

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

GABRIEL THURMAN, *Applicant*

vs.

**LESLIE'S POOLMART, INCORPORATED;
ZURICH INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ10131609
Van Nuys District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant Leslie's L. Poolmart, Inc., by and through its insurer, Zurich Insurance Company, seeks reconsideration of the December 23, 2020 Findings and Award, wherein a workers' compensation administrative law judge (WCJ) found applicant, Gabriel Thurman, while employed as a store manager/loading/unloading, sustained an industrial injury on June 5, 2015, to his cervical spine, thoracic spine, shoulders, right elbow, coccyx, DVT/vascular, and sleep, and claimed to have also sustained industrial injury to his head, brain, seizure, psyche, and lower extremities. The WCJ found the injury resulted in 100% permanent disability, and that the apportionment to pre-existing disability did not affect the finding of permanent total disability. The WCJ awarded a period of temporary disability, and permanent disability indemnity at the rate of \$569.29 per week for life, increased per Labor Code section 4859, less attorney fees and credit to defendant for prior payments.

Defendant contests the finding of permanent total disability, contending that the medical and vocational reporting is not substantial medical evidence to support the finding of permanent total disability because there is no substantial evidence that applicant sustained a blunt head trauma or loss of consciousness. Defendant argues that the finding that applicant's injury resulted in permanent total disability was premised on a claim of a traumatic head injury, which is negated by Dr. Richman, the Agreed Medical Examiner in neurology. Defendant further asserts that the impairments cited to support the finding of permanent total disability are subject to apportionment

to non-industrial factors, and were based on a non-existent head injury, which issues were not addressed by the vocational expert and renders his report not substantial evidence. Defendant also argues that the medical opinions on applicant's ability to return to the labor market are not substantial medical evidence because the limitations cited were based on the existence of an industrial head injury. Defendant further contests the credibility of applicant's testimony that he sustained a head injury and lost consciousness, as contemporaneous medical records fail to support his claim. Defendant cites to other inconsistencies in the record to demonstrate that applicant's testimony is not believable. Defendant next argues that the findings on applicant's benefit rate for temporary disability and permanent disability are inconsistent and not supported by applicant's actual earnings. Defendant next argues that Labor Code section 4660.1 prevents impairment ratings for sleep and psychiatric impairment. Finally, defendant argues applicant cannot rebut the scheduled rating pursuant to the methods provided in *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624], because Section 4660.1 eliminated reference to diminished future earning capacity.

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

We have considered the Petition for Reconsideration, the Answer and the contents of the WCJ's Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant reconsideration, rescind the Findings and Award and return this matter for further development of the record.

FACTS

The parties stipulated that applicant sustained an industrial injury on June 5, 2015, to his cervical spine, thoracic spine, shoulders, right elbow, coccyx, DVT/vascular, and sleep, when he was struck by a heavy barrel of chlorine. Applicant also claimed he sustained injury to his head, brain, seizure, psyche, and lower extremities.¹ According to the summary of evidence, applicant

¹ While applicant's claim that he sustained an injury to the head, brain and seizure was placed at issue, the Findings and Award, as well as the Opinion on Decision, are silent on this issue. The WCJ did not find applicant sustained injuries to these body parts. The WCJ will have the opportunity to address this when issuing a new final decision.

testified repeatedly at trial that he had struck his head in the accident and lost consciousness multiple times, both at the scene of the accident and in the ambulance afterwards.

In his initial AME neurologic examination on July 25, 2018, Dr. Richman reported applicant's history of the accident on June 5, 2015. Dr. Richman reported that applicant stated that he "sustained blunt trauma to the right side of the scalp," and he "believed there was some intracranial pathology from his head injury that was noted on imaging studies. He does reaffirm that he was unconscious from the initial blow to the scalp." (Ex. T. 7/25/18 Dr. Richman AME Report, p. 2.) Dr. Richman reported applicant's complaints of "ongoing difficulty with memory and concentration, anxiety, depression, and lightheadedness as well as vertigo. He reports blurred vision of both eyes and tinnitus of both ears. He reports constant headaches described as 7-10." (Ex. T. p. 3.) Applicant also reported that he began suffering multiple daily seizures six months after the injury.

Dr. Richman reviewed extensive medical records in which multiple physicians reported applicant's claim that he sustained an injury to his head. Dr. Richman noted Dr. Zakin's June 15, 2016 report that applicant reported losing consciousness during the accident, that Dr. Schiffman reported on July 27, 2016, that applicant suffered a contusion of his head and concussion during the accident, and Dr. Hasday reported on October 11, 2017 that applicant had a "closed head injury with residual complaints of headaches, dizziness, memory loss and cognitive deficits (and now seizure disorder)." Dr. Nudleman reported on November 2, 2017 that applicant was rendered unconscious by the accident and remained hospitalized for two weeks. (Ex. T, p. 10, 13, 20, 26.)

Dr. Richman provided the following diagnosis of applicant's neurological injury:

1. Blunt head trauma and cerebral concussion, 6/05/15, industrial causation.
 2. Posttraumatic head syndrome, 6/05/15, industrial causation.
 3. Anxiety and depression, part of posttraumatic head syndrome, industrial causation.
 4. Lightheadedness associated with anxiety, industrial causation.
 5. Posttraumatic headaches, industrial causation.
 6. Epileptiform activity related to hyperventilation syndrome (no true epileptic condition), industrial causation.
 7. Cervicogenic vertigo, industrial causation.
 8. Sleep disturbance due to pain, anxiety, and depression, industrial causation.
 9. Orthopedic complaints, to be addressed by Dr. Chester Hasday, the Agreed Medical Examiner in orthopedics.
- (Ex. T. p. 46-47.)

Regarding applicant's complaints of seizure episodes, Dr. Richman reviewed medical literature that indicated "a strong relationship between the severity of traumatic brain injury and risk of subsequent unprovoked seizures," but noted that:

The more likely explanation for the patient's episodes is related to anxiety, which is part of posttraumatic head syndrome, as described in the textbook Neurology and Trauma by Randolph Evans, Second Edition, Oxford University Press, 2006, page 98, Table 5.1. Anxiety in turn is associated with hyperventilation syndrome which can cause syncope and syncopal related seizures, as described in the following literature.

(Ex. T. p. 48.)

Dr. Richman concluded that applicant's neurologic impairment stemmed from a head injury causing a posttraumatic head syndrome with headaches, anxiety and depression.

In summary, this is a 40-year-old male who sustained a cerebral concussion on 6/05/15 when he was inadvertently pushed and fell during his course of employment resulting in brief alteration or loss of consciousness. He sustained posttraumatic headaches with a migrainous component, posttraumatic head syndrome, anxiety and depression which are part of posttraumatic head syndrome, as well as recurrent syncopal spells associated with seizures. This is not to be considered a true seizure disorder such as epilepsy.

(Ex. T, p. 52.)

Dr. Richman provided whole person impairment ratings, including a 10% WPI for a posttraumatic head syndrome caused entirely by his industrial injury, 3% WPI for posttraumatic headaches and for applicant's episodes of syncope and lightheadedness, absent an AME quality psychiatric evaluation incorporated into a GAF score, he assessed a 29% WPI. (Ex. T, p. 53.)

Dr. Richman opined that applicant was not "employable at this time," and recommended "intensive psychiatric care and psychotherapy for recurrent episodes of syncope and syncopal seizures related to an anxiety disorder stemming from posttraumatic head syndrome." (Ex. T, p. 54.)

Dr. Richman prepared a supplemental report dated July 16, 2019, after he had the opportunity to review additional medical records that he had not previously been provided. (Ex. U, 7/16/19 Dr. Richman AME Supplemental Report.) He noted that previously "[m]edical records that were concurrent with the time of the patient's injury were not available for my review. The first medical record provided to me for review was dated 6/15/16, a year later." (Ex. U, p. 3.)

After Dr. Richman reviewed records from applicant's treatment in the emergency room on June 5, 2015, he amended his impairment ratings. The emergency room records revealed that applicant had denied he had sustained a head injury on June 5, 2015, and his complaints centered on pain from the injury to his spine. As a consequence, Dr. Richman removed only the 10% WPI for posttraumatic head syndrome, and did not otherwise alter his opinion.

Having had an opportunity to review medical records that were concurrent with the injury of 6/05/15, I would amend the opinions provided in my report as relates posttraumatic head syndrome. I provided 10% whole person impairment from Table 13-6. In my opinion this impairment rating should be subtracted from the patient's final whole person impairment rating.

...

The remainder of my opinions remain unchanged.
(Ex. U, p. 4.)

DISCUSSION

Dr. Richman's reporting on applicant's industrial impairments cannot be relied upon as substantial medical evidence in light of his subsequent consideration of the contemporaneous emergency room records of applicant's treatment for his industrial injury, which revealed that applicant denied he sustained an injury to his head, and which did not establish applicant sustained a loss of consciousness. While Dr. Richman determined that only his 10% WPI rating of applicant's traumatic head syndrome was no longer applicable, he has not provided an explanation for his findings with regard to applicant's symptoms which he had previously attributed directly to a posttraumatic head syndrome. Dr. Richman concluded that applicant still suffers from ratable industrial sequelae of anxiety, depression and headaches, and from lightheadedness associated with his anxiety, which he had attributed to a posttraumatic head syndrome.

As defendant argues, the finding of permanent total disability is predicated upon impairment caused by these sequelae. We are persuaded that the record must be further developed, to provide Dr. Richman with the opportunity to explain their industrial cause in the absence of a posttraumatic head syndrome. It is insufficient for the AME to amend only his rating of a posttraumatic head syndrome without addressing the cause and nature of the sequelae he attributed to that head injury. Additionally, the medical and vocational reporting that is premised on the existence of a posttraumatic head syndrome caused by a head injury at the time of the June 5, 2015 incident must address Dr. Richman's revised finding that applicant did not sustain a ratable injury

to his head. The record as it now stands is not adequate to make a final determination of the extent of applicant's permanent disability caused by his admitted industrial injury.

We will therefore grant reconsideration, rescind the Findings and Award and return this matter to the trial level for further development of the record and for a new final determination. To this end, the WCJ should follow Dr. Richman's recommendation and require the parties to obtain an additional evaluation of applicant's syncope and anxiety from a board certified psychiatrist. Dr. Richman indicated that applicant's anxiety is associated with hyperventilation syndrome which can cause syncope and syncopal related seizures. He indicated that this further evaluation is necessary to address the cause of applicant's anxiety and syncope.

Additionally, we note the WCJ's explanation in his Report of the methodology he followed to determine the extent of applicant's permanent disability. He states on page 6 of his Report:

Petitioner attempts to "guess" or "surmise" as to how the Court reached its decision as to a 100% total and permanent disability.

The Court did not rely on "Ogilvy" or other such formulas. The Court relied on the medical evidence presented, its observations of the applicant, which were consistent with the medical reporting. The reporting of the vocational expert and Ms. Koski, certainly supported the medical doctors' findings and the Courts observations of the applicant.

The Court and/or the medical providers may never know whether Mr. Thurman actually struck his head at the time of the injury. While Mr. Thurman testified that he did, he really didn't seem to remember. It appears that the doctors were presented with this theory, and did not appear to have any significant change of opinion.

Though he referenced the vocational expert's opinion, the WCJ disclaimed any reliance on *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] to find applicant had rebutted the scheduled rating of his impairments. In the absence of a rebuttal based upon applicant's vocational evidence, the rating of applicant's permanent disability must be based on impairment ratings obtained through application of the AMA Guides pursuant to Labor Code section 4660.1. A finding of permanent disability cannot be based on Labor Code section 4662(b). (*Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd. (Fitzpatrick)* (2018) 27 Cal.App.5th 607, 614 [83 Cal.Comp.Cases 1680].)

The court in *Fitzpatrick* reversed a finding of permanent total disability that was based upon Labor Code section 4662(b), which provides that if the conclusive presumption of permanent

total disability in Section 4662(a) is not applicable, “In all other cases, permanent total disability shall be determined in accordance with the fact.” The court held that Section 4662(b) does not provide a means for determining a permanent disability rating separate from the method that was provided in Labor Code section 4660. “We further see no basis for concluding section 4662, subdivision (b), provides a second independent path to permanent total disability findings separate from section 4660. Section 4660 is mandatory.” The court held that a rebuttal of the scheduled rating pursuant to *Ogilvie* is still viable to establish permanent total disability. While Section 4660.1 now provides the method for determining a permanent disability rating, the court’s directive that it is the only acceptable methodology for determining permanent partial disability is still applicable. (*Fitzpatrick*, 83 Cal.Comp.Cases at 1692.)

Accordingly, upon return of this matter, the WCJ shall have the opportunity to make a new final decision in this matter after he determines that the record is appropriately augmented, and may address the body parts issue that was not determined and provide an Opinion on Decision that sets forth the legal rationale to support his decision.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the December 23, 2020 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the Findings and Award is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion and for a new final determination.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

KATHERINE WILLIAMS DODD, COMMISSIONER
PARTICIPATING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 12, 2021

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

**GABRIEL THURMAN
GLAUBER BERENSON VEGO
LAW FIRM OF FRIEDMAN BARTOUMIAN**

SV/pc

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