WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LISA MCELLEY, *Applicant*

vs.

D.R. HORTON; XL WORKERS' COMPENSATION, adjusted by GALLAGHER BASSETT, *Defendants*

Adjudication Number: ADJ1201899
Oakland 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 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 below, we will grant reconsideration, amend Findings of Fact number 1 solely to include the name of the employer and Findings of Fact number 2 to defer the issue of indemnity rate for permanent partial disability. We will otherwise affirm the WCJ's decision for the reasons stated in the WCJ's Report and Opinion on Decision, both of which we adopt and incorporate.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of November 7, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of November 7, 2022 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Lisa McElley, while employed on May 4, 2007, as a human resources manager, by D.R. Horton, insured by XL Workers Compensation, adjusted by

Gallagher Bassett, sustained injury to her neck, back, right and left shoulder, right lower extremity, psyche, cognitive disorder, head, face, diet, right hip, right ankle, and right knee.

2. At the time of her injury, applicant's average weekly wage was $1,742.52 warranting indemnity rates of $881.66 for temporary disability. The issue of indemnity rate for permanent partial disability is deferred.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 23, 2023

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

LISA MCELLEY
GORELICK & WOLFERT
WILLIAMS S. FRANK, INC.

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:	Human Resources Manager
	Applicant's Age:	60
	Date of Injury:	May 4, 2007
	Parts of Body Inured:	Neck, back, right shoulder, left shoulder, right lower extremity, psyche, cognitive disorder, headache, face, diet
2.	Identity of Petitioner:	Defendant
	Timeliness:	Yes
	Verification:	Yes
3.	Date of Findings and Award:	November 7, 2022
4.	Defendant's Contentions:	WCJ's Award of 100% is not supported by evidence and is in excess of the WCAB's powers because applicant's vocational consultant report does not rebut the PDRS.

II.

STATEMENT OF THE CASE AND FACTS

Injured worker, Lisa McElley, worked as a human resources manager for D.R. Horton. She sustained injury to her neck, bilateral shoulders, lower right extremity, psyche, cognitive disorder, headache, face, and diet. She claims to have sustained injury to right hip, right ankle, and right knee. The injury occurred when she attended a work retreat in Texas. She was given a choice of one of three activities: guns, ATV or horseback riding. She chose horseback riding. Ms. McElley was thrown from her horse and landed face first unconscious. She was transported by helicopter to Odessa Hospital. She underwent several surgeries.

The matter continued to trial on September 14, 2022. A Findings and Award issued on November 7, 2022, in which the WCJ found the applicant 100% permanently and totally disabled. Disability was based on the whole record presented including the medical reports of Neurology QME Dr. Robert Shorr, orthopedic medicine QME Dr. Ernest Cheng, Ophthalmic QME Dr. David Sami, Neuropsychologist AME Dr. Claude S. Munday, Dental QME Dr. Greg Goddard, ENT QME Dr. Joel Ross, and PTP Dr. Peter Abaci and VE Scott Simon reports. Ms. McElley was awarded 100% permanent disability. Defendant filed a timely and verified Petition for Reconsideration on November 22, 2022. Defendant contends that Ms. McElley is not 100% disabled as the applicant's vocational consultant report does not rebut the PDRS and is not supported by the medical record or applicant's testimony. The WCJ acted in excess its powers. For the following reasons Defendant's Petition should be denied.

III.

DISCUSSION

The Findings of Fact and Award of 100% permanent and total disability is not supported by evidence and is in excess of the WCAB's powers because applicant's vocational consultant report does not rebut the PDRS.

The defendant is of the opinion that not only does the vocational consultant report not rebut the PDRS but that apportionment is also at issue. Ms. McElley may have experienced headaches previously but that did not stop her from working a hectic job and sustaining fulltime employment. After her neck, surgery during her employment with Trammel Crow Ms. McElley received a $10,000 salary increase. Her workload increased. She only left that employer due to the commute and having teenagers at home. (SUE/MOH pg. 8, ln 16-17) She was thereafter employed by D.R. Horton as a human resources manager.

Ms. McElley admits to prior migraine headaches but those were different from the headaches she experienced after the industrial injury. Those were primarily located in the back of her head. She previously took medication to control the migraines which after a while she did not require "…I didn't have to take anything anymore." (Ex. B, pg.59, ln. 9-12) The headaches she experienced after the industrial injury were excruciating "…I just wanted to pull my eyes out of my head sometimes." (Ex B, pg. 59, ln. 14-15)

Neurology QME Dr. Shorr was of the opinion that "[g]iven the claimant's multiple impairments, she likely is not employable" by analogy the applicant is 100% permanently disabled. (Ex 106, pg. 37) It is also noted that Dr. Shorr was of the opinion that Ms. McElley "…did have seizures following the head injury.." Ms. McElley required future medical care in regards to her seizures. (Ex 106, pg. 40) Notwithstanding the non-industrial apportionment, the Applicant is found to be permanent and totally disability. The finding was based on the entire record including the medical reports, testimony of the applicant and Vocational Expert reporting of Scott Simon.

Mr. Simon conducted a thorough evaluation of Ms. McElley including her work history, present symptoms, and reviews, summarizes all the relevant medical reporting, and provides his resulting analysis as to her employability. Mr. Simon stated, "[T]here has been no clear indication that any apportionable conditions prevented her from working in her prior occupations. Neither are there any indictors that pre-existing conditions reduced her available labor market. Ms. McElley maintained a solid work history until her labor disabling unfortunate accident…" Ms. McElley testified that after her prior non-industrial injury, her workload increased and she did have any work restrictions. Dr. Cheng was of the opinion that Ms. McElley would not be able to compete in the open labor market. (Ex. 101, pg. 9) Dr. Shorr opinioned that "[g]iven the claimant's multiple system impairments, it is likely that the claimant is unable to compete in the open labor market and would be 100% disabled." (Ex 107, pg. 5) Dr. Shorr reiterated his opinion that Ms. McElley was unable to compete in open labor market in his subsequent report. (Ex. 106, pg. 40) Her PTP Dr. Peter Abaci diagnosed Ms. McElley with Chronic pain syndrome. In support of his opinion, Mr. Simon states "…Ms. McElley would not be able to reliably participate day after day due to issues related to managing her pain and multiple effects of the impairment directly stemming from the 5/4/2007 industrial injury alone." (Ex 2, pg. 30) His further opinions "there are multiple

impairments including orthopedic, ophthalmological, otorhinolaryngology, neuro-psychological trauma and traumatic brain injury with ongoing related sequela" these factors taken into account confirm Ms. McElley's inability to work in the open labor market. The medical reports and testimony supports Mr. Simon's conclusions that Ms. McElley is not working due to her extensive medical problems and that there is not a job the applicant perform on a fulltime basis. The applicant has rebutted the permanent disability rating and is therefore permanently and totally disabled. The applicant is totally and permanently disabled based on her inability to be retrained as set forth in Mr. Simon's report in accordance with *LeBoeuf.*

The defendant utilized the service of VE Thomas L. Sartoris ("Mr. Sartoris"). Mr. Sartoris authored one report dated June 8, 2021. He failed to address *Dahl* and *Ogilvie*. He did not consider her limitations described by the medical practitioners, specifically her limited ability to sit, stand and walk. Nor did he discuss her cognitive impairments as they relate to employability. Under the DOT occupation matches there were no matches found for Ms. McElley. (Ex. A, pg. 35) He did not sequentially evaluate all the different potential return to work options as pointed out by Mr. Simon. The vocational report of Mr. Sartoris was not considered persuasive in light of the entire record but was given the due weight and consideration it deserved.

Based upon the above, I recommend the denial of the Defendant's Petition for Reconsideration.

Date: November 29, 2022

Tammy Homen
Workers' Compensation
Administrative Law Judge

OPINION ON DECISION
FACTS

Injured worker, Lisa McElley, worked as a human resources manager for D.R. Horton. She sustained injury to her neck, bilateral shoulders, lower right extremity, psyche, cognitive disorder, headache, face, and diet. She claims to have sustained injury to right hip, right ankle, and right knee.

The main issues are: (i) whether the applicant is 100% permanently totally disabled; (ii) whether the applicant sustained an injury to her right ankle, right, knee and right hip; and (iii) applicant asserts that the start date for permanent disability is May 30, 2009.

Ms. McElley worked for D. R. Horton since May of 2005. She worked fulltime as an assistant to the Vice President, a Human Resource Manager, and an Office Manager. She also prepared the commissions for the sales staff. Her salary was $68,000 a year with overtime and quarterly bonuses of $3,000 - $5,000.

Prior to work at D.R. Horton she was employed by Trammel Crow Residential "Trammel Crow"). She was assistant to the Vice President and was Human Resource Manager. Her Salary was $68,000 a year. While employed with Trammel Crow she sustained a non-industrial motor vehicle accident ("MVA"). This was approximately in 2002 around the time of her son's 8th grade graduation.

Due to the non-industrial MVA, she underwent neck surgery after chiropractic care. After the surgery, she was off work for approximately 3 – 4 months. She did part-time work for approximately 6 weeks. She would work 2 hours a day then 4 hours a day and so forth until she worked a full day. She did not have any limitations when she returned to full duty. Her workload increased when she returned to fulltime employment with Trammel Crow.

When she returned to Trammel Crow, she was in charge of coordinating the move to the new office in Foster City. She was in charge of obtaining the new office permits. She worked as an assistant to the Director of Residential Development, assistant to Director of Commercial Apartment Manager, and assistant to the President. She received a $10,000 dollar raise when she returned to work following the MVA. She would drive to the Foster City office 5-6 times a week. The commute was 1 to 1 ½ hours in the morning and 1 hour in the evening. Because she had teenagers, who needed her around more often she resigned her employment at Trammel Crow.

After her employment to Trammel Crow she was employed by D.R. Horton. She was the Human Resources Manager and assistant to the Vice President. Her industrial injury occurred when she attended a work retreat in Texas. She was given a choice of one of three activities: guns, ATV or horseback riding. She chose horseback riding.

Ms. McElley's horse kept pulling out of the group. Another horse kicked her horse in the head. She continued riding it. When all the horses drank from the trough her horse kicked it. Her horse took off and started bucking. Ms. McElley was thrown from the horse. She landed face first. She was unconscious. She was transported by helicopter to Odessa Hospital.

Ms. McElley underwent several surgeries. Three left shoulder surgeries, three right shoulder surgeries, and two fusions to her neck. Treatment included many injections including neve ablations. She felt like a "full-time patient". She took tons of medications. The doctor kept adding medications when one would not work. It became too much for her.

Ms. McElley goes to the ER when her back goes out. She obtains x-rays and medications. She can hardly walk. She cannot bend her back. She walks hunched over. Her back was out for three days before trial. She will treat her back with laying on hot pad for 20 minutes, then ice for 20 minutes. She takes two Advil and two hours later takes another two Tylenol. She soaks in a hot bathtub for relief. She will try to stretch and lay down. Sitting up is difficult.

Ms. McElley's neck is sore when it is overextended. She falls a lot and has dizzy spells. She experiences balance issues and continues vestibular therapy. She has a difficult time sleeping. Sleeping pills do not work. She has trouble with range of motion in her bilateral shoulders. There was talk of total shoulder replacement surgery however she cannot have any more surgeries because of the general anesthesia she has received. She has dental issues. Her jaw is ajar. Her bite is off and she suffers from disfigurement. The doctor has advised her that she cannot deal with the disfigurement they would need to discuss other modalities. She suffers from anxiety and has difficulty leaving home. She will only drive the freeways within a 5-mile radius when needed. She has problems going out in public. Her sister helps with shopping, cleaning the shower and floors. Her sister helps her 1 to 5 times a week. Her aunt also comes to help her 1 – 2 times per week.

Prior to May 2007, she had migraine headaches. They would come and go a couple times of week. Sometimes they would last a day or two or longer. After taking medications, they were gone. She never missed time from work. She would work through her headaches. She would close the door or window.

Ms. McElley testified to the best of her ability. She spoke thoughtfully and made genuine efforts to remember information. Her demeanor and testimony was credible.

DISCUSSION

Permanent Disability/Apportionment

Applicant's counsel is of the opinion that the applicant is 100% disabled based upon his interpretation of the medical evidence and Vocational Rehabilitation report. Defendant is of the opinion that the applicant is not 100% disabled based on the medical reports and his Vocational Rehabilitation expert.

The Supreme Court has recognized the degree of difficulty in assessing permanent disability when presented with widely disparate expert opinions. "Applicable here is the rule followed in other cases where the trier of fact does not adopt exactly the view of any expert witness as to value. The trier of fact may accept the evidence of any one expert or choose a figure between them based on all the evidence." *Liberty Mutual Ins. Co. v. IAC (Serafin)* (1948) 33 Cal. 2d 89 [13 Cal.Comp.Cases 267, 270], citations omitted. Many cases have followed this "range of evidence" rule. See, e.g., *Rios v. SCIF* (2002) 30 Cal. Workers'Comp. Rptr. 17. The judge is therefore not bound to endorse all factors of disability described by an evaluating physician he can make a determination based on all evidence combined including testimony and the record. "It is

not necessary that there be evidence of the exact degree of disability." *U.S. Auto Stores v. WCAB (Brenner)* (1971) 4 Cal. 3d 469 [36 Cal.Comp.Cases 173, 176], citing *Serafin*, *supra*. A workers' compensation judge is seen as an expert in rating permanent disability, "capable of (making) his own appraisal of the extent of applicant's disability." *Brenner, supra,* at 177.

A medical report is not substantial evidence unless it offers the reasoning behind the physician's opinion, not merely his or her conclusions. (Dr. does not state that 50 percent apportionment would be reasonable partially due to the normal progress of the preexisting injury). *Granado v. Workmen's Comp. App. Bd., 33 Cal. Comp. Cases 647.*

Neurology PQME Dr. Robert Shorr in his March 5, 2020 medical report (Ex. 106) was of the opinion that given the multiple impairments Ms. McElley was likely not employable. (Ex. 106, pg. 37). Dr. Shorr reviewed extensive medical reports and obtained a complete history of the applicant. He diagnosed her with traumatic brain injury and right orbital fracture; posttraumatic head syndrome with balance issues, posttraumatic visual syndrome, cognitive deficits and bilateral median neuropathy at the wrists. He commented in the vocational rehabilitation part of the report that she was "unable to compete in the open labor market and would be considered 100% disabled". (Ex 106, pg. 40) Dr. Shorr's medical reporting constitutes substantial medical evidence.

Dr. Ernest Cheng ("Dr. Cheng") was utilized as PQME in orthopedic medicine. He reviewed extensive medical reports and obtained a complete history of the applicant. He diagnosed chronic right knee, ankle and hip; chronic lumbar radiculopathy; bilateral carpal tunnel syndrome; bilateral rotator cuff tear; traumatic brain injury; seizure disorder; right trigeminal nerve injury; dental injury and chronic tinnitus. Future medical care consisted of physician office visits, pain medications and periodic injections. He indicated that "given the multiple other body systems involved, it is quite possible that as a whole she is totally permanently disabled." (Ex. 102, pg. 28). Dr. Cheng found injury to right knee, right hip, and right ankle. Dr. Cheng's medical reporting constitutes substantial medical evidence.

Ms. McElley's injuries were quite extensive. Ophthalmic QME Dr. David Sami stated that Ms. McElley had significant facial injuries, which required an orbital floor implant. She had problems with her vision including persistent diplopia. Neuropsychologist AME Dr. Claude S. Munday diagnosed Ms. McElley with depressive disorder, anxiety disorder with post-traumatic stress features, cognitive disorder due to mild traumatic brain injury, and psychological stressors including concussion. (Ex 115, pg. 23) Dental QME Dr. Greg Goddard also diagnosed her with chronic pain from her treating physician Dr. Peter Abaci and TMJ, broken teeth, facial deformity right maxilla, trigeminal neuralgia, and right maxillary division. (Ex. 116, pg. 51). ENT QME Dr. Joel Ross diagnosed tinnitus. (Ex. 117) Dr. Peter Abaci, Dr. Claude S. Munday, Dr. Greg Goddard, and Dr. David Sami medical reports constitute substantial medical evidence.

Based upon review of the medical reports, VE Scott Simon (as discussed below), credible testimony of Ms. McElley and the entire record it is found that Ms. McElley is permanently and totally disabled as a result of her injuries and has effectively rebutted the PDRS.

VR Reports

Applicant contends that VE Scott Simon ("Mr. Simon") reporting rebuts the scheduled rating and reflects 100% disability. The applicant has the burden of proving this contention. This must be supported by substantial evidence.

Labor Code §4660.1(d) provides that the scheduled rating is prima facie evidence of an employee's permanent disability. A scheduled rating "is effectively rebutted…when the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating." (*LeBouef v Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234)

The *LeBouef* analysis was provided in *Contra Costa Count v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746, 758. The Appeals Court held that "[t]he first step in any *LeBouef* analysis is to determine whether a work-related injury precludes the claimant from taking advantage of vocational rehabilitation and participating in the labor force. This necessarily requires an individualized approach."

In order to rebut a scheduled rating a determination is based upon a finding the applicant is "not amenable to rehabilitation and, for that reason, the employee's diminished future earning capacity is greater than reflected in the scheduled rating." The employee's diminished future earnings must be directly attributable to the employee's work-related injury and not due to non-industrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education. (*Ogilvie v. Workers' Comp. Appeals Bd*., 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624, 2011 Cal. App. LEXIS 988; *Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)*, 240 Cal. App. 4th 746, 193 Cal. Rptr. 3d 7, 80 Cal. Comp. Cases 1119, 2015 Cal. App. LEXIS 828.) Mr. Simon's was of the opinion that Ms. McElley lacked amenability to vocational rehabilitation. She was not capable of benefitting from vocational rehabilitation services. His determination was based on the following factors: (i) she had a steady work history prior to her industrial injury; (ii) there were no pre-existing conditions which reduced her availability to the labor market; (iii) post traumatic brain injury that is accompanied by cognitive deficits and migraine headaches; (iv) visual impairment that will hinder the return to work; (v) chronic pain; (vi) multiple orthopedic injuries including spinal injuries which require that she alternate sitting, standing and walking;(vii) medical report of QME Neurology Dr. Shorr which finds her "unable to compete in the open labor market and would be 100% disabled."; (viii) episodes of fatigue; and (xi) PQME Orthopedic Dr. Cheng was of the opinion she was most likely unable to compete in the open labor market. Mr. Simon's report was persuasive and consistent with Ms. McElley's testimony.

There were no pre-existing factors, which took the applicant out of the open labor market. Furthermore, Mr. Simon stated, "[T]here has been no clear indication that any apportionable conditions prevented her from working in her prior occupations. Neither are there any indictors that pre-existing conditions reduced her available labor market. Ms. McElley maintained a solid work history until her labor disabling unfortunate accident…" Ms. McElley testified that after her prior non-industrial injury, her workload increased and she did have any work restrictions. Dr. Cheng was of the opinion that Ms. McElley would not be able to compete in the open labor marked. (Ex. 101, pg. 9) Dr. Shorr opinioned that "[g]iven the claimant's multiple system impairments, it is likely that the claimant is unable to compete in the open labor market and would be 100%

disabled." (Ex 107, pg. 6) Dr. Shorr reiterated his opinion that Ms. McElley was unable to compete in open labor market in his subsequent report. (Ex. 106, pg. 40) Her PTP Dr. Peter Abaci diagnosed Ms. McElley with Chronic pain syndrome.

Mr. Scott gave a well-reasoned and thorough analysis of Ms. McElley's inability to be vocationally rehabilitated. His report was persuasive.

The defendant utilized the service of VE Thomas L. Sartoris ("Mr. Sartoris"). Mr. Sartoris authored one report dated June 8, 2021. He failed to address *Dahl* and *Ogilvie*. He did not consider her limitations described by the medical practitioners, specifically her limited ability to sit, stand and walk. Nor did he discuss her cognitive impairments as they relate to employability. Under the DOT occupation matches there were no matches found for Ms. McElley. (Ex. A, pg. 35) He did not sequentially evaluate all the different potential return to work options as pointed out by Mr. Simon. The vocational report of Mr. Sartoris was not considered persuasive in light of the entire record but was given the due weight and consideration it deserved.

Start Date of Permanent Total Disability Benefits

The applicant asserts the permanent and stationary date is May 30, 2009. Labor Code 4650(b)(1) "…when an award of permanent disability indemnity is made, the amount then due shall be calculated from the last date for which temporary disability indemnity was paid, or the date the employee's disability became permanent and stationary, whichever is earlier." Ms. McElley was declared permanent and stationary on January 12, 2019. The last date of which she received temporary disability benefits was May 29, 2009, following the 104-week cap. Therefore, the start date of permanent total disability benefits is May 30, 2009.

Further Treatment

Ms. McElley is entitled to further medical treatment to cure or relieve the effects of the industrial injury to bilateral shoulders, neck, back, right lower extremity, cognitive disorder, headache, face, diet, psyche, right hip, right ankle, and right knee based on the medical reports of the PQMEs Dr. Ross, Dr. Sami, Dr. Cheng, Dr. Shorr and AME Dr. Munday.

Date: November 7, 2022

Tammy Homen
Workers' Compensation
Administrative Law Judge