WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SILVIA MARTINEZ, ***Applicant,*** **vs.** **PACK FRESH PROCESSORS, LLC; MIDWEST INSURANCE COMPANY,** ***Defendants.***	**Case No. ADJ8552281** **(Salinas District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

Defendant's petition for reconsideration of the December 18, 2016 Findings And Award of the workers' compensation administrative law judge (WCJ) was earlier granted in order to further study the record and issues in the case. The WCJ found in pertinent part that applicant incurred a period of temporary disability, total permanent disability and need for future medical treatment as a result of the industrial injury to her right upper extremity and psyche sustained while employed by defendant as a packer on or about June 30, 2011.

The WCJ explains in his December 18, 2016 Opinion On Decision (Opinion) that he reached his decision by adding the percentage of permanent disability caused by the injury to the right upper extremity and consequential complex regional pain syndrome (CRPS) to the percentage of permanent disability caused by the injury to applicant's psyche to calculate the overall permanent disability caused by the industrial injury instead of using the Combined Values Chart (CVC) in the 2005 Permanent Disability Rating Schedule (PDRS) to combine those percentages.[1] The WCJ further determined that the finding of total permanent disability is "in accordance with the fact" as provided in Labor Code section 4662(b).

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[1] Applicant's condition is diversely described in the record as "complex regional pain syndrome," "CRPS," "reflex sympathetic syndrome," "reflex sympathetic dystrophy," "RSD," and "chronic reflex pain syndrome."

Defendant contends in its Petition For Reconsideration (Petition) that the CVC should be used to determine applicant's overall permanent disability instead of adding the disabilities caused by the orthopedic/CRPS injury and injury to psyche, that the finding of total permanent disability is not "in accordance with the fact" as described in Labor Code section 4662(b) and is not otherwise supported by substantial evidence, that it should be relieved of its stipulation to the occupational variant of 490, that the award of temporary disability indemnity exceeds the amount allowed by Labor Code section 4656(c)(2), and that the record should be opened to allow defendant to offer into evidence a medical report that was not available at trial.[2]

An answer was received from applicant.

The WCJ provided a Report And Recommendation On Petition For Reconsideration (Report) recommending that the award of temporary disability indemnity be amended to include the limitation contained in section 4656(c)(2), but that his decision otherwise be affirmed.

As the Decision After Reconsideration of the Workers' Compensation Appeals Board, the award of temporary disability indemnity is amended to add the 104 compensable weeks limitation on temporary disability indemnity contained in section 4656(c)(2), but the decision of the WCJ is otherwise affirmed for the reasons below. The permanent disability caused by the injury to applicant's psyche and her CRPS combine to preclude her from engaging in gainful employment and constitute total permanent disability in accordance with the fact.

BACKGROUND

The WCJ describes the procedural and factual background of the case in his Report, as follows:

> Applicant, Silvia Martinez, while employed on or about 6/30/11, sustained an admitted injury to her right upper extremity and psyche arising out of

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[2]Further statutory references are to the Labor Code.

Section 4662 subdivisions (a)(1) through (a)(4) provide for a finding of "total permanent disability" when any of the following conditions exist: "(1)Loss of both eyes or the sight thereof. (2) Loss of both hands or the use thereof. (3) An injury resulting in a practically total paralysis. (4) An injury to the brain resulting in permanent mental incapacity." Section 4662 subdivision (b) provides as follows: "In all other cases, permanent total disability shall be determined in accordance with the fact."

Section 4656(c)(2) provides as follows: "Aggregate [temporary] disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury."

and occurring in the course of her employment (AOE/COE). Applicant was initially treated conservatively ultimately undergoing an MRI which disclosed an oblique tear of the TFCC, a partial tear of ulnar attachment and a likely tear of the volar radial ulnar ligament. On 4/12/12, she underwent arthroscopic surgery with Dr. Rasi with no meaningful improvement. On 12/3/12, she was then seen in consultation with Dr. Christian Foglar, M.D.[,] who after evaluation recommended injection of the site. Initially, following the injections there was some improvement. On 6/4/13, she underwent a second surgery performed by Dr. Christian Foglar. He reported that she returned with much less pain and swelling. Applicant had worked in a modified duty status from July 1 through December of 2011. Eventually, the employer moved to a different location and she was unable to continue working. Up until this time she had worked since the age of 17 through 2011 as a field worker and packer in agricultural work.

Following her second surgery, it is noted that Dr. Foglar in his treatment note of 12/20/13 at page 12 states: '[s]he clearly has severe reflex sympathetic dystrophy.['] He noted that the 'hand is swollen, cold and extremely stiff. She can't move it much. By all means a useless and severely altered hand.' He concludes it is a chronic reflex pain syndrome. Applicant has continued to treat with conservative care by Dr. Melinda Brown who also diagnosed reflex sympathetic dystrophy. Dr. Lisa Kroopf, M.D. examined the applicant on 6/10/16 (Exhibit A-1) and notes again a diagnosis of complex regional pain syndrome. A panel QME [Panel Qualified Medical Evaluator or PQME], Dr. Mark Howard, evaluated the patient and in his final evaluation concluded applicant has complex regional pain syndrome. On cross-examination by the defendant, he did not waiver from his opinion stating that he had treated patients with this condition and felt qualified to make that determination.

At trial, Applicant presented with a right dominant hand that was swollen the size of a grapefruit and fingers swollen like stiff sausages, applicant indicated it was very sensitive to touch and cause severe pain. Dr. Kroopf noted in her treatment records (Exhibit A-1): '[S]he has a bit more pain today because her daughter accidentally bumped her hand and this type of minimal trauma sets off a severe pain cascade.'

Applicant was also evaluated by Dr. Mark Kimmel, Ph.D., a [PQME] in psychology, (Exhibit A-6). He noted in the history [that] Dr. James Weiss, M.D., a psychiatrist, diagnosed her with major depression and a chronic medical condition noted passive suicidal ideation; noted that her pain levels were 6-7/10. He does reference [a November 22, 2013 report by Dr. Tong that 'I think it is time to think about Reflex Sympathetic Syndrome.']. In Dr. Kimmel's report of 5/25/15, he makes note that she did make a suicide attempt in October 2014. Dr. Kimmel concluded in his report of 12/15/15 that applicant suffers from a major depressive disorder; that she has a GAF score of 55 – that she has moderate impairment with regard to activities of daily living. She has reclusive symptoms. She has a moderate impairment in her range of concentration, persistence, and pace. That she has a significant concern about re-injuring her hand. Dr. David Torrez, Ph.D. (Exhibit A-9) in his report of 3/26/15 concluded and confirmed a diagnosis of severe depression. In Exhibit A-14 the treating physician notes that the complex regional pain syndrome symptomatology is still severe and that

because of the symptoms the injured worker 'keeps the hand covered to avoid contacts or brushes on it; she can't grasp'.

The applicant's Vocational Evaluator, Mr. Linvill, in his report of 10/19/14 (Exhibit A-5) makes note of applicant's work and educational background. She has 9 years of education and with reasonable reading and writing skills in Spanish - he notes that she reads books and magazines in Spanish. She has worked for 12 years as a field worker; and she had taken some English classes but stopped as it interfered with work. She is monolingual Spanish; probably understands some English.

It should be noted that applicant's educational and language skills are commensurate with similarly situated workers. Exhibit W-1 notes that most of the agricultural workers (97%) completed their highest grade in their country of origin. That most of the foreign-born workers had completed their sixth grade. With respect to language skills, Spanish was the predominant native language for the crop workers (81%). Forty-four (44%) percent reported they could not speak English at all; 53% cannot read English at all. Table 3.1 shows that of the Mexican born agricultural worker, 68% did not speak English at all and just 24% speak it a little.

The applicant's skills, as reported by Mr. Linvill, her academics skills were poor; as she had done only unskilled work. But it should be noted that her history of work showed that she was effective in production prior to her injury; that she had no problems with attendance or punctuality. With respect to the single arm occupations, he notes that there are not many in this number and also notes that her *pain syndrome would impact her ability to handle these jobs*. As he reports, the jobs available to her would have include greeter, gate guard, and limited service cashiering positions. Most of these positions require 'interpersonal interaction' and do not focus upon production activity. The primary activities in these jobs are social, not hand oriented. The difficulty in this case with Ms. Martinez is the pain that she suffers; difficulty with engaging with people and socializing. Mr. [Linvill's] report took into account all of the impairments the applicant has suffered from this injury.

Applicant was also examined by a Vocational Evaluator selected by the defendant, Ms. Emily Tincher, (Exhibit D-6)[. I]n her report of 6/8/15 she did little to rebut Mr. Linvill's findings; she simply concluded that because of the GAF score she could not take into consideration the severe major depression which this woman suffers, in determining whether she could maintain a work position saying that the GAF psychiatric ratings are not tenable for determining employment outcomes. She did not consider the doctor's discussion of applicant's impairments. Additionally, she did not take into consideration the pain syndrome which would affect the applicant's ability to use her damaged hand as an assist for her left hand. While she indicates that the applicant's language and educational limitations may affect her rehabilitation she does not identify the kinds of work that would be available to her if she were retrained. Nor does she take into account the pain syndrome and major depression that applicant suffers from this injury and whether [there is] any job [for a] person with a useless right dominant upper extremity, a severe pain syndrome and a major depression.

> The matter came before us at hearing. Following receipt of testimony from the applicant and observation of the applicant's hand, which was quite swollen appearing the size of a grapefruit and with thick sausage-like fingers, it was concluded that applicant was permanently and totally disabled. As part of the gathering of evidence, a rating was obtained from the Rater[.] At trial the parties had stipulated to 490 as the occupational group. This WCJ was concerned about this stipulation so when he requested the rating, he asked the rater to rate it under 491 as well as 490 because of the possible mistake. But at the time of the cross-examination of the Rater, there was no effort made by either party to withdraw from that stipulation. It is a policy of the Board to encourage parties to stipulate to facts, if we will not ignore those stipulations. Certainly, had a party inadvertently stipulated to the 490 occupational group, they would have presented that to the Judge at the time of the trial and/or at the time of the cross-examination of the Rater; but that did not occur. So, in deference to the parties' stipulation, it was applied to the rating. Because the psychiatric disability and the orthopedic/neurological disability effect different regions of the body and impact different activities the CVC was not used and it was concluded the disability was best described by adding the disabilities rather than combining them using the CVC. (Italics in original.)

The WCJ explains in his Report that he found that applicant is totally permanently disabled because the vocational reporting identified no occupations "that could accommodate this worker with a useless dominant limb, a severe pain syndrome and a major depression," and "[t]here is no evidence that the applicant with these impairments would be amendable to rehabilitation even if her educational level was higher or her English skills were better."

In addition, the WCJ determined that the impairment resulting from applicant's orthopedic injury and CRPS does not overlap the impairment caused by her psychiatric injury, and that adding the ratings for those separate areas of the body shows that applicant is totally permanent disability, writing in his Report as follows:

> Th[e] determination [of permanent disability] cannot be made based upon the whole person impairment percentage alone. The physicians, as they did in this case, must spell out the effect of the impairment on the applicant's work life. Here, the orthopedic impairment affects the use of the right dominant hand finding it effectively useless to the applicant at work. Likewise, the psychiatrics impairments **and** the associated pain syndrome affect her ability to do the occupations available to similarly situated workers who have lost the use of their upper extremity, i.e. a social engagement type of occupation. It is not usual for an orthopedic surgeon to determine the functional limitations from a psychiatric injury nor is it usual for a psychologist to determine the functional limitations for an orthopedic disability. Thus, they are not able to determine if the limitations overlap or not. However, it is usual for the Board to determine if functional impairments overlap or are added on to other functional impairments.

> Based on the facts of this case it was determined that the functional impairments were best added rather than combined. (Bolding in original.)

DISCUSSION

For injuries occurring before January 1, 2013, like the June 30, 2011 injury in this case, section 4660 provides for use of the 2005 Permanent Disability Rating Schedule (PDRS) to determine the level of permanent disability. As part of that process, a physician may, with proper explanation, deviate from the percentages contained in the applicable chapter of the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides) in order to better express the injured worker's level of impairment in light of the physician's skill, knowledge, and experience, as well as considerations unique to the injury and information derived from extrinsic resources. (*Almaraz v. Environmental Recovery Service/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) (*Almaraz/Guzman*) as affirmed by the Court of Appeal in *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp. Cases 837].)

"Total permanent disability" may also be proven by showing the existence of any of the four conditions described in section 4662(a)(1) through section 4662(a)(4), or "in accordance with the fact" as provided in section 4662(b). (See footnote 2, *supra*.)

In addition, it has been held that an injured worker may present evidence that rebuts a PDRS rating and supports a finding of a higher level of permanent disability. (*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] (*Dahl*).)

Three ways of rebutting the PDRS rating are described in *Ogilvie*.

The first is by showing factual error in the calculation of a factor in the rating formula or in the application of the formula. (*Ogilvie*, *supra*, 197 Cal.App.4th at p. 1273.)

The second is by showing the omission of medical complications aggravating the employee's disability in the preparation of the rating schedule. (*Ogilvie*, *supra*, 197 Cal.App.4th at p. 1276 ["in certain rare cases [in which] the amalgamation of data used to arrive at a diminished future earning

capacity may not capture the severity or all of the medical complications of an employee's work-related injury" and "a claimant can demonstrate that the nature or severity of the claimant's injury is not captured within the sampling of disabled workers that was used to compute the adjustment factor"].)

The third method identified in *Ogilvie* of rebutting a scheduled rating is by showing that the employee is not amenable to rehabilitation and suffers a greater loss of future earning capacity than reflected in the scheduled rating. (*Ogilvie*, *supra*, 197 Cal.App.4th at p. 1274-1275, citing *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587] (*LeBoeuf*) ["An employee effectively rebuts the scheduled rating when the employee will have a greater loss of future earnings than reflected in a rating because, due to the industrial injury, the employee is not amenable to rehabilitation...the most widely accepted view of [the holding in *LeBoeuf*,] and that which appears to be most frequently applied by the WCAB, is to limit its application to cases where the employee's diminished future earnings are directly attributable to the employee's work-related injury, and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education"].)

In this case, the WCJ determined that the scheduled rating under section 4660 supports a finding of total permanent disability when the permanent disability caused by the upper extremity injury and CRPS is added to the permanent disability caused by the psychiatric injury, as explained by the WCJ in his Opinion as follows:

> If we rate the psyche using a GAF of 55, it rates as follows allowing for the 10% apportionment: we have 90% (14.01.00.00 -23[8] 32 -490J -44 -40) 36. For the right upper extremity which suffers from complex regional pain syndrome, a chronic condition: we have a 51% WPI which is rated as follows: (13.11.01.03 -51[5] 65 -490I -73 -70) – adding those two together results in a 106% which is a 100% permanent and total disability.

Defendant contends in the Petition that it was error for the WCJ to add the levels of permanent disability caused by the CRPS and psychiatric injury to determine total permanent disability because that approach is not endorsed by the medical reporting and because there is overlap between the two

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conditions that supports use of the CVC.[3] In support of that contention, defendant cites five earlier Appeals Board panel decisions. However, in four of those decisions the panels concluded that adding the permanent disabilities provided a more accurate reflection of the injured worker's actual level of permanent disability than using the CVC. (*Athens Administrators v. Workers' Comp. Appeals Bd.* (*Kite*) (2013) 78 Cal.Comp.Cases 213 [2013 Cal. Wrk. Comp. LEXIS 34] [appropriate to use additive approach because AMA Guides describe several methods of combining impairments and rigid application of CVC is not mandated]; *Los Angeles County Metropolitan Transportation Authority* v. *Workers' Comp. Appeals Bd.* (*La Count*) (2015) 80 Cal.Comp.Cases 470 [2015 Cal. Wrk. Comp. LEXIS 47] [proper to add impairments rather than use CVC in light of AME opinion that there was synergistic effect to orthopedic injuries so that they should be added rather than combined]; *Diaz v. State* (November 18, 2015, ADJ7682048) [2015 Cal. Wrk. Comp. P.D. LEXIS 683] [additive approach within the authority of WCJ because there was no clear overlap in impairments]; *Sanchez v. California Dept. of Corrections* (August 4, 2015, ADJ6995506) [2015 Cal. Wrk. Comp. P.D. LEXIS 482] [additive rating may be used when combining multiple impairments results in more accurate rating of overall permanent disability]; but see, *Borela v. State of California* (May 13, 2014, ADJ7181658) [2014 Cal. Wrk. Comp. P.D. LEXIS 217] [adding permanent disability caused by separate impairments not shown to provide more accurate measure of worker's overall level of permanent disability in absence of supporting opinion of agreed medical examiner and WCJ reasoning].)

Moreover, it has long been recognized that a rating schedule like the PDRS is only a guide and adding the level of permanent disability caused by an injury to separate body parts is proper to determine the overall level of permanent disability when that results in a more accurate rating than using the CVC to combine them. (*Mihesuah v. Workers' Comp. Appeals Bd.* (1976) 55 Cal.App.3d 720, 728 [41 Cal.Comp.Cases 81] [schedule "is only a 'guide' to be employed" and that the final rating should reflect "the entire picture of disability and possibility of employability"]; *Abril v. Workers' Comp. Appeals Bd.* (1976) 55 Cal.App.3d 480 [40 Cal.Comp.Cases 804] [work restriction must be considered in evaluating

[3] Using the CVC to combine a 36% rating with a 70% rating yields a combined rating of 81%.

employee's permanent disability based upon diminished ability to compete on the open labor market even if not covered in schedule]; *County of Los Angeles v. Workers' Comp. Appeals Bd.* (*LeCornu*) (2009) 74 Cal.Comp.Cases 645 (writ den.) [finding of total permanent disability affirmed notwithstanding that recommended combined schedule rating was 96% because AME opined that applicant was unable to return to the open labor market]; *Morgan v. Workers' Comp. Appeals Bd.* (1983) 48 Cal.Comp.Cases 98 (writ denied) [table for combing permanent disabilities only a guide and finding of 76% permanent disability correct even though application of the table would result in 96% rating]; *State of California v. Workers' Comp. Appeals Bd.* (*McDonald*) (1982) 47 Cal.Comp.Cases 1204 (writ den.) [finding of total permanent disability proper based upon evidence that applicant unable to work notwithstanding that schedule and table combining disabilities yielded 97½% rating].)

Here, the WCJ determined that applicant's functional impairments were best added rather than combined because her orthopedic/CRPS impairment precludes her from performing the physical work she has done in the past and her psychiatric impairment limits her ability to enter a new occupation, described on page 7 of the Report as "a social engagement type of occupation." The WCJ found that the orthopedic/CRPS and psychiatric impairments involve different regions of the body and that there is no evidence that the impairments overlap. As noted by the WCJ in his Report, adding the CRPS and psychiatric limitations is consistent with the fact that the orthopedic PQME did not determine functional limitations flowing from a psychiatric injury and the psychiatric PQME did not determine the functional limitations caused by orthopedic injury. In that the WCJ found that the injuries did not overlap in a way that supports use of the CVC, he determined that it was more accurate to add the functional impairments rather than combine them to describe applicant's overall level of permanent disability.

Defendant disputes the WCJ's determination, and argues that his analysis is "completely one-sided" and "overly simplistic." (Petition, 7:14-18.) In defendant's view, a person with psychiatric impairment and pain "may be emotionally reluctant to utilize that extremity due to a fear of pain," and this constitutes "overlap at least to some degree" that supports use of the CVC. (*Id*, 7:23-8:14.)

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Defendant cites no medical evidence in support of its argument that there is overlap between applicant's orthopedic/CRPS disability and her psychiatric disability that requires use of the CVC. Instead, a review of the medical reporting reveals that the two disabilities impact applicant's ability to return to work in different ways. As the WCJ discusses in his Opinion and Report, the orthopedic/CRPS disability precludes applicant from returning to the agricultural work that she has successfully performed her entire life. The psychiatric disability affects applicant's amenability to vocational rehabilitation that would allow her to work in jobs outside the agricultural sector that do not demand the physical capability of her past employments.

It has been recognized that a disability rating, "should reflect as accurately as possible an injured employee's diminished ability to compete in the open labor market." (*LeBoeuf, supra,* 34 Cal.3d at pps. 245-246.) In this case, the WCJ reasonably concluded that adding the orthopedic/CRPS and psychiatric permanent disabilities more accurately reflects applicant's *entire* permanent disability and is a more accurate measure of applicant's diminished future earning capacity than results from using the CVC.

In addition to finding total permanent disability by adding the orthopedic/CRPS and psychiatric permanent disabilities, the WCJ also found total permanent disability "in accordance with the fact" under section 4662(b), and that finding is supported by the record.

Defendant challenges the WCJ's finding of total permanent disability under section 4662(b) by arguing that the PQME, Dr. Howard, is not an expert on CRPS and that his reporting "does not satisfy requirements for diagnosis of CRPS as set forth in the AMA Guides, 5th Addition." (Petition, 8:25-26.) Defendant also argues that a November 9, 2016 report by Dr. Howard that defendant received after the mandatory settlement conference should now be received into evidence because it includes observations that are inconsistent with the earlier diagnosis of CRPS provided by the physician. These contentions fail because Dr. Howard is a qualified physician whose diagnosis of CRPS is supported by the record.

In his August 6, 2014 deposition (Defendant's Exhibit D-3, "Deposition"),[4] Dr. Howard

[4] The deposition date is incorrectly identified in the Minutes of Hearing as August 8, 2014.

acknowledged that he is not an "expert" on CRPS. (Deposition, 6:2-8; 9:21-10:2.) However, he also testified that he has diagnosed CRPS before, and his diagnosis in this case provides a "physiologic or anatomic explanation for [applicant's] remarkable dysfunction after what would be considered two relatively minor surgeries." (Deposition, 8:25-9:1.)

When asked during his deposition about how he made the diagnosis of CRPS, Dr. Howard responded as follows:

> A. [S]he was a pretty classic presentation of CRPS. If according to AMA [G]uides they absolutely have to have eight of those to make the diagnosis, you can certainly make the argument that she doesn't meet that criterion, doesn't carry that diagnosis. But, in my opinion, she does.... (Deposition, 11:23-12:11-16)
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> [S]he functionally really almost had a -- what we euphemistically call a hook hand, being that it's really quite nonfunctional. And you're -- it almost functions more as a hook by virtue of weakness, dysesthetic pain, and stiffness.
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> So I describe as best I can her stiffness and her lack of motion. And I go through the different joints. And you can see that analysis and sensory testing. I reported it as definitely altered inhibitus throughout all five digits ... (Deposition, 13:4-13)

Defendant argues in its Petition that Dr. Howard's reporting is not substantial evidence because he admits he is not an expert on CRPS and his testimony is "unabashedly non-expert." (Petition, 11:6.) This argument is without merit. Defendant confuses an individual's expertise in dealing with a particular medical condition with a physician's overall qualifications to provide opinion as a medical expert. Dr. Howard has substantial experience as a physician and surgeon, and he has diagnosed CRPS on prior occasions, as he explained in his deposition. He expressed no reservation in his diagnosis of CRPS or its effects. (Deposition, 15:11-19 ["Q. Was there anything said today that would change your opinion with respect to the 51 percent whole person impairment rating related to the CRPS I diagnosis? A. Short answer, no..."].)

Dr. Howard's qualifications meet the criteria for providing expert opinion. (See, Evid. Code, § 800 et seq.; *People* v. *Chapman*, 207 Cal.App.2d 557, 576 [the determination of an expert's qualification is primarily the function of a trial court, and its ruling will not be disturbed in the absence of an abuse of discretion].) Here, the WCJ properly recognized Dr. Howard as an expert based upon his

knowledge, skill, experience, training and education. (*Id*; *People v. Cruz* (1968) 260 Cal.App.2d 55.)

Moreover, no medical opinion supports the implication in defendant's argument that applicant does not have CRPS. To the contrary, the overwhelming weight of the evidence supports Dr. Howard's diagnosis of CRPS, including the reporting of applicant's treating physician Dr. Tong who also diagnosed and the WCJ's observation of applicant's arm and hand as set forth in the Report as quoted above. The diagnosis of CRPS is not changed by the November 9, 2016 surgical consultation report prepared by Dr. Howard after the July 26, 2016 trial, and there is no good cause to open the record and receive that report into evidence at this time. (Cal. Code Regs., tit. 8, § 10856(d) [a factor in deciding whether to receive newly discovered evidence is "the effect the evidence will have on the record and on the prior decision"].)

In addition to challenging the substantiality of the medical reporting by Dr. Howard, defendant contends that the alternative basis for the WCJ's finding of total permanent disability "in accordance with the fact" under section 4662(b) is not supported by the reporting of applicant's vocational expert, Tom Linvill, because he had an "erroneous" understanding of the "impairment analysis" provided by Dr. Howard. (Petition 15:27-16:9.) Defendant disingenuously argues that Mr. Linvill relies upon "an erroneous set of key facts" because he describes applicant's reduction in function as "severe" based upon Dr. Howard's October 19, 2014 report of an "80% upper extremity deficit," and that "[o]bviously an impairment of 80% is vastly more than an impairment of 51%." (*Id.*)

In fact, an "85% upper extremity impairment...equals 51% whole person impairment," as Dr. Howard wrote in his February 20, 2014 report, where he noted that the 85% upper extremity impairment he calculated was based upon table 16.3, page 439 of the AMA Guides, and that the upper extremity impairment is all attributable to "postoperative CRPS I (RSD)." (Defendant's Exhibit D-1.) Mr. Linvill did not rely upon an erroneous set of key facts as asserted by defendant. To the contrary, he correctly described applicant's 85% upper extremity impairment as severe, consistent with the opinion of Dr. Howard and the WCJ's observations of applicant's condition.

Defendant also notes that Mr. Linvill wrote in his reporting that applicant's "limited skills" and "lower academic achievement" impact her participation in the labor market, but that this could change

over sufficient time if she improved her academic skill in Spanish and fluency in English. From that observation, defendant asserts that Mr. Linvill's reporting "would have the employer compensate applicant for impairing factor not directly caused by the injury" and is inconsistent with the view of the Court in *Dahl*. (Petition 13:21-22.)

What defendant overlooks in its argument is that applicant worked successfully for many years for defendant and others with her current language skills and academic achievement. It is only because of the industrial injury that applicant is unable to continue employment in her regular occupation. In other words, applicant's loss of earning capacity was caused by the industrial injury, not by her limited academic achievement or lack of fluency in English.

The importance of considering all factors in evaluating loss of future earning capacity was recognized by the Supreme Court in *Argonaut Ins. Co. v. Industrial Acc. Com.* (*Montana*) (1962) 57 Cal.2d 589 [27 Cal.Comp.Cases 130] (*Montana*), where the Court wrote as follows:

> An estimate of earning capacity is a prediction of what an employee's earnings would have been had he [or she] not been injured...[A] prediction [of earning capacity for purposes of permanent disability] is... complex because the compensation is for loss of earning power over a long span of time...In making a permanent award, [reliance on an injured employee's] earning history alone may be misleading...[A]ll facts relevant and helpful to making the estimate must be considered. The applicant's ability to work, his [or her] age and health, his [or her] willingness and opportunities to work, his [or her] skill and education, the general condition of the labor market, and employment opportunities for persons similarly situated are all relevant. (*Montana, supra,* 57 Cal.2d at pp. 594-595 [27 Cal.Comp.Cases at p. 133], internal citations omitted, bracketed material added.)

It is recognized that *Ogilvie* and *Dahl* includes no citation to or mention of the Supreme Court's decision in *Montana*, and that those decisions appear to reject consideration of the nonindustrial individualized factors described in *Montana* as a way of rebutting the diminished further earning capacity factor in the PDRS. As the Court wrote in *Dahl*:

> [The] vocational expert's method attempted to establish applicant's diminished future earning capacity based not on applicant's individual assets and detriments but on those of theoretical group of 'similarly situated employees,' which expert identified as more similarly situated to applicant than group identified in Schedule for someone with applicant's characteristics, that, under this approach, injured workers would be

> permitted to rebut their scheduled rating in virtually all cases when expert can provide statistical analysis of group of individuals he or she claims is more similarly situated to applicant than that identified in Schedule, producing greater diminished future earning capacity than that determined by applying Schedule, precisely approach that is no longer permissible...(*Dahl, supra* 197 Cal.App.4th at p. 758.)

It is also recognized that *Ogilvie* considered the enactment of Senate Bill 899 and section 4664(a) after the decision in *Montana* as limiting an employer's liability for an injured worker's permanent disability to "the percentage of permanent disability directly caused by the injury," so that a scheduled rating under the PDRS is not now rebutted by "nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education" that limit future earning capacity. (*Ogilvie, supra*, 197 Cal.App.4th at 1275.)

Nevertheless, individualized factors are relevant in evaluating a worker's amenability to vocational rehabilitation, as further addressed by the Court in *Dahl* as follows:

> The first step in any *LeBoeuf* analysis is to determine whether a work-related injury precludes the claimant from taking advantage of vocational rehabilitation and participating in the labor force. This necessarily requires an individualized approach...The focus [is] on the limitations flowing from the claimant's particular condition, not the earning potential of similarly situated individuals who might be subject to different limitations. It is this individualized assessment of whether industrial factors preclude the employee's rehabilitation that *Ogilvie* approved as a method for rebutting the Schedule. (*Dahl, supra*, 240 Cal.App.4th at p. 758.)

In this case, Mr. Linvill provided an analysis of the individualized factors identified in *Montana* on pages 7 and 8 of his October 19, 2014 report. This analysis shows that before the injury applicant was well qualified for the agricultural work she was performing, and that it is the effects of the industrial injury that limits her ability to continue work in that sector. As Mr. Linvill wrote, "[h]er limited skills and her lower academic achievement certainly impact the degree she can participate in the labor market. Until her injury, they did not prevent effective work."

By contrast, defendant's vocational expert, Ms. Tichner, opines on pages 17 and 18 of her June 8, 2015 report that applicant has sustained *no* loss of future earning capacity as a result of the

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industrial injury. Ms. Tichner provides her explanation in the Conclusion section of her report on page 24 as follows:

> Ms. Martinez is, in fact, unable to benefit from vocational rehabilitation due to the effect of her functional illiteracy and inability to speak fluent English. Were it not for these non-industrial factors, she would be able to access the jobs I selected in the preliminary report. The jobs are low skilled and workers learn the tasks through brief demonstration. No transferable skills are needed. The jobs are suited for 'one-armed' workers. In fact, Ms. Martinez is not an amputee, and can use her injured arm and hand as a helper hand. She demonstrated her ability to write, and she performs her ADLs such as driving which requires use of two hands. Therefore, I find my suggestions for future jobs to be conservative, and accurate.
>
> The wages for the alternative employment pay, an estimated $9.17/hr. in 2014 compared to average wages of a similarly situated worker of $9.16/hr., there is Zero DFEC. Zero DFEC would be associated with the FEC modifier of One.

It is not possible to reconcile Ms. Tichner's opinion that applicant incurred *no* loss of future earning capacity because of her injury with the evidence of her condition and circumstances. Applicant has always worked in physical occupations, and has lost effective use of her right, dominant upper extremity, and is now "precluded from any grasping, lifting, carrying, or repetitive motions like keyboard or any requirements requiring, you know, fine motor dexterity." (Deposition 13:24-14:5.) As Ms. Linvill wrote on pages 8 and 11 of his report:

> People who support the agricultural industry require sufficient strength and dexterity to move, sort, pick and package products. Prior to injury, these were the employment opportunities Ms. Martinez sought. She effectively found good employment with Pack Fresh Processors. Now, she must find basic work that allows her to depend on less manipulation, less grasping and less dexterity. This is a major challenge for Ms. Martinez and for others who are similarly situated…
>
> Ms. Martinez worked in types of jobs described as unskilled by the Dictionary of Occupational Titles. In the classic sense, she does not develop transferable skills in those occupations. At the same time, as a long term, consistent worker, she built adaptive skills that would allow her the capability of moving into other work. Her experience is most related to agricultural field work and agricultural processing work. Without her injury, she could have moved into other positions in either of those situations.
>
> Now she is a person whose dominant hand does not function. Now she is a person who has pain that is exceptionally problematic. This definitely impacts her earning capacity.

Defendant argues that Mr. Linvill's reporting is entitled to no weight because he is not qualified to provide expert opinion and his reporting is not in a proper form and "is likely intentionally incomplete." (Petition, 13:23-14:18.) Defendant's objections to Mr. Linvill's qualifications and the form of the report were not raised at trial and the reporting was received into evidence without objection at that time. (July 26, 2016 Minutes Of Hearing, 4:15-16.) In addition, the bare assertion that Mr. Linvill's reporting is intentionally incomplete is unsupported by any evidence and this contention was also not raised at trial. Failure to raise objections at the hearing where they may first properly be raised acts as a waiver of the objections, and they need not be further addressed. (See, *U.S. Auto Stores v. Workers' Comp. Appeals Bd.* (*Brenner*) (1971) 4 Cal.3d 469 [36 Cal.Comp.Cases) 173; *Los Angeles Unified Sch. Dist. v Workers' Comp. Appeals Bd.* (*Henry*) (2001) 66 Cal.Comp.Cases 1220 (writ denied).)

Similarly, defendant's request to be relieved of its stipulation to the occupational variant of 490 is not timely raised. Stipulations made at a mandatory settlement conference, like the one the parties made to the occupational variant of 490, are binding upon the assenting parties unless good cause to be relieved of the stipulation is shown. (Lab. Code, § 5502(d)(2); *County of Sacramento v. Workers' Comp. Appeals Bd.* (*Weatherall*) (2000) 77 Cal.App.4th 1114, 1120 [65 Cal.Comp.Cases 1]; *Huston v Workers' Comp. Appeals Bd.* (1978) 95 Cal.App.3d 856 [44 Cal.Comp.Cases 798].) A change in the case law or judicial interpretation of a statute may provide "good cause" to relieve a party from a stipulation, but a unilateral mistake as defendant now claims is not recognized as good cause that supports nullification of an agreement. (*Id*; *State Comp. Ins. Fund v Industrial Acc. Com.* (*Dean*) (1946) 73 Cal.App.2d 248, 257 [11 Cal.Comp.Cases 30] (*Dean*); see also, *General Ins. Co. v Workers' Comp. Appeals Bd.* (*Sale*) (1980) 104 Cal.App.3d 278, 285 [45 Cal.Comp.Cases 403]; *Brunski v. Industrial Acc. Com.* (1928) 203 Cal. 761 [15 I.A.C. 128]; *Smith v. Workers' Comp. Appeals Bd.* (1985) 168 Cal.App.3d 1160 [50 Cal.Comp.Cases 311].)

Lastly, defendant contends that the award of temporary disability indemnity should have been found to be limited by section 4656(c). The WCJ acknowledges this in his Report, and the amendment to the award he recommends is appropriate and is applied as part of this Decision After Reconsideration. In all other respects the December 8, 2016 Findings And Award is affirmed.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the December 8, 2016 Findings And Award of the workers' compensation administrative law judge is **AFFIRMED**, except that Paragraph (B) of the Award is **RESCINDED** and the following is **SUBSTITUTED** in its place:

AWARD

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(B) Subject to the limitations of Labor Code section 4656(c)(2), temporary partial disability payable at the rate of $271.22 per week for the period September 15 2014 to December 15, 2015 less an attorney fee to applicant's attorney of 15% of the retroactive TTD paid and less wages made.

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IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the case is returned to the trial level.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

F. M. Brass

FRANK M. BRASS

I DISSENT (See Dissenting Opinion),

Deidra E. Lowe

DEIDRA E. LOWE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCT 23 2017

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

SYLVIA MARTINEZ
RUCKA O'BOYLE ET AL.
BRADFORD AND BARTHEL

JFS/abs

DISSENTING OPINION OF COMMISSIONER LOWE

I dissent. There is no substantial medical or vocational evidence that supports deviation from use of the Combined Values Chart (CVC) by adding the orthopedic and psychiatric permanent disabilities instead of combining them as provided in the 2005 Permanent Disability Rating Schedule (PDRS). The CVC should be used when there is no substantial medical or other evidence that supports use of the additive method, as in this case. Applicant is entitled to a finding of permanent disability pursuant to section 4660 based upon use of the PDRS and its CVC. (*Athens Administrators v. Workers' Comp. Appeals Bd.* (*Kite*) (2013) 78 Cal.Comp.Cases 213 [2013 Cal. Wrk. Comp. LEXIS 34] (*Kite*); *Borela v. State of California* (May 13, 2014, ADJ7181658) [2014 Cal. Wrk. Comp. P.D. LEXIS 217] (*Borela*).)

In *Kite*, the injured worker sustained injury to both hips. The Qualified Medical Evaluator (QME) reported in that case that there was a "synergistic effect of the injury to the same body parts bilaterally versus body parts from different regions of the body" and opined "that the best way to combine the impairments to the right and left hips would be to add them versus using the combined values chart, which would result in a lower whole person impairment." (*Kite*, *supra,* 78 Cal.Comp.Cases at p. 214.) The Appeals Board panel agreed with the WCJ that the expert opinion of the QME in *Kite* was logical and reasonable in explaining why adding the permanent disability caused by the injuries to each hip in that case was more accurate in establishing the injured worker's level of permanent disability than combining those percentages under the CVC.

The PDRS provides on page 1-10 that the CVC and its formula is "generally" used to combine multiple disabilities and the Labor Code provides that a PDRS rating "shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." (Lab. Code, § 4660(c).) In *Kite*, use of the CVC was rebutted by the QME's expert medical opinion that the separate ratings for each hip should be added instead of combined in order to obtain a more accurate rating of the injury. (*Kite*, *supra*, 78 Cal.Comp.Cases at p. 216.) By contrast, the record in this case, unlike the record in *Kite*, contains *no* medical evidence that adding the orthopedic and psychiatric disabilities will provide a more accurate permanent disability rating than using the CVC to combine them as provided in the PDRS.

The only reason given by the WCJ for adding the psychiatric and orthopedic disabilities instead of combining them with the CVC is his belief that those disabilities do not overlap. However, the belief of a WCJ is not evidence. In the absence of substantial medical or other evidence that supports use of the additive method, the PDRS provides for use of the CVC to obtain an accurate rating of the combined effect of the orthopedic and psychiatric disabilities.

The role of the WCJ in rating permanent disability is set forth in the Appeals Board's en banc decision in *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613 [2010 Cal. Wrk. Comp. LEXIS 74] (Appeals Board en banc) (*Blackledge*), and that role does not involve substitution of a WCJ's belief for substantial medical evidence. As the panel wrote in *Borela, supra*:

> In the absence of medical evidence that justifies an alternative approach, such as the QME's opinion in *Kite, supra,* there is no medical justification for the WCJ's rating instruction. Under [*Blackledge*], the WCJ's role in the context of a formal rating is to frame instructions, based on substantial medical evidence, that specifically and fully describe whole person impairments to be rated. The WCJ appropriated the role of the medical expert when she made a medical determination as to how to combine the separate impairments in the absence of specific medical evidence to substantiate her choice.

As in *Borela,* the WCJ in this case acted contrary to the principles set forth in *Blackledge* by appropriating the role of the medical expert and concluding that applicant's orthopedic and psychiatric impairments should be added instead of combined under the CVC. In the absence of medical evidence supporting use of the additive method, the role of the WCJ is to apply the PDRS, including the CVC, to determine the presumptively correct permanent disability rating. (*Blackledge, supra.*) Authorizing a WCJ to forego use of the CVC in the absence of substantial medical or other evidence and based only upon a belief that there is insufficient overlap between the disabilities defeats the purpose of the PDRS, which is to "promote consistency, uniformity, and objectivity" in rating permanent disabilities (Lab. Code, § 4660.)

Moreover, overlap is not the only reason the CVC exists to combine permanent disabilities caused by the injury to separate body parts. By combining the permanent disabilities, the CVC addresses the fact that the amount of indemnity due for each percentage point of permanent disability increases as the overall level of permanent disability increases. The CVC accounts for this difference by adjusting the

values. If the disabilities are simply added together without supporting medical evidence instead of combined using the CVC, the resulting award of permanent disability indemnity will exceed the amount the employer is legally obligated to pay and "[t]he employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (Lab. Code, § 4664(a).)

I also dissent from the view of the majority that applicant established that she is totally permanently disabled "in accordance with the fact" as provided in section 4662(b). No medical evidence supports such a finding, and the reporting of applicant's vocational expert is not substantial evidence. To the contrary, the weight of the evidence, including the reporting of defendant's vocational expert shows that applicant's diminished future earning capacity is captured within the section 4660 PDRS rating.

In opining that Ms. Martinez has a diminished future earning capacity of 100%, applicant's vocational expert Mr. Linvill wrote in his October 19, 2014 report that her ability to find alternative work is impacted by her lack of academic skill and lack of fluency in English. Nevertheless, he attributed the lack of alternative employment opportunities to the injury instead of those individualized factors. This is contrary to *Ogilvie*, where the Court wrote that the PDRS is *not* rebutted by evidence of "nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education" that limit future earning capacity. (*Ogilvie*, *supra*, 197 Cal.App.4th at 1275.)

By contrast, defendant's expert Ms. Tichner wrote in her June 8, 2015 report that applicant's lack of amenability to vocational rehabilitation is not due to the effects of her injury, but is instead "due to the effect of her functional illiteracy and inability to speak fluent English." As Ms. Tichner wrote, "[w]ere it not for these non-industrial factors, she would be able to access the jobs I selected in the preliminary report." Evidence that the injured worker's loss of future earning capacity was caused by nonindustrial factors precludes a finding that the scheduled rating is rebutted. (*Ogilvie*, *supra*, 197 Cal.App.4th at p. 1275; *Dahl*, *supra*, 240 Cal.App.4th at pps. 757-758.)

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I would set aside the decision of the WCJ and enter a new finding of permanent disability pursuant to section 4660 by applying the PDRS with use of the CVC.

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCT 23 2017

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

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