

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

KARIM ELANEH, *Applicant*

vs.

**EZ LUBE; CIGA for CASTLEPOINT NATIONAL INSURANCE, in liquidation,
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Defendants***

**Adjudication Numbers: ADJ7882792 (MF), ADJ7882793
Marina del Rey District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report and 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, 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/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 9, 2023

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

**KARIM ELANEH
LAW OFFICE OF STANLEY ODA INC.
BENTHALE, MCKIBBIN & MCKNIGHT**

AS/ara

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

On 12/21/22 a Findings & Award was served finding Applicant had 100% permanent disability. On 1/17/23 Defendant filed a timely and verified Petition for Reconsideration on the grounds “*that the evidence does not justify the findings of fact.*”

The focus of Defendant’s argument is challenging the judge’s decision to rely on the findings of Applicant’s vocational expert Laura Wilson rather than the findings of Defendant’s vocational expert Amy Koellner.

Applicant filed a timely Answer on 1/27/23.

**II.
FACTS**

Title 8, CCR 10945(a) requires a Petition for Reconsideration to “fairly state all of the material evidence relative to the point or points at issue.” Yet, Petitioner inexplicably provides no history of the injury itself. The fact is the injury was caused by an incident of workplace violence.

Applicant credibly testified before the judge that he had minor injury on April 13, 2011 when he hit his head on a hanging piece of metal. This is ADJ7882792. The judge considered this injury at the Trial but ultimately awarded all benefits and medical treatment for the second injury.

On June 6, 2011 Applicant Karim Elaneh, at age 47, while working on a customer’s car at EZ Lube, was injured when a car thief entered the premises and tried to drive off with the vehicle he was working on at that exact time. This is ADJ7882793.

During the melee Mr. Elaneh was struck by the bumper of the car and was knocked down. At least one tire ran over his leg. When he tried to stand up the thief ran over him again and at one point his body was flung up in the air. He felt the thief wanted to kill him. (Summary of Evidence 9/27/22, page 3, lines 3-8; page 5, lines 7-12) This event would cause Mr. Elaneh to suffer permanent disability to 16 separate body parts or systems.

Applicant saw numerous physicians and vocational experts from each side. This reporting was offered into evidence at a Trial in 2019 involving a now-retired Workers Compensation Judge. She awarded 100% permanent disability but in her decision she ruled Defendant’s vocational expert report as inadmissible. (Exhibit A, Amy Koellner, 5/9/18)

Defendant at that time filed a Petition for Reconsideration specifically challenging the admissibility decision. This caused the trial judge to rescind the Findings and Award. The parties came back and performed additional discovery including the use of Agreed Medical Examiners.

The Minutes for the 9/16/19 Hearing reflect the previous trial judge “*strongly recommends*” the use of an agreed vocational expert. Instead, the parties doubled-down on their own vocational experts with Defendant obtaining five additional reports from their expert Amy Koellner and Applicant obtaining four additional reports from Laura Wilson.

When the parties could not settle the Trial was re-set with the undersigned as the new judge on this case. Applicant testified credibly about his injury and ability to return to work. The matter was submitted for decision.

Just like the trial judge before him, this current judge wanted a formal rating as part of the decision making process. The rating instructions to the DEU was similar but not identical to the rating instructions given by the prior trial judge. There were some slight differences with each judge’s rating instructions with the former judge getting a rating of 92% and the undersigned at 93%. Ultimately another award of 100% was issued.

III. DISCUSSION

The judge provided a ten page Opinion on Decision that is barely referenced by Petitioner. Most of that Opinion sets forth corroborating reasons in support of the 100% Award. These will be further discussed below.

Petitioner seems to focus mainly on vocational evidence and the comparisons between the two party’s experts. They state four separate arguments as to why the reporting of vocational evaluator Amy Koellner is more persuasive than the reporting of Laura Wilson.

1. VOCATIONAL EXPERT LAURA WILSON FAILING TO REVIEW AME DR. BRIAN JACKS REPORTING.
2. APPLICANT’S VOCATIONAL EXPERT FAILED TO ADDRESS VALID APPORTIONMENT.

The judge will address the above two issues together.

When this case went to Trial in 2019 before the prior judge, the psychiatric evidence that judge relied on was from Dr. Hirokawa. The psychiatrist found significant permanent disability but apportioned 40% of it as non-industrial. Ultimately, the prior trial judge determined that apportionment was invalid but no specific reasons were given.

Eventually that prior judge’s decision was rescinded after Defendant’s 2019 Petition for Reconsideration. The parties then proceeded to Dr. Brian Jacks as an AME in psychiatry. Petitioner raises the importance that their vocational expert Amy Koellner reviewed that report and Applicant’s expert Laura Wilson did not.

Dr. Jacks also found significant psychiatric injury but apportionment was only 15% as compared to the 40% apportionment found by Dr. Hirokawa. Dr. Jacks apportionment of 15% was found to be valid.

Applicant responds to this by stating that Laura Wilson had at least reviewed and commented on the prior psychiatric expert Dr. Hirokawa who found 40% non-industrial apportionment. The argument goes that if Laura Wilson still found unapportioned 100% industrially-caused permanent disability when she thought the psychiatric apportionment was 40%, then failure to review the later AME report finding the lesser 15% apportionment should not be a problem. No reason is given in Applicant's Answer why Dr. Jacks' report was not provided to Laura Wilson to comment.

Ms. Wilson does discuss apportionment at pages 12-14 of her most recent report dated 4/22/22 (Exhibit 12) as well as all her other reports. At page 14 she stated after a long discussion "*This non-amenability to benefit from vocational retraining is the direct result of the work injury and no other factors.*"

Laura Wilson having not reviewed AME Dr. Jack's psychiatric report is a real shortcoming to her opinion on the issue of what's being called "vocational apportionment." Moreover, the majority of her five vocational reports seem to indicate her belief that Dr. Hirokawa found no apportionment. Only in one of her five reports does she discuss apportionment with any accuracy concerning Dr. Hirokawa. (Exhibit 14, page 7) The other four reports make conclusions on apportionment under an apparent belief that Dr. Hirokawa found zero psychiatric apportionment when in fact he found it was 40%. (Exhibit 11, page 22; Exhibit 12, page 14; Exhibit 13, page 10; Exhibit 15 page 8) The statement contained in each of these vocational reports is "*Qualified Medical Examiner Dr. Greg Hirokawa mentioned Mr Elaneh's injuries are felt to be industrial and there is no apportionment.*"

Applicant's vocational expert does a good job on her conclusion concerning Applicant's ability to compete in the labor force, his ability to be rehabilitated, and his future earning capacity. The problem however is that Laura Wilson's opinion on apportionment for the reasons stated above are unreliable.

Despite this shortcoming, the judge still believes a 100% unapportioned Award is warranted. (See also discussion below) As a reminder, there were 16 body parts involved. Apportionment was to just three of those body parts. With apportionment the DEU determined those 16 body parts caused 93% permanent disability. The judge believes that without apportionment the rating would have been only 2% higher at 95%.

The judge is aware of the concept of "vocational apportionment." However, this judge believes it is a more important consideration when apportionment is a significant amount of the final permanent disability calculation and when there are fewer body parts. Here, the impact on apportionment to PD is arguably minimal amongst the 16 body parts assigned permanent disability.

Moreover, the judge saw how the CVC calculation worked to combine the first 5 of the 16 body part impairments, versus the next 11 body parts. The last 11 body parts added only about 5% additional PD despite more than minimal PD found on them.

Under the totality of these circumstances of this case, it just feels fair to the judge that less emphasis be given to the need to have substantial evidence from a vocational expert on apportionment.

3. KOELLNER'S REPORTING PROGRESSES FROM ALL MEDICAL RESTRICTIONS OF RECORD THROUGH TRANSFERABLE SKILLS ANALYSIS IN MAKING HER FINDINGS WHILE WILSON'S REPORTING USES RESTRICTION SPECULATIVE TO THE ACTUAL MEDICAL EVIDENCE.

Petitioner raises this issue but references no specific portion of the evidentiary record as required by Title 8, CCR 10945(b). Amy Koellner wrote six reports and Laura Wilson wrote five. It is unclear what the exact argument Defendant is trying to make here.

The judge stated in his Opinion as shown in italics below:

“There are not many established standards for which a judge can compare one vocational expert’s opinion to another. Both experts issued multiple and costly reports. Each expert made conclusions that predictably match the party’s interest that hired them, and with content that seemed to repeat the same thing over and over again in unnecessarily voluminous reporting.

Per the Minutes of Hearing dated 9/16/19, the prior trial judge “strongly” recommended that an agreed vocational expert be used. But this did not happen and the judge is now required to make a pick or develop the record. Since this case was tried twice, and in consideration of the Constitutional mandate to accomplish substantial justice in all cases expeditiously, inexpensively, and without any incumbrance of any character, the judge did his best to make a decision based on the presented record. (Cal. Const., art. XIV, § 4)

Overall, the judge felt applicant's vocational expert was the better reasoned and more persuasive than that of Defendant's, and that it more accurately provides information relevant to the issue at hand. The judge therefore concludes that Applicant Karim Elaneh is totally and permanently disabled and will be awarded 100%. It was shown by medical and vocational evidence that he is not vocationally feasible, can no longer compete in the active labor force, and has a complete loss of future earning capacity.”

At page 27 of the 3/29/16 report (Exhibit 11) Laura Wilson wrote:

“I was asked as a vocational expert to determine if Mr. Elaneh is able to return to work in the current labor market. After careful review and consideration of Mr. Elaneh's physical and emotional work restrictions, dosage of medications that he is currently taking and its side effects, and his transferable skills, determined by

McCroskey and Volcano 15.0 it is my professional opinion that based on his industrial related impairment and his industrial physical limitations that were provided in the medical reports of Dr. Domenic J. Sisto, Agreed Medical Examiner Jeffrey A. Hirsh, Dr. Philip A. Sobol, Qualified Medical Examiner Karl E. Epstein, and Qualified Medical Examiner Greg Hirokawa, Mr. Elaneh is not amenable to vocational rehabilitation and is unable to sustain gainful employment and therefore is unable to compete in the open labor market and as result of his work related impairments provided by considering his preinjury capacity and abilities, he has at present no consistent and stable future earning capacity.

By that I mean that he is unable work competitively and productively 5 days per week, 8 hours per day and that his ability to work a full or part time job would require that he be able to set the total hours worked, the days and the hours worked such that he would be able to come and go as she pleased and work at his own pace and whenever he was able to physically and emotionally able to. This kind of "employment" is really a "niche" employment or a sheltered working environment and is not consistent with the realities of the Open Labor Market and therefore not considered competitive within the Open Labor Market."

"Defendant hired vocational expert Amy Koellner who first issued a report dated 5/9/18 (Exhibit A) There was a division as to the vocational experts as to whether consideration of the side effects of medication and pain limiting activity can be a factor in determining vocational feasibility. The judge felt it was an important factor in one's ability to return to work.

While it was felt both vocational experts go out of their way to try to please the party that hired them, the judge feels there is one important factor that is downplayed by Amy Koellner and that is the fact that in the eleven years since the date of injury there has been no return to any type of work whatsoever. It seemed easy for her to say in her 9/24/20 report, at page 5 that "Mr. Elaneh is amendable to vocational rehabilitation and Mr Elaneh is able to secure employment in the open labor market" when the fact is he has not returned to any work in the past 11 years and is likely to never return to any type of suitable, gainful employment other than the most sedentary, sheltered jobs that seem to only exist in defense-oriented vocational reports."

4. VOCATIONAL EXPERT LAURA WILSON HAVING A SPARSE AND INADEQUATE EMPLOYMENT HISTORY

The judge agrees with Defendant that when comparing the two vocational experts that Defendant's expert Amy Koellner has a slightly more detailed history of prior employment. However, Petitioner does not make it clear how having an incrementally better history means the judge should rely on the Defense vocational expert over Applicant's expert when it comes to determining Applicant's current vocational and earning abilities.

ADDITIONAL EVIDENCE TO SUPPORT 100% AWARD

Defendant's Petition for Reconsideration does not appear to challenge any of the judge's findings other than his reliance on vocational expert Laura Wilson as justification to go beyond the 93% rating to a finding of 100%. Yet the judge spent the majority of his Opinion on Decision going over corroborating reasons why an Award of 100% is appropriate. They are discussed below with much copied (in italics) from the original Opinion on Decision:

THERE ARE 16 SEPARATE BODY PARTS OR SYSTEMS THAT SUSTAINED DISABILITY.

1. Upper Digestive Tract
2. Lower Digestive Tract
3. Hernia
4. Reproductive System
5. Sleep
6. Psyche
7. Cervical
8. Lumbar
9. Left Cubital Tunnel
10. Left Hand Grip Loss
11. Left Shoulder
12. Right Cubital Tunnel
13. Right Hand Grip Loss
14. Right Shoulder
15. Left Knee
16. Right Knee

DR. SOBOL'S REPORTING AS TO ACTIVITIES OF DAILY LIVING

In preparing the formal rating of the orthopedic injuries, the judge's conclusions on permanent disability were based mainly on the reporting of Dr. Sobol. The physician spends some time in his 7/21/15 report (Exhibit 3) going over Mr. Elaneh's activities of daily living. He wrote:

"The patient provides good activities of daily living of assessment to include ability to perform activities independently but with pain with eating by himself and sitting. He indicates ability to perform activities but with modification or assistance with brushing his teeth, combing his hair, bathing, dressing himself, writing, gripping, grasping, traveling by motor vehicle whether he is the passenger or driver, standing, reclining, walking, climbing stairs, carrying groceries or garbage, pushing the vacuum cleaner and doing the laundry. He indicated that he is totally unable to perform activities of daily living to include preparing meals by himself, typing, lifting, carrying, pushing, pulling, reaching overhead, traveling by plane, bending, stooping, kneeling, squatting, making a bed and washing the dishes."

Dr. Sobol provided orthopedic work restrictions as follows:

“With regard to cervical spine and bilateral shoulders, the patient is precluded from lifting items weighing over five pounds, forceful pushing or pulling with the bilateral upper extremities and over the shoulder work with the bilateral upper extremities.

With regard to the lumbar spine, the patient is precluded from lifting items weighing over 5 pounds, repetitive bending or stooping and prolonged sitting. He should also limit standing or walking to no greater than 20 minutes per hour.

With regard to the bilateral upper extremities, bilateral elbows, forearms and bilateral wrists and hands, the patient is precluded from lifting items weighing over five pounds, forceful pushing or pulling with the bilateral upper extremities and repetitive or forceful gripping and grasping with the bilateral upper extremities.

Based on the patient's physical limitations and considering his job description as an auto mechanic, I feel that he is physically unable to return to work performing his usual and customary duties. Therefore, he is considered medically eligible for vocational rehabilitation. He will require permanent accommodation of his work restrictions to return to work.”

APPLICANT KARIM ELANEH WAS CREDIBLE WITNESS.

The judge’s Opinion on Decision stated about the Applicant:

“The judge considered the testimony of Applicant Karim Elaneh to be credible. He testified to having two knee surgeries and having significant treatment. Ten years after the injury he continues to treat for ongoing internal problems involving his GI, IBS, blood pressure, sexual dysfunction, constipation and hernia. He is taking medication prescribed by Dr. Longacre.

He testified to having continued psychiatric complaints mentioning nightmares and flashbacks of him being run over by a car and thoughts that this person was out to kill him. He takes Xanax for psychiatric symptoms and Prosom for sleep. He was taking medication for his orthopedic injuries including Voltaren pill and gel, Tramadol, Baclofen, Cyclobenzaprine and Aleve.

Applicant credibly testified as to how pain affects his life and why it prevents him from returning to work. This includes having too much pain, too little sleep and need to use the bathroom frequently. The pain along with reduced sleep gives him concentration problems. He uses a walker provided to him since 2012 by Dr. Sisto due to knee weakness and lack of balance. He has been accepted for Social Security since 2012 and is currently on Medicare.

Mr. Elaneh did not come across to the judge as someone who is lazy and would prefer to not work if given the opportunity. Rather, he came across as a man with integrity who is frustrated over his situation and inability to return to any work. The judge believes Mr. Elaneh that there is no work he can perform in light of his catastrophic injury.”

APPLICANT HAS NEVER RETURNED TO WORK SINCE THE INCIDENT ON 6/6/11.

Defendant claims Applicant can be rehabilitated and is employable but the fact is he has not returned to any employment since the date of injury almost 12 years ago. The judge considers this significant corroborating evidence in support of Laura Wilson’s vocational findings.

Moreover, the fact that Applicant has never returned to work since the 2011 injury is insufficiently discussed by Defendant’s expert Amy Koellner. The lack of income from any work for the past 12 years is in direct rebuttal to Ms. Koellner’s arguably speculative opinion of employability and earning potential.

REPORTING FROM INTERNIST DR. HIRSCH.

The judge wrote in his Opinion on Decision as shown in italics below:

Dr. Hirsch was the AME in internal medicine. There are five reports jointly offered into evidence as Exhibits X, T and U. There appears to be just a single exam in 2015 and then supplemental reports thereafter. His reporting is substantial medical evidence concerning how much impairment exists on the upper GI, lower GI, hernia, sleep and sexual dysfunction. (See Formal Rating Instructions)

Dr. Hirsh highlights symptoms of the injury and its treatment/medication including:

- 1. Constipation with the need to use multiple medications and fiber preparations*
- 2. Occasional nausea without vomiting*
- 3. Being “stuck” on the walker due to widespread pain and many different orthopedic complaints.*
- 4. Use of analgesic medications causing chronic upper and lower GI symptoms including heartburn, reflux, dyspepsia and severe constipation.*
- 5. Use of Zantac at maximum dose.*
- 6. Physical pain, stress and certain foods promote reflux.*
- 7. Anxiety, nightmares and physical pain causing insomnia*
- 8. Asthma, diabetes and hypertension. (non-industrial)*
- 9. Medications including:*

Metformin 500 mg twice per day.

Flonase 50 once per day.

Xanax 1 mg as needed.

Zantac 300 mg once per day.

Advair 100/50 twice per day.

*Aspirin 81 mg per day.
Voltaren gel once or twice per day.
Biotherm cream 20%/10%/4% once per day.
ProSom 2 mg as needed.
Tramadol Hcl 50 mg once per day as needed.*

REPORTING FROM AME PSYCHIATRIST DR. JACKS.

The judge wrote in his Opinion on Decision as shown below in italics:

Dr. Jacks was the AME in psychiatry. There are two reports but all the findings are found in Exhibit W which is the 5/13/21 report. He discussed the repercussions of this injury on Mr. Elaneh. He is taking Xanax once a day, Prosom at bedtime, Baclofen, Tramadol three times a week, Voltaren, Famotidine, Metformin, Norco and Advair.

At page 7, Dr. Jacks noted:

“He is depressed now constantly, anxious constantly. On a scale of 1 to 10, 10 being the worst anxiety and upset, he has an average of a 10 for both. He cannot do things he used to do before, he has no control on his life, he cannot play with his son or do his hobbies. He was always acting his life, but now there are physical limitations, he cannot work, there is pain and now his wife has to take care of him.”

Dr. Jacks described sleep at only about two and a half hours per day, with nightmares every evening of what happened or another accident or he is going to lose his family. He has visual flashbacks of the traumatic injury making him on edge, startle more easily and act jumpy. He is tired most of the time and forces himself to do things if his son needs it. He has problems concentrating, getting distracted then forgetting what he did, and needing long breaks.”

The AME indicates Applicant cannot work because of

"bilateral knee pain, bilateral hip pain, bilateral calf pain, bilateral ankle pain, headaches, dizziness, neck pain, back pain, hernia, depression, anxiety, insomnia, lack of focus, forgetfulness, no control, flashbacks, nightmares, not enough sleep, constant pain, using a walker to ambulate, shoulders pain, right elbow pain, I can't stand for a long time, can't work for a long time."

"I have constant pain to body parts mentioned already, plus I am very forgetful. I lack focus and I don't get much sleep because of nightmares, terror, flashbacks from 6/06/2011. I will not be able to compete in today's job market, I have been disabled for ten years, I have no skills than being a mechanic.”

Dr. Jacks diagnosed both Post Traumatic Stress Disorder, Generalized Anxiety Disorder and Major Depressive Disorder. In discussing future treatment and work restrictions, the AME commented at page 45:

“At this time, he should have continued supportive psychological treatments to prevent further deterioration in his emotional condition because he is continuing to be suicidal in his ideas and wishes he were dead at least twice a month. He should have therefore individual cognitive behavioral therapy once every two weeks for approximately twelve to fifteen times along with the use of continued antianxiety sleep medication, and probably he should be on antidepressant medications as well. Following that period of time, hopefully the medications and psychotherapy could be tapered down and discontinued. Following the discontinuation of his medications and psychotherapy if his anxiety and depression gets much worse over several weeks significantly and/or he becomes more suicidal significantly over several weeks, then, another similar duration, of reinstitution of the medications and psychotherapy should be undertaken and, then, later tapered down and discontinued ... etc.”

“In the future, as depression and anxiety like this have a high frequency of relapse, provision should be made for supportive psychological treatments to prevent further deterioration in his emotional condition. If and when his anxiety and depression gets much worse over several weeks significantly and/or if he becomes much more suicidal significantly over several weeks, then, individual cognitive behavioral therapy once every two weeks for approximately twelve to fifteen times along with the use of antianxiety and/or antidepressant medications would be indicated for him.”

In terms of work restrictions, the AME wrote:

“From a strictly psychiatric point of view, he should avoid undue emotional stress in the workplace due to excessive demands or performance, overly critical supervisors or jobs which by their very nature carry some degree of danger or physical harm such as working at nights or in dangerous neighborhoods, or handling cash regularly, or dealing with conflictual interactions with people such as customer service.”

The judge does not see how any vocational rehabilitation will improve Mr. Elaneh’s prospects. Defendant has made no known effort at the recommendations made by Ms. Koellner such as providing Applicant a voucher, securing job seeking skills and job placement assistance.

**IV.
RECOMMENDATIONS**

It is respectfully requested that Defendant's Petition for Reconsideration be denied.

FEBRUARY 1, 2023

Jeffrey Ward
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

JOINT OPINION ON DECISION

DEFENDANT'S VOCATIONAL EVIDENCE IS ADMISSIBLE

For the reasons set forth in Defendant's Trial brief dated 10/7/22, all of Vocational expert's Amy Koellner's report are admitted into evidence. (Exhibits A, B, C, D, E and F) Defendant did disclose the first report at the time of the MSC. There was no rebuttal to Defendant's argument that they failed to exercise due diligence when one considers CIGA's late joinder of the case and that the insolvent carrier had purportedly set an evaluation with a different vocational expert that was claimed to have been cancelled.

More importantly, once the case was vacated by the prior Trial judge, any prejudice to having Amy Koellner's reporting being admissible is eliminated by the four additional supplemental reports that have been prepared by Applicant's vocational expert Laura Wilson.

INITIAL PERMANENT DISABILITY FINDING

Karim Elaneh suffered a cruel and violent attack at work that has had a devastating and catastrophic effect on his life. There are long term consequences to all four extremities, the spine, multiple internal systems as well as significant psychiatric injury including post-traumatic stress disorder. There are multiple knee surgeries and continuing treatment for the past 11 years since the injury.

Based on evidence submitted at the earlier Trial and the current Trial, a formal rating dated 11/8/22 was obtained showing a total of 93% permanent disability. Applicant seeks to rebut this percentage with vocational evidence in an effort to show he is 100% permanently and totally disabled.

APPLICANT IS 100% DISABLED BASED ON VOCATIONAL EVIDENCE

The judge agrees with Applicant's contention that Karim Elaneh is unable to compete in the open labor market as a result of his physical and psychiatric limitations, as well as dependence on medications.

There are not many established standards for which a judge can compare one vocational expert's opinion to another. Both experts issued multiple and costly reports. Each expert made conclusions that predictably match the party's interest that hired them, and with content that seemed to repeat the same thing over and over again in unnecessarily voluminous reporting.

Per the Minutes of Hearing dated 9/16/19, the prior trial judge "strongly" recommended that an agreed vocational expert be used. But this did not happen and the judge is now required to make a pick or develop the record. Since this case was tried twice, and in consideration of the Constitutional mandate to accomplish substantial justice in all cases expeditiously, inexpensively, and without any incumbrance of any character, the judge did his best to make a decision based on the presented record. (Cal. Const., art. XIV, § 4)

Overall, the judge felt applicant's vocational expert was the better reasoned and more persuasive than that of Defendant's, and that it more accurately provides information relevant to the issue at hand. The judge therefore concludes that Applicant Karim Elaneh is totally and permanently disabled and will be awarded 100%. It was shown by medical and vocational evidence that he is not vocationally feasible, can no longer compete in the active labor force, and has a complete loss of future earning capacity.

At page 27 of the 3/29/16 report Ms. Wilson wrote:

"I was asked as a vocational expert to determine if Mr. Elaneh is able to return to work in the current labor market. After careful review and consideration of Mr. Elaneh's physical and emotional work restrictions, dosage of medications that he is currently taking and its side effects, and his transferable skills, determined by McCroskey and Volcano 15.0 it is my professional opinion that based on his industrial related impairment and his industrial physical limitations that were provided in the medical reports of Dr. Domenic J. Sisto, Agreed Medical Examiner Jeffrey A. Hirsh, Dr. Philip A. Sobol, Qualified Medical Examiner Karl E. Epstein, and Qualified Medical Examiner Greg Hirokawa, Mr. Elaneh is not amenable to vocational rehabilitation and is unable to sustain gainful employment and therefore is unable to compete in the open labor market and as result of his work related impairments provided by considering his preinjury capacity and abilities, he has at present no consistent and stable future earning capacity.

By that I mean that he is unable work competitively and productively 5 days per week, 8 hours per day and that his ability to work a full or part time job would require that he be able to set the total hours worked, the days and the hours worked such that he would be able to come and go as she pleased and work at his own pace and whenever he was able to physically and emotionally able to. This kind of "employment" is really a "niche" employment or a sheltered working environment and is not consistent with the realities of the Open Labor Market and therefore not considered competitive within the Open Labor Market."

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The judge does not see how any vocational rehabilitation will improve Mr. Elaneh's prospects. Defendant has made no known effort at the recommendations made by Ms. Koellner such as providing Applicant a voucher, securing job seeking skills and job placement assistance.

ADDITIONAL FACTORS CONSIDERED IN DETERMINING 100% PERMANENT DISABILITY

1. The judge considered how many separate body parts were affected by this injury. It affected all four extremities and the spine from the neck to the low back. There was actually ratable impairment for 16 body parts or systems including:

1. Upper Digestive Tract
2. Lower Digestive Tract
3. Hernia
4. Reproductive System
5. Sleep
6. Psyche
7. Cervical
8. Lumbar
9. Left Cubital Tunnel
10. Left Hand Grip Loss
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bilateral upper extremities and over the shoulder work with the bilateral upper extremities.

With regard to the lumbar spine, the patient is precluded from lifting items weighing over 5 pounds, repetitive bending or stooping and prolonged sitting. He should also limit standing or walking to no greater than 20 minutes per hour.

With regard to the bilateral upper extremities, bilateral elbows, forearms and bilateral wrists and hands, the patient is precluded from lifting items weighing over five pounds, forceful pushing or pulling with the bilateral upper extremities and repetitive or forceful gripping and grasping with the bilateral upper extremities.

Based on the patient's physical limitations and considering his job description as an auto mechanic, I feel that he is physically unable to return to work performing his usual and customary duties. Therefore, he is considered medically eligible for vocational rehabilitation. He will require permanent accommodation of his work restrictions to return to work."

2. The judge considered the testimony of Applicant Karim Elaneh to be credible. He testified to having two knee surgeries and having significant treatment. Ten years after the injury he continues to treat for ongoing internal problems involving his GI, IBS, blood pressure, sexual dysfunction, constipation and hernia. He is taking medication prescribed by Dr. Longacre.

He testified to having continued psychiatric complaints mentioning nightmares and flashbacks of him being run over by a car and thoughts that this person was out to kill him. He takes Xanax for psychiatric symptoms and Prosom for sleep. He was taking medication for his orthopedic injuries including Voltaren pill and gel, Tramadol, Baclofen, Cyclobenzaprine and Aleve.

Applicant credibly testified as to how pain affects his life and why it prevents him from returning to work. This includes having too much pain, too little sleep and need to use the bathroom frequently. The pain along with reduced sleep gives him concentration problems. He uses a walker provided to him since 2012 by Dr. Sisto due to knee weakness and lack of balance. He has been accepted for Social Security since 2012 and is currently on Medicare.

Mr. Elaneh did not come across to the judge as someone who is lazy and would prefer to not work if given the opportunity. Rather, he came across as a man with integrity who is frustrated over his situation and inability to return to any work. The judge believes Mr. Elaneh that there is no work he can perform in light of his catastrophic injury.

3. It is a fact that Applicant Karim Elaneh has never returned to work since the incident at work on 6/6/11.
4. Reporting from Dr. Hirsch.

Dr. Hirsch was the AME in internal medicine. There are five reports jointly offered into evidence as Exhibits X, T and U. There appears to be just a single exam in 2015 and then

supplemental reports thereafter. His reporting is substantial medical evidence concerning how much impairment exists on the upper GI, lower GI, hernia, sleep and sexual dysfunction. (See Formal Rating Instructions)

Dr. Hirsh highlights symptoms of the injury and its treatment/medication including:

1. Constipation with the need to use multiple medications and fiber preparations
2. Occasional nausea without vomiting
3. Being “stuck” on the walker due to widespread pain and many different orthopedic complaints.
4. Use of analgesic medications causing chronic upper and lower GI symptoms including heartburn, reflux, dyspepsia and severe constipation.
5. Use of Zantac at maximum dose.
6. Physical pain, stress and certain foods promote reflux.
7. Anxiety, nightmares and physical pain causing insomnia
8. Asthma, diabetes and hypertension. (non-industrial)
9. Medications including:

Metformin 500 mg twice per day.

Flonase 50 once per day.

Xanax 1 mg as needed.

Zantac 300 mg once per day.

Advair 100/50 twice per day.

Aspirin 81 mg per day.

Voltaren gel once or twice per day.

Biotherm cream 20%/10%/4% once per day.

ProSom 2 mg as needed.

Tramadol Hcl 50 mg once per day as needed.

5. Reporting from Dr. Jacks

Dr. Jacks was the AME in psychiatry. There are two reports but all the findings are found in Exhibit W which is the 5/13/21 report. He discussed the repercussions of this injury on Mr. Elaneh. He is taking Xanax once a day, ProSom at bedtime, Baclofen, Tramadol three times a week, Voltaren, Famotidine, Metformin, Norco and Advair.

At page 7, Dr. Jacks noted:

“He is depressed now constantly, anxious constantly. On a scale of 1 to 10, 10 being the worst anxiety and upset, he has an average of a 10 for both. He cannot do things he used to do before, he has no control on his life, he cannot play with his son or do his hobbies. He was always acting his life, but now there are physical limitations, he cannot work, there is pain and now his wife has to take care of him.”

Dr. Jacks described sleep at only about two and a half hours per day, with

“nightmares every evening of what happened or another accident or he is going to lose his family. He has visual flashbacks of the traumatic injury making him on edge, startle more easily and act jumpy. He is tired most of the time and forces himself to do things if his son needs it. He has problems concentrating, getting distracted then forgetting what he did, and needing long breaks.”

The AME indicates Applicant cannot work because of

"bilateral knee pain, bilateral hip pain, bilateral calf pain, bilateral ankle pain, headaches, dizziness, neck pain, back pain, hernia, depression, anxiety, insomnia, lack of focus, forgetfulness, no control, flashbacks, nightmares, not enough sleep, constant pain, using a walker to ambulate, shoulders pain, right elbow pain, I can't stand for a long time, can't work for a long time."

"I have constant pain to body parts mentioned already, plus I am very forgetful. I lack focus and I don't get much sleep because of nightmares, terror, flashbacks from 6/06/2011. I will not be able to compete in today's job market, I have been disabled for ten years, I have no skills than being a mechanic.”

Dr. Jacks diagnosed both Post Traumatic Stress Disorder, Generalized Anxiety Disorder and Major Depressive Disorder. In discussing future treatment and work restrictions, the AME commented at page 45:

“At this time, he should have continued supportive psychological treatments to prevent further deterioration in his emotional condition because he is continuing to be suicidal in his ideas and wishes he were dead at least twice a month. He should have therefore individual cognitive behavioral therapy once every two weeks for approximately twelve to fifteen times along with the use of continued antianxiety sleep medication, and probably he should be on antidepressant medications as well. Following that period of time, hopefully the medications and psychotherapy could be tapered down and discontinued. Following the discontinuation of his medications and psychotherapy if his anxiety and depression gets much worse over several weeks significantly and/or he becomes more suicidal significantly over several weeks, then, another similar duration, of reinstitution of the medications and psychotherapy should be undertaken and, then, later tapered down and discontinued ... etc.”

“In the future, as depression and anxiety like this have a high frequency of relapse, provision should be made for supportive psychological treatments to prevent further deterioration in his emotional condition. If and when his anxiety and depression gets much worse over several weeks significantly and/or if he becomes much more suicidal significantly over several weeks, then, individual cognitive behavioral therapy once every two weeks for approximately twelve to fifteen times

along with the use of antianxiety and/or antidepressant medications would be indicated for him.”

In terms of work restrictions, the AME wrote:

“From a strictly psychiatric point of view, he should avoid undue emotional stress in the workplace due to excessive demands or performance, overly critical supervisors or jobs which by their very nature carry some degree of danger or physical harm such as working at nights or in dangerous neighborhoods, or handling cash regularly, or dealing with conflictual interactions with people such as customer service.”

MISCELLANEOUS

All of the permanent disability and need for further medical treatment arises from the injury of June 6, 2011 and none to the earlier injury of 4/13/11.

DECEMBER 20, 2022

Jeffrey Ward
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE