WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RICARDO GONZALEZ, ***Applicant***

vs.

ADVANCED CONSTRUCTION; OLD REPUBLIC GENERAL INSURANCE CORP., adjusted by GALLAGHER BASSETT, ***Defendants***

Adjudication Number: ADJ10766894
San Jose 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, both of 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/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

DEIDRA E. LOWE, COMMISSIONER
CONCUR NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 22, 2021

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

RICARDO GONZALEZ
AUBAIN & GUEVARA
KARLIN, HIURA & LASOTA

PAG/*pc*

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

Applicant, Ricardo Gonzalez, while employed on 10/16/2015, as a carpenter/framer, occupational group number 481, in San Jose, California, by Advanced Construction, sustained an injury arising out of and arising in the course of employment to the right eye, cervical spine, right wrist, psyche and face/head – resulting in headaches.

The Findings and Award in this case issued on 10/08/2021. The Petitioner is Defendant, who has timely filed the verified Petition for Reconsideration on 10/25/2021. The Petition for Reconsideration is not legally defective. Applicant has filed an Answer.

Petitioner contends that the mechanism of injury did not constitute a violent act as set forth in Labor Code section 3208.3(b)(2), and that the impairments should not be added pursuant to *Kite*.

II.
FACTS

On 10/16/2015 Applicant was working at a construction site, framing a balcony. It was a new construction. He was working at the height of a second floor. He was walking on a metal beam, and balancing while carrying a beam. He fell off the beam upon which he was balancing, onto the concrete below. It was generally estimated he fell from 10 – 15 feet. He landed on his face. He lost consciousness, was taken to the hospital via ambulance, and remained hospitalized for five days. The fall caused not only a loss of consciousness, but he also suffered facial fractures and a neck fracture. From the Qualified Medical Examination (QME) report of Dr. Kaiser-Meza, summarizing the emergency room medical reports, it is noted the fall caused cervical vertebral fractures at two levels (C1 and C2), a closed fracture of the nasal bone, a closed fracture of the roof of the eye orbit, a closed fracture of the right wrist, glaucoma of the right eye due to ocular trauma, subdual hematoma, vision loss, and vitreous hemorrhage.

Applicant sought medical care and was eventually able to return to work in a lighter capacity.

Applicant sought to establish that the mechanism of injury was a violent act under Labor Code section 3208.3(b)(2) and also alleged that the impairments should be added pursuant to *Kite* rather than combined using the Combined Values Chart (CVC).

III.
LEGAL ARGUMENTS

1. DEFENDANT ALLEGES THAT THE FINDING OF A VIOLENT ACT IS NOT SUPPORTED BY THE FACTS

As set forth in the facts above, facts which are undisputed, Applicant fell from a second story work-site onto concrete below, generally landing on his face. There was nothing to break the fall. His hard hat did not save his face. He hit the ground with sufficient force such as to break his neck in two places, and many of his facial bones including the nasal bone, and the eye socket, as well as his right wrist, and also with sufficient force such as to suffer glaucoma from the ocular trauma, a subdural hematoma, vision loss, and vitreous hemorrhage. He was unconscious for a period of five days.

This Judge applied the holding in the *en banc* decision of *Wilson v. State of California Cal Fire* (2019) 84 CCC 393 in which the Appels Board addressed the definition of violent act. Wilson notes that panel decisions evaluating whether an injury may receive an increased impairment rating have defined "violent act" as an act that is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening. The evaluation focuses on the mechanism of injury as the statute's language emphasizes the event causing the injury rather than the injury itself.

Here, Applicant's face hit the concrete with force. There was no expert testimony as to the level of force generated by the fall, but the results were well established. It is not an abuse of discretion for this Judge to find that the fall which resulted in this level of facial fractures, internal head trauma, and neck fractures, as well as five days of unconsciousness, did meet the criteria of strong, extreme or intense force.

Defense counsel posits: The Judge is convinced that the striking of the ground involved strong physical force, but is that sufficient to be a violent act? The answer is YES. The test is not "strong, extreme AND intense force" but rather "strong, extreme OR intense force." Strong force alone is sufficient.

Defendant questions the height of the fall, as some medical reports report different heights. Whether the height was 9 feet, 12 feet, 15 feet or 20 feet is irrelevant. The relevant factor is whether the hitting of the ground was with sufficient force. Had Applicant landed on a giant pillow, or a fireman's net, the result would be different. Here, the fall resulted in severe trauma as previously described. It is without doubt that there was sufficiently strong force to meet the criteria.

Defendant asserts that the injury herein was more akin to a motor vehicle accident without loss of consciousness. I disagree. Here, there was five days of

unconsciousness. There is nothing similar between an accident as described by Defendant and the facts of this case.

There is no legal, factual or medical basis to disturb the finding that the mechanism of injury herein qualified as a violent act.

2. DEFENDANT ASSERTS THE IMPAIRMENT SHOULD BE COMBINED USING THE CVC RATHER THAN ADDED APPLYING *KITE*.

Psychiatric evaluator Dr. Drucker was deposed on 11/18/2020 and was extensively questioned on his opinion that the impairments in this case should be added pursuant to Kite. [Applicant's Exhibit 7, beginning at page 12] Dr. Drucker specifically opines that the injuries are complex and varied, with the vision loss, the mild cognitive impairment, and the physical all impacting each other. Dr. Drucker makes it very clear that there is a synergistic effect, that the pain affects the mood, and the cognitive does as well. Dr. Drucker indicates this is an area of expertise for him, as he wrote his "short" 500-page dissertation on this issue. The opinions of Dr. Drucker were echoed by Dr. Kaisler-Meza in his report of 06/25/2018. [Joint Exhibit 2] Dr. Kaisler-Meza is an Agreed Medical Examiner and therefore entitled to great weight.

Defendant asserts that Dr. Schainholz endorses combining rather than adding, but does not cite to the evidence. I have carefully reviewed Joint Exhibit 9 and do not find any commentary, opinions or analysis by Dr. Schainholz that the impairments should be combined and not added. What this Judge *does* see in the report of Dr. Schainholz is reference to the exquisite complexity of this case (page 42), that Applicant is fortunate to have survived this fall (page 40), that this case is mathematically complex due to the "bilaterality of the visual field losses" (page 45), that Applicant is anticipated to have some challenges to his independence with regard to performance of most, if not all, of his visually intensive activities of daily living (page 47), and that Applicant's work activities are to be restricted due to the "loss of binocularity" (page 52). While not specifically stating that the vision has a synergistic effect with the remainder of the body, I can see the inference therein (no pun intended). I do NOT see that Dr. Schainholz recommends combining impairments rather than adding.

As such, there was no medical evidence offered by Defendant to rebut either the opinion of Dr. Kaisler-Meza or the opinion of Dr. Drucker. It is well-established that the opinion to add using *Kite* rather than combine using the CVC is a medical determination. Here, both Dr. Kaisler-Meza and Dr. Drucker are in agreement, and there is nothing to rebut these medical determinations. The reports and opinions have been found to be substantial medical evidence, and thus there is no medical basis to disturb the determination that the impairments herein are to be added pursuant to *Kite*.

IV.
RECOMMENDATION

The Petition for Reconsideration should be denied.

DATE: 11/02/2021
ADORALIDA PADILLA
WORKERS' COMPENSATION JUDGE

OPINION ON DECISION

OCCUPATIONAL GROUP NUMBER

The parties presented a dispute over occupational group number, with Applicant alleging "481" which is the category for skilled construction workers, and Defendant alleging "480" which is the category for construction helpers, with some skilled construction.

As the parties could not resolve the dispute, this Judge ordered a formal job analysis (JA) to be performed. The parties did obtain a formal JA from Mr. Frank Diaz.

This Judge began the analysis by a review of the Permanent Disability Rating Schedule (PDRS) which contains the various occupational groups and their descriptions.

It is noted that "480" indicates that this is a "helper" classification, which results in the worker undertaking the heavy labor which is performed at construction sites. Some skill is required. There is no reference made to any type of construction in particular, and there is no reference made as to the need to climb, the need to balance, or working at heights.

It is noted that "481" is a skilled construction worker classification, and the description specifically references construction of buildings or large structures, and also indicates a need to perform skilled work at various levels with significant climbing involved.

A review of the JA shows that Applicant was a "lead" employee, who supervised from 3 – 10 construction workers, and prepared daily reports as to the work completed. This cuts against the argument that he was a "helper" as outlined in group 480. The JA further notes that Applicant's work was in the construction of new apartment buildings, which lines up with the requirement of "construction of buildings or large structures" in group 481. The JA also notes that Applicant performed frequent climbing of stepladders, and scaffolding up to 70 feet in height, as well as performed frequent balancing on beams up to 5 stories in height. These factors line up with the "significant climbing" outlined

in group 481. Noted in the JA was that Applicant used power drills, skill saws, on occasion a forklift, and performed supervision of employees and report writing. Considering the type of construction and the climbing/balancing, I am convinced that the proper occupational group number is 481.

VIOLENT ACT

Applicant alleges the injury meets the requirement of "violent act" as set forth in Labor Code section 3208.3(b)(2) and Defendant disagrees.

Labor Code section 3208.3 sets forth the threshold requirements of compensability of a psychiatric injury. Section 3208.3(b)(2) indicates that in the case of an employee whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury – which means at least 35 – 40 percent of the causation from all sources combined. It was the intent of the Legislature to establish a new and higher threshold of compensability for psychiatric injury.

The Appeals Board has addressed the definition of "violent act" in the *en banc* decision of *Wilson v. State of California Cal Fire* (2019) 84 CCC 393. *Wilson* notes that panel decisions evaluating whether an injury may receive an increased impairment rating have defined "violent act" as an act that is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening. The evaluation focuses on the mechanism of injury as the statute's language emphasizes the event causing the injury rather than the injury itself.

A number of cases have been decided, some finding violent act, and others not. A brief analysis shows the following fact patterns DO meet the violent act definition:

A pedestrian being struck by a car

A motor vehicle accident involving a roll-over of the vehicle

Fingers being crushed in a press

A tree trimmer falling 20 feet, losing his helmet, hitting his head repeatedly against a tree and suffering a brief loss of consciousness.

And the following fact patterns NOT meeting the violent act definition:

Motor vehicle accident without loss of consciousness, no air bags deployed

A gate falling off a hinge onto a foot

Falling off a running board

Falling out of a dental chair.

Now let us review the mechanism of injury in this case: On 10/16/2015 Applicant was working at a construction site, framing a balcony. It was a new construction. He was working at the height of a second floor. He was walking on a metal beam, and balancing while carrying a beam. He fell off the beam upon which he was balancing, onto the concrete below. General estimate was he fell from 10 – 15 feet. He lost consciousness, was taken to the hospital via ambulance, and remained hospitalized for five days. The fall caused not only a loss of consciousness, but he also suffered facial fractures and a neck fracture. From the Qualified Medical Examination (QME) report of Dr. Kaiser-Meza, summarizing the emergency room medical reports, it is noted the fall caused cervical vertebral fractures at two levels (C1 and C2), a closed fracture of the nasal bone, a closed fracture of roof of orbit, a closed fracture of the right wrist, glaucoma of the right eye due to ocular trauma, subdual hematoma, vision loss, and vitreous hemorrhage.

Applying this mechanism of injury to the definition in *Wilson*, I find the fall was sufficient such as to meet the definition of violent act. In the cases where an employee has fallen – such as off a dental chair, the distance was not great, resulting in not sufficient force as to cause much injury, if any. In the case of the tree trimmer, while the worker did not hit the ground, he did hit a tree with such force that he had a brief loss of consciousness. Here, the injured worker fell from the second story to the concrete below, and hit with such force resulting in multiple facial fractures and neck fractures, plus loss of consciousness, subdural hematoma and a loss of vision. I am convinced that the striking of the ground involved strong physical force or extreme or intense force given the immediate results.

Applicant has met his burden of proof that the mechanism of injury was a "violent act."

BODY PARTS

Applicant alleges injury to the psyche, the lumbar spine, the thoracic spine, and a loss of hearing.

There is no medical evidence to support an injury to the thoracic or lumbar spines. There are a few treatment reports from Dr. Camenson which reference

pain in the thoracic spine, but they are most often listed as "cervical/thoracic" leading me to believe the problem is in the neck and radiating down. Only once does Dr. Camenson reference the lumbar spine and that is simply to note a one-time adjustment of the lumbar spine. There are no measurements or studies as to the thoracic and lumbar spines, and there is no discussion by any of the treating doctors or evaluators as to nature and extent of injury, much less causation.

As to the hearing loss, I do note a medical report from Dr. Shin, in which he notes that upon examination at the emergency room, Applicant had bloody otorrhea and complained of hearing loss. There is no discussion as to whether there was a bloody discharge due to the subdural hematoma, injury to the actual ear/inner ear, or for some other reason. Examination was performed and Dr. Shin noted a very slight 10 decibel difference between the right and left sides. However, Dr. Shin offers no analysis if this is due to the fall or if the condition is pre-existing, and Dr. Shin offers no rating analysis. As such, while I can determine that Applicant had a bloody discharge from his ear, I really have no further information. Applicant has not met his burden of proof as to hearing loss.

Applicant has met his burden of proof as to the psyche. The mechanism of injury has been reviewed herein-above, and it has been herein determined that the injury was a violent act. Dr. Drucker has issued multiple reports indicating that 91% of the permanent disability is directly due to the actual events of employment/injury, and therefore Applicant has also met the substantial cause threshold.

APPORTIONMENT

Pursuant to the reports and opinions of QME Douglas Drucker, there is apportionment in this case. Dr. Drucker found that Applicant had some experiences in his youth including being abandoned by his parents, and the loss of a grandfather who had raised him, and based on these facts apportioned 9% of the permanent disability to pre-existing factors.

There is also medical evidence to support apportionment as to the vision loss, with ophthalmological QME Daniel Schainholz finding that 18% of the visual impairment is pre-existing, namely because Applicant was partially color-blind before the industrial injury.

And finally, AME Kaisler-Meza indicates that there is a 1% overlap in his opinions and the opinions of QME Schainholz.

There is no medical evidence to support any other apportionment in this case, while there is other evidence of overlap, as discussed herein-below.

PERMANENT DISABILITY

The permanent disability is based upon the reports of AME Kaisler-Meza, the reports of QME Drucker and the report of QME Schainholz. These reports are found to be substantial medical evidence and are unrebutted. Applicant also testified, and was found to be a credible witness.

Pursuant to the reports and opinions of AME Kaisler-Meza, Applicant has suffered a constellation of injuries from this specific incident. AME Kaisler-Meza has identified the following conditions/impairments, without apportionment:

1) **Cranial nerve V, neuralgia:** Class 1, Table 13-11, 10% Whole Person Impairment
(WPI)
13.07.05 – 10[1.4]14 – 481(F) – 14 – 13

2) **Headaches/fatigue:** Class 1, Table 13-4, 5% WPI

13.04.00 – 05[1.4]07 – 481(I) – 11 – 10

3) **Cervical spine (fractures at C1 and C2)**: DRE II, Table 15-5, 7% WPI

11.02.00 – 06[1.4]08 – 481(H) – 11 – 10

Pursuant to the reports and opinions of QME Douglas Drucker, Ph.D., Applicant has suffered permanent psychiatric disability as a result of the specific incident. QME Drucker has identified the conditions/impairments of mild neurocognitive disorder, Post-Traumatic Stress Disorder, and a pain disorder. Given the totality of the conditions and the testing results, QME Drucker has found a Global Assessment of Functioning (GAF) score of 58, which results in an 18% WPI, with 91% industrial and 9% non-industrial, which rates as follows:

4) **GAF of 58**: 18% WPI

.91(14.01.00 – 18[1.4]25 – 481(H) – 30 – 28) = 25

Pursuant to the reports and opinions of QME Daniel Schainholz, M.D., Applicant has suffered additional permanent disability, with QME Schainholz diagnosing a visual impairment (6.7% WPI), loss of contrast sensitivity (2% WPI), loss of depth perception (1% WPI) and color blindness (3% WPI), as well as a facial disfigurement (3% WPI) and neuralgia/causalgia (1% WPI), and assigns an overall impairment of 16% WPI with 82% industrial and 18% pre-existing due to the color blindness. It is recalled that AME Kaisler-Meza found a 1% overlap as to the neuralgia. I also see that AME Kaisler-Meza also rated the facial fractures, as did Dr. Schainholz, so it is also appropriate to deduct the

3% WPI for the facial disfigurement, as already rated herein-above. As such, I will deduct the 1% for the neuralgia and the 3% for the facial fractures, and rate the remaining 12% WPI and then apply the apportionment, with the visual impairment therefore rating as follows:

5) **Visual**: Class 2, Table 12-4, 12% WPI

.82(12.01.00 – 12[1.4]17 – 481(H) – 21 – 20) = 16

Pursuant to the opinions of AME Kaisler-Meza and QME Drucker, the impairments should be added using *Kite* rather than combined using the CVC. As such, we add the results outlined above, as follows: 13 + 10 + 14 + 10 + 25 + 16 = 88% permanent disability, which is payable at the rate of $290 per week, for 721.25 weeks, for a total of $209,162.50, plus a life pension thereafter.

I recognize that this is a higher value than that which Applicant proposed at trial, but only by 3%. I did not receive proposed rating strings, so I cannot determine where there may be differences. It is also noted that this result is highly unusual given that Applicant has returned to work with the same employer, doing the same type of work, only somewhat lighter. However, it is noted that these findings are based on medical determinations made by the medical evaluators, and for the most part, on an opinion by an **Agreed** Medical Evaluator, which is to be given great weight. The opinions are found to constitute substantial evidence, and are unrebutted. The AME and QME Drucker have both opined that it is appropriate to add the impairments rather than combine them, given the synergistic effect of the various involved body parts. Dr. Drucker discussed this synergistic effect in his deposition of 11/18/2020, indicating that there is a synergistic effect between the loss of vision, the orthopedic injuries, the pain, the Post-Traumatic Stress Disorder and the mild cognitive injury. This specific incident resulted in a constellation of conditions, which Dr. Drucker repeatedly refers to as "catastrophic." While somewhat of an unusual result, the result is certainly medically supported, and I have no reservation in making the findings herein.

NEED FOR FURTHER MEDICAL CARE

Pursuant to the reports and opinions of QME Drucker, Applicant is in need of further medical care for the psychiatric injury.

ATTORNEY'S FEES

Applicant's attorney has earned a reasonable attorney's fee equal to 15% of the permanent disability awarded herein, to be commuted from the far end of the Award, and 15% of the present value of the Life Pension. Applicant's counsel is to seek calculations from the DEU as the present value of the Life

Pension, and provide those calculations to this Judge, so that a supplemental and specific Award may issue as to the attorney's fees.

LIEN CLAIMS

The lien claims remain specifically deferred.

DATE: 10/08/2021
ADORALIDA PADILLA
WORKERS' COMPENSATION JUDGE