WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JAVIER PARAMO, *Applicant*

vs.

LAMB CHOPS, INCORPORATED, SECURITY NATIONAL INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ9714013; ADJ9895296; ADJ9895387
Bakersfield District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and the Opinion on Decision 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 and Opinion, which are both adopted and incorporated herein, we will deny reconsideration.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*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 determinations. (*Id.*)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
CONCUR NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 21, 2021

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

JAVIER PARAMO
BARKHORDARIAN LAW FIRM
TOBIN LUCKS, LLP

PAG/*pc*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

RECOMMENDATION: DENY

INTRODUCTION

Trial in the primary proceedings of the above-captioned case was held on July 21, 2021. The matter was thereafter submitted on August 17, 2021 to Workers' Compensation Judge Christopher M. Brown. A Rulings on Evidence, Findings of Fact, Awards and Orders; Opinion on Decision was issued on September 30, 2021. Defendant filed a timely, verified and sufficiently served Petition for Reconsideration.

Defendant's Petition does not state the legal basis for its filing but the arguments are consistent with Labor Code § 5903(a), (c) and (e). Specifically, Petitioner argues that its proposed Exhibit N should have been admitted as Applicant did not state an objection at the MSC, the Award of Permanent Total Disability Indemnity and the Allowance of Applicant's Attorney Fee from the Permanent Disability Indemnity should be set aside.

FACTUAL HISTORY

The parties stipulated that on August 29, 2014 Javier Paramo (Applicant) suffered an injury arising out of and in the course of his employment with Lamb Chops, Inc. (Employer) to his ribs, right shoulder, internal injuries and a stroke. (MOH Page 1 Lines 13 – 18) The specific injury occurred when the truck Applicant was driving rolled onto its side. Applicant's stroke occurred on August 31, 2014 in the form of right hemisphere cerebrovascular incident that has resulted in severe impairment of Applicant's ability to perform activities of daily living. Defendant denied the right hemisphere cerebrovascular incident cause by Applicant's admitted industrial stroke was a brain injury.

A Finding of Fact was issued that Applicant suffered a brain injury. (FOF No. 1, OOD Page 5) Applicant's stroke on August 31, 2014 was found to be a compensable consequence of his industrial injury on August 29, 2014. (FOF No. 3) Defendant has not asked for Reconsideration of these finding and Defendant's Petition agrees that Applicant had significant brain injury. (Petition Page 16 Line 5 – 7) The WCJ determined Applicant's brain injury produced substantial impairment that created a Labor Code Section 4662(a)(4) conclusive presumption he is permanently totally disabled. (OOD Pages 10 – 12)

The parties listed Applicant's Average Weekly Wage as an issue with the employee claiming $1,207.57 per week as a permanent employee and Defendant asserting $1,207.57 per week as a seasonal employee. (MOH Page 3 Lines 18 – 21) Defendant did not assert what the alleged season's start and end dates were

in the Pre-Trial Conference Statement, at the time of Trial or in the Petition for Reconsideration.

Applicant collected animal feed at various locations and delivered it to various dairies. Sometimes Applicant drove his own truck to perform the job, at other times Applicant worked as an employee for Employer to perform the job duties. Defendant references Defendant's Exhibit L as earnings information. A notation from the employer in Exhibit L states Applicant had worked for Employer with his own truck for part of the year in 2014 and then was only placed on payroll in August of 2014. (Defendant's Exhibit L) Defendant paid Temporary Disability Indemnity benefits from August 29, 2014 to November 5, 2019 at the rate $805.04 per week. (Defendant's Ex. Q)

Applicant has not been employed since the date of the accident on August 29, 2014. The stroke on August 31, 2014 occurred while Applicant was at his home recovering from the accident. The Qualified Medical Examiners gave their expert opinions that the stroke was caused by a drop in Applicant's blood pressure caused by the medications prescribed for his industrial injury.

There was no finding of permanent total disability pursuant to Labor Code § 4662(b).

THE ORDER, DECISION AND AWARD DO NOT EXCEED THE POWERS OF THE BOARD

Defendant asserted that the Order, Decision or Award exceed the powers of the Board. Jurisdiction over the issues presented is created by Labor Code § 4604 and developed by Title 8 CCR 10330.[1] The WCJ has jurisdiction to hear this case and authority determine all issues of fact and law presented as well as the authority to issue findings, decisions, awards and orders necessary for full adjudication of the case. Defendant has not established a basis for Reconsideration pursuant to Labor Code § 5903(a).

APPLICANT PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT HE WOULD WORK YEAR ROUND AS LONG AS WORK WAS AVAILABLE AND DEFENDANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE APPLICANT WAS A SEASONAL EMPLOYEE

Defendant has not asserted what the season should be. Defendant asserts that its Exhibit L establishes Applicant's annual earnings. Employer clearly has records of other payments to Applicant made while Applicant drove his own truck. These records were not provided as exhibits. (Defendant's Ex. L) Defendant's characterization of Defendant's Exhibit L as a statement of

[1] Labor Code § 4604 & Title 8 CCR § 10330

"Applicant's earnings for the entire year" from Employer in the year proceeding the date of injury misstates the evidence. (Petition Page 7 Lines 16 – 18) Defendant's Exhibit L has a clear notation apparently made by Employer that Applicant had worked for Employer using his own truck.[2] (Defendant's Ex. L) Applicant's son and wife credibly testified that Applicant would drive his own truck for Employer and drive trucks owned by employer. (OOD Page 9) The evidence convincingly established Applicant's employment was not limited to the sampling provided by Defendant. However, the payroll records do establish Applicant was earning $1,207.57 per week at the time of his injury on August 29, 2014.

Defendant asserts that Applicant was a seasonal worker without identifying the asserted season. Applicant's wife credibly testified that Applicant would work delivering different crops as long as there crops available and that there might be breaks between the available crops. She also credibly testified that Employer sent Applicant out of state when crops were not available in California. (SOE Page 10 Lines 18 – 24) Applicant's son credibly testified that Applicant worked at least ten months a year. (SOE Page 8 Lines 26 – 33) The credible testimony of Applicant's son and wife established that he would work as long as there was feed to deliver, and that he would work at least ten months a year. (OOD Pages 9 – 10) Defendant's Exhibit L confirms the credible testimony.

Both parties asserted Applicant's Average Weekly Wage was $1,207.57. The notation of off payroll earnings in Defendant's Exhibit L and Defendant's provision of Temporary Disability Indemnity at the full rate for over a full year combined with the credible testimony of Applicant's wife and son established by a preponderance of the evidence that Applicant worked full time, and not seasonally, earning $1,207.57 per week as of August 29, 2014. Therefore, the evidence does support the Findings of Fact, and the Findings of Fact do support the Awards.

THE RECORD CLEARLY ESTABLISHES THAT APPLICANT IS ENTITLED TO THE CONCLUSIVE PRESUPTION OF PERMANENT TOTAL DISABILITY CREATED BY LABOR CODE § 4662(a)(4) AND DEFENDANT FAILED TO PROVE APPORTIONMENT OF THE PERMANENT TOTAL DISABILITY IS LEGALLY PERMITTED OR VALID

Defendant agrees in its Petition that Applicant has a significant brain injury. (Petition Page 16 Line 5 – 7) This creates the conclusive presumption that Applicant is permanently totally disabled pursuant to Labor Code Section 4662(a)(4).

[2] Defendant's failure to provide a record of all payments made by Employer to Applicant in the year preceding the industrial injury creates a negative inference as it appears as though earnings information is being withheld.

There is no prior Award of permanent disability to create apportionment pursuant to Labor Code § 4664.

The WCJ determined that Labor Code § 4663 may not be used to apportion the permanent total disability created by the conclusive presumption of 4662(a) based on:

> The case of *City of Santa Clara v. W.C.A.B.* (*Sanchez*) 76 Cal. Comp. Cases 799 (2011) wherein Writ was denied by the Sixth Appellate District Court of Appeal is persuasive authority on the issue of apportionment of the Labor Code § 4662(a) conclusive presumption of permanent total disability pursuant to labor Code § 4663. The applicant in Sanchez had an orthopedic industrial injuries to his knees and spine. He suffered a stroke as a complication of a knee surgery and was determined to be 100% permanently totally disabled pursuant to the presumption created by Labor Code Section 4662 for brain injuries. [Fn. omitted] The Applicant in this case suffered a stroke resulting in a brain injury as the result of a complication caused his treatment of the underlying orthopedic injury. The fact patterns leading to creation of the Labor Code § 4662(a)(4) presumption align perfectly.
>
> The Board panel in *Sanchez* issued a split decision with the majority determining the conclusive presumption created by Labor Code §4662(a)(4) is not subject to apportionment pursuant to Labor Code § 4663. The dissenting opinion indicated 4663 apportionment might be applicable as Labor Code § 4662 is not listed in Labor Code § 4663(e). [Fn. Omitted] This WCJ finds the presumptions of injury created by code sections listed in Labor Code 4663(e) distinguishable from presumption disability created by Labor Code § 4662(a) for three reasons. First, those presumptions are all rebuttable and not conclusive. Second, those presumptions all apply to causation of the injury and not causation of the disability. Finally, those presumptions create special protections for public safety employees while the 4662(a) presumption applies to all injured workers.
>
> The majority opinion in the panel decision in *Sanchez* was building on the reasoning established in *Kaiser Foundation Hospitals v W.C.A.B.* (*Dragomir-Tremoureux*) 71 Cal. Comp. Cases 538 (2006) (Writ Denied) wherein the Board determined the conclusive presumption of permanent total disability created by the applicant's bilateral loss of ability to use her hands was not subject to apportionment pursuant to labor Code § 4664. [Fn. Omitted] While 4664 apportionment is not at issue in this case, the determination that the conclusive presumption of total disability

> cannot be rebutted by a prior award of disability supports the determination that apportionment pursuant to 4663 is not applicable. (OOD Pages 11 – 12)

A public policy argument against apportionment of the permanent total disability also exists as liability would potentially shift to the Subsequent Injuries Benefit Trust Fund for the difference in Permanent Disability Indemnity owed by Defendant and the value of the Permanent Total Disability Indemnity.

In the alternative the WCJ found that the apportionment analysis was invalid. (OOD Pages 12-13) Dr. Krell's apportionment analysis because he changed from a finding of 100%apportionment to the industrial injury to a finding of 50%/50% apportionment without explaining how and why he picked these percentages and his opinion was found to be arbitrary and capricious in regard to apportionment. (OOD Page 13)

Petitioner also references the prohibition of apportionment of permanent disability that is created by medical care for an industrial injury. (Petition Page 16 Lines 7 - 12) The medical experts in this case determined that Applicant's stroke resulted from a drop in blood pressure caused by the pain medications he was prescribed for his orthopedic injuries. (OOD Pages 5 – 6, 10 – 11) Petitioner raised the bar against apportionment of permanent disability caused by medical treatment is not subject to apportionment. (*Hikida v WCAB* (2017) 12 CA 5th 1249, 45 CWCR 141, 82 CCC 679) (Petition Page 16 Lines 7 – 12) In *Hikida* the applicant was found to be permanently totally disabled as the result complex regional pain syndrome caused by carpal tunnel surgery. Applicant's disability in the *Hikida* case was found to be unapportionable even though the underlying carpal tunnel was subject to apportionment. In this case, Applicant's conclusively presumed permanent total disability was a result of the drop in blood pressure caused by his pain medications. (OOD Pages 5 - 6) The substantial mental incapacity caused by the stroke on August 31, 2014 is completely separate from the physical impairments caused by the auto accident on August 29, 2014. Therefore, *Hikida* is a controlling precedent and apportionment would not be legally valid even in light of the decision in *County of Santa Clara v. WCAB* (*Justice*) (2020) 49 Cal. App. 5th 605, 262 Cal. Rptr. 3d 876, 85 Cal. Comp Cases 467.

Petitioner agreed, after trial, that Applicant had a significant brain injury as a result of his stroke, which was admitted before trial, that gives rise to the conclusive presumption of permanent total disability created by Labor Code § 4662(a)(4). The WCJ determined based on persuasive authorities that the conclusive presumption of permanent total created by Labor Code § 4662(a) is not subject to Labor Code § 4663. The WCJ also determined the medical examiner's apportionment was arbitrary and capricious and not legally valid. Finally, as raised by Petitioner, apportionment of this permanent disability resulting from the brain injury caused by medical treatment that is new and

distinct from the initial industrial injury is legally barred pursuant to the reasoning advanced in *Hikida* and *Justice*.

EXCLUSION OF DEFENDANT'S PROPOSED EXHIBIT N WAS APPROPRIATE BECAUSE IT WAS AN UNVERIFIED AOE/COE INVESTIGATIVE REPORT ON AN ADMITTED INJURY

Defendant asserted it was prejudiced by the failure of Applicant to object to the admissibility of three proposed exhibits until the time of trial. Defendant was not prejudiced or denied due process as they were provided an opportunity to file a Post-Trial Points and Authorities on all issues raised at the trial.

Applicant objected to Defendant's Exhibits I, the undated print out of benefits, Exhibit L, undated earnings information, and proposed Exhibit N, the investigative report dated September 16, 2014. Applicant's objections to Exhibit I and L was overruled and they were received into evidence. (ROE 1 & 2)

Defendant's proposed Exhibit N was not admitted into evidence and Applicant's objection was sustained. (ROE 3) The WCJ determined it was not relevant to a disputed issue and it was not necessary for development of the record. It is marked for identification in the record for convenience of the Board to review at this time. The WCJ takes notice that injury AOE/COE was accepted by Defendant and the actual title of the document is, "Javier Paramo AOE/COE Investigation Report" and there is no verification or attestation as to its accuracy by any individual. The statement is essentially an interview of Preston Lamb, the owner Employer, Lamb Chops, Inc.

CONCLUSION

The credible testimony of Applicant's wife and son combined with Defendant's limited earnings record that includes an express statement that Applicant worked additional months prior to those recorded in the statement establish that Applicant was not a seasonal worker. The Defendant provided no evidence that driving a truck to deliver feed to dairy animals is seasonal work. Defendant and Applicant both asserted that Applicant would earn $1,207.57 per week while he was working. Defendant has not argued what the first day or the last day of the providing food for dairy animals season should be. Therefore, the evidence supports the finding that Applicant was not a seasonal employee and the mutual assertion to the AWW of $1,207.57 supported by the earning record provided by Defendant supports the Awarded Permanent Total Disability Indemnity based on an AWW of $1,207.57.

Applicant's significant brain injury creates a presumption of permanent total disability. The brain injury is a distinct event that resulted from a stroke on August 31, 2014 that is a compensable consequence as it was caused by the medical treatment for Applicant's specific injury on August 29, 2014.

Apportionment of permanent disability that causes a new unique injury and disability is not subject to apportionment pursuant to the reasoning in *Hikida* and *Justice*. The WCJ determined that the permanent total disability presumption created by Labor Code § 4662(a) is not subject to apportionment pursuant to Labor Code § 4663. The WCJ also determined the apportionment analysis of the PQME was arbitrary and not legally valid.

Defendant has not established a basis for Reconsideration pursuant to Labor Code § 5903 (a), (c) or (e). The Petition should be denied.

DATE: NOVEMBER 1, 2021
Christopher Brown
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

BURDEN OF PROOF

The party holding the affirmative on an issue bears the burden of proving it by a preponderance of the evidence.[1]

Defendant accepted Applicant's specific industrial injury of August 29, 2014 (ADJ9714013) wherein Applicant was involved in an accident while driving a truck. Defendant disputes that the nature and extent of Applicant's specific industrial injury on August 29, 2014 includes diabetes, high blood pressure, brain, head, hypertensive cardiovascular disease, type II hyperlipidemia, renal failure, lungs, psyche, spine, upper extremities and lower extremities. Applicant must prove by a preponderance of the evidence the disputed systems and conditions were directly injured on August 29, 2014 or are a compensable consequence of the specific injury.

Applicant claims to have sustained a separate injury arising out of and in the course of his employment with Employer on August 31, 2014 to his head, brain and nervous system. (ADJ9895296) Defendant denied liability for this specific injury, and Applicant must prove by a preponderance of the evidence this industrial injury occurred.

Applicant claims to have sustained a cumulative trauma injury during the period of August 28, 2013 through August 28, 2014 to his upper extremities, lower extremities, psyche and multiple body parts arising out of and in the course of his employment with Employer. (ADJ9895387) defendant denied liability for this cumulative trauma injury, and Applicant must prove by a preponderance of the evidence this industrial injury occurred.

[1] Labor Code §§ 3202.5 and 5705

Applicant raised the issue that his claims in ADJ9895296 and ADJ9895387 are presumed compensable. Defendant has asserted that these claims were denied in a timely manner. Applicant must prove by a preponderance of the evidence the facts that give rise to the presumption of injury. Then Defendant holds the affirmative on rebuttal of the presumption.

Applicant's Average Weekly Wage was raised as an issue. Applicant asserts he earned $1,207.57 per week as a permanent employee. Defendant asserts Applicant earned $1,207.57 per week as a seasonal employee.

Applicant holds the affirmative on the issue of his level of permanent disability resulting from each injury claimed. Defendant holds the affirmative of the issue of apportionment of Applicant's permanent disability.

APPLICANT'S OCCUPATIONAL WAS SHOWN BY A PREPONDERANCE OF THE EVIDENCE TO BE TRUCK DRIVER, OCCUPATIONAL GROUP NUMBER 350

The parties agree that Applicant was driving a truck for Employer on August 29, 2014 when he was involved in an accident wherein the truck partially rolled over. (SOE Page 7 Lines 1 – 7) Defendant asserted Applicant's Occupational Group Number should be 350. Applicant has asserted his Occupational Group Number should be 560 for a materials handler.

Applicant's son, Javier Paramo Jr, credibly testified that Applicant drove a truck delivering feed to dairies, and that the trucks were automated but Applicant would have to unload or fix the machine when it was broken. (SOE Page 9 Lines 19 - 23) Applicant testified at his deposition that a machine would fill the truck with pastures for that dairies, cow food, and it would be dumped at the dairy by way of chains. (Applicant's Ex. 3 Page 18 Lines 1 – 16) Therefore a preponderance of the evidence establishes Applicant worked as a Truck Driver, Occupational Group Number 350.

INJURY AOE/COE

APPLICANT DID NOT PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THERE IS A PRESUMPTION OF INJURY IN ADJ9895296 OR ADJ9895387

Applicant holds the affirmative on the issue of creating a presumption of compensable injury. Applicant was in an accident on August 29, 2014 wherein the truck he was driving to deliver animal feed rolled. He was diagnosed with seven broken ribs. Injury arising out of and in the course of employment is not disputed for this specific injury. (ADJ9714013) Therefore, presumption of compensable injury is moot.

Applicant must prove by a preponderance of the evidence there is a presumption of compensable injury regarding his claim of specific industrial injury on August 31, 2014 and the cumulative industrial injury ending on August 28, 2014 in ADJ9895296 and ADJ9895387. Applicant has not filed DWC-1 claim forms for either of these injuries. Applicant activated the claims with the filing of Applications for Adjudication of Claim. The Application in ADJ9895296 was filed on March 27, 2015. Defendant filed an Answer that denied injury AOE/COE in this claim on April 20, 2015. (Court Exs. 1 & 2) The Application in ADJ9895387 was also filed on March 27, 2015. Defendant filed an Answer that denied injury AOE/COE in this claim on April 15, 2015. (Court Exs. 3 & 4) Therefore, Applicant did not prove by a preponderance of the evidence that there is a presumption of industrial injury in ADJ9895296 or ADJ9895387.

THE MEDICAL EVIDENCE ESTABLISHES BY A PREPONDERANCE OF THE EVIDENCE THAT APPLICANT'S CEREBROVASCULAR INCIDENT OF AUGUST 31, 2014 WAS A COMPENSABLE CONSEQUENCE OF HIS ADMITTED INDUSTRIAL INJURY ON AUGUST 29, 2014 AND NOT A SEPARATE INDUSTRIAL INJURY

Applicant suffered a stroke on August 31, 2014. An Application for Adjudication of Claim has been filed for this specific injury claiming injury arising out of and in the course of Applicant's employment to his head, brain and nervous system. The claim has been assigned ADJ9895296. Defendant has denied liability for this specific injury.

An Application for Adjudication of claim has been filed asserting a cumulative trauma injury occurred up to August 29, 2014 claiming injury arising out of and in the course of his employment to his upper and lower extremities, psyche and unspecified multiple body parts, The claim has been assigned ADJ9895387. Defendant has denied liability for this claim.

Applicant was evaluated by Dr. Martin Krell, M.D. as a Panel Qualified Medical Examiner specializing in Neurological Surgery. Dr. Krell evaluated Applicant on November 6, 2015. Dr. Krell issued reports dated November 24, 2015 and September 30, 2017. (Applicant's Ex. 9, Defendant's Exs. A & B) Dr. Krell was deposed on February 5, 2016 and January 9, 2017. (Applicant's Ex. 1 & 2) Dr. Krell gave his expert medical opinion based on the history he obtained from and examination of Applicant along with the medical records he was provided.

Dr. Krell documents that on August 31, 2014 Applicant:

> [B]ecame sleepy or lethargic and was taken to a hospital where brain scans revealed a large right-sided infarction in the territory of the

right posterior cerebral artery. (Applicant' Ex. 9/Defendant's Ex. A Page 9)

Dr. Krell goes on to give his expert medical opinion that:

> The onset of this man's right-sided cerebral stroke of August 31, 2014 occurred in close proximity to the industrial injury of August 29, 2014 and can be considered to have been caused by the circumstances of August 29, 2014, even though there is no reported injury to his head nor was a CT brain scan performed during his initial medical evaluation on August 29, 2014.
>
> It is more likely than not that the truck roll over injury of August 29, 2014 would have caused sufficient physical and emotional distress to have precipitated his stroke by most likely an alteration in his blood pressure.
> (Applicant' Ex. 9/Defendant's Ex. A Page 11)

Dr. Krell testified at his deposition held February 5, 2016 that the stroke was caused by the accident of August 29, 2014. (Applicant's Ex. 2/Defendant's Ex C Page 37 Lines 14 – 16)

Applicant was evaluated by Dr. Gary Zagelbaum, M.D. as a Panel Qualified Medical Examiner in the field of internal medicine. Dr. Zagelbaum examined Applicant on January 18, 2017. He issued reports dated February 3, 2017, August 14, 2017 and November 5, 2018. (Defendant's Exs. E, F & G) He was deposed on June 19, 2018. (Defendant's Ex. H) Dr. Zagelbaum examined Applicant and reviewed substantial medical records to reach his expert medical opinion that:

> Mr. Paramo's primary internal medical problems include diabetes mellitus, hypertensive cardiovascular disease, renal failure, and cerebrovascular accident. Prior to his injuries, he already had pre-existing hypertension and diabetes with some level of renal insufficiency. However, based on available information, there is evidence that his injuries sustained from the accident on August 29, 2014 were associated with both the development of an acute cerebrovascular accident as well as worsening of his pre-existing kidney injury. Following this accident, there also appeared to be some worsening in is diabetic control and need for medication. (Defendant's Ex. F Page 65)

Dr. Zagelbaum's expert medical opinion supports Dr. Krell's that Applicant's stroke of August 31, 2014 was a compensable consequence of the specific industrial injury of August 29, 2014 and not a separate injury. Therefore, Applicant did not prove by a preponderance of the evidence that he suffered an

injury arising out of and in the course of his employment with Employer on August 31, 2014.

DR. KRELL'S AND DR. ZAGELBAUM'S EXPERT MEDICAL OPINIONS ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE APPLICANT DID NOT SUFFER A CUMMULATIVE TRAUMA INJURY FROM AUGUST 28, 2013 THROUGH AUGUST 28, 2014

Dr. Krell was required to address all issues created by the Application for Adjudication of Claims that were filed before his initial examination of Applicant. He gave his expert medical opinion that:

> The medical records do not document nor supply sufficient evidence for a continuous trauma injury from August 28, 2013 to August 28, 2014. (Defendant's Ex. A Page 11)

He explains clearly that Applicant's medical records do not reveal medical treatment for orthopedic issues prior to the specific industrial injury on August 29, 2014. He attributes causation of Applicant's seven broken ribs and low back injury and the stroke of August 31, 2014 to the specific injury.

Dr. Zagelbaum, as discussed below, attributes causation of Applicant's internal medical issues to preexisting nonindustrial factors and apportions worsening of the conditions to the August 31, 2014 stroke which was a compensable consequence of the specific industrial injury on August 29, 2014.

Therefore, Applicant did not prove by a preponderance of the evidence that he suffered an industrial cumulative trauma ending on August 28, 2014.

NATURE AND EXTENT

As discussed above, Applicant was evaluated by Dr. Gary Zagelbaum, M.D. as a Panel Qualified Medical Examiner in the field of internal medicine. Dr. Zagelbaum examined Applicant on January 18, 2017. He issued reports dated February 3, 2017, August 14, 2017 and November 5, 2018. (Applicant's Exs. 6, 7 & 8) He was deposed on June 19, 2018. (Applicant's Ex. 10)

Dr. Zagelbaum gave his expert medical opinion regarding the nature and extent of Applicant's injuries in his report dated August 14, 2017. He stated:

> In my prior report dated February 3, 2017, I noted Javier Paramo is 63-year-old male with a history of multiple internal medical problems including hypertensive cardio vascular disease, diabetes mellitus, a cerebrovascular accident, hyperlipidemia, renal failure requiring hemodialysis, restrictive changes in lung function, a

> history of pneumonia, and a history of motor vehicle accident with broken ribs. (Applicant's Ex. 7 Page 63)

Dr. Zagelbaum gave his expert opinion that Applicant's industrial accident of August 29, 2014 worsened some of his preexisting problems and led to both a need for medical care and permanent disability on an industrial basis. He expressly stated that:

> Prior to his injuries, he already had pre-existing hypertension and diabetes with some level of renal insufficiency. However, based on available information, there is evidence that his injuries sustained from the accident on August 29, 2014 were associated with both the development of an acute cerebrovascular accident as well as worsening of his pre-existing kidney injury. Following this accident, there also appeared to be some worsening in his diabetic control and need for medication. (Applicant's Ex. 7 Page 65)

He assigns Applicant's hypertension 30% Whole Person Impairment with 20% apportioned to pain associated with his industrial injuries and 80% to non-industrial factors. He states Applicant has 10% WPI from his diabetes. He indicates the diabetes was caused by non-industrial factors but the kidney disease caused by the diabetes including the renal failure were aggravated by the industrial injury. He assigned 95% WPI to Applicant's renal disease and associated impairment. He apportioned 20% of this impairment to the industrial injuries and 80% to non-industrial factors. He concludes with a final determination of issues related to Applicant's stroke being deferred to a neurological specialist. (Applicant's Ex. 7 Page 65 - 67)

Dr. Zagelbaum's expert medical opinion is based on his examination of Applicant, the history obtained from the medical records provided and the history he obtained. He explained both how and why he reached his opinion. His opinions are found to be substantial medical evidence. Therefore, Applicant proved by a preponderance of the evidence that his hypertension, diabetes and renal failure each fall within the nature and extent of his industrial injury.

Defendant also denied liability for Applicant's spine injury. Dr. Krell also evaluated Applicant for his back injury and indicated that Applicant has lumbar impairment as a result of the August 29, 2014 accident. He gave his expert medical opinion that:

> In the absence of prior symptoms and having not undergone prior lumbar scans, it is more likely than not that the claimed industrial injury of August 29, 2014 caused the lumbar disc protrusions at the L4-L5 and L5-S1 levels. (Defendant's Ex. A Page 11)

Dr. Krell explains how and why he reaches this opinion. Therefore, applicant proved by a preponderance of the evidence that he suffered an industrial injury to his spine on August 29, 2014.

Defendant denied liability for injury to Applicants bilateral lower and upper extremities or his lungs. Applicant holds the affirmative on these claimed injuries. Dr. Krell gives his expert medical opinion the:

> The claimant currently has no residual weakness involving all four of his extremities at this time and no loss of sensation. (Defendant's Ex. A Page 11)

His formal diagnosis of Applicant do not contain any indication of injury to Applicants arms or legs. He indicates Applicant suffered 7 rib fractures and a right chest wall contusion. There is no indication that Applicant's lungs were injured. Therefore, Applicant did not prove by a preponderance of the evidence that he suffered an injury to his upper extremities, lower extremities or lungs as a result of his industrial injury on August 29, 2014.

Defendant denied liability for Applicant's type II hyperlipidemia (high cholesterol levels). Applicant holds the affirmative on this issue and must prove by a preponderance of the evidence his industrial injury contributed to disability from or need for medical treatment for his type II hyperlipidemia. Dr. Zagelbaum's review of medical records documents that Applicant does have hyperlipidemia. Dr. Zagelbaum provides his expert medical opinion regarding which of Applicant's internal problems were affected by the industrial injury. He does not indicate that Applicant's industrial injury caused a need for medical treatment or disability in regard to his hyperlipidemia. Therefore, Applicant did not prove by a preponderance of the evidence that hyperlipidemia falls within the nature and extent of his industrial injury.

APPLICANT PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT HIS EARNINGS WERE $1,207.57 PER WEEK AS OF AUGUST 29, 2014 AND DEFENDANT DID NOT ESTABLISH THAT HE WAS A SEASONAL EMPLOYEE

Applicant's earnings at the time of his injury were $1,207.57. Defendant issued a Notice Regarding Temporary Disability Benefits on August 7, 2019 indicating it paid benefits for the period from August 29, 2014 through November 5, 2015 at the rate of $805.04 per week based on earnings of $1,207.57 per week. (Defendant's Ex. Q) Defendant has asserted at trial that Applicant was a seasonal worker based on limited days worked for Employer. However, Defendant's Exhibit L has a hand written statement that says, "Javier Paramo owned his own truck and was working for himself. He worked with his truck for our company in the spring of 2014. We hired him to drive our truck because he needed work." (Defendant's Ex. L)

Applicant's son, Javier Paramo Jr., credibly testified that Applicant worked every day as a driver and sometimes he would work weekends before the accident. His testimony confirmed that he would use his own truck and the truck of Employer to do the job. He also testified that Applicant would work about ten months per year. (SOE Page 8 Lines 26 – 33)

Applicant's wife credibly testified that her husband would work as long as there were crops available, and that while there might be breaks between crops Employer would also send her husband to work in El Centro, Blythe and Arizona. (SOE Page 10 Lines 18 – 24)

As discussed above, Applicant drove a truck where he would pick up hay and drive it and deliver it to locations where the animals needed feed. The testimony establishes that as long as there was hay available that Applicant would work as a truck driver. There is no evidence in the record that feeding dairy animals is seasonal work.[2] Therefore, Applicant proved by a preponderance of the evidence that his Average Weekly Wage was $1,207.57 as of August 29, 2014 and he was not shown to be a seasonal employee.

APPLICANT'S WAS SHOWN TO BE TOTALLY TEMPOARILY DISABLED FROM AUGUST 29, 2014 THROUGH NOVEMBER 5, 2015 AND TO HAVE BEEN PERMANENTLY TOTALLY DISABLED AS OF NOVEMBER 6, 2015

Dr. Krell first examined Applicant on November 6, 2015. He gave his expert medical opinion that Applicant had reached Maximum Medical Improvement at that time. (Defendant's Ex. A Page 10) Dr. Krell did not change his finding regarding Applicant reaching MMI status on November 6, 2015 in either his later report or during his depositions. (Defendant's Exs. B, C & D)

Dr. Zagelbaum first examined Applicant on January 18, 2017. He asked for additional records to review in his first report. (Defendant's Ex. E Page 8) Dr. Zagelbaum's reports identify many preexisting internal medical problems and details, as discussed above, how several but not all of them were impacted by Applicant's accident on August 29, 2014 and the related cerebrovascular incident of August 31, 2014. Dr. Zagelbaum does not indicate any disagreement with Dr. Krell's finding Applicant was MMI as of November 6, 2015. Therefore, a preponderance of the evidence establishes Applicant was permanent and stationary as of November 6, 2015.

PERMANENT DISABILITY AND APPORTIONMENT

APPLICANT PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT HE SUFFERED AN INJURY TO HIS BRIAN RESULTING IN

[2] At this point in time the WCJ is unaware of any dairy cows that are fed seasonally and can go months on end without being fed.

PERMANENT MENTAL INCAPACITY CREATING A CONCLUSIVE PRESUMPTION OF PERMANENT TOTAL DISABILITY

As discussed above, Applicant suffered a cerebrovascular incident in the form of a stroke on August 31, 2014 that was a compensable consequence of his industrial injury of August 29, 2014. The cerebrovascular incident was evaluated by Dr. Martin Krell, M.D. as a Neurosurgical Panel Qualified Medical Examiner. Part of Dr. Krell's diagnosis of Applicant was a right cerebral hemisphere infarction. (Applicant's Ex. 9 Page 9) He gave his expert opinion that:

> The onset of this man's right-sided cerebral stroke of August 31, 2014 occurred in close proximity to the industrial injury of August 29, 2014 and can be considered to have been caused by the circumstances of August 29, 2014, even though there was no reported injury to the head nor was a CT brain scan performed during his initial medical evaluation on August 29, 2014.
>
> It is more likely than not that the truck roll over injury of August 29, 2014 would have caused sufficient physical and emotional distress to have precipitated his stroke by most likely an alteration or drop in his blood pressure. (Applicant's Ex. 9 Page 11)

Dr. Krell clarified his findings regarding the extent of Applicant brain injury during his deposition. Dr. Krell's first deposition took place on February 5, 2016 and his second deposition took place on January 9, 2017. During his second deposition Dr. Krell was asked if he thought Applicant could return to work and he testified:

> Absolutely not. He has a massive infarction on the right side of his brain that would interfere with his ability to operate a vehicle, regardless of what he says, even though he stated when I examined him, he could remember things all right, without problem. Then it did come out he has a tendency to forget some things. (Defendant's Ex. D Page 9 Lines 7 – 14)
>
> The right side of your brain has some function. One of the functions is your position in space. And when you have an injury to the right side of your brain, you can very easily not be able to judge your location in space. And that would be significant if you had to drive a truck. (Defendant's Ex. D Page 10 Lines 10 – 16)

Dr. Krell testified that he believed Applicant is permanently totally disabled because of the impact the brain injury has had on his ability to perform activities of daily living. (Defendant's Ex. D Page 15 Line 8 – Page 16 Line 18)

The findings of Dr. Krell are supported by the credible testimony of Applicant's son that Applicant has problems with his memory that include recognizing his son, remembering friends and even remembering who he is himself. Applicant also has problems dressing himself, requires assistance with personal hygiene tasks and does not drive himself to places. (SOE Page 7 Line 43 – Page 8 Line 25)

Dr. Krell's expert medical opinion explaining how and why the specific injury of August 29, 2014 caused Applicant's right-sided cerebral stroke which resulted in serious permanent mental incapacity proves by a preponderance of the evidence that Applicant suffered a brain injury as defined by Labor Code § 4662(a)(4) and he is entitled to the conclusive presumption of permanent total disability.

There is no prior Award of Permanent Disability so apportionment pursuant to Labor Code § 4664 is not at issue.

The case of City of *Santa Clara v. W.C.A.B.* (*Sanchez*) 76 Cal. Comp. Cases 799 (2011) wherein Writ was denied by the Sixth Appellate District Court of Appeal is persuasive authority on the issue of apportionment of the Labor Code § 4662(a) conclusive presumption of permanent total disability pursuant to labor Code § 4663. The applicant in Sanchez had an orthopedic industrial injuries to his knees and spine. He suffered a stroke as a complication of a knee surgery and was determined to be 100% permanently totally disabled pursuant to the presumption created by Labor Code Section 4662 for brain injuries.[3] The Applicant in this case suffered a stroke resulting in a brain injury as the result of a complication caused his treatment of the underlying orthopedic injury. The fact patterns leading to creation of the Labor Code § 4662(a)(4) presumption align perfectly.

The Board panel in *Sanchez* issued a split decision with the majority determining the conclusive presumption created by Labor Code §4662(a)(4) is not subject to apportionment pursuant to Labor Code § 4663. The dissenting opinion indicated 4663 apportionment might be applicable as Labor Code § 4662 is not listed in Labor Code § 4663(e).[4] This WCJ finds the presumptions of injury created by code sections listed in Labor Code 4663(e) distinguishable from presumption disability created by Labor Code § 4662(a) for three reasons. First, those presumptions are all rebuttable and not conclusive. Second, those presumptions all apply to causation of the injury and not causation of the

[3] The Sanchez case references L.C. § 4662(d) which has been designated as 4662(a)(4): "(a) Any of the following permanent disabilities shall be conclusively presumed to be total in character: … (4) An injury to the brain resulting in permanent mental incapacity."

[4] L. C. § 4663(e): "Subdivisions 9 (a), (b) and (c) do not apply to injuries or illnesses covered under Sections 3212, 3212.1, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3212.8, 3212.85, 3212.9, 3212.10, 3212.11, 3212.11, 3212.12, 3213, and 3213.2"

disability. Finally, those presumptions create special protections for public safety employees while the 4662(a) presumption applies to all injured workers.

The majority opinion in the panel decision in Sanchez was building on the reasoning established in *Kaiser Foundation Hospitals v W.C.A.B.* (*Dragomir-Tremoureux*) 71 Cal. Comp. Cases 538 (2006) (Writ Denied) wherein the Board determined the conclusive presumption of permanent total disability created by the applicant's bilateral loss of ability to use her hands was not subject to apportionment pursuant to labor Code § 4664.[5] While 4664 apportionment is not at issue in this case, the determination that the conclusive presumption of total disability cannot be rebutted by a prior award of disability supports the determination that apportionment pursuant to 4663 is not applicable.

Dr. Krell determined Applicant's abilities to perform activities of daily living are so limited by the effects of the cerebrovascular incident that he is totally permanently disabled. Defendant's Ex. D Page 15 Line 8 – Page 16 Line 18) Dr. Zagelbaum deferred to the expertise of Dr. Krell on this issue. (Defendant's Ex. G Page 9) Therefore, Applicant proved by a preponderance of the evidence that he suffered a brain injury in the form of a cerebrovascular incident that produced permanent mental incapacity. Applicant is entitled to an Award of Permanent Total Disability Indemnity commencing November 6, 2015 pursuant to Labor Code § 4662(a).

If the conclusive presumption of permanent total disability may be apportioned pursuant to Labor Code § 4663 then Defendant holds the affirmative on the issue and bears the burden of proving by a preponderance of the evidence that apportionment is appropriate. Dr. Krell gives his initial expert medical opinion that:

> 100% of this claimant's memory impairment (dementia) was caused by and is apportioned to the stroke injury of August 31, 2014 which in turn was caused by the industrial injury of August 29, 2014. (Defendant's ex. A Page 11)

He changed his conclusion in his second report when he gave his expert medical opinion that:

> It is reasonable to conclude that this claimant's co morbidities which involve renal disease, diabetes and hypertension would contribute to the development of a cerebral infarction by way of arterial occlusion. However, there are many individuals that have these

[5] The Dragomir-Tremoureux case references the presumption created by L. C. § 4662(b) for bilateral loss of use of hands which can cause confusion as that presumption is now created by L. C. § 4662(a)(2) while current L. C. § 4662(b) discusses permanent total disability based on the facts.

> comorbidities and have extended lifespans. One cannot state with probable certainty that an individual with these comorbidities would develop a cerebral infarction at any point in time.
>
> However, it is more likely than not that this individual would be susceptible to a shortened lifespan due these comorbidities which also includes obesity. Life insurance actuary would be consistent with this.
>
> Therefore, it is reasonable that apportionment of 50% with regard to this man's multiple caused or contributed to his cerebral infarction and subsequent mental impairment as stated in my Neurosurgical Panel Qualified Medical Evaluation as of November 24, 2015. The remaining 50% is considered to be a probable cause as related to the claimed industrial injury of August 29, 2014.
> (Defendant's Ex. B Page 2)

This WCJ notes that Dr. Krell first states he cannot state with medical probability that Applicant would have developed a stroke at any point in time. This statement is placed in the context that Dr. Krell determined the stroke was caused by medications taken after the industrial injury wherein Applicant broke 7 ribs and suffered a spine injury. Dr. Krell does not explain in the later report how or why he determined 50%/50% apportionment is appropriate other that a reference to shortened life spans as determined by an unidentified insurance actuary.

Dr. Krell's report finding apportionment does reference his deposition of February 5, 2016 for an apportionment analysis. He discusses his initial opinion regarding apportionment and stated:

> I could have given him a 29 percent and then apportioned it 50 percent to his comorbidities and 50 percent to the injury, but I gave him a 15 and made it 100 percent. (Defendant's Ex. C Page 27 Lines 8 – 11)

Dr. Krell is stating his conclusion regarding apportionment without explaining how or why he reached it. He does not explain how or why the comorbidity factors create disability resulting from the injury to Applicant's. In fact, Dr. Zagelbaum established a separate analysis of Applicant's WPI and apportionment of the resulting disability relating to hypertension, renal failure and diabetes. None of these disabilities overlap with the disability resulting from the injury to Applicant's brain.

Dr. Krell's statement during his deposition that he initially determined apportionment and then issued a whole person impairment after apportionment without explaining apportionment is not legally proper. (Defendant's Ex. C Page 27 Lines 8 – 11) Based on this record his 50%/50% split seems arbitrary and

capricious as it lacks an explanation of how and why he reached his expert medical opinion regarding apportionment. Therefore, Defendant did not prove by a preponderance of the evidence apportionment of Applicant's conclusively presumed permanent total disability would be appropriate. Applicant is entitled to a finding of permanent total disability based on the brain injury he suffered as a result of the industrial accident on August 29, 2014.

THE REPORTS ESTABLISH OTHER PERMANENT DISABILITY BY A PREPONDERANCE OF THE EVIDENCE, HOWEVER IF THE APPLICANT IS NOT CONCLUSIVLY PRESUMED PERMANENTLY TOTALLY DISABLED FURTHER DEVELOPMENT OF THE RECORD WILL BE REQUIRED TO ESTABLISH PSYCHIATRIC WHOLE PERSON IMPAIRMENT

Dr. Zagelbaum determined Applicant has 30% Whole Person Impairment as a result of his hypertensive cardiovascular disease with apportionment of 20% to Applicant's August 29, 2024 industrial injury. (Defendant's Ex. F Page 65) Based on Applicant's Age at Injury being 60 and his occupation being Truck Driver (OGN 350) this WPI adjusts as follows:

(20%)(04.01.00.00-30-[1.4] 42-350G-45-53) = 11

Diabetes 10% WPI 100% nonindustrial causes. (Defendant's Ex. F Page 66)

Dr. Zagelbaum determined Applicant's kidney disease/renal failure creates 95% WPI and apportions 20% of the resulting permanent disability to industrial causes. (Defendant's Ex. F Page 67) Applicant's 95% WPI rates as follows:

(20%)(07.02.00.00-95-[1.4] 100-350H-100-100) = 20

Dr. Krell determined Applicant's lumbar spine has a DRE 8% WPI with 100% industrial causation. (Defendant's Ex. A Page 11) Applicant's lumbar spine WPI adjusts as follows:

15.03.01.00-9-[1.4] 11-350G-9-12

The parties did not submit a report from a panel Qualified Medical Examiner in the field of Psychiatry. It is clear the cerebrovascular event of August 31, 2014 has impaired Applicant's thinking, behavior and social interactions. If Applicant is not permanently totally disabled pursuant to the conclusive presumption of disability created by Labor Code § 4662(a)(4) then a Psychiatric Panel will be required.

Additionally, if Applicant is not permanently totally disabled pursuant to the conclusive presumption of disability created by Labor Code § 4662(a)(4) further development of the record will be required from Dr. Krell to determine

the appropriate method for combining Applicant's disabilities as there appears to be little to no overlap.

APPLICANT PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT HE REQUIRES FURTHER MEDICAL CARE TO CURE OR RELIEVE THE EFFECTS OF HIS AUGUST 29, 2014 INDUSTRIAL INJURY IN ADJ9714013

Dr. Krell determined Applicant will require further medical treatment to cure or relieve the effects of his August 29, 2014 injury. (Defendant's Ex. A Page 12) Dr. Zagelbaum also determined Applicant will require further medical treatment to cure or relieve his industrial injury of August 29, 2014. (Defendant's Ex. F Pages 66 – 67) There is no medical evidence indicating Applicant does not require further medical treatment to cure or relieve the effects of his August 29, 2014 industrial injury. Therefore, Applicant proved by a preponderance of the evidence he requires further medical care to cure or relieve the effects of his industrial injury and that he is entitled to an Award of medical care in ADJ9714013.

APPLICANT'S ATTORNEY PROVIDED VALUABLE SERVICES WITH A REASSONABLE VALUE OF $152,671.87

Applicant's Attorney provided valuable services before and at trial of Applicant's claim. $152,671.87, 15% of the Permanent Total Disability Indemnity being Awarded, is a reasonable fee when consideration is given to the time involved, responsibility assumed, care given and results obtained by Applicant's Attorney.

Defendant will need to hold this amount in trust pending resolution of Applicant Attorney Fee Lien issues.