

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

ISIDRO SORIANO GONZALEZ, *Applicant*

vs.

**HICKORY SPRINGS OF CALIFORNIA;
LIBERTY MUTUAL INSURANCE COMPANY, *Defendants***

**Adjudication Numbers: ADJ9254033; ADJ9254163
Marina del Rey 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 along with pages 5–9 of the WCJ's Opinion on Decision, 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.*)

Finally, we echo the WCJ's observations that much of the evidence relied upon by defendant in the Petition was never introduced at trial, and that defendant did not attempt to impeach applicant's testimony at trial via the theory advanced in the Petition. We remind defendant that a Petition for Reconsideration is not a substitute for presenting one's case at the trial level in the first instance.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 8, 2022

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

**ISIDRO SORIANO GONZALEZ
FORD & WALLACH
LAW OFFICES OF KIRK & MYERS**

AW/ara

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

I. INTRODUCTION

Applicant Mr. Isidro Soriano Gonzalez, at age 45, while employed as a truck driver, for Hickory Springs of California, sustained injury on 6/3/13 involving a hernia, upper GI, bilateral shoulders, neck, lumbar spine, right knee, right ankle, hands, left ankle, and psyche. This is case ADJ9254033. There was also filed a cumulative trauma, ADJ9254163, which the parties stipulated was non-compensable. All injured body parts and need for treatment were the result of only the specific injury of 6/3/13.

There were multiple issues submitted for decision but the most controversial was whether the judge would find all or part of the psychiatric impairment compensable as a direct injury arising from the event on 6/3/13, or alternatively compensable under the violent act exception of Labor Code 4660.1. The judge ultimately ruled in Applicant's favor and determined the psychiatric injury was fully compensable leading to a combined permanent disability Award of 89%.

The judge's decision was served on 4/26/22. On 5/13/22 Defendant filed a timely but unverified Petition for Reconsideration upon the following grounds:

1. "That the Award made by the workers compensation judge, the Appeals Board acted without or in excess of its powers;
2. The Evidence does not justify the Findings of Facts;
3. That the Findings of fact do not support the Order, Decision or Award."

Applicant filed an Answer on 5/18/22.

II. FACTS

Mr. Gonzalez testified at his Trial as to the following taken from the Summary of Evidence at page 4, lines 8 to 11.

"He described the injury of 6/3/13 when he was at work moving trailers around the truck yard. He was standing on a tractor trailer in the yard unplugging hoses on top of the trailer. This is when he fell approximately six to eight feet onto the ground. He testified that on the ground there were pieces of rock and concrete. He lost consciousness, He hit his head on the rocks."

The fall caused significant orthopedic, internal and psychiatric injuries with permanent disability determined as follows:

PSYCHE 40 WP

14.01.00.00 - 40 - [1.4]56 - 350H - 62 - 64-This is broken down further as follows:

(50% apportionment as direct injury = 32%)

(50% apportionment as a consequence of the physical injury = 32%)

UPPER GI 8WP

06.01.00.00 - 8 - [1.4]11 - 350F - 11 - 12

LEFT INGUINAL & UMBILICAL HERNIAS 10 WP

50% [06.05.00.00 - 10 - [1.4]14 - 350G - 16 - 17] 9

CERVICAL DRE 28 WP

90% [15.01.01.00 - 28 - [1.4]39 - 350G - 42 - 44] 40

LUMBAR DRE 8 WP

15.03.01.00 - 8 - [1.4]11 - 350G - 13 - 14

LEFT SHOULDER ROM 6 WP

90% [16.02.01.00 - 6 - [1.4]8 - 350F - 8 - 9] 8

RIGHT SHOULDER ROM 5 WP

90% [16.02.01.00 - 5 - [1.4]7 - 350F - 7 - 8] 7

RIGHT KNEE MUSCLE STRENGTH 5 WP

17.05.05.00 - 5 - [1.4]7 - 350G - 8 - 9

RIGHT ANKLE ROM 3 WP

17.07.04.00 - 3 - [1.4]4 - 350G - 5 - 5

COMBINE (R) LE: 9 C 5 = 14

COMBINE: 64 C 40 C 14 C 14 C 12 C 9 C 8 C 7=89 FINAL PD

The parties had no dispute over the orthopedic and internal injuries. Defendant did however dispute it's liability for the psychiatric injury. They sought to bar the compensability of the entire 64% impairment determined by PQME Dr. Levander claiming that it arose as an compensable physical injury and thus barred under Labor Code Section 4660.1(c)(1).

Applicant on the other hand argued that the violent act exception applied to the entire 64% impairment found by Dr. Levander. Alternatively, Applicant argued that if not the full amount then at least half of the psychiatric impairment found by Dr. Levander should be compensable as that half was caused by a direct injury and not as a result of a compensable physical injury.

Dr. Levander diagnosed post-traumatic stress disorder arising from a direct injury and that half of the 64% impairment apportioned to that cause. The other half of that 64% psychiatric impairment was blamed as a consequence of pain from the orthopedic injuries. This is where the violent act exception applied as found by the judge.

The judge has recollection at the Trial that Defendant was fighting the compensability of all the psychiatric impairment found by Dr. Levander. However, based on Defendant's reconsideration request, Petitioner is now focused only on the judge's application of the violent act exception. Defendant apparently no longer disputes the 32% psychiatric impairment caused by the direct injury to the head as arising from a diagnosis of post-traumatic stress. Thus the violent act exception will be at the center of the discussion below.

III. **DISCUSSION**

LACK OF VERIFICATION

The judge checked both ADJ Cases, scrolled down on screen fully for both the Petition for Reconsideration and proof of service, but could not locate Defendant's verification. This is despite Labor Code Section 5902's requirement that it be filed. Repercussions from this omission can be severe with Title 8, CCR Section 10510(d) allowing summary dismissal or denial of the reconsideration request.

Whether reading this now leads to Petitioner curing this defect will likely be significant to the WCAB's decision to summarily dismiss the Petition or not.

LOSS OF CONSCIOUSNESS/VIOLENT ACT/CREDIBILITY OF APPLICANT

The judge wants to make clear that even without the violent act exception being applied that Applicant would have still been awarded 32%, instead of 64%, psychiatric impairment. The total PD Award would have been 79% instead of 89%. This is based on Dr. Levander's opinion as to the cause of the psychiatric injury.

Detailed reasons why, along with direct quotes from Dr. Levander's reports, can be found in the judge's Opinion on Decision and is thus incorporated by reference rather than cut and pasted below. The violent act exception was used by the judge to add other half of the full 64% psychiatric impairment. That was the half that was a consequence of the pain from the injuries and that caused a separate DSM-IV diagnoses of Depressive Disorder, NOS and Anxiety Disorder, NOS.

Defendant is calling into question Applicant's credibility. They use Applicant's deposition testimony to claim he testified inconsistently in 2014 than at the 2022 Trial as to whether he lost consciousness. However, as pointed out by Applicant in his Answer, Defendant did not offer Applicant's deposition testimony into evidence. Moreover, as far as the judge can tell Defendant did not specifically ask Applicant at that deposition if he thinks he lost consciousness.

Defendant also cites in its Petition information from an exam with Dr. Ganjianpour, which while reviewed by Dr. Levander, was not separately offered into evidence by Defendant at the Trial. That report allegedly states Applicant felt “*dazed but did not lose consciousness.*”

Based on histories given to other physicians, whose reports are not in evidence, Petitioner believes Applicant did not lose consciousness but would apparently admit to him being “dazed.” Applicant told the judge and Dr. Levander that he lost consciousness. Petitioner then seems to argue that if there was no loss of consciousness then the facts no longer lean towards the violent act exception.

The problem for the judge is that Defendant could have flushed out this credibility and loss of consciousness issue at the cross-examination of Dr. Levander to see if he would give an alternative opinion based on differing set of facts. Instead it was Applicant’s attorney that broached the subject at the cross examination.

Dr. Levander was asked at page 7 about this during his cross examination. (Exhibit S) He mentions “*Well, I mean, the whole loss of consciousness thing it seems to be like a big deal. I don’t - like whether he did or didn’t lose consciousness, I mean, ultimately, it’s the long-term effect. And according to the orthopedic surgeon, he’s fairly disabled.*”

The judge also gave great weight with regard to finding the violent act exception applies after Dr. Levander found a direct injury causing post-traumatic stress disorder. It is believed the two go hand-in-hand. Dr. Levander was asked to define the disorder at his deposition and stated at page 18 (Exhibit S) the following:

“the person has been exposed to a traumatic event in which they are confronted with an event that involves threatened serious injury or threat to -- or threat to the physical integrity of yourself and the person’s response involved/ear, hopelessness, or horror which he did. And the traumatic event is persistently reexperienced in several different ways. Recurrent and intrusive thoughts and nightmares which I described Persistent avoidance of stimuli associated with the trauma, efforts to avoid the thought. Marked diminished interest or participating in significant activities and a sense of detachment or estrangement from others. Restricted range of affect. Sense of foreshortened future. Does not expect to have a career, marriage, or normal life span. And he’s sort of—he’s describing that. And persistent symptoms of increased arousal. Difficulty staying asleep. Problems concentrating. Exaggerated startled response.”

Defendant might have pressed Dr. Levander as to whether his opinion would change if the injury allegedly occurred in the less physical manner described by Petitioner. Aside from the brief discussion above where Dr. Levander seems more interested in the long-term effects rather than if Applicant did or did not lose consciousness, Petitioner did not confront the PQME with information from other physician’s reports, or from Applicant’s earlier deposition testimony, or even paint a picture for the doctor to know that Defendant was placing in issue whether there was loss of consciousness or not, and whether his opinion would be different if the facts were different. At best Petitioner’s arguments require further development of the record in a situation where they already had the opportunity to do so.

Loss of consciousness is not a straight forward thing, Dr. Levander could have been pressed on whether Applicant would even know the difference at that time between being knocked unconscious and being dazed, or what recollections someone has after waking up. One may need to know whether one would expect any type of amnesia or memory recall problems.

Applicant was thought to be credible with his testimony to the judge, with the understanding he is being asked questions as to events from 9 years before, and given the injury itself caused Mr. Gonzalez to experience true psychiatric consequences.

The judge agrees with Applicant's contentions that there was indeed a violent act when Applicant fell 6 to 8 feet from the ground onto broken rocks and concrete. The injury was sufficiently violent as shown by the post-traumatic stress disorder diagnoses and is considered by the judge to involve strong physical force that ultimately caused significant injuries to the neck, lumbar spine, left and right shoulder, right knee, right ankle, upper GI and multiple hernias.

The judge did not perceive Applicant misrepresenting the injury. He was credible and his testimony was consistent with what he told Dr. Levander, which the judge determined was substantial medical evidence. Petitioner makes conclusions based on evidence not admitted into the record.

The judge awarded 89% permanent disability. This was a very serious injury. The fall was violent. Applicant perceived this violence and it caused post-traumatic stress disorder. In the judge's mind this is a violent act. Despite Petitioner's opinion, the judge believes this is not the type of injury for which the legislative intent of limiting psychiatric injuries should apply.

IV. **RECOMMENDATIONS**

It is respectfully recommended that Defendant's Petition for Reconsideration be denied.

Date: June 3, 2022

Jeffrey Ward
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

ORTHOPEDIC INJURY

The parties obtained medical evidence from Dr. Silbart (Exhibits P & Q) and Dr. Dell (Exhibit T) concerning any orthopedic injuries. The ratings are summarized below as derived from multiple prior consultative ratings from the DEU.

NECK 90% [15.01.01.00 - 28- [1.4]39 – 350G – 42 - 44] **40 PD**

LUMBAR SPINE 15.03.01.00 - 8 - [1.4]11 – 350G - 13 - **14 PD**

LEFT SHOULDER 90% [16.02.01.00 - 6 - [1.4]8 - 350F - 8 - 9 PD] **8 PD**

RIGHT SHOULDER 90% [16.02.01.00 - 5 - [1.4]7 - 350F - 7 - 8 PD] **7 PD**

RIGHT KNEE 17.05.05.00 - 5 - [1.4]7 – 350G - 8 - 9 **PD**

RIGHT ANKLE 17.07.04.00 - 3 - [1.4]4 – 350G - 5 - 5 **PD**

INTERNAL INJURY

Dr. Sherman was the internal PQME and he found injury and permanent disability as follows:

UPPER GI: 100% [06.01.00.00 - 8 - [1.4]11 - 350F - 11 - 12] **12 PD**

INGUINAL/UMBILICAL HERNIAS: 50% [06.05.00.00- 10- [1.4]14 – 350G - 16 - 17] **9 PD**

PSYCHIATRIC INJURY

Whether Applicant Isidro Soriano Gonzalez suffered a “compensable” psychiatric injury is the main disputed issue in this case. To help decide the issue the judge reviewed the psychiatric PQME report of Dr. Eric Levander dated 4/2/20 (Exhibit R) and Dr. Levander’s deposition testimony taken on 1/7/21. (Exhibit S)

Dr. Levander’s report and testimony is concluded to be substantial medical evidence that satisfies Applicant’s burden of proof under Labor Code Section 3208.3(b)(1) that “*that actual events of employment were predominant as to all causes combined of the psychiatric injury.*” The actual event of employment was the serious injury Applicant sustained on 6/3/13 when he fell off the back of a truck and sustained injury to his multiple body parts with claimed loss of consciousness.

The report of the PQME psychiatrist is quite extensive and detailed. There are at least 70 pages of records review and about 30 pages of analysis. The GAF score of 45 represents “serious symptoms.” The PQME findings have been rated by the DEU as follows:

14.01.00.00--40-[1.4]56-- 350H---62-**64 PD**

Applicant is diagnosed with multiple DSM-IV Psychiatric Disorders including Post-Traumatic Stress Disorder (Chronic), Anxiety Disorder and Depressive Disorder. There is no non-industrial apportionment.

Defendant contends the entire 64% psychiatric permanent disability found by Dr. Levander is barred as being a consequence of the physical injuries. Those injuries include hernia, upper GI, bilateral shoulders, neck, lumbar spine, right knee, left and right ankle, and bilateral hands.

Defendant raises Labor Code Section 4660.1 (c)(1) which states:

(c) (1) Except as provided in paragraph (2), 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. This section does not limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury.

(2) An increased impairment rating for psychiatric disorder is not subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following:

(A) Being a victim of a violent act or direct exposure to a significant violent act within the meaning of Section 3208.3.

(B) A catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury.

In reading the lengthy report, and its conclusions, it seemed that Dr. Levander had an understanding of the law with regards to the barring of compensable consequence psychiatric injuries as set forth in Labor Code Section 4660.1(c). He provides conclusions that help the judge decide if that law applies or not. At page 100, he wrote:

“It is my opinion that Mr. Gonzalez has sustained a psychiatric injury resulting from the orthopedic injuries sustained in the course of his employment for Hickory Springs of California. In my opinion, 50% of the applicant’s PTSD, Depressive Disorder, NOS, and Anxiety Disorder, NOS, were caused by the orthopedic injuries that he sustained on June 3, 2013, in the course of his employment for Hickory Springs of California, and 50% was caused by the trauma of the incident that resulted in his injuries.”

At page 101 he wrote:

“Following careful psychiatric evaluation, I have determined that the applicant’s orthopedic injuries and the trauma of the fall from the truck combined were the cause of his psychiatric condition. It appears that Mr. Gonzalez has been found to have sustained compensable orthopedic injuries that have caused substantial impairment, and this has resulted in the development of clinically significant anxiety and depression. In addition, Mr. Gonzalez experienced the fall from the truck as a traumatic, life-threatening experience.”

At page 102 he wrote:

“Within reasonable medical probability, the actual events of employment were predominant (>50%) to all the causes combined to have produced a psychiatric injury. This injury meets requirements under section 3208.3 for predominant cause. In my opinion, 50% of the applicant’s PTSD, Depressive Disorder, NOS, and Anxiety Disorder, NOS, were caused by the orthopedic injuries that he sustained on June 3, 2013, in the course of his employment for Hickory Springs of California, and 50% was caused by the trauma of the incident that resulted in his injuries.”

At page 104 he states:

“I would apportion 100% of the applicant’s permanent psychiatric disability to industrial factors. Of this 100%, 50% is apportioned to the orthopedic injuries sustained in the course of his employment on June 3, 2013; 50% should be apportioned to the traumatic nature of the incident that led to his orthopedic injuries.”

“I am aware that, according to SB863, disability awards for psychiatric injuries secondary to physical injuries occurring after January 1, 2013 are barred.”

At page 105 he discusses an exception to LC 4660.1(c) and states:

“The date of injury in this case is subsequent to January 1, 2013, and as such, LC 4660.1(c) would apply. In my opinion, the effects of Mr. Gonzalez’s injuries have truly been catastrophic, and thus I would consider the psychiatric injury to be compensable according to the exception noted in para. 2 of LC 4660.1(c). However, I defer to legal experts to determine whether or not a permanent psychiatric disability award is appropriate in this case.”

Dr. Levander was deposed on 1/7/21. (Exhibit S) He testified he knew the difference between apportioning to causation and to disability. He discusses how that 50% causation that was not a compensable consequence of the physical injuries but *“came from the horror of failing, the horror of his injury.”* (Page 14)

He discusses why Applicant qualified for a diagnosis of post-traumatic stress disorders at pages 17-18. Half of the psychiatric injury and PD arose from experiencing a traumatic event.

As stated above, despite Defendant claiming PQME Levander is not substantial evidence, the judge finds his reporting quite detailed, probative and insightful. He did what was expected of a PQME, which is resolving the case’s key medical dispute. Dr. Levander helped the judge conclude the following:

Applicant is entitled to the full 64% psychiatric permanent disability found by Dr. Levander. The 50% apportionment he found that arose from a *“traumatic, life-threatening experience”* is determined to be compensable as a direct injury and not a consequence of any physical injury as

would otherwise be barred under Labor Code 4660.1(c). This is further supported by the diagnoses of Post-Traumatic Stress Disorder which directly arises from the experience of the violent act and not by the pain from the orthopedic injuries.

The other 50% apportionment he found was caused as a consequence of the physical injuries, most significantly to the low back, neck, and bilateral shoulders. Defendant wants this barred under LC 4660.1. Applicant argued that despite half the cause and PD being blamed on the pain and experience dealing with these injuries that there are two possible exceptions under LC 4660.1(c) as follows:

4660(c)(2)--An increased impairment rating for psychiatric disorder is not subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following:

(A) Being a victim of a violent act or direct exposure to a significant violent act within the meaning of Section 3208.3.

(B) A catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury.

The judge agrees with Applicant that the violent act exception applies here. Dr. Levander refers to the fall and resulting head injury and loss of consciousness as a “*traumatic, life-threatening experience.*” This is corroborated by Applicant’s credible testimony at the Trial.

Mr. Gonzalez testified at the Trial that as a result of a fall of approximately 6 to 8 feet he lost consciousness after he hit his head on pieces of rock and concrete. He has thoughts of dying from the accident including while he was falling at the time of the actual injury. (Minutes of Hearing page 4)

The judge also believes the DSM-IV Diagnosis is relevant here to establish the violent act exception. Dr. Levander diagnosed the Applicant with Post traumatic Stress Disorder. He discussed the diagnoses at pages 17-18 of his deposition. (Exhibit S)

“the person has been exposed to a traumatic event in which they are confronted with an event that involves threatened serious injury or threat to -- or threat to the physical integrity of yourself and the person’s response involved/ear, hopelessness, or horror which he did. And the traumatic event is persistently reexperienced in several different ways. Recurrent and intrusive thoughts and nightmares which I described. Persistent avoidance of stimuli associated with the trauma, efforts to avoid the thought. Marked diminished interest or participating in significant activities and a sense of detachment or estrangement from others. Restricted range of affect. Sense of foreshortened future. Does not expect to have a career, marriage, or normal life span. And he’s sort of—he’s describing that. And persistent symptoms of increased arousal. Difficulty staying asleep. Problems concentrating. Exaggerated startled response.”

This diagnoses corroborates that Applicant perceived the injury as it was occurring as a violent act and it was that violence that is integral to a diagnoses of post-traumatic stress disorder.

The judge also considered the en banc decision in the case of Wilson v. State of CA Cal Fire 84 Cal. Comp. Cas.es 620, 2019 Cal. Wrk. Comp. LEXIS 58. The case includes a definition of a violent act as “*an act that is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening.*” Applicant’s credible testimony, combined with all the medical evidence, help establish that this definition applies to the injury in this case.

Thus the psychiatric permanent disability is folly compensable since the impairment and injury was either caused by a direct injury to the head causing the DSM-IV diagnosis, or is under the violent act exception of Labor Code 4660.1(c).

Defendant argues in its trial brief that the report of Dr. Levander is not substantial medical evidence. They cite examples in the brief such as claiming Applicant continued working, that he did not lose consciousness after the fall, and that early medical records do not establish a significant injury. Defendant seems to be providing a revisionist history to the judge suggesting “*Applicant merely fell and twisted his ankle...*” and that “*it was such a minimal event that he did not even report it to his Employer until about/our months later in October.*”

When the judge read Defendant’s trial brief it was recalled that Defendant had taken Dr. Levander’s deposition. The judge looked to see how Dr. Levander responded to these same allegations by Defendant during his cross examination. (Exhibit S) However, upon review of the transcript, it appears Defendant did not fully confront Dr. Levander with these arguments.

Dr. Levander did consider if the loss of consciousness was an important factor and he testified in his opinion it is not. (Page 7, line 13-15)

Dr. Levander issued a very detailed written report and then Defendant had the opportunity to cross-examine him. The psychiatrist did not change his mind in any way. Defendant has a duty of a good faith investigation, and must “*fully and fairly gather the pertinent information, whether that information requires or excuses benefit payment.*” (Title 8, Section 10109)

Defendant in its trial brief makes comments about the history of the case, and factors that might have been relevant to a PQME. Defendant should have directly confronted PQME Dr. Levander with these concerns at his deposition.

Dr. Levander provided a 100+ page report with 70 pages of records review. He was then cross-examined by Defendant. At this point in the case the judge is not going to second guess the findings of the PQME, or require him to address the allegations made by Defendant in its trial brief, because Defendant already had the opportunity to do that.

Finally, the judge has not ruled out there was also a catastrophic injury, which would also be a basis for negating the effects of LC 4660.1(c).