WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PAULIN SANDOVAL, ***Applicant***

vs.

RANSOM COMPANY; and TRAVELERS CASUALTY & SURETY COMPANY, ***Defendants***

Adjudication Number: ADJ7744441
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to further study the factual and legal issues. This is our Decision After Reconsideration.

In the First Amended Findings and Award of April 15, 2020, the Workers' Compensation Judge (WCJ) found, in pertinent part, that on October 27, 2010, applicant sustained industrial injury to his low back and psyche, causing permanent disability of 69 percent after apportionment, and the need for further medical treatment.

Applicant filed a timely petition for reconsideration of the WCJ's decision. Applicant contends that the medical opinions of Dr. Conrad and Dr. Petrakis do not support a finding of apportionment, and that the reports of applicant's vocational expert, Mr. Jeff Malmuth, support a finding of permanent and total disability.

Defendant filed an answer, which has been considered.

The WCJ submitted a Report and Recommendation ("Report").

In reference to the issues of permanent disability and apportionment resulting from the orthopedic injury to applicant's low back, as well as his contention that Mr. Malmuth's vocational opinion justifies a finding of permanent and total disability, we have considered the allegations of applicant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate only on the issues specified above, we agree with the WCJ's reliance upon the

medical opinion of Dr. Conrad, and we will affirm the WCJ's finding that the orthopedic injury to applicant's low back caused permanent disability of 48 percent after apportionment.

However, we find merit in applicant's contention that defendant failed to meet its burden of proving apportionment of the psychiatric permanent disability. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114 [71 Cal.Comp.Cases 1229].) For the reasons discussed below, we conclude that Dr. Petrakis's opinion on apportionment of the psychiatric disability is not substantial evidence. Without apportionment of the psychiatric disability, applicant is entitled to a permanent disability award of 71 percent. We will amend the WCJ's decision accordingly.

Dr. Conrad served as the Agreed Medical Evaluator ("AME") in orthopedics, while Dr. Petrakis served as the AME in psychiatry. As mentioned before, we take no issue with the WCJ's reliance upon Dr. Conrad to determine the issues of orthopedic permanent disability and apportionment. As for Dr. Petrakis, the WCJ's Opinion on Decision only explains in general terms why the WCJ followed Dr. Petrakis to find that applicant's psychiatric disability is subject to non-industrial apportionment of 10 percent. At pages 14 and 15 of her Report, however, the WCJ provides a more specific explanation:

> Dr. Petrakis evaluated applicant, with an interpreter, for two and one-half hours on 04/21/2014, reviewed applicant's deposition testimony of 01/11/2012, medical records and psychological testing, and submitted reports dated 06/09/2014 and 01/13/2016. In his 06/09/2014 report, Dr. Petrakis opined applicant sustained an industrial psyche injury, found applicant permanent and stationary, provided a GAF of 55 and after noting applicant's wife suffers from diabetes, that it is under control, but that he worries about his wife's health because he counts on her, opined as to apportionment of ten percent as follows:
>
> "I believe there are grounds for apportionment. The applicant does express concerns and worry over his wife's health. This is ongoing. I would apportion 10% of Applicant's overall psychiatric disability to this concurrent psychiatric dynamic." (Joint Exhibit 106, at pages 1, 7, and 11 -12)
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> Based on the foregoing, I remain persuaded that based on the evidence at trial and the relevant law, the reports and opinions of Dr. Conrad and Dr. Petrakis, including their opinions as to apportionment, constitute substantial medical evidence and that their opinions justify the permanent disability stipulated to by the parties as to the impairment caused by applicant's injury to his low back and psyche, 69% after apportionment.

We disagree that Dr. Petrakis's medical opinion is substantial evidence on the issue of apportionment. In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (en banc), the Board described the necessary qualities for a physician's opinion to be accepted as substantial evidence of apportionment:

> [I]n the context of apportionment determinations, the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles. (*Ashley v. Workers' Comp. Appeals Bd.*, *supra*, 37 Cal.App.4th at pp. 326-327; *King v. Workers' Comp. Appeals Bd.*, *supra*, 231 Cal.App.3d at pp. 1646-1647; *Ditler v. Workers' Comp. Appeals Bd*., *supra*, 131 Cal.App.3d at pp. 812-813.)
>
> Thus, to be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.

In this case, we are not persuaded that in relying upon applicant's worry about his wife's health to apportion psychiatric disability, Dr. Petrakis described in detail the exact nature of the apportionable disability. Applicant's worry evidently flows from his dependence on his wife and family to help him cope with the effects of his low back disability. In that case, applicant's worry is related to the effects of the industrial injury. Considering Dr. Petrakis's opinion in this context, it is apparent the doctor relied upon the incorrect premise that an aspect of an injured employee's disability that has its source in the industrial injury is a legal basis for non-industrial apportionment. As Dr. Petrakis relied upon a faulty premise, his medical opinion on apportionment is not substantial evidence. (*Hegglin v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Examining the issue in further depth, exhibit 106 shows that Dr. Petrakis apportioned psychiatric disability based on applicant telling the doctor that although his wife's diabetes is under control, applicant worries about her because he counts on her. (Petrakis report dated June 9, 2014, p. 7.) Considering applicant's statements in the context of the whole of Dr. Petrakis's report, it is clear that applicant's worry is a consequence of the disability resulting from his industrial injury, in that applicant views himself as a disabled person who has become dependent on his family.

(Petrakis report dated June 9, 2014, p. 10.) Applicant's worry over his wife's health, and his belief that he has become dependent on his family, is one of the results of the orthopedic injury that has left him disabled and feeling that he needs help. Stated yet another way, applicant's ongoing concerns and worry over his wife's health are based upon the effects of his orthopedic injury and resultant disability, not upon any separate, non-industrial basis as required by Labor Code section 4663. (See *Hillenbrand v. Cal Cabinets & Store Fixtures* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 25 [no basis for apportionment of psychiatric disability where physician opined that impairment resulting from marital discord was caused by chronic pain due to the applicant's industrial injury].)

In conclusion, we reject Dr. Petrakis's opinion that 10 percent of applicant's psychiatric disability is non-industrial because it is not substantial evidence under the standards set forth in *Escobedo, supra*. At trial on November 28, 2018, the parties stipulated that without apportionment, Dr. Petrakis's medical opinion supports a rating of 44% permanent disability. Taken together with the parties' stipulation that Dr. Conrad's orthopedic reporting justifies a rating of 48 percent after apportionment, the final rating after application of the Combined Values Chart (48 C 44) is 71 percent. This means that applicant is entitled to a life pension that is subject to a cost of living allowance ("COLA"). (Lab. Code, § 4659(c).) This additional benefit means that the WCJ will need to revisit and determine the issue of attorney's fees and adjust the life pension, with the assistance of the Disability Evaluation Unit as necessary or appropriate. Therefore, we will issue an amended permanent partial disability indemnity award, but we will defer the life pension portion of the award. Likewise, we will defer the issue of attorney's fees pending further proceedings and determination by the WCJ, jurisdiction reserved. (See *Gilmore v. Autoland Resale Ctr.* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 148 and *Wilson v. Piedmont Lumber & Nursery* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 48, citing *Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434 [76 Cal.Comp.Cases 701].)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the First Amended Findings and Award of April 15, 2020 is **AFFIRMED**, except that Finding 6 and paragraph (a) of the Award are **AMENDED** to read as follows:

> 6. Applicant's injury to his low back and psyche caused permanent partial disability of 71%, after adjustment for age and occupation and apportionment of the low back disability.
>
> …
>
> (a) Permanent partial disability indemnity as set forth in Finding of Fact No. 6, in the amount of $121,297.50 payable for 449.25 weeks at the weekly rate of $230.00 beginning on the date following the last date for which temporary disability indemnity was paid, less credit for any permanent partial disability indemnity advanced heretofore on account thereof, with payout of the indemnity to be followed by a life pension, which shall be calculated and determined by the WCJ in further proceedings at the trial level, jurisdiction reserved, less an attorney's fee based upon the benefits awarded under this paragraph, to be calculated and determined by the WCJ in further proceedings at the trial level, jurisdiction reserved.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and determination of the life pension and attorney's fees by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR___

I DISSENT. (See attached Dissenting Opinion.)

JOSÉ H. RAZO, COMMISSIONER________

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 29, 2021

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

GORELICK WOLFERT
LAURA G. CHAPMAN & ASSOCIATES
PAULIN SANDOVAL

JTL/bea/*pc*

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

DISSENTING OPINION OF COMMISSIONER RAZO

I dissent. Based on the analysis set forth in the WCJ's Report, which I adopt and incorporate, I would not disturb her finding of 10% non-industrial apportionment of applicant's psychiatric disability. The WCJ correctly followed the opinions of both Dr. Conrad, the AME in orthopedics, and Dr. Petrakis, the AME in psychiatry. The AMEs were chosen by the parties because of their expertise and neutrality, and their opinions ordinarily should be followed unless there is good reason to find them unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

I do not find good reason to reject Dr. Petrakis's apportionment opinion as unpersuasive. On page seven of his June 9, 2014 report, Dr. Petrakis recorded applicant's "psychosocial history." There the doctor quoted applicant as stating that although his wife's diabetes is under control, he worries about her health because "I count on her." Dr. Petrakis did not report that applicant stated he counted on his wife because she takes care of his needs as a disabled person. I also note that applicant has been awarded further medical treatment for his low back, so the extent to which applicant's wife needs to help care for him is uncertain.

I would leave the WCJ's decision undisturbed. I agree with the WCJ's reliance upon Dr. Petrakis's opinion that 10 percent of applicant's psychiatric disability is non-industrial. I agree with the WCJ not only because of Dr. Petrakis's status as the AME, but also because the doctor made a determination based on his medical expertise of the approximate percentage of permanent disability caused by applicant's concern and worry over his wife's health, and Labor Code section 4663 requires nothing more. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 930 [71 Cal.Comp.Cases 1687].)

WORKERS' COMPENSATION APPEALS BOARD

<u>JOSÉ H. RAZO, COMMISSIONER</u>

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

Terri Ellen Gordon, Workers' Compensation Judge, hereby submits her Report and Recommendation on the Petition for Reconsideration filed herein.

INTRODUCTION

Applicant, Paulin Sandoval, (hereinafter referred to as "applicant") petitions for reconsideration of the First Amended Findings and Award and Opinion on Decision that issued in this case on 04/15/2020 wherein I found applicant while employed on 10/27/2010 by Ransom Co., insured by Travelers Casualty and Surety Company (hereinafter referred to as "defendant") sustained injury arising out of and in the course of his employment to low back and psyche but did not sustain industrial injury to his left knee. In the Findings and Award and Opinion on Decision that issued in this case on 04/15/2020 I also found applicant's injury to his low back and psyche caused permanent partial disability of 69 percent, after adjustment for age and occupation and apportionment, and a need for further medical treatment. I also found applicant's earnings per week are $1085.60 warranting a weekly temporary disability rate of $723.73, his Occupational Group Number is 481 and that he was permanent and stationary on 04/21/2014.

Applicant has now filed a timely Petition for Reconsideration contending that I acted without or in excess of my powers, that the evidence does not justify the findings of fact, and that the findings of fact do not support the order, decision or award. Applicant specifically takes issue with Finding of Fact Number 6 wherein I found that applicant's injury to his low back and psyche caused permanent partial disability of 69 percent. Applicant claims I did not address limitations opined to by Dr. Conrad and Dr. Petrakis. Applicant further argues that I did not specifically address his claim that the opinions of Dr. Conrad and Dr. Petrakis do not support a finding of apportionment. Applicant also contends that the reports of his vocational rehabilitation expert, Jeff Malmuth do not reflect his opinion of 78 percent post injury diminished labor market and do support a finding of permanent total disability. Applicant does not take issue with my findings that applicant did not sustain industrial injury to his left knee, that applicant's earnings per week are $1085.60 warranting a weekly temporary disability rate of $ 723.73, that his Occupational Group Number is 481 or that he was permanent and stationary on 04/21/2014.

Applicant's Petition for Reconsideration was timely filed and is accompanied by the verification required under Labor Code section 5902. As of 04/28/2020, defendant has not filed an Answer.

DISCUSSION

In my Opinion on Decision, I explained the rationale for my decision as follows:

"BODY PARTS, PERMANENT DISABILITY and APPORTIONMENT"

At the 11/28/2018 trial, the parties stipulated that applicant sustained industrial injury to low back and psyche on 10/27/2010 and claims industrial injury to his left knee. (M.O.H., dated 11/28/2018, at page 2)

> At trial, applicant testified that he is 60 years old and lives in San Leandro. He came to the United States in 1977 and, after some coming and going, has remained here since 2000 and with his family since 2001. He was married in 1982 and he has five children, all grown. When he first started working for the defendant, he had no physical problems or pain and was not receiving any medical treatment or any mental health counseling. After he injured his back, he had medical treatment and ultimately surgery. His medical treatment included acupuncture, physical therapy, chiropractic care, pills, and epidural injection. Dr. Grant performed his back surgery. After that surgery, he had physical therapy, swim therapy, and medications. He also tried a spinal cord stimulator to block the pain. The surgery did not stop the pain. Dr. Grant then recommended fusion surgery, but he believes that defendant denied that request; otherwise, he would have had the fusion surgery. He is not taking medications consistently because they are sometimes not authorized. Currently there is no other treatment recommended. It bothers him to walk, sleep, sit, stand, or to even lift the smallest thing.
>
> Any small movement against him can cause him to lose his balance and experience discomfort. His legs, feet, and middle of his back sometimes feel like they are on fire. He sometimes helps his wife with small or little things. He uses a cane. However, using a cane was never prescribed by any doctor, although he says Dr. Grant tried to prescribe one for him but didn't because he already was using a stick. He uses the cane all the time, a little at home when he goes out on the balcony. Walking and lying down can sometimes help the discomfort. He takes hydrocodone at night for pain, and he takes another medication for nerves in his legs and another for constipation. The prescriptions cause him to feel tired and fatigued and he can't drive. He feels dizzy, he cannot concentrate, and he forgets things. How much he sleeps varies. He can sleep one hour a night, or two or three hours a night, sometimes up to five hours a night. After surgery, he got mental health counseling from a psychologist because he believes they believed the pain was in his brain. He would talk to the psychologist about feeling depressed

and having no desire to live. That counseling stopped because the insurance denied it, he thinks. The injury has changed his life completely. It has affected his relationship with his wife because he no longer has intimate relations, and he can't visit people when he wants to visit people. He liked working. That was his hobby. Now he gets angry sometimes. A friend invited him to a support group and that was free. He went sometimes but not often. He has not tried any retraining. He has attended some English classes, but because of the pills, he can't concentrate. He feels sad. At home or on a walk, that makes his day shorter, as does talking to people. His son went to UC Berkeley but has now left so he can help his dad, and he is now a carpenter. Previous to working for the defendant, he worked at Sansei Gardens. He had two injuries there. Once, he was walking and carrying plastic pipes when one of the pipes fell and hit his left knee. He got medical treatment, an X-ray, and pills. He did not take any time off. The second injury was when he was unrolling a roll of wire and his left leg was injured. His left leg felt stiff like he had a cramp. When asked if he also injured his low back while working at Sansei Gardens, he said it could be because he did hurt his leg but it was very little and he doesn't really remember it well. He does remember seeing Dr. Conrad in 2013 in San Francisco and remembers filling out a questionnaire indicating he could walk two or three miles at a time. He does walk, with some pain, on level ground. Time wise, he thinks he can walk up to two hours to clear his head, sometimes a little less, sometimes a little more. He reiterated that while he uses a cane, it was never prescribed by a doctor. When asked about a reference in Dr. Conrad's 2016 report indicating he was able to drive, applicant testified that he can drive; he just cannot drive far, is afraid of getting into an accident because his legs feel discomfort and because of the medications. He can drive and has driven all the way to Madera. The distance he can drive varies. He sees his current doctor, Dr. Roth, every three months or every two months. Dr. Roth prescribes the medications. He takes his pain medication, hydrocodone, once at bedtime. He took English classes before his injury for about a month, but he understands very little English. He recalls seeing Ira Cohen in person and told him that he would work if he could get into a light job, something that would not strain his lower back. He has a problem with his left arm because, after a while, it gets numb but he is able to lift it and use it and he can use both of his hands. His hands are good. When asked if someone could give him a job that matched his doctor's restrictions, including breaks, and would not fire him, would he be interested in hearing about the job, he answered that he would almost say no because he is not 100 percent focused, his senses are not 100 percent, he is not always in the same condition, and he cannot always drive. His wife does have some health

problems, specifically diabetes, and he does worry about that. He believes his medication usage affects his ability to work. He does not recall Dr. Conrad or Dr. Petrakis talking to him about being off task. He takes his hydrocodone at night. He also takes gabapentin for his nerves and for pain and he takes one in the morning and one at night but he only takes one when he takes it. (M.O.H., dated 11/28/2018, pages 5 - 9)

Stephen Conrad, M.D., the parties' AME as to applicant's low back and knee claim, evaluated applicant on 02/12/2013 and 03/08/2016, reviewed relevant medical records and reports, and authored reports dated 02/12/2013, 06/24/2015, 03/08/2016, 05/17/2016 and 06/22/2016. (Joint Exhibits 101 through 105)

In his report of 02/12/2013, Dr. Conrad noted his impressions that applicant had lumbar intervertebral disc protrusion at L4-L5 and L5-S1 with S1 radiculopathy and a status post lumbar foraminotomy 01/11/2012 with failed back surgery syndrome, found applicant permanent and stationary as of 02/12/2013, and opined as to permanent disability and apportionment as follows:

> "In the case of Mr. Sandoval, the DRE method could be considered. This gentleman has undergone lumbar spine surgery, but has not undergone a lumbar fusion. If the DRE method is used, he would then qualify for DRE III, which allows 10% to 13% WPI (Table 15-3, page 384). This gentleman should be allowed the maximum, which is 13% WPI. In this case, I do not recommend the DRE method, however. This gentleman has sustained a single injury, but there is multiple level disc involvement rather than single level disc involvement. Finally, the 13% WPI which is permitted by the AMA Guides does not accurately depict this gentleman's loss of function. I asked Mr. Sandoval to complete an ADL Impact Form. He experiences difficulties bathing, defecating, dressing, brushing his teeth, eating, standing, sitting, stair climbing, reclining, lifting, riding and driving, as well as sexual dysfunction and sleep disorder. In order to achieve an accurate depiction of functional loss, it is reasonable to use the range of motion method. The reader is referred to the Range of Motion Chart. The reader will note 13% WPI on the basis of motion deficits alone. This is combined with Table 15-7, page 404. This gentleman has undergone surgery. He is eligible for IIE, which for the lumbar spine allows 10% WPI. I did not detect sensory loss. Using the Combined Values Chart, the combination of 13% and 10% allows 22% WPI. The final impairment then is 22% WPI for the lumbar spine. I am also allowed a 3% pain add-on or chronic pain. This gentleman does, in fact, experience continuous pain. The sum of 22% and 3% is 25% WPI. (See page 573) The final impairment then is 25% WPI. "

> "In the case of Mr. Sandoval, there is a remote prior history of back pain, with pain referral into the left leg in approximately 1998. I do not have those records available for review, but the onset of pain occurred during work for the Sansei Gardens. He recovered fully, but the MRI scans of the lumbar spine in conjunction with the October 2010 injury do indicate intervertebral disc disease at L4-L5 and L5-S1. These findings cannot be explained on the basis of the industrial injury at Ransome Company, but represent pre-existing pathology which should be considered in the analysis of apportionment since this pathology predisposes to disc herniation and impairs recovery. In the final analysis, however, absent the maneuver of 27 October 2010 at Ransome Company, I am unable to state with reasonable medical probability if Mr. Sandoval would have ever become symptomatic. For this reason, the lion's share of causation of disability is work related and secondary to the industrial injury. In my best judgment, for the lumbar spine, 90% is apportioned to the work related injury of 27 October 2010 and 10% is apportioned to pre-existing pathology." (Joint Exhibit 101 at pages 1, 11-14).

In his 03/08/2016 report, Dr. Conrad further opined as to permanent disability:

> "The reader is referred to the range of motion chart for the lumbar spine. Motion deficits how indicate 16% WPI. This value is combined with Table 15-8. This gentleman is qualified for IIE which allows for 10% WPI. Sensory loss is also present in the left leg in the distribution of the S1 nerve root. The reader is referred t Table 15-18, page 424. The sensory loss is Grade IV at 25%. The maximum allowance is 5% WPI. Twenty-five percent of 5% is 1.25% which is multiplied by 0.90% (see page 423) for 1% WPI. The impairment then using the range of motion method is the combination of 16%, 10% and 1% which allows 25% WPI. This gentleman is allowed a 3% pain add-on, which was permitted at my earlier evaluation, and the sum of 25 and 3 is 28. The impairment at this time, then, is 28% WPI. (Joint Exhibit 103 at pages 1, 11).

In his 05/17/2016 report, Dr. Conrad further opined as to impairment as follows:

> "The decision whether to add or combine, however, can apply to the method for calculation of impairment for the lumbar spine alone. At my evaluation of 8 March 2016, I used the traditional method in which 16% WPI motion loss was combined with 10% WPI (Table 15-8) and 1% WPI for sensory loss. The outcome using this

> traditional approach was 28% WPI as reported on 8 March 2016. In the alternative, these values could be added. The sum of 16% WPI (motion deficits), 10% WPI (Table 15-8), and 1% WPI (sensory loss) is 30% WPI. Of the two methods, the 30% WPI most closely depicts Mr. Sandoval's functional loss. I hope this is helpful but ultimately the decision whether to add or combine becomes a legal rather than medical issue and I will defer to the administrative law judge. (Joint Exhibit 105 at pages 1, 2)

Dr. Petrakis, M.D., the parties AME as to applicant's psyche claim, evaluated applicant on 04/21/2014, reviewed medical records and psychological testing, and submitted reports dated 06/09/2014 and 01/13/2016. In his 06/09/2014 report, Dr. Petrakis opined applicant sustained an industrial psyche injury, found applicant permanent and stationary, provided a GAF of 55 and apportionment of ten percent. (Joint Exhibit 106, at pages 1 and 11 -12)

> Based on my review of the stipulations and evidence at trial and the relevant law, I find applicant while employed on 10/27/2010 by defendant sustained injury arising out of and in the course of his employment to low back and psyche but did not sustain injury to his left knee arising out of and in the course of his employment.

At trial, the parties stipulated that if there is a finding that applicant's occupational group number is 481, the reports of Dr. Conrad and Dr. Petrakis would rate with and without apportionment as follows:

> 15.03.01.00 Lumbar DRE 30w [5] 1.2714 38 481I 47 53 53%
> 90% [15.03.01.00 Lumbar DRE 30w [5] 1.2714 38 481I 47 53] 48%
> 14.01.00.00 23w[8] 1.4 32 481H 38 44 44%
> 90% [14.01.00.00 23w[8] 1.4 32 481H 38 44]
> 40% (M.O.H., dated 11/28/2018 at page 2)

I find the reports of Dr. Conrad and Dr. Petrakis constitute substantial medical evidence and that the opinions of Dr. Conrad and Dr. Petrakis justify the permanent disability stipulated to by the parties as to the impairment caused by applicant's injury to his low back and psyche. I also find the opinions of Dr. Conrad and Dr. Petrakis as to apportionment to be substantial medical evidence. Accordingly, I adopt the rating stipulated to by the parties and find that applicant's injury to his low back and psyche caused permanent partial disability of 69%, after apportionment.

In his 02/12/2013 report, Dr. Conrad opined as to work restrictions as follows:

"In the analysis of work limitations, we must understand that this gentleman is able to walk moderate distances. He exhibits poor sitting tolerance. He is

limited to light work which allows work in a standing and walking positions with minimal demands for physical effort. Specifically, I do not recommend lifting more than 20 pounds, or bending or stooping more than five times an hour. (Joint Exhibit 101 at pages 1, 11)

In his 06/24/2015 report, Dr. Conrad further opined as to work restrictions as follows:

> "…In general, Mr. Sandoval should not walk distances greater than one-quarter mile before resting. …I would recommend sitting after fifteen minutes of walking. … His sitting tolerance is therefore 15 minutes. .. In general, I do not recommend overtime work; however, he is capable of working 40 hours a week. … [He] is able to work eight hours per day, five days per week, in light of his functional limitations. … Overall, Mr. Sandoval should be able to work 40 hours per week, however, it is probable that he would have good and bad days and would lose periodic time from work. At my interview, this gentleman's back pain was continuous. The frequency of good and bad days could vary. I would estimate that in one month Mr. Sandoval might lose one to two days from work, but this could vary. I mentioned that Mr. Sandoval is able to work in a standing or walking position and although his sitting tolerance is somewhat poor (15 minutes according to the history he provided to me), he should be allowed sitting and standing at will in the future work place. (Joint Exhibit 102 at pages 1 – 3)

In his 03/08/2016 report, Dr. Conrad further opined as to work restrictions as follows:

> "Mr. Sandoval should not lift greater than 20 pounds. He should not bend or stoop more than five times per hour. He should not stand for greater than 15 minutes. (Joint Exhibit 103 at pages 1, 10)

In his 05/17/2016 report, Dr. Conrad, when asked about application of Labor Code section 4662, opines as follows:

> "In this instance, the outcome of disability as calculated is, in fact, reflected of Mr. Sandoval's functional losses. … In the final analysis, the levels of impairment which have been calculated using traditional methods accurately reflect this gentleman's functional loss." (Joint Exhibit 105 at pages 1, 2)

> In his report dated 01/13/2016, Dr. Petrakis provided a mental residual functional capacity assessment as to applicant. His report defined degrees of functional limitation as follows: (1) None means no impairment is noted; (2) Mild implies that any discerned

> impairment is compatible with most useful functioning; (3) Moderate means that the identified impairments are compatible most useful functioning; (4) Marked is a level of impairment that significantly impedes useful functioning – taken alone, a marked impairment would not completely preclude functioning, but together with marked limitation in another class, it might limit useful functioning; and (5) Extreme means that the impairment or limitation is not compatible with useful function. Dr. Petrakis noted applicant will be off task up to 20 percent of the time over the course of an 8 hour day when performing the mental activity. In that same report, Dr. Petrakis noted mild impact on applicant's ability to remember locations and work-like procedures, to understand and remember very short and simple instructions, to sustain an ordinary routine without special supervision, to work in coordination with or proximity to others without being distracted by them, to interact appropriately with the general public, to get along with coworkers or peers without distracting them or exhibiting behavioral extremes, to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness, to respond appropriately to changes in the work setting, and the ability to travel in unfamiliar places or use public transportation. Dr. Petrakis further noted moderate impact on applicant's ability to understand and remember detailed instructions, to carry out detailed instructions, to maintain attention and concentration for extended periods, to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances, to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods, to accept instructions and respond appropriately to criticism from supervisors, to be aware of normal hazards and take precautions, and to set realistic goals or make plans independently of others. Dr. Petrakis also noted no impairment on applicant's ability to carry out very short and simple instructions, to make simple work-related decisions, or to ask simple questions or request assistance. Dr. Petrakis noted no marked or extreme levels of impairment. (Joint Exhibit 107 at pages 1 – 2)

Jeffrey Malmuth, a vocational rehabilitation expert, was retained by applicant and submitted reports dated 10/27/2015, 05/12/2017, and 05/02/2018. In his report dated 10/27/2015, Mr. Malmuth noted his review of Dr. Conrad's 02/12/2013 report and Dr. Petrakis's report dated 06/09/2014, and opined applicant will experience a 74% diminished occupational capacity and a 78% diminished labor market; he further stated that as there is no meaningful distinction between loss of future earning capacity and inability to complete in the open labor market, applicant will experience an estimated 78% post injury

diminished labor market. My review of this report does not reflect Mr. Malmuth interviewed applicant at this time. (Applicant's Exhibit 1 at pages 1, 11)

Applicant was evaluated by another vocational rehabilitation expert Ira Cohen at defendant's request. Mr. Cohen met with applicant on 09/30/2016 with an interpreter, reviewed Dr. Conrad's reports dated 02/12/2013, 03/08/2016, 05/17/2016, and 06/22/2016, Dr. Petrakis's reports dated 06/09/2014 and 12/27/2015, and applicant's 01/11/2012 deposition, and submitted reports dated 01/16/2017, 08/23/2017, and 02/28/2018. In his 01/16/2017 report, Mr. Cohen determined applicant is amendable to rehabilitation, is employable for selected occupations occurring for the sedentary, semi-sedentary and light work levels in jobs that are typically unskilled and semi-skilled in nature, including packer, cashier, electrical and electronic assembler, inspector, tester, sorter, sampler and weigher, and has not rebutted the scheduled rating. Mr. Cohen identified residual abilities for applicant as he can lift up to 20 pounds, can bend/stoop less than five times per hour, can stand one hour at a time, can sit, walk, and drive up to two hours at a time, and has full and unrestricted abilities for handling, fingering, and feeling. With respect to Dr. Petrakis's opinions, Mr. Cohen considered Dr. Petrakis's opining as to a GAF of 55 as applicant experiencing an impairment at a moderate level that would allow applicant to perform relatively repetitive and routine activities where supervision is generally available and such occupations are typically considered unskilled and semi-skilled in nature. Noting that Dr. Petrakis found various levels of impairment applicant will likely experience, Mr. Cohen went on to state that it is important to note that Dr. Petrakis did not conclude any "marked" or "extreme" levels of impairment that applicant may experience. Mr. Cohen concluded:

> "With due respect to the orthopedic and psychiatric factors of disability, signifying losses from pre-injury capabilities, I believe Mr. Sandoval to possess sufficient residual abilities so as to be able to perform selected occupations that are classified as Sedentary, Semi-sedentary or Light work levels, and those which are Unskilled and Semi-Skilled in nature. This opinion applies to the orthopedic and psychiatric impairment separately as well as in combination."

Mr. Cohen further noted that despite applicant's functional limitations and subjective complaints, applicant reported to him that is able to independently perform all light activities of daily living including dress and grooming, shopping, light meal preparation and may take and pick up his grandchildren to school, take a walk, and converse with others in his neighborhood. (Defendant's Exhibit C, at pages 1, 18 – 20, 23 – 27)

In his 05/12/2017 report, Mr. Malmuth challenged Mr. Cohen's opinions, noted his review of Dr. Conrad's 03/08/3016 and 05/17/2016 reports and the 12/27/2015 report of Dr. Petrakis, opined applicant is not amenable to any form of vocational rehabilitation and that he has sustained a total loss in his capacity

to meet occupational demands, a total loss of labor market access and a total loss of future earnings capacity. With respect to the opinions of Dr. Conrad, Mr. Malmuth noted that applicant is also precluded from climbing ladders, kneeling, stooping, crouching, or crawling and applicant would need to alternate or change positions after 20 minutes of sitting and standing and after two hours of walking. As to the opinions of Dr. Petrakis, Mr. Malmuth stated that Dr. Petrakis determined applicant will be "off-task", meaning an inability to perform the activity and/or a reduction in productivity 20% or more over the course of an 8 hour work day when performing certain mental functions; Mr. Malmuth goes on to conclude that as a 20% reduction is equal to 1.6 hours, applicant will be unable to perform certain essential functions. Mr. Malmuth further concluded that from a vocational perspective the combination of applicant's functional limitations produce a synergistic effect that increases his overall disability. My review of this report reflects applicant was initially interviewed via Skype by a bilingual associate of Mr. Malmuth on 05/03/2016, then evaluated by another associate of Mr. Malmuth on 12/15/2016, then interviewed via Skype with Mr. Malmuth on 12/15/2016. (Applicant's Exhibit 2 at pages 1, 2, 3 – 5, 12, 13, 41-42, 48, 56)

In his 08/23/2017 report, Mr. Cohen responded to the opinions of Mr. Malmuth in his 05/12/2017 report and noted that his opinions remained unchanged. (Joint Exhibit B at pages 1, 3) In his 05/02/2018 report, Mr. Malmuth responds to the opinions of Mr. Cohen in his 08/23/2017. (Applicant's Exhibit 3) In his 02/28/2018 report, Mr. Cohen further opines that the job openings of assembler, packer, cashier/clerk, parking lot attendant, and quality control inspector are likely within applicant's post-injury medical capacity. (Defendant's Exhibit A at pages 1 – 5)

A permanent disability rating should reflect as accurately as possible an injured worker's diminished ability to compete in the open labor market and a scheduled rating can be rebutted by a rating derived from the opinions of vocational rehabilitation and labor market experts where such evidence more accurately describes a worker's diminished future earning capacity and ability to compete in the labor market. (*LeBoeuf v. Workers' Comp. Appeals Bd. (*1983) 34 Cal.3d 234 [48 Cal. Comp. Cases 587, 597]; *Gill v. Workers' Comp. Appeals Bd.* (1985) 167 Cal.App.3d 306 [50 Cal. Comp. Cases 258, 260].) (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1271 [76 Cal. Comp. Cases 624, 634])

Based on my review of the evidence at trial and the relevant law, I conclude that applicant has not rebutted the scheduled rating in this matter. Mr. Malmuth, who evaluated applicant at his request, has not given sufficient consideration to the opinions rendered by Dr. Conrad and Dr. Petrakis. Dr. Conrad concluded that applicant is able to walk moderate distances, should not walk distances greater than one-quarter mile before resting, exhibits poor sitting tolerance of about fifteen minutes and should sit after fifteen minutes of walking, is limited to light work which allows work in a standing and walking positions

with minimal demands for physical effort, and should not lift more than 20 pounds, or bend or stoop more than five times an hour. Dr. Conrad further opined that applicant is able to work eight hours per day, five days per week, in light of his functional limitations, that applicant should be able to work 40 hours per week, that he would have good and bad days and would lose periodic time from work in that he might miss one to two days per month but that might vary. Dr. Conrad also stated that applicant is able to work in a standing or walking position and although his sitting tolerance is somewhat poor he should be allowed sitting and standing at will in the future work place. Finally, when asked about application of Labor Code section 4662, Dr. Conrad opined that the outcome of disability as calculated is, in fact, reflected of Mr. Sandoval's functional losses and that in the final analysis, the levels of impairment which have been calculated using traditional methods accurately reflect this gentleman's functional loss. (Joint Exhibit 101 at pages 1, 11; Joint Exhibit 102 at pages 1 – 3; Joint Exhibit 103 at pages 1, 10; Joint Exhibit 105 at pages 1, 2) In his report dated 01/13/2016, Dr. Petrakis provided a mental residual functional capacity assessment noting applicant will be off task up to 20 percent of the day with mild to moderate impact on his understanding and memory, sustained concentration and persistence, social interaction, and adaptation. Specifically, Dr. Petrakis noted mild impact on applicant's ability to remember locations and work-like procedures, to understand and remember very short and simple instructions, to sustain an ordinary routine without special supervision, to work in coordination with or proximity to others without being distracted by them, to interact appropriately with the general public, to get along with coworkers or peers without distracting them or exhibiting behavioral extremes, to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness, to respond appropriately to changes in the work setting, and the ability to travel in unfamiliar places or use public transportation. Dr. Petrakis also noted no impairment on applicant's ability to carry out very short and simple instructions, to make simple work-related decisions, or to ask simple questions or request assistance. Dr. Petrakis noted no marked or extreme levels of impairment. (Joint Exhibit 107 at pages 1 – 2) Mr. Cohen determined applicant is amendable to rehabilitation and employable for selected occupations occurring for the sedentary, semi-sedentary and light work levels in jobs that are typically unskilled and semi-skilled in nature, including packer, cashier, electrical and electronic assembler, inspector, tester, sorter, sampler and weigher. (Defendant's Exhibit C, at pages 1, 23 – 27) Mr. Malmuth has not given sufficient consideration to the opinions rendered by Dr. Conrad and Dr. Petrakis or to the employment opportunities described by Mr. Cohen in his reporting in this matter. As such, I do not find Mr. Malmuth's opinions persuasive. Accordingly, based on my review of the evidence in this matter and the relevant law, I conclude that applicant has not rebutted the scheduled rating and find applicant's injury to his low back and psyche caused permanent partial disability of 69 percent, after adjustment for age and occupation and apportionment. "

DISCUSSION
APPLICANT'S CONTENTIONS

I

The Finding That Applicant's Injury to his Low Back and Psyche caused Permanent Partial Disability of 69 Percent is supported by the Evidence Received at Trial and the Relevant Law

Applicant claims that that I did not specifically address his claim that the opinions of Dr. Conrad and Dr. Petrakis do not support a finding of apportionment. Applicant's claim lacks merit. In order to constitute substantial medical evidence, a medical opinion must be predicated on reasonable medical probability. Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. *(E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten) (2006) 145 Cal. App. 4th 922, 928 [71 Cal Comp Cases 1687*].) Applicant does not allege that the apportionment opinions of Dr. Conrad or Dr. Petrakis are based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. Applicant does claim that Dr. Conrad and Dr. Petrakis do not provide the basis of their opinions of apportionment. That claim is not supported by the record.

Dr. Conrad and Dr. Petrakis are the parties' agreed medical evaluators as to applicant's orthopedic and psyche claims. Dr. Conrad met with the applicant and an interpreter for one hour on 02/12/2013 and an additional hour on 03/08/2016, reviewed applicant's deposition testimony of 01/11/2012, reviewed and summarized extensive medical records, and submitted four reports. In his report of 02/12/2013, Dr. Conrad noted his impressions that applicant had lumbar intervertebral disc protrusion at L4-L5 and L5-S1 with S1 radiculopathy and a status post lumbar foraminotomy 01/11/2012 with failed back surgery syndrome, found applicant permanent and stationary as of 02/12/2013 and opined as to permanent disability and apportionment as follows:

> "In the case of Mr. Sandoval, the DRE method could be considered. This gentleman has undergone lumbar spine surgery, but has not undergone a lumbar fusion. If the DRE method is used, he would then qualify for DRE III, which allows 10% to 13% WPI (Table 15-3, page 384). This gentleman should be allowed the maximum, which is 13% WPI. In this case, I do not recommend the DRE method, however. This gentleman has sustained a single injury, but there is multiple level disc involvement rather than single level disc involvement. Finally, the 13% WPI which is permitted by the AMA Guides does not accurately depict this gentleman's loss of function.

I asked Mr. Sandoval to complete an ADL Impact Form. He experiences difficulties bathing, defecating, dressing, brushing his teeth, eating, standing, sitting, stair climbing, reclining, lifting, riding and driving, as well as sexual dysfunction and sleep disorder. In order to achieve an accurate depiction of functional loss, it is reasonable to use the range of motion method. The reader is referred to the Range of Motion Chart. The reader will note 13% WPI on the basis of motion deficits alone. This is combined with Table 15-7, page 404. This gentleman has undergone surgery. He is eligible for IIE, which for the lumbar spine allows 10% WPI. I did not detect sensory loss. Using the Combined Values Chart, the combination of 13% and 10% allows 22% WPI. The final impairment then is 22% WPI for the lumbar spine. I am also allowed a 3% pain add-on or chronic pain. This gentleman does, in fact, experience continuous pain. The sum of 22% and 3% is 25% WPI. (See page 573) The final impairment then is 25% WPI. …

'In the case of Mr. Sandoval, there is a remote prior history of back pain, with pain referral into the left leg in approximately 1998. I do not have those records available for review, but the onset of pain occurred during work for the Sansei Gardens. He recovered fully, but the MRI scans of the lumbar spine in conjunction with the October 2010 injury do indicate intervertebral disc disease at L$-L5 and L-S1. These findings cannot be explained on the basis of the industrial injury at Ransome Company, but represent pre-existing pathology which should be considered in the analysis of apportionment since this pathology predisposes to disc herniation and impairs recovery. In the final analysis, however, absent the maneuver of 27 October 2010 at Ransome Company, I am unable to state with reasonable medical probability if Mr. Sandoval would have ever become symptomatic. For this reason, the lion's share of causation of disability is work related and secondary to the industrial injury. In my best judgment, for the lumbar spine, 90% is apportioned to the work related injury of 27 October 2010 and 10% is apportioned to pre-existing pathology." (Joint Exhibit 101 at pages 1, 11-14).

In his 03/08/2016 report, Dr. Conrad further opined as to permanent disability:

"The reader is referred to the range of motion chart for the lumbar spine. Motion deficits how indicate 16% WPI. This value is combined with Table 15-8. This gentleman is qualified for IIE which allows for 10% WPI. Sensory loss is also present in the left leg in the distribution of the S1 nerve root. The reader is referred to Table 15-18, page 424. The sensory loss is Grade IV at 25%. The maximum allowance is 5% WPI. Twenty-five percent of 5% is 1.25% which is

multiplied by 0.90% (see page 423) for 1% WPI. The impairment then using the range of motion method is the combination of 16%, 10% and 1% which allows 25% WPI. This gentleman is allowed a 3% pain add-on, which was permitted at my earlier evaluation, and the sum of 25 and 3 is 28. The impairment at this time, then, is 28% WPI. …

I have considered apportionment. I have done so with the understanding that Labor Code Section 4663 requires apportionment of permanent disability shall be based on causation. I have also studied for this issue with my understanding of the Escobedo decision as it explains Labor Code Section 4663 borne in mind. Even if not directly stated, all my apportionment opinions are given to a reasonable degree of medical probability. In reaching those conclusions, I have not engaged in guessing, speculation or surmise.

In approximately 1998, Mr. Sandoval experienced an episode of back pain while at work for a different employer, the Sansei Gardens. Conservative measures sufficed, however, and the symptoms resolved.

Mr. Sandoval then remained pain-free until 27 October 2010 when he experienced an abrupt onset of back pain with pain referral into the lower extremities as he attempted to remove a stake which was embedded in hardening concrete. The pain which he experienced was radicular with primary referral into the left leg and an MRI scan obtained which identified left protrusions at L$-L5 and L5-S1, Electrical studies demonstrated denervation at the distribution of S1 on the left side and the current physical findings demonstrate denervation which is specific to the S1 dermatome on the left leg.

Mr. Sandoval failed conservative treatment, but the operation of 6 June 2011 failed to alleviate his pain. I do note that Dr. Grant performed decompression surgery and did not include a fusion in the surgery of 6 June 2011. At my evaluation of 12 February 2013, he was MMI for the lumbar spine with 25% WPI on the basis of motion deficits and the pain add-on. At the current evaluation, Mr. Sandoval exhibits further decreases in range of motion so that the current level of impairment calculates to 25% WPI on the basis of motion deficits and with 3% pain add-on, the impairment becomes 28% WPI.

The cause of this gentleman's lumbar spine condition, then, is the injury of 27 October 2010 and the apportionment at this point is the same as discussed on 12 February 2013 with 10% causation related to preexisting pathology and 90% causation secondary to the injury of 27 October 2010 without basis for additional apportionment." (Joint Exhibit 103 at pages 1, 11 - 12).

Dr. Petrakis evaluated applicant, with an interpreter, for two and one-half hours on 04/21/2014, reviewed applicant's deposition testimony of 01/11/2012, medical records and psychological testing, and submitted reports dated

06/09/2014 and 01/13/2016. In his 06/09/2014 report, Dr. Petrakis opined applicant sustained an industrial psyche injury, found applicant permanent and stationary, provided a GAF of 55 and after noting applicant's wife suffers from diabetes, that it is under control, but that he worries about his wife's health because he counts on her, opined as to apportionment of ten percent as follows:

> "I believe there are grounds for apportionment. The applicant does express concerns and worry over his wife's health. This is ongoing. I would apportion 10% of Applicant's overall psychiatric disability to this concurrent psychiatric dynamic". (Joint Exhibit 106, at pages 1, 7, and 11 -12)

Based on the foregoing, I remain persuaded that based on the evidence at trial and the relevant law, the reports and opinions of Dr. Conrad and Dr. Petrakis, including their opinions as to apportionment, constitute substantial medical evidence and that their opinions justify the permanent disability stipulated to by the parties as to the impairment caused by applicant's injury to his low back and psyche, 69% after apportionment.

Applicant further claims that I did not address limitations opined to by Dr. Conrad and Dr. Petrakis and that the reports of his vocational rehabilitation expert, Jeff Malmuth do not reflect his opinion that of 78 percent post injury diminished labor market and do support a finding of permanent total disability. Applicant's claim is not supported by the record.

In my First Amended Findings and Award and Opinion on Decision, I state that in his report dated 10/27/2015, Mr. Malmuth noted his review of Dr. Conrad's 02/12/2013 report and Dr. Petrakis's report dated 06/09/2014, and opined applicant will experience a 74% diminished occupational capacity and a 78% diminished labor market; he further stated that as there is no meaningful distinction between loss of future earning capacity and inability to complete in the open labor market, applicant will experience an estimated 78% post injury diminished labor market. (Applicant's Exhibit 1 at pages 1, 11) My First Amended Findings and Award and Opinion on Decision further reflects that in his 05/12/2017 report, Mr. Malmuth noted his review of Dr. Conrad's 03/08/3016 and 05/17/2016 reports and the 12/27/2015 report of Dr. Petrakis, opined applicant is not amenable to any form of vocational rehabilitation, and that he has sustained a total loss in his capacity to meet occupational demands, a total loss of labor market access and a total loss of future earnings capacity. (Applicant's Exhibit 2 at pages 1, 2, 3 – 5, 12, 13, 41-42, 48, 56)

Insofar as applicant claims that I did not address limitations opined to by Dr. Conrad and Dr. Petrakis and that the reports of his vocational rehabilitation expert, Jeff Malmuth support a finding of permanent total disability, those claim lack merit. After reviewing the testimony and evidence at trial, including the opinions of Dr. Conrad and Dr. Petrakis as to work restrictions, Dr. Conrad's

opinion as to Labor Code section 4662, Dr. Petrakis's mental residual functional capacity assessment, the reports and opinions of Mr. Malmuth and Mr. Cohen, and the relevant law, I opined in my Opinion on Decision as follows:

"Based on my review of the evidence at trial and the relevant law, I conclude that applicant has not rebutted the scheduled rating in this matter. Mr. Malmuth, who evaluated applicant at his request, has not given sufficient consideration to the opinions rendered by Dr. Conrad and Dr. Petrakis. Dr. Conrad concluded that applicant is able to walk moderate distances, should not walk distances greater than one-quarter mile before resting, exhibits poor sitting tolerance of about fifteen minutes and should sit after fifteen minutes of walking, is limited to light work which allows work in a standing and walking positions with minimal demands for physical effort, and should not lift more than 20 pounds, or bend or stoop more than five times an hour. Dr. Conrad further opined that applicant is able to work eight hours per day, five days per week, in light of his functional limitations, that applicant should be able to work 40 hours per week, that he would have good and bad days and would lose periodic time from work in that he might miss one to two days per month but that might vary. Dr. Conrad also stated that applicant is able to work in a standing or walking position and although his sitting tolerance is somewhat poor he should be allowed sitting and standing at will in the future work place. Finally, when asked about application of Labor Code section 4662, Dr. Conrad opined that the outcome of disability as calculated is, in fact, reflected of Mr. Sandoval's functional losses and that in the final analysis, the levels of impairment which have been calculated using traditional methods accurately reflect this gentleman's functional loss. (Joint Exhibit 101 at pages 1, 11; Joint Exhibit 102 at pages 1 – 3; Joint Exhibit 103 at pages 1, 10; Joint Exhibit 105 at pages 1, 2) In his report dated 01/13/2016, Dr. Petrakis provided a mental residual functional capacity assessment noting applicant will be off task up to 20 percent of the day with mild to moderate impact on his understanding and memory, sustained concentration and persistence, social interaction, and adaptation. Specifically, Dr. Petrakis noted mild impact on applicant's ability to remember locations and work-like procedures, to understand and remember very short and simple instructions, to sustain an ordinary routine without special supervision, to work in coordination with or proximity to others without being distracted by them, to interact appropriately with the general public, to get along with coworkers or peers without distracting them or exhibiting behavioral extremes, to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness, to respond appropriately to changes in the work setting, and the ability to travel in unfamiliar places or use public transportation. Dr. Petrakis also noted no impairment on applicant's ability to carry out very short and simple instructions, to make simple work-related decisions, or to ask simple questions or request assistance. Dr. Petrakis noted no marked or extreme levels of impairment. (Joint Exhibit 107 at pages 1 – 2) Mr. Cohen determined applicant is amendable to rehabilitation and employable for selected occupations occurring for the sedentary, semi-sedentary and light work levels in jobs that are

typically unskilled and semi-skilled in nature, including packer, cashier, electrical and electronic assembler, inspector, tester, sorter, sampler and weigher. (Defendant's Exhibit C, at pages 1, 23 – 27) Mr. Malmuth has not given sufficient consideration to the opinions rendered by Dr. Conrad and Dr. Petrakis or to the employment opportunities described by Mr. Cohen in his reporting in this matter. As such, I do not find Mr. Malmuth's opinions persuasive. Accordingly, based on my review of the evidence in this matter and the relevant law, I conclude that applicant has not rebutted the scheduled rating and find applicant's injury to his low back and psyche caused permanent partial disability of 69 percent, after adjustment for age and occupation and apportionment. "

Based on the foregoing, I remain persuaded that based on the evidence at trial and the relevant law, applicant has not rebutted the scheduled rating and that applicant's injury to his low back and psyche caused permanent partial disability of 69 percent, after adjustment for age and occupation and apportionment.

RECOMMENDATION

For the foregoing reasons, I recommend that applicant Paulin Sandoval's Petition for Reconsideration, filed 04/20/2020, be DENIED.

DATE: 04/28/2020
Terri Ellen Gordon
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE