WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSEPH RYAN, *Applicant*

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS, Legally Uninsured, Adjusted by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Numbers: ADJ10256108 (MF), ADJ10255968, ADJ10256212, ADJ10256223, ADJ10489875
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

On September 8, 2021, the Workers' Compensation Judge ("WCJ") issued decisions in four case numbers.

In the Findings and Award in ADJ10255968, the WCJ found that during the period July 12, 2011 through December 11, 2015, applicant, while employed as a correctional captain, sustained industrial injury to his cervical and thoracic spine, and to his lumbar spine including back muscles, spine and spinal cord, that the additional body parts of "cervicogenic headaches, sleep disorder, hernia, cardiovascular disease-hypertension, pulmonary embolism, upper gastrointestinal, lower gastrointestinal-IBS, urologic/sexual dysfunction and knees…are conformed to the medical record," that "applicant's injury caused permanent total disability of 100% in accord with the AME report of Dr. Charles Hasday," that "there is no apportionment for this award," and that applicant is entitled to further medical treatment for this injury.

In the Findings and Award in ADJ10256108, the WCJ found that on May 29, 2015, applicant, while employed as a correctional captain, sustained industrial injury to his cervical and thoracic spine, and to his lumbar spine including back muscles, spine and spinal cord, and that applicant is entitled to further medical treatment for this injury. The WCJ also found that

"apportionment is addressed in ADJ10255968," that "permanent disability is encompassed within the award under ADJ10255968," and that "due to the nature of the ratable disability from the cumulative trauma [in ADJ10255968] no apportionment is made since the additional disability to the lumbar spine, cervical spine thoracic spine would be beyond 100% and is not permitted."

In the Findings and Award in ADJ10256212, the WCJ found that on July 11, 2011, applicant, while employed as a correctional captain, sustained industrial injury to his lumbar spine including back muscles, spine and spinal cord, and to his cervical spine and sleep disorder, and that applicant is entitled to further medical treatment for this injury. The WCJ also found that "apportionment is addressed in ADJ10255968," that "permanent disability is encompassed within the award under ADJ10255968," and that "due to the nature of the ratable disability from the cumulative trauma [in ADJ10255968] no apportionment is made since the additional disability to the lumbar spine would be beyond 100% and is not permitted."

In the Findings and Award in ADJ10256223, the WCJ found that on November 12, 2012, applicant, while employed as a correctional captain, sustained industrial injury to his bilateral knees (patella) and hernia, and that applicant is entitled to further medical treatment for this injury. The WCJ also found that "apportionment is addressed in ADJ10255968," that "permanent disability is addressed within the award under ADJ10255968," and that "due to the nature of the ratable disability from the cumulative trauma [in ADJ10255968] no apportionment is made since the additional disability to the bilateral knees would be beyond 100% and is not permitted."

Defendant filed a timely petition for reconsideration of the four Findings and Awards. The caption of defendant's petition included case number ADJ10489875 as well. Defendant contends that the WCJ erred in merging applicant's cases to issue a single award of permanent and total disability, that "applicant's claims do not reach 100% PD" under *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd.* (*Fitzpatrick*) (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680], that the opinion of Frank Diaz, applicant's vocational expert, is not substantial evidence because it does not rebut the 2005 Schedule for Rating Permanent Disabilities ("PDRS") and because it ignores the apportionment findings of Dr. Hasday, the Agreed Medical Evaluator ("AME") in orthopedics, that the WCJ erred in failing to follow Dr. Hasday's apportionment findings because the doctor did not opine that industrial medical treatment caused applicant's permanent disability, and that Dr. Hasday's opinion supports apportionment between applicant's multiple injuries and multiple permanent disability awards.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report"). We adopt and incorporate the WCJ's Introduction and Statement of Facts as set forth in sections I and II of her Report. We also adopt and incorporate Section III ("Discussion") except for subsections (1), (2) and (4), which are not relied upon.

Based on our review of the record and applicable law, we conclude that the WCJ did not err in issuing a combined award of permanent and total disability, but the WCJ must revisit the issue of apportionment under Labor Code section 4663 in light of Dr. Hasday's opinion that a portion of the permanent disability is caused by preexisting spinal disease. Therefore, we will affirm the Findings and Awards in part and amend them in part to defer the issue of apportionment and final determination of applicant's overall permanent disability. In addition, we will return this matter to the trial level for further proceedings and new determination of the outstanding issues by the WCJ.

Preliminarily, we observe in reference to case number ADJ10489875 that the Minutes of Hearing of May 24, 2020 indicate the WCJ issued an order dismissing ADJ10489875, while the other four cases proceeded to trial and ultimately resulted in the Findings and Awards listed above. We further observe that defendant does not challenge the WCJ's findings on injury and medical treatment in the Findings and Awards in the other cases. Therefore, we will not disturb those findings. (Lab. Code, § 5904.)

Turning to defendant's contention that "applicant's claims do not reach 100% PD" under *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd.* (*Fitzpatrick*) (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680], we find defendant's reliance on *Fitzpatrick* to be misplaced. Therein the Court of Appeal held that Labor Code section 4662(b) does not provide an independent basis to find permanent and total disability "in accordance with the fact," where the medical record justifies a scheduled rating of less than 100% and the scheduled rating is not rebutted. However, *Fitzpatrick* is distinguishable because it involved a 2012 injury to which Labor Code section 4660 applied, whereas here the WCJ awarded permanent disability resulting from two injuries in 2015, making Labor Code section 4660.1 applicable. As the *Fitzpatrick* court itself pointed out, section 4660.1(g) provides, "[n]othing in this section shall preclude a finding of permanent total disability in accordance with Section 4662." Section 4662(b) in turn specifically provides that permanent disability in all cases which do not involve a presumptive total and

permanent disability injury "shall be determined in accordance with the fact." Accordingly, the WCAB may rely on a totality of substantial evidence in post-2012 cases to justify a finding of permanent and total disability. (See *Manvelian v. Edris Plastics Mfg.* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 298.)

We further note that unlike *Fitzpatrick*, in this case applicant secured the opinion of a vocational expert, Mr. Diaz, with whom AME Hasday agreed in finding applicant permanently and totally disabled, thus rebutting the strict impairment ratings for body parts individually evaluated by Dr. Hasday himself. (See *County of Alameda v. Workers' Comp. Appeals Bd.* (*Williams*) (2020) 85 Cal.Comp.Cases 792 (writ den.) [scheduled rating may be rebutted by establishing that the rating fails to account for the impact of an injured worker's ability to participate in vocational rehabilitation, pursuant to *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 (48 Cal.Comp.Cases 587)].)[1]

In this case, we agree with the WCJ that the medical opinion of AME Hasday, taken in conjunction with the vocational opinion of Mr. Diaz, justifies the WCJ's finding that the injuries to applicant's cervical, thoracic and lumbar spine in ADJ10256108 (May 29, 2015 specific) and ADJ10255968 (July 12, 2011-December 11, 2015 CT) resulted in permanent and total disability.[2] (See Report and Recommendation of the WCJ, footnotes 9 through 11; Exhibit MM, Hasday report dated February 4, 2020, pp. 126-140.) In affirming the WCJ's finding of permanent and total disability based on Dr. Hasday's medical opinion, we follow the well-established doctrine that the AME's opinion ordinarily is followed because the AME has been chosen by the parties for the doctor's expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114]; see also, *Brower v. David Jones Constr.* (2014) 79 Cal.Comp.Cases 550, 553-556 (Appeals Board in banc) [evaluating physician qualified to opine that an injured employee is so disabled by the industrial injury that he is incapable of working in the open labor market].)

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[1] Our Supreme Court stated in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 243 [48 Cal.Comp.Cases 587], "[j]ust as retraining may increase a worker's ability to compete in the labor market, a determination that he or she cannot be retrained for any suitable gainful employment may adversely affect a worker's overall ability to compete. Accordingly, that factor should be considered in any determination of a permanent disability rating."

[2] As discussed in Section II of the WCJ's Report, applicant's injuries in ADJ10256212 (on July 11, 2011, to his lumbar spine including back muscles, spine and spinal cord, cervical spine and sleep disorder) and in ADJ10256223 (on November 12, 2012, to his bilateral knees (patella) and hernia) were not the basis for the WCJ's finding that the injuries in ADJ10256108 and ADJ10255968 resulted in permanent and total disability.

Turning next to defendant's contention that the WCJ erred in not issuing separate permanent disability awards for each injury, we acknowledge that in *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113], the Court of Appeal concluded that pursuant to Senate Bill 899 enacted in 2004, the law of apportionment mandates that multiple injuries ordinarily require separate permanent disability awards. However, the Court also stated that "there may be limited circumstances…when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability. In such limited circumstances, when the employer has failed to meet its burden of proof, a combined award of permanent disability may still be justified." (170 Cal.App.4th at 1560.)

In the instant matter, the WCJ issued a combined award of permanent and total disability relating to ADJ10256108 (specific injury May 29, 2015) and ADJ10255968 (cumulative trauma July 12, 2011-December 11, 2015). We note that Dr. Hasday opined that the permanent disability relating to applicant's thoracic and lumbar injuries should be apportioned 40 percent to the May 29, 2015 specific injury and 40% to the cumulative trauma injury from July 12, 2011 through December 11, 2015. (Exhibit MM, p. 129.) However, we find this aspect of Dr. Hasday's opinion to be speculative because the doctor did not provide an explanation for his conclusion. In fact, Dr. Hasday's conclusion is undermined by the following discussion at page 126 of his report:

> The applicant then sustained a third compensable industrial injury to his low back on May 29, 2015, his second documented episode of lumbar instability, *from which he never fully recovered*; hence, there is element of industrial causation attributed to this specific injury. The applicant's fifth industrial claim is the CT injury (CT 07/2/2011 - 12/11/2015), which was filed for his back but appears to involve both his thoracic and cervical spine as well. (I note *the specific injury of May 29, 2015 apparently involved his lower thoracic spine as well,* as he soon developed early urinary and sexual dysfunction symptomatology following this injury. *This was then worsened over the course of time as part of the CT claim*.)
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> (Italics added.)

Based on the above discussion by Dr. Hasday, the only reasonable interpretation is that although the doctor *concluded* that applicant's spinal disability should be apportioned 40 percent to the May 29, 2015 specific injury and 40% to the cumulative trauma injury from July 12, 2011

through December 11, 2015, the doctor *explained* that he could not really parcel out, with *reasonable medical probability*, the percentages to which each of those injuries causally contributed to applicant's overall permanent disability. As Dr. Hasday explained in the part of his report excerpted above, applicant never recovered from the specific injury of May 29, 2015, which resulted in urinary and sexual dysfunction; the specific injury, like the cumulative trauma injury, involved applicant's lower thoracic spine, followed by worsening of the specific injury symptoms within the continuing cumulative trauma. Therefore, we conclude that the *Benson* exception of "intertwined injuries" is applicable, and that the WCJ correctly issued a combined award.

Finally, we address defendant's contention that the WCJ erred in not following Dr. Hasday's apportionment of permanent disability under Labor Code section 4663. On this issue, we agree (1) the WCJ erred in applying *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679] based on the incorrect premise that all of applicant's permanent disability resulted from his spinal surgeries; and (2) the WCJ must revisit the issue of apportionment under section 4663 in light of Dr. Hasday's findings of preexisting spinal disease.

In *Hikida*, the injured employee sustained industrial injury in the form of carpal tunnel syndrome, and she underwent surgery to alleviate that condition. The surgery was unsuccessful and resulted in the injured employee developing chronic regional pain syndrome ("CRPS"). The CRPS left her permanently and totally disabled. On one hand, the AME concluded that the permanent and total disability was entirely due to the injured employee's new CRPS condition. On the other hand, the AME found apportionment based on his opinion that 10% of the disability resulting from the original carpal tunnel syndrome condition was non-industrial. On those facts, the Court of Appeal framed the issue as "whether an employer is responsible for both the medical treatment and *any disability arising directly from unsuccessful medical intervention, without apportionment*." (*Hikida, supra,* 12 Cal.App.5th at 1260, italics added.) Although the Court answered yes to that specific question, the Court further explained in pertinent part: "Nothing in the 2004 legislation [broadening application of apportionment] had any impact on the reasoning that has long supported the employer's responsibility to compensate for medical treatment *and the consequences of medical treatment without apportionment*." (*Hikida, supra,* 12 Cal.App.5th at 1263, italics added.)

Though the Court in *Hikida* apparently did not limit its principle to situations involving failed treatment or new injuries, the Court of Appeal subsequently did so in *County of Santa Clara*

v. Workers' Comp. Appeals Bd. (*Justice*) (2020) 49 Cal.App.5th 605, 615 [85 Cal.Comp.Cases 467]. In the latter case, the Court explained: "*Hikida* precludes apportionment *only where* the industrial medical treatment is the *sole cause* of the permanent disability." (Italics added.)

In this case, Dr. Hasday did not conclude that the industrial medical treatment (spinal surgeries) endured by applicant was the sole cause of his permanent disability. Rather, the doctor gave reasons why he concluded that a part of applicant's disability is related to preexisting spinal disease:

> In regards to the applicant's low back and lower thoracic spine, the applicant's second documented episode of instability occurred at the time of his May 29, 2015 injury, after which the applicant remained symptomatic. The specific injury involved the applicant's thoracic and lumbar spine. His second continuous trauma claim from July 12, 2011 to December 11, 2015 now adds the applicant's cervical spine with further aggravation of his thoracic and lumbar spine symptomatology. *It is clear that the applicant's grade I isthmic spondylolisthesis at L5-S1 predated his employment and would be considered an apportionable preexisting condition. The applicant's first set of thoracolumbar X-rays on May 31, 2006 showed evidence of mild degenerative disc disease at T12-L1 with Schmorl nodes and endplate changes from L1 to L3.* This would have predated the applicant's ATV non-industrial injury of May 20, 2006, where he sustained a transverse process fracture of T11.
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> Based on these assumptions *in regards to the applicant's cervical spine, I would apportion 10% due to preexisting degenerative disc disease* and 90% to continuous trauma AOE/COE his employment in the pled period July 12, 2011 to December 11, 2015, noting that the applicant's cervical spine symptomatology appears first in the medical records of Dr. Bakshian on February 8, 2016.
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> *In regards to the applicant's thoracic spine, I would apportion 20% due to preexisting degenerative disc disease,* 40% to the applicant's specific injury of May 29, 2015, and 40% to continuous trauma AOE/COE his employment in the period July 12, 2011 to December 11, 2015.
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> *In regards to the applicant's lumbar spine, I would apportion 20% due to preexisting grade I isthmic spondylolisthesis at L5-S1,* 40% to the applicant's specific injury of May 29, 2015, and 40% to continuous trauma AOE/COE his employment in the period July 12, 2011 to December 11, 2015.
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> (Exhibit MM, p. 129, italics added.)

Thus, in connection with applicant's permanent and total disability, Dr. Hasday apportions 10 percent of the cervical spine disability to preexisting degenerative disc disease, 20 percent of the thoracic spine disability to preexisting degenerative disc disease, and 20 percent of the lumbar spine disability to preexisting grade I isthmic spondylolisthesis at L5-S1. Dr. Hasday also provided medical reasoning and evidence in support of these conclusions. Other than stating that it was applicant's three spinal surgeries in 2016 that caused all his permanent disability, which is contrary to Dr. Hasday's opinion, the WCJ's Report does not address defendant's contention regarding apportionment under Labor Code section 4663. (See, e.g., *E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 930 (71 Cal.Comp.Cases 1687) [Section 4663(c) satisfied where evaluating physician makes determination, based on medical expertise, of the approximate percentage of permanent disability caused by degenerative condition of injured employee's back].)

We note that "the Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further [inquiry or] evidence." (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1164 [66 Cal.Comp.Cases 1290].) Based on Dr. Hasday's opinion and the unresolved issues relating to apportionment under section 4663 in this matter, we conclude that the WCJ must revisit and resolve the issue in further proceedings at the trial level. The WCJ may further develop the record as she deems necessary or appropriate, consistent with *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 [Appeals Board en banc]. This may include the procurement of supplemental opinions from Dr. Hasday and the vocational experts.

In sum, we affirm the WCJ's findings that applicant's overall disability is permanent and total as a result of the injuries in ADJ10256108 and ADJ10255968, without apportionment between those injuries, but we amend the Findings and Awards to defer the extent of legal apportionment of the disability, if any, under Labor Code section 4663.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Awards of September 8, 2021 in **ADJ10255968, ADJ10256108, ADJ10256212,** and **ADJ10256223** are **AFFIRMED**, except that the Findings and Awards in **ADJ10255968, ADJ10256108,** and **ADJ10256212** are **AMENDED** in the following particulars:

In **ADJ10255968,** paragraph (a) of the Award and the Order of Commutation are **RESCINDED AND DEFERRED** pending further proceedings and determination by the WCJ, jurisdiction reserved, and Findings 4, 5, and 7 are **AMENDED** to state as follows:

4. The injury in this case, in conjunction with the injury in **ADJ10256108**, resulted in permanent and total disability, subject to apportionment under Labor Code section 4663, if any, as set forth in Finding 5 herein.

5. The issue of apportionment under Labor Code section 4663, if any, is deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved.

7. The issue of an attorney's fee for applicant's attorney is deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved.

In **ADJ10256108,** Findings 4 and 5 are **AMENDED** to state as follows:

4. The issue of apportionment under Labor Code section 4663, if any, is deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved.

5. The injury in this case, in conjunction with the injury in **ADJ10255968**, resulted in permanent and total disability, subject to apportionment under Labor Code section 4663, if any, as set forth in Finding 4 herein.

In **ADJ10256212,** Finding 4 is **AMENDED** to state as follows:

4. Permanent disability is encompassed within the award in **ADJ10255968**.

IT IS FURTHER ORDERED that the cases are **RETURNED** to the trial level for further proceedings consistent with this opinion.

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

September 23, 2022

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

JOSEPH RYAN
METZINGER & ASSOCIATES
STATE COMPENSATION INSURANCE FUND

JTL/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

I.
INTRODUCTION

1.	Findings and Award	09-08-2021
2.	Identity of Petitioner	Defendant
3.	Verification	Yes
4.	Timeliness	Petition is timely
5.	Petition for Removal Filed	09-28-2021

6. The petitioner states the undersigned erred: 1) The court should not have merged the applicant's cases into one order to award the applicant 100% PD; 2) Per *Fitzpatrick* applicant's claims do not reach 100% PD; 3) The vocational rehabilitation report of Frank Diaz is not substantial evidence because it ignores AME Hasday's apportionment analysis and fails to rebut the schedule for rating permanent disability 4) judge erred in not issuing separate PD awards per AME Hasday's report.

II.
FACTS

Case number ADJ10489875 (DOI: CT 04/03/12 to 04/03/2013) claiming an injury to the right knee. AME Dr. Hasday determined that this claim did not play any role in the applicant's permanent disability.[1] The petitioner made no effort to resolve this claim by stipulated award after the applicant was made permanent and stationary and had returned to work. Eventually AME Dr. Hasday remarked there were nomedical records to support a CT claim to the knees.[2]

Since this claim was dismissed by the court at trial at the request of applicant it should not comprise any basis for reconsideration as the time for reconsideration of the claim diismissal has long past.

ADJ10256212 DOI: 07/11/2011 or 07/12/2011). On 07/11/2011 the applicant filed a claim of injury to his low back while reaching and twisting to lift a printer. He's also claims to sustained injury to his neck and sleep disorder. AME Hasday reporting finds injury to the back and six weeks later the applicant was at Maximum Medical Improvement by 08/26/2011 without Permanent Disability or need for work restrictions. This injury played no role in the eventual lumbar disabilities[3] found under ADJ10255968. This claim was subsequently amended to include cervical and sleep. There's no industrial support for these allegations as a result of this event.

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[1] Exhibit MM
[2] Exhibit MM page 122, paragraph 6.
[3] Exhibit MM page 121 paragraph 2 and 3.

Case number ADJ10256223 (DOI: 11/12/2012) was a specific to the knees[4] and later a hernia with a resultant DVT to the right lower extremity. This claim of injury did not involve the thoraco lumbar spine and was not part of the basis of the 100% permanent disability award. The petitioner made no effort to resolve this claim by stipulated award even after the applicant was made permanent and stationary and had returned to work continuing to work in his usual and customary capacity.

Case number ADJ10256108 (DOI: 05/29/2015) occurring when the applicant was lifting a printer in his office weighing approximately 70 pounds. He believe it to be part of his 2011 injury and sought treatment with his personal medical physician. He continued working his usual and customary job duties.[5] When faced with worsening pain and increasing symptoms the applicant reported a work injury on or about 11/10/2015 and continues working.

It is in January 2016 that applicant claims a continuous trauma from under ADJ10255968 (DOI: 07/12/11 to 12/11/2015).[6] The applicant had continued working and was placed on TTD on or about 02/16/2016.[7] He did not return to work after this date.

III.
DISCUSSION

From this point on the applicant undergoes a failed attempt at a fusion of L5-S1 on 05/10/2016. It is noted the aborted first surgery resulted in an incisional hernia requiring a subsequent abdominoplasty and herniorrhaphy on 03/13/2017.

On 06/28/2016 the applicant underwent a second lumbar spine surgery with insturmentation at L-5, S-1 with an S-1 – S2 foraminotomy of the S1 nerve root resulting in increased right sided radicular pain.

On 07/02/2016 the applicant underwent a third spinal surgery comprised of a lateral decompression on the right L-4, L-5 and extension of the fusion to L-4 on the left re-exploring the right L-5 nerve root leaving the pedicle screw untouched. The applicant had ongoing back, urologic and radicular complaints. He receive caudal blocks of minimal benefit.

These procedures directly resu[l]ted in urologic injuries involving the bladder and sexual organs as a result of the surgical interventions.

On 01/24/2017 the operating surgeon suggested additional surgeries to the thoracolumbar spine. On 02/06/2017 the operating surgeon also suggested a fusion from T-12 to S-1 with decompression at multiple levels.[8]

[4] The DWC-1 filed by the applicant asserted a specific injury of 4/03/2013 as the date of the event.
[5] Exhibit MM page 122, paragraph 9.
[6] Exhibit MM page 123, paragraph 8.
[7] Exhibit MM page 124, paragraph 1.
[8] Exhibit MM page 124 paragraphs 7 and 8.

On 07/06/2017 the operating surgeon requested authorization for a posterior lumbar interbody fusion at L1-L2 and L2-L3 with removal of the pedicle screws. Eventually further thoracolumbar surgery was approved but by this time on 06/20/2019 the operating surgeon performed a cervical spine procedure at C-5 C-6 disectomy with interbody fusion with a locking plate.

At the time of the AME evaluation the applicant has deferred further spinal surgeries.

It was this course of trea[t]ment in 2016 that resulted in a cumulative trauma claim being filed for the period of 07/02/11 to 12/11/2015. It was this worsening over time that comprised the CT claim.

The applicant has had no less than three thoraco-lumbar procedures and a cervical fusion resulting in spinal instability, cauda equina symptoms, probable non union at L5-S1 posterior insturmentation and arthrodesis with spinal stenosis extending cephalad to the T-11-T12 level.[9]

It is here that the court paid particular attention in coming to the determinations:

> "The applicant has undergone vocational rehabilitation assessment, which finds him to be totally disabled from the open labor market. Based on his multilevel lumbar instability and neurological involvement, I would concur in opinion, and I believe that the applicant is unemployable – even in a sedentary position. He has significant weakness of this core muscles and his low back and has limited sitting or standing tolerance. This would make completion of a full work day – even in a sedentary capacity – impractical."[10]

Also important in my considerations that with regard to future medical care the AME's opinion was that the applicant will require additional surgery with a fusion from T- 11 to the sacral fusion and a thoracolumbar fusion at T-11 to T- 10.[11] He notes the applicant has currently deferred this but it would support a reservation of jurisdiction over permanent disability.

The applicant has not been able to return to work since his last day of work on February 16, 2016 and is found to have been TTD on an industrial basis from that point forward. The AME goes on to state that the applicant is in his opinion is hundred percent totally disabled for the open labor market.

In his apportionment determination he places 90% of the applicants disability on the cumulative trauma pled from 07/12/2011 to December 11/2015. He makes other determinations with regard to the 05/29/2015 event again apportioning to the cumulative trauma. It's clear that he contemplates the specific injury of 05/29/2015 as falling within the cumulative trauma ending 12/11/2015.

[9] Exhibit MM page 126 paragraphs 3, 4.
[10] Exhibit MM page 126 paragraph 5.
[11] Exhibit MM page 128, paragraph 7.

Ultimately the only two events that involve the thoraco-lumbar spine with regards to permanent disability are ADJ10256108 and ADJ10255968. The specific event of 05/29/2015 did not result in the 100% award it was the series of subsequent surgical interventions that support the basis of the award, the first surgery taking place on 05/10/2016, the second on 06/28/2016, the third on 07/02/2016.

3) The vocational rehabilitation report of Frank Diaz is not substantial evidence because it ignores AME Hasday's apportionment analysis and fails to rebut the schedule for rating permanent disability.

The applicant's vocational evaluator authored five reports. He provides a through assessment of the applicant including an opinion that is consistent with the AME reporting of Dr. Hasday.

Defendant's vocational evaluator authored one report. Her apportionment stated as a medical determinination [sic] is erroneous in particular with the urologic conditions that were the result of surgical interventions. There were other conditions that were evaluated but she appears to focus on this medical reporting. This evaluator also relied on the orthopedic QME of Dr. Smith who was discarded by the parties in favor of the more complete and through AME reporting of Dr. Hasday. Her opinions are not supported by the medicals the court relied upon.