WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SEAN FISHER, ***Applicant***

vs.

ENLOE DRILLING AND PUMPS, INC.;
MIDWEST EMPLOYERS CASUALTY COMPANY, ***Defendants***

Adjudication Number: ADJ10967072
Redding District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and the Opinion on Decision 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 Report and Opinion on Decision, both of which we adopt and incorporate except as noted below, we will grant reconsideration, and amend the WCJ's decision as recommended in the Report to correct the identity of defendant insurance carrier to Midwest Employers Casualty Company. We will otherwise affirm the April 26, 2023 Findings and Award, Orders.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id*.)

The WCJ properly relied on the substantial opinions of the multiple agreed medical examiners (AMEs), who the parties presumably chose because of their expertise and neutrality. The WCJ was presented with no good reason to find the AMEs' opinion unpersuasive, and we also

find none. (See *Power v. Workers' Comp. Appeals Bd*. (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

We do not adopt and incorporate the WCJ's reference to applicant as the petitioner.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the April 26, 2023 Findings and Award, Orders is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the April 26, 2023 Findings and Award, Orders is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. At the time of injury, the employer's workers' compensation insurance carrier was Midwest Employers Casualty Company.

* * *

AWARD

AWARD IS MADE in favor of **SEAN FISHER** against **MIDWEST EMPLOYERS CASUALTY COMPANY**, of permanent total disability, to be paid at the temporary disability rate beginning from the last day of payment of temporary disability, and continuing, less credit to defendants for permanent disability already paid, and less 15% to applicant's counsel, the Law Office of Larry S. Buckley, for reasonable attorney's fees; to be commuted off the far end of the award, and the fee to be held in trust by applicant's current counsel pending resolution of the lien of Workers' Comp Law Redding.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 14, 2023

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

SEAN FISHER
LAW OFFICES OF LARRY S. BUCKLEY
PEARLMAN BROWN & WAX

PAG/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

1.	Applicant's Occupation:	Core Drill Operator
2.	Applicant's Age:	29
3.	Date of Injury:	5/2/2017
4.	Parts of Body Injured:	Head, Brain, Back, Cervical Spine, Psyche, Sleep, Hearing and Vision Loss
5.	Manner of Injury:	Struck on the head by machinery and knocked off platform
6.	Identity of Petitioner:	[Defendant]
7.	Timeliness:	The petition was timely filed.
8.	Verification:	The petition was properly verified.
9.	Date of Findings and Order:	4/26/2023
10.	Petitioner's Contentions:	The evidence relied on by the WCJ was not substantial evidence, and the applicant has not met his burden to prove 100% disability by refuting the scheduled PD rating.

II. FACTS

The applicant suffered an accepted industrial injury to the aforementioned body parts when an object fell off a drilling rig and struck Mr. Fisher in the head, knocking him off a platform, and causing him to fall about six feet onto the ground.

The parties used multiple AME's and two vocational rehabilitation experts to address the case.

The applicant's vocational rehabilitation expert, Eugene Van de Bittner, ultimately concluded that the applicant could not benefit from rehabilitation services because his frequent and debilitating headaches, which occurred four to five times a week, would render him unable to hold down either a part or full time job. The un-contradicted evidence from trial testimony and the medical records was that the applicant had debilitating headaches on an average of four to five times a week (Summary of Testimony, page 6: 16-18).

Finding themselves unable to resolve their dispute informally, the case was tried, and a finding and award, order and opinion on decision issued on 4/26/23. The applicant subsequently filed a timely petition for reconsideration.

III.
DISCUSSION

There is no dispute that the medical record supports a scheduled permanent disability rating that is less than 100%. The real question presented by this case is whether the opinion of the applicant's vocational rehabilitation expert is substantial evidence such as to rebut the scheduled PD rating by a finding that the applicant cannot benefit from the provision of vocational rehabilitation services.

Mr. Van de Bittner, the applicant's vocational evaluator, wrote three reports, but the relevant findings were based on his last report, in evidence as Applicant's Exhibit 14. Therein, this vocational expert determined that because the applicant suffered debilitating headaches on average of four to five times a week, he would be unable to hold down either part time or full time work, and on that basis could not benefit from rehabilitation. This opinion was supported by the final report of Dr. Newton, in evidence as Joint Exhibit MM, in which Dr. Newton reviewed once more the entire medical file as well as a witness statement from the applicant's wife. After that review, Dr. Newton modified his opinion in permanent disability and the applicant's work restrictions, noting that the record clearly established that the applicant suffered from a significant headache disorder that last from a few hours to all day. With this established, Mr. Van de Bittner discussed on pages 4 and 5 of Applicant's Exhibit 14 that this opinion from Dr. Newton, coupled with the frequency of the significant headaches established from his own interview with the applicant and the statement of his wife, was enough evidence to make a determination that the applicant was not employable due to the unpredictability, severity and duration of his headaches.

Said another way, Mr. Van de Bittner determined that due to the unpredictable moderate to severe headaches that occurred four to five times a week, the applicant could not hold down either part time or full time work, and therefore was not able to benefit from rehabilitation.

It is this evidence of the frequency and severity of the headaches that Mr. Van de Bittner cites as the reason the applicant cannot be employed. He cannot hold down a scheduled job because there is no way to predict when he will have a debilitating headache, and these headaches occur on an average of four to five times a week.

Relevant to and supporting this conclusion are the studies on page 70 of the 9/27/21 report of Mr. Van de Bittner, in evidence as Applicant's exhibit 7, which document the maximum number of days per month that an employee could be absent without being terminated.

Since Mr. Van de Bittner's opinions are based on the un-contradicted testimonial evidence and the medical opinions of the AME Dr. Newton, as well as Mr. Van de Bittner's thorough vocational testing and analysis, and expressed to a degree of reasonable vocational probability, they are therefore substantial evidence.

Pursuant to **Ogilvie v. WCAB (2011) 197 Cal. App. 4th 624**, a scheduled rating may be rebutted when the injury to the employee impairs his or her rehabilitation, and because of that, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating. That is the case here, and the evidence as described above both rebuts the scheduled rating and establishes that the applicant's loss of future earning capacity is total.

Having now established this as the basis of the finding that the applicant cannot benefit from rehabilitation and is totally permanently disabled, we can turn to the petitioner's specific arguments.

Petitioner first argues that since the applicant has made no attempt to return to work, or use any vocational services since the injury, this renders it highly speculative to conclude he is 100% disabled. Petitioner does note that the applicant stated to Mr. Van de Bittner that this was because he wanted to focus on recovery (Applicant's Exhibit 7, page 48), but it bears noting that since he suffers from frequent, unpredictable and debilitating headaches, that would also be a reasonable explanation as to why he has not made an effort to return to work. Petitioner argues that applicant's stated reason for not looking for work is not credible, but does not offer a convincing reason why this should be so. The applicant's reason, as related to the vocational expert, for why he has not looked for work stands unrefuted by any other evidence. Thus, this fact does nothing to disprove Mr. Van de Bittner's conclusion that the headache problem makes the applicant unemployable.

The same analysis applies to the petitioner's argument that the fact that the applicant has had little to no treatment since moving to Arizona shows he is not 100% disabled. The reasons why the applicant has not received treatment in Arizona are not established by the evidence, so without further context, the lack of treatment out of state for a California workers' compensation injury are obscure, and do nothing to refute the conclusions of Mr. Van de Bittner.

Next, petitioner cites the fact that the applicant has not had any significant medical procedures since the injury, only doctor visits and physical therapy, as an argument that he cannot be 100% disabled. However, other than pointing this out, petitioner does not offer any analysis or reason why this should refute the conclusions of Mr. Van de Bittner and the reasons he described for finding the applicant unable to benefit from rehabilitation. As such, this argument is simply specious, and is irrelevant to the question of whether the applicant can benefit from rehabilitation, and whether that in turn shows a greater disability than provided by the scheduled rating.

Next the petitioner argues that the three day drive the applicant participated in when moving from California to Arizona is evidence that he cannot be totally disabled.

In considering this interesting argument, it must be kept in mind that we know of this move because the applicant and his wife forthrightly described it in their testimony at trial. We know from that testimony that the applicant drove four to five hours a day, for three consecutive days, behind the wheel of a U-Haul truck towing a trailer. The applicant described the drive as physically exhausting (Summary of Testimony, page 9: 7-19).

Mr. Van de Bittner determined that the applicant could not benefit from rehabilitation due to the fact that he would miss too much time from work because of his debilitating headaches that occurred on average of four to five days out of the week.

The fact that the applicant was on one occasion able to drive four to five hours per day, for three consecutive days, when he presumably did not suffer from a debilitating headache during those hours of driving, is not a fact that refutes the reasons that Mr. Van de Bittner cited in concluding that the applicant could not maintain a work schedule necessary to obtain and then keep a job. While this judge can certainly sympathize with the defendant's argument here, the circumstances of this trip, namely a three day window without a debilitating headache during the four to five hours he was driving, is not inconsistent with his unrefuted testimony of suffering from headaches four to five times a week (or three to five times, from the wife's testimony; Summary of Testimony, page 11: 15-16), but being headache free the other two, three or even four days.

Next, the petitioner argues that the final report of Mr. Van de Bittner (Applicant's Exhibit 14), is not substantial evidence. Petitioner again cites the move from California to Arizona, but does admit that this vocational evaluator was aware of this move (page 2, Applicant's Exhibit 11). However, again, the circumstances of that move are not inconsistent with the frequency of headaches established by the applicant's own testimony. The headaches come on in an unpredictable manner, and on average occur three, four or five days a week. The three day drive, with four to five hours a day behind the wheel, could fit into this frequency as days without a debilitating headache, at least during the four to five hours the applicant said he drove each day. Therefore, even though petitioner noted that Mr. Van de Bittner was aware of the drive/move, the circumstances of the move are not inconsistent with the described frequency of headaches from unrefuted witness testimony, and per Mr. Van de Bittner's analysis, it is the unpredictability, frequency and debilitating nature of these headaches that render the applicant unemployable. Thus, the move, though probably at the ragged edge of the applicant's abilities, is not inconsistent with the analysis provided by Mr. Van de Bittner, or the trial testimony from the applicant, especially when it is clear that this vocational evaluator was indeed aware of the move. This does not make the opinions of Mr. Van de Bittner insubstantial.

Petitioner further argues that the move to Arizona demonstrates that the applicant could, at a minimum, work for firms like Uber, Lyft, or Door Dash. However, this is a bare assertion, and is supported by neither of the opinions of the vocational experts. Further, the move to Arizona was the applicant's private affair, and had he had a headache during that drive he could have presumably stopped driving until the headache resolved. However, petitioner, in making this claim, does not explain what would happen should the applicant suffer a headache during an Uber or Lyft job. Could he simply pull over and stop? Would that be tolerable by the fare, or the company? No evidence is offered by petitioner, even though they have their own vocational expert's opinions in evidence, and who is silent on this issue. Furthermore, although Mr. Van de Bittner doesn't specifically address the applicant's ability to do this kind of work, he does generally indicate that due to the unpredictable nature of the headaches, even part time work would be unavailable –and it is a reasonable presumption that this would include a part time Uber or Lyft job. This argument from petitioner, therefore, can have no weight or probative value.

Finally, petitioner argues that the opinion of Dr. Newton, the AME the parties used to address the headache problem and as he expressed them in Joint Exhibit MM, is not substantial evidence, and cannot therefore be the basis of Mr. Van de Bittner's opinion that the applicant cannot benefit from rehabilitation.

Recall that Mr. Van de Bittner's rehabilitation opinion was in part based on Dr. Newton's final report, in evidence as Joint Exhibit MM, which in turn noted the receipt and review of a statement from the applicant's wife, in evidence as Applicant's exhibit 13, and a re-review by Dr. Newton of the medical file with an eye towards the severity and frequency of the applicant's headaches. The statement that Dr. Newton saw from the applicant's wife documents the frequency and severity of the headaches, and this is generally consistent with her testimony at trial. Further, the medical record re-reviewed by Dr. Newton on this occasion also consistently records the frequency, duration and severity of the applicant's headaches. Based on this, the doctor concluded that the applicant suffered from headaches lasting from a couple of hours to all day. He further noted the plurality of medical records from multiple doctors that characterized the headache pain as severe. All of this evidence certainly accurately describes the headache problem, and indeed no party really disputes that the applicant experiences a headache problem at this degree of severity, frequency and duration, and there is in fact nothing in evidence that would contradict it. Therefore, Dr. Newton, the neurological AME, had the correct history of the applicant's headache problem, and properly based his opinions, in part, thereon.

As discussed at length above, the fact that the applicant drove to Arizona is not inconsistent with this headache history. Thus, Dr. Newton did have the necessary information to reach his conclusions, even if he didn't know the details of the applicant's move to Arizona. His opinions are substantial evidence.

On one point, though, the petition for reconsideration should be granted. This is to correct the name of the proper carrier for workers' compensation, which petitioner now identifies as **Midwest Employers Casualty Company**.

IV.
RECOMMENDATION

It is respectfully recommended that the petition for reconsideration be granted to correct the proper name of the defendant's carrier for workers' compensation insurance to **Midwest Employers Casualty Company**, but in all other respects, denied.

Date: 5/26/23

Curt Swanson
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

FACTS

The applicant, Sean Fisher, suffered a significant industrial injury on 5/17/2017 when an object fell off a drilling rig and struck Mr. Fisher on the head, causing him to fall about six feet off a platform onto the ground.

This is an accepted injury to the head, brain, neck, back, psyche, sleep, hearing and vision.

In order to assess the applicant's condition, the parties used multiple AME's. They are Dr. Sommer (Joint Exhibits AA – EE), Dr. Klein (Joint Exhibits GG – KK), Dr. Newton (Joint Exhibits LL – MM), Dr. Gupta (Joint Exhibit FF) and Dr. Weber (Joint Exhibit NN). The parties also utilized the services of two vocational rehabilitation experts in the form of Eugene Van de Bittner (Applicant's Exhibits 7, 11 and 14) and Emily Tincher (Defendant's Exhibit A).

Finding themselves unable to resolve their disputes on their own, the parties took the issues of permanent disability and apportionment to trial, and this decision now issues therefrom. All other issues are deferred.

APPORTIONMENT

All doctors whose reports are in evidence apportion 100% of the disability to the industrial injury.

PERMANENT DISABILITY

The opinions of all the AME evaluators on permanent disability combine and add to less than 100% permanent disability.

The real question presented by this case is whether the applicant can rebut the rating schedule by showing, through the opinions of the vocational rehabilitation experts, that the applicant cannot benefit from the provision of rehabilitation, and thus suffers more disability that reflected in the scheduled rating.

The report of vocational expert Emily Tincher was obtained at the direction of the defendant, is dated 5/31/22, and is in evidence as Defendant's Exhibit A. This report concludes that the applicant can benefit from vocational rehabilita tion, but that opinion is not presented in a way that rises to the level of substantial evidence. To be substantial evidence on this subject, the opinions in that report must be based on a correct history and review of the medical evidence, and in this case Ms. Tincher listed and discussed only one report from the neuromuscular AME, Dr. Newton, dated 4/13/21 and in evidence as Joint Exhibit LL. In review of that report, Ms. Tincher erroneously found that Dr. Newton assessed a whole person impairment for headaches at 3%, based on a report of mild, uncontrolled facial neurologic pain that would only preclude the use of a hard hat at work in noisy environments. This is inaccurate.

In fact, on pages 36 and 37 of that report, the AME properly used an Almaraz/Guzman analysis to support an increased and more accurate whole person impairment of 10%. Further, in a later report that was not seen by Ms. Tincher, the AME again reassessed his opinion on permanent disability after a review of the medical record which documented an even more severe symptomology from the headaches. Dr. Newton consequently increased his assessment to 20% whole person impairment (see page 3, Joint Exhibit MM). Ms Tincher was not provided this report to comment on, nor was she allowed to correct her inaccurate understanding of the one report from Dr. Newton that she did see.

Therefore, based on this inaccurate history, the opinions of Ms. Tincher cannot be considered to be substantial evidence.

Applicant's counsel used Mr. Eugene Van de Bittner as a vocational expert. That personage produced three reports, in evidence as Applicant's Exhibits 7, 11 and 14. In his last report (Joint Exhibit 14), Mr. Van de Bittner reviewed the last, most recent report from Dr. Newton, wherein Dr. Newton re-reviewed the medical record and a witness statement, and based on that information modified his opinions on permanent disability as well as the work restrictions that the applicant had as a result of the headaches. Since Mr. Van de Bittner, the vocational rehab expert, used this report to support his opinion that due to the industrial injury the applicant would have access to no jobs, and thus could not benefit from rehabilitation, one must first address the opinions of Dr. Newton as we find them in Joint Exhibit MM for substantiality.

In that report, Dr. Newton reviewed the medical record on headaches, and determined that the record supported a more severe headache symptomology that he had originally recognized. Specifically, on pages 2 – 3 the doctor noted his previous opinion was based on reports of mild headache pain, when the actual medical record consistently showed that the headache pain was in fact moderately severe to severe.

Dr. Newton noted that these sort of headaches lasted anywhere from a couple of hours to all day.

In support of this, it should be noted that the medical record does in fact document moderate to severe, frequent headaches.

Dr. Gupta reported, in Joint Exhibit FF, on page 3, that the applicant *"…experiences headaches on a daily basis at least once a day. It can last 6 to 7 hours. The headaches are characterized as sharp pain. It can be bilateral or on either side. There is a tingling feeling over the head. The headaches are associated with nausea, phonophobia, photophobia. The headaches tends to have acute onset. Once or twice per week, the headache intensity increases and they can reach up to 9/10.*

Dr. Goldthwaite, in his report of 9/26/2019, Applicant's Exhibit 3, noted that the applicant's current complaints were of *"severe headaches daily."*

Dr. Sommer in his report of 2/14/2019, Joint Exhibit CC, found that *"Mr. Fisher says he has continued pain in his head which he characterizes as migraine style headache. These occur daily."*

Dr. Klein, in Joint Exhibit GG, page 3, reported that the applicant has *"Constant pain is present in his head, neck and spine. He has more severe headaches characterized as migraines, approximately three times a week, which may be accompanied by nausea and vomiting.* **…** *Migraines are also characterized as some of the most severe pain he experiences."*

At trial, the applicant testified that *"He has headaches four to five days out of the week. The pain level is a level of nine to ten when he does have a headache. His headaches can last from two hours to all day. They come on randomly without any known precursor or aggravating event. When he does get a headache, he goes into a dark room, takes aspirin and tries to lay down and fall asleep.*

…
The frequency and pain level of his headaches have been stable for the last two years.
…
He testified that once the headache comes on, he really cannot do much of anything."

See the Summary of Testimony, page 6:16-22.

This testimony was supported by the testimony of the applicant's wife, at trial, under oath. The applicant also informed Mr. Van de Bittner of the type and frequency of his headaches at his initial meeting in September 2021, and as recorded on page 44 of Applicant's Exhibit 7.

There was no evidence submitted at trial or in the medical record to contradict this history of headaches.

This consistent evidence amply supports Dr. Newton's adjusted opinion on permanent disability as expressed in the 7/12/2022 report, and renders it substantial evidence.

Next we turn to the report of the applicant's vocational expert, Mr. Van de Bittner, dated 10/7/22 and in evidence as Applicant's Exhibit 14. Therein, Mr. Van de Bittner reviews the 7/12/22 report of Dr. Newton, as well as a statement from the applicant's wife, in evidence as Applicant's Exhibit 13, and based on this new evidence, finds that *"Since Mr. Fisher 'experiences headaches that last from a couple of hours to all day,' which are understood to involve severe pain, he would not be able to maintain a regular work schedule either full-time or part-time. As such, Mr. Fisher would have access to no jobs in the open labor market based on the opinions of Dr. Newton alone."*

Mr. Van de Bittner further noted, on page 5, that the testimony of both the applicant and his wife established that *"…he has migraine-type headaches that occur at least 5 days a week at level 9 and they occur unpredictably at any time of the day or night."*

Relevant to this issue are the studies referenced on page 70 of Mr. Van de Bittner's 9/27/21 report, in evidence as Applicant's Exhibit 7, which document the maximum number of days per month that an employee could be absent without being terminated. Given that Mr. Fisher has debilitating headaches four or five times a week, rendering him unable to function while the headache lasts, these studies support Mr. Van de Bittner's determination that the applicant likely cannot maintain either part time or full time employment.

This evidence supports the conclusion reached by Mr. Van de Bittner that the applicant cannot maintain a regular work schedule either part of full time. It therefore follows that the applicant would not have access to the open labor market, and thus would not be able to benefit from the provision of vocational rehabilitation because of his industrial injuries. As Mr. Van de Bittner's opinions are based on the un-contradicted testimonial evidence and the medical opinions of the AME Dr. Newton, as well as Mr. Van de Bittner's thorough vocational testing and analysis, and expressed to a degree of reasonable vocational probability, they are substantial evidence.

Pursuant to **Ogilvie v. WCAB (2011) 197 Cal. App. 4th 624,** a scheduled rating may be effectively rebutted when the injury to the employee impairs his or her rehabilitation, and because of that, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating. That is the case here, and the evidence as described above both rebuts the scheduled rating and establishes that the applicant's loss of future earning capacity is total.

At this point a moment should be taken to address some of the defendant's concerns about some of the evidence they feel shows that the applicant is not totally disabled. Perhaps most interesting is the undisputed fact that the applicant assisted in a move of his family from California to Arizona by driving a Uhaul truck and fishing boat combo 1000 miles over three days in 2021. On page 9 of the Summary of Testimony, the applicant testified under oath to all of that, plus that he drove four to five hours a day for three days. He described the drive as physically exhausting.

It should be noted that the issue here is whether the applicant can benefit from rehabilitation. That analysis determined that because the applicant would miss too much work due to his frequent and debilitating headaches, he would not be able to maintain a regular work schedule. The fact that he was able on one occasion to with difficulty drive for three days, four to five hours per day, and presumably days on which he did not suffer a headache, does not refute the reasons that Mr. Van de Bittner cited in concluding that the applicant could not maintain a work schedule necessary to obtain and then keep a job. While defendant's focus on this trip is understandable, it simply does not establish that a three day window without a headache is inconsistent with the applicant's history of having headaches four to five times a week, but being headache free the other two or three days.

The same analysis applies to the defendant's point that the applicant was able to travel to and participate in the 12/1/20 evaluation with Mr. Van de Bittner (Applicant's Exhibit 7), which combined to last about 9 hours. Again, if this happened on a day without a headache, then this activity would be within the applicant's abilities. In addition, the activities involved in the evaluation were not physically strenuous, and accommodations were able to be made for activities that did bother the applicant. Further, the record establishes that the applicant was driven to this evaluation by his wife (see page 39) and they stopped 2-3 times during the trip to rest. Mr. Van de Bittner reported that the applicant appeared uncomfortable throughout the interview and testing (see pages 40 and 43). Hence, the applicant's participation in the evaluation does not contradict the reasons Mr. Van de Bittner eventually used to determine that the applicant was unable to benefit from rehabilitation.

Defendant also points to the fact that the applicant has made no attempts to return to work. The applicant mentioned to Mr. Van de Bittner that this was because he wanted to focus on recovery first (see page 48, Applicant's Exhibit 7). While defendant may disagree with this position, it does explain the applicant's behavior. Further, without any other context, it does nothing to refute the reasoning behind the opinion of Mr. Van de Bittner that the applicant cannot benefit from rehabilitation services. Therefore, this fact has no bearing on the issues presented for decision.

The same analysis applies to the defendant's concern that the applicant has had little or no treatment since moving to Arizona. The reasons for that are not established by the evidence. For instance, it is very common to have great difficulty for an applicant to find a treating doctor in another state that will comply with California law. Without any further context, the lack of treatment is not relevant to any issue presented for decision.

Finally, defendant expresses concern that the applicant remained seated for an hour and 27 minutes at trial. However, defendant agrees that the applicant's testimony is that he can sit for *15 to 20 minutes before his symptoms start increasing.* On its face, this testimony does not establish a maximum time that the applicant can remain seated before his symptoms require him to move or get up, but only how long he can sit before he feels an increase in symptoms. Thus, without further context, the length of time the applicant spent sitting at trial is not pertinent to the question of whether his frequent debilitating headaches render him unable to benefit from rehabilitation.

ADMISSIBILITY OBJECTIONS

Defendant objects to the admissibility of **the two reports of Dr. McGee-Williams**, a treating doctor, because they were not signed under penalty of perjury as required by LC section 5703(a)(2) to include the statements required by 139.32. That law states unambiguously that the reports of attending or examining physicians are admissible as evidence at trial ***only*** if the doctor has included the statements required by LC section 139.32. These two reports do not include that statement, and therefore, are not admissible at trial. Defendant's objection to the admissibility of these two reports is sustained.

For the same reason, the defendant's objection to the admissibility of **the supplemental report of Dr. Ross, proposed exhibit 5**, is sustained. Further, this is a supplemental report, and in that report makes reference to prior reports. Defendant has also objected to the admissibility of this report as it does not address apportionment, as required. While this doctor does mention apportionment, he does not do so in a manner that rises to the level of substantial evidence. One wonders why all the reports of Dr. Ross were not offered, and whether prior reports might have addressed apportionment in a more comprehensive manner. In addition, the parties should recall that they have stipulated that there was an industrial injury to the hearing, which Dr. Ross addressed. Although here the issue of permanent disability has been decided on other grounds, if that had not been the case, the parties have not provided any substantial evidence for the issue of permanent disability to the hearing to be determined. Hence, it would almost certainly be necessary to develop the record per the McDuffie case, which would require the matter to be sent back to Dr. Ross for another supplemental opinion containing a proper analysis of apportionment, as well as the needed

statement as required by LC section 5703(a)(2). The parties should be cognizant that the delay in that course of action, had it been needed, would be significant.

Defendant objects to the admissibility of **the report of Dr. Penafiel**, applicant's proposed exhibit 6. This is a report of a functional capacity evaluation that appears to have been solicited by applicant's counsel. It is informally noticed by this judge that Dr. Penafiel frequently provides this testing in conjunction with and at the request of Mr. Van de Bittner, who in turn uses the FCE in his analysis. Neither party appears to have sent the FCE done by Dr. Penafiel to any of the medical evaluators.

As a simple FCE, the report is admissible, and valuable in that form for the vocational experts to review. However, Dr. Penafiel has gone far beyond his duty here and usurped the role of the vocational expert, Mr. Van de Bittner, and added the conclusion that the bare FCE results themselves render the applicant unable to benefit from rehabilitation. This doctor does this without any explanation as to why or how the FCE results translate into a complete inability to benefit from rehabilitation. He does no evaluation of the job market. The doctor allows the applicant to subjectively define many of his limitations without any or significant effort to determine the validity of such subjective and self-serving determinations. Dr. Penafiel did not see the critical report of Dr. Newton dated 7/12/22, and which is in evidence as Joint Exhibit MM. As such, his report is useful as a functional capacity evaluation, but it is not substantial evidence to prove anything beyond the results of that test itself. Said differently, his opinion that the applicant cannot benefit from rehabilitation is not substantial evidence for the reasons discussed above.

Finally, the FCE does not violate LC section 4061(i) or 4062.2, as this evidence does not support the proposition that it was obtained to rebut the opinions of the other evaluating physicians. The report was only sent to Mr. Van de Bittner, who considered it in his analysis. Neither party sent it to the AME's or Dr. Ross. While Mr. Van de Bittner did use it in his analysis, he did so in the context of a vocational rehabilitation evaluation, not a medical one. Further, the opinions of Dr. Penafiel, as noted above, are not substantial evidence on the question of permanent disability.

It is therefore admissible as a FCE. The opinions of Dr. Penafiel on permanent disability are, for the reasons discussed above, not substantial evidence.

Defendant also objects to the admission into evidence of **the three reports from Mr. Van de Bittner**, which are applicants proposed exhibits 7, 11 and 14.

In proposed exhibits 7 and 11, Mr. Van de Bittner specifically bases his opinions on the conclusion reached by Dr. Penafiel that the applicant cannot benefit from rehabilitation, citing specifically Dr. Penafiel's conclusion as the foundation of this belief. Mr. Van de Bittner clearly believed that absent Dr. Penafiel's opinions, the reports of the AME's and his vocational investigation showed that the applicant could in fact benefit from rehabilitation and was not 100% disabled. Since Dr. Penafiel's opinions on this were the cited reason Mr. Van de Bittner determined the applicant wasn't able to benefit from rehabilitation, and since Dr. Penafiel's opinions are clearly not substantial evidence, Mr. Van de Bittner's conclusions based thereon are also not substantial.

While all three reports are admissible and will be admitted into evidence, the first two reports, exhibits 7 and 11, are not substantial evidence for the reasons discussed. The final report of Mr. Van de Bittner, Applicant's Exhibit 14, was based on completely different grounds, and is substantial evidence on the issue in question.

Defendant objects to the admissibility of **the two emails from applicant's significant other, Kayli Ronquillo, proposed exhibits 8 and 9**, on the grounds that they were not authenticated at trial and contain hearsay statements. However, the subject of the emails was discussed at trial, in sworn testimony that basically communicated the same information. There is a hearsay statement, but this judge will weigh the evidentiary value of that statement appropriate to its level of hearsay. The two emails are admissible, and the defendant's objections are overruled.

Defendant objects to **the applicant's proposed exhibit 10, a declaration from Kayli Ronquillo, made under penalty of perjury and dated 5/6/22**. The information in the declaration is in nearly all respects the same or similar to this person's testimony at trial. It is in fact a statement of the witness' personal knowledge, and the hearsay statements that are discussed therein will be weighted accordingly by this judge. The objection to admissibility is overruled.

Finally, defendant object to the admissibility of **the statement of Kayli offered as applicant's exhibit 13.** This statement is autosigned by Ms. Ronquillo, and offers the same testimony that she did at trial (see page 11 of the Summary of Testimony). The only discrepancy claimed by defendant is that in the statement, Kayli says that the applicant gets headaches "about 5 days a week," while at trial, she testified he gets headaches "…three to five times a week…" On this point, the witness' sworn trial testimony will be given precedence, but it should be kept in mind that the two statements are really not at great odds with each other. Under the circumstances, this minor and arguable deviation does not render the statement inadmissible, and defendant's objection is therefore overruled.

ATTORNEY'S FEES/ LIEN OF WORKERS' COMP LAW

Applicant's counsel has expended considerable work in this case, to include litigation through trial. He is entitled to a reasonable attorney's fee of 15% of the permanent disability awarded. Applicant's current counsel is to hold the attorney's fee in trust pending resolution of the lien of Workers' Comp Law, and is to engage in immediate good faith negotiations with the lien claimant to resolve that lien. Jurisdiction is reserved should such negotiations fail.

Date: 4/26/23

Curt Swanson
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE