

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

**ANASTACIO LAMAS, *Applicant***

**vs.**

**ALLEN CONSTRUCTION; PENN MANUFACTURING INSURANCE COMPANY  
administered by AMERICAN CLAIMS MANAGEMENT, *Defendants***

**Adjudication Number: ADJ7644093  
Van Nuys District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

Defendant, Allen Construction, Inc., by and through its insurer, Penn Manufacturing Insurance Company, seeks reconsideration of the Findings and Award, served March 8, 2021, wherein the workers' compensation administrative law judge (WCJ) found that applicant Anastacio Lamas, while employed on September 14, 2010, as a construction laborer, sustained an industrial injury to right shoulder, right leg, bilateral upper extremities, right lower extremity, lumbar spine, right elbow, right hip, right knee, psyche, and internal (in the form of gastritis and constipation), resulting in 100% permanent disability, without apportionment. The WCJ awarded permanent disability indemnity at the rate of \$849.57 per week for life, beginning September 12, 2012, subject to annual SAWW adjustments per Labor Code section 4659(c), less credit for sums paid, payments to EDD and attorney fees.

Defendant contests the award of permanent total disability, contending that the medical and vocational evidence the WCJ relied upon is not substantial evidence to support the finding that applicant had rebutted the scheduled permanent disability rating. Defendant argues that we should follow the opinion of its vocational expert, who concluded that applicant was able to return to the part time labor market, which establishes that applicant is not permanently totally disabled. Defendant further argues the WCJ relied upon a legal standard rejected in *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd. (Fitzpatrick)* (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680], to determine applicant is permanently totally disabled.

We have considered the allegations and arguments of the Petition for Reconsideration, as well as the Answer thereto, and have reviewed the record in this matter and the WCJs' Report and Recommendation on Petition for Reconsideration of April 25, 2021, which considers, and responds to, each of the defendant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate as the decision of the Board, we will affirm the WCJ's Findings and Award, and deny the petition for reconsideration.

Additionally, we note defendant's contention that the WCJ applied an incorrect legal standard when determining that applicant had rebutted the scheduled permanent disability rating, in that she cited Labor Code section 4662(b), "in accordance with the fact," to find permanent total disability. Defendant argues that the finding of permanent total disability cannot be based on application of Section 4662(b), citing the decision in *Fitzpatrick, supra*, which held that a finding of permanent total disability must be based on application of the permanent disability rating schedule.

Contrary to defendant's contention, the WCJ's determination was predicated on applicant's presentation of vocational expert evidence rebutting the diminished future earning capacity factor supplied by the rating schedule, as provided in *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624]. A primary method for rebutting the scheduled rating is based upon a determination that the injured worker is "not amenable to rehabilitation and, for that reason, the employee's diminished future earning capacity is greater than reflected in the scheduled rating." (*Ogilvie, supra*, at pp. 1274–1275.) This method for reaching 100% permanent disability was acknowledged in *Fitzpatrick*, as the court recognized that under *Ogilvie*, vocational expert opinion may be relied upon to establish that an injured worker has a greater loss of future earning capacity than provided by the permanent disability rating schedule. (*Fitzpatrick, supra*, at pp. 619-620.)

As no vocational rebuttal evidence was presented or considered in *Fitzpatrick*, that holding is not applicable. Here the WCJ relied upon applicant's, and his wife's, unrebutted, credible and stipulated testimony, as well as the opinions of the vocational and medical experts, to find that applicant is not amenable to participate in vocational rehabilitation due to the effects of his industrial injury, and has lost the capacity to return to gainful employment. To the extent the WCJ's findings are based on her assessment of the credibility of witness testimony, we defer to these

findings based upon her superior ability to make these assessments. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].)

Accordingly, we will affirm the Findings and Award and deny defendant's Petition for Reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the Findings and Award, served March 8, 2021, is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

I CONCUR,

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



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

**May 24, 2021**

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

**ANASTACIO LAMAS  
MICHAEL BURGIS & ASSOCIATES  
GOLDMAN, MAGDALIN & KRIKES**

***SV/pc***

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

**REPORT AND RECOMMENDATION**  
**ON PETITION FOR RECONSIDERATION**

**I**  
**INTRODUCTION**

1. **Applicant's occupation:** Construction laborer
2. **Applicant's age at injury:** 46
3. **Date(s) of injury:** 9/14/2010
4. **Part(s) of body injured:** right shoulder, right leg, bilateral upper extremities, right lower extremity, lumbar spine, psyche, internal (gastritis and constipation), right elbow, right hip and right knee.
5. **Identity of petitioner(s):** Defendant
6. **Timeliness:** The Petition for reconsideration was timely filed on 4/1/2021
7. **Verified:** yes
8. **Date of Action that is the Subject of Removal:** 3/8/2021
9. **Answer Filed:** yes, 4/9/2021
10. **The petitioner's contentions:** 1. The court relied on expert reporting that is not substantial evidence; 2. That it was error to not allow apportionment for internal issues; 3. That there is no evidence to justify the findings of fact that the injury caused permanent disability of 100%.

**II**  
**FACTS**

Anastacio Lamas, sustained injury on September 14, 2010 when he fell approximately 11 or 12 feet off a roof and landed on the ground (SOE 1/19/2017 page 7 lines 20 – 21). The parties stipulated that the applicant sustained injury to his right shoulder, right leg, bilateral upper extremities, right lower extremity, lumbar spine, psyche, internal (in the form of gastritis and constipation), right hip and right knee (SOE 9/29/2020 page 2 lines 9-12).

Following the injury, the applicant was hospitalized and underwent surgery for his fractured right femur and right elbow fracture. The 9/14/2010 operative report from Dr. Ding (reviewed by Dr. Silver Exhibit Joint B6 page 5) notes that “an intramedullary rodding open reduction of the right femur fracture and closed reduction of the right elbow fracture-dislocation were performed.” On 1/11/2011 Dr. Ding notes that “a secondary repair of the elbow lateral ligament complex and removal of most of the loose body and contracture release was performed for an unstable right elbow with loose body and status post fracture-dislocation with radial head fracture.” (Exhibit Joint B6 page 6). The applicant had additional surgery to his right shoulder. Dr. Silver evaluated the applicant as the orthopedic PQME and documented that the applicant complained of constant pain in the right thigh (Exhibit Joint B6 page 2) in addition Dr. Silver documents that the right leg is 2 cm shorter than the left (Exhibit B6 page 4). Dr. Silver again documents the applicant's history in his

report dated 10/2/2013 (Joint Exhibit B3). “There is constant pain in the lumbosacral spine and right lower extremity that are increased by activities of daily living and decreased by rest. There is giving way of the right knee. There is numbness over the lateral aspect of the right thigh and the plantar aspect of the right foot.”

The applicant was seen by AME Timothy Reynolds, M.D. in internal medicine. AME Dr. Reynolds also reported that the applicant has constant pain in the lower back, right hip and right thigh and that the applicant has almost daily pain in the right shoulder and right elbow. The right lower extremity pain is worse than the other body parts (Court Exhibit X page 3). The applicant was seen by a pain specialist who noted that the applicant sleeps poorly due to his pain (Exhibit 13 page 3). Steven Brouman, M.D. treated the applicant and reports that the applicant has constant pain in his right hip which increases with prolonged standing, excessive walking. The pain is moderate to severe and radiates down his right lower extremity. The low back pain comes and goes with prolonged sitting, standing, excessive walking, bending, twisting and lifting. The applicant also has constant pain in his right knee that increases in pain with prolonged standing, excessive walking and stair climbing. The applicant has constant pain in his right elbow, which increases with movement, adding pressure to the area and lifting with the right elbow (Exhibit 12 pages 3 – 5). Difficulties with activities of daily living are reported by Dr. Brouman in pages 5 and 6 of Exhibit 12 and Exhibit 10 pages 3-4. In the permanent and stationary report, Dr. Brouman reports that the applicant has constant pain in his right shoulder that radiates into the right arm along with stiffness. Activities such as raising his right arm at or above shoulder level, pushing, pulling and sleeping on the right shoulder causes an increase in the pain. The applicant has constant burning pain in the right elbow with numbness, stiffness and crepitation. The pain radiates to the wrist area. Activities such as extending the elbow, lifting more than 5 lbs., pushing, pulling will cause an increase in pain. There is constant low back pain. Activities such as bending, squatting, stooping, twisting, stairs, pushing, pulling and lifting more than 10 lbs. causes an increase in pain (Exhibit 10 page 3).

Dr. Shamie reports that the applicant has difficulty sleeping in part due to the pain (Exhibit 5 page 7, Exhibit 4 page 6, Exhibit 5 page 7). Dr. Shamie finds that the applicant has suffered a catastrophic physical injury followed by more than five years of severe pain and attempts to control the pain have failed, numerous surgeries have not relieved the pain, continuing physical impairments, and the applicant has suffered a complete loss of his ability to return to work. Dr. Shamie finds that a combination of the applicant’s physical impairments and psychological impairments have led to the applicant being totally and permanently disabled (Exhibit 3 page 9).

Psych PQME Yatin Patel, M.D., “found that the applicant has not been able to perform his regular work duties as a consequence of the industrial

exposure he is unable to compete in the open labor market mainly due to his physical injuries, but partially due to his mild to moderate ongoing psychiatric disability.” In his opinion, the applicant’s “current orthopedic injuries and psychological symptoms would interfere in his ability to compete in an open labor market.” Prior to submission the parties agreed to obtain additional reports from Dr. Shamie. Dr. Shamie assigns a GAF of 45 with a 40% WPI (Exhibit 21). Dr. Shamie issued another report dated 3/30/3017 (Exhibit 20) and states the applicant has a complete loss of his ability to return to work and the impairment have led to the patient being totally and permanently disabled (Exhibit 20 page 2).

The medical reports rated as follows:

AME Timothy Reynolds

Gastritis: 95% (06.01.00.00 – 7-[6]9 – 480F - 9 - 10)10  
 Constipation: 85% (06.02.00.00 -12 –[6]16 – 480H – 20 - 21)18

PQME Yatin Patel

Psyche: 14.01.00.00 – 11 – [8]15 – 480E – 14 – 15

PQME Lee Silver

Right shoulder: 90% (16.02.02.00 – 13 – [7]18 - 480G – 20 – 21)19  
 Right elbow: 16.03.01.00 – 3 – [2]3 – 480H – 5 - 5  
 Right grip: 16.01.04.00 – 18 – [4]22 - 480G – 24 – 25  
 25C19C5=42  
 Right Limb Length: 17.01.01.00 – 5 – [5]6 -480G – 7 – 8  
 Right Knee: 17.05.04.00 – 4 – [2]5 – 480H – 7 – 8  
 Right Hip:  
 8C8C8=22 17.03.04.00 – 4 – [5]5 – 480H – 7 – 8

42C24C22C18C15C10=78 Final PD after apportionment

After further development of the record, the parties obtained reports from John Stalberg, M.D in psychiatry and reports from Vocational Rehabilitation Experts.

Dr. Stalberg stated that based on all of the applicant’s disabilities, internal, orthopedic, and psychiatric he could not foresee any job the applicant could do in the open labor market. Dr. Stalberg further stated that he is not a vocational expert but felt that further investigation would “be a waste of time as Applicant will never be returning to work.” (Exhibit Y1 page 6). Dr. Stalberg also notes that the applicant’s main problem with sleeping is caused by pain (Exhibit Y1 page 8 and 27). Dr. Stalberg testified in his deposition that he basically agreed with Dr. Patel that the applicant is unable to compete in the open labor market mainly due to his physical injuries but partially due to his mild to moderate psychiatric disability (Exhibit Y2 page 7 lines 5- page 8 line 8). Dr. Stalberg also

agreed with Dr. Shamie's opinion that the applicant has suffered a complete loss of his ability to return to work and that a combination of the applicant's physical impairments and psychological impairments have led to the applicant being totally and permanently disabled (Exhibit Y2 pages 8-9, lines 25-14).

The applicant obtained vocational rehabilitation reports from Enrique Vega. Mr. Vega found that the applicant was "unfeasible for vocational rehabilitation services." The loss of future earnings was apportioned entirely to industrial factors (Exhibit 22 and 23).

The defendant obtained a vocational rehabilitation report from Nick Corso. Mr. Corso testified that if somebody was homebound five days a week they would be unable to compete in the open labor market. He further testified that as a general rule, a person would not be employable if they had absenteeism of one to two days a month (Exhibit pages 54-55 lines 13 – 11).

The un rebutted and credible testimony of the applicant and Amparo Castillon was that the applicant has several days a week that he has to stay in bed or rest on the couch due to constant pain in his back and right leg.

Based upon the evidence submitted, the reports and deposition testimony of the vocational rehabilitation experts and the testimony of the applicant and the witness with due consideration to their credibility it was found that the applicant is entitled to an award of permanent total disability in accordance with the fact, per Labor Code 4662(b). Defendant alleges the WCJ acted in excess of her powers in awarding permanent total disability in accordance with the fact.

### **DISCUSSION**

The applicant sustained a catastrophic injury that resulted in multiple surgeries including a surgery for intramedullary rodding of the right leg. As a result of the injury, the applicant has constant pain in his right leg. Defendant asserts that the finding of permanent and total disability is not based on substantial medical evidence.

The applicant treated with Dr. M.A. Shamie for his psychiatric injury. Dr. Shamie found that the applicant suffered a catastrophic physical injury followed by five years of severe pain and attempts to control the pain have failed. The applicant testified that his low back pain never goes away. His back hurts when he is sitting and when he is lying down and the pain goes down into his leg. The applicant further testified that there are days that the pain in his leg is so bad he can't focus on anything and he has days he feels like taking his own life (SOE 1/19/2017 page 10 lines 16 – 20). When the leg pain is bad he can't drive because he can't push the gas or brake pedals. On the bad days he can't get out of bed. (SOE 1/19/2017 page 10 lines 3 – 9). Based on a combination of the applicant's physical and psychological injury, Dr. Shamie found that the applicant suffered



a complete loss of his ability to return to work and apportioned 100% of the psychiatric disability to the industrial injury (Exhibit 20 and 21). PQME Yatin Patel also found that based on a combination of the physical and psychiatric injuries, the applicant would be unable to compete in the open labor market and he apportioned 100% to the industrial injury (Joint Exhibit A page 130 and 135).

John Stalberg was appointed as a regular physician and noted several reasons why the applicant is unlikely to return to work. In addition, he acknowledged that he was not a vocational expert. However, Dr. Stalberg still found that based on all of his disabilities, internal medical, orthopedic, and psychiatric, he could not foresee any job that the applicant could undertake in the open labor market (Court Exhibit Y1 page 6). Dr. Stalberg testified in his deposition that he agreed with Dr. Patel that the applicant is unable to compete in the open labor market mainly due to his physical injuries but partially due to his mild to moderate psychiatric disability (Exhibit Y2 page 7 lines 5- page 8 line 8). Dr. Stalberg also agreed with Dr. Shamie's opinion that the applicant has suffered a complete loss of his ability to return to work and that a combination of the applicant's physical impairments and psychological impairments have led to the applicant being totally and permanently disabled (Exhibit Y2 pages 8-9, lines 20-14).

All three of the doctors that evaluated the applicant for his psychiatric injury found that the applicant was totally and permanently disabled based on a combination of his physical and psychiatric injury.

Defendant incorrectly asserts that "the evidence relied on by the trial court turned heavily on medical reporting and deposition by Dr. Stalberg and vocational reporting by Mr. Vega..." Although several of the doctors, including Dr. Stalberg, found that the applicant was 100%, the finding of permanent and total disability was based on a review of the entire record with considerable weight given to the findings of the two vocational rehabilitation experts and the un rebutted testimony of the applicant and the witness.

The defendant's vocational rehabilitation expert Nick Corso, testified in his deposition that in determining if an injured worker is 100%, the injured worker must demonstrate that as a result of the industrial injuries, that there is no work that the applicant is able to do in the labor market. There are three factors to consider in determining if the injured worker is 100%, is the injured worker amenable to vocational rehabilitation, is the injured worker able to be placed in the job market, and is the injured worker employable (meaning able to maintain employment). An injured worker is not amenable to vocational rehabilitation if the injured worker is not able to participate in training or job placement, or any other type of vocational rehabilitation program that would normally be provided. The injured worker will be 100% if their injuries are such that they wouldn't be able to participate in a job search or present themselves in a job interview to successfully secure employment, and therefore, are not able

to be placed in any employment. An injured worker is not employable if they are unable to perform the essential functions of any job and are unable to attend to their duties to meet the demands of competitive employment, and therefore, are unable to maintain employment(Exhibit 24 page14 line 17 – page16 line 4). Mr. Corso further testified that based on his expertise as a vocational expert, one to two days a month of absenteeism would make a person unemployable. (Exhibit 24 page 54 line 24 – page 55 line 11).

Contrary to the assertion of the defendant, the court did not take issue with the fact that Mr. Corso did not read the trial testimony as the trial testimony of the applicant and of Amparo Castillon was read to Mr. Corso at the deposition. Based on the trial testimony of the applicant and his wife, Mr. Corso testified that the applicant would be unable to compete in the open labor market. A person that is bedridden several days a week would be unable to maintain employment. The un rebutted testimony of the applicant and Amparo Castillon was that the applicant was unable to get out of bed several days a week.

The applicant retained the services of Vocational Rehabilitation expert, Enrique Vega. Mr. Vega concluded that the applicant was not feasible for vocational rehabilitation services and found that he was not employable in the open labor market as a result of his industrial injury (Exhibits 22 &23).

The applicant has problems with numerous parts of his body, however, the trial testimony and medical evidence clearly show that the most significant problem is the right leg. The applicant testified that at times the leg pain is so bad that he wishes he didn't have his leg and has thought about taking his life. Amparo Castillon testified that the leg pain is so bad that the applicant is bedridden 4 or 5 days a week (SOE 4/13/2017 page 6 lines 14 – 17). Based on the evidence, the applicant's inability to work is due primarily to the right leg pain that causes the applicant to be bedridden 4 to 5 days a week rendering the applicant incapable of maintaining employment. His inability to work is due to industrial factors.

Defendant asserts that it is an error to not allow apportionment for gastritis, constipation and the right shoulder (pages 5-6 lines 26 -2). Vocational apportionment is not the same thing as medical apportionment. The difference between medical and vocational apportionment was articulated in the case of Estrada v. Target (2016) Cal. Wrk. Comp P.D Lexis 422 as follows:

“Even when it is found that an applicant is permanently, totally disabled and unable to compete in the open labor market in accordance with the fact under Labor Code §4662(b), an apportionment analysis is required. Labor Code §4663 requires apportionment of permanent disability to be based upon causation, so when a finding of permanent disability is based upon applicant's vocational non-feasibility, and not upon individual medical impairments, the apportionment analysis should be a separate, vocational one, and should not rely exclusively on

each medical cause of impairment criteria under the *AMA Guides to the Evaluation of Permanent Impairment, 5th Edition* (“AMA Guides”). The AMA Guides expressly state that impairment percentages are not the same thing as work disability. “The whole person impairment percentages listed in the Guides estimate the impact on the individual’s overall ability to perform activities of daily living, excluding work” (AMA Guides, p.4, italics in original).

When addressing vocational apportionment, the issue is what is causing the total loss of earning capacity and ability to compete in the open labor market. There can be no vocational apportionment if the applicant’s pre-existing nonindustrial factors did not contribute to the applicant’s vocational impairment.

In this case, the applicant was found to be permanently, totally disabled in accordance with the fact per the opinions of the vocational experts, therefore, the apportionment analysis must not be limited to what each doctor thought was causing each underlying impairment under the AMA Guides, the ultimate question is what is causing the total loss of earning capacity and ability to compete in the open labor market.

The chronic pain in the applicant’s right leg is causing him to be bed-ridden several days a week rendering him unable to maintain employment. Defendant asserts that it is an error to not allow apportionment for gastritis, constipation and the right shoulder. The shoulder and internal complaints (in the form of constipation and gastritis) did not cause or contribute to the applicant’s total loss of earning capacity. The applicant’s inability to work was not caused by any impermissible *Montana* factors.

Defendant asserts that the holding in Fitzpatrick<sup>1</sup> is binding and precludes a finding of permanent total disability in accordance with the fact under Labor Code Section 4662(b). Defendant’s interpretation of Fitzpatrick conflicts with all other published case law addressing this issue, including the decision in Ogilvie<sup>2</sup>, holding that it is permissible to depart from a scheduled rating on the basis of vocational expert opinion that an applicant has a greater loss of future earning capacity than reflected in a scheduled rating. The court concluded that the Legislature “left intact the cases, including [*LeBoeuf v. WCAB* (1983) 34 Cal.3d 234], recognizing ‘that a scheduled rating has been effectively rebutted ... when the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating.’ The court interpreted *LeBoeuf* and its progeny as limited in application ‘to cases where the employee's diminished

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<sup>1</sup> Department of Corrections & Rehabilitation v. WCAB (Fitzpatrick)(2018) 27 Cal.App.5th 607 [238 Cal. Rptr.3d 224]

<sup>2</sup> Ogilvie v. Workers' Comp. Appeals Bd. (2011) 197 Cal.App.4th 1262 [129 Cal.Rptr.3d 704].

future earnings are directly attributable to the employee's work-related injury, and not due to nonindustrial factors.”

In *Bagobri v. AC Transit* (85 Cal. Comp. Cases 61) the WCAB upheld the WCJ’s decision to reject the defendant’s assertion that the holding in *Fitzpatrick* precluded a finding of permanent total disability “in accordance with the fact.” The WCJ found that the applicant sustained 100% permanent disability “in accordance with the fact” when the orthopedic AME and applicant’s vocational expert found that the applicant was unable to sustain gainful employment and had a total loss of future earning capacity due to his industrial injuries.

On the facts in this case, the holding in *Fitzpatrick* does not preclude a finding of 100% permanent total disability per Labor Code Section 4652(b).

There is substantial evidence to support the finding that the applicant is unable to compete in the open labor market as he is unable to maintain gainful employment.

#### **IV** **RECOMMENDATION**

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,  
Date: 4/26/2021  
SHARON L. VELZY  
Workers’ Compensation Judge