

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

**ROBERTA HERNANDEZ, *Applicant***

**vs.**

**VENTURA POST ACUTE; STARSTONE NATIONAL INSURANCE COMPANY,  
Administered By CANNON COCHRAN MANAGEMENT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ13064691  
Oxnard District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR RECONSIDERATION  
AND DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings, Award and Order of February 21, 2023, wherein it was found that while employed on August 21, 2019 as a medical records director, applicant sustained industrial injury to her back causing permanent disability of 45% and the need for further medical treatment. At trial applicant introduced vocational expert evidence standing for the proposition that applicant was unable to work, and had thus rebutted the scheduled permanent disability, and should be found permanently totally (100% disabled). However, this evidence was rejected by the WCJ.

Applicant contends that the WCJ erred in finding only 45% permanent partial disability, arguing that it successfully rebutted the scheduled disability by showing that applicant was unable to work or be vocationally rehabilitated. Applicant argues that based on this vocational evidence, we should find applicant permanently totally (100%) disabled. We have received an Answer from defendant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we find applicant's vocational evidence persuasive and thus grant reconsideration and amend the WCJ's decision to reflect that applicant's injury caused permanent total disability. We have deferred the issues of the exact calculation of applicant's permanent total disability indemnity award and attorneys' fees, and a final award of permanent total disability indemnity should be issued at the trial level after resolution of these issues.

Applicant sustained injury to her back after falling on the floor. She was evaluated by qualified medical evaluator orthopedist Brian S. Grossman, M.D. who ultimately opined that the

scheduled AMA Guides rating was 30% whole person impairment based on the range of motion method of evaluating impairment. (November 4, 2021 report at p. 8.) However, regarding work restrictions, Dr. Grossman wrote, “She has disability resulting in limitation to sedentary work no greater than 4 hours per 8 hour day which contemplates that she can do work predominantly in a sitting position with minimal demands for physical effort and with some degree of walking and standing being permitted.” (November 4, 2021 report at p. 8.) At the conclusion of his report, Dr. Grossman included a short “Functional Capacity Assessment” which read, “Ms. Hernandez is precluded from lifting greater than 5 pounds and standing greater than 15 minutes or sitting greater than 30 minutes at one time without a 5 minute break to alter her position. She is precluded from any bending, stooping, or twisting. She can work for up to 4 hours per 8 hour day.” (November 4, 2021 report at p. 9.) Dr. Grossman noted that applicant, “has constant moderate low back pain that increases to occasional severe low back pain.” (November 4, 2021 report at p. 8.)

Applicant was then evaluated by her vocational expert P. Steve Ramirez, M.S. C.R.C. In a report of February 22, 2022, Mr. Ramirez wrote:

The work restrictions issued for Ms. Hernandez, include maximum lifting capacity of 5 pounds, in conjunction with her need to alternate sitting and standing with standing, limited to no longer than 15 minutes and sitting limited to no longer than 30 minutes without a 5-minute break and a moveable workstation to eliminate any postural when standing,

However, while sedentary work is not defined in the *Dictionary of Occupational Titles* as requiring bending/stooping, in a real-world scenario there are going to be occasions, even in rare instances such as picking up something dropped or retrieving a file from a lower cabinet, when bending/stooping occur. Based on her preclusion from any posturals, this serves to render her incapable of performing any work as generally performed in the open labor market.

(February 24, 2022 report at p. 7.)

Although Mr. Ramirez opined that applicant’s work restrictions in and of themselves precluded applicant from employment, he also noted that her constant pain was another factor that could impact her work performance and make her less employable, especially given her already very restrictive work preclusions. (February 24, 2022 report at pp. 7-8.)

In a supplemental report of September 6, 2022, Mr. Ramirez wrote:

In preparing for the transferable skills analysis, Ms. Hernandez’ vocational profile was developed, based on the above work restrictions:

- Part-time sedentary work with a sit-stand option with no bending, stooping, twisting, or lifting more than 5 pounds.
- Her profile would include jobs in which she was allowed to alternate sitting and standing with standing limited to no longer than 15 minutes and sitting limited to no longer than 30 minutes continuously without a 5-minute break.
- A moveable workstation would be required to allow for no posturals when standing. She already has available a “reacher,” which she uses to avoid bending/stooping, to pick up items on the floor and overhead reaching.

Now, let’s take a closer look at the work restrictions:

- No bending, stooping or twisting
- Part-time work, maximum of 4 hours a day
- Lifting, maximum of 5 pounds which reduces her access to the sedentary open labor market for all jobs requiring lifting from 6 to 10 pounds
- Standing no greater than 15 minutes at a time
- Sitting no greater than 30 minutes at a time, without a 5-minute break to alter her position
- To accommodate these restrictions to avoid bending/stooping when standing, she will need to have access to a movable work station which can be raised and lowered, which requires her to adjust the levels by stooping and bending.

(September 6, 2022 report at p. 4.)

Mr. Ramirez concluded, “When giving consideration to Ms. Hernandez’ work restrictions precluding her from working more than 4 hours per day with no bending or stooping ... in a real-world scenario ,this would eliminate all jobs. Further with her limitation of lifting no more than 5 pounds, with sedentary work defined as lifting up to 10 pounds, this would significantly erode her occupational base prior to the restrictions on posturals.” (September 6, 2022 report at p. 4.)

Defendant does not argue that rebuttal of applicant’s permanent disability rating based on vocational evidence is not available to applicant in this case. Rather, defendant argues that we

should follow the opinion of its vocational expert Debbie Abitz, M.Ed., who opined that applicant's work injury alone did not render applicant unemployable.

As explained by the Court of Appeal in *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1274 [76 Cal.Comp.Cases 624], one "way the cases have long recognized that a scheduled rating has been effectively rebutted is 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. This is the rule expressed in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587]. In *LeBoeuf*, an injured worker sought to demonstrate that, due to the residual effects of his work-related injuries, he could not be retrained for suitable meaningful employment."

Based on the vocational evidence submitted by the applicant, we agree that applicant has shown that she is not reasonably employable or amenable to vocational rehabilitation. Defendant's expert Ms. Aziz does not directly contradict Mr. Ramirez's opinion that applicant is not employable, but rather states, "The applicant's work restrictions are based on an injury that was deemed 67% non-industrial. Accordingly, only 33% is industrially based. Absent the non-industrial component, the applicant would clearly be capable of working in sedentary/full-time positions that are consistent with her skill set/work history." (June 8, 2022 report at p. 32.) However, while Dr. Grossman did opine applicant's AMA Guides work impairment was subject to apportionment to preexisting pathology, the WCJ ultimately rejected apportionment. In any case, if the permanent disability award is based on applicant's lack of employability based on work restrictions, apportionment would be to the cause of the work restrictions. However, Dr. Grossman never stated that work restrictions were caused by anything other than the industrial injury. To the contrary, Dr. Grossman wrote, "Ms. Hernandez was working without restrictions up until the date of her 8/21/19 industrial injury. I have received no medical records that indicate that she was symptomatic or required medical care for her low back in the years preceding the 8/21/19 industrial injury. It remains my opinion that, although the degenerative abnormalities are pre-existing, they were not causing symptoms and did not require treatment until Ms. Hernandez was injured at work." (November 4, 2021 report at p. 7.)

The WCJ rejected Mr. Ramirez' analysis because of Mr. Ramirez's analysis of the effect of applicant's chronic pain on her employability. Although Mr. Ramirez's pain analysis buttresses the rest of his conclusions, Mr. Ramirez opined that applicant was not employable or subject to

vocational rehabilitation based on the work preclusions provided by Dr. Grossman. Based on this analysis, we will grant reconsideration and amend the WCJ's decision to reflect that applicant's injury caused permanent total (100%) disability. However, we defer the award of permanent disability and attorneys' fees so that a calculation of applicant's permanent total disability indemnity and the attorney's fees award may be determined at the trial level.

For the foregoing reasons,

**IT IS ORDERED** that Applicant's Petition for Reconsideration of the Findings, Award and Order of February 21, 2023 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board the Findings, Award and Order of February 21, 2023 is **AMENDED** as follows:

#### **FINDINGS OF FACT**

1. Roberta Hernandez Vigil, born October 21, 1953, while employed by Ventura Post Acute, then insured by StarStone National Insurance Company, administered by Cannon Cochran Management Services, Inc., as a medical records director, sustained injury arising out of and occurring in the course of employment to her back on August 21, 2019.
2. Applicant's injury caused permanent total (100%) disability. The rate of payment, credit for advances and overpayments of temporary disability, and the issue of attorneys' fees is deferred, with jurisdiction reserved.
3. The evidence herein does not support any apportionment.
4. Applicant falls within occupational group number 112.
5. Based on the opinion of Dr. Grossman, applicant will require further medical treatment.
6. The issue of liability for self-procured medical treatment is deferred, jurisdiction reserved, pending the filing and prosecution of any liens therefor.
7. The issue of attorney's fees is deferred, with jurisdiction reserved.

**AWARD**

**AWARD IS MADE** in favor of ROBERTA HERNANDEZ against STARSTONE NATIONAL INSURANCE COMPANY of:

- a. Further medical treatment pursuant to Finding of Fact No. 5, above.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ NATALIE PALUGYAI, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I DISSENT,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**May 12, 2023**

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

**ROBERTA HERNANDEZ  
DONALD COCQUYT  
RK LAW WC**

**DW/oo/abs**

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

## DISSENTING OPINION OF COMMISSIONER JOSÉ H. RAZO

I respectfully dissent. I would have denied the applicant's Petition for Reconsideration.

As noted by the WCJ in his Report, any finding by vocational expert Steve Ramirez that applicant is unemployable because of chronic pain is inapposite. Ultimately, qualified medical evaluator Brian S. Grossman, M.D. did not opine that applicant was in any unusual pain given her condition and did not even include a pain add-on allowed by the AMA Guides. While it is not difficult to accept that chronic pain may affect job performance, this is already considered by the ratings of the Guides and the allowance of a pain add-on. Mr. Ramirez cited to a generalized article with no discussion of applicant's specific condition. It is not unusual for an injured worker to have chronic pain after an injury, and indeed a *permanent* disability foresees that a condition will not completely improve. Mr. Ramirez's discussion can be taken to mean that any worker with chronic pain is unemployable because the pain may affect their work performance. This clearly cannot be the law, which bases disability on the AMA Guides unless rebutted by evidence of an individual worker's circumstances. (Lab. Code, § 4660.1, subd. (b)(1).)

With regard to applicant's work restrictions, Mr. Ramirez takes an unreasonably restrictive view of Dr. Grossman's preclusion from "any bending, stooping, or twisting." Dr. Grossman was clearly stating that these activities should not be a required activity of the job, not that in a very rare instance, if not otherwise accommodated, applicant may sometimes have to partially bend or twist. Elsewhere in the report, Dr. Grossman wrote "She has disability resulting in limitation to sedentary work no greater than 4 hours per 8 hour day which contemplates that she can do work predominantly in a sitting position with **minimal demands** for physical effort and with some degree of walking and standing being permitted." (November 4, 2021 report at p. 8 [emphasis added].) Dr. Grossman's report did not contain any pain add-on or make any mention at all of applicant's use of opiates, other than vaguely stating in the future medical care section that, "All further treatment should be consistent with the California Medical Treatment Utilization Schedule or other Evidenced-Based Medicine Guidelines, and should include prescription anti-inflammatory or analgesic medications...." (November 4, 2021 report at p. 9.) Dr. Grossman does not specify whether these analgesics should be Tylenol or opiates. Ultimately, Dr. Grossman does not paint a picture of someone who's disability is not adequately reflected by the AMA Guides, and certainly not someone who is permanently totally disabled.

For these reasons, applicant has not rebutted the scheduled disability with substantial evidence, and I would have denied the applicant's Petition. I therefore respectfully dissent.



**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**May 12, 2023**

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

**ROBERTA HERNANDEZ  
DONALD COCQUYT  
RK LAW WC**

**DW/oo/abs**

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