

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

JAMES GUNDERSON, *Applicant*

vs.

COUNTY OF KERN, Permissibly Self-Insured, *Defendants*

**Adjudication Number: ADJ9727055
Bakersfield District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration filed on July 5, 2023, and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Opinion on Decision and Report and Recommendation, both of which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 5, 2023

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

**JAMES GUNDERSON
KAMPF SCHIAVONE & ASSOCIATES
OFFICE OF COUNTY COUNCIL**

DM/oo

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

Report and Recommendation on Petition for Reconsideration

I. Introduction: Applicant James Gunderson, then 60 years of age, sustained a specific industrial injury to his lumbar spine, thoracic spine, cervical spine, right shoulder and head when he slipped and fell on a staircase while employed on March 14, 2014 in Bakersfield, California, as a Senior Information Systems Specialist (Occupational Group 470) by Defendant County of Kern. On March 14, 2014, Defendant County of Kern was permissibly self-insured for California workers compensation liability.

Following Trial on April 11, 2023, Rulings, Orders Admitting Evidence, Findings of Fact & Award issued on June 9, 2023. Defendant's proposed Exhibit F (Report of Surveillance Films) was not received into evidence for lack of authentication. *Rulings & Orders Admitting Evidence 6/09/2023 p.3 (Ruling #27)*. Among other things, Applicant was found to have been employed within Occupational Group 470 and to have sustained 70% permanent partial disability, after applicable adjustment and apportionment, as a result of the specific industrial injury. Indemnity consistent with the findings was awarded. *Findings of Fact & Award 6/09/2023 p. 4 (Findings of Fact #1 & #4), p. 5 (Award ¶B)*.

By timely,¹ verified and properly served petition, Defendant County of Kern seeks reconsideration. *Petition for Reconsideration 7/05/2023 p. 10 (verification), Proof of Service 7/05/2023*. Authorized grounds for reconsideration are alleged consistent with Lab.C. §5903 {a}, {c} and {e}. *Petition for Reconsideration 7/05/2023 p. 1 lines 22-26*. Petitioner argues I) The WCALJ Erred in Finding that Occupation Group 470 Applied (*Petition for Reconsideration 7/05/2023 p. 4 line 2 to p. 6 line 260*, II) The WCALJ Erred in Awarding Permanent Disability based on a Medical Report that is not Substantial Medical Evidence (*Petition for Reconsideration 7/05/2023 p. 7 line 1 to p. 8 line 25*), and III) The WCALJ Erred in Sustaining Applicant's Objection to the Receipt into Evidence of Defendant's proposed Exhibit F (Surveillance Video and Report January 14, 2015) for Lack of Authentication (*Petition for Reconsideration 7/05/2023 p. 9 lines 1-13*).

Applicant has provided a timely², verified and properly served Answer to the pending petition. *Answer 7/17/2023 p.14 (verification), pp. 15-15 (Proof of Service)*. Applicant argues I) Based on his job Duties, the Occupational Group Number of 470 should be assigned (*Answer 7/17/2023 p. 5 line 26 to p. 10 line 9*), II) Apportionment outlined by the Prior PTP's is not Substantial Evidence-Dr. Schaffzin is more persuasive (*Answer 7/17/2023 p. 10 line 10 to p. 12 line 22*), and III) Defendant did not Authenticate the Surveillance Videotape-It should not be Admissible (*Answer 7/17/2023 p. 12 line 24 to p. 13 line 12*).

It is recommended that the pending petition be denied.

¹ The pending petition was filed on July 5, 2023, the 26th day after the Findings of Fact & Award of June 9, 2023. However, the 25th day was the July 4th holiday, allowing an additional day for the timely filing of the pending petition.

² The Answer was filed on July 17, 2023, the 12th day after the filing of the pending petition.

II. Facts: Applicant James Gunderson began working for Defendant County of Kern in or about 2002. He was hired permanently as a Senior Information Specialist in March 2003. *Defendant's Exhibit A: Doctors' First Report of Northwest Urgent Care (Christopher Parks, M.D.) 3/17/2014 p. 3; Applicant's Exhibit 14: Vocational Evaluation Report of Paul Broadus, M.A. 7/31/2019 p. 3*

Applicant's work duties and the appropriate Occupational Group classification are disputed in the pending petition. A job duties statement indicates lifting, placing and positioning computer equipment and other items of up to forty pounds with standing of up to thirty minutes, sitting of up to two hours, and working behind, under and around desks and other furniture. *Applicant's Exhibit 12: Physical Requirements for An Information Systems Specialist (undated)*. Applicant's vocational evaluator confirmed forty pound lifting with standing and sitting requirements. *Applicant's Exhibit 14: Vocational Evaluation Report of Paul Broadus, M.D. 7/31/2019 p. 6.*

On the other hand, Applicant credibly testified at Trial that his actual work performance exceeded the established physical requirements. Assisted lifted could involve printers weighing as much as one hundred pounds. Unassisted lifting included work stations of up to eighty pounds. He actually did very little sitting and was usually moving. *Summary of Evidence 4/11/2023 p. 5 line 41 to p. 6 line 14.*

Applicant sustained an initial spinal injury in or about 2004. He strained his middle and lower back while lifting an AutoCAD at work. He obtained medical treatment, probably including physical therapy and was off work for three or four days. He may have had a couple of weeks of light duty work but was thereafter able to return to unrestricted work. *Summary of Evidence 4/11/2023 p. 6 lines 21-27.* It does not appear that a compensation claim was litigated.

In September 2011 Applicant began to experience tingling in his right arm and hand. He would lose grip strength and drop things. He also had a burning sensation in his right eye. *Defendant's Exhibit G: Records of Steven Strategos, M.D. pp. 32-33: Report of Spine Center (Rick B. Delamater, M.D.) 6/13/2012; Summary of Evidence 4/11/2023 p. 6 lines 29-33.*

Applicant sought additional medical treatment. Electrodiagnostic testing was within normal limits but was suggestive of "bilateral chronic C7 radiculopathies." *Defendant's Exhibit G: Records of Steven Strategos, M.D. pp. 36-40: Report of Richard Alexan, M.D. 5/29/2012 p. 1.* MRI scanning of Applicant's neck revealed "impingement of the spinal cord mildly at C5-C6" which was felt to be causing Applicant's symptoms. *Defendant's Exhibit G: Records of Steven Strategos, M.D. p. 52 (general note), pp. 150-151 MRI Report of Kern Radiology (John M. Gundzik, M.D.) 6/01/2012.*

Applicant eventually came to a cervical spinal fusion from C3 to C7 on August 7, 2012. He was off work for a couple of months, returned to light duty for about six months and was eventually able to resume full duty work. *Summary of Evidence 4/11/2023 p. 6 lines 35-39; Defendant's Exhibit A: Doctors' First Report of Northwest Urgent Care (Christopher Parks, M.D.) 3/17/2014 pp. 2-3.*

On March 14, 2014, Applicant James Gunderson was walking down a staircase at work. There was loose rubber molding on the stairs that had not been tacked or glued down. He fell backward, landing on his tailbone and striking his head, neck, upper back and lower back on the stairs. *Summary of Evidence* 4/11/2023 p. 6 line 41 to p. 7 line 5; *Defendant's Exhibit A: Doctors' First Report of Northwest Urgent Care (Christopher Parks, M.D.) 3/17/2014 p. 1.*

Treating Dr. Parks reportedly "felt that there was some embellishment of symptoms and that the subjective complaints far out weighted the objective findings." Applicant was upset with this opinion, leading Dr. Parks to request that Applicant be found a new primary treating physician. *Defendant's Exhibit B-1: Doctors' First Report of Kaiser Occupational Medicine (Kathryn Mason, M.D.) 11/11/2014- reviewing a 6/10/2014 report of Dr. Parks not in evidence.*

Applicant sought further treatment from The Industrial Medical Group. An MRI brain scan was considered negative. Applicant's cranial nerves were considered intact. Nevertheless, Applicant exhibited jerking motions in his hands and complained of sharp pain. This was considered "very suspicious for psychogenic root as none of his findings have a nerve root distribution." Only 50% normal range of motion of the cervical spine was noted. Tenderness and a 20% loss of motion in the lumbar spine were reported. A 20% loss of range of motion of the right shoulder with impingement was also reported. Applicant was released to modified duty work. *Applicant's Exhibit 13: PR-2 Report of The Industrial Medical Group (Jeffrey Freeseaman, M.D.) 8/06/2014 pp. 2-3; MRI Report of Stockdale Radiology (Gabriel Gelves, D.O.) 8/04/2014.*

Applicant initiated the present case with the filing of an Application for Adjudication on November 17, 2014. *Applicant for Adjudication of Claim 10/17/2014.* The present case was initially venued at the DWC's San Bernardino's District Office. Treating Dr. Strategos declined to continue treating Applicant in the context of a litigated workers compensation claim. At Dr. Strategos' request, Applicant transferred his care to Kaiser Occupational Medicine. *Summary of Evidence 4/11/2023 p. 7 lines 11-15.*

Dr. Kathryn Mason of Kaiser-Occupational Medicine provided a Doctors' First Report on November 12, 2014. She noted that Applicant's right eye complaints had been evaluated and considered non-industrial. Applicant's prior cervical fusion surgery was noted. Dr. Mason commented that Applicant "Does not appear motivated to return to work" but also reported that Applicant was "off duty since employer has no limited duty available." Further physical therapy was not considered worthwhile. Dr. Mason recommended a scalene block for diagnostic purposes regarding Applicant's right shoulder but was concerned about obtaining authorization. Dr. Mason also reported that:

There appears to be some component of symptom magnification in that the hand jerking appears to be somewhat calculated and when right leg lift was requested there was no obvious effort noted by no corresponding pressure of the left heel. Range of motion of the right shoulder was fluid and without stiffness but PROM and AROM was self-limited and jerky.

I am not sure how motivated Mr. Gunderson is to return to work and that will be a complicating factor. *Defendant's Exhibit B-1: Doctors First Report of Kaiser Occupational Medicine (Kathryn Mason, M.D.) 11/11/2014 p. 11.*

Petitioner objected to the initial assignment of the venue of this case at the DWC's San Bernardino District Office and obtained a change of venue to Bakersfield. *Petition for Change of Venue 12/2/2014; Order Changing Venue 12/16/2014.*

Applicant continued to treat with Kaiser Occupational Medicine. Dr. Chang R. Na provided a PR-2 treatment report on January 8, 2015. He reported a neurological examination by Dr. Stephen Helvie indicating:

History of fall 3/14/14. Patient appears to have suffered significant cervical strain superimposed on pre-existing discogenic NT arthritic changes requiring surgical intervention in August of 2012. In this regard, neurologically intact, except for numbness probably old, thumb and index finger. No evidence of a otherwise of radiculopathy. No evidence of myelopathy involving the legs. *Defendants' Exhibit C: PR-2 Report of Kaiser Occupational Medicine (Chang R. Na, M.D. 1/08/2015-review of consultation of Stephen Helvie, M.D. 1/07/2015).*

Dr. Helvie noted that he and neurosurgeon Dr. Jones agreed that there was no need or indication for surgery. He opined that "I would doubt any type of treatment at this time would be really very effective." *Defendants' Exhibit C: PR-2 Report of Kaiser Occupational Medicine (Chang R. Na, M.D. 1/08/2015-review of consultation of Stephen Helvie, M.D. 1/07/2015).*

Dr. Na conducted an examination of Applicant and reported concerns including "patient in wheelchair stating he cannot ambulate," "superficial tenderness of diffuse cervico-thoracolumbar spine," "Reports back pain with axial loading," "variable range of motion; when standing during examination, says he cannot forward flex but observed to be sitting down with legs slightly elevated on wheelchair," "Motor strength: reports he cannot cooperate; variable effort," and "Psychiatric: Emotionally liable and raises voice and breaks down in tears." *Defendants' Exhibit C: PR-2 Report of Kaiser Occupational Medicine (Chang R. Na, M.D.) 1/08/2015 pp. 6-7.*

Dr. Kathryn Mason of Kaiser Occupational Therapy reported again on February 4, 2015. Applicant complained of right low back pain and discomfort radiating to the thigh and calf. Applicant explained that he had to be carried by his supervisor and coworker for his prior visit and was brought into the office by wheelchair. He was thereafter house-bound but was able to drive himself to the next visit and walk into the clinic although "I was passed by a little old lady with a cane." *Defendants' Exhibit B- 2: PR-2 Report of Kaiser Occupational Medicine (Kathryn Mason, M.D. 1/12/2015 p.2*

Dr. Mason reported that Applicant was "Well developed Gives appearance of great distress No twitching" with "Profound loss of strength right leg but otherwise normal. There is no jerking of the arms of shoulders noted today." Psychiatric factors were noted to be "normal mood and

affect.” *Defendants’ Exhibit B-2: PR-2 Report of Kaiser Occupational Medicine (Kathryn Mason, M.D.) 1/12/2015 p.2*

Dr. Mason also reported:

When asked to stand from chair, Mr. Gunderson had several false starts falling back into the chair.

When I approached to assist him he attempted to stand again and made a very graceful and controlled fall forward first to his knees and then to his left forearm. He did seem surprised when he placed his right hand on a rolling stool that moved causing him to slide forward in a less controlled manner onto his chest. Until the stool rolled from him his fall was almost like a ballet move in its grace and smoothness and it exhibited remarkable athleticism and control given his reported complaints.

Once on the floor, Mr. Gunderson lay there sobbing softly. He did not try to get up immediately so I asked him to roll to his right side. He did and then my nurse helped him get off the floor which was surprisingly easy for what should have been dead weight given his apparent distress. He appeared to have good control while rising. Later I helped him from the chair to the exam table by placing his left arm over my shoulders. This is a technique I have used many times with infirm patients and I have come to expect significant weight on my shoulders while I compensate for my patient’s impairment. Oddly, with Mr. Gunderson, there was minimal pressure on my shoulders as we walked the 2 yards to the table. He walked to the table on his own with his arm lightly draped on my shoulder. It was almost as if he and I were doing a stage performance of an assist, creating the visual appearance of my helping him while, in fact, there was no actual help on my part. *Defendants’ Exhibit B-2: PR-2 Report of Kaiser Occupational Medicine (Kathryn Mason, M.D.) 1/12/2015 p.3.*

Dr. Mason noted Applicant’s difficulties with prior treating physicians and discussed whether there was embellishment and contrivance. She carefully distinguished between exaggeration of symptoms, which can result from fear of increased pain and/or fear that “their real level of pain simply would not be taken seriously if they did not emphasize it” and contrived symptoms that are not linked to any specific injury or diagnostic problem. She expressed reluctance to conclude that Applicant’s reports were untrue. Dr. Mason concluded that “What will weigh heavily against the patient’s testimony is objective evidence of actual falsehood.” *Defendants’ Exhibit B- 2: PR-2 Report of Kaiser Occupational Medicine (Kathryn Mason, M.D.) 1/12/2015 p.5.*

Applicant was the subject of surveillance filming. The filming included the two days (January 7 & 8 2015) that Applicant was seen by Drs. Na and Mason at Kaiser Occupational Medicine. The surveillance films were provided to Dr. Mason. She provided a supplemental report including direct comparisons of Applicant’s presentation to her and Dr. Na and the filmed activities on the same days. Dr. Mason concluded:

As outlined above, Mr. Gunderson consistently seems to have given the impression to several physicians who have examined him that he is embellishing his symptoms. Sometimes he is observed making a physical effort one moment that he had claimed he could not make only minutes before. On other occasions he complains of symptoms for which there is no diagnostic rationale.

More importantly, I cannot reconcile the video showing Mr. Gunderson's physical activities outside his home with his report that he spent the days from January 7 to January 12 entirely in bed except for going to the bathroom. His claim that he was bedbound during those days is false.

The video contrasted against Mr. Gunderson's claims of pain and impairment shows that Mr. Gunderson is not a credible historian and that his statements and symptoms are not to be trusted. *Defendants' Exhibit B-3: Primary Treating Physician's Progress Report- Kaiser Occupational Medicine (Kathryn Mason, M.D.) 2/04/2015 p. 10.*

Dr. Steven Shopler provided a treatment consultation and report on April 29, 2015. He opined that:

The patient's complaints and hyperdemonstrative findings on the physical examination are strongly at odds with the documented objective diagnostic imaging findings. Based on his highly nonphysiologic response to routine examination testing, I believe there is a large nonorganic component to his pain picture.

With respect to treatment, no surgical intervention is recommended at this time. I would recommend the patient undergo a functional capacity evaluation to determine his ability to return to work and consistency and examination motivation. I would certainly not recommend any complex interventional treatment for this gentleman at this time. *Defendant's Exhibit D: Report of Stephen Shopler, M.D. 4/16/2015 p. 4.*

The recommended functional capacity evaluation was provided on May 14, 2015. Applicant was considered to have demonstrated the capacity to perform sedentary work. The evaluator concluded:

Mr. Gunderson's performance in strength, postural and movement tasks was consistent however self limited secondary to subjective pain response. He was unable to complete many of the tasks during the evaluation due to the self limitations. Analysis of test results and the physiological response during testing (heart rate) also indicates that performance was limited. Therefore the test results indicate a minimum of baseline level of capacity that can be performed. *Joint Exhibit A: Functional Capacity Evaluation of Functional Ergonomics (James C. Reyes, RKT) 5/14/2015.*

Dr. Kathryn Mason of Kaiser Occupational Medicine provided a PR-4 Permanent and Stationary Report on June 30, 2015. Dr. Mason opined that Applicant was permanent and stationary from the effects of his injury. *Defendant's Exhibit B-4: PR-4 Report of Kaiser Occupational Medicine (Kathryn Mason, M.D.) 5/28/2015 p. 13.* Applicant's cervical spinal impairment was classified within Diagnosis Related Estimate (DRE) Category IV with 28% Whole Person Impairment appointed 10% to the specific injury of March 14, 2014 and 90% to pre-existing non-industrial factors. *Defendant's Exhibit B-4: PR-4 Report of Kaiser Occupational Medicine (Kathryn Mason, M.D.) 5/28/2015 pp. 13-15.* Applicant's lumbar spinal impairment was classified within DRE Category II with 6% Whole Person Impairment, 50% due to the 3/14/2014

Injury. *Defendant's Exhibit B-4: PR-4 Report of Kaiser Occupational Medicine (Kathryn Mason, M.D.) 5/28/2015 p. 13, pp. 15-16.* Dr. Mason denied that Applicant had sustained ratable disability to his right shoulder. *Defendant's Exhibit B-4: PR-4 Report of Kaiser Occupational Medicine (Kathryn Mason, M.D.) 5/28/2015 p. 13.* Further medical treatment was recommended. *Defendant's Exhibit B-4: PR-4 Report of Kaiser Occupational Medicine (Kathryn Mason, M.D.) 5/28/2015 p. 16.*

Dr. Elliott A. Schaffzin is serving as a Qualified Medical Evaluator (QME) in the field of Orthopedic Surgery. He initially evaluated Applicant on September 28, 2015 and provided a report. Dr. Schaffzin reported that Applicant had been self-procuring treatment from Dr. Rasoulli at Cedars-Sinai Medical Center. Dr. Rasoulli had recommended cervical spine surgery and lumbar spinal surgery with injections. The cervical surgery scheduled for October 16, 2015. *Applicant's Exhibit 01: Report of Elliott Schaffzin, M.D. 9/28/2015 p.3.*

Dr. Schaffzin denied that an injured worker with a scheduled spinal surgery was permanent and stationary. *Applicant's Exhibit 01: Report of Elliott Schaffzin, M.D. 9/28/2015 p. 33.* Dr. Schaffzin noted Applicant's "inconsistencies" and "somewhat exaggerated presentation" as noted by other physicians and during Dr. Schaffzin's examination. However, he also noted that the mechanism of Applicant's March 14, 2014 injury was consistent with "upper and possibly lower cervical spine injury, above and below" the prior cervical fusion with closed head injury. *Applicant's Exhibit 01: Report of Elliott Schaffzin, M.D. 9/28/2015 p. 32.* He also noted that Applicant "experienced complete resolution of cervical and upper extremity symptoms with an excellent result from surgery in August 2012." *Applicant's Exhibit 01: Report of Elliott Schaffzin, M.D. 9/28/2015 p. 31.*

Dr. Schaffzin recommended a middle ground between entirely discarding Applicant's complaints as inauthentic and proceeding directly to further spinal surgery. He recommended:

... a comprehensive psychosocial evaluation to determine whether emotional issues are contributing to his presentation and, if he is a candidate for surgery, to determine what type of psychological support can be considered necessary postoperatively. *Applicant's Exhibit 01: Report of Elliott Schaffzin, M.D. 9/28/2015 p. 33.*

Dr. Schaffzin also recommended that the scheduled spinal surgery be preceded by therapeutic trials of injections of the cervical spine, lumbar spine and right shoulder. *Applicant's Exhibit 01: Report of Elliott Schaffzin, M.D. 9/28/2015 p. 35.*

Notwithstanding QME Dr. Schaffzin's contrary recommendation, Applicant's second cervical spinal surgery occurred on October 22, 2015. Dr. Schaffzin reviewed additional records and provided a supplemental report. He noted that the prior fusion was at the C3-C7 levels, the new surgery fused C7-T1 and no surgery had been performed at C2-C3. Dr. Schaffzin recommended post-surgical physical therapy. Reevaluation in August or September 2016 was recommended. *Applicant's Exhibit 02: Report of Elliott Schaffzin, M.D. 4/24/2016 p. 4.*

In October 2016, QME Dr. Schaffzin was provided with still more records of Applicant's ongoing treatment and provided a supplemental report. The October 2015 cervical fusion was complicated by a dehiscence (splitting open) of the surgical wound, requiring additional care. *Applicant's Exhibit 03: Report of Elliott Schaffzin, M.D. 10/14/2016 p. 5 (review of report of Randolph Sherman, M.D. 10/26/2015).* The fusion was considered solid and properly positioned. *Applicant's Exhibit 03: Report of Elliott Schaffzin, M.D. 10/14/2016 p. 5 (review of X-ray report of James Tourne, M.D. 3/03/2016.*

Applicant was provided with lumbar spinal surgery on June 2, 2015. L4-5 and L5-S1 were fused. Complications were limited to a post-operative fever, which resolved. *Applicant's Exhibit 03: Report of Elliott Schaffzin, M.D. 10/14/2016 pp. 7-8 (review of operative report of Anexandre Rasouli, M.D. 6/02/2015 and hospital records 5/31/2015-6/06/2016).*

Dr. Schaffzin endorsed the additional medical treatment (including the two spinal surgeries as "medically necessary and appropriate." He opined that Applicant would not be at Maximum Medical Improvement until 6-9 months after the June 2, 2016 lumbar surgery but was already at MMI with respect to the cervical spine. Additional treatment had not been provided for Applicant's right shoulder. *Applicant's Exhibit 03: Report of Elliott Schaffzin, M.D. 10/14/2016 p. 9.*

QME Dr. Schaffzin re-evaluated Applicant on September 24, 2018 and provided a report. Applicant's August 2012 and October 2015 cervical spinal surgeries and his May 2016 lumbar surgery were noted. *Applicant's Exhibit 04: Report of Elliott Schaffzin, M.D. 9/24/2018 p. 2.* Dr. Schaffzin opined that Applicant had become permanent and stationary overall, with both his cervical and lumbar spinal conditions within DRG Category VI with 28% Whole Person Impairment. *Applicant's Exhibit 04: Report of Elliott Schaffzin, M.D. 9/24/2018 pp. 10-11.* Dr. Schaffzin opined that Applicant did not appear to have residual issues following the original 2004 injury, so he apportioned 100% of Applicant's cervical and lumbar impairment to "the specific injury of 10/14/2016³ with 0% nonindustrial contribution." *Applicant's Exhibit 04: Report of Elliott Schaffzin, M.D. 9/24/2018 p. 10.*

³ Dr. Schaffzin later testified that he was aware that the slip and fall injury occurred on March 14, 2014. *Applicant's Exhibit 08: Transcript of Deposition of Elliott Schaffzin, M.D. (Vol. 1) 7/01/2019 p. 13 lines 8-10.*

QME Dr. Schaffzin was deposed on July 1, 2019, the first of three deposition sessions. In the first deposition session, Dr. Schaffzin testified that he had recommended that Applicant be evaluated by a neurologist for his closed head injury and that, to Dr. Schaffzin's knowledge, that evaluation had not been done. He indicated that he would defer to a neurologist on those issues, but that whether the neurological examination was still needed would depend on whether Applicant was still having significant headaches. *Applicant's Exhibit 08: Transcript of Deposition of Elliott Schaffzin, M.D. (Vol. 1) 7/01/2019 p. 7 line 18 to p. 9 line 4.*

Dr. Schaffzin also testified that Applicant had complained to him about depression and he would recommend that Applicant see a psychiatrist or psychologist to help him with those issues. *Applicant's Exhibit 08: Transcript of Deposition of Elliott Schaffzin, M.D. (Vol. 1) 7/01/2019 p. 9 lines 5-12.*

Dr. Schaffzin confirmed that he has used the Diagnostic Related Estimate (DRE) Categories to quantify Applicant's impairment with Category V with 28% Whole Person Impairment for both his cervical and lumbar spine. Dr. Schaffzin testified that the alternative would have been the Range of Motion (ROM) method, that the ROM method would have been appropriate in light of multiple spinal surgeries but that the ROM results would have been significantly less so he used the method that gave Applicant the maximum benefit. He also noted that Applicant had a normal gait despite his multiple surgeries so "it came down to the most appropriate method being the DRE method." *Applicant's Exhibit 08: Transcript of Deposition of Elliott Schaffzin, M.D. (Vol. 1) 7/01/2019 p. 9 line 13 to p. 11 line 9.*

Dr. Schaffzin testified that he had suggested significant work restrictions and had not seen any additional tests or other information that suggested that he change his opinion regarding the work restrictions. *Applicant's Exhibit 08: Transcript of Deposition of Elliott Schaffzin, M.D. (Vol. 1) 7/01/2019 p. 11 line 10 to p. 12 line 22.*

On cross-examination, Dr. Schaffzin testified that he was aware that the specific injury was in 2014. *Applicant's Exhibit 08: Transcript of Deposition of Elliott Schaffzin, M.D. (Vol. 1) 7/01/2019 p. 13 lines 8-10.*

Dr. Schaffzin also testified that he was aware of the prohibition on adding psychiatric impairment to a physical injury but it would be a separate issue from his examinations of Applicant. He continued to recommend independent evaluation in psychiatry and psychology. *Applicant's Exhibit 08: Transcript of Deposition of Elliott Schaffzin, M.D. (Vol. 1) 7/01/2019 p. 13 line 12 to p. 12 line 22.*

Dr. Schaffzin testified that the evaluation of Applicant's permanent impairment was complete without a neurological evaluation of the headaches unless the headaches were a serious issue. *Applicant's Exhibit 08: Transcript of Deposition of Elliott Schaffzin, M.D. (Vol. 1) 7/01/2019 p. 15 line 4 to p. 16 line 6.*

Dr. Schaffzin was also cross-examined regarding apportionment of cervical spinal impairment. He testified that his opinion had changed and he now believed that 30% of the DRE Category V was the result of the prior condition, including the initial cervical surgery. He indicated that he felt it was only 30% despite the fact that the first cervical surgery (four level fusion) was more extensive than second (three levels) based on the excellent result Applicant had obtained from the first surgery and the seriousness of his symptoms after the March 2014 injury. Dr. Schaffzin testified that he was aware of the prior problems with Applicant's presentation of his symptoms but that didn't change the fact that the second cervical surgery occurred and, in the more recent examination, Applicant "didn't demonstrate any of those abnormal, exaggerate responses." *Applicant's Exhibit 08: Transcript of Deposition of Elliott Schaffzin, M.D. (Vol. 1) 7/01/2019 p. 21 line 3 to p. 26 line 12.*

Dr. Schaffzin testified that evidence that Applicant was not as symptomatic as he represented following the March 2014 might change his opinion but he had not seen such evidence, including having not seen the surveillance films. *Applicant's Exhibit 08: Transcript of Deposition of Elliott Schaffzin, M.D. (Vol. 1) 7/01/2019 p. 21 line 3 to p. 26 line 12.* Otherwise, Dr. Schaffzin testified that he was "comfortable with 30% unless you can provide me with evidence that he was significantly symptomatic in his upper extremities and had significant restrictions prior to the 2014 fall. *Applicant's Exhibit 08: Transcript of Deposition of Elliott Schaffzin, M.D. (Vol. 1) 7/01/2019 p. 31 lines 22-25.*

Paul Broadus, M.A. is serving as Applicant's vocational evaluator. He initially examined Applicant on July 31, 2019 and provided a report. Mr. Broadus opined that Applicant was unable to benefit from vocational rehabilitation including any retaining or employment in the open labor market. Mr. Broadus reported that "There is no evidence that Mr. Gunderson is malingering, or unwilling or unmotivated to work."⁴ *Applicant's Exhibit 14: Vocational Evaluation Report of Broadus & Associates (Paul Broadus, M.A.) 7/31/2019 p. 15.*

A second session of the deposition of QME Dr. Schaffzin occurred on January 13, 2020. Dr. Schaffzin testified that he had received or reviewed the vocational evaluation report of Mr. Broadus but believed that Applicant could be re-trained and employed within the work restrictions that Dr. Schaffzin had suggested. *Applicant's Exhibit 09: Transcript of Deposition of Elliott Schaffzin, M.D. (Vol. II) 1/13/2020 p. 6 lines 20-24.*

Dr. Schaffzin also testified that it was still his opinion that if Applicant was still having sufficiently bothersome headaches, evaluation by a neurologist was appropriate or, if the headaches were cervicogenic, "there is some other treatment that a pain management physician might be involved." *Applicant's Exhibit 09: Transcript of Deposition of Elliott Schaffzin, M.D. (Vol. II) 1/13/2020 p. 8 lines 7-24.*

On cross-examination, Dr. Schaffzin was again asked about apportionment of the cervical spinal impairment. He testified that it was still his opinion that 30% of the impairment "could be

⁴ This conclusion is hard to understand in light of the above-reviewed medical record, particularly Dr. Mason's PR-4 report contrasting Applicant's presentation at examinations with the activities depicted on surveillance videos for the same days.

attributed to the prior surgeries.” *Applicant’s Exhibit 09: Transcript of Deposition of Elliott Schaffzin, M.D. (Vol. II) 1/13/2020 p. 11 line 15 to p. 13 line 4.* Regarding Applicant’s lumbar spine Dr. Schaffzin testified that it remained his opinion that Applicant’s lumbar spinal impairment was within DRE Category V with 28% Whole Person Impairment, entirely as a result of the March 14, 2014 injury. *Applicant’s Exhibit 09: Transcript of Deposition of Elliott Schaffzin, M.D. (Vol. II) 1/13/2020 p. 27 line 16 to p.28 line 9.*

Paul Broadus continued to serve as Applicant’s vocational evaluator. He provided a supplemental vocational evaluation report on March 2, 2020. Mr. Broadus reported his review of the reports and deposition testimony of QME Dr. Schaffzin. He noted that the only change in Dr. Schaffzin’s medical-legal opinion was the apportionment of 30% of the cervical spinal impairment to non-industrial factors. Mr. Broadus opined that Applicant had been doing unrestricted work, “there should be no vocational apportionment” and, therefore, his opinion that Applicant was not amenable to vocational rehabilitation benefits and services was unchanged. *Applicant’s Exhibit 15: Vocational Evaluation Report of Broadus & Associates (Paul Broadus, M.A.) 3/02/2020 p. 4.*⁵

QME Dr. Schaffzin provided a supplemental report on July 3, 2020. He reported his receipt and review of Mr. Broadus’ original vocational evaluation report of July 2019. He did not discuss the supplemental report of March 2020. Dr. Schaffzin opined that, per Mr. Broadus’ discussion, “I agree that preexisting issues, although a favor regarding causation of impairment, have not significantly impacted his ability to work.” He re-affirmed his prior opinion, however, that “were Mr. Gunderson to indicate a desire to perform some type of work activity, appropriate accommodations would allow him to do so within the restrictions I provided both in the report of 9/24/2018 and deposition testimony in January 2020” although he reserved the possibility that a return to work might not be “gainful employment on a full-time basis.” *Applicant’s Exhibit 05: Report of Elliott Schaffzin, M.D. 7/30/2020 p. 3.*

Dr. Schaffzin was deposed again on March 24, 2021. Defendant returned to inquiring regarding Dr. Schaffzin’s opinions on the apportionment of cervical spinal impairment over Applicant’s continuing objection(s) that Defendant’s questions had been “asked and answered” in the prior deposition sessions.

Dr. Schaffzin was asked to review the earlier reports of Dr. Na and Dr. Mason and asked whether “Mr. Gunderson was fabricating or exaggerating the nature and extent of his injury when he presented on January 7?” *Applicant’s Exhibit 10: Transcript of Deposition of Elliott Schaffzin, M.D. 3/24/2021 p. 14 lines 11-14.*

Dr. Schaffzin testified that it certainly appeared that Dr. Mason appeared to have that opinion regarding Applicant’s examination with her, but, during Applicant’s examination with him “I always had the impression that the fellow was honest, forthright.” Dr. Schaffzin would have

⁵ The concept of “vocational apportionment” has been rejected by the Appeals Board. *Nunes v. Calif. DMV*, (6/22/2023) 88 CCC ____ (WCAB *en banc*).

noted an exaggerated pain response and his notes at the time do not so indicate. Dr. Schaffzin also pointed out that it was unlikely that Applicant would have undergone major surgeries, with reported improvement, without medical necessity for them. *Applicant's Exhibit 10: Transcript of Deposition of Elliott Schaffzin, M.D. 3/24/2021 p. 14 line 15 to p. 15 line 15.*

Defendant's advocate pointed out that Dr. Schaffzin's report indicated an exaggerated response to testing of lumbar spinal range of motion to the point that the range of motion could not be established, although Dr. Schaffzin noted the possibility of "fear avoidance behavior." *Applicant's Exhibit 10: Transcript of Deposition of Elliott Schaffzin, M.D. 3/24/2021 p. 16 line 18 to p. 17 line 19.* Dr. Schaffzin testified that fear avoidance is an authentic problem addressed in both the Medical Treatment Utilization Schedule (MTUS)/Utilization Review Guidelines as well as the AMA Guides but acknowledged that fear avoidance does not explain Applicant's claims to have been bed-ridden or requiring a wheelchair at other times. *Applicant's Exhibit 10: Transcript of Deposition of Elliott Schaffzin, M.D. 3/24/2021 p. 18 line 10-18.*

Defendant's advocate then challenged Dr. Schaffzin on the seeming-inconsistency between his opinions that natural degeneration in the cervical spine resulted in the need for significant spinal surgery without a traumatic event in 2012 but that the same naturally occurring process in the lumbar spine played no role in lumbar spinal impairment after a traumatic event in 2014. Dr. Schaffzin testified in response that the County hires people at is finds them, including predispositions to disc degeneration and degeneration resulting from the normal "components of aging in the spine" to which he does not apportion unless it is likely that the injury or need for surgery would have happened without the traumatic event. *Applicant's Exhibit 10: Transcript of Deposition of Elliott Schaffzin, M.D. 3/24/2021 p. 33 line 16 to p. 35 line 3.*

QME Dr. Schaffzin provided a supplemental report on April 2, 2021. He reported his receipt and review of Mr. Broadus' supplemental vocational evaluation of March 2, 2020. After some discussion of the varied roles of the medical-legal evaluator as opposed to a vocational evaluator, Dr. Schaffzin maintained his prior opinion that Applicant could be re-employed but also his skepticism that Applicant wanted to be re-employed. *Applicant's Exhibit 06: Report of Elliott Schaffzin, M.D. 4/02/2021 p. 3.*

Paul Broadus continued to serve as Applicant's vocational evaluator. He provided a second supplemental report on September 7, 2020. He reported his receipt and review of the transcript of the second session of Dr. Schaffzin's deposition. He opined that the work restrictions suggested by Dr. Schaffzin were actually a great deal more restrictive than Dr. Schaffzin seemed to believe and, in any event, that evaluation was within the scope of his expertise as a vocational evaluator rather than that of a medical-legal evaluator. *Applicant's Exhibit 16: Vocational Evaluation Report of Broadus & Associates (Paul Broadus, M.D.) 9/07/2021 pp. 4-5.*⁶

⁶ This supplemental report does not appear to address whether Applicant was interested in re-employment.

Dr. Schaffzin continued to serve as the Qualified Medical Evaluator in the field of Orthopedic Surgery. He provided an additional supplemental report on July 25, 2022. He responded to an annotated Consultative Rating which questioned whether a DRE Category IV classification for the thoracic spine was appropriate since the cervical spinal fusion extended downward to T2. Dr. Schaffzin reported that “Mr. Gunderson did not injury his thoracic spine” but that a fusion that extends below C7 often continues to T1-TD to “better stabilize the lower levels of the cervical spine and to present additional degeneration at the T-1-T2 level, potentially requiring further extension of the fusion to stabilize the patient’s neck.” Dr. Schaffzin reported that the result is not considered a surgery for the thoracic spine and the use of the thoracic DRE criteria is not appropriate. *Applicant’s Exhibit 04: Report of Elliott Schaffzin, M.D. 9/24/2022 p. 2.*

The primary parties were unable to settle this case. A Mandatory Settlement Conference was held on February 15, 2023. After the MSC, Applicant filed a unilateral amended Pre-Trial Conference Statement adding temporary disability and supplemental job displacement benefits (and penalties thereon) as issues with the unfortunate and inaccurate representation that the parties had agreed to post-MSC modifications of the Pre-Trial Conference Statement. Defendant had not agreed and, in fact, objected to the addition of new issues. Defendant’s objection was eventually sustained. See, “*Amended” Pre-Trial Conference Statement 2/15/2023; Minutes of Hearing-Summary of Evidence 4/11/2023 p. 3 lines 17-20 (Issue #7); Rulings & Orders Admitting Evidence 6/09/2023 p. 3 (Rulings #29 & #20); Findings of Fact & Award 6/09/2023 pp. 6-7 (Opinion on Decision).*

Applicant objected to the receipt into evidence of the surveillance films and the investigators report thereof for lack of authentication. That objection was sustained. The films were not exhibited and Defendant’s Exhibit F (the investigator’s report) was not received into evidence. *Minutes of Hearing-Summary of Evidence 4/11/2023 p. 3 lines 14-15 (Issue #6); Rulings & Orders Admitting Evidence 6/09/2023 p. 3 (Ruling #27).*

Rulings, Orders Admitting Evidence, Findings of Fact & Award issued on June 9, 2023. Among other things, Applicant was found to have been employed within Occupational Group 470 and to have sustained 70% permanent partial disability, after applicable adjustment and apportionment, as a result of the specific industrial injury. Indemnity consistent with the findings was awarded. *Findings of Fact & Award 6/09/2023 p. 4 (Findings of Fact #1 & #4), p. 5 (Award ¶B).*

Whereupon, Defendant County of Kern seeks reconsideration.

III. Discussion: Petitioner argues I) The WCALJ Erred in Finding that Occupation Group 470 Applied (*Petition for Reconsideration 7/05/2023 p. 4 line 2 to p. 6 line 260*, II) The WCALJ Erred in Awarding Permanent Disability based on a Medical Report that is not Substantial Medical Evidence (*Petition for Reconsideration 7/05/2023 p. 7 line 1 to p. 8 line 25*), and III) The WCALJ Erred in Sustaining Applicant’s Objection to the Receipt into Evidence of Defendant’s proposed Exhibit F (Surveillance Video and Report January 14, 2015) for Lack of Authentication (*Petition for Reconsideration 7/05/2023 p. 9 lines 1-13*).

Applicant replies that I) Based on his job Duties, the Occupational Group Number of 470 should be assigned (*Answer 7/17/2023 p. 5 line 26 to p. 10 line 9*), II) Apportionment outlined by the Prior PTP's is not Substantial Evidence-Dr. Schaffzin is more persuasive (*Answer 7/17/2023 p. 10 line 10 to p. 12 line 22*), and III) Defendant did not Authenticate the Surveillance Videotape-It should not be Admissible (*Answer 7/17/2023 p. 12 line 24 to p. 13 line 12*).

III-A. Occupational Group: Applicant's work for Petitioner was found to be within Group 470. Petitioner argues that Group 320 should have been found instead. Use of Group 320 would reduce the level of permanent partial disability from 70% to 64%, would cut the awarded indemnity to \$111,142.50, the allowed attorneys' fees to \$16,672.38 and eliminate the Life Pension.

Petitioner acknowledges that it is the performance of job duties rather than job titles that are the measure of the proper Occupational Group classification. Petitioner also appears to concede that Applicant's job performance might have exceeded Group 320 prior to the initial cervical spinal surgery in August 2012 but, thereafter, the heavier monitors were no longer being lifted and Applicant was seeking help and working carefully. *Petition for Reconsideration 7/05/2023 p. 4 line 15 to p. 5 line 9*.

Petitioner argues that Applicant has the affirmative of the issue and the burden of proof regarding Occupational Group and did not carry it. His work was not shown to be in more than one Occupational Group and the work he was doing after August 2012 is more like the work of other occupations in Group 320 rather than other occupations within Group 470. *Petition for Reconsideration 7/05/2023 p. 5 line 10 to p. 6 line 25*.

Applicant responds that he did restrict his work after the 2012 cervical spinal surgery, but only for about six months after returning to work. Thereafter, he performed full duty work. Even if the monitors were lighter, other objects such as printers and work stations exceeded the forty pound limitation of the written job duties. Additionally, the arduousness of Applicant's work duties with not limited to lifting, but included working around desks and crawling under them to install cables and perform other tasks. In this regard, Applicant's work was very different from other workers in Group 320, such as assemblers. *Answer 7/17/2023 p. 4 line 1 to p. 5 line 13*.

Applicant points out that the frequency of heavier activities is secondary to whether the activities are required and gives the example of occasional 50-100 lifting is defined by the US Department of Labor as a physical work demand for heavy strength. *Answer 7/17/2023 p. 5 lines 17-25, p. 7 line 24 to p. 8 line 5*.

Applicant concludes that if his work duties prior to the first cervical spinal surgery in August 2012 included lifting more than forty pounds and other arduous activities sufficient to justify a Group 470 classification and Applicant returned to full duty work after the first surgery, then the Group 470 classification is appropriate even if the activities that went beyond Group 320 were less frequent. *Answer 7/17/2023 p. 10 lines 2-8*.

Classification of Applicant's work activities at the time of the March 14, 2014 specific injury was supported by the evidence.

III-B. Apportionment: The second argument of the pending petition is "The WCALJ Erred in Awarding Permanent Disability based on a Medical Report that is not Substantial Medical Evidence." *Petition for Reconsideration 7/05/2023 p. 7 line 1 top. 8 line 25.* Applicant relies that "Apportionment outlined by the Prior PTP's is not Substantial Evidence-Dr. Schaffzin is more persuasive." *Answer 7/17/2023 p. 10 line 10 to p. 12 line 22.*

Petitioner's argument begins with the general rule that WCAB decisions must be based on substantial medical evidence. *Petition for Reconsideration 7/05/2023 p. 7 lines 3-9.* This second argument of the pending petition does not appear to acknowledge that apportionment is one of the exceptions to the general rule. Where the employer has not proved apportionment, the employee is entitled to an unapportioned award. Thus, if the second argument is correct, to wit, that Dr. Schaffzin's failure to apportion some portion of the lumbar spinal impairment to pre-existing degeneration is irrational, the lack of proof for some other apportionment would entitle Applicant to an unapportioned award on his lumbar spinal disability.

Petitioner also argues that Dr. Schaffzin's indication that Applicant was permanent and stationary when seen on September 24, 2018 is irrational since it is likely that Applicant's condition reached maximum medical improvement (MMI) before that.

Petition for Reconsideration 7/05/2023 p. 7 lines 10-26. However, unless the physician indicated otherwise, the opinion that a patient was permanent and stationary on the date of the examination neither affirms nor denies that they might have been permanent and stationary earlier.

Petitioner argues that Dr. Schaffzin's lack of apportionment of the lumbar spinal disability "defies all logic and common sense" since degeneration was sufficient to cause the earlier first cervical spinal surgery and since Dr. Schaffzin had warned before the lumbar surgery of Applicant's "nonphysiologic response to routine testing" and opined that there was a "large nonorganic component to his pain picture." *Petition for Reconsideration 7/05/2023 p. 8 lines 1-2 citing Defendant's Exhibit D: Report of Elliott Schaffzin, M.D 4/16/2015.*

Petitioner urges that the 50% apportionment suggested by Dr. Mason is more probably correct than the "erroneous and biased" conclusions of Dr. Schaffzin. *Petition for Reconsideration 7/05/2023 p. 8 lines 13-25.*

Applicant replies that the May 2015 PR-4 report of Treating Dr. Kathryn Mason of Kaiser Occupational Medicine is no longer germane. Quite a bit has happened then, including both the second cervical spinal fusion and the lumbar fusion that triggers the lumbar spinal impairment from which apportionment is sought. *Answer 7/17/2023 p. 10 line 11 to p. 12 line 8.*

In the alternative, Applicant points out that Dr. Schaffzin's analysis of the causation of the first cervical fusion is "somewhat based on speculation" due to the lack of medical records and "does not waive his argument that there is no substantial evidence of apportionment and all current opinions are speculative." *Answer 7/17/2023 p. 12 lines 9-22.*

Disallowing apportionment of the cervical spinal impairment would increase the overall level of permanent partial disability to 78%, the applicable level of permanent partial disability indemnity to \$162,762.50, the starting rate for a Life Pension to \$139.15 per week, and the proportional attorneys' fee to \$27,384.05.

III-C. Surveillance Films & Investigative Report: Petitioner neglected to provide authentication of the surveillance films and investigative report. As a result, the report was not received into evidence and the films were not exhibited at Trial. *Rulings & Orders Admitting Evidence 6/09/2023 p. 3 (Ruling #27)*. On the other hand, Dr. Mason's detailed analysis of the films and comparison of the depicted activities with Applicant's presentation to herself and Dr. Na on the same days was received into evidence and considered. *Rulings & Orders Admitting Evidence 6/09/2023 p. 3 (Rulings #23 & #24)*.

The third argument of the pending petition is "The WCALJ Erred in Sustaining Applicant's Objection to the Receipt into Evidence of Defendant's proposed Exhibit F (Surveillance Video and Report January 14, 2015) for Lack of Authentication." Petitioner argues that Dr. Mason's review was sufficient authentication. *Petition for Reconsideration 7/05/2023 p. 9 lines 1-13*.

Applicant replies that authentication by the investigator is required and exclusion of surveillance for lack of authentication is appropriate. *Answer 7/17/2023 p. 12 line 24 to p. 13 line 13* citing *PSI Ball Bearings v. WCAB*, (2001) 66 CCC 1114. 1115-1116 (2nd DCA WDn) and *Richard v. San Francisco 49er's* (2015 Cal Wrk Comp Lexis 265).

While it appears to be the case that the person featured on the films was, in fact, Applicant and that he did, in fact, engage in the depicted activities, Applicant is nevertheless correct that authentication by the investigator is required. Petitioner is incorrect that review by the Primary Treating Physician is an acceptable substitute. "Surveillance films are not normally admitted, unless the operator of the movie camera testifies concerning the manner in which the applicant was observed and relates the technical data pertaining to the taking of the movies," *In re Alleged Contempt of James Buzan and Clifford Sweet III*, (1978) 43 CCC 789 (WCAB *en banc*).

The present case provides a good example of the need for this requirement. Critical to Dr. Mason's harsh analysis of Applicant's credibility is the day-by-day contrast of his representations to Dr. Na and Dr. Mason regarding his activities and the filming of his actual activities on the same days. But Dr. Mason had no way from her medical office to verify that the films had been taken on the same days. That required the investigator. Likewise, authentication from the investigator is important not only for what the films show, but what they did not show, i.e. what editing, if any, took place.

Recommendation: For the reasons discussed herein, it is recommended that the pending petition be denied.

DATE: July 25, 2023



Robert Norton
PRESIDING WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE