WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ARVIN MANVELIAN, *Applicant*

vs.

EDRIS PLASTICS MANUFACTURING; SECURITY NATIONAL INSURANCE COMPANY, administered by AMTRUST, *Defendants*

Adjudication Number: ADJ9655567
Los Angeles 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.

Defendant Edris Plastic Mfg., by and through its insurer, Security National Insurance Company, filed a Petition for Reconsideration from the September 19, 2019 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant Arvin Manvelian, while employed as a machine operator on September 26, 2014, sustained an industrial injury to his right hand, right wrist and psyche, which caused permanent total disability, without apportionment. Applicant was awarded 100% permanent disability, and further medical treatment.

Defendant contests the award of permanent total disability, contending that the medical evidence is not substantial evidence of the extent of applicant's permanent disability, that applicant's vocational expert's report is not substantial evidence to rebut the scheduled permanent disability rating, that the WCJ acted in excess of his powers by excluding defendant's vocational expert's reporting and testimony to defendant's prejudice, that the WCJ erred in relying upon *Athens Administrators v. Workers' Comp. Appeals Bd.* (2013) 78 Cal.Comp.Cases 213 (*Kite*) to add applicant's disability rating, and that the WCJ improperly relied upon Labor Code section 4662(b) to find permanent total disability "in accordance with the fact," which was disapproved

by the holding in *Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd*. (*Fitzpatrick*) (2018) 83 Cal.Comp.Cases 1680.

We have reviewed applicant's Answer. 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 dated October 28, 2019, which considers, and responds to, each of the defendant'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 Findings and Award.

The WCJ's award of permanent total disability is based on his finding that the vocational evidence was sufficient to rebut the scheduled permanent disability rating, as provided in *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624], *Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119], and *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587]. The record, as detailed in the WCJ's Report, establishes that due to the effects of his catastrophic industrial injury, applicant is precluded from returning to gainful employment in the open labor market and is unable to benefit from vocational rehabilitation services. The WCJ found the report of applicant's vocational expert to be "reasonable, credible and of solid value and . . . put forth a more persuasive assessment of the applicant's employability than what might otherwise be inferred from the PDRS rating." (Report at p. 19.)

Accordingly, we affirm the Findings and Award.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 19, 2019 Findings and Award is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

DEIDRA E. LOWE, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 20, 2021

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

ARVIN MANVELIAN
LAW OFFICES OF ARMEN YEDALYAN
GILSON DAUB

SV/*pc*

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 DEFENDANT'S PETITION FOR RECONSIDERATION

I
INTRODUCTION

Defendant Amtrust has filed a timely, verified and properly served petition for reconsideration in the above matter, following this judge's award of 100% permanent disability without apportionment arising from the applicant's admitted injury to the applicant's right major hand, right wrist and psyche.

The within matter involved a very severe amputation injury to the right hand which took place when the applicant was trying to remove a plastic cup from a cup molding machine he was operating. The molding arm came down on his right major hand, amputating all four of his fingers and severely damaging his right thumb. There is also a serious and willful misconduct application which was deferred at the trial herein and which is still pending.

On reconsideration, defendant contends substantially as follows:

1. The findings of the applicant's Medical Provider Network (MPN) treating physician, Dr. Sean Younai and orthopedic QME Dr. Benjamin Lesin, a hand specialist, each do not constitute substantial evidence in support of their findings of permanent disability mid are not supported by the AMA Guides.
2. Because a two page impairment worksheet prepared by Dr. Lesin is missing from the record, the decision should be reversed and/or remanded in order to complete development of the record.
3. The report of vocational expert Laura Wilson finding the applicant unamenable to vocational rehabilitation is not substantial evidence because a) it is internally contradictory; b) relies on an erroneous analysis of the applicant's transferable skills; is unsupported by medical work restrictions and; d) mischaracterizes the opinions of the examining physicians.
4. It was error to bar defendant's vocational witness, Nick Corso, from testifying where he was listed as a witness at the MSC and where there was no proof that applicant served their own vocational report of Laura Wilson on defendant prior to the MSC.
5. The 100% award herein was not properly supported by the "*Kite*" decision allowing addition of PD values in certain cases.
6. Vocational expert Wilson's report cannot support a finding of permanent total disability "in accordance with the fact" pursuant to Labor Code section 4662(b).)

II
FACTS

Procedural History

The matter went through two days of trial, although the first day was taken up mainly with framing the issues and taking in exhibits. Only the applicant testified.

There was also an earlier trial before the undersigned regarding admissibility of medical reports prepared by non-MPN treaters which took place 10/30/17. The disputed reports were found admissible but, since they came from unauthorized treaters, were deemed to be reports which could not support an award of benefits in and of themselves pursuant to LC sec. 4605.

As mentioned above, there is also a pending application for serious and willful misconduct benefits filed directly against Edris Plastic Manufacturing on 9/8/15. All issues pertaining to that claim have been deferred. In addition, the applicant previously filed a claim for cumulative trauma against Edris in case No. ADJ10112230 but agreed to dismiss that claim at the trial proceedings herein which took place on 11/6/08.

Substantive History

At the time of the injury, the then-23 year old applicant had been working for defendant Edris approximately one year. The applicant was responsible for operating a machine which manufactured plastic cups. Although it was a stressful environment, the applicant "received consistently positive feedback for his work performance," according to the information he provided to psychological PQME Dr. Natasha Mahnovski. Per his unrebutted history, he was referred for the job through his prior employer who ran a water company that went bankrupt, because "Edris was asking for a good worker." (See, .e.g., Exh. 18, pp. 5, 13.)

Prior to working for the water company, he worked as a food server for around two years, where he would "serve food and clean plates." Prior to his injury, he also took English and basic education classes at Garfield Community College. (Id. at p. 34; Exh. 30, pp.3, 4)

Prior to that, he and his family emigrated from Iran in 2008. As a youth there, he participated in soccer and won numerous medals for that. (Exh. 18, p. 12.)

The applicant had no history of mental health treatment before the injury or any medical issues of substance. He had no prior injury claims or lawsuits, or contacts with authorities. He had a green card conferring residency status in the United States. He was on no medication at the time of the injury. (Id. at pp. 13, 31; Minutes, 8/15/19, p. 7, line 11.)

The applicant reported his working hours as being from 7 pm to 4 am, six days a week. The wage statement placed in evidence confirms that he worked significant amounts of overtime for Edris. (See Exh. H; Exh. 18, p. 5.)

According to the applicant's unrebutted testimony, amply corroborated in the reporting of Dr. Mahnovski and elsewhere in the record, the injury occurred as follows: The machine in question frequently malfunctioned and the owners were very concerned about keeping up the pace of their production notwithstanding the failures of their equipment. Frequently, plastic cups would get caught in the machine. There were various strategies employed to resolve this issue, including heating the machine up which would sometimes cause the cups to eject and sometimes not. This approach apparently was disfavored because it would normally take 10 or 15 minutes and slow down production for that amount of time. Yet another approach was to shut the machine of entirely, but this would cost two hours of production time so the employer did not want this to be done. So

instead the applicant was directed to remove the cups with his hand and arm while the molding machine was running despite the obvious dangers involved.

The applicant previously was using a stick to remove the cups to reduce the obvious danger to his hands. However, per his trial testimony, he was instructed by his boss not to do this because the stick might damage the machine. Instead, he was told to insert his hand into the machine during the lapse of a few seconds in the cycle of the molding machine and manually remove the stuck cup. The applicant did this and the vacuum of the machine pulled his hand in. When the molding implement came down on his hand, it severed all four of his fingers and badly damaged his thumb as discussed below.

His hand remained trapped in the machine for approximately ten seconds. "During that time he was yelling and screaming but the machine was very loud. When the machine opened up, he noticed that four of his fingers were gone." (See generally Minutes, 8/15/19, pp. 3-4; Exh. 18, pp. 5-7; 31-32.)

He was originally taken to a local clinic where nerve blocks were applied, then to LA-USC Medical Center, where he arrived with two of his digits in a bag of ice. The digits could not be saved and he ended up spending 17 days in the hospital He had three surgeries during that period of time, including one that lasted five hours. In all he had five surgical procedures, including stump revision surgery and surgery to remove painful neuromas on what was left of his fingers. (See Exh. 17, pp. 2-3, 12, 14; Minutes, 8/15/19, pp. 3-4.)

Taken as a whole, the record showed that the injury was both physically and psychologically damaging to the applicant. Initially the applicant tried to conceal the accident from his mother, who was in ill health and who has since passed away. She finally learned of the injury around two weeks after it occurred. Around a week later his mother was taken to the hospital because "her heart ... was weak .... " (Exh. 18, p. 34; Minutes, 8/15/19, p. 8, lines 3-5.)

The applicant had extensive psychological treatment through Dr. Stanley Goodman, a provider through the employer's MPN.

In addition to the shock and limitations imposed by the injury itself, the applicant had significant ongoing physical pain at the site of his amputation. In contrast to his healthy and pill-free pre-injury functioning, he reported to Dr. Mahnovski that he was taking 25 pills per day. (Exh. 18, p. 12.) Through the employer's authorized MPN treater, he was referred not only for psychiatric care but for dental treatment and right shoulder and thoracic dysfunction. (Exh. 17, pp. 21, 22, 24.) The applicant testified at trial that he had had dental issues ever since he was biting down "so hard" at the time of the accident due to pain, and had neck and shoulder pain from trying to yank his hand out of the machine. (Minutes, 8/15/19 p. 4, lines 1-7; p. 6, lines 12-14.) It is noted that at the time of the accident, not only did the applicant suffer four amputations, but his hand was described as "mangled" with third degree bums. (Exh. 17, pp. 11, 14.)

At trial the applicant described himself as "upset and anxious and hopeless because he cannot perform any type of job." He further stated that "No doctor has ever told him he would ever be able to use his right hand again." He described his right major arm as "very, very uncomfortable"

and "very, very sensitive." He was given prosthetic devices but they did not work properly and only added to his pain. He mentioned difficulties with doing his daily activities including tying his shoes, using knives, opening bottles or jars or bathing and self-care. He mentioned "flashbacks and nightmares" about the incident itself which per the medical reporting were quite frequent. (See Minutes, 8/15/19, pp. 5-8.)

Both in his testimony and in the medical reporting, the applicant mentioned a great-deal of self-consciousness about his physical appearance, causing him to withdraw from others, including his family. (Minutes, pp. 5-6; Exh. 18, pp. 8, 10.) At trial he also mentioned cramps, abdominal pain and nausea "on almost a daily basis." (Minutes, p. 6, lines 7-9.) According to Dr. Marvin Pietruszka, a non-MPN treater whose reports are nevertheless cited by defendant in their reconsideration petition, the applicant has "gastritis/GERD" secondary to use of anti-inflammatory medications. (Exh. 9, p. 7.) The applicant testified at trial that even five years after the injury he had difficulty writing his name with his left, non-dominant hand. (Minutes, 8/15/19, p. 8, lines 12-15.)

Cross-examination at trial was limited to a handful of questions regarding the applicant's prior employment at a restaurant, Royal Palace. (Id. at p. 8, lies 17-21.)

Medical Reporting

While there were a number of non-MPN treater reports admitted after the earlier trial of 11/16/17, these were given limited consideration as I ruled following that trial that the reports could not be used in and of themselves to suppm1 an award of benefits pursuant to Labor Code section 4605. Primarily, I gave consideration to the treatment reports of providers from the employer's MPN, specifically Dr. Sean Younai in orthopedic surgery and Dr. Stanley Goodman in psychiatry, and the reporting QMEs, Dr. Benjamin Lesin in orthopedic surgery and psychological PQME Dr. Natasha Mahnovski.

Dr. Younai is a hand specialist who performed revision surgery on the applicant's right arm after he was released from the hospital. He treated the applicant over a period of 16 months and saw him approximately 25 times during that period as per treatment records reviewed by Dr. Lesin. (See Exh. 17, pp. 15-24.) In his 2/15/16 permanent and stationary report, Dr. Younai noted there was amputation of four of the applicant's fingers and repeatedly described the applicant's right thumb as either "dysfunctional" or "total dysfunctional." He found a restriction of "no use of right hand (non-existent)." He found 90% upper extremity impairment based on lost use of the right hand pursuant to Table 16-1 of the AMA Guides and 54% whole person impairment based on table 16-3. (See generally Exh. C.)

Dr. Lesin, also-a hand specialist who as of the time of his deposition had practiced medicine for 41 years, examined the applicant on 9/8/16 and prepared a 28 page report which included an extensive review of records. He described the applicant's right hand as disfigured with scar formation and amputation. He noted hypersensitivity on the right, making it too painful to perform a two point discrimination test. The remaining thumb had '·very limited motion," with the distal joint of the thumb in a "mallet" or abnormally flexed position. (See Exh. 17, p. 8.) (In her report

of her 10/14/16 evaluation, Dr. Mahnovski described the applicant's thumb as "appear[ing] fractured and crooked." (Exh. I 8, p. 19.))

Dr. Lesin diagnosed a "Severe mangling injury to the right hand with amputation of the index, long, ring, and small fingers, a degloving injury to the thumb, secondary to a crush and burn injury, with psychiatric trauma." He noted, "[H]e only has a thumb, he does not have four fingers, and there is nothing for the thumb to work against." He further stated, "There is no work that Mr. Manvelian can do using his right hand." (Exh. 17, pp. 26-27.)

As defendant points out on reconsideration, and as I acknowledged in my opinion on decision there is a bit of confusion regarding Dr. Lesin's findings as, for whatever reason, a worksheet incorporating his WPI findings was missing from his 9/8/16 report placed in evidence as applicant's Exhibit 17. However, Dr. Lesin clarified at his 11/l0/17 deposition that he, like Dr. Younai, assigned 90% upper extremity impairment to the amputation. Dr. Lesin also assigned additional WPI to loss of wrist motion and added pain, and another 50% WPI for "disfigurement, Class 3." (See Exh. I, pp. 7-10.)

Psychiatrist Dr. Stanley Goodman MD, a treater through the employer's MPN, saw the applicant on numerous occasions and prepared a series of treatment reports which were placed in evidence. For unknown reasons, it does not appear that Dr. Goodman ever prepared a permanent and stationary report, or at least one that was placed in evidence. Dr. Goodman's most recent report of 8/31/16 recommended medical transportation in light of the amputation. (Exh. 19.) (It did appear from other information in the record that the applicant was capable of driving, though with difficulty.) Dr. Goodman's progress reports made frequent mention of the applicant's ongoing pain complaints in his hand, lessened somewhat by the use of medication, as well as ongoing difficulties with sleep and with flashbacks about the injury. On a number of occasions, Dr. Goodman tried to encourage the applicant to participate in gym membership with a trainer. (See generally, Exhs. 19-27.)

PQME psychologist Dr. Malmovski evaluated the applicant on a single occasion on 10/14/16. She prepared a detailed 57 page report with an extensive record review. According to the history she took, the applicant reported "no use and no control of his right thumb." The applicant related physical limitations and complaints as well as psychological complaints as noted above. He mentioned headaches, diarrhea and acid reflux in addition to other complaints. He denied drinking alcohol or any history of alcohol abuse. Per Dr. Mahnovski, testing results supported a profile that, "Because [the applicant] is likely to question and mistrust the motives of those around him, working relationships with others are likely to be very strained, despite the efforts of others to demonstrate support and assistance." (Exh. 18, pp. 8, 9-10, 13, 17.)

Dr. Malmovski diagnosed chronic post-traumatic stress disorder as well as a depressive disorder. She found a GAF score of 54, placing the applicant at the lower half of the range of individuals who experience "Moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning (e.g. few friends, conflicts with peers or co-workers)." She found a premorbid GAF score of 90. She described the applicant's prognosis as "poor." She commented, "Over the course of the evaluation, he presented with observable physical and mental fatigue." Like the other reporting

experts, she found no apportionment. Under the section entitled "Qualified Injured Worker Status," Dr. Mahnovski wrote, " ... I defer determination of his ability to perform his usual and customary duties and consideration of being a Qualified Injured Worker to vocational rehabilitation." (Exh. 18, p. 56; see generally Exh. 18 at pp. 46-56.)

Dr. Mahnovski also prepared a supplemental report dated 2/28/18, in which she reviewed additional treating reports which came mainly from non-authorized, non-MPN treaters. Upon reviewing these documents, she opined that additional QME evaluations in dentistry, neurology and internal medicine would be appropriate. (Exh. G.) Rather than pursuing these options, the applicant's attorney instead filed a DOR to proceed on all issues. Following trial, I determined that the applicant had not sustained their burden of proving injury to additional body parts within these specialties and that any error in terms of presenting a sufficient record was invited by the applicant's own filing of a DOR.

Vocational Expert Reporting

Applicant submitted on his own behalf the 51 page 8/l 0/17 report of vocational rehabilitation consultant Laura Wilson. Ms. Wilson noted that she personally interviewed the applicant on July 26, 2017. (Exh. 30, p. 22.)

Ms. Wilson explained that she performed a transferable skills analysis which took into account the limitations imposed by the applicant's injury as well as his employment and educational background. Ms. Wilson quantified the applicant's limitations or impairments in 34 different type of work activities, including "temperaments" pertaining to mental and psychological skills needed to maintain employment. She then used various vocational software programs to determine whether the applicant's remaining skillset as compromised by his physical limitations would be compatible with any open labor market jobs. The outcome from this computer analysis supported Ms. Wilson's conclusion that there were no jobs available compatible with the applicant's limitations and limited transferable skills. (Id. at pp. 7-14, 27-28.) I did have some difficulty with this portion of the report because the meaning various numbers assigned to various work limitations did not appear to be explained, and Ms. Wilson appeared to rely on a number of restrictions not found by the medical experts, such as with regard to sitting, standing, walking and running (though the applicant did voice complaints at trial regarding sitting and standing, and Dr. Mahnovski observed overall fatigue). (See Minutes, 8/15/19, P. 8, line 8.)

Ms. Wilson's report also included a lengthy and illuminating discussion of the role of vocational expet1s in evaluating impairment and disability in the AMA Guides era. She noted that per the AMA guides themselves, certain determinations regarding employability "requires input from medical and non-medical experts such as vocational specialists." She noted that as per *LeBoeuf v. WCAB* (en banc) 48 CCC 587, "a permanent disability rating should reflect as accurately as possible an injured employee's diminished ability to compete in the open labor market." It was noted that a correct PD rating involved, per *Mihesuah v. WCAB*, 41 CCC 81, "consideration of the entire picture of disability and possible employability." It was further noted under multiple authorities that while the DEU rating schedule rating was prima facie evidence of permanent disability, it could be rebutted by competent vocational expert opinions to the effect that the underlying rating did not accurately reflect the injured worker's true ability to participate

in retraining and successfully return to competitive employment in the open labor market. (See generally Exh. 3, pp. 14-20.)

Ms. Wilson took note of the applicant's ongoing difficulties with carrying out basic activities of daily living due to his amputation and injuries. In considerable detail, she summarized the restrictions and impairments noted by the various reporting experts in the case. (Id. at pp. 22-26.) She also discussed that multiple injuries to different body part or body systems, such as the significant physical and psychological injury found herein, can have a compounding or additive effect. She wrote: "When a vocational expert considers these matters together, the sum is always greater than the additional parts. The real test is not some 'mythical' or 'potential' job but real placement in the real world and see what the real loss of earning capacity is. Therefore, in the "Real World' Mr. Manvelian with his multiple impairments would be unable to sustain productive and competitive gainful employment and therefore, he is unable to compete with in the open labor market and does not have any future earning capacity." (Id. at pp. 26-27.) At page 28 of her report, Ms. Wilson restating her opinion that the applicant "has at present no consistent and stable future earning capacity."

As noted on reconsideration and as discussed in more detail below, defendant sought to place in evidence two vocational reports from vocational expert Frank Corso, who never actually met with or interviewed the applicant. These reports were prepared on or about 10/29/18, approximately a week before the first trial date and well after 8/22/18 mandatory settlement conference before the undersigned at which time discovery closed by operation of law. Because the reports were not prepared, identified or served prior to the MSC, I excluded them from evidence at the time of trial. (See Minutes, 1l/6/19, p. 4, lines 1-20.)

I also ruled at trial that Mr. Corso would not be permitted to testify in lieu of the reports, citing rule 10606.S(a) noting that testimony of vocational experts was disfavored and would only be allowed upon good cause which I did not find in this case. I also indicated, over defendant's objection, that it appeared defendant may have foresworn objection to the trial being set from the 8/22/18 MSC based on a tactical gamble that this might pave the way for in-person testimony in rebuttal to Ms. Wilson's written findings pursuant to rule 10606.S(a). Accordingly, I also determined that any error in excluding Mr. Corso's underlying reports may have been invited by defendant. (Ibid.)

Findings and Award at Trial

With regard to the primary PD issue, I determined that the findings of the orthopedic evaluators and Dr. Mahnovski, which would arguably lead to a PDRS (Permanent Disability Rating Schedule)-based permanent disability award of less than 100%, were successfully rebutted by the well-considered findings of vocational expert Wilson that the applicant was not amenable to being retrained to return to any available job within the open competitive labor market. Accordingly, I found the applicant to be 100% disabled without apportionment, leading to an award with an estimated present value per DEU computations of $1,197,227. The defendant's reconsideration petition followed.

III
DISCUSSION

Reasons for Finding of 100% PD in the Opinion on Decision

In my opinion on decision, I gave the following reasons for finding the applicant permanently and totally disabled. Because I believe that may of my reasons are responsive to defendant's contentions on reconsideration, I am quoting from the opinion as set forth below:

> "It has long been recognized that 'a disability rating "should reflect as accurately as possible an injured employee's diminished ability to compete in the open labor market."' (*SCIF v. WCAB* (*Devereaux*), 84 CCC 423,425, quoting from *LeBoeuf v. WCAB*, 48 CCC 587.) Thus in order to correctly and accurately assign the proper permanent disability rating herein, the trier of fact and law must do more than simply mechanically apply a DEU rating without fm1her discussion or review.
>
> "Vocational expert Wilson's report, at pages 14-20, contains an illuminating and accurate discussion of the role that the WCJ plays in determining the correct level of pe1manent disability.
>
> "As Ms. Wilson's discussion makes clear, while the rating per the DEU schedule is prima facie evidence of permanent disability, it is not the final word on the subject. As noted in *Mihesuah v. WCAB*, 41 CCC 81, 'the final rating will be the result of the entire picture of disability and possible employability.' As indicated in *Glass v. WCAB*, 45 CCC 441, 'the Board may not rely on alleged limitations in the rating schedule to deny the injured worker a permanent disability award which accurately reflects his true disability.'
>
> "Exactly what the case would rate via strict application of the DEU schedule presents some interesting questions but none that I believe to be dispositive of the case. I have reviewed defendant's extensive and very energetic trial brief but my overall sense is that it does not match up well with the facts of the case. Yes, the applicant does still have his thumb but it is severely compromised by limited motion and as Dr. Lesin points out, there is 'nothing for the thumb to work against.' Dr. Younai, the MPN orthopedic treater, has repeatedly described the applicant's thumb as dysfunctional. Dr. Lesin, a hand expert orthopedic MD who has practiced for 41 years, is firmly of the opinion that 'There is no work that the applicant can do using his right hand.' On that basis, he has [per his cross-examination] assigned a 90% upper extremity rating to the amputation, the same as would be given for a full hand amputation.

Interestingly enough, Dr. Younai, the employer's MPN treater, comes to exactly the same conclusion and assigns a full 90% upper extremity rating, based on 'right hand total amputation, except thumb, which is total dysfunctional.'

"With regard to the actual physical injury, there are possibly additional disputed ratings based on loss of wrist motion and/or disfigurement and/or pain factors. As to these, I am unable to find the two page worksheet referred to in both Dr. Lesin's report and deposition in either document or anywhere else in the Board's electronic file. However, whether these added impairments might apply is basically a moot issue in my view because, as discussed below, I consider any DEU rating based on the functional amputation of the right hand and psychiatric factors found by Dr. Mahnovski to be rebutted by Ms. Wilson's findings that the applicant is not amenable to vocational retraining or any foreseeable new position within the open labor market.

"The psychiatric PD has been assessed at 24% WPI by PQME psychologist Mahnovski. Using what I believe to be the baseline rating of 90% upper extremity impairment or 54% WPI for the amputation, this physical aspect of the injury rates out to 74% after adjustment. The psychiatric component of 24% WPI rates out to 26%. Combining the two under the CVC yields 81 % ....

"However, as discussed in some detail above, the inquiry does not end there. Ms. Wilson's report contains an extensive discussion of the manner in which the applicant's multiple orthopedic and psychiatric impairments have an additive effect in terms of his overall impairment. It is difficult enough to imagine that the claimant, a virtual major hand amputee, could compete successfully on the open labor market with a two-handed individual for any available position. Dr. Mahnovski correctly notes that the applicant's 'loss of limb has severe implications for the ability to perform activities of daily living.'

"Even more severe, I believe, is the impact on one's ability to compete successfully for work with able-bodied individuals. It is noted that it is the applicant's major hand which is effectively gone and that per his unrebutted testimony, he has trouble even signing his name with his non-dominant hand. He has been described as being on 'heavy medication' and has credibly described severe pain complaints in his once-mangled hand. The applicant cannot perform basic activities such as buttoning a shirt or cutting with a pair of scissors without a great deal of difficulty.

"Combined with his physical impairments is his undisputed psychiatric impairment with a GAF score of 54, putting him in the range of individuals who, even if working, would have 'moderate difficulty' getting along with coworkers. Dr. Mahnovski noted that during the evaluation, the applicant 'presented with observable physical and mental fatigue.' In connection with the applicant's test results, Dr. Mahnovski observed that, 'Because he is likely to question and mistrust the motives of those around him, working relationships with others are likely to be very strained, despite the efforts of others to demonstrate support and assistance.' Thus the applicant faces a 'double whammy' of severe physical compromise and psychiatric decompensation in the face of formidable challenges any open labor market position would present.

"Ms. Wilson's report is not perfect and does give rise to some concerns, several of which are noted in defendant's trial brief. For example, Ms. Wilson takes into account sitting restrictions which do not make a lot of sense for this type of injury. However, the fact remains that in my view no job has been identified that this applicant could be retrained for that he would have a reasonable likelihood of holding in the open labor market where other more able-bodied individuals are readily available to do the same work. Much is made of the applicant's background in food service but it is hard to imagine a one-armed individual functioning successfully in this hand-intensive field.

"In this type of case, jobs are proposed that are largely mythical in my view such as 'information clerk' or 'greeter' but these positions are seldom as simple as they seem, typically requiring a variety of security and/or paperwork and/or other responsibilities, or the jobs themselves are reserved for recuperating injured workers within the organization in question.

"I further note that if one adds rather than combines the (arguably higher) orthopedic disability of 74% and the psychiatric disability of 26%, one ends up with 100%. I am not relying per se on an additive principle pursuant to *EDMUB v. Kite* (78 CCC 213) and numerous other decisions but I do note Ms. Wilson's opinion that there is an additive effect and that this type of analysis is corroborative of my conclusions. Rather, I am persuaded that Ms. Wilson's determination that the applicant cannot be retrained to an open labor market position effectively rebuts the DEU rating and that a preponderance of evidence supports a 100% award. Alternatively, I believe Ms. Wilson's findings support a determination of total PD 'in accordance with the fact,' which is

permissible for post-2012 injuries pursuant to LC secs. 4660. l(g) and 4662(b).

"While in determining disability, a judge may not weigh in such factors as education or economic circumstances, I do not believe those play a role there. The applicant had a very steady work history at a variety of positions prior to the tragic incident herein. As discussed below, I cannot see how any factors other than the industrial injury have contributed to the applicant's unemployability." See Opn. on Decision, 9/19/19, pp. 7-11.)

Additional Responses to Defendant's Contentions on Reconsideration

While I believe the above discussion is responsive to many of defendant's concerns, I do have the following additional comments in response to the contentions raised on reconsideration.

Rating of Orthopedic Disability Based on Drs. Younai and Lesin

While apparently not disputing the psychiatric rating of 26% as discussed above based on Dr. Mahnovski's findings, defendant does challenge my assumption that the proper rating of the findings of the orthopedists in this case is 76%, based on 54% WPI. (Combining the two under CVC would yield 81 % as noted above.)

Of course I did not ultimately rely on these ratings but rather on the rebuttal to these ratings by vocational expert Laura Wilson. However, defendant apparently argues at page nine of its petition that the correct medical rating is 54% upper extremity impairment, which works out to 32% WPI, which in turn would lead to a 42% PD rating for the hand injury. If f combined with the psychiatric injury under the eve, this hand rating would lead to overall PD of 57% rather than 81 % PD under my computations. Accordingly, it can be argued by defendant that the 100% rating based on Ms. Wilson's opinions is significantly out of line with the underlying PDRS rating and suspect on that basis.

However, I do not agree with defendant's characterization of the hand injury as a 54% upper extremity impairment under the PDRS rather than a 90% upper extremity impairment as I have found. This is for several reasons.

First of all, defendant's theory is not supported by any authorized reporting expert in this case. The sole doctor to endorse this theory is non-MPN unauthorized treater Marvin Pietruszka, M.D., who lists himself as a "Professor of Pathology." (Exh. 8, p. 12.) However, I have already ruled in connection with the earlier trial in this case that I may not rely on any of the non-MPN treaters pursuant to Labor Code section 4605, unless these findings are supported by authorized physicians, which they are not. (See 11/15/17 Minutes of 10/30/17 Hearing and Findings of Fact.)

Second, I believe that a medical rating of 90% upper extremity impairment or 54% WPI based on the hand injury is quite amply supported by the seven page permanent and stationary report of hand specialist Dr. Sean Younai dated 2/15/16, who saw the applicant approximately 25

times and operated on his hand at one point. Dr. Younai was part of the employer's own medical provider network. It is notable that defendant actually offered this report in evidence as its Exhibit D. Interestingly, Dr. Younai did not rely on table 16-4 regarding amputations perse but rather on table 16-1 which relies on percentages of impairment for the various digits. While noting that the applicant survived the accident with a vestigial thumb, Dr. Younai repeatedly described this thumb as "dysfunctional" or "total dysfunctional." (See generally Exh. e.) It is clear that Dr. Younai reviewed table 16-1 and determined that there was 100% impairment of the applicant's thumb. The well-considered opinion of a single expert is sufficient to support a given medical rating.

Nowhere in defendant's petition is it argued or shown that the applicant has any meaningful use of his thumb, or the applicant has any greater ability to perform activities of daily living with his pain-producing, largely frozen and unopposable thumb than another individual whose thumb was fully amputated. The rating schedule itself provides that "If an impairment based on an objective medical condition is not addressed by the AMA Guides, physicians should use clinical judgment, comparing measurable impairment resulting from the unlisted objective medical condition to measurable impairment resulting from similar objective medical conditions with similar impairment of function in performing activities of daily living. (AMA Guides, p. 11.)" (See PDRS, Jan. 2005, p. 1-4.)

Here there is the objective fact of a largely frozen thumb with no fingers to work against. It is Dr. Younai's carefully considered opinion that this is equivalent to a total loss of use of the thumb. Dr. Younai does not provide a detailed explanation of his determination that the thumb is "total dysfunctional" but this conclusion is amply corroborated by other evidence in the record, including the opinion of Dr. Lesin that, "There is no work that Mr. Manvelian can do using his right hand. He is completely limited to left-handed work." Overall, I believe Dr. Younai has given us a valid and well-considered analysis falling fully within the AMA guides and PDRS which is properly followed in this case.

It is worth noting that the 90% upper extremity rating found by Dr. Younai is also supported by table 16-18 of the AMA Guides, which clearly states that a 100% hand impairment is equivalent to a 90% upper extremity impairment. At least one commentator has opined that table 16-18 "can be used as an elegant alternative rating method for an upper extremity joint dysfunction." (Rassp, Lawyer's Guide to the AMA Guided (2019 ed.), p. 3-191.) Although this was not the table specifically relied on by Dr. Younai, I see no substantial basis for treating this matter differently depending on whether table 16-1 or 16-18 is employed to cover the same impairment. To assign a substantially lower rating to the applicant merely because of the presence of a nonfunctional and nonusable thumb would simply elevate form over substance.

In my own view, the assignment of 90% rating to the loss of use of the hand and nonfunctional thumb was based on a "strict" application of the AMA guides, particularly table 16-1 or alternatively table 16-18 considered in conjunction with the PDRS language quoted above, making a separate *Almarez-Guzman* analyses unnecessary. Dr. Younai relied specifically on a *hand impairment* table based on a *hand* injury. However, it is reasonably clear that an *Almarez-Guzman* analysis would lead to the same outcome.

Finally, it is urged that because a two page worksheet intended to be appended to Dr. Lesin's orthopedic PQME report is missing from the record, this justifies reversal and remand of this entire five year old case. This of course, could serendipitously allow the introduction of defense rebuttal vocational reporting, not to mention, on behalf of the applicant, further QME evaluations in the specialties of internal medicine, neurology and dentistry as specifically recommended by QME psychologist Mahnovski in her 2/27/18 report. However, I have not been persuaded that such steps are necessary to accomplish substantial justice in this case.

It should be noted that I am not relying on Dr. Lesin's findings in any event, but rather on vocational expert Laura Wilson who, in my view, has successfully rebutted the likely rating coming from the reporting of orthopedic treater Dr. Younai and psychological QME Mahnovski. Thus, whether or not we have Dr. Lesin's impairment rating sheet is basically a moot point in terms of the outcome of the case now up on reconsideration. Also, Dr. Lesin made it clear in his cross-examination that he assigned a 90% upper extremity impairn1ent to the amputation component of the injury, the same as that assigned by Dr. Younai.

Obviously defense counsel could have queried Dr. Lesin further about this opinion upon cross-examination but chose not to do so. It is notable to this judge that defendant now argues this two page worksheet is a document of great importance, yet pursued little inquiry over it at the deposition where it was produced, nor did defendant take any steps to attach it as an exhibit to the deposition. Of course, had this document been included, it would have been supportive of a higher degree of medical impairment (based on wrist, pain and disfigurement add-ons) than that found by Dr. Younai, whose medical impairment rating I relied on in analyzing the issues. I am not sure on what basis defendant can now claim reversible error based on missing documents which, had they been included, would only have been helpful to the applicant.

To sum up, I believe I analyzed the question of medical impairment under the PDRS correctly in concluding that it would come to 81% based on a "strict" application of the AMA guides. While I agree that the worksheet of Dr. Lesin's discussed above should have been included as part of the record, its absence is not greatly significant in my view where Dr. Lesin explained its contents at deposition and Dr. Lesin was not relied on in any event.

Reliance on the Opinions of Laura Wilson as Rebuttal to the PDRS

I would be the first to admit that vocational expert Laura Wilson's 8/10/17 report is not a model of forensic analysis. Some of the restrictions and impairments that she relied on seem to be based more on the applicant's own account of what he can and cannot do than any actual medically imposed restrictions. There are quantifications of various activities in connection with the computer analysis of available occupations that are not well-explained. We are simply told that the computer analysis of available occupations supported Ms. Wilson's ultimate conclusions rather than being provided with any discussion of potentially available jobs and why they are not suitable.

The report does contain a strong discussion of the role of vocational experts in cases such as this. Also, a vocational report does not have to be bullet-proof to be followed in a WCAB case. It does have to comprise substantial evidence which is reasonable, credible and of solid value and it does have to put forth a more persuasive assessment of the applicant's employability than what

might otherwise be inferred from the PDRS rating. I believe Ms. Wilson's report meets these criteria and is properly followed in this case.

I would agree that Ms. Wilson's efforts to get the applicant a job retraining voucher are arguably inconsistent with her conclusions that the applicant is not amenable to job retraining and re-employment. Nevertheless, I do not think these errant comments change the validity of Ms. Wilson's conclusion that this severely physically and psychologically damaged individual is quite unlikely to successfully compete for employment as a one-handed person when other two-handed individuals are available in abundance.

It may also true that the applicant's complaints about difficulty sitting and standing, etc. found in Ms. Wilson's 8/10/17 report are not endorsed in the orthopedic reporting, and that some other findings such as gastritis are based on the opinions of unauthorized, non-MPN treaters. However it is well established that the applicant is significantly psychologically damaged and has a major hand that has been rendered useless. There is also credible evidence that he suffers from ongoing fatigue, pain, and difficulty concentrating that would make it quite difficult to attend to tasks methodically. With or without restrictions against sitting, standing, etc., I find it reasonable and credible that an individual in Mr. Manvelian's position cannot be reasonably expected to return to gainful employment.

Ms. Wilson did duly note the applicant's prior experience in the restaurant business. However, as I discussed in my opinion on decision, it has not been explained how a psychologically impaired individual without use of their right major hand would be able to hold a food service job based on a prior restaurant job with limited customer contact which consisted of "serv[ing] food and clear[ing] plates." (Exh. 18, p. 34.)

Defendant raises two other objections as well to Ms. Wilson's reporting which I do not find meritorious.

Defendant contends the recent Court of Appeal decision in *Department of Corrections v. WCAB (Fitzpatrick*), 83 CCC 1680 compels a different outcome than that which issued herein. However, nothing in Fitzpatrick precludes vocational rebuttal of a scheduled PDRS rating where the vocational assessment more accurately assesses ability to compete in the open labor market. In Fitzpatrick, error was assigned and the matter was remanded for further proceedings after the trial judge relied on a medical expert's ad hoc opinion that the applicant was 100% disabled, where this opinion was not supported by a 100% PDRS rating. Here I am relying squarely on a vocational opinion entered in evidence to rebut the PDRS rating. Such vocational rebuttal is permissible under multiple decisions, including but not limited to *Costa v Hardy Diagnostic*, 71 CCC 1797; *Ogilvie v. WCAB*, 76 CCC 624 and *Contra Costa Co. v. WCAB* (*Dahl*), 80 CCC 1119.

Furthermore, Fitzpatrick dealt with a 2012 injury to which Labor Code section 4660.1 did not apply, as section 4660.1 only deals with injuries taking place after 1/1/13 as in the present case. As the *Fitzpatrick* court itself points out, section 4660.1 (g) provides that "Nothing 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 TPD injury "shall be determined in accordance with the fact." Therefore it is my best

reading of *Fitzpatrick* that judges may rely on the totality of substantial evidence in post-2012 cases in support of a finding of 100% PD.

Defendant also contests the role of the "*Kite*" case (*Athens Admin. v. WCAB*, 78 CCC 213) and its ample progeny in determining the correct PD value in this case. As defendant acknowledges, I did not rely specifically on *Kite* but did note that a *Kite* analysis corroborated my determination where the orthopedic PD· based on Dr. Younai of 74% and the psychiatric PD found by Dr. Mahnovski of 26% neatly added to 100%.

In questioning the role of the *Kite* case, defendant has not presented any evidence or argument that the applicant's fatigue, difficulty with working with others and withdrawal arising from his psychiatric injury are similar or overlap with orthopedic impairments arising from the functional loss of his right major hand. Board panels have noted that the CVC method of combining disabilities is just one approach to this issue which is not to be applied mechanically in every case. While in most instances adding rather than combining disabilities under the CVC has been explicitly supported by medical findings, WCJs have also been upheld in making their own determinations based on the evidence presented that an additive approach is appropriate for multiple and differing disabilities. (See, e.g., *Martinez v. Pack Fresh Processors*, 2017 Cal.Wrk.Comp.P.D. LEXIS 492; *Sanchez v. Dept. of Corrections*, 2015 Cal.Wrk.Comp.P.D. LEXIS 482.) The *Martinez* case is of particular interest because, like the present matter, it involved a psychiatric impairment being considered in conjunction with a severe major extremity impairment arising, in *Martinez*, from complex regional pain syndrome (CRPS).

In connection with the appropriateness of a *Kite* analysis in this case, I note that PQME Mahnovski explicitly determined that any issues of vocational feasibility were best determined by a vocational expert. Vocational expert Wilson, in her report, includes a fairly detailed discussion of the additive and synergistic effect of the multiple impairments suffered by the applicant. Although, again, I do not rely explicitly on a *Kite* analysis, I am also not persuaded it would be erroneous to reach a determination of 100% PD in this case based on addition of the orthopedic and psychiatric PDRS values as discussed above.

Exclusion of Defendant's Post-MSC Vocational Reporting and Vocational Expert Testimony

Finally, defendant assigns error to my determination at trial that 1) defendant's post-MSC vocational reporting from expert Nick Corso would not be admitted in evidence and 2) that Mr. Corso would not be permitted to testify at trial even though he was named as a witness at the pretrial conference.

Specifically, I ruled (and documented my rulings in a very detailed record reflection on the first day of trial), that the reports of Mr. Corso, who never actually met with the applicant, would not come in for the simple reason that they were prepared and served after the MSC despite ample time to prepare them prior to the MSC. Critical to my ruling was the fact that I was unable to document any objection to the applicant's declaration of readiness or any objection at the time of the MSC to the matter being set over for trial, an event which closes discovery as a matter of law. (Minutes. l 1 /6/18, p. 4, lines 1-20.)

At the first day of trial on 11/6/18 when the admissibility questions regarding Mr. Corso were taken up, defendant made a colorable argument that it was taken by surprise at the MSC by the applicant's vocational reporting of Ms. Wilson, which had not been provably served on defendant prior to the MSC itself. Had this argument been presented at the MSC, there is a very good chance I would have found it meritorious and continued the matter or taken it off calendar to allow for defense vocational rebuttal. However, as I clearly indicated in the minutes of the 11/6/18 trial proceedings, no documented objection was raised at the 8/22/18 MSC to the setting of the matter over for trial and the attendant closure of discovery. (Ibid.) Nor was any documented objection raised at the MSC to the admission of Ms. Wilson's report based on late service.

At this first trial date of 11/6/18, defendant argued that its reports from Mr. Corso should come into evidence based on the arguably belated service of Ms. Wilson's report at the 8/22/18 MSC. Defendant also argued under rule 10606.5(a)[1] that, based on the same belated service, an exception should be carved out to the usual rule against vocational testimony and Mr. Corso should be permitted to present live testimony in response to Ms. Wilson's paper report.

What stood out in my evaluation of this issue was the failure to object to the matter going forward to trial at the 8/22/18 MSC where Ms. Wilson's report, per defendant, was first served. Therefore, I felt that any objection or requests for continuance based on the belated service of Ms. Wilson's report were foreclosed. The failure to object, in my view, was either through oversight or for tactical reasons. Given that defendant was represented by competent counsel at the MSC, I did not think that any such oversight constituted due diligence which should allow for late reporting or allow for vocational testimony in lieu of such reports. It also appeared plausible that objection was foresworn for tactical reasons as defendant was apparently counting on the provisions of rule 10606.5(a) to present live testimony from Mr. Corso in response to Ms. Wilson's paper report. It is noted that defendant did list Mr. Corso as a trial witness, from which one could certainly infer defendant's knowledge of a vocational feasibility issue being raised at trial.

Whether the lack of an objection was due to oversight or tactics. I did not see a basis further delay of this long-open case and/or conferring a tactical advantage on defendant where the same defendant had previously been silent in the face of a discovery closure. I clearly documented my reasons for my ruling at some length in the minutes of the 11/6/18 trial at page four.

Defendant now asserts for the first time in a sworn reconsideration petition that there the defense *did* in fact object to the trial going forward from the 8/22/18 MSC but that this judge failed to make any record of this issue in the MSC statement or accompanying minutes. In essence, defendant now asserts that this judge, who also handled the MSC, breached his duty under Policy and Procedural Manual sec. 1.45 to "ensure that the [pretrial conference statement] is complete and contains the following information for each case being set: ... (2) the issues raised .... " In my respectful view, this argument is meritless.

I admit I have no independent recollection of the MSC. (Interestingly, the same appears to be true of petitioner's attorney, as the declarant who verified the reconsideration petition, Edward Tsui, is a different person than the individual who appeared for defendant at the MSC, Michael

[1] This rule reads in relevant part, "A continuance may be granted for rebuttal testimony if a report that was not served sufficiently in advance of the close of discovery to permit rebuttal is admitted in evidence.

Pantig.) However, it is my habit as a pretrial conference judge to record any objections to trial going forward and my reasons for denying such an objection. The conferences do get busy and sometimes I will not remember earlier discussions over the course of a long morning but I will *always* enter such an objection and my ruling in the minutes or pretrial conference statement if asked to do so at the time of disposition.

Putting my own habits aside, I made it quite clear in the text of the 11/6/18 court reporter's minutes that I was denying defendant's motions regarding their proposed vocational expert because of the same defendant's failure to object to the trial setting at the prior MSC. These court reporter's minutes of the 11/6/18 trial proceedings were duly served on the parties on 11/27/18. At the second, subsequent trial date of 8/15/19 both Mr. Pantig and Mr. Tsui appeared for defendant and neither raised any objection to my 11/6/18 minutes or sought their correction.

As noted above, the assertion of an unrecorded objection to trial being set from the MSC is being raised for the first time on reconsideration, rather than at the trial level at which time a response could have been made. Assertions not timely raised at the trial level which are raised for the first time on reconsideration are ordinarily deemed waived. (See *Cottrell v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 760. writ denied; *Sonoma County Office of Education v. Workers' Comp. Appeals Bd.* (*Pasquini*) (1998) 63 Cal.Comp.Cases 877, writ denied; *Paula Insurance Co. v. Workers ' Comp. Appeals Bd.* (*Diaz*) 62 Cal.Comp.Cases 375, writ denied.) I do not believe an exception to this rule should be made in this case.

V
RECOMMENDATION

It is respectfully recommended that the defendant's reconsideration petition be denied.

Respectfully submitted,

DANIEL A. DOBRIN
Workers' Compensation Judge