

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

JUSTO GOMEZ, *Applicant*

vs.

MCDONALD'S WARMEL COMPANY; administered by BROADSPIRE, *Defendants*

**Adjudication Number: ADJ7450282
Pomona District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant Justo Gomez seeks reconsideration of the Findings of Fact and Award, served October 9, 2020, wherein the workers' compensation administrative law judge (WCJ) found applicant sustained an industrial cumulative trauma injury over the period May 24, 2009 through September 8, 2020, to his neck (cervical spine), bilateral shoulders, bilateral elbows, bilateral wrists, bilateral thumbs, and bilateral knees, but not to his psyche, while employed as a maintenance technician by Warmel Company dba McDonalds. The WCJ found applicant did not rebut the permanent disability rating, and relied on the impairment rating of Dr. Jackson, the Agreed Medical Examiner (AME), to rate applicant's permanent disability. The WCJ found applicant was entitled to an award of 104 weeks of temporary disability, and permanent partial disability of 24%, after apportionment.

Applicant contests the award of 24% permanent disability, arguing that the report of his vocational expert is substantial evidence to support a finding that applicant rebutted the rating derived from application of the permanent disability rating schedule, as well as the AME's apportionment determination, and contends that he is entitled to an award of permanent total disability.

We have reviewed defendant's Answer to applicant's Petition for Reconsideration. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations and arguments of the Petition for Reconsideration, as well as the Answer thereto, and have reviewed the record in this matter and the WCJ's Report of November 30, 2020, which considers, and responds to, each of the applicant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate as the decision of the Board, we will, as our Decision After Reconsideration, affirm the WCJ's Findings and Award.

We concur with the WCJ that the report of Ms. Wilson, applicant's vocational expert, is not substantial evidence to support a rebuttal of the permanent disability rating derived from AME Dr. Jackson's impairment and apportionment findings. The WCJ concluded that Ms. Wilson's analysis was based upon an incomplete history of applicant's employment, such that her opinion that applicant lacked the transferable skills and physical capacity to return to competitive employment failed to factor in his years of retail work experience and the fact that he continued to manage his self-owned upholstery business for two years after his injury, until closed by economic forces.¹

In addition, Ms. Wilson failed to adequately address the non-industrial factors that the AME found caused some of applicant's current level of disability. For a vocational expert report to constitute substantial evidence, it must consider the non-industrial contributing factors to vocational non-feasibility. (See *Acme Steel v. Workers' Comp. Appeals Bd. (Borman)* (2013) 218 Cal. App. 4th 1137 [78 Cal. Comp. Cases 751]; *Lentz v. Workers' Comp. Appeals Bd.* (2013) 78 Cal. Comp. Cases 1003 [writ den.])

Dr. Jackson found applicant sustained cumulative orthopedic injuries as a result of his work duties at McDonald's, requiring only conservative treatment, except for the left knee arthroscopic surgery in 2015. After detailing applicant's impairment for each body part, he calculated applicant's whole person impairment at 26%, and provided work restrictions for each impaired body part. He then apportioned 40% of applicant's cervical spine impairment to the degenerative condition that was aggravated by applicant's industrial exposure, 60% of the right shoulder

¹ In her review of applicant's transferable skills, Ms. Wilson stated: "Since Mr. Gomez's employment with McDonalds Warmel Corporation he has not been employed." (Ex. 1, 9/27/18 Wilson Report, p.5.)

impairment to the presence of significant arthritic changes at the acromioclavicular joint; 20% of the left shoulder impairment to conditions similar to that of the right shoulder, with less arthritic changes; in the absence of permanent impairment in the elbows, he prospectively assigned 20% of any future impairment to non-industrial factors; 20% of the bilateral thumb impairment to non-industrial factors; 90% of applicant's bilateral knee impairment to the residuals of a longstanding injury dating to 2000, which was aggravated by his industrial exposure. He also noted that applicant was precluded from returning to his previous work duties, and should be provided modified duties or he could participate in a vocational rehabilitation program. (Ex. X. 6/28/16 Dr. Jackson AME Report, p. 32-33, 34.)

Ms. Wilson's consideration of the medical apportionment to non-industrial factors involved a summary of Dr. Jackson's and Dr. Lee's apportionment findings, and her conclusion that applicant is 100% permanently disabled solely due to industrial factors. She provided no analysis to support her conclusion that applicant's non-industrial factors of disability, including applicant's knee disability, which Dr. Jackson found was only 10% causally related to his industrial injury, play no role in her finding that he is permanently totally disabled, other than to state that she "considered" the medical opinions.

In my analysis, I have considered any apportionment raised by Agreed Medical Examiner Dr. Thomas W. Jackson and Qualified Medical Examiner Dr. Allen H. Lee, without consideration of whether it is valid under the law (i.e. as explained in Escobedo) or not. With regard to apportionment under LC 4663, I have considered the opinions of Agreed Medical Examiner Dr. Thomas W. Jackson and Qualified Medical Examiner Dr. Allen H. Lee and the impairments and the physical and emotional mental industrial functional losses directly caused by the industrial injury that they have discussed. Even if non-industrial apportionment is found, then, in my opinion, the applicant has 100% permanent disability as a direct result of the industrial injury.
(Ex. 1, 9/27/18 Wilson Report, p. 22-23.)

A conclusion without additional explanation is not sufficient to meet her obligation as a vocational expert to provide an opinion on how applicant's non-industrial limitations factor into his ability to participate in vocational rehabilitation and return to work in the open labor market. Just as medical reports must provide a sufficient analysis to constitute substantial evidence (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164), a vocational expert must provide adequate reasoning to justify her opinion. Here, there is none. We concur with the WCJ that Ms. Wilson's report does not constitute substantial evidence to support

a finding that applicant has rebutted the permanent disability rating schedule or has established that he is permanently totally disabled.

Accordingly, we affirm the WCJ's Findings and Award.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the Findings of Fact and Award, served October 9, 2020, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 15, 2021

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

**JUSTO GOMEZ
LAW OFFICES OF RICHARD WOOLEY
DIETZ, GILMOR & CHAZEN**

SV/pc

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

INTRODUCTION

Petitioner:	Applicant
Timeliness of Petition:	Timely
Verification:	Verified
Issue:	Findings of Fact and Opinion on Decision

Applicant, Justo Gomez, while employed during the period May 24, 2009 through September 8, 2010, as a maintenance technician, occupational group number 340, at Walnut, California, by McDonalds Warmel Company, claims to have sustained injury arising out of and occurring in the course of employment to the head, neck, arms, wrists, hands, shoulders, knees and psyche.

This case was resubmitted for decision August 13, 2020. At that time there were additional stipulations between the parties: Defendant paid E.D.D. (\$6,708.00) per a prior Findings and Award; Defendant paid additional benefits to applicant (\$1,747.42) (Minutes of Hearing August 13, 2020).

At trial August 13, 2020 no testimony was taken and no additional exhibits were admitted. Prior Findings and Award had been vacated to allow for parties to meet and confer with the Court. Following the resubmission for decision Findings of Fact and Award and Opinion on Decision was issued. It is from the Findings of Fact and Award and Opinion on Decision dated October 8, 2020 (served October 9, 2020) from which applicant seeks Reconsideration on a specific and limited issue.

Based on the medical findings and opinions and report of the orthopedic AME, Dr. Thomas Jackson (Court's "X"), it was found the applicant did sustain injury as alleged to the neck (cervical spine), bilateral shoulders, bilateral elbows, bilateral wrists, bilateral thumbs, and bilateral knees.

Based on the medical findings and opinions and report of the PQME, Dr. Allen Lee (Exhibit "N"), it was found the applicant did not sustain psyche injury as alleged. Based on the PQME Dr. Lee it was found the applicant sustained a temporary exacerbation of his pre-existing psychiatric disease. It was found the applicant would be entitled to an additional set of (24) psychotherapy sessions (Exhibit "M" page 73).

The AME report of Dr. Thomas Jackson (Court's "X") was found to constitute substantial medical evidence of the applicant's level of impairment resulting from the orthopedic injuries found to be industrial. The AME report of

Dr. Jackson was also found to constitute substantial medical evidence of the appropriate factors of apportionment.

The Permanent Disability Rating Schedule (PDRS) was found to be prima facie evidence of the percentage of permanent disability (Labor Code Section 4660(c)). The Court concluded the (PDRS) had not been rebutted. The Court concluded the (PDRS) had not been rebutted by the Vocational Evaluation Report of Laura Wilson (Exhibit "1").

Defendant has filed an answer to applicant's petition.

Applicant filed a Petition for Reconsideration as follows:

1. That by said decision and award the WCAJ acted without or in excess of its power;
2. That the evidence does not justify the findings of fact;
3. The findings of fact do not support the decision and award.

Applicant seeks reconsideration of the Findings of Fact and Award, number 10 and number 11, issued October 8, 2020, on the contention the evidence presented in this case, specifically the vocational evaluation and resulting report by Laura Wilson (Exhibit "1") effectively rebuts the (PDRS) contrary to the Findings of Fact number 10 and number 11, dated October 8, 2020, and that the applicant is entitled to an award of permanent disability consistent with that report (Petition for Reconsideration by Applicant page (2)).

DISCUSSION

Applicant argues in petitioning for reconsideration the court in *Ogilvie v. Workers' Compensation Appeals Board* (2011) 197 Cal App.4th 1262, 76 CCC 624 at 629, stated that where the injury impairs (though not necessarily precludes) vocational rehabilitation, and as a result the diminished future earning capacity of the employee is greater than that reflected by the strict rating provided by the PDRS, the schedule has been rebutted. In addition that this approach is also justified by the holding in *Le Boeuf v. WCAB* (1983) 34 Cal3rd 234, 48 CCC 587.

In petitioning for reconsideration applicant relies on the analysis set forth in the vocational evaluation and report of Laura Wilson (Exhibit "1") to support the contention the applicant is not amenable to vocational rehabilitation, that he is not able to sustain gainful employment, and is therefore unable to compete in the open labor market.

The Finding of Fact the (PDRS) was prima facie evidence of the applicant's percentage of permanent disability (Labor Code Section 4660(c)) was not rebutted based on the vocational report of Laura Wilson (Exhibit "1").

The report of Laura Wilson was not found to constitute substantial evidence due to the fact the conclusions reached were not based on a complete and accurate history of not only the applicant's entire work history but also his relevant formal education.

The March 29, 2019 report from Worthington Vocational Experts, Inc., (Exhibit "C") shows on page seven how the applicant reported to defendant's vocational expert additional educational background relevant to this proceeding, that additional educational background was not addressed in the report of Laura Wilson (Exhibit "1"). In terms of reporting on the applicant's educational background, page 2 of the Wilson report (Exhibit "1") stated he attended Chaffey College and took a course in English as a second language. The Worthington report (Exhibit "C"), page 7, stated the applicant attended Chaffey College from 2003 to 2004 and that his English studies reached the Intermediate Level.

There were significant discrepancies between the vocational reports as to the applicant's additional vocational training and work history prior to the claimed injury. (The analysis on those issues set forth in defendant's Answer to Applicant's Petition for Reconsideration, pages 5 and 6, is found to be comprehensive). It does appear there is a glaring omission in the Wilson report as to the applicant's past employment history as a salesman for Leroy Boys' Home Thrift Store. That employment spanned 16 years as noted in the Worthington Report (page 17). Also the Wilson report stated the applicant was self-employed with Justo's Upholstery for a period of seven years (page 2 and 3). Contrasted with the Worthington report (pages 16 and 17) where it states the applicant's employment was from approximately February 2005 to June 2012 and provided details as to the applicant's duties as the General Manager and Owner. The reason for leaving that employment was having to close down the business due to the recession. Those facts were not included in or addressed by the Wilson report. There was no evidence shown that the applicant was unable to continue with his business other than due to the recession. Also that his business continued for approximately two years after he last worked for the defendant employer. The applicant was able to maintain his own business after his period of employment with McDonald's Warmel. The applicant's own employment history shows he was able to continue to perform and maintain gainful employment.

RECOMMENDATION

It is respectfully recommended reconsideration be denied and the Findings of Fact and Award issued October 8, 2020, specifically Findings of Fact number 10 and 11, be affirmed and upheld.

DATE: November 30, 2020

Sharon Bernal

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE