addressed in the Appeals Board panel decision in *Coca-Cola Enterprises, Inc. v. Workers' Comp. Appeals Bd.* (*Jaramillo*) 77 Cal. Comp. Cases 445 [2012 Cal. Wrk. Comp. LEXIS 45] (writ den.) (*Jaramillo*). In *Jaramillo*, the applicant suffered from several conditions whose combined disability did not reach the level of 100% under the applicable PDRS, and none of which established a presumption of total permanent disability under section 4662(a). However, the WCJ entered a finding of total permanent disability based upon the medical reporting. Defendant challenged that approach, contending that the AMA Guides and the Combined Values Chart in the PDRS were not properly applied.

The panel in *Jaramillo* denied reconsideration, noting that under section 4662(b) total permanent disability may be determined "in accordance with the fact," in contrast to section 4660, which addresses "the percentages of permanent disability," and writing in pertinent part as follows:

> Support for interpreting these sections [4660 and 4662] separately is found in section 4658(d), which establishes the benefit owed for permanent disability occurring as a result of an injury occurring after the effective date of the 2005 Schedule: 'If the injury causes permanent disability, *the percentage of disability* to total disability shall be determined, and the basic disability payment computed as follows...' (Emphasis added.) The table that follows covers disabilities up to 99.75 percent. Computation of the benefit owed when permanent disability is 100 percent is governed by a separate section, section 4659(b). That there are separate sections for computing disability payments in cases involving partial and total disability confirms that there is a meaningful difference between disabilities that are *a percentage* of total disability and those that are *total*.

> We note that section 4660(b) (1) and (2) apply only '[f]or purposes of this section....' Because these subdivisions expressly apply only for purposes of section 4660, i.e., for determining 'the *percentages* of permanent disability' (emphasis added), those subdivisions do not apply to the determination of permanent total disability under a different Labor Code section. Therefore, the specific constraints of section 4660(b) (1) and (2) are not necessarily applicable to a determination of permanent total disability 'in accordance with the fact' pursuant to section 4662.
>
> Sections 4662 and 4659(b) demonstrate that distinct statutory provisions may apply in cases of permanent total disability. Section 4662's language that 'permanent and total disability shall be determined in accordance with the fact' was not changed by Senate Bill 899. While this language has not been definitively interpreted in a binding appellate or en banc decision, it appears to authorize a finding of permanent total disability based on an evaluation of the evidentiary record of an individual case. Moreover, the rules of statutory construction militate against our interpreting these statutes in such a way as to negate the language of section 4662 or to render it superfluous. (See, e.g., *Klein v. United States of America* (2010) 50 Cal.4th 68, 80 [235 P.3d 42, 112 [448] Cal.Rptr.3d 722]; *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22 [801 P.2d 1054, 276 Cal.Rptr. 303, 55 Cal. Comp. Cases 494].) While it is theoretically possible to obtain a 100 percent rating using the Combined Values Chart, that result is highly improbable, even in cases involving 'factually' total loss of earning capacity.
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> In the present case, despite the WCJ's failure to articulate clearly the legal basis for her finding on permanent disability, it is apparent that she determined applicant was totally disabled 'in accordance with the fact' [pursuant to section 4662]. (Italics in original.)

In sum, total permanent disability may be shown to exist by rebutting the section 4660 scheduled rating, or "in accordance with the fact" under section 4662. It is not necessary for an injured worker to have a total loss of earning capacity in order to be found to be totally permanently disabled. (*Spartech Plastics v. Workers' Comp. Appeals Bd. (Ochoa-Pena)* (1998) 64 Cal.Comp.Cases 124 [1998 Cal. Wrk. Comp. LEXIS 4202] (writ denied); *Greco v. Workers' Comp. Appeals Bd.* (2005) 70 Cal.Comp.Cases 1512 [2005 Cal. Wrk. Comp. LEXIS 274] (writ den.); cf. *Pacific Greyhound Lines v. Workmens' Comp. Appeals Bd. (Dickow)* (2005) 38 Cal.Comp.Cases 359 [1973 Cal. Wrk. Comp. LEXIS 2209].)

In this case, the entirety of the record evidences establishes that applicant is totally permanently disabled in accordance with the fact under section 4662(b), and the WCJ's decision is affirmed.

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For the foregoing reasons,

IT IS ORDERED that defendant's petition for reconsideration of the April 8, 2016 Findings, Award And Orders of the workers' compensation administrative law judge is **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

KATHERINE ZALEWSKI

I CONCUR,

MARGUERITE SWEENEY

I CONCUR AND DISSENT, (See Separate Concurring And Dissenting Opinion)

JOSÉ H. RAZO

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUN 28 2016

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

GUILLERMO ANAYA
ELDER & BERG
LAW OFFICE OF CHRISTIAN GREEN

JFS/abs

CONCURRING AND DISSENTING OPINION OF COMMISSIONER RAZO

I concur with the majority regarding the date of injury finding, and also concur that total permanent disability may be shown either "in accordance with the fact" pursuant to section 4662(b) or by rebutting a section 4660 PDRS rating.

My dissent is from the majority conclusion that total permanent disability is established in this case by substantial evidence "in accordance with the fact" as required by section 4662. I would grant reconsideration, rescind the WCJ's decision, and return the case to the trial level for development of the record on applicant's amenability to vocational rehabilitation and his loss of future earning capacity.

I recognize that applicant has a substantial permanent disability and that the medical examiners have opined that he is totally permanently disabled and unable to work. However, the physicians are not vocational experts and their opinions are not substantial evidence of a lack of amenability to vocational rehabilitation and total loss of future earning capacity, and the record should be developed on those issues.

When Dr. Cayton opined in his May 1, 2015 report that "Mr. Anaya will not work again," he based that view upon applicant's susceptibility to problems, not a lack of amenability to rehabilitation. (Joint Exhibit 101.) Dr. Cayton described only mild limitations on physical activity in his report and did not provide any specific work restrictions. Nor did he address the fact that applicant was able to provide volunteer work for the John Muir Medical Center. Dr. Cayton did state in his report that applicant "is not a good candidate for vocational rehabilitation," but he provided no explanation or reasoning for that summary conclusion.

As reported by Dr. Nacouzi on April 21, 2015, applicant was able to walk two and one half miles on a treadmill, ride a stationary bike for up to 15 minutes and was volunteering one to three times per week at John Muir Hospital in the Pulmonary Rehabilitation Center, activities inconsistent with total disability. (Joint Exhibit 102.) Dr. Nacouzi did not address in his reporting whether applicant was amenable to vocational rehabilitation and did not discuss what jobs applicant might be able to perform in the open labor market. (Joint Exhibit 103.)

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Dr. Larsen formed his opinion regarding permanent disability, in part, based upon applicant's psychiatric testing. However, in his August 21, 2014 report Dr. Larsen wrote that, "if taken literally [the testing] would result in the conclusion that Mr. Anaya is psychotic and needs institutionalization." (WCAB Exhibit X.) This led Dr. Larsen to note that, "I interpret the more extreme psychiatric complaints ...to be an effort by the applicant to impress upon others his felt plight." (*Id.*) He further noted that the psychological test results showed a 100 percent probability of over-reporting and showed no evidence of problems with testing comprehension. (*Id.*) The test giver further wrote that any differential diagnosis, "should include malingering." (*Id.*) Dr. Larsen did state in his report that applicant was "precluded from full-time employment," but further wrote that he could "become involved in some type of volunteer activities," and specifically deferred to "vocational experts" on the question of permanent total disability. (*Id.*)

While total disability "in accordance with the fact" under section 4662(b) may not always require evidence of lack of amenability to vocational rehabilitation and proof of total loss of future earning capacity, in this case the reporting physicians do not provide sufficient reasoning to support their opinions. The absence of substantial evidence on the issues of amenability to vocational rehabilitation and future earning capacity precludes the application of section 4662(b) in this case at this time.

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I would grant reconsideration, rescind the WCJ's decision and direct development of the record on the issue of permanent disability, including the development of evidence regarding applicant's amenability to vocational rehabilitation and future earning capacity.

WORKERS' COMPENSATION APPEALS BOARD

JOSÉ RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUN 2 8 2016

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

GUILLERMO ANAYA
ELDER & BERG
LAW OFFICE OF CHRISTIAN GREEN

JFS/abs

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

GUILLERMO ANAYA v. BAY AREA CARBIDE and VALLEY FORGE INSURANCE COMPANY
WCAB CASE NO.: ADJ7607362

JUDGE STANLEY E. SHIELDS

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

ISSUES PRESENTED

a. Whether the Judge's finding regarding date of injury was error.

b. Whether the Judge's finding of a total, permanent disability was error.

INTRODUCTION

Defendant filed a timely, verified Petition for Reconsideration of the Judge's Findings, Award and Orders filed and served April 8, 2016. To date, no Answer has been received from Applicant.

In this case, the undersigned made 14 separate Findings of Fact. Defendant objects to Finding No. 1, which includes the language that, "while employed in the period July 8, 2009 through July 8, 2010 . . . [Applicant] sustained injury arising out of and occurring in the course

of his employment to his lungs, respiratory system, and psyche." Defendant also objects to Finding No. 10, which stated, among other things, that, "Applicant is totally, permanently disabled from his injury."[1]

It should be pointed out that Defendant Valley Forge has been paying benefits to date, and that Applicant "elected against" Valley Forge prior to Trial.

This matter was quite complex, involving the services of an Agreed Medical Evaluator in the field of psychiatry and two Panel Qualified Medical Evaluators in the field of Internal Medicine (because of the death of the first PQME).

Relevant portions of the Joint Opinion on Decision follow:[2]

INTRODUCTION

> Applicant Guillermo Anaya was employed by Bay Area Carbide as a tool handler in the period July 8, 2009 through July 8, 2010, during which time he claims to have sustained injury to his lungs, respiratory system, and psyche.[3] The carrier has provided medical care and paid both temporary and permanent disability indemnity.
>
> The parties utilized Robert Larsen, M.D., as Agreed Medical Evaluator for the psychiatric injury claim. Revels Cayton, M.D., served as Panel Qualified Medical Evaluator (PQME) with respect to the internal injuries until his death; Roger Nacouzi, M.D., was then chosen as the replacement PQME.

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[1] Defendant also objects to the finding of attorney's fee (Finding No. 13), but since that finding merely calls for the attorney to receive a percentage of the indemnity awarded, there is no substantive objection to the finding.

[2] I omit sections on Parts of Body Injured, Permanent and Stationary Date, Entitlement to Temporary Disability Indemnity, Occupation and Group Number, Need for Further Medical Treatment, Attorney's Fees, and Change of Administration, Contribution, Reimbursement.

[3] At Trial, Applicant raised a claim of injury in the form of diabetes. (Footnote in original.)

The issues were submitted on a designated record; no testimony was taken.

MEDICAL EVIDENCE

Dr. Cayton first evaluated Mr. Anaya on September 9, 2011, reporting on September 27, 2011. Dr. Cayton took a history that Mr. Anaya's job included, among other things, using abrasive grinding wheels on metal tools. Mr. Anaya began to experience respiratory difficulties in 2005, approximately two years after starting the job at Bay Area Carbide. Dr. Cayton performed a full examination, including extensive testing, and diagnosed pulmonary fibrosis secondary to carbide exposure and respiratory failure secondary to the pulmonary fibrosis. Dr. Cayton found that the condition was related to the employment, that Mr. Anaya was in need of further medical care, that he was not permanent and stationary, and that he was temporarily disabled and had been so since leaving work. In response to a specific query from defense counsel, Dr. Cayton stated that "latency is extremely short with heavy metal pneumoconiosis."

Dr. Cayton examined again on April 23, 2014, reporting on May 1, 2014.[4] Once again, Dr. Cayton performed a thorough evaluation, including appropriate testing. He noted that Mr. Anaya had undergone bilateral lung transplants at Stanford University Hospital. While still quite disabled, Dr. Cayton found that Mr. Anaya's condition had improved somewhat. In a section regarding Activities of Daily Living, Dr. Cayton rated Mr. Anaya severely impaired in two of eight areas; at the time of the 2011 examination, Dr. Cayton rated Mr. Anaya severely impaired in six of eight areas. Dr. Cayton found Applicant to be permanent and stationary at the time of his evaluation. Dr. Cayton made the following impairment findings. In connection with the lung

[4] According to this report, Dr. Cayton had furnished reports on June 14, 2012, May 16, 2013, September 17, 2013, and October 28, 2013. For unknown reasons, none of these reports was placed in evidence at Trial. (Footnote in original.)

transplants, he found a 60% Whole Person Impairment (WPI), with no apportionment. With respect to Mr. Anaya's diabetic condition, he found a 10% WPI, with no apportionment. With respect to medications causing multiple difficulties, he found a 10% WPI, with no apportionment.[5] With respect to Mr. Anaya's Gastroesophogeal Reflux Disease (GERD), he found a 9% WPI, with no apportionment. With respect to sleep maintenance insomnia, he found a 10% WPI, with no apportionment. Once again, he found a need for further medical treatment.

Although Dr. Cayton had rendered a final report on Mr. Anaya's internal condition, after Dr. Cayton's death in August, 2014, the parties obtained a new PQME, Roger Nacouzi, M.D.

Dr. Nacouzi examined on April 21, 2015, reporting the same day. He found himself in complete agreement with Dr. Cayton as to causation, permanent and stationary date, permanent disability and apportionment, and need for medical care, with one exception. Dr. Nacouzi disagreed with Dr. Cayton's finding of impairment due to medications causing multiple difficulties, for which Dr. Cayton found a 10% WPI. Dr. Nacouzi notes that the 10% WPI offered by Dr. Cayton is for the taking of anti-coagulation drugs, which Mr. Anaya does not take. Dr. Nacouzi suggests that Dr. Cayton was perhaps analogizing pursuant to *Almaraz/Guzman.* After stating that this impairment would not apply, Dr. Nacouzi spends a single-spaced page explaining the problems that Mr. Anaya will (and does) have from taking the immunosuppression drugs that he is prescribed.

Dr. Nacouzi's deposition was taken on October 15, 2015. At the deposition, Dr. Nacouzi gave his opinion that Mr. Anaya was totally, permanently disabled. Dr. Nacouzi was questioned extensively as to whether there was a latency period connected with Mr. Anaya's condition. Defense counsel represented that Dr. Cayton had initially found a five-

[5] In another part of the report, Dr. Cayton gives a 15% WPI for this condition. (Footnote in original.)

year latency and later changed his opinion to a one-year latency.[6] Dr. Nacouzi initially responded that "for that process (irritative response to dust exposure) to take place, I would say that five years is a reasonable time." (Joint Exhibit 103, p. 17.) Having considered the issue further, Dr. Nacouzi testified on the following page, "I would say even three years is enough to induce this type of metal-induced pneumoconiosis." On the next page of the deposition, Dr. Nacouzi stated, "All injurious exposure, all dust exposure, fume exposure at the workplace was injurious to the last day of employment."

Dr. Larsen examined the Applicant on August 4, 2014, reporting on August 21, 2014. Dr. Larsen diagnosed a Major Depression, recurrent, and moderate. He found psychiatric injury as a compensable consequence of the pulmonary condition and notes that Mr. Anaya "became depressed soon after learning the extent of his respiratory condition." Dr. Larsen goes on, "There is more than enough reason for this individual to be dejected and worried." Dr. Larsen felt that Mr. Anaya had become permanent and stationary, from a psychiatric perspective, at the time of his evaluation.[7] Dr. Larsen found a GAF score of 55, with no basis for apportionment; he also found need for further medical care. Dr. Larsen was of the opinion that the combination of physical and psychiatric impairment rendered the Applicant 100% permanently disabled.[8]

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[6] If Dr. Cayton expressed either of these opinions, it was not in the medical reports presented at Trial. (Footnote in original.)

[7] He actually states, "at the time of this reporting," but I don't believe he meant that there would be any change between the date of the examination and the date the typed report issued. (Footnote in original.)

[8] In a side comment, Dr. Larsen noted that Dr. Cayton had recently died. Dr. Larsen stated, "I hope that there will be no steps taken to obtain the services of another evaluating physician to address the physical injury and disability. Dr. Cayton was an esteemed colleague and recognized expert in the areas of internal medicine and pulmonology. The doctor considered a wealth of information in this case. His opinions are substantive in nature. Bringing in another evaluator to substitute for Dr. Cayton at this point will only delay the decisions that need to be made in Mr. Anaya's case and subject this man to unnecessary evaluation which would not be helpful to his state of mind." (Footnote in original.)

DATE OF INJURY

Applicant makes the claim that the date of injury is the last date of employment; Defendant contends that there is a latency period which would change the date of injury and implicate other carriers.

Labor Code Section 5412 provides: "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment."

In this case, it is clear that Mr. Anaya first suffered ***symptoms*** in 2005 but did not suffer ***disability*** until 2010.

Labor Code Section 5500.5 provides that liability for an occupational disease or cumulative injury is limited to those employers who employed the employee during the one-year period immediately preceding the date of injury, "as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first."

In this case, the date of injury pursuant to Labor Code Section 5412 is the same date as the last date on which Mr. Anaya was employed in an occupation exposing him to the hazards which brought about his injury.

Although I have quoted from Dr. Nacouzi's deposition, above, the following testimony seems to me particularly important on this issue:

> So we said the first two years he was inhaling dust and fumes. And at the end of the first two years, he started becoming symptomatic for a dry irritative cough. And I think that the disease process started a year after that, so it would be the third year.
>
> . . .
>
> But then here we are in 2007; right? But the exposure after 2007 continued to be injurious to the lungs.

. . .

> This is important, Counsel, because I deal with this issue all the time and it's the source of – I know we have to address it because it's an important question. And I read the case involving the latency once in the past. I am telling you here, Counsel, "latency," as defined in this expert opinion, from a medical point of view, is the time between the exposure and the development of the disease. This may not be the latency that you are interested in for establishing liability. And this is what my understanding of the court case is, is to find when was – who can be involved in a case and see where the injurious exposure took place.
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> So in order to avoid discussion about latency, I told you that, clearly, all exposure through last day of employment contributed to this person's lung disease. If you are asking a latency from a medical point of view to try to understand the path of physiology of the disease, I tried to explain to you how the disease process took place. But it doesn't mean that before 2007 he's not injurious or after 2007 he's not injurious. The whole period is injurious, Counsel.

Joint Exhibit 103, 20:7–21:23.

In a case involving exposure to asbestos, the 2nd District Court of Appeal found that, "Where the employee has established industrial asbestosis after a period of exposure to asbestos, the Board is authorized . . . to impose liability on those employers employing the employee within the last year of exposure to asbestos in the absence of substantial evidence demonstrating that a prior period of employment ***was the sole cause of the disease."*** *Industrial Indemnity Co. v. Workers' Comp. Appeals Bd. (Pisciotta)* (1983) 145 Cal.App.3d 480, 48 Cal.Comp.Cases 560, at 565 (emphasis added).[9]

In this case, Dr. Nacouzi has identified the entire period of employment as injurious. In Dr. Nacouzi's opinion, the "disease process" started sometime in 2007, but the injurious exposure existed both before and after 2007. The duration of the exposure contributed to the disease,

[9] *See also Sulivan on Comp,* Chapter 5.10, and the cases cited at footnote 18. (Footnote in original.)

including the severity of the disease. Accordingly, I find the date of injury, as pled, to be correct.

PERMANENT DISABILITY and APPORTIONMENT

If permanent disability were to be rated based purely upon the Schedule for Rating Permanent Disabilities, and relying on the opinions of Dr. Cayton and Dr. Larsen, the rating formula would be as follows:

04.04.00.00 - 60 - [7] 81 - 330F - 81 - 82
05.02.00.00 - 10 - [7] 14 - 330F - 14 - 15
06.01.00.00 - 9 - [6] 12 - 330F - 12 - 13
10.01.00.00 - 10 - [2] 11 - 330F - 11 - 12
13.03.00.00 - 10 - [6] 13 - 330F - 13 - 14
14.01.00.00 - 23 - [8] 32 - 330F - 32 - 34
82 C 34 C 15 C 14 C 13 C 12 = 93%

Balanced against this formula, I note that Dr. Nacouzi and Dr. Larsen have found Applicant to be totally and permanently disabled. I also note the opinion of the Court of Appeal in *Luchini v. Workers' Comp. Appeals Board* (1970) 7 Cal.App.3d 141, 35 Cal.Comp.Cases 205, at 209: "the Board cannot rely on some administrative procedure to deny to petitioner a disability award commensurate with the disability that he has suffered."

Based upon all of the evidence, I find that Applicant has sustained a permanent, total disability.

DISCUSSION

DATE OF INJURY.

Defendant argues in its Petition, as it did at Trial, that Mr. Anaya's disease process included a period of latency which should shift liability backwards in time. Defendant quotes various sections of the reports of Dr. Cayton and Dr. Nacouzi in support of this proposition.

There is no basis in statute or case law for the proposition that date of injury in a cumulative trauma case must be based on some alleged "latency" period. As set out, above, Labor Code Section 5412 provides:

> The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.

It is undisputed that Mr. Anaya did not suffer **disability** until he left work in 2010.

Again, as set out in the Opinion, Labor Code Section 5500.5 provides that liability for an occupational disease or cumulative injury is limited to those employers who employed the employee during the one-year period immediately preceding the date of injury, "as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first."

In this case the last date on which the employee was employed in an occupation exposing him to the hazards of the occupational disease was July 8, 2010, the same date of injury pursuant to Labor Code Section 5412. Dr. Nacouzi was adamant that injurious exposure continued through the last day of work.

I finally note that Defendant has not attempted to rebut the court of appeal decision cited in the Opinion, that, "Where the employee has established industrial asbestosis after a period of exposure to asbestos, the Board is authorized . . . to impose liability on those employers employing the employee within the last year of exposure to asbestos in the absence of substantial evidence demonstrating that a prior period of employment ***was the sole cause of***

the disease." *Industrial Indemnity Co. v. Workers' Comp. Appeals Bd. (Pisciotta)* (1983) 145 Cal.App.3d 480, 48 Cal.Comp.Cases 560, at 565 (emphasis added).

PERMANENT DISABILITY.

Defendant argues that I should have found that Applicant sustained a 93% permanent, partial disability based on the mechanical formula of combining six separate and discrete impairments (one of which, by itself, rates 82%). I should have disregarded the opinions of the AME and PQME that Applicant is totally, permanently disabled, with no basis for apportionment to any non-industrial condition, because the physicians are not experts in the labor market.

I reject the notion that, where the medical evidence reflects a total, permanent disability, the parties must nonetheless go to the expense and delay of obtaining vocational evidence.

Defendant cites Labor Code Section 4660 as laying out the rules for determining extent of permanent disability, including utilization of the descriptions and measurements set forth in the *AMA Guides,* and on that basis claims that the permanent disability must be 93% based on the mechanical formula set forth in the Opinion. This contention misses the point. Labor Code Section 4660 applies **only** to calculation of permanent, partial disability, not to permanent, total disability. The first subparagraph of the section makes this clear: "(a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity." The Schedule for Rating Permanent Disabilities makes plain that a total, permanent disability is **not** adjusted for either age or occupation. Accordingly, Section 4660 does not apply to cases in

which the medical evidence is clear (and, in this case, unanimous) that the injured worker is totally and permanently disabled.

RECOMMENDATION

Deny Reconsideration.

Dated: May 10, 2016

Stanley E. Shields
Workers' Compensation Judge

Served by mail on all parties listed on the Official Address record on the date below:

BY: Ben Aguilar Date: 05-11-2016

1. BAY AREA CARBIDE, US Mail
2. CASTLEPOINT NATIONAL INS IRVINE, US Mail
3. CHRISTIAN GREEN SAN FRANCISCO, Fax
4. CNA CLAIMS PLUS BREA, US Mail
5. DARLENE SHARP GOLD RIVER, US Mail
6. DEPARTMENT OF INDUSTRIAL RELATIONS, US Mail
7. ELDER BERG CONCORD, Email
8. GUILLERMO ANAYA, US Mail
9. HARTFORD SACRAMENTO, US Mail
10. KELLEY BURG RICHMOND, US Mail
11. SAMUELSEN GONZALEZ SACRAMENTO, US Mail
12. STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, US Mail
13. TOWER NATIONAL INSURANCE IRVINE, US Mail