

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

RYAN GASKINS, *Applicant*

vs.

WET DIRT INC.;
NATIONAL FIRE AND LIABILITY INSURANCE COMPANY
as administered by GALLAGHER BASSETT, *Defendants*

Adjudication Number: ADJ11269770
San Bernardino District Office

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case.¹ We now issue our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on July 1, 2022, wherein the WCJ found in pertinent part that applicant while employed by defendant on October 23, 2017 as a truck driver sustained injury arising out of and in the course of employment to his head, brain and nervous system and that the injury caused 100% total permanent disability in accordance with Labor Code section 4662(a)(4)². Defendant contends that the presumption in section 4662(a)(4) does not apply because there is no substantial medical evidence that applicant's injury resulted in permanent mental incapacity; that applicant is not 100% permanently and totally disability based on a strict rating under AMA Guidelines; and that any award should be issued against National Liability and Fire Insurance Company, and that Gallagher Bassett is no longer its adjusting agency.

¹ Commissioner Lowe, who was on the panel that issued a decision on March 18, 2020, no longer serves on the Appeals Board. Another panelist was substituted in her place.

² Unless otherwise stated, all further statutory references are to the Labor Code.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny Reconsideration, except to amend the F&A to make the award against National Liability and Fire Insurance Company.

In its Petition, defendant requested that it be allowed to submit supplemental pleadings as necessary pending review of transcripts of the proceedings of March 7, 2022 and April 12, 2022.³ The transcripts were uploaded in the record in FileNet in the Electronic Adjudication Management System (EAMS) on December 1, 2022. We have not received a request from defendant to submit supplemental pleadings.

We have considered the allegations of the Petition for Reconsideration and the answer and the contents of the Report with respect thereto. Based on our review of the record, including the transcripts for March 7, 2022 and April 12, 2022, and for the reasons stated in the Opinion on Decision and the WCJ's Report, both of which we adopt and incorporate, except as to the section in the Report titled "Conclusion," we will affirm the F&A, except that we will amend the Award to correct the name to National Liability and Fire Insurance Company and remove Gallagher Bassett.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued by the WCJ on July 1, 2022 is **AFFIRMED** except that the Award is **AMENDED** as follows:

AWARD

AWARD IS HEREBY MADE in favor of **RYAN GASKINS**, Applicant, and against, **WET DIRT INCORPORATED** as insured by **NATIONAL LIABILITY AND FIRE INSURANCE COMPANY** Defendants, payable as follows:

- (a) Permanent disability of 100% payable at the statutory maximum rate per week, taking into consideration award of attorney's fees as indicated below; jurisdiction is reserved on Labor Code section 4659(c) SAWW increase, as set forth in Findings Nos. 3, 4, and 6;

³ A transcript for February 3, 2022 is not currently available. However, on February 3, 2022, stipulations and issues were prepared, and no testimony was taken. No party takes issue with the proceedings on February 3, 2022, and accordingly, we do not believe that preparation and review of a transcript for February 3, 2022 is necessary.

- (b) Further medical treatment as set forth in Findings of Fact no 6;
- (c) Attorney's fees as set forth in Finding No 7.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 8, 2023

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

**RYAN GASKINS
WILLIAMS, BECK & FORBES
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN**

AS/ara

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

The Defendant National Liability and Fire Insurance, by and through their attorney of record Hanna, Brophy, MacLean, McAleer and Jensen filed a timely, verified Petition for Reconsideration. Applicant filed a verified Response to Defendant's Petition for Reconsideration.

STATEMENT OF FACTS

The Applicant was working for the Defendant on October 23, 2017 driving a water truck at a construction site. That afternoon while the Applicant was driving the water truck, the truck rolled over while driving down an embankment. On November 16, 2017, the Applicant was working for another employer and had a seizure. As a result of the seizure the Applicant was taken to the hospital. Several hours after being admitted, the Applicant underwent a craniotomy performed by Dr. Cutler.

The Applicant was evaluated by Dr. Shortz on February 27, 2019 in the capacity of Panel Qualified Medical Evaluator. Dr. Shortz's deposition was taken in relation to this matter on June 26, 2019. The matter proceed to AOE/COE trial and was submitted on December 9, 2019. A Findings and Award issued on January 31, 2020 from which Defendant sought reconsideration.

Dr. Shortz re-evaluated the Applicant on October 21, 2020 and found the Applicant remained temporarily totally disabled. He also noted the Applicant would require vocational rehabilitation as a result of permanent impairments from the injury. (See Exhibit 6 p. 19) Dr. Shortz evaluated the Applicant on July 28, 2021 at which time he found the Applicant was permanent and stationary. Dr. Shortz modified his opinion from his October 21, 2020, report. He found the Applicant totally disabled and unable to do work of any kind. (See Exhibit 7 p. 45)

The matter proceeded to trial and was submitted on May 9, 2022. A Findings and Award issued on July 1, 2022, which found the Applicant totally disabled pursuant to Labor Code section 4662(a)(4). It is from the Findings and Award that Defendant now seeks reconsideration.

CONTENTIONS

CONTENTION 1: THE WCJ ERRED IN PERMANENT TOTAL DISABILITY PURSUANT TO LABOR CODE SECTION 4662

In Defendant's Petition for Reconsideration the first two contentions can be synthesized to the following: WCJ erred finding permanent mental incapacity resulting in total disability pursuant to Labor Code § 4662(a) (4). The Defendant candidly acknowledged the Applicant has suffered serious mental deficits as a result of the work related brain injury. However, they argue that nowhere in Dr. Shortz or Dr. Fogel's reporting do they opine the Applicant's mental deficits are permanent, or that the Applicant's injury has led to permanent mental incapacity. (See Petition for

Reconsideration p.7, ll. 20-28) The Defendant acknowledged Dr. Shortz opinions but believed they were general statements of the Applicant's conditions and did not equate to permanent mental incapacity as contemplated by Labor Code § 4662(a)(4). Defendant does not argue the Applicants' condition is the result of anything other than a brain injury. The undersigned acknowledges neither Dr. Shortz nor Dr. Fogel used the phrase "permanent mental incapacity".

Dr. Shortz opined the Applicant sustained a very significant brain injury, the Applicant would require continued daily care twenty-four hours per day, seven days a week as his father currently does, the Applicant may, after a few years, require a complete care facility. (See Exhibit J-7, p. 44). Dr. Shortz further noted the Applicant was considered totally disabled and unable to work any kind of work. (See Exhibit J-7, p. 45)

Dr. Fogel, a neuropsychologist, evaluated the Applicant and issued a report dated January 21, 2021. On page 8 of his report, under the heading, "How are Mr. Gaskins' neuropsychological weaknesses and impairments likely to be expressed in his every day environment?" Dr. Fogel stated "Certainly Mr. Gaskins memory problems are likely to be one of the greatest contributing factors to his functional struggles. Mr. Gaskin is likely to appear much more forgetful than his same-aged peers. ... Mr. Gaskins' new learning and memory impairments are certain to pose significant barriers to his ability to efficiently manage his instrumental activities of daily living. He is likely to appear slower to take in and assimilate new information and take longer to respond to others. He is likely to require information to be presented in a much slower manner and an unusually large number of repetitions in order to retain new information. Even with such repetition, Mr. Gaskins is unlikely to be able to encode information at the same level as others. That is, not only does he experience difficulties in encoding new information, but he also has difficulties holding onto the limited information he is able to encode."

Dr. Fogel provided recommendations that may assist in Mr. Gaskins future treatment which included: simplify information; be clear and concise with instructions; reduce the amount of information to be remembered; check for understanding, and help individuals organize information that needs to be remembered, and noted due to the patient's medical condition and cognitive compromise consideration should be given to a medical ID, medical alert as they provide 24 hour nationwide assistance.(See Exhibit J-8, P. 9-10).

As it related to the Applicant's permanent impairment, disability status and ability to work Dr. Fogel stated, "Given the severity of Mr. Gaskins' neuropsychological impairments, their functional impact, and stability, he should be considered disabled and unable to sustain gainful employment. As such, he is highly encouraged to apply for Social Security Disability Insurance (SSDI) benefits." (See Exhibit J-8, p. 11) Based on the entirety of the medical evidence, the undersigned found Dr. Shortz's and Dr. Fogel's opinion constituted substantial medical evidence on the issue of total disability pursuant to Labor Code § 4662(a)(4).

**CONTENTION 2: THE WCJ ERRED BY FAILING TO ADOPT THE AMA
IMPAIRMENT PROVIDED BY DOCTOR SHORTZ**

It appeared to the undersign the Defendant's contention is that since Dr. Shortz and Dr. Fogel failed to use the phrase "permanent mental incapacity", the presumption under Labor Code §

4662(a)(4) did not apply. The Defendant contends the court is required to determine permanent impairment in accordance with the AMA guides. A whole person impairment of 50% is inconsistent with the opinions and conclusions of both of Drs. Fogel and Shortz. Dr. Fogel documented the numerous mental deficits the Applicant sustained as a result of his work injury. Dr. Fogel's conclusion was the Applicant was disabled and unable to sustain gainful employment, and given his condition he should apply for Social Security Disability benefits. The undersigned interpreted Dr. Fogel's conclusion literally in that the Applicant was unable to perform any employment and was totally disabled. A conclusion that the Applicant sustained a 50% whole person impairment based on Dr. Fogel's opinions and conclusions was inconsistent.

Additionally, Dr. Shortz found the Applicant totally disabled and unable to perform work of any kind. Again, the undersigned found Dr. Shortz opinion inconsistent with the stated AMA impairment rating of 50%. In light of Drs. Fogel and Shortz's opinion the Applicant is totally disabled and unable to work as a result of his work related brain injury undersigned found the presumption of Labor Code § 4662(a)(4) applied.

OPINION ON DECISION

On the morning of trial, the parties listed the following as issue:

1. Permanent disability
2. Apportionment
3. Need for medical treatment
4. Whether Applicant is presumed permanently totally disabled pursuant to Labor Code section 4662(a)(4)
5. Lien of Riverside County DCSS

LABOR CODE SECTION 4662(a), PERMANENT DISABILITY, APPORTIONMENT

Labor Code section 4662(a) titled *Permanent Disability; Presumption of Total Disability* states in relevant part: “Any of the following permanent disabilities shall be conclusively presumed to be total in character: ... An injury to the brain resulting in permanent mental incapacity.”

In Dr. Shortz’s July 28, 2021 report, he listed the following as his diagnosis of Mr. Gaskins:

1. Acute and Chronic Traumatic Subdural Hematoma
2. Traumatic Cerebral Contusion
3. Post Traumatic Seizure Disorder
4. Neurological Sequelae of Traumatic Brain Injury with Cognitive Impairment
5. Post Concussion Syndrome

Dr. Shortz noted, during his neurological exam, “The patients responses are somewhat slowed, and his recent and remote memory are impaired. ...” He also noted under the heading *Cerebellar Function* “ ... Tandem walking is moderately impaired. (See Exhibit 7 p. 44).

In his Discussion and Opinion, Dr. Shortz stated “The claimant sustained a very significant brain injury which arose AOE/COE resulting in acute and chronic subdural hematoma with post-traumatic seizure and need for emergency craniotomy and all subsequent treatment to date. ...” In his discussion of Future Medicals, Dr. Shortz noted “Patient will require appropriate treatment so as to keep him intact mentally, this is appropriate on a monthly basis and occasionally may need to be bimonthly. Patient will require office visit with neuropsychologist every other year for testing his capabilities and any progression. Patient will require continued daily care 24\7 as his father is currently doing, this may after a period of time, 1 to 4 years, may require a complete care facility.

Patient will require continued medication that he is currently taking. This may need to be changed to different medication(s) as is the nature of taking medications permanently for life.” (See Exhibit 7 p. 44-45).

Dr. Shortz’s stated, under the heading *Causation* “The claimant sustained a distinct injury to his head and brain as a direct result of the vehicular accident on 10/23/2017 and is AOE/COE. ...” Under the heading *Disability Status* Dr. Shortz noted “The patient is MMI at this time and is P&S. Patient is considered totally disabled at this point and is unable to work in any kind of work whatsoever.” (See Exhibit 7 p. 45).

Dr. Shortz opined the Applicant sustained a traumatic brain injury. He found the Applicant suffered from permanent mental incapacity as noted above; wherein he stated the Applicant required continued daily care twenty-four hours per day. He also opined the Applicant, in a few years may, require a complete care facility. Based on Dr. Shortz opinions and conclusions, the undersigned found the Applicant sustained a brain injury resulting in permanent mental incapacity.

As it relates to the issue of apportionment, Dr. Shortz noted there was no history of prior injury to the brain, seizure disorder or other medical conditions, which would indicate the need for apportionment. There are no non-industrial factors to consider. (See Exhibit 7 p. 45). Based on Dr. Shortz’s discussion on apportionment the Defendant failed to meet their burden of proof and establish non-industrial apportionment.

Based on the credible, uncontroverted, testimony of Ryan Gaskins, Stephen Gaskins, and the medical reports of Dr. Shortz, dated February 27, 2019, October 21, 2020, July 28, 2021, Dr. Shortz’s deposition transcript dated June 26, 2019, and medical report from Dr. Fogel dated January 21, 2021, it is found the Applicant sustained a brain injury resulting in permanent mental incapacity in accordance with Labor Code section 4662(a)(4).

ATTORNEYS FEES

Applicant’s attorney has provided valuable legal services on behalf of the Applicant in order to prove permanent total disability. The computation of attorney fees is deferred pending the commutation pursuant to Labor Code section 4659. (See MOH/SOE February 3, 2022.)

LIEN OF RIVERSIDE COUNTY DCSS

The lien of Riverside County DCSS is deferred, with jurisdiction reserved.

Date: 07/01/2022

TRACY L. HUGHES
WORKERS’ COMPENSATION
ADMINISTRATIVE LAW JUDGE