WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CHRISTINA HIRSCH, ***Applicant***

vs.

PHYSICIANS FOR HEALTHY HOSPITALS;
ARCH INSURANCE COMPANY HEALTHCARE, INC., ***Defendants***

Adjudication Number: ADJ12933120
Riverside District Office

OPINION AND ORDERS DISMISSING PETITION FOR REMOVAL AND DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the December 30, 2022 Findings and Award with Order (F&A), wherein the workers' compensation administrative law judge (WCJ) found applicant to be permanently and totally disabled, without apportionment.

Defendant contends the closure of discovery abrogated its due process rights, that the reporting of applicant's vocational expert is not substantial evidence for failure to consider apportionment, and that the WCJ did not adequately address apportionment. Defendant further contends the WCJ erred in adding the disabilities arising out of applicant's orthopedic and internal medicine injuries, rather than combining them.

Defendant also seeks removal of the WCJ's order of October 26, 2022 closing discovery and setting the matter for trial. Defendant contends that it was denied due process by the closure of discovery.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed in the WCJ's Report, which we adopt and incorporate as the decision of the Workers' Compensation Appeals Board (WCAB), and for the reasons discussed below, we will affirm the F&A. As the basis for

applicant's Petition for Removal was superseded by the WCJ's Report and Recommendation on Petition for Reconsideration, we will also dismiss the Petition for Removal as moot.

BACKGROUND

Applicant claimed injury to her right thumb, skin, upper extremities, lower extremities, psyche, sleep and nervous system while employed as a nurse by defendant Physicians for Healthy Hospitals on February 26, 2019. Applicant was injured while shaving a patient. Defendant admits injury to the right thumb only and disputes injury to all other body parts.

On February 26, 2019, applicant needed to perform an EKG test on a patient, requiring that she shave the patient's chest to attach the EKG pads. (Minutes of Hearing and Summary of Evidence (Minutes), dated November 28, 2022, at 7:26; Ex. 1, report of QME Lawrence Miller, M.D., dated January 8, 2021, at p. 2.) Applicant sustained a deep laceration to the right thumb. Applicant sought wound care for the laceration, and was treated with stitches and silver nitrate, which in turn caused a burn to the wound area. (*Ibid.*) The wound did not heal, and following several additional trips to Urgent Care, the wound area was debrided. (*Id*. at 8:13.) An abscess developed, requiring applicant to seek medical attention from the emergency department, at which time she received the antibiotic medication Bactrim. Applicant developed a serious allergic response to the medication, including a painful, itchy rash, and a persistent chemical burning sensation that interfered with her ability to sleep, and resulted in extreme skin sensitivity, even to her own clothing. (*Id*. at 8:32.)

Applicant sought treatment with Eric Chang, M.D., in pain management. (Exhibits 13-33.) Dr. Chang diagnosed Complex Regional Pain Syndrome (CRPS) on the first or second visit, and further diagnosed fibromyalgia and neuropathy. (Minutes, at 9:6.)

Qualified Medical Evaluator (QME) Kenneth Nudleman, M.D. evaluated applicant in neurology, and diagnosed small fiber neuropathy and fasciitis. (Minutes, at 10:4.) QME Lawrence Miller, M.D. evaluated applicant in the field of pain management. (*Id.* at 10:7.) Dr. Miller diagnosed allergic dermatitis, somatic symptom disorder, a pain disorder associated with psychological factors and iatrogenic opioid use. (Ex. 1, report of Lawrence Miller, M.D. dated January 8, 2021, at p. 54.)

QME Howard Sofen, M.D., evaluated applicant in dermatology, and diagnosed allergic dermatitis secondary to a Bactrim reaction, secondary to cellulitis, and secondary to a work related laceration. (Ex. 8, report of QME Howard Sofen, M.D., dated August 28, 2020, at p. 9.)

QME Daniel King, Psy.D., also evaluated applicant in psychology, identifying a major depressive disorder and an anxiety disorder, both with industrial causation and predominance. (Ex. 34, report of Daniel King, M. D. dated December 28, 2020, at p. 52.)

Vocational experts Michael Bonneau and Kelly Winn have evaluated applicant's feasibility for a reentry into the labor market.

The parties proceeded to Mandatory Settlement Conference on October 26, 2022, at which time the WCJ ordered the closure of discovery and set the matter for trial over defense objection. (Minutes of Hearing, dated May 26, 2022.)

On November 22, 2022, defendant filed a Petition for Removal, averring the closure of discovery abrogated its right to due process because applicant declined to attend the October 11, 2022 evaluation by defense vocational expert Kelly Winn. (Petition for Removal, dated November 22, 2022, at 2:17.)

On November 28, 2022, applicant filed an Answer to the Petition for Removal, averring defendant's petition was untimely, and that defendant failed to timely object to applicant's Declaration of Readiness to Proceed. (Answer to Petition for Removal, dated November 28, 2022, at 5:24.)

On November 29, 2022, the parties proceeded to trial, framing issues of permanent disability, apportionment, the need for further medical treatment and attorney fees. (Minutes, at 2:41.) Applicant testified under direct and cross-examination, and the WCJ took the matter under submission.

On December 6, 2022, the WCJ filed his Report and Recommendation on Petition for Removal, averring defendant's petition was untimely, and that at trial, the court marked for identification the report of defendant's vocational expert Ms. Winn, and that the issue of admissibility was currently pending. (Report and Recommendation on Petition for Removal, dated December 6, 2022, at pp. 4-5.)

On December 30, 2022, the WCJ issued his F&A, admitting the defense vocational report of Ms. Winn over applicant's objection. The WCJ further determined in relevant part that applicant

was 100% permanently and totally disabled, without apportionment. (F&A, Findings of Fact No.6, 7.)

Defendant's Petition for Reconsideration contends the WCJ erred in closing discovery and setting the matter for trial. (Petition for Reconsideration, dated January 23, 2023, at 4:24.) Defendant also contends that applicant's vocational expert "fails to adequately incorporate apportionment and did not explain why the non-industrial apportionment in the medical reporting would not be applied to the vocational report," and that the WCJ "erred in not finding apportionment as Dr. Miller's analysis adequately supports apportionment." (*Id*. at 9:1.) Defendant further contends the various percentages of disabilities should be combined, rather than added. (*Id*. at 10:11.)

Applicant's Answer to Petition for Reconsideration observes that pain management QME Dr. Miller has opined that applicant's disability in this matter arises out of her industrial medical treatment, and that pursuant to *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679], apportionment is inapplicable. The Answer notes that treating physician Dr. Chang and applicant's vocational expert Mr. Bonneau concur with Dr. Miller's opinion. (Answer to Petition for Reconsideration, dated January 27, 2023, at 3:2.)

The WCJ's Report and Recommendation on Petition for Reconsideration observes:

> The court relied on the reporting of Drs. Chang and Miller, the pain management doctors. Neither doctor assigned any psych impairment or nonindustrial apportionment. They both found applicant permanently totally disabled and applied *Hikida*. Dr. Miller's analysis of apportionment and *Hikida* was fully discussed in his deposition. (Deposition of Dr. Miller, Volume 2, dated 5/10/22, Exhibit 7.) Moreover, Defendant did not rebut these doctors' findings. (Report, at p. 4.)

DISCUSSION

Applicant has the initial burden of establishing an industrial injury by a preponderance of the evidence. (Lab. Code §§3202.5, 5705; *McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 416 [445 P.2d 313, 71 Cal. Rptr. 697] [33 Cal.Comp.Cases 660].) Additionally, applicant has the burden of proving, by a preponderance of the evidence, both the overall level of permanent disability and that at least some of this permanent disability was industrially-caused. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Bd. en banc).

Here, we concur with the WCJ's analysis as set forth in his Opinion on Decision, which describes in detail how the medical record addresses and supports causation of the industrial injury, and the overall level of permanent disability:

> Applicant's primary treating physician in pain management is Eric Chang, M.D., who found applicant [had sustained] permanently totally disability. Dr. Chang stated "patient has not made any recovery and is not able to return to work. At this time there is complete loss of preinjury work capacity. The patient is considered permanently totally disabled." (PTP report of Dr. Chang dated 6/29/21, Exhibit 14, pp. 5-6.) Dr. Chang was deposed on July 15, 2022, and he made additional findings to his previous reporting. Dr. Chang concluded that the applicant having all three-industrial diagnosis of chronic pain syndrome, CRPS, and small fiber neuropathy was massive, and just one of these diagnoses was enough to make someone unemployable. (Deposition of Dr. Chang dated 7/15/22, Exhibit 33, pp. 20-22.) Dr. Chang testified that applicant's prognosis is very poor. (Id., at 27.) As to AMA Guides Impairment, he found the Chronic Pain section was more accurate and gave 30% whole person impairment for the right upper extremity, 20% whole person impairment for the left upper extremity, and 19% whole person for the gait. (*Id*., pp. 5-8.) Dr. Chang also found no apportionment based on the case of *Hikida v. WCAB* (2017) 12 Cal App. 5th 1249. (*Id*., at 10-11, 24-25, and 34-35.) Dr. Chang agreed with the findings of Lawrence Miller, M.D., the panel Qualified Medical Evaluator ("QME") in the specialty of pain medicine.
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> Dr. Miller found applicant unable to resume work as a registered nurse or compete in any significant capacity in the open labor market. (QME report by Dr. Miller dated 7/23/21, Exhibit 4, p. 13.) Dr. Miller was deposed on May 10, 2022, and he opined applicant "was in miserable continuous neuropathic pain, she is distracted by the pain. You have continuous nagging. It could be just more than just nagging, but you have continuous pain that's going to limit your functions, because this pain becomes the center of, the attention of your life." (Deposition of Dr. Miller date 5/10/2022, Exhibit 7, pp. 27-28.) Dr. Miller also utilized the chronic pain section of the AMA Guides and found 30% for the right upper extremity, 20% for the left upper extremity, and 19% for the lower extremities. (*Id.*, pages 32-35.) Dr. Miller concluded applicant was permanently totaled disabled, and he said she is unable to return to work. (*Id.*, at 37:5-8; 48:3-4.) Dr. Miller also utilized the *Kite* case for the most accurate form of disability and added his pain management impairments to the dermatological impairments outlined by Howard Sofen, M.D., the QME in dermatology. (*Id.*, at 40:6-14.) Dr. Miller also found no apportionment based on the *Hikida* decision. (Id, at 49:7-12.)
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> Applicant was also seen and evaluated by Daniel King, M.D., as the QME in psychology. He opined the predominate (sic) cause of the development of

> applicant's psychiatric injury was the allergic dermatitis. (QME report by Dr. King dated 2/20/2021, Exhibit 35, p. 10.)
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> Applicant was seen and evaluated by Howard Sofen, M.D., as the QME in dermatology. In his report dated August 28, 2020, Dr. Sofen concluded applicant's dermatological condition was completely industrially related and precluded applicant from heat sources and sun exposure. (QME report by Dr. Sofen dated August 28, 2020, Exhibit 8, p. 10.) (Opinion on Decision, dated December 30, 2022, at p. 3.)

We agree that the medical record supports a finding of industrial causation, and that applicant's disability is both permanent and total. We therefore affirm the WCJ's determination of 100% permanent and total disability. (Findings of Fact No. 6.)

While the employee holds the burden of proof regarding the approximate percentage of permanent disability directly caused by the industrial injury, the employer holds the burden of proof to show apportionment of permanent disability. (*Lab. Code, § 5705; 2 see also Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 613 (Appeals Board en banc); *Pullman Kellogg v. Workers' Comp. Appeals Bd. (Normand)* (1980) 26 Cal.3d 450 [45 Cal.Comp.Cases 170].) To meet this burden, the employer "must demonstrate that, based upon reasonable medical probability, there is a legal basis for apportionment." (*Gay v. Workers' Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555, 564 [44 Cal.Comp.Cases 817]; see also *Escobedo, supra*, 70 Cal.Comp.Cases at p. 620.)

"Apportionment is a factual matter for the appeals board to determine based upon all the evidence." (*Gay, supra*, 96 Cal.App.3d at p. 564.) Thus, the WCJ has the authority to determine the appropriate amount of apportionment, if any. It is also well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Therefore, the WCJ must determine if the medical opinions regarding apportionment constitute substantial evidence. (See *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358].)

In *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679], the Court of Appeal held that the employee was entitled to a permanent disability award without apportionment where her disability was due entirely to a new condition, chronic regional

pain syndrome (CRPS), that she developed as a result of failed carpal tunnel surgery. The court reasoned that legislative reforms to California's apportionment scheme had not changed the longstanding principle that medical treatment for an industrial injury is not subject to apportionment. (*Id*. at 1261.) Thus, where medical treatment that is not subject to apportionment results in additional disability, the resulting disability is also not subject to apportionment. The court in *Hikida* reasoned:

> Here, there is no dispute that the disabling carpal tunnel syndrome from which petitioner suffered was largely the result of her many years of clerical employment with [applicant's employer] Costco. It followed that Costco was required to provide medical treatment to resolve the problem, without apportionment. The surgery went badly, leaving appellant with a far more disabling condition—CRPS—that will never be alleviated. California workers' compensation law relieves Costco of liability for any negligence in the provision of the medical treatment that led to petitioner's CRPS. It does not relieve Costco of the obligation to compensate petitioner for this disability without apportionment. (*Id*. at 1262.)

We find the decision in *Hikida* directly relevant to the present matter. Here, applicant originally sustained injury to her right thumb, and the treatment for that injury directly precipitated a significant adverse reaction. Primary Treating Physician Eric Chang, M.D., testified:

Q. And on page two of that permanent stationary report that you did, Dr. Chang, the mechanism of the injury was Christina injured herself when she sliced her right thumb at work with her razor; correct?
A. That's correct.
Q. And then they originally treated the thumb wound with silver nitrate; correct?
A. That's correct.
Q. Okay. And then that caused the burn, so then they had to treat the burn with Bactrim; is that correct?
A. That is correct.
Q. And Bactrim is an antibiotic; is that correct?
A. That's correct, used to treat cuts.
Q. And you noted that subsequent to using the antibiotic, that she developed rashes, severe pain, and burning all over her body; correct?
A. Right, as a sequela.
Q. And she described that pain to you as electric type of pain; is that correct?
A. A lot of description words. I think it's -- I can read from the initial. But electric is one of the words she used.
Q. What other words would you use to describe it?
A. So the words that she used: Burning, electrocuted, aching, itching. Those four words. So very neuropathic description of her pain complaints, actually, rather than a nociceptive dull, achy.

Q. Gotcha. So an intense type of pain. You would agree with that; right?
A. That's correct.
Q. Doctor, would you agree with me that a medication that results in rashes, severe pain, burning all over one's body as a sequela was not a successful form of medical treatment?
…
A. It's just -- it didn't reach its ultimate goal, which is just curing infection, getting her back to work.
BY MR. GILLIAM:
Q. And it caused new issues; correct?
A. That's correct.
Q. Okay. So obviously, that medication is a failed form of medical treatment by creating those new conditions that you just testified to; correct?
A. That's correct.
(Ex. 33, transcript of the deposition of Eric Y. Chang, M.D., at 9:13.)

Similarly, pain management QME Dr. Miller testified that applicant's medical treatment in the form of the administration of Bactrim caused applicant's allergic dermatitis, which in turn precipitated applicant's pain syndrome. (Ex. 7, transcript of the deposition of Lawrence Miller, M.D., dated May 10, 2022, at 21:8.)

Both Dr. Chang and Dr. Miller have testified that the sequelae of applicant's industrial medical treatment are *solely causative* of her allergic dermatitis and subsequent CRPS, resulting in applicant's permanent and total disability. Just as in *Hikida*, because the medical treatment is not subject to apportionment, so too is the sequelae of the industrial medical treatment. Under these facts, the employer is responsible for both the medical treatment and any disability arising directly from unsuccessful medical intervention, without apportionment." (*Hikida*, *supra*, 12 Cal.App.5th 1249, 1260.) We therefore agree with the WCJ's determination that applicant's award of permanent and total disability is not subject to apportionment.

Defendant next contends that applicant's vocational expert Mr. Bonneau fails to address the nonindustrial apportionment identified by psychology QME Dr. King and pain management QME Dr. Miller. (Petition for Reconsideration, dated January 23, 2023, at 6:9.) However, as the Answer observes, the reporting of Dr. King was not among the reports cited by the WCJ in reaching his determination of permanent and total disability. (Report, at p. 4; Answer to Petition for Reconsideration, dated January 27, 2023 at 3:21.) Moreover, Mr. Bonneau relies upon the opinions of Dr. Miller, including his application of the *Hikida* analysis to the issue of apportionment. (Report, at p. 4; Ex. 47, report of Michael Bonneau, dated July 1, 2022, at pp. 7-

15.) We are therefore not persuaded that applicant's vocational evidence fails to consider the applicable evidence of apportionment.

Defendant next contends that Dr. Miller erred when he opined that applicant's pain and dermatological impairments should be added rather than combined. In *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 (writ den.), we held that adding, rather than combining, two different impairments better reflected a worker's impairment when substantial medical evidence supported the notion that the two impairments had a synergistic effect where, in effect, the resultant impairment was more than the sum of the two impairments. Defendant contends that Dr. Miller failed to adequately explain why the additive approach disability was a more accurate description of applicant's disability than the combinative approach. (Petition for Reconsideration, date January 23, 2023, at 9:10.) However, Dr. Miller's deposition testimony explains that applicant's disability is "more than a disfiguring rash," and that the combination of applicant's mood, sleep, fatigue and impaired function act in a synergistic fashion to produce more disability than each of the impairments separately. (Ex. 7, transcript of the deposition of Lawrence Miller, M.D., dated May 10, 2022, at pp. 40-41.) We therefore discern no error in the QME's assessment that the additive approach would provide the most accurate assessment of applicant's disability because of the synergistic effect of her multiple industrial conditions.

Defendant next contends that the WCJ failed to adequately explain why the reporting of applicant's vocational expert Mr. Bonneau is more persuasive than defendant's expert Ms. Winn. (Petition for Reconsideration, dated January 23, 2023, at 11:18.) We observe, however, that because the record establishes applicant's permanent and total disability without the need to consider vocational evidence, the issue is moot. Even were this not the case, we note that Mr. Bonneau's reports dated October 31, 2021 and July 1, 2022 reviewed the relevant medical and medical-legal record, including the May 10, 2022 deposition of QME Dr. Miller. Additionally, Mr. Bonneau offered a comprehensive vocational and medical history of the applicant, and appropriately analyzed the totality of applicant's work restrictions and other conditions affecting her ability to reenter the labor market. (Ex. 39, report of Michael Bonneau, dated October 31, 2021, at p. 12.) Mr. Bonneau concluded that applicant's "sleep problems due to pain, her issues with memory and concentration along with the limitations in activities of daily living, the painful rashes that occur with contact with clothes, water when showering, sitting at a desk and using a computer,

it is highly unlikely based on a reasonable degree of vocational certainty she would be amenable to rehabilitation." (*Id*. at pp. 15-16.) Following a review of the May 10, 2022 deposition of QME Dr. Miller, Mr. Bonneau confirmed that from a vocational standpoint, "the symptoms and effects on Ms. Hirsch's activities of daily living from the sequel of her industrial injury and with the opinions of Dr. Miller's in his deposition confirms my opinion of non[-]amenability to rehabilitation." (Ex. 47, report of Michael Bonneau, dated July 1, 2022, at p. 7.) We also observe that defendant's vocational expert Ms. Winn was not provided with the transcript of Dr. Miller's May 10, 2022 deposition, or that of Dr. Sofen, dated May 13, 2021. (See Ex. C, report of Kelly Winn, dated November 14, 2022, at p. 25.) Accordingly, the reporting of Ms. Winn is not substantial evidence because it reaches an opinion that applicant can be retrained to enter the labor market based on an incomplete review of the medical record. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [83 Cal. Rptr. 208, 463 P.2d 432, 35 Cal.Comp.Cases 16].)

In summary, we conclude that the record supports the WCJ's determination that applicant has sustained permanent and total disability arising out of the industrial medical treatment she received following her admitted injury. We concur with the WCJ that under the principles espoused in *Hikida*, *supra*, 12 Cal.App.5th at 1260, applicant's disability is not subject to apportionment. Additionally, we agree with the WCJ that Dr. Miller appropriately explicated the rationale for adding, rather than combing, applicant's pain and dermatology-related impairments pursuant to the analysis in *Kite, supra*, 78 Cal.Comp.Cases 213. We also agree that the reporting of applicant's vocational expert, which reviews the deposition testimony of QME Dr. Miller and QME Dr. Sofen, is the more convincing and persuasive.

Accordingly, we will affirm the WCJ's determination and will deny defendant's Petition for Reconsideration. We will also dismiss the Petition for Removal as moot.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal, filed November 22, 2022, is **DISMISSED**.

IT IS FURTHER ORDERED that the Correct Amended Petition for Reconsideration, filed January 23, 2023, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 9, 2023

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

CHRISTINA HIRSCH
BENTLEY & MORE
BOLEN & ASSOCIATES

SAR/abs

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

Date of Injury	2/26/2019
Age on DOI	49
Occupation	Nurse
Parts of Body Injured	Thumb and other conditions (accepted)
Identity of Petitioner	Defendant (Petitioner)
Type of Petition	Petition for Reconsideration
Timeliness	The petition was filed on 1/20/2023 *amended twice on 1*/23/23
Verification	The petition was verified
Date of Order	October 26, 2022, served October 27, 2022
First Petitioner's Contentions	Petitioner contends the WCJ erred by: A. Issuing the decision finding applicant is 100% disabled.

Petitioner, Defendant, by and through his attorney of record, attorney Ryan Stander, California State Bar #277715, from Bolen & Associates, has filed a verified Petition for Reconsideration on January 20, 2023, an Amended Petition and Correct Amended Petition on January 23, 2023, challenging the decision dated December 30, 2022, finding applicant is permanently totally disabled. Trial was held on November 29, 2022 and submitted after applicant's testimony.

Petitioner contends the case should not have been set for trial because defendant still has outstanding discovery of a defense vocational expert evaluation, and the order setting the matter for trial would result in significant prejudice and irreparable harm. This contention was raised in Petitioner's untimely Petition for Removal, which is still pending with the Workers' Compensation Appeals Board.

Respondent, applicant, by and through her attorney of record, filed a verified Answer to the Correct Amended Petition for reconsideration January 27, 2023, highlighting the fact that the Correct Amended Petition contained seven material misrepresentations and reconsideration should be denied. Respondent also requests sanctions and attorney's fees pursuant to Labor Code section 5813, which the undersigned concurs. Respondent's request of five hours is reasonable but should

be at the reduced hourly rate of $400. Sanctions should also be imposed as discussed in the Conclusion section below.

It is recommended that the petition for reconsideration be denied.

II
FACTS AND PROCEDURAL HISTORY

Applicant filed an application for adjudication of claim for an injury to her right thumb, skin, upper extremities, psyche and sleep from a razor laceration that occurred on February 26, 2019. According to the parties' submitted pre-trial conference statement ("PTCS"), the injury, parts and conditions were accepted. The PTCS also stated in computer-typed form under section 2 of the Stipulations that the carrier was "Arch Insurance Company Healthcare, Inc." (PTCS, p. 2; EAMS ID 43731746.)

According to Petitioner's Correct Amended Petition for Reconsideration, the following facts are undisputed. Applicant's right thumb cut was treated with silver nitrate and Bactrim. Applicant had an allergic dermatitis reaction to Bactrim, and applicant was examined by panel qualified medical examiners Dr. Howard Sofen in Dermatology; Dr. Lawrence Miller in Pain Management; and Dr. Daniel King in Psychology. (Correct amended Petition for Reconsideration dated 1/23/23, p 2.) Applicant was also evaluated by vocational experts, Mr. Michael Bonneau and Ms. Kelly Winn, virtually and forensically, respectively.

The MSC was held before Judge Yee on October 26, 2022, and the case advanced to trial, but allowed the trial judge's discretion to develop the record. Defendant objected to this trial setting and filed an untimely Petition for Removal on November 22, 2022. Trial proceeded on November 29, 2022, and the matter submitted on the same day after applicant's testimony. Defendant had requested to submit a post-trial brief, so the court allowed them; however, only applicant's attorney filed one.

The court issued the decision on December 30, 2022, finding the applicant is permanently totally disabled and denied defendant's request for additional discovery. On January 20, 2023, Petitioner filed their Petition for Reconsideration, an amended and then the Correct Amended Petition for Reconsideration on January 23, 2023. Respondent filed an Answer on January 27, 2023.

III
DISCUSSION

Petitioner's first issue according to page one of the Correct Amended Petition for Reconsideration is: "The evidence does not justify the findings of fact. 2." (Correct amended Petition for Reconsideration 1/23/23, p. 1:24.) This Finding number 2 states "the employer's workers' compensation carrier was Arch Insurance Company Healthcare, Inc." Petitioner does not provide any supporting evidence to the contrary, failed to clearly state or provide the actual carrier's name if incorrect, or how the finding was derived; this finding was taken directly from the parties' stipulations within the PTCS which clearly stated the carrier was "Arch Insurance Company Healthcare, Inc." (PTCS, p. 2; EAMS ID 43731746.) Moreover, during trial, the parties acknowledged the stipulations were accurately read into the record except for defendant's oral argument contesting a joint stipulation which the Summary of Evidence notated. (SOE Trial 11/29/22, p. 2:14-26.)

Petitioner continues to argue that the case should not have proceeded to trial. (Correct Amended Petition for Reconsideration 1/23/23, pp. 4-5.) The court highlights that this issue was the subject of Petitioner's untimely filed Petition for Removal, currently pending with the Workers' Compensation Appeals Board or indirectly denied. The court had recommended denial of the removal.

Petitioner's arguments continue with various excerpts from the record; however, as Respondent's Answer highlighted, the arguments were not supported by the evidence or the excerpts were misrepresented. Petitioner asserts the vocational reporting from Mr. Bonneau did not adequately address apportionment and references the panel QME report dated July 26, 2021 by Dr. King, and Dr. Miller's pQME report dated July 23, 2021. Petitioner adds that there should have been apportionment based on Dr. Miller's opinions. To the contrary, Mr. Bonneau did review and incorporated Dr. Miller's deposition in his reporting as to permanent total disability and no apportionment. (VE Supplemental Report by Ms. Bonneau dated 7/1/22, Exhibit 47, pp. 7-15.) And Mr. Bonneau concluded that applicant was not amenable to rehabilitation.

The court disagrees with Petitioner's premises that there lack substantial evidence for the court to rely upon and render the decision. The court relied on the reporting of Drs. Chang and Miller, the pain management doctors. Neither doctor assigned any psych impairment or nonindustrial apportionment. They both found applicant permanently totally disabled and applied

Hikida. Dr. Miller's analysis of apportionment and *Hikida* was fully discussed in his deposition. (Deposition of Dr. Miller, Volume 2, dated 5/10/22, Exhibit 7.) Moreover, Defendant did not rebut these doctors' findings.

IV
RECOMMENDATION

It is respectfully recommended that Defendant's Correct Amended Petition for Reconsideration be denied. The court further respectfully requests the Board to consider further action of sanctions and Respondent's attorney's fees against defendant and/or defense counsel based on the following coupled with Respondent's Answer highlighting Petitioner's seven misrepresentation. Defense counsel's actions have been less than reasonable to date. Defendant's numerous errors and misrepresentations have become systematic, and it is now apparent the sole purpose was to intentionally delay this case in bad faith. Such actions need to stop. 1. He did not timely secure a vocational expert until the matter was close to the mandatory settlement conference; 2. He had filed an untimely objection to the DOR; 3. He filed an untimely Petition for Removal; 4. He orally objected to the stipulation which the parties had accepted all parts of the body and condition; 5. He now states in the Petition for Reconsideration that the carrier is not Arch Insurance Company Healthcare, Inc.; 6. At the close of trial, he requested to submit a post-trial brief but did not; and, 7. He filed a Petition for Reconsideration, an Amended Petition for Reconsideration and then a Correct Amended Petition for Reconsideration with misrepresented facts with the intention to mislead the tribunal.

Dated: 02/03/2023

ERIC YEE
Workers' Compensation
Administrative Law Judge