

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

DEMESIO CAMACHO, *Applicant*

vs.

**VICTOR TRUJILLO, Permissibly Self-Insured;
administered by FINISH LINE SELF INSURANCE GROUP, *Defendants***

**Adjudication Number: ADJ10571459
San Francisco District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

In a single pleading, defendant filed a Petition for Reconsideration & Petition for Removal challenging the November 25, 2020 Findings of Fact and Award issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant sustained admitted industrial injury to his right shoulder, head, back, and ribs while employed as horse exerciser/rider on December 1, 2015, causing 38% orthopedic permanent disability without apportionment. The WCJ deferred the issue of injury arising out of and occurring in the course of employment (AOE/COE) to the psyche/cognitive defects. Despite deferring the issue of causation of the psyche/cognitive injury, the WCJ made an award of 38% permanent disability.

Defendant contends that the deferral of the issue of injury AOE/COE as to the psyche/cognitive will result in significant prejudice and irreparable harm. Defendant further contends that the WCJ should have relied on the opinion of orthopedic panel qualified medical examiner (PQME) William Campbell, M.D., and neurological PQME Michael Butler, M.D., rather than the opinion of primary treating physician Tariq Mirza, M.D.

Applicant did not file an answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny defendant's petition.

Based on our review of the record and for the reasons discussed below, we will rescind the WCJ's decision and substitute it with a new Findings and Award. The new Findings and Award will restate and affirm the finding of 38% partial permanent disability, for the reasons stated in the WCJ's Report, which we adopt and incorporate. It will restate and affirm the deferral of the issue of AOE/COE of the alleged psyche/cognitive injury, based upon the WCJ's analysis of the merits of petitioner's arguments in the WCJ's report. The new Findings and Award will also defer the issue of any additional permanent disability that may be attributable to the head, which has not been addressed by the WCJ, and the psyche/cognitive injuries and will also defer the award of permanent disability and attorney fees until the issue of AOE/COE is resolved.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).) Here, based upon the WCJ's analysis of the merits of petitioner's arguments, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

For the reasons stated in the WCJ's report, we agree that the opinion of Dr. Mirza is substantial medical evidence upon which the WCJ properly relied. To be considered substantial evidence, a medical opinion "must be predicated on reasonable medical probability." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-17, 419 [33 Cal.Comp.Cases 660].) A physician's report must also 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. (*Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70

Cal.Comp.Cases 604, 612 (Appeals Board en banc), 70 Cal.Comp.Cases 1506 (writ den.)) We observe, moreover, it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

While we are deferring the ultimate award of permanent disability pending resolution of the issue of AOE/COE for the psyche/cognitive injury, we are affirming the finding of 38% partial permanent disability. Therefore, defendant should advance permanent disability indemnity consistent with this finding, reserving a reasonable amount for attorney fees. Lastly, we note that the WCJ's Opinion on Decision is not part of the Findings and Award. Therefore, any clerical error in the former as to the name of the injured worker is of no consequence.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 25, 2020 Findings of Fact and Award is **RESCINDED** and **SUBSTITUTED** with a new Findings and Award, as provided below.

FINDINGS OF FACT

- 1.) Demesio Camacho, while employed by Victor Trujillo (permissibly self-insured by Finish Line Self Insurance Group,) as a horse exerciser rider (occupational group 491) on December 1, 2015, at the age of 31, sustained an admitted injury to his right shoulder, head, back, and ribs, with alleged injuries to psyche/cognitive defects when a horse fell and landed on top of him while working. The issue of injury arising out of and occurring in the course of employment (AOE/COE) to the psyche/cognitive defects is deferred.
- 2.) The orthopedic injuries herein caused 38% permanent disability without apportionment. The issue of permanent disability related to the alleged psyche/cognitive defects injury is deferred.
- 3.) The injured worker is entitled to further medical treatment which is reasonable and necessary to cure or relieve the effects of this industrial injury to all body parts deemed industrially injured.
- 4.) Attorney fees are deferred.
- 5.) Petitions for penalties filed by both applicant and defense are deferred.

AWARD

AWARD IS MADE in favor of applicant **DEMESIO CAMACHO** and against defendant, **VICTOR TRUJILLO**, PSI by Finish Line Self Insurance Group, as follows:

A.) All further medical treatment reasonably required to cure or relieve from the effects of the injury herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 4, 2021

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

**DEMESIO CAMACHO
LAW OFFICES OF NADEEM MAKADA
LAW OFFICES OF RICHARD K. GREEN**

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 PETITIONS
FOR REMOVAL AND RECONSIDERATION**

A. INTRODUCTION

- | | |
|-------------------------------------|---|
| 1. IDENTITY OF PETITIONER: | Defendant |
| 2. TIMELINESS: | BOTH Petitions were timely filed. |
| 3. VERIFICATION: | A verification is attached. |
| 4. DATE OF INJURY (DOI): | 12/01/2015 |
| 5. MECHANISM OF INJURY: | Racehorse Fell on Applicant |
| 6. BODY PARTS INJURED: | Admitted: head, right shoulder, back, ribs

Claimed: Psyche/cognitive defects |
| 7. OCCUPATION AT DOI: | Rider/Exerciser for racehorses |
| 8. PETITIONER'S CONTENTIONS: | The WCJ erred by:

a. Only proceeding to trial on the PD & MT issues for the right shoulder, back, and ribs, and deferring the issues of PD & MT for admitted head injury, and AOE/COE for psyche/cognitive defects to a later date once the record on those issues has been sufficiently developed; and

b. Finding the PTP medical-legal report to constitute substantial medical evidence and following that report, and finding the PQME's report to not constitute substantial medical evidence and not following that report. |

B. DISCUSSION – RESPONSE TO DEFENDANT'S CONTENTION

Defendant has filed a Petition for Removal disputing the WCJ's decision to defer the issues of PD & MT for admitted head injury, and AOE/COE for psyche/cognitive defects. In this same Petition, defendant has included a Petition for Reconsideration of the findings and award issued by the undersigned on 11/25/2020.

With regard to defendant's contentions in his Petition for Removal, for the first time at trial while reviewing the evidence offered, I realized that I did not have an adequate record

upon which to determine the issues of PD & MT for the admitted head injury and AOE/COE for psyche/cognitive defects. I therefore was left with a choice of ordering the entire case off calendar, until both parties adequately developed the record on these issues, so that I would be able to make a determination on these issues based on substantial evidence.

I felt it more appropriate to proceed to trial on the issues where I did have substantial medical evidence and resolve those issues at least, while deferring the remaining issues where I did not have substantial evidence. I based this decision to go forward in this manner, on California's constitutional mandate to process injured workers' claims as expeditiously as possible. Given that this injury had occurred **FIVE** years ago, this mandate had already been violated, and I did not want to make it worse, by postponing the matter even longer, when I knew there were substantial PD and MT issues I was able to determine on the day of trial, 11/12/2020.

The response to defendant's contentions in his Petition for Reconsideration were set forth in my Opinion on Decision set forth below:

OPINION ON DECISION

I. FACTUAL HISTORY

Demesio Camacho, while employed by Victor Trujillo (permissibly self-insured by Finish Line Self Insurance Group,) as a horse exerciser rider (occupational group 491) on 12/1/2015 at the age of 31, sustained an admitted injury to his right shoulder, head, back, ribs, with alleged injuries to psyche/cognitive defects when a horse fell and landed on top of him while working. (Injury to the psyche/cognitive defects body parts and penalty petitions filed by both applicant and defense are deferred at this time.)

On 9/20/2016, applicant began treatment with primary treating physician (PTP), Dr. Tariq Mirza, a pain management and rehabilitation specialist.

Subsequently, an orthopedic surgeon, Dr. William Campbell was selected as the PQME in this case. Dr. Campbell evaluated applicant on 6/14/2019, and timely issued his report thereafter. (Defendant's Exhibit E.)

Applicant objected to WPI finding of PQME. Applicant requested a rebuttal PR4 from the PTP Dr. Tariq Mirza, which issued on 9/17/2019. (Applicant's Exhibit 1.)

II. ISSUE – Which Physician's report = Greater Substantial Medical Evidence?

Since the determination of whether the injury to applicant's psyche and cognitive function are industrial is deferred at this time, along with the issues of the penalty petitions filed by both applicant and defense, the sole remaining issue was the level of permanent

disability (PD) to applicant's right shoulder, cervical spine, lumbar spine and ribs. This required a comprehensive evaluation of the medical evidence in this case. A determination needed to be made as to which of the following evaluating physicians, if either, had provided a report that constituted "substantial medical evidence."

- (1) Dr. Tariq Mirza, a pain management and rehabilitation specialist (PTP)
- (2) Dr. William Campbell an orthopedic surgeon (PQME)

Both evaluating physicians determined the industrial injury of 12/1/2015 to be the sole cause of applicant's injuries. Therefore, there was no need for an analysis of apportionment to non- industrial causes in this case.

A. What Constitutes "substantial medical evidence"?

LC §4628 and 8 CCR §10682 (formerly 10606) set forth the following list of items that must be included in a medical-legal report in order for it to be considered "Substantial Medical Evidence" upon which an evaluating physician may rely for his or her determination: LC §4628 (a):

- (1) A complete history.
- (2) A Review and summary of prior medical records.
- (3) An explanation of the conclusions of the report.

Regulation 8 CCR §10682: (b) Medical reports should include where applicable:

Nonmedical records relevant to determination of the medical issue and:

- (1) The date of the examination;
- (2) The history of the injury;
- (3) The patient's complaints;
- (4) A listing of all information received in preparation of the report or relied upon for the formulation of the physician's opinion;
- (5) The patient's medical history, including injuries and conditions, and residuals thereof, if any;
- (6) Findings on examination;
- (7) A diagnosis;
- (8) Opinion as to the nature, extent and duration of disability and work limitations, if any;
- (9) Cause of the disability;
- (10) Treatment indicated, including past, continuing and future medical care;
- (11) Opinion as to whether or not permanent disability has resulted from the injury and whether or not it is stationary. If stationary, a description of the disability with a complete evaluation;
- (12) Apportionment of disability, if any;
- (13) A determination of the percent of the total causation resulting from actual events of employment, if the injury is alleged to be a psychiatric injury;
- (14) The reasons for the opinion; and
- (15) The signature of the physician.

B. Diagnosis of Industrial Injuries

In his report dated 6/14/2019 at page 12, pursuant to 8 CCR §10682(b)(7), the **PQME Dr. Campbell set forth the following diagnosis** for each body part injured: (Exhibit E)

- “1. Right shoulder sprain with clavicle fracture
2. cervical strain
3. lumbar strain with ongoing myofascial pain and spasm
4. right sided thoracic rib fracture”

In his report dated 9/17/2019 at page 9, pursuant to 8 CCR §10682(b)(7), the **PTP Dr. Mirza setforth the following diagnosis** for each body part injured: (Exhibit 1)

- “1. History of subdural hematoma
2. S/P Craniotomy for subdural
3. Right shoulder sprain
4. cervical sprain
5. history of broken ribs on right side
6. lumbar sprain
7. post traumatic headaches
8. fracture of the clavicle right side
9. insomnia
10. traumatic brain injury
11. post traumatic stress disorder
12. post concussive headache
13. depressed mood

C. Mechanism of Injury

The difference in the diagnoses listed above by the two evaluating physicians appeared to reflect their different understanding of the mechanism of injury. As set forth above, LC §4628(a)(1) requires the physician take “a complete history.” Regulation 8 CCR §10682: (b)(2) also requires that the physician included “the history of the injury” in his report. Failure to take a complete history may lead to a misunderstanding as to the mechanism of injury, as has occurred in this case.

In his report dated 6/14/2019 at page 3, the PQME Dr. Campbell stated the following sentence for the “History of Injury”:

“The patient states that while at work on 12/1/2015 he was thrown from a horse.”

This did not comport with the witness’ credible testimony at trial as well as the parties stipulated chronology which stated, “Date: 12/1/2015 Description of Event: Applicant sustains an injury to his right shoulder, head, back, ribs, with

alleged injuries to psych/cognitive defects **when a horse fell and landed on top of him.**" (Emphasis added.)

The primary treating physician, Dr. Mirza's understanding of applicant's mechanism of injury appeared to be more consistent with applicant's testimony and the stipulation of the parties and was therefore compliant with the requirements of both the Labor Code and the Regulations.

In his report dated 9/17/2019 at page 2, the PTP Dr. Mirza set forth his understanding of the mechanism of injury as follows: (Exhibit 1)

"The patient states that he was working for this employer more than 10 years exercising the racehorse when he was racing a horse, a **horse suddenly slipped and fell on top of him** hurting his right shoulder, right rib cage, low back and head. The patient lost consciousness and did not remember exactly how it happened. The patient however was told that an ambulance was called and he was taken to Highland Hospital in the ambulance. The patient states that in the hospital they did surgery on the left side of his head. The patient states that when he was in the hospital he was told that he had subdural hemorrhage, broken ribs and had also hurt his back neck and shoulder." (Emphasis added.)

Falling off a horse and having a horse fall on top of a person are two totally **different mechanisms of injury**. It was evident in this case, that the mechanism of injury was not a mere fall from a horse, but was a more severe and damaging injury with the added factor of having the **horse's full body weight fall on top of applicant causing him to lose consciousness, break some bones, and incur a head trauma** after which he was immediately transported to the hospital by ambulance.

Unfortunately, since the PQME in this case did not have a viable grasp of the precise mechanism of injury, he was not able to provide accurate diagnoses or a true analysis of the nature and extent of applicant's permanent disability as required. I have discussed this in depth below.

D. Impact of Injury on Applicant's ADLs

For this date of injury post 1/1/2013, LC 4660.1 provides that the AMA Guides must be used to calculate level of permanent disability. Essentially, the metrics of the AMA Guides are driven by the impact of applicant's injury on his Activities of Daily Living (ADLs). See Table 1-2 at page 4 of the AMA Guides which states:

"The whole person impairment percentages listed in the *Guides* estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, *excluding work* as listed in Table 1-2."

The eight activities of daily living or ADLs as they are commonly referenced include the following:

- Communication
- Physical activities
- Nonspecialized hand activities
- Travel
- Self-care, personal hygiene
- Sensory function
- Sexual function
- Sleep function

1. PTP Dr. Mirza has Analyzed the Impact of Injury on ADLs

On page 4 & 5 of Dr. Mirza's report of 9/17/2019, the PTP set forth an extensive **analysis of the impact of applicant's injuries on each of the eight ADLs**, summarizing and concluding with the statement "The patient has difficulty with 6 out of the 8 categories."

2. PQME Dr. Campbell has NOT Analyzed the Impact of Injury on ADLs

In his report dated 6/14/2019 at page 4, the PQME Dr. Campbell provided a discussion of applicant's present "complaints" which include the impact of pain on applicant's current lifestyle. However, pain is not a metric or measurement factor used by the AMA guides, at least not in this manner. Dr. Campbell also includes a discussion with regard to the activity limitation and the level to which pain interferes with these activities. Dr. Campbell asked the applicant to rate the limitation of activities due to pain on a scale of 1 to 10. However, again this is not a viable metric available for use in the AMA Guides. I am unable to translate this discussion of Dr. Campbell to comply with the activities of daily living Table 1-2, which is the metric to be used. (See Page 4 of the AMA Guides, Table 1-2.).

In his report dated 6/14/2019 at page 4, the PQME Dr. Campbell provided a discussion of applicant's present "activity status." However again this is not compliant with the chart on activities of daily living in the AMA guides.

Since an analysis of the impact of injury on applicant's ADLs is critical to a physician's proper analysis of an injured worker's whole person impairment (WPI) per the above quote from the AMA Guides, it is not possible for Dr. Campbell to have arrived at an accurate determination of WPI, which is a critical factor in the PD rating string.

Based on the above rationale, I determined that the PTP's report of Dr. Mirza did constitute "substantial medical evidence" upon which I could base an accurate determination of PD, whereas the PQME's report of Dr. Campbell did not constitute "substantial medical evidence."

III. Level of Permanent Disability Percentage

Since I determined that PTP Dr. Mirza's reports constituted substantial medical evidence on the issue of permanent disability, I will follow his rating methods which he set forth in his report of 9/17/2019. (See page 10 – 13 of Exhibit #1.)

Dr. Mirza began with a strict rating per the AMA Guides as follows:

Cervical: 15.01.01.00 - 8 - [1.4]11 - 491H - 14 = **12%**

R Shoulder: 16.02.01.00 - 3 - [1.4]4 - 491G - 5 = **4%**

Lumbar (DRE II = 13%WPI + 3%pain = 16%WPI):
15.03.01.00 - 16 - [1.4]22 - 491H - 27 = **24%**

Clavicle: 08.01.00.00 - 3 - [1.4]4 - 491E - 4 = **3%**

CVC = 24 C 12 C 4 C 3 = 38% PD

Next, Dr. Mirza provided a Guzman Rebuttal rating to replace the strict rating of the AMA Guides for lumbar Spine. All remaining body parts are rated using the strict AMA Guides method as follows:

Cervical: 15.01.01.00 - 8 - [1.4]11 - 491H - 14 = **12%**

R Shoulder: 16.02.01.00 - 3 - [1.4]4 - 491G - 5 = **4%**

Lumbar (Hernia Table) = 26%WPI: 06.05.00.00 - 26 - [1.4]36 - 491H - 42 = **39%**

Clavicle: 08.01.00.00 - 3 - [1.4]4 - 491E - 4 = **3%**

CVC = 39 C 12 C 4 C 3 = 50% PD

Although Dr. Mirza made a good faith attempt at a *Guzman* rebuttal rating by analogizing to Table 6-9 at page 136 of the AMA Guides, his selection of Class 3 does not fit within the definition of the injury incurred by applicant. Applicant has a low back injury. This table deals with "Impairment Due to Herniation."

There is case law that has upheld rating analogies to Class 2 of this Table 6-9 for an injured worker with a back injury, but that is because of the use of the conjunctions "and" & "or" in Class 2. However, the conjunctions used for Class 3 are both "and." There is no "or" conjunction used for Class 3.

This means that in order for an injured worker to be rated using Class 3, he or she would have to have the following:

- **Palpable defect in supporting structures of abdominal wall;**
and
- **Persistent, irreducible, or irreparable protrusions at the site of the defect;**
and
- **Limitation in activities of daily living.**

In this case, applicant only has the last factor, “limitation in activities of daily living” and not the first two factors. Therefore, Dr. Mirza’s *Guzman* rebuttal rating is not viable. The most accurate rating would therefore be the strict AMA Guides rating of **38% PD** as set forth by Dr. Mirza.

IV. MEDICAL TREATMENT

Pursuant to the plethora of medical reports in this Mr. Mendoza Lopez is entitled to further medical treatment which is reasonable and necessary to cure or relieve the effects of his industrial injury

V. ATTORNEY’S FEES

The applicant’s attorney is entitled to a reasonable fee of 15% of the permanent disability benefits awarded in this case, the exact amount to be adjusted by the parties with WCAB jurisdiction reserved in the event the parties are unable to amicably resolve this.

C. RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the petitions for removal and for reconsideration filed by defendant herein be **DENIED** on the merits.

DATE: 12/8/2020

Colleen S. Casey

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE