WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERTO ARIAS, *Applicant*

vs.

WILLIAMS ROOFING COMPANY; STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ6428404
Salinas District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings, Award and Order of July 22, 2021, the workers' compensation judge ("WCJ") found that on June 19, 2006, applicant, while employed as a roofer, sustained industrial injury to his neck, upper and lower back, psyche, sleep disorder, and erectile dysfunction, causing permanent disability of 73%, after apportionment.

Applicant filed a timely Petition for Reconsideration of the WCJ's decision. Applicant contends, in substance, that the medical opinions of the Agreed Medical Evaluators ("AMEs") in orthopedics and psychiatry, as well as the opinion of applicant's vocational expert, justify a finding of permanent and total disability. Applicant further contends that the vocational opinion of defendant's expert is not substantial evidence, and that even if there is a basis for apportionment under Labor Code sections 4663 and 4664, there should be a finding of permanent and total disability "with a percentage apportioned to the industrial injury."

Defendant filed an answer, which has been considered.

The WCJ submitted a Report and Recommendation ("Report"). We adopt and incorporate the "Statement of Material Facts" (Section II) from the WCJ's Report, as indicated in the

[1] Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated November 23, 2021. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

attachment to this decision. Unless stated otherwise in this opinion, we do not adopt or incorporate the remainder of the WCJ's Report.

At the outset, we note that the Appeals Board has 60 days within which to act on a petition for reconsideration. (Lab. Code, § 5909.) Here, through no fault of the applicant, his petition for reconsideration did not come to the attention of the Appeals Board until after the expiration of the statutory time period. Consistent with fundamental principles of due process and common sensibilities, we conclude that the running of the 60-day statutory period for reviewing and acting upon the applicant's petition for reconsideration was tolled for a reasonable period of time after the Board received actual notice of it. (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1107-1108 [57 Cal.Comp.Cases 493]; *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd.* (*Felts*) (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622, 624].)[2]

Turning to the merits of applicant's contentions, we agree with the statement on page three of the WCJ's Report that "[t]he weight of the evidence supports permanent and total disability." (Lab. Code, § 3202.5.) However, the WCJ's statement does not match the "Conclusion" section of his Report, wherein he states that applicant has not rebutted the scheduled permanent disability rating.[3] Further, this "conclusion" is contradicted by the WCJ's statement in the preceding paragraph that the findings of Mr. Gonzalez, applicant's vocational expert, "on overall employability are better-reasoned and have been considered, along with the opinions of the AMEs, in reaching the [WCJ's] opinion that *applicant is unemployable*." (Italics added.)

To the extent the WCJ determined that applicant is unemployable yet failed to rebut the scheduled permanent disability rating, we disagree. The Disability Evaluator recommended a formal rating of 73% permanent disability, but this rating reflected 25% non-industrial apportionment of applicant's lumbar spine disability and 5% non-industrial apportionment of

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[2] In *Zurich American Ins. Co. v. Workers' Compensation Appeals Bd.* (Dec. 18, 2023) - Cal.App.5th - [2023 Cal.App.LEXIS 968], the Court of Appeal concluded that the language and purpose of Labor Code section 5909 show a clear legislative intent to terminate the Appeals Board's jurisdiction to consider a petition for reconsideration after the 60 days afforded by section 5909 have passed, and therefore decisions on a petition for reconsideration made after that date are void as in excess of the Board's jurisdiction. The Court's opinion in *Zurich* reflects a split of authority on application of the "*Shipley*" principle. However, the Court in *Zurich* did not indicate that its decision applies retroactively. In the instant case, we follow *Shipley*.

[3] In *Nunes v. State of California, Dept. of Motor Vehicles* (June 22, 2023) 2023 Cal. Wrk. Comp. LEXIS 30 [88 Cal.Comp.Cases 741], the Board stated in Footnote 8 that notwithstanding the statutory changes to the calculation of diminished future earning capacity (DFEC) made by Labor Code section 4660.1, the holding of *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624], i.e., that vocational evidence may be offered to rebut the permanent disability rating schedule, continues to apply to all dates of injury.

applicant's psychiatric disability. (Exhibit X1.) Here, in spite of the apportionment reflected in the *recommended* rating, applicant met his burden of rebutting the *scheduled* rating because it was the WCJ's conclusion that applicant's overall disability following the industrial injury of June 19, 2006 is permanent and total, leaving him "unemployable."

The WCJ's conclusion is justified by the preponderance of evidence. As summarized in the WCJ's Statement of Material Facts, Dr. Miner and Dr. Larsen evaluated applicant's orthopedic and psychiatric conditions, respectively, and both doctors found applicant medically unfit to return to gainful employment. Thus the medical evidence regarding applicant's permanent and total disability is compelling, and it supports the conclusions of applicant's vocational expert, Mr. Gene G. Gonzalez. In his final report, Mr. Gonzalez found that applicant is not amenable to vocational rehabilitation and "has lost the ability to compete in the open labor market since he cannot be retrained for any form of gainful employment." (Exhibit A3, Gonzalez report dated March 23, 2021, pp. 40-41.) Based on our review of the entire record, including the opposing vocational opinion of Mr. Scott Simon, we find no reason to reject the opinions of Dr. Miner, Dr. Larsen, and Mr. Gonzalez that applicant is permanently and totally disabled. (*Place v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

Turning to the issue of apportionment, the WCJ cites Labor Code section 4664(a) in the "Conclusion" section of his Report and states that applicant has the burden of proving the percentage of permanent disability directly caused by the industrial injury.

Section 4664(a) states: "The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment."

To the extent the WCJ cites section 4664(a) to suggest that applicant has the burden of *disproving* apportionment, we disagree. Subdivisions (a) and (b) of section 4664 (and section 4663) pertain to the issue of apportionment, with no mention that *applicant* has the burden of proof. Rather, it is well-settled that the burden of proving apportionment is with the defense. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114 [71 Cal.Comp.Cases 1229].)

With the foregoing legal clarification in mind, we turn to the issue of whether defendant met its burden of proving apportionment under Labor Code section 4663(c). We conclude the answer is no. The apportionment opinions of Dr. Miner, AME in physical medicine and rehabilitation, and Dr. Larsen, AME in psychiatry, do not rise to the level of substantial evidence

under *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [Appeals Board en banc]. In *Escobedo*, the Board outlined the following attributes of substantial evidence capable of proving apportionment:

> "[I]n the context of apportionment determinations, the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles. (*Ashley v. Workers' Comp. Appeals Bd.*, *supra*, 37 Cal.App.4th at pp. 326-327; *King v. Workers' Comp. Appeals Bd.*, *supra*, 231 Cal.App.3d at pp. 1646-1647; *Ditler v. Workers' Comp. Appeals Bd.*, *supra*, 131 Cal.App.3d at pp. 812-813.)
>
> Thus, to be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.
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> (*Escobedo*, *supra,* 70 Cal.Comp.Cases at 621.)

In this case, both defendant's answer and the WCJ's Report rely upon the February 8, 2010 report of AME Miner as substantial evidence of apportionment of applicant's lumbar spine disability. In her February 8, 2010 report, Dr. Miner found that applicant sustained Whole Person Impairment ("WPI") of 28 percent, one quarter of which she found to be non-industrial. Dr. Miner's diagnoses and discussion of apportionment are as follows:

> DIAGNOSES:
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> 1. Status-post fall 9 feet onto the buttocks (by report).
>
> 2. Pre-existing congenital lumbar spinal stenosis.
>
> 3. Traumatic spondylosis, particularly at L4-5 with 4-5 cm disc herniation, left paracentric with bilateral foraminal stenosis (left neuroforaminal. obliteration).
>
> 4. Left L4-5 hemilaminotomy, medial facetectomy, and discectomy (05/01/2007).

5. Persistent axial pain with radiculopathy.

6. Opiate dependence.

7. Chronic pain syndrome with deconditioned state, poor posture, fear of pain and re-injury, mood alteration, reported sleep and sexual dysfunction.

IMPRESSION:

Mr. Roberto Arias is a 33-year-old right-handed gentleman who on 06/19/2006 sustained an industrial, injury status-post fall off a roof estimated 9 feet. He was working as a Roofer for Williams Roofing Company when the injury occurred.

From the radiographic standpoint, it is clear that Mr. Arias had pre-existing spinal canal stenosis at the affected lumbar region. Radiographically, there is also clear evidence of a traumatic disc herniation affecting the L4-5 level left paracentric, and causing radiculopathy in the correlated nerve root distribution.

Electrodiagnostic studies confirmed clinical findings of the L5-S1 radiculopathy on the left side. The symptoms are primarily on the left side, yet he did develop some possibly radicular, more likely referred pain in the right lower extremity.

The CT myelogram confirmed the central canal stenosis superimposed on the disc herniation at the L4-5 level. This was the level that Dr. Wong performed surgery on. Technically, the surgery went well, yet the patient has persistent radicular findings. He was referred to Dr. Carpentier for pain management options. A repeat epidural steroid injection was performed (transforaminal approach), which the patient did not benefit from. He has been managed primarily with medications, both opioid and neuropathic.

…

Since the last examination, the patient has continued under the care of Dr. Mangar who facilitated additional pain management therapeutic options. The patient underwent a spinal cord stimulator trial with no subjective benefit noted. He has documentation of need for escalation of his narcotics, quadrupled the amount since the time he was seen by the undersigned. There is documentation of "30% reduction of pain" with the opiates. The patient has a continued desire to be on less pain medication and none if at all possible.

…

> The question as to whether or not there is a separate disability/impairment for psyche should be addressed by a Psychiatrist. In the patient questionnaire from this office, the PHQ-9 score is 17/27. I believe that most of his psychological issues stem from his chronic pain. After Mr. Arias is evaluated by a forensic psychiatric consultant of the parties' choice, I will submit a Supplemental Report on overall Impairment.
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> …
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> CAUSATION:
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> But for Mr. Arias' work with Williams Roofing Co., he would not have the disability to the degree that he does and by the time that he does. His disability arose during his course of employment and is compensable.
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> APPORTIONMENT:
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> With respect to apportionment of permanent disability based upon causation as mandated by Labor Code 4663 and 4664, and taking into account the en banc decision, of *Escobido vs. CNA/Marshalls*, permanent disability must be described on the basis of the approximate percentage; of causation to industrial and non-industrial factors. The [*E.L. Yeager v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922 (71 Cal.Comp.Cases 1687)] decision was also considered in addressing apportionment in this case.
>
> In my opinion, when considering all medical issues of the current physical and orthopedic disability, it is with reasonable medical probability that apportionment is indicated. The approximate percentage caused by the industrial injury is 75% and the remaining 25% is secondary to the preexisting congenital lumbar spinal stenosis. From the anatomical standpoint, the patient has a narrowed lumbar spinal canal that places him at increased risk for disability due to trauma. Because the fall itself was significant, from a reported 9 feet, there is a greater contribution to causation resulting in the single level traumatic disc herniation of 4-5 mm than that of the spinal stenosis alone.
>
> ….
>
> (Joint exhibit 8, pp. 16-20.)

In concluding that 25% of applicant's lumbar spine disability is secondary to preexisting congenital lumbar spinal stenosis, i.e., a narrowed lumbar spinal canal that placed applicant at increased risk for disability due to trauma, Dr. Miner actually apportioned to the cause of applicant's industrial injury – he was at increased risk of injury due to his narrowed spinal canal - rather than to the cause of applicant's disability at the time of Dr. Miner's evaluation. In doing so,

Dr. Miner mistakenly equated a contributing factor in applicant's industrial injury to a contributing factor in his post-injury permanent disability. This is not substantial evidence of apportionment, because the analysis of the issues of causation of injury and causation of disability is different in this case. The fact that applicant had a narrow spinal canal that may have made him more susceptible to injury in the first place does not mean that his narrow spinal canal is causing permanent disability now. (See *Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223 [Significant Panel Decision], citing *Employers Mutual Liability Ins. Co. of Wisconsin v. Industrial Acc. Com.* (*Gideon*) (1953) 41 Cal.2d 676 (18 Cal.Comp.Cases 286) [employee's head injury resulting from fall caused by non-industrial seizure found compensable].)

Furthermore, though the imaging studies referenced by Dr. Miner showed that applicant had significant preexisting pathology, Dr. Miner did not explain how and why she arrived at the 75-25% ratio of industrial/nonindustrial causation of applicant's spinal disability. Similarly, Dr. Miner did not explain how and why applicant's preexisting congenital lumbar spinal stenosis is contributing to the 50-75% loss in workdays described by the doctor in her reporting. For these reasons, we conclude that defendant did not meet its burden of proving apportionment of applicant's spinal disability according to the standards of *Escobedo*.

As for apportionment of applicant's psychiatric disability, AME Larsen found no basis for non-industrial apportionment in his report of June 25, 2020. (Exhibit J13, p. 29.) At 20:11-21:13 of Dr. Larsen's deposition of October 20, 2020, however, the doctor testified as follows upon questioning by defense counsel:

> Q. Okay. Let's see. Do you recall the February 26, 2019 report from Dr. Torres?
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> A. Off the top of my head, no.
>
> Q. Dr. Torres reported that Mr. Arias was somewhat depressed today, fearful. He works with at risk youth and two with whom he works died of an overdose and he feels responsible. That's what Dr. Torres wrote.
>
> A. What date was that?
>
> Q. February 26, 2019.
>
> A. Okay. I see that in my summary, yes.

> Q. So my question is wouldn't it be fair to say that some small part of his current psychiatric disability is due to the missionary work he does [in] which sometimes people [die] that he works with?
>
> A. Well, I don't want to be argumentative. I think I see where you're going and I would say I think a case can be made that a very small portion of this man's depression is contributed to by factors outside of his industrial injuries and I would put together living in the time of COVID and having exposed himself to working with at risk youth who have bad outcomes and to what extent any minor nonindustrial conditions of a physical nature struggle with him and finally the contribution that would come from who he is as a person as described in Dr. Morgenthaler's testing making reference to certain maladaptive characteristics I would give all of that approximately five percent of the total causation for the psychiatric disability.
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> (Joint exhibit 22, pp. 20:11-21:13.)

We conclude that the above deposition testimony of Dr. Larsen is not substantial evidence that five percent of applicant's psychiatric disability is non-industrial. The doctor's testimony is derived from defense counsel's speculative suggestion that applicant's psychiatric disability is partly due to his missionary activities in which applicant worked with some clients who died. However, the performance of mission work involving clients who died is not a description of psychiatric impairment under the AMA Guides. Similarly, "living in the time of COVID," "working with at-risk youth who have bad outcomes," and applicant's supposed "maladaptive characteristics" in which he struggled with "minor nonindustrial conditions of a physical nature," do not equate to psychiatric impairments found in the AMA Guides. Defendant did not meet its burden of proving apportionment consistent with *Escobedo*, because the part of Dr. Larsen's deposition testimony relied upon by defendant is speculative and unsupported by reasoning, and it fails to describe the exact nature of the apportionable disability.

Finally, we note that in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 2023 Cal. Wrk. Comp. LEXIS 30 (88 Cal.Comp.Cases 741) [en banc] ("*Nunes* I"), the Appeals Board held that vocational evidence must address apportionment, but such evidence may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment. The Board explained that an analysis of whether there are valid sources of apportionment is still required, even when applicant is deemed not feasible for vocational retraining and is permanently and totally disabled as a result. In such cases, the WCJ must determine whether the cause of the permanent and total disability includes nonindustrial or prior industrial factors, or whether the

permanent disability reflected in applicant's inability to meaningfully participate in vocational retraining arises solely out of the current industrial injury. The Board later affirmed these principles in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 23 Cal. Wrk. Comp. LEXIS 46 [88 Cal.Comp.Cases 894] ("*Nunes* II").

In this case, we observe that Mr. Gonzalez's report of March 23, 2021 includes a comprehensive discussion of "vocational apportionment," in which Mr. Gonzalez finds no basis for it because applicant had no vocational disability before his industrial injury. (Exhibit A3, pp. 39-41.) Under *Nunes* I and II, Mr. Gonzalez's opinion that there is no "vocational apportionment" would be invalid if the record included substantial evidence of medical apportionment. However, Mr. Gonzalez's opinion that there is no "vocational apportionment" is not fatal to his assessment of applicant's vocational infeasibility. This is because the medical apportionment of Dr. Miner and Dr. Larsen is not substantial evidence, as previously discussed. Moreover, Mr. Gonzalez emphasized in the final words of his report that he deferred to the trier-of-fact as to whether applicant's permanent disability rating "would need to be apportioned or not." (Exhibit A3, p. 41.) For these reasons, we conclude that *Nunes* I and II do not preclude reliance on Dr. Gonzalez's opinion that applicant cannot compete in the open labor market.

Applicant's attorney is allowed a reasonable fee equivalent to 15% of the present value of the permanent and total disability award. Calculation of the fee will involve accounting for the annual cost-of-living adjustment (COLA) and State Average Weekly Wage (SAWW) pursuant to Labor Code section 4659(c). (See, e.g., *Gilmore v. Autoland Resale Ctr.* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 148; *Wilson v. Piedmont Lumber & Nursery* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 48.) We will defer calculation of the exact amount of the fee for determination by the WCJ, with assistance from the Disability Evaluation Unit as necessary or appropriate.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings, Award and Order of July 22, 2021 is **AFFIRMED**, except that Finding 2 and paragraph A of the Award are **RESCINDED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the following new Finding 2 and paragraph A of the Award are **SUBSTITUTED** in place of the rescinded Finding 2 and Paragraph A of the Award:

FINDINGS OF FACT

2. The injury on June 19, 2006 resulted in permanent and total disability, with no legal basis for apportionment.

AWARD

(A) Permanent disability of 100%, payable at the rate of $453.34 per week beginning August 1, 2008 and continuing for the remainder of applicant's life, subject to the COLA afforded by Labor Code section 4659(c), less credit to defendant for permanent disability indemnity previously paid, and less an attorney's fee equivalent to 15% of present value of the permanent disability award, with the weekly indemnity rate subject to adjustment to account for calculation of the attorney's fee, jurisdiction reserved at the trial level.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for calculation of the attorney's fee by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 11, 2024

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

ROBERTO ARIAS
WILSON & WISLER
STATE COMPENSATION INSURANCE FUND

JTL/*ara*

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

STATEMENT OF MATERIAL FACTS

Roberto Arias was employed on 6/19/06 as a roofer by Williams Roofing, when he sustained injury AOE/COE to his low back, psyche, sleep disorder, and erectile dysfunction, neck, and upper back. Pertinent to the present issue, Applicant was evaluated for medical/legal purposes by AME Maureen Miner, with respect to orthopedic disabilities; by AME Robert Larsen, for psychiatric disability; and by AME Dr. Roger Nacouzi for the sleep disorder and sexual dysfunction. He was also evaluated by his vocational expert, Gene Gonzales; and by Scott Simon, as the defense vocational expert.

Dr. Miner found 29% Whole Person Impairment for the musculoskeletal factors (9/20/20 report, Ex. J-17, p. 4). She offered the opinion that Applicant's disability would limit him to semi-sedentary work and cause him to miss 50% of his work on a good day; and limit him to sedentary work and cause him to miss 75% of his work on a bad day; which would preclude him being "competitively employable" in the open labor market, although she deferred to vocational experts on employability issues (12/20/20 and 2/19/21 reports, Exs. J-15 and J-18).

Regarding apportionment, Dr. Miner stated: "From a radiographic standpoint, it is clear that Mr. Arias had pre-existing spinal canal stenosis…[and] traumatic disc herniation…[at] L4-5…causing radiculopathy in the correlated nerve root distribution…The CT myelogram confirmed the central canal stenosis superimposed on the disc herniation at the L4-5 level." She noted that the earlier MRI on 01/08/2008 showed mild central canal stenosis and that the CT myelogram "…confirmed the central canal stenosis superimposed on the disc herniation at the L4-5 level." Dr. Miner's diagnosis for this element of Applicant's condition was "pre-existing congenital lumbar spinal stenosis." She concluded that these non-industrial factors caused 25% of the overall impairment. (2/8/10 report, Ex. J-8, p. 15)

For the psychiatric elements, Dr. Larsen assigned a GAF score of 53 (corresponding to 26% WPI) and reported that causation was entirely industrial. He recommended that the physical impairments identified by Drs. Miner and Nacouzi should be combined with the psychiatric impairment, by the addition method per the *Kite* case. He found that Applicant was "not a good candidate for re-training." (7/13/20 report, Ex. J-13) Dr. Larsen's deposition was taken on 10/20/20 (Ex. J-22), on pp. 20-21 and 24, he testified that 5% of the disability was caused by "…living in the time of COVID and having exposed himself to working with at risk youth who have bad outcomes and to what extent any minor nonindustrial conditions of a physical nature struggle with him and finally the contribution that would come from who he is as a person as described in Dr. Morgenthaler's testing making reference to certain maladaptive characteristics…"

From the internal medicine standpoint, Dr. Nacouzi concluded that the industrial injury was entirely causative of permanent impairment of 4% for a sleep disorder and 3% for sexual dysfunction (10/14/13 Report, Ex. J-1, p. 21).

Mr. Gonzales concluded that Applicant was precluded from his pre-injury work, was not amenable to vocational rehabilitation, was unemployable and has lost 100% of his future earning capacity (3/23/21 report, Ex. A-3, p. 41).

Following trial, Findings, Award and Order was issued on 7/22/21, awarding, inter alia, 73% permanent partial disability.