WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

STEPHEN WAGGONER, ***Applicant***

vs.

CITY OF TORRANCE, Permissibly Self-Insured, ***Defendants***

Adjudication Numbers: ADJ8260868, ADJ8260850
Van Nuys 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, we will deny reconsideration.

We have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id*.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 22, 2021

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

STEPHEN WAGGONER
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE, LLP
SORIANO LAW GROUP

PAG/ara

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

JOINT REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Defendant City of Torrance, permissibly self-insured, has through its counsel filed a timely, verified petition for reconsideration of the November 30, 2020 Third Amended Findings and Award, which found that applicant Stephen Waggoner, while employed on September 2, 2011, as a firefighter, Occupational Group Number 490, at Torrance, California, sustained injury arising out of and in the course of employment to his back, and, while employed during the period of March 11, 1985 through November 15, 2011, as a firefighter, Occupational Group Number 490, at Torrance, California, sustained injury arising out of and in the course of employment to his back, neck, knees, right shoulder, hearing loss, inner ears, hypertension, skin, sexual dysfunction, lungs, heart, GERD, IBS, and hernias, causing permanent disability of 100%. Mr. Waggoner was 62 years of age on the specific date of injury and end of the cumulative trauma period. The Third Amended Findings and Award was based on the opinions of a vocational expert, Enrique Vega, as well as the medical expert opinions of Agreed Medical Evaluator (AME) Roger S. Sohn, M.D., and Qualified Medical Evaluators (QMEs) in five different specialties: Ronald A. Carlish, M.D., Graham M. Woolf, M.D., Omar Tirmizi, M.D., Howard L. Sofen, M.D., and K.C. Salkinder, M.D.

The petition contends that the evidence does not justify the findings of fact, and that the findings of fact do not support the decision and award. Specifically, defendant raises sixteen contentions, under headings lettered A through P, as follows: (a) evaluating physicians and the Appeals Board must rely on the AMA Guides, Fifth Edition concepts and standards towards the proper determination of impairment and disability; (b) the AMA Guides require findings to be based on consistent findings once an applicant has reached Maximal Medical Improvement (MMI); (c) the record documents multiple complaints and problems which are commonly associated with aging and have been inappropriately attributed to cumulative trauma; (d) the magnitude of the combined impairment and combined permanent disability are inconsistent with observed level of applicant's functioning; (e) the record documents lack of evidence to support the ratings for the heart and hypertension when at MMI; (f) the rating for sexual dysfunction is not supportable; (g) the ratings for orthopedic impairments are not supportable; (h) the Qualified Medical Evaluations for gastroesophageal reflux disease (GERG), irritable bowel syndrome (IBS), inguinal hernia, and ventral hernia were performed by Dr. Graham Woolf, hose role as a qualified medical evaluator was not active when he was initially deposed on March 7, 2017; (i) there are no definitive ratings for GERD; (j) Mr. Waggoner was not at MMI when rated for IBS; (k) the ventral hernia diagnosis has not been confirmed and observation was not made until over three years after retirement; (l) the inguinal hernia does not cause interference with Activities of Daily Living (ADLs) and thus there is no impairment; (m) Dr. Woolf has called for a re-evaluation of this applicant to ensure the most accurate medical opinion pertaining to any gastrointestinal issues; (n) Dr. Woolf did not sufficiently explain a sufficient basis for not using the Combined Values Chart (CVC) in order to

combine the various gastrointestinal impairments; (o) Lack of motivation is a critical issue not considered in the decision of 100% permanent disability; and (p) Depriving Mr. Waggoner of the ability to work is a threat to his health.

Applicant Stephen Waggoner has through his counsel filed a timely, verified answer to the petition for reconsideration, which contends that the Third Amended Findings and Award are supported by extensive evidence and legal authority, and more specifically that (a) MMI was stipulated by defendant when the matter was submitted three times for a permanent disability award; (b) applicant was motivated to work but precluded by injury, and (c) the vocational expert conducted a reasoned and objective analysis supporting the award.

II

FACTS

The original Joint Findings and Award, dated December 29, 2017, was rescinded following the petition for reconsideration of defendant City of Torrance to develop the record by having AME Dr. Sohn, and QMEs Dr. Carlish, Dr. Woolf, Dr. Tirmizi, Dr. Sofen, and Dr. Salkinder answer questions about their Whole Person Impairment (WPI) assessments using the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides), and review surveillance videos that they had not previously reviewed.

A First Amended Joint Findings and Award was issued on April 23, 2019, based on further trial proceedings and the supplemental reports and deposition testimony received from the physicians, as well as further testimony from Mr. Waggoner. A Second Amended Joint Findings and Award dated May 7, 2019 followed two weeks later, including a commuted attorney fee per the calculations of the Disability Evaluation Unit (DEU). The Second Amended Joint Findings and Award was rescinded following defendant's petition for reconsideration to develop the record with vocational evidence to determine whether applicant Stephen Waggoner's *disability* is greater, or less than, what was calculated based on the scheduled adjustment of his medical *impairments* under the AMA Guides.

After the parties were unable to agree upon a vocational expert, the undersigned workers' compensation judge appointed Enrique N. Vega, MS, CRC, CDMS to evaluate applicant as a vocational expert and provide his opinion regarding disability pursuant to Labor Code §4660, which mandates "consideration being given to an employee's diminished earning capacity" and §5701, which permits the record to be developed by causing testimony to be taken. Mr. Vega evaluated Mr. Waggoner and prepared a report dated January 27, 2020. Following the report, Mr. Vega was deposed by videoconference on May 8, 2020. Finally, good cause was found under Labor Code §5703(j) to allow defendant to call Mr. Vega to testify at trial, after applicant had testified a third time, in order to fully test Mr. Vega's opinions and determine whether they were, in fact, correct.

In Case Number ADJ8260868, defendant admitted a specific industrial injury of September 2, 2011 to applicant's back, and in ADJ8260850, a cumulative trauma during the period of March 11, 1985 through November 15, 2011 to applicant's back, neck, left

knee, right shoulder, hearing loss, and hypertension. In the cumulative trauma case, applicant also claimed injury in the form of skin cancer, sexual dysfunction, lungs, heart, sleep, GERD, IBS, and hernia. Based upon applicant's credible testimony and the medical reports of the AME and QMEs, it was found that applicant also sustained injury arising out of and in the course of employment to both knees, inner ears, skin, sexual dysfunction, lungs, heart, GERD, IBS, and hernias (inguinal and ventral). Applicant's earnings at the time of injury were found to be sufficient to produce maximum temporary and permanent disability rates for 2011. A disputed 20-day period of additional temporary disability was not found and awarded, based on the lack of medical opinion specifically supporting this additional period of temporary disability. The need for further medical care was also found, based on the medical expert opinions of the AME and the QMEs.

After development of the record, based on the medical opinions of the AME and QMEs, permanent disability (PD) was found by the undersigned by adjusting percentages of Whole Person Impairment (WPI) as follows, using Labor Code §4660 and the 2005 rating schedule:

Case Number ADJ8260850:

03.06.00.00-35-[5]45-490I-54-64% PD, heart
04.01.00.00-30-[5]38-490I-47-57% PD, hypertension
05.01.00.00-20-[7]27-490I35-44% PD, lungs
90% (06.01.00.00-9-[6]12-490F-12-16) 14% PD, GERD
90% (06.02.00.00-5-[6]7-490H-10-13) 12% PD, IBS
90% (06.05.00.00-15-[6]20-490H-25-32) 29% PD, inguinal hernia
90% (06.05.00.00-15-[6]20-490H-25-32) 29% PD, ventral hernia
90% (06.05.00.00-15-[6]20-490H-25-32) 29% PD, third hernia
70% (07.05.00.00-5-[2]6-490F-6-8) 6% PD, sexual dysfunction
75% (08.05.00.00-5-[2]6-490H-8-11) 8% PD, skin
11.01.02.00-3-[8]4-490I-7-10% PD, inner ears (vestibular) 80% (15.01.01.00-6-[5]8-490I-12-16) 13% PD, cervical spine
80% (80%(15.03.02.02-16-[5]20-490I-27-35)28) 22% PD, lumbar spine
90% (16.02.02.00-6-[7]8-490I-12-16) 14% PD, right shoulder
50% (17.05.05.00-10-[2]11-490I-16-21) 11% PD, knees

Add 14 + 12 = 26%, GERD and IBS (per Dr. Woolf)
Add 26 + (CVC 29 29 29) = 26 + 65 = 91%, GERD/IBS and hernias (per Dr. Woolf) Add 57 + 8 = 65%, hypertension and skin (per Dr. Carlish)
CVC 91 65 64 44 22 14 13 11 10 6 = 99% PD

Case Number ADJ8260868:

10% (06.01.00.00-9-[6]12-490F-12-16) 2% PD, GERD
10% (06.02.00.00-5-[6]7-490H-10-13) 1% PD, IBS
10% (06.05.00.00-15-[6]20-490H-25-32) 3% PD, inguinal hernia
10% (06.05.00.00-15-[6]20-490H-25-32) 3% PD, ventral hernia
10% (06.05.00.00-15-[6]20-490H-25-32) 3% PD, third hernia

20% (80%(15.03.02.02-16-[5]20-490I-27-35)28) 6% PD, lumbar spine

Add 2 + 1 = 3%, GERD and IBS (per Dr. Woolf)
Add 3 + (CVC 3 3 3) = 3 + 9 = 12%, GERD/IBS and hernias (per Dr. Woolf)
CVC 12 6 = 17% PD

The foregoing rating strings took into account the preclusion of non-industrial apportionment to the heart, and to left ventricular hypertrophy as "heart trouble," even though it was caused by hypertension, per the presumption applicable to firefighters under Labor Code §3212 and the provisions of Labor Code §4663(e). The presumption of §3212 to skin cancer was found to be inapplicable, as applicant's condition was not skin cancer, but rather actinic keratosis. Two levels of apportionment were applied to the lumbar spine (80% industrial, of which 80% is apportioned to cumulative trauma and 20% to the specific injury of September 2, 2011) and the applicability of the Range of Motion method for rating the lumbar spine, based upon Dr. Sohn's deposition testimony, which substantially explains his method and rationale, with the understanding that the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition* (AMA Guides) provides guidelines that do not override the clinical judgment of the physician. Also based on AME Dr. Sohn, 20% non-industrial apportionment was applied to permanent disability of the cervical spine, 10% non-industrial apportionment was applied to permanent disability of the right shoulder, and 50% non-industrial disability was applied to permanent disability of the knees. All apportionment not precluded by Labor Code §4663(e) was applied to the rating strings, as shown above, although the result was ultimately rebutted by vocational expert opinion.

Even after adding non-overlapping disabilities as instructed by Dr. Woolf and Dr. Carlish in their deposition testimony, the majority of the permanent disability ratings combined in Case Number ADJ8260850 had absolutely no effect on the combined permanent disability rating, due to the compressing effect of the Combined Values Chart.

After the initial trial hearing on October 19, 2017, Defendant's D, sub rosa surveillance videos, were admitted over applicant's objection, and were all viewed in chambers as permitted by the parties at trial, and although the size of the videos makes it impossible to store them in FileNet, a physical copy is in the possession of the undersigned as well as the parties. These videos did not appear to the undersigned to contain any evidence that would change any of the medical experts' conclusions drawn from the remainder of the evidence, but in an abundance of caution defendant was permitted to show them to the evaluators to develop the record, and the content of the surveillance videos ultimately did not change the opinions of either medical or vocational evaluators. A brief summary of the surveillance videos was provided in each of the opinions on decision to date, using the following words, without any apparent objection by either party as to the accuracy of this general description:

03/22/2014 – Applicant's head is visible over a fence.
03/25/2014 – Applicant drives a sport utility vehicle (SUV) and eats at International House of Pancakes (IHOP).

03/28/2014 – Applicant walks, drives, pumps gas, sits at a table, and stands. After sitting a while, he stands up and reaches for his back, apparently due to back pain.
03/28/2014 – (Part II) Applicant sits a table, gets up to purchase food and drink, drives an SUV, and walks.
04/11/2014 – Applicant carries a green bag into "South Bay Aquatics Indoor Swim Center," where he appears to be doing some kind of aquatic therapy by walking slowly in a pool. He carries the bag, (which we now may surmise contains his swimsuit) back to his SUV, and drives. 04/18/2015 – Applicant carries the same green bag. He stops to hold his back. He stands by a door, then walks to the curb and gets into an SUV. He carries the green bag in one hand and what appears to be a travel mug in the other. He then appears to be doing some kind of aquatic therapy again, by walking slowly across a pool. He drives, and carries the green bag again.
04/10/2016 – Applicant gets into a different SUV, and eats at a restaurant. He is shown walking. He opens the hood of his vehicle, looks at something, and closes the hood. He opens the door of his vehicle and lets some big dogs out.
04/11/2016 – Applicant pulls two plastic trash containers away from the curb at the same time. Based on his movement away from the curb, it can be inferred that these containers are empty. The video is only 17 seconds long.
04/15/2016 – Applicant's fence is shown, without applicant present. Then, someone is shown getting into a vehicle, possibly applicant, but the view is blocked by rear-view mirrors. Then, applicant's vehicles are shown, parked, without applicant present.
04/16/2016 – Applicant puts air into his tires, sits in vehicle, drives, appears to be pouring some liquid from a yellow bottle under the hood of his vehicle, sits at a table for a while, stands up and sits down again, and talks on a mobile phone.
04/17/2016 – Applicant gets into an SUV, and walks in a parking lot.
04/24/2017 – Applicant walks to a garbage can, and parks an SUV.
07/28/2107 – Applicant is carrying the same green bag as before. He gets in and out of an SUV. He visits a golf store, where he tries out putters.

In the Second Amended Opinion on Decision, it was noted that no basis had been shown by any of this evidence, or the medical experts' supplemental opinions, to increase or decrease the impairments, found by the AME and QMEs and rated using the AMA Guides and the 2005 rating schedule. The Second Amended Joint Opinion on Decision, page 3, lines 24-26 (end of second full paragraph) expressly stated what would be required to show that the permanent disability findings should be lower or higher than the scheduled formula: "The only way that these findings of the medical evaluators regarding permanent disability could be rebutted, to either increase or lower the finding of permanent disability, would be by vocational expert opinion."

When defendant petitioned for reconsideration from the Second Amended Joint Findings and Award, challenging the correctness of the finding of 99% permanent disability based on, *inter alia*, applicant's apparent employability based on his range of activities, it appeared that the record needed to be developed by obtaining a vocational

expert opinion to determine whether Mr. Waggoner's actual disability was less than, or greater than, the schedule's standard adjustments for future earning capacity. This manner of developing the record is based on Labor Code §4660's mandate of "consideration being given to an employee's diminished earning capacity" in determining permanent disability for injuries occurring prior to January 1, 2013. The parties were asked to attempt to agree on a vocational expert at a status conference on June 19, 2019. The parties requested names of vocational experts to consider, so the undersigned searched California Compensation Cases and found five vocational experts whose opinions had been found to be substantial in other recent cases: Debbie Abitz, Rodney Bolton, Roderick Stoneburner, Enrique Vega, and Ann Wallace. The parties were unable to agree on a vocational expert to develop the record by the next status conference, which was taken off calendar by joint request for "WCJ to appoint a voc. evaluator to develop record re: PD" (Minutes of Hearing, August 28, 2019, handwritten notation under "other/comments"). The evaluator with what appeared to be the strongest credentials was selected by the undersigned, and an Order Appointing Vocational Expert was issued on November 5, 2019, appointing Enrique Vega to evaluate Mr. Waggoner, review all evidence, and give full consideration to the nature and extent of diminished earning capacity.

Based on the vocational expert report of Mr. Vega dated January 27, 2020, admitted as Court's Y1 at trial on September 22, 2020, the deposition testimony of Mr. Vega dated May 8, 2020, admitted as Court's Y2, and Mr. Vega's trial testimony, which was permitted for good cause on defendant's request under Labor Code §5703(j), and cogently and persuasively explained his opinion on applicant's total disability due to vocational non-feasibility, the Third Amended Findings and Award found that Mr. Waggoner is not 99% permanently disabled, but 100% permanently disabled, based on a total loss of earning capacity. Mr. Vega found this loss of earning capacity to be entirely caused by industrial factors (Court's Y1, Report of Enrique Vega dated January 27, 2020, page 20, lines 14-20). Mr. Vega did not find applicant's participation in poker tournaments to constitute gainful employment or evidence of vocational feasibility, and explained why applicant has not been able to use his real estate license to generate income, due to lack of dexterity, and lack of sales ability as shown by vocational testing (Minutes of Hearing and Summary of Evidence, September 22, 2020, pages 8-9). Because Mr. Vega did not indicate any apportionment between injuries, even after being deposed and cross-examined at trial by counsel for defendant, whose burden it would be to show such apportionment, it was found that instead of two concurrent awards of 99% and 17% permanent disability, applicant is entitled to a single, joint award of 100% permanent disability.

Applicant testified at the initial trial hearing on October 19, 2017, at the second trial hearing on February 21, 2019, as well as at the most recent trial hearing, held by videoconference on September 22, 2020, where Mr. Vega also testified. It was the undersigned's impression that the applicant testified credibly about how he wanted to work, but was forced by the City of Torrance to retire prematurely due to his injuries (Id., page 3, numbered lines 6-13 and page 6, lines 23-25).

Defendant City of Torrance, through its counsel, filed a timely, verified petition for reconsideration of the November 30, 2020 Third Amended Findings and Award, contending that the evidence does not justify the findings of fact, and that the findings of

fact do not support the decision and award. Applicant Stephen Waggoner, through his counsel, filed a timely, verified answer to the petition for reconsideration, which contends that the Third Amended Findings and Award are supported by extensive evidence and legal authority.

III

DISCUSSION

The petition for reconsideration raises sixteen contentions, each discussed under a heading lettered A through P. Each of the contentions will be discussed below. This is all that need be addressed, because under Labor Code §5904, a petitioner for reconsideration "shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the mater upon which the reconsideration is sought other than those set forth in the petition for reconsideration."

What was not raised in the petition is any allegation that the petition is based upon the undersigned acting without or in excess of his authority, which would include the authority to order development of the record with supplemental medical opinions and a vocational opinion. The petition is expressly based on the contention that the evidence does not justify the findings of fact, and that the findings of fact do not support the decision and award. Defendant's detailed arguments in this regard are summarized under the general heading, "Impairments and associated permanent disability are not supportable, since impairment must be based on consistent, reliable findings at Maximal Medical Improvement (MMI), which are lacking in this case. The overall magnitude of impairment and associated permanent disability is inconsistent with Mr. Waggoner's current level of functioning" (Petition for Reconsideration, dated December 23, 2020, page 5, lines 17-21). The following responses to lettered arguments A through P in defendant's petition will explain why the findings of medical experts and the vocational expert in this case justify the findings and support the award of permanent, total disability.

A. Defendant is correct that use of the AMA Guides, 5th Edition, and substantial evidence are required

The petition points out that the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition* (AMA Guides) must be used, and that is undoubtedly required by Labor Code §4660, which is applicable to applicant's two 2011 injuries. In this case, the AMA Guides was used extensively by the AME in orthopedics, and five QMEs in other specialties. Each of those evaluators assessed Whole Person Impairment (WPI) percentages using criteria within the four corners of the AMA Guides, which were adjusted into permanent disability with fifteen different rating strings using the 2005 rating schedule.

The petition also points out that a medical expert's opinions must be substantial, based on relevant facts and correct legal theories. This is also undoubtedly true, as explained in the Appeals Board's *en banc* opinion in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604. However, his section of the petition does not explain how the

decision violated either of these principles. As the petition points out, it is the physicians' role to assign WPI percentages, and lay opinion of attorneys or a judge cannot be used in lieu of what the medical experts have provided. The medical experts' opinions all seem to be consistent with the facts and applicable law, and to the extent that defendant believed otherwise, it had more than a sufficient opportunity to present its position to the medical experts. However, in this case, a vocational expert was ultimately used to find 100% permanent disability, in rebuttal of the scheduled adjustment of impairments.

As pointed out in applicant's answer to the petition, as well as the AMA Guides themselves at page 5, disability and impairment are different things, and "impairment ratings are not intended for use as direct determinants of work disability." The AMA Guides acknowledge that employability determinations usually require "input from medical and nonmedical experts, such as vocational specialists" (AMA Guides, page 14, lines 9-11).

To the extent that scheduled impairment ratings do not accurately describe disability, the scheduled ratings may be rebutted. *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 76 Cal.Comp.Cases 624, describes three methods of rebutting a scheduled rating: (1) errors in the calculation or application of the rating schedule's Future Earning Capacity (FEC) adjustment; (2) the inability to be rehabilitated to meaningful employment, as expressed in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 48 Cal.Comp.Cases 587; or (3) "in rare cases," it may be shown that the data used to create the FEC adjustments in the schedule did not capture all of a particular worker's medical complications or their severity. As permitted by *Ogilvie* and suggested on page 14 of the AMA Guides themselves, input from a vocational specialist, Enrique Vega, was sought to determine whether adjusted impairments accurately reflected applicant's vocational disability, and whether applicant is amenable to rehabilitation. Mr. Vega took all of Mr. Waggoner's industrial medical conditions into account, and also performed vocational testing. He concluded that Mr. Waggoner is not amenable to vocational rehabilitation:

> Even if Mr. Waggoner were to participate in these services, it is unlikely that he would be successful in returning to work given his poor residual functioning and poor vocational aptitudes.
> Mr. Waggoner struggled to perform simple physical tasks in a controlled testing environment. He exhibited significant problems with pain. He demonstrated cognitive decline and scored poorly for vocational aptitudes and abilities due to his significant medical problems. Mr. Waggoner would have difficulty keeping up a work pace or meeting deadlines due to his problems. Based on the vocational evidence which is consistent with his combination of medical problems, Mr. Waggoner would not benefit from a vocational training program or direct job placement services; given the evidence in this case, I find that he cannot benefit from vocational rehabilitation services.

Accordingly, the AMA Guides are followed with substantial medical evidence, then

rebutted by a substantial vocational opinion per the second method in *Ogilvie*.

B. Defendant is also correct that the AMA Guides requires consistent findings after MMI

Again, the requirement that WPI be assessed at Maximal Medical Improvement (MMI) is undoubtedly the correct principle, as stated in the AMA Guides, and the Guides' objective of consistency is also beyond question. However, in this section, the petition does not explain how it applies to the facts of this case. All of the evaluators found applicant to have reached Maximal Medical Improvement (MMI), which as applicant's answer points out, does not mean that over time there will not be some expected change. Although defendant did not expressly stipulate to MMI status at trial, it likewise did not raise the contention that applicant was not MMI when submitting the issue of permanent disability for decision three times.

C. There is no medical opinion in evidence to support defendant's contention that applicant's complaints and problems are "commonly associated with aging" and have been "inappropriately attributed to cumulative trauma"

Medical causation of injury and permanent disability are for medical evaluators to determine, and these opinions, once provided and sufficiently explained, may not be rebutted by lay opinion. The petition does not specify exactly which complaints and problems should have been attributed or apportioned to aging, or which medical opinion supports that argument, but defendant does allege in this section of the petition that the heart presumption in Labor Code §3212 should not apply to that aspect of the hypertension unrelated to the heart. However, there is no aspect of the WPI for hypertension that is unrelated to the heart, because the impairment assessment is based on left ventricular hypertrophy (LVH). It would strain the plain meaning of the statute to argue that an abnormal enlargement of the heart is not "heart trouble." Accordingly, the WPI for hypertension should be subject to the presumption for "heart trouble," and there is no medical opinion in evidence to rebut that presumption, based upon the effects of aging or any other reason.

D. The magnitude of combined WPI, or PD, are not "inconsistent with observed level of applicant's functioning"

The petition does not specify which medical reports document that applicant is "physically active," or what is meant by that term. Surveillance videos do show that applicant is physically capable of walking, sitting, and even driving, but the ability to do those things on occasion does not rebut the impairments found by the medical evaluators, nor the conclusion of the vocational evaluator that Mr. Waggoner is not capable of meaningful employment or amenable to vocational rehabilitation. The criteria used by the doctors for impairments, and the criteria used by Mr. Vega for vocational determination of disability, are all clearly spelled out, but not correlated by the petition to any specific activities in the surveillance or other evidence that would rebut those criteria. Indeed, impairments under the AMA Guides, and a state of vocational non-feasibility, may not be observable.

The petition argues that medical evaluators should not rely on applicant's self-reporting, but applicant did not say that he could not do the simple things shown in the videos, and the videos were made available for all of the medical evaluators to review in the process of developing the record.

The petition cites the AMA Guides (on page 5), where it says that 90%-100% WPI "indicates a very severe organ or body system impairment requiring the individual to be fully dependent on others for self-care, approaching death." In arguing that applicant does not appear to be fully dependent on others or approaching death, defendant confuses the AMA Guides' description of a *single impairment* with a level of *combined permanent disability*. Mr. Waggoner does not have any single assessment of 90% WPI or greater, because if he did, his scheduled permanent disability rating would automatically be 100% after adjustment of that one impairment under the rating schedule.

E. Applicant's heart condition and hypertension are at MMI

The petition asserts that applicant's heart condition and hypertension are not at MMI, which is contrary to all of the medical expert opinions in evidence. All medical evaluators have found applicant to have reached MMI, and have provided WPI assessments with their final opinions. The last round of reports was relatively recent, between the first trial in 2017 and the second one in 2019, and none of the evaluators endorsed defendant's theory that Mr. Waggoner is retired, so his hypertension must be better. Defendant theorizes that "emergency conditions are no longer present" because applicant has retired, but this is both speculative and discounts the stressful effects of applicant's loss of career, his other symptoms, and his apparent anticipation that he does not have much time left to live (Minutes of Hearing and Summary of Evidence, September 22, 2020, page 7, lines 22-25).

Defendant's assertion that applicant must not have had arrhythmia because on October 25, 2015, Dr. Tirmizi reported that applicant "denies any exertional chest pain, pressure, palpitations, orthopnea, PND or ankle swelling" is not a conclusion endorsed by Dr. Carlish or any other QME. Defendant certainly had more than adequate opportunity to emphasize such points in the medical records to Dr. Carlish and the other QMEs, who remained of the opinion that applicant is MMI.

Defendant argues that applicant had LVH, but only 13mm, which meets AMA Guides criteria by 1mm. Defendant argues that this particular AMA Guides criterion "lacks a consensus within the medical community," but provides no specific evidence to rebut the criteria of the Guides, and apparently did not convince Dr. Carlish the Guides were wrong in this respect.

Defendants argue that "obesity and athletic heart" were not considered, but anything not considered by the QMEs after years of reporting would have to be attributed to defendant's failure to raise those points in an interrogatory or deposition, and only the conclusions of the AME and QMEs could be relied upon in formulating a decision regarding impairment and disability. The theory that new medications may have decreased left ventricular mass is speculative, because there is no evidence that they did in this case.

F. Sexual dysfunction WPI is sufficiently supported, and does not alter total disability

The petition points out that Dr. Orlin is not board-certified in urology, but there is no strict requirement of board certification to assess WPI under Chapter 7 of the AMA Guides. Likewise, the WPI is not invalidated by being based on self-reporting, or the lack of objective testing, because sexual dysfunction may be caused by subjective factors, and this seems to be Dr. Orlin's opinion. The petition correctly points out that Dr. Orlin agreed to reduce WPI to 5% for sexual dysfunction, which is what was rated in the opinion on decision. Ultimately, there is no reason to believe that any of these arguments regarding the presence or absence of 5% WPI for sexual dysfunction would alter the conclusion of the vocational expert that Mr. Waggoner is permanently, totally disabled and unamenable to vocational rehabilitation.

G. Ortho ratings are sufficiently supported by the opinion of an AME, which is entitled to great weight.

Defendant argues that AME Dr. Sohn should have put applicant in Diagnosis-Related Estimate (DRE) Cervical Category I, with 0% WPI, and not DRE II, with 6% WPI, for non-verifiable radicular pain. This is an incorrect reading of Table 15-5 on page 392 of the AMA Guides, which allows category II based on "nonverifiable radicular complaints." The petition further contends that Dr. Sohn should not have given 16% WPI for the lumbar spine, because "Mr. Waggoner does not meet the criteria" for ROM method, although the petition does not specify why. Also, defendant contends that warm-up movements were not done, a goniometer was probably used instead of an inclinometer, and that Dr. Sohn probably did one or two measurements instead of three, all based on Dr. Sohn's responses to questions at deposition, which indicated that Dr. Sohn was applying the AMA Guides in a less than strict manner, based on his own expertise and judgment. Defendant adds that Dr. Sohn should not have given applicant 6% WPI for right shoulder because he incorrectly used loss of strength, but Dr. Sohn explained that, in his expert opinion, the measured motion of the shoulder was normal for applicant, and did not constitute diminished range of motion for him. The petition argues that Dr. Sohn should not have given 5% WPI for weakness in each knee because this is "subjective."

Although the petition makes good points about Dr. Sohn's decision to apply the Guides in a more liberal than strict manner, this seems to be consistent with the AMA Guides' own indication that "[c]linical judgment, combining both the 'art' and 'science' of medicine, constitutes the essence of medical practice" (AMA Guides, page 11, lines 22-23). This deference to expert judgment is even greater where the evaluator is an AME, whose opinions are ordinarily entitled to great weight due to the presumed expertise and neutrality of an evaluator selected by both parties (Power v. Workers' Comp. Appeals Bd. (1986) 179 Cal.App.3d 775, 51 Cal.Comp.Cases 114). Milpitas Unified School District v. Workers Comp. Appeals Bd. (Guzman) (2010) 187 Cal.App.4th 808 endorsed the ability of an evaluator to liberally use material within the four corners of the AMA Guides, and Labor Code §3202 mandates liberal interpretation of Divisions 4 and 5 of the Labor Code, which would include §4660. Considering all of these authorities, and particularly Power and Dr. Sohn's status as the AME, Dr. Sohn's WPI assessments were rated without the

encumbrance of spending more years developing the record. Perhaps most importantly, given the differences between impairment and disability, there is no reason to believe that any of these arguments regarding the correct method, class, or percentage of a particular WPI under the AMA Guides would alter the conclusion of the vocational expert that Mr. Waggoner is permanently, totally disabled and unamenable to vocational rehabilitation.

H. GERD, IBS, and hernias were validly assessed by Dr. Woolf

The petition does not say that Dr. Woolf's QME license was inactive when he performed the evaluations, but does point to the fact that Dr. Graham indicated on page 7 of his March 7, 2017 deposition that his QME status was inactive at the time of the deposition. Because there is no indication that Dr. Woolf was not licensed as a QME at the time of his impairment evaluation, there is no reason to believe Dr. Woolf's evaluation was legally invalid for purposes of formulating an opinion regarding causation and WPI for GERD and IBS.

The petition also says that Dr. Woolf "suggested the necessity of a future evaluation" but does not specify where Dr. Woolf said this, and in any event, as with the other impairment evaluations, there is no reason to believe that a higher or lower percentage of WPI under the AMA Guides for gastroesophageal disorders would alter the conclusion of the vocational expert that Mr. Waggoner is permanently, totally disabled and unamenable to vocational rehabilitation.

I. The WPI for GERD is supported by the AMA Guides

The petition argues that because weight loss not shown, Dr. Woolf agreed on page 43, line 18 of his deposition transcript that his opinions on GERD are speculative. The criteria in the AMA Guides do not support this conclusion. The 9% WPI assessed for GERD is within Class 1 of Table 6-3 for upper digestive tract disorders, which does not require any showing of weight loss. If the WPI had been 10%, in Class 2, then weight loss would have been required to support the WPI, but Dr. Woolf stopped short of that class, and his opinion is not inconsistent with the AMA Guides.

Again, in any event, as with the other impairment evaluations, there is no reason to believe that a higher or lower percentage of WPI under the AMA Guides for upper gastroesophageal disorders would have altered the conclusion of the vocational expert that Mr. Waggoner is permanently, totally disabled and unamenable to vocational rehabilitation.

J. Mr. Waggoner was at MMI when he was rated for IBS

Defendant assumes that applicant has discontinued use of narcotics because of "widespread awareness that the use of chronic narcotics for musculoskeletal disorders is inappropriate" (Petition for Reconsideration, p. 17, lines 12-17). However, this assumption is unsubstantiated and speculative. It therefore does not follow that IBS probably resolved or improved.

As with the upper GI tract, or any one of the 15 other specific impairments in this

case, there is no reason to believe that a higher or lower percentage of WPI under the AMA Guides for lower gastroesophageal disorders would have altered the conclusion of the vocational expert that Mr. Waggoner is permanently, totally disabled and unamenable to vocational rehabilitation.

K. A ventral hernia does not have to be confirmed by a surgeon, and was found to be industrial by Dr. Woolf

It is sufficient that Dr. Woolf is the QME in gastroenterology for him to diagnose a ventral hernia. There is no legal authority to require that the diagnosis be "confirmed by a surgeon" or urologist as asserted by the petition. Defendant's claim that the ventral hernia "was not present until over three years post retirement" is speculative, because it may have been present prior to diagnosis, and in any event there is no legal authority to suggest that a medical expert may not deem an internal condition to be industrial simply because it was discovered months or even years after the period of injurious exposure. Likewise, it would be for Dr. Woolf to determine whether Dr. Smith's September 7, 2010 reference to an "incidental umbilical defect" calls the ventral hernia diagnosis into question and it seems he did not endorse this theory advanced by defendant in the petition.

L. The inguinal hernia does not interfere with ADLs, so no WPI

Defendant claims that applicant has no Activity of Daily Living (ADL) limitations that "specifically relate to his inguinal hernia" but ADL impairment are not required of a Class 2 hernia with 15% WPI under Table 6-9 of the AMA Guides that is palpable, frequently protrudes with increased abdominal pressure, and is manually reducible. To the extent that a hernia does not protrude, frequent discomfort precluding heavy lifting "but not hampering some activities of daily living" may be shown instead. Defendant argues that subjective symptoms are "not reliable," but the AMA Guides "do not deny the existence or importance of these subjective complaints to the individual or their functional impact" (AMA Guides, p. 10). Defendant asserts that there are studies which have demonstrated that claimants exaggerate, but only an article in the September/October issue of the Guides Newsletter is cited, and no medical evaluator has indicated that Mr. Waggoner is exaggerating. As a lay trier of fact, the undersigned observed Mr. Waggoner on three occasions, twice in person and once by videoconference, and he appeared to have the stoic demeanor one might expect from a former fireman, and did not appear to be exaggerating for effect.

The petition points out that applicant could have surgery to resolve the hernia and any associated impairment, but this is speculative because Mr. Waggoner has not had the surgery, and the outcome of surgery is therefore unknown.

As with the other impairment evaluations, there is no reason to believe that the presence or lack of correlation of Mr. Waggoner's inguinal hernia with ADLs under the AMA Guides, which exclude work activity, would have altered the conclusion of the vocational expert that Mr. Waggoner is permanently, totally disabled and unamenable to vocational rehabilitation.

M. A re-evaluation by Dr. Woolf is not required

The petition points out that Dr. Woolf said that if applicant was taking Prilosec every day, he would go up to Class 2 under Table 6-3 and argues that Dr. Woolf felt that Prilosec, narcotics, hernia status, and applicability of "various nonindustrial factors" would be "fair game" to clarify with the applicant during a new evaluation (citing the deposition of Dr. Woolf, pages 11-14). There are several reasons why these considerations do not justify a re-evaluation with Dr. Woolf. First, there is no evidence that applicant has been taking Prilosec every day, or that his status has changed. Second, it is not "fair game" to request a re-evaluation after trial on matters that could have been evaluated years ago. Third, Dr. Woolf did not indicate that his final opinions were invalid without a re-evaluation. The petition says that Dr. Woolf indicated it would be "medically improbable that [applicant] would improve" with Prilosec and fiber supplements, which is most likely a typographical error in the petition. However, the probability of improvement with Prilosec is a contingency not borne out by the evidence, and therefore it does not justify a re-evaluation by Dr. Woolf. Fourth, as pointed out in response to the other arguments about impairment levels, there is no reason to believe that a higher or lower percentage of WPI under the AMA Guides for GERD, IBS, or hernias would have altered the conclusion of the vocational expert that Mr. Waggoner is permanently, totally disabled and unamenable to vocational rehabilitation.

N. Dr. Woolf did sufficiently explain why GERD and IBS impairments should be added

In support of its assertion that Dr. Woolf did not adequately explain his opinion to add impairments, except hernias, the petition cites Leo v. Greenspan Adjusters International, Inc., 2016 Cal. Wrk. Comp. P.D. LEXIS 431 and Newberry v. San Francisco Forty Niners, Atlanta Falcons, 2017 Cal. Wrk. Comp. P.D. LEXIS 143, as standing for the proposition that "there must be a substantial and justifiable rationale" for rebuttal of the Combined Values Chart (CVC). First, these two cases are non-binding panel decisions which only illustrate what was done in those particular cases, and second, the AMA Guides themselves do not suggest any basis for a stringent standard of proof to rebut the CVC. On the contrary, the AMA Guides expressly question the validity of the CVC, on page 10:

> A scientific formula has not been established to indicate the best way to combine multiple impairments. Given the diversity of impairments and great variability inherent in combining multiple impairments, it is difficult to establish a formula that accounts for all situations. A combination of some impairments could decrease overall functioning more than suggested by just adding the impairment ratings for the separate impairments (e.g., blindness and inability to use both hands). When other multiple impairments are combined, a less than additive approach may be more appropriate. States also use different techniques when combining impairments. Many workers' compensation statutes contain provisions that combine impairments to produce a summary rating that is more than additive. Other options are to combine (add, subtract, or multiply) multiple impairments

> based upon the extent to which they affect an individual's ability to perform activities of daily living. The current edition has retained the same combined values chart, since it has become the standard of practice in many jurisdictions.

In another panel decision, Martinez v. Fresh Pack Processors, LLC, et al. (2017) Cal. Wrk. Comp. P.D. LEXIS 492), a workers' compensation judge was permitted to exercise discretion, even in the absence of a medical opinion, to find that impairments to the psyche and orthopedic/neurological disability should be added because they do not overlap. In Mr. Waggoner's case it was found that there is a valid medical opinion in support of adding the GERD and IBS permanent disability, which was sufficient in light of the AMA Guides' own invitation to use a method other than the CVC. As with the other impairment evaluations, there is no reason to believe that the small difference in percentages created by adding the GERD and IBS ratings instead of combining them would have altered the conclusion of the vocational expert that Mr. Waggoner is permanently, totally disabled and unamenable to vocational rehabilitation.

O. There is no evidence of lack of motivation

The petition alleges "documented inconsistencies between what Mr. Waggoner reports as his ability to perform activities of daily living and what is documented on sub-rosa," but does not give any specific examples. In any event, it is not lay opinion but expert opinion that forms the basis of the findings regarding impairments and disability, and these inconsistencies would therefore have to be identified by the medical experts and vocational expert, for which an opportunity has already been provided, without any change in the experts' opinions.

Defendant alleges that "many individuals with far greater impairment and functional losses are gainfully employed," but does not give any examples, or explain how the experience of a different individual could rebut applicant's expert-based disability findings.

The petition claims that because of these two things, "it is clear that motivation is a barrier to his return to work" (Petition for Reconsideration, p. 21, lines 9-12), but this was not found to be true by any of the medical evaluators, the vocational evaluator, nor the undersigned.

Defendant concludes that "[i]t is reasonable to assume that motivation for large financial award is greater than [applicant's] motivation to return to work" (Id., p. 21, lines 20-21), but it is not reasonable to assume this in applicant's case. There is absolutely no reason to question Mr. Waggoner's motivation, or as the petition suggests, his "underlying character" (Id., p. 21, line 19).

P. A finding and award of permanent total disability does not harm Mr. Waggoner

Finally, the petition argues that "[d]epriving Mr. Waggoner with [sic] the ability to work is a threat to his health" (Petition for Reconsideration, p. 21, lines 23-24). Defendant does not offer any supporting evidence for its assertion that "[a]ssigning 100% permanent

disability to Mr. Waggoner is detrimental to his health and well-being" (Id., p. 21, lines 25-26). Although there are undoubtedly "healthy benefits of work" for those who can work, a vocational expert has explained that Mr. Waggoner is, unfortunately, unable to avail himself of those benefits. A finding and award providing workers' compensation benefits at the total disability rate does not harm Mr. Waggoner, and does not physically or legally limit him beyond his already significant existing limitations.

IV

RECOMMENDATION

It is respectfully recommended that the petition be denied.

DATE: 1/6/2021

Clint Feddersen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE