

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

OMAR RASCON, *Applicant*

vs.

**BAY CITIES PAVING AND GRADING;
GALLAGHER BASSETT RANCHO CUCAMONGA, *Defendants***

**Adjudication Number: ADJ9553015
Oakland 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 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 which we adopt and incorporate in part as stated below, we will deny reconsideration.¹

Additionally, we note that there are 20 days allowed within which to file a petition for reconsideration from a "final" decision. (Lab. Code, §§ 5900(a), 5903.) This time is extended by 10 calendar days if service is made to an address outside of California but within the United States. (Cal. Code Regs., tit. 8, § 10605(a)(1).) While applicant and his attorney received service of the decision within California, defendant was served at an address outside of California. Accordingly, and to observe due process for all parties, we interpret Rule 10605 as extending the time to file for all parties being served.

¹ We note that defendant filed a document titled "Response To Report And [Recommendation] On Petition For Reconsideration. We will treat the June 9, 2023 document as a supplemental pleading and pursuant to our authority, we accept defendant's supplemental pleading. (Cal. Code Regs., tit. 8 § 10964) We advise defendant that "[a] party seeking to file a supplemental pleading shall file a petition setting forth good cause for the Appeals Board to approve the filing of a supplemental pleading and shall attach the proposed pleading." (Cal. Code Regs., tit. 8 § 10964) We expect defendant to comply with this requirement in the future.

In this case, the WCJ issued the decision on April 20, 2023. May 20, 2023 was a Saturday, so Defendant had until Monday May 22, 2023 to file a timely Petition for Reconsideration. As a result, the May 18, 2023 petition is timely.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR.

/s/ JOSÉ H. RAZO, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 17, 2023

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

**OMAR RASCON
RATTO LAW FIRM
KARLIN, HIRUA & LASOTA**

LN/pm

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

**REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

Applicant's Occupation:	Laborer Foreman
Applicant's Age:	61
Date of Injury:	July 3, 2014
Parts of Body Inured:	Cervical Spine, Lumbar Spine, Neuropsychic, Psyche, Headaches, Vertigo, and Dizziness
Identity of Petitioner:	Defendant
Timeliness:	No
Verification:	Yes

Date of Findings and Award:	April 20, 2023
Date of Petitioner's Receipt at District Office:	May 18, 2023

Defendants' Contentions: The Finding that applicant is permanently and totally disabled is incorrect. In support, defendant argues that the impairments to applicant's neuropsychic, psyche and tinnitus are not compensable, that the reports from Ann Allen, the agreed medical evaluator (AME) are not substantial evidence, that the rating for applicant's dizziness is incorrect, that Kite should not apply, and that applicant is not entitled to an occupational code of 481

[...]

**III.
STATEMENT OF THE CASE AND FACTS**

On July 3, 2014, applicant fell and consequentially sustained injuries arising out of and in the course of his employment as a Laborer Foreman for defendant to his cervical spine, lumbar spine, neuropsychic, and psyche and in the form of headaches, vertigo, and dizziness.

On September 1, 2015, Steven Feinberg, M.D., the AME, issued a report after evaluating applicant stating that applicant's job entailed supervising a crew and that applicant did trench work, grading, laying pipe and shoveling. (Exhibit M, Report of Steven Feinberg, M.D., September 1, 2015, p. 2.) Dr. Feinberg stated that applicant's symptoms included pain in his head, neck, and low back, dizziness, nausea, and a ringing in his right ear. (*Id.* at p. 6.) Dr. Feinberg also stated that applicant had "word-finding problems," that applicants were

consistent with a post-concussive syndrome, and that applicant should be seen by a neuropsychologist for cognitive dysfunction. (*Id.* at p. 11.) Dr. Feinberg further stated that applicant was permanent and stationary from a physical/neurological/orthopedic standpoint, that there was “some legitimate question as to [applicant’s] ability to return to gainful employment,” and that apportionment did not apply. (*Id.* at pp. 11-12; *see also* Exhibit K, Report of Steven Feinberg, M.D., January 31, 2017.)

On March 23, 2016, Joel C. Ross, M.D., issued a report after performing an otolaryngologic evaluation of applicant, and in that report, Dr. Ross stated that applicant had no impairment for hearing loss, that applicant’s tinnitus interferes with applicant’s sleeping, that it was within reasonable medical probability that the tinnitus was a result of the blunt head trauma, and that applicant should be given a 2% whole person impairment because his tinnitus interferes with his sleep. (Exhibit C-1, Report of Joel Ross, M.D., March 23, 2016, at p. 6.)

On July 11, 2018, Timothy Lo, M.D., applicant’s primary treating physician, issued a report stating that applicant’s job was physical in nature and it required “construction type activities. (Exhibit 2, Report of Timothy Lo, M.D., July 11, 2018, p. 1.)

On October 28, 2016, applicant testified in pertinent part during his deposition that his job duties were to make sure “everyone was working” and to “make sure that everything was okay” at the job site. (Exhibit A, deposition of Applicant, October 28, 2016 at p. 18:11-18:21.) He was injured while “straightening out [his] tools.” (*Id.* 20:21-20:25.)

On February 22, 2017, Ann Allen, M.D., the AME in psychiatry, issued a report after evaluating applicant stating in relevant part that applicant worked with his crew and that on the date of injury applicant fell about four feet and struck his head on pavement. (Exhibit V, Report of Ann Allen, February 22, 2017, pp. 2-3.) Dr. Allen stated that applicant had headaches, buzzing in the right ear that woke him from sleep, nausea, and headaches. (*Id.* at p. 4.) Dr. Allen stated that applicant’s family noticed that he was not focusing or functioning the way that he had before the accident and that applicant belonged to AA. (*Id.* at pp. 4-5.) Dr. Allen stated that applicant had a GAF of 53 and that applicant met the criteria for a Post-Concussive Disorder and that,

Recent studies indicate that the development of psychological symptoms in the context of mild concussion is probably due to the burst of neurotransmitters at the time of impact. Diffusion tensor studies reveal axonal shearing and, along with functional MRI imaging studies, support a sudden neurophysiologic insult to the brain with swelling and acute metabolic changes at the area of the concussion not appreciated on conventional MRI or CT scanning as used in hospitals. Further, 15% of

mild concussion cases go on to develop post-concussive syndrome lasting at least one year and longer with perpetuating circumstances. (*Id.* at p. 31.)

Dr. Allen further stated that applicant had a “mild traumatic brain injury characterized by co-morbid depression and anxiety.” (*Id.* at p. 32.) Dr. Allen discussed causation as follows, “the work event of July 3, 2014 resulted in a concussion with disruption of emotional control and mood disorder. ... The industrial event ... was directly, instantly and predominately responsible for psychiatric injury.” (*Id.* at p. 38.)

On May 23, 2017, Dr. Allen issued a supplemental report stating that she would apportion 10% of the psychiatric disability to the pain problem and 10% to the non-industrial somatization. (Exhibit T, Report of Ann Allen, May 23, 2017, p. 1.)

On November 8, 2018, Dr. Feinberg issued a report after re-evaluating applicant stating that there continued to be a “legitimate concern” about applicant’s ability to return to gainful employment, but that further information was needed from medical evaluators and a vocational specialist. (Exhibit I, Report of Seven Feinberg November 8, 2018, p. 16.) Dr. Feinberg stated that applicant had impairment in the forms of headaches, tinnitus, and dizziness and impairments related to his lumbar spine and to his cervical spine. (*Id.* at p. 17.)

On August 19, 2019, Dr. Feinberg issued a report regarding whether the tinnitus and vertigo should be added or combined with the cervical and low back disabilities and stated that there was “no medical rationale for combining such disparate problems that do not overlap. Medically, adding makes more sense. This provides a more accurate impairment rating.” (Exhibit F, Report of Steven Feinberg, M.D., August 19, 2019, p. 4.)

On March 3, 2020, Dr. Allen issued a supplemental report after reviewing the neuropsychology report written by Jed Sussman, Ph.D [Dr. Sussman’s report was admitted into evidence as Applicant’s Exhibit 5.] and stated that she would provide a 7% whole person impairment rating for cognitive dysfunction, which was independent of the rating for the psychiatric impairment, and that the ratings “should be added rather than combined ... [t]he cognitive impairment is above and beyond any cognitive difficulties that are due to his psychiatric impairment. Thus, a more accurate reflection of his true level of disability would be the addition of his cognitive impairment rating... and his psychiatric rating.” (Exhibit R, Report of Ann Allen, M.D., March 3, 2020, pp. 2-3.)

On September 15, 2020, Dr. Allen issued a report stating in relevant part that applicant’s psychiatric injury was a direct injury that began at the instant of his traumatic brain injury, July 3, 2014. Research studies show that mild brain injuries result in edema and release of neurotransmitters and other substances that cause a direct injury to the mood regulatory centers of the brain as well as

cognitive areas. His fall, when he struck his head and sustained a concussion, was a direct psychiatric injury arising at the instant of the injury, causing a Postconcussive Syndrome. As far as apportionment of residual psychiatric disability, 10% flows as a compensable consequence from the physical injury. His chronic pain and limitations caused psychiatric disturbance beginning months out from the industrial injury. The physical injury adversely affected mood regulation in the brain.

80% of residual psychiatric disability flows from the direct psychiatric injury, July 3, 2014, when he sustained head trauma.

As far as Kite, the psychiatric injury (23% WPI before apportionment) that resulted from his traumatic head injury should not be combined to the other impairments. The cognitive, neurologic, and physical impairments should be added to the psychiatric disability 23% WPI, as there is no overlap between the injuries. His rating for psychiatric disability is based on psychiatric symptoms and not physical pain, physical limitations, neurologic symptoms or cognitive problems. (Exhibit O, Report of Ann Allen, M.D., September 15, 2020, p. 2.)

On February 9, 2021, Dr. Ross issued a report stating that he would not change any of his previously expressed opinions after reviewing the surveillance films. (Exhibit X, Report of Joel C. Ross, M.D., February 9, 2021, p. 1.)

On February 9, 2021, Dr. Feinberg issued a supplemental report after reviewing surveillance films of the applicant, and in relevant part, Dr. Feinberg stated that he was hesitant to make additional comments without a re-evaluation. (Exhibit E, Report of Steven Feinberg, February 9, 2021, p. 5.)

On April 12, 2021, Dr. Allen issued a supplemental report after reviewing surveillance films of the applicant, and in that report she stated in relevant part that Exhibit N, Ann Allen, M.D., Report of April 12, 2021, she would revise her ratings of applicant. She noted that applicant had a mild impairment psychiatric impairment for his activities of daily lifting, mild impairment in social abilities, mild to moderate impairment in concentrating, persistence, and pace, moderate deterioration or decomposition in complex work settings, and that he had a GAF of 58, which translates to a whole person impairment of 18%. (Exhibit N, Ann Allen, M.D., Report of April 12, 2021, p. 3.)

On April 29, 2021, Dr. Feinberg issued a report after re-evaluating applicant stating that applicant complained of constant neck pain, constant headaches, constant numbness in both arms and hands, constant low back pain, leg weakness, and trouble with balancing. (Exhibit D, Report of Steven Feinberg, April 29, 2021, p. 15.) Dr. Feinberg also stated that applicant does not sleep well, that applicant struggles with bladder and bowel movements because of pain, and that applicant has thought about “shooting himself in the head.” (*Id.* at p. 16.)

Dr. Feinberg stated that although applicant was “probably less disabled [than he] noted previously, the actual impairment ratings [did] not change based on the findings and pathology noted.” (*Id.* at p. 22.) Dr. Feinberg stated that applicant was limited to light to medium work, that applicant should not climb ladders or work at heights and that applicant’s cervical and lumbar spine disabilities remain “100% industrial.” (*Ibid.*) Dr. Feinberg stated that applicant had whole person impairments at 8% for his cervical spine, 12% for his lumbar spine, 3% for headache pain, 2% for tinnitus that impairs sleep, and 8% for vertigo and dizziness. (*Ibid.*) Dr. Feinberg continued stating that,

There are 2 methods to rebut the CVC Table and add rather than combine. If the impairments have no overlap on ADLs, adding is appropriate. If there are overlapping ADLs with synergistic/amplifying effect, then adding is also appropriate. As I stated previously, regarding tinnitus and vertigo in relationship to the cervical and lumbar disabilities, they do not overlap and should be added.
(*Ibid.*)

On December 22, 2022, Frank Diaz issued a report addressing applicant’s ability to participate in the labor market. (Exhibit 6, Report of Frank Diaz, December 22, 2022.) In that report, he stated in relevant part that: Applicant’s pain required the vocational interview and testing to span three days. (*Id.* at pp. 2-3.) Applicant’s testing scores were average to low. (*Id.* at p. 9.) Before his injury, applicant was performing unskilled work at a very heavy level of physical functioning and as a result of his injury, applicant is limited to working at a sedentary level of functioning. (*Id.* at p. 12.) Applicant’s pain would “negatively impact his ability to maintain a work pace appropriate to a given work load.” (*Id.* at p. 21.) Applicant could benefit from work accommodations, but the myriad of accommodations that applicant would require would be beyond what is considered reasonable. (*Id.* at p. 25.) The accommodations applicant would need included a personal attendant, a mentor, a self-paced workload, frequent breaks, and the reduction or elimination of workplace stress. (*Id.* at p. 26.) These accommodations could only be provided in a sheltered workshop situation. (*Ibid.*) Mr. Diaz also stated that,

In all vocational probability, in order to successfully complete a vocational training program Mr. Rascon would require accommodations that include scribes, permission for late class arrivals, early class departures, extra time for assignments and tests, and excessive absences. However, having someone write down your notes, arriving late for work, leaving early from work, being provided extra time in order to complete work tasks, and having excessive absences are not reasonable accommodations in the open labor market (*Id.* at p. 28.)

Mr. Diaz concluded that applicant incurred a 100% loss of access to the open labor market and that this was entirely caused by the instant injury. (*Id.* at pp.

31-33.) Mr. Diaz stated that he reviewed the subrosa films and taken account Dr. Allen's change of opinions into account when formulating his opinions. (*Id.* at p. 35.)

On March 1, 2023, this matter proceeded to trial on the issues of applicant's average weekly wage and corresponding indemnity rates, applicant's occupational code, and applicant's level of impairment with applicant arguing that he was 100% disabled and defendant arguing that applicant's impairments for the psyche, neuropsychyche, and sleep disorders were not compensable. Before the trial concluded, the parties reached an agreement regarding applicant's average weekly wage.

As relevant herein, applicant testified during the trial that: As a Labor Forman, he was required to check work and lay pipe. He would go into the trenches and shovel. He did not operate heavy equipment. He fell while loading a ladder into his truck. He has dizziness, headaches, a buzzing in his ear, neck pain, and headaches. These symptoms are unpredictable and he has them often. He does not know why the physician who wrote Exhibit E-1 said that he was working because he has not worked since his accident. He would attend Alcoholics Anonymous meetings at San Quentin, but he did not work there. He got a dog at his son's suggestion for exercise, but had to put the dog down after a few months since he could not care for it and no one would take the dog. He will occasionally meet friends for coffee or breakfast. He does not think he can work because of his injuries. He has to nap and lie down. He does not recall telling anyone that his prior right knee injury caused problems with sleeping.

On April 20, 2023, the Findings and Award issued.

On May 18, 2023, the district office received defendant's Petition for Reconsideration.

IV. **DISCUSSION**

Applicant's Occupational Code is 481

Over fifty years ago, the Court of Appeal stated that,

The employee is entitled to be rated for the occupation which carries the highest factor in the computation of disability. Labor Code section 3202 provides that the provisions of the Workmen's Compensation Act 'shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.' It has been determined that where the duties of the employee embrace the duties of two forms of occupation, the rating should

be for the occupation which carries the higher percentage. (See *Stocker v. Brea Grammar School District* (1932) 18 I.A.C. 32.)(*Dalen v. Workmen's Comp. Appeals Bd.* (1972) 26 Cal.App.3d 497, 505-506.)

In a later decision, the Court of Appeal stated that, “*Dalen, supra*, does not set forth any particular time requirement for the activities engaged in. Where the activities are an integral part of the worker’s occupation, as they are here, the worker is entitled to the higher occupational group and the variant that results therefrom.” (*National Kinney v. Workers' Comp. Appeals Bd. (Casillas)* (1980) 113 Cal.App.3d 203, 215.) Additionally, it is well established that the occupational code is determined by job duties and not by job titles. (*Parks v. Workers' Compensation Appeals Bd.* (1984) 49 Cal. Comp. Cases 638 (writ denied); *City of Sebastopol v. Workers' Compensation Appeals Bd. (Camden)* (2004) 70 Cal. Comp. Cases 48 (writ den.).)

Here, defendant acknowledges that that applicant’s job required significant amounts of climbing and arm usage. (Petition for Reconsideration, May 18, 2023, p. 14.) However, defendant contends that applicant should have been provided a lower occupational code based on applicant’s job title and because applicant was not injured while climbing out of a ditch. (*Id.*) Defendant’s contention must be rejected because applicant’s un rebutted trial testimony and repeated statements to evaluators reflected that climbing ladders, digging trenches, laying pipe, and filling trenches were integral parts of applicant’s occupation. (*Dalen, supra*, 26 Cal.App.3d 505-506; *Casillas, supra*, 113 Cal.App.3d 215; *Parks, supra*, 49 Cal. Comp. Cases 638; *Camden, supra*, 70 Cal. Comp. Cases 48.) Accordingly, since applicant’s job required significant amounts of climbing and specialized arm impairment, applicant falls under occupational code 481.

The Psychiatric Impairment and Tinnitus Impairment are Compensable

Labor Code section 4660.1(c) provides in relevant part that, “the impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury shall not increase.” (Cal Lab Code § 4660.1(c).) The Appeals Board issued an *en banc* case discussing the compensability of psychiatric injuries and this statute stating in relevant part that, “*section 4660.1(c) does not apply to psychiatric injuries directly caused by events of employment.* Section 4660.1(c)(1) only bars an increase in the employee's permanent impairment rating for a psychiatric injury that is a compensable consequence of a physical injury occurring on or after January 1, 2013. (*Wilson v. State Cal Fire* (2019) 84 Cal. Comp. Cases 393, 403 (Appeals Board en banc).)

Further, it is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274; *Garza v. Workmen's*

Comp. Appeals Bd. (1970) 3 Cal. 3d 312; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627.) To constitute substantial evidence "... 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." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Additionally, "the relevant and considered opinion of one physician, though inconsistent with other medical opinions, normally constitutes substantial evidence. [Citations.] Medical reports and opinions are not, however, substantial evidence if they are based on surmise, speculation, or conjecture, or if they are known to be erroneous or based on inadequate medical histories and examinations. [Citations.]" (*Patterson v. Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 916, 921.) Further, it is presumed that parties chose a physician to act as an agreed medical evaluator because of that physician's expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782.) Therefore, an agreed medical evaluator's opinion should be followed unless there is good reason to find the opinion unpersuasive. (*Ibid.*)

Here, Dr. Allen, the agreed medical evaluator, has consistently explained that applicant's psychiatric injury was a *direct* result of the instant injury. (Exhibit V at pp. 31, 38; Exhibit O at p. 2.) Dr. Allen provided reasoning in support of this conclusion, and defendant's failure to ask her to provide citations to the studies she referenced in her report does not constitute good cause to set aside her opinions regarding causation. (*Power, supra*, 179 Cal.App.3d 782.) Defendant also argues that Dr. Allen incorrectly determined that applicant's psychiatric injury was a direct cause of the injury. However, defendant has not provided any medical reports to support its theory of the causation of applicant's psychiatric injury, and as the Court of Appeal stated in *Peter Kiewit Sons v.*

Industrial Acc. Com. (1965) 234 Cal.App.2d 831, 838-839, "[w]here an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a [WCAB] finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence. Expert testimony is necessary where the truth is occult and can be found only by resorting to the sciences." Put differently, without more, defendant's disagreement regarding Dr. Allen's causation determinations does not constitute good cause to set aside her opinions regarding causation. (*Power, supra*, 179 Cal.App.3d 782.) Accordingly, 80% of applicant's psychiatric impairment is compensable. (*Wilson, supra*, 84 Cal. Comp. Cases 403.)

Continuing, Dr. Ross explained that applicant's tinnitus and its impact on applicant's sleep was a *direct* result of the injury. (Exhibit C-1 at p. 6.) His opinions are also well reasoned, and again, there is nothing in the record reflecting that the tinnitus and its resulting sleep disturbance was a compensable consequence of the injury. Accordingly, the impairment for the tinnitus is also compensable. (*Wilson, supra*, 84 Cal. Comp. Cases 403.)

Applicant is Permanently and Totally Disabled

In *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Case 213 (writ den.), the Appeals Board held that adding, rather than combining, two different impairments better reflected a worker's impairment when substantial medical evidence supported the notion that the two impairments in effect combined and the resultant impairment was more than the sum of the two impairments. Subsequently, the Appeals Board has issued persuasive opinions[While panel decisions are not binding, they may be considered to the extent that their reasoning is persuasive (*Guitron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc).)] finding that it is appropriate to add psychiatric impairments to cognitive and or orthopedic impairments when there is substantial evidence reflecting that those impairments did not overlap and that adding those impairments would produce the most accurate reflection of an applicant's impairment. (*Hodson v. Vacasa, LLC*, 2021 Cal. Wrk. Comp. P.D. LEXIS 170; *Taina v. County of Santa Clara/Valley Medical Center*, 2018 Cal. Wrk. Comp. P.D. LEXIS 344; *Guandique v. State of California, Department of Motor Vehicles*, 2019 Cal. Wrk. Comp. P.D. LEXIS 53; *Garibay v. Silverado Farming Co. Inc.*, 2019 Cal. Wrk. Comp. P.D. LEXIS 57; *Robertson v. Bosco Oil*, 2019 Cal. Wrk. Comp. P.D. LEXIS 61; *Balvaneda v. Options A Child Care and Human Services*, 2019 Cal. Wrk. Comp. P.D. LEXIS 196; *Barrett Business Services, Inc. v. WCAB (Chavez)* (2019) 84 CCC 991 (writ denied); *Gonzales v. Cal Fire* (2020) 85 CCC 412 (panel decision); *Evans v. Richards Appliances Services*, 2020 Cal. Wrk. Comp. P.D. LEXIS 44; *United Airlines, Inc. v. WCAB (Van Dyne-Parment)* (2020) 85 CCC 685 (writ denied); *Conrad v. Scandia Family Fun Center*, 2020 Cal. Wrk. Comp. P.D. LEXIS 288; *Gonzalez v. Advanced Construction*, 2021 Cal. Wrk. Comp. P.D. LEXIS 336.) Further, the Appeals Board has explained that it is inappropriate to add an applicant's impairments when there is no substantial evidence in support of that recommendation. (*Bradley v. State of California*, 2022 Cal. Wrk. Comp. P.D. LEXIS 26; *Martinez v. Sousa Tire Service*, 2022 Cal. Wrk. Comp. P.D. LEXIS 70.)

Here, as explained in the Opinion on Decision, both of the AMEs recommended adding the impairments for applicant's tinnitus, headaches, dizziness, cognitive dysfunction and psyche to the impairments for the cervical and lumbar spine. Further, both doctors explained that this would produce the most accurate rating. (Exhibit D at p. 15; Exhibit F at p. 4; Exhibit R at pp. 2-3.) Their recommendations were followed because their opinions constituted substantial evidence and there was nothing in the evidentiary file that would constitute good cause to set aside their determinations. (*Power, supra*, 179 Cal.App.3d 782.)

Next, defendant contends that applicant's dizziness should have been rated using a 5% whole person impairment as recommended by Dr. Ross, as opposed to the 8% recommended by the agreed medical evaluator. First, the relevant and

considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. (*Patterson v. Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 916, 921.) Secondly, assuming *arguendo* that applicant's dizziness resulted in a whole person impairment of 5% as opposed to the 8% described by the AME, applicant would still be 100% disabled. This is because the dizziness would rate as follows:

Dizziness: 13.02.00.00- 5 – [1.4] – 7 - 481 – J – 12 – 15

Combining the cervical impairment of 19% with the lumbar impairment of 27% leads to 41% whole person impairment. Adding the 5% for tinnitus, 7% for headaches, 13% for cognitive dysfunction, 15% for dizziness, and 28% for the psyche to the 41% impairment for the psyche gives a total whole person impairment of 100%. Again, as stated in the Opinion on Decision, the finding that the applicant is permanently and totally disabled is supported by the concerns that Dr. Feinberg and Dr. Lo raised about applicant's ability return to the workforce, by Mr. Diaz's vocational evaluation of applicant, and by applicant's credible trial testimony. (Exhibit M at pp. 11-12; Exhibit K; Exhibit 1 at p. 7; Exhibit 6.)

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

Date: May 24, 2023

Alison Howell
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE