

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

SOLEDAD GARCIA, *Applicant*

vs.

**LYONS MAGNUS, INC.; ZURICH, administered by TRISTAR RISK MANAGEMENT,
*Defendants***

**Adjudication Number: ADJ9618682
Fresno District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings of Fact, Award and Opinion on Decision (F&A) issued by the workers' compensation administrative law judge (WCJ) on May 11, 2021. By the F&A, the WCJ found that applicant sustained injury arising out of and in the course of employment (AOE/COE) to the right shoulder, right fibula, right knee, left knee, cervical spine, right leg, head and face (left eyebrow and eyelid laceration), but did not sustain an injury AOE/COE in the form of Parkinson's disease. The WCJ further found that her injury did not constitute a violent act and therefore, her permanent disability rating may not be increased for psychiatric impairment. Applicant's injury was found to have caused 64% permanent disability based on ratings for her right shoulder, bilateral knees and cervical spine.

Applicant contends that the WCJ erred by not finding her Parkinson's to be industrially caused. She also argues that the WCJ ignored the impairment provided by the neurological qualified medical evaluator (QME) for headaches, disfigurement and right leg pain. Lastly, applicant asserts that the violent act exception under Labor Code¹ section 4660.1(c)(2)(A) applies to her injury so she is entitled to an increased impairment rating for her psychiatric injury. (Lab. Code, § 4660.1(c)(2)(A).)

We received an answer from defendant. The WCJ issued a Report and Recommendation

¹ All further statutory references are to the Labor Code unless otherwise stated.

on Petition for Reconsideration (Report) recommending that we grant reconsideration and amend the permanent disability rating to be 66% by including impairment for the headaches, sleep, eyebrow scar and right leg pain.

We have considered the allegations of applicant's Petition for Reconsideration, defendant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will rescind the F&A and return this matter to the trial level for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

Applicant claims injury to the right shoulder, right fibula, right knee, left knee, cervical spine, right leg, head, face (left eyebrow and eyelid laceration), psyche and Parkinson's disease on May 29, 2014 while employed as an extractor by Lyons Magnus, Inc.²

Brian Jacks, M.D. evaluated applicant as the psychiatric QME. In his December 1, 2015 report, Dr. Jacks provided diagnoses as follows:

MAJOR DEPRESSIVE DISORDER [DSM IV-TR-296.2] – as manifested by symptoms of constant depression, irritability, impatience, lack of self-confidence, initial and mid-phase insomnia, loss of libido, anergia, anhedonia; anxiety and depression on mental status examination and psychological testing.

POSTTRAUMATIC STRESS DISORDER [DSM IV-TR-309.81] – as manifested by symptoms of sleep problems with initial and mid-phase insomnia, visual flashbacks, conscious intrusive recollections of the events three or four times a week, startle reaction, generalized anxiety, lack of interest in things, fears of falling and being reinjured.

(Joint Exhibit U, Psychiatric QME Report by Brian P. Jacks, M.D., December 1, 2015, p. 16.)

Dr. Jacks addressed causation:

Therefore, first of all, there were significant physical injuries following a forklift knocking her over on 5/29/2014 at work. However, there is no final permanent and stationary report or report of maximum medical improvement from any agreed medical examiner. Still, this injury has been extremely frightening and terrifying for her and has been labor disabling for her.

...

² The Minutes of Hearing refer to the date of injury as being "May 24, 2014." However, the evidence and Amended Application for Adjudication of Claim indicate the injury occurred on May 29, 2014.

Considering all this, however, I would conclude that what she is most upset about was the frightening injury when a forklift hit her from behind and she suffered multiple injuries requiring multiple surgeries following that. She has not been able to work since. I would therefore conclude that the predominant, more than 50%, cause of her psychiatric injury is related to her upset about her physical problems. Her emotional difficulties have arisen out of her employment and causation is industrial.

(Id. at pp. 19-21.)

He provided a GAF score of 66 (6% WPI) and stated his opinion regarding apportionment of the psychiatric permanent disability:

In summary, then, while the events surrounding her work injury have predominantly caused her permanent psychiatric disability and whole-person impairment, there is substantial medical evidence for apportionment based upon her Parkinson's disease and the physical abuse in her first marriage. But for this preexisting and personal, nonindustrial stress, the disability would not be as great. In all reasonable medical probability, then, I would assign approximately **85%** of her current permanent psychiatric disability and whole-person impairment due to her upset about her physical problems from the injury at work of 5/29/2014 and **15%** due to her preexisting and personal, nonindustrial stress.

(Id. at p. 29, emphasis in original.)

Dr. Jacks confirmed his previous diagnoses of major depressive disorder and post-traumatic stress disorder in his subsequent February 26, 2020 report. He then opined regarding causation as follows:

Causation of psychiatric injury for clarification purposes would include the following: approximately **45%** due to her upset about the physical injuries 5/29/2014, approximately **35%** being caused by the psychological impact of the injury of 5/29/2014, approximately **15%** being caused by the tremors with the Parkinson's, approximately **5%** due to the preexisting and personal, nonindustrial stressors.

Causation is of the acute psychiatric injury and the Parkinson's, especially initially with the tremors, had not yet progressed and had not required medications.

(Joint Exhibit V, Psychiatric QME Report by Brian Jacks, M.D., February 26, 2020, pp. 21-22, emphasis in original.)

Dr. Jacks found that her psychiatric condition would be permanent and stationary at the same time

her physical condition became so. A GAF score of 60 was given, which translates to 15% WPI. (*Id.* at p. 29.) With respect to apportionment, Dr. Jacks stated:

But now, still, the events surrounding her work injury of 5/29/2014 have predominantly caused permanent psychiatric disability and whole-person impairment, but there is substantial medical evidence for apportionment based upon her Parkinson's disease and the physical abuse in her first marriage. But for this preexisting and personal, nonindustrial stress, the disability would not be as great. In all reasonable medical probability, then, I would assign approximately **10%** due to the physical abuse in her first marriage, approximately **30%** due to her upset about her Parkinson's, approximately **60%** due to the injury of 5/29/2014.

(*Id.* at p. 30, emphasis in original.)

Scott Graham, M.D. evaluated applicant as the orthopedic QME (replacing the first QME Payam Moazzaz, M.D.). In his October 12, 2016 report, Dr. Graham found that she had sustained injury AOE/COE to the right shoulder, bilateral knees, right lower leg and cervical spine. (Joint Exhibit T, QME Report by Scott Graham, M.D., October 12, 2016, p. 14.) These conditions were considered permanent and stationary with impairment ratings provided as follows: 7% WPI for the right shoulder, 18% WPI for the right knee, 12% WPI for the left knee and 8% WPI for the cervical spine. (*Id.* at pp. 15-16.) Apportionment of permanent disability was 100% to the industrial injury for all parts except the cervical spine, for which Dr. Graham apportioned 90% to the injury and 10% to non-industrial factors. (*Id.* at p. 16.)

Shen Ye Wang, M.D. evaluated applicant as the neurological QME. Dr. Wang issued several reports and was cross-examined. He concluded that applicant's Parkinson's was not caused by the 2014 industrial injury. (Joint Exhibit W, Neurological QME Report by Shen Ye Wang, M.D., December 15, 2017, p. 24.) However, applicant's headaches and sleep disorder were considered industrially caused by Dr. Wang. (*Id.*) Dr. Wang opined that applicant "does have trouble sleeping at night due to the chronic pain." (*Id.* at p. 25.) Applicant's condition was considered permanent and stationary in Dr. Wang's December 15, 2017 report. (*Id.* at p. 24.) Dr. Wang provided the following impairment ratings: 3% WPI for headaches, 3% WPI for sleep, 1% WPI for left eye disfigurement and 3% WPI for pain in the right leg. (*Id.* at p. 25.) Apportionment for these impairment ratings was 100% to the industrial injury. (*Id.*)

The matter proceeded to trial on January 25, 2021. The parties stipulated to injury AOE/COE to the right shoulder, right fibula, right knee, left knee, cervical spine, right leg, head,

face injury to left eyebrow and eyelid laceration. (Minutes of Hearing and Summary of Evidence, January 25, 2021, p. 2.) Applicant also claimed injury AOE/COE to the head, Parkinson's and psyche "with defendant asserting impairment non-compensable pursuant to Labor Code Section 4660.1(c)." (*Id.*) Sleep was not pled as a body part. Issues included injury AOE/COE and parts of body injured to head/neuro, Parkinson's and psyche, permanent disability and apportionment, and sections 4660.1(c) and (c)(2)(A). (*Id.* at pp. 2-3.) Applicant's exhibits included medical reporting from Dr. Sanjay Chauhan finding her Parkinson's to be industrially related. (Applicant's Exhibit No. 1, Neurological Consultation Report by Sanjay Chauhan, M.D., March 1, 2017.)

Applicant testified at trial as follows regarding how her injury occurred:

She does remember the May 24, 2014 accident. She was walking when a forklift hit her from behind and threw her to the ground. She did hit the front left part of her forehead on the cement. She did get stitches. She did lose consciousness for a few minutes.

(Minutes of Hearing and Summary of Evidence, January 25, 2021, p. 5.)

The WCJ issued the F&A as outlined above.

DISCUSSION

I.

The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a); 3202.5.)

Decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and

examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

In this matter, the WCJ relied on Dr. Wang's reporting to find that applicant's Parkinson's was not industrially related. Dr. Wang issued several reports and was cross-examined regarding his opinions about causation for applicant's Parkinson's. An examining neurologist, Dr. Chauhan, came to a different conclusion about whether her Parkinson's was related to the industrial injury.

Dr. Wang explained his conclusions in detail and provided them to a reasonable medical probability. Alternatively, Dr. Chauhan provides little explanation for his opinion that applicant's industrial injury was a contributing cause to her Parkinson's. It is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].) We agree with the WCJ that Dr. Wang's opinions are more persuasive regarding causation for applicant's Parkinson's than Dr. Chauhan's opinions.

We therefore agree that applicant did not meet her burden of proving injury AOE/COE in the form of Parkinson's disease.

II.

With respect to psychiatric injuries, section 3208.3 provides, in relevant part, as follows:

(a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition—Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.

(b) (1) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury.

(Lab. Code, § 3208.3(a)-(b)(1).)

“Predominant as to all causes” for purposes of section 3208.3(b)(1) has been interpreted to

mean more than 50 percent of the psychiatric injury was caused by actual events of employment. (*Dept. of Corr. v. Workers' Comp. Appeals Bd. (Garcia)* (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356].)³ This predominant causation threshold applies to psychiatric injuries pled as a compensable consequence of a physical injury. (*Lockheed Martin Corp. v. Workers' Comp. Appeals Bd. (McCullough)* (2002) 96 Cal.App.4th 1237, 1249 [67 Cal.Comp.Cases 245].) The Court of Appeal in *McCullough* opined that for a compensable consequence psychiatric injury, “the precipitating physical injury constitutes an ‘actual event[] of employment’ within the meaning of [section 3208.3(b)(1)].” (*Id.*)

The issue of causation of injury is distinct from causation of permanent disability. As outlined in *Escobedo*:

The issue of the causation of permanent disability, for purposes of apportionment, is distinct from the issue of the causation of an injury. (See *Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223 (Significant Panel Decision).) Thus, the percentage to which an applicant’s *injury* is causally related to his or her employment is not necessarily the same as the percentage to which an applicant’s *permanent disability* is causally related to his or her injury. The analyses of these issues are different and the medical evidence for any percentage conclusions might be different.

(*Escobedo, supra*, 70 Cal.Comp.Cases at p. 611, original italics.)

In *Wilson v. State of CA Cal Fire* (2019) 84 Cal.Comp.Cases 393, 403 (Appeals Board en banc), causation of an injury was discussed as follows in relevant part:

Causation of an injury may be either direct or as a compensable consequence of a prior injury. More precisely, an injury may be directly caused by the employment. Alternatively, a subsequent injury is a compensable consequence of the first injury where it “is not a new and independent injury but rather the direct and natural consequence of the” first injury. (*Carter v. County of Los Angeles* (1986) 51 Cal.Comp.Cases 255, 258 (Appeals Board en banc).)

In this matter, the psychiatric QME Dr. Jacks split causation for applicant’s psychiatric injury in his 2020 report as follows: “approximately 45% due to her upset about the physical injuries 5/29/2014, approximately 35% being caused by the psychological impact of the injury of

³ If the psychiatric injury was caused by “being a victim of a violent act or from direct exposure to a significant violent act,” the employee must instead show that actual events of employment were a substantial cause of the injury, which is statutorily defined as “at least 35 to 40 percent of the causation from all sources combined.” (Lab. Code, § 3208.3(b)(2)-(3).) As further discussed herein, applicant did not meet her burden of showing that her injury resulted from a violent act and therefore, the predominant causation threshold applies to her alleged psychiatric injury.

5/29/2014, approximately 15% being caused by the tremors with the Parkinson's, approximately 5% due to the preexisting and personal, nonindustrial stressors." This language suggests that causation for the psychiatric condition is in part a compensable consequence of the physical injury (45%) and in part directly caused by the injurious event itself (35%). Neither of these causes alone is greater than 50% to meet the required predominant causation threshold. The question is whether they may be added together to meet the required threshold.

The Appeals Board has previously upheld decisions where two or more injurious events (with the same employer) were added together to meet the predominant causation threshold for a psychiatric injury. In *Dept. of Corrections v. State Comp. Ins. Fund (Van Dyk)* (2016) 81 Cal.Comp.Cases 458 (writ den.), the Appeals Board affirmed a finding that the psychiatric injury was compensable per the psychiatric QME's opinion that applicant's psychiatric condition was due to the combined effects of his specific 2005 back injury and his separate cumulative trauma back injury through 1/4/2012 while employed as a correctional officer by defendant. Similarly, in *Trugreen Landcare v. Workers' Comp. Appeals Bd. (Gomez)* (2010) 75 Cal.Comp.Cases 385 (writ den.), applicant's psychiatric injury was found to be compensable since it was predominantly caused by three actual events of employment: the 11/29/2005 specific injury seeing his co-worker run over and killed by a car, applicant's emotional reaction to the subsequent events relating to that incident and his emotional reaction to his 12/13/2005 industrial back injury. (See also *County of Contra Costa v. Workers' Comp. Appeals Bd. (Guthery)* (2005) 70 Cal.Comp.Cases 1496 (writ den.) [applicant's psychiatric injury was a compensable consequence of his two specific injuries while employed by the County (2001 right wrist injury and 2002 left arm injury) per opinion of applicant's treating physician and therefore was predominantly caused by actual events of employment].)⁴

It would thus appear that applicant in this matter may add the percentage attributed to the compensable consequence psychiatric injury with the percentage attributed to the directly caused psychiatric injury to meet the predominant causation threshold under section 3208.3(b)(1). The

⁴ Where however, an applicant's psychiatric condition was predominantly caused by a successive injury with a different employer, applicant could not add together causation from his separate injuries with two different employers to meet the predominant causation threshold for the alleged psyche injury with his prior employer. (See *Lewis v. Workers' Comp. Appeals Bd.* (2011) 77 Cal.Comp.Cases 108 (writ den.) [applicant did not meet predominant causation for the psychiatric claim against his previous employer where the psychiatric AME attributed 35% of the psychiatric injury to his physical injuries sustained with the prior employer and 65% to a 2005 specific injury from a car accident while working for a subsequent employer].)

facts here are even more compelling than the cases discussed above since both “events of employment” adding up to predominant causation resulted from applicant’s sole specific injury.

This analysis assumes that Dr. Jacks’ causation opinion is as discussed herein. In order to confirm that applicant has met the predominant causation threshold, the record must be developed, including by requesting further reporting from Dr. Jacks to clarify his opinions on causation for the psychiatric injury. The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.) The Appeals Board also has a constitutional mandate to “ensure substantial justice in all cases” and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The “Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee.” (*San Bernardino Cmty. Hosp. v. Workers’ Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].)

The preferred procedure to develop a deficient record is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) The proper method to develop the record is thus for the parties to return to the physicians who have already reported in this case, including the psychiatric QME Dr. Jacks. Thereafter, per *McDuffie*, if the existing physicians cannot cure the need for development of the record, the selection of an agreed medical evaluator (AME) should be considered by the parties. If the parties cannot agree to an AME, then the WCJ can appoint a physician to evaluate applicant pursuant to section 5701.

Therefore, we will return this matter to the trial level for further development of the record. It is recommended that this include further reporting from Dr. Jacks regarding causation for applicant’s psychiatric injury.

III.

Assuming that applicant has met the predominant causation threshold for a psychiatric injury, applicant also bears the burden of establishing the approximate percentage of permanent disability directly caused by the industrial injury. (*Escobedo, supra*, 70 Cal.Comp.Cases at p. 612; Lab. Code, §§ 3202.5, 5705.)

Applicant's injury occurred in 2014. Section 4660.1 governs how to determine permanent disability for injuries occurring on or after January 1, 2013. (Lab. Code, § 4660.1.) Section 4660.1(c) provides as follows in relevant part:

(c) (1) Except as provided in paragraph (2), there shall be no increases in impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury. Nothing in this section shall limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury.

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

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

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

(Lab. Code, § 4660.1(c)(1)-(2).)

As stated in *Wilson*:

[S]ection 4660.1(c) does not apply to psychiatric injuries directly caused by events of employment. Section 4660.1(c)(1) only bars an increase in the employee's permanent impairment rating for a psychiatric injury that is a compensable consequence of a physical injury occurring on or after January 1, 2013. However, the employee may receive an increased impairment rating for a compensable consequence psychiatric injury if the injury falls under one of the statutory exceptions outlined in section 4660.1(c)(2).

(*Wilson, supra*, 84 Cal.Comp.Cases at p. 403.)

Therefore, in order to receive an increased impairment rating for her psychiatric injury, applicant "bears the burden of proving [her] psychiatric injury was directly caused by events of employment,

or, alternatively, if the psychiatric injury is a compensable consequence of the physical injury, applicant must show that the psychiatric injury resulted from either: 1) being a victim of a violent act or direct exposure to a significant violent act, or 2) a catastrophic injury.” (*Id.*)

At trial and on reconsideration, applicant contends that her injury resulted from being a victim of a violent act, and thus, she qualifies for an increased impairment rating for her psyche per section 4660.1(c)(2)(A). In *Wilson*, the Appeals Board stated that panel decisions “have defined a ‘violent act’ [under section 4660.1(c)(2)(A)] as an act that is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening.” (*Wilson, supra*, 84 Cal.Comp.Cases at p. 405, citing *Larsen v. Securitas Security Services* (2016) 81 Cal.Comp.Cases 770 [2016 Cal. Wrk. Comp. P.D. LEXIS 237]⁵.) The *Wilson* decision outlined how to evaluate whether an injury qualifies for the “violent act” exception:

Evaluation of whether an injury resulted from a “violent act” under section 4660.1(c)(2)(A) focuses on the *mechanism* of injury. This focus on the mechanism of injury comports with the statute’s language, which emphasizes the *event causing the injury*, rather than the injury itself: the statute expressly refers to being a victim of or direct exposure to a violent “act.” The word “injury” is not in this subsection. The focus in evaluating whether an injury qualifies for the exception in section 4660.1(c)(2)(A) is therefore on the mechanism of injury, not on the injury itself.

(*Wilson, supra*, 84 Cal.Comp.Cases at p. 406, emphasis in original.)

Previous panels have found an injury resulted from a violent act under the following circumstances: a security guard struck by a car while walking on patrol (*Larsen, supra*), a landscaper falling from a tree hitting his head multiple times and losing consciousness (*Greenbrae Mgmt. v. Workers’ Comp. Appeals Bd. (Torres)* (2017) 82 Cal.Comp.Cases 1494 (writ den.)), and a truck driver being pinned and crushed in his vehicle for approximately 35-40 minutes with a fractured neck (*Madson v. Michael J. Cavaletto Ranches* (February 22, 2017, ADJ9914916) [2017 Cal. Wrk. Comp. P.D. LEXIS 95]).

Applicant’s injury occurred when she was struck from behind by a forklift and fell to the

⁵ Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers’ Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and may be considered to the extent their reasoning is persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers’ Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

ground.⁶ The force of this incident cannot be characterized as either extreme or intense, such as being struck by a car, falling from a tree and being struck in the head multiple times or being pinned and crushed in a truck for 35-40 minutes after rolling the truck. (See e.g., *Garcia v. Harvest Church* (November 9, 2018, ADJ10544189) [2018 Cal. Wrk. Comp. P.D. LEXIS 530] [injury did not result from a violent act when a gate fell crushing applicant's foot while he was opening it and he was able to drive himself to receive medical treatment]; *Ugalde v. Rockwell Drywall, Inc.* (June 14, 2019, ADJ9474687) [2019 Cal. Wrk. Comp. P.D. LEXIS 213] [taper who fell while working on 2½-foot stilts and lost consciousness did not sustain an injury as a result of a violent act].) The incident in this case also cannot plausibly be characterized as vehemently or passionately threatening. We consequently agree with the WCJ's conclusion that applicant did not meet her burden of proving that her injury qualified for the statutory exception and her permanent disability rating may not be increased utilizing section 4660.1(c)(2)(A).

The *Wilson* decision clarified that “the proscription against an increased rating for psychiatric injuries in section 4660.1(c) does not apply to psychiatric injuries directly caused by events of employment.” (*Wilson, supra*, 84 Cal.Comp.Cases at p. 404.) Due to this distinction between direct and compensable consequence psychiatric injuries, the *Wilson* decision held that:

The evaluating physicians must render an opinion as to whether the psychiatric injury was predominantly caused by actual events of employment. The physicians must further specify if the psychiatric injury is directly caused by events of employment or if the psychiatric injury is a compensable consequence of the physical injury.

(*Id.* at p. 414.)

As discussed above, Dr. Jacks appears to have split causation of *injury* between a compensable consequence psychiatric injury and a direct psychiatric injury. Dr. Jacks then attributed the psychiatric permanent disability “approximately 60% due to the injury of 5/29/2014” in his 2020 report. This language is unclear if he is apportioning the resulting disability to a psychiatric injury directly caused by events of employment or to a compensable consequence psychiatric injury. If applicant shows that she has met the predominant causation threshold for her

⁶ Although applicant testified at trial that she lost consciousness from the incident, the evidentiary record is inconsistent on whether she actually lost consciousness. (See Joint Exhibit W, Neurological QME Report by Shen Ye Wang, M.D., December 15, 2017, pp. 3 and 10 [applicant reported that “she might have been knocked unconscious momentarily” and emergency room report on the date of injury states there was “no loss of consciousness”].)

psychiatric injury per section 3208.3(b)(1), she is entitled to an increased impairment rating for the psychiatric permanent disability, if any, that was directly caused by actual events of employment. If the psychiatric permanent disability was caused by a compensable consequence psychiatric injury, applicant must both show that she has met the predominant causation threshold and that her injury qualifies for one of the exceptions in section 4660.1(c)(2) in order to receive an increased impairment rating for her psychiatric condition.⁷

Therefore, we also recommend that the record be developed to clarify Dr. Jacks' opinions regarding apportionment.

IV.

We agree with applicant that the WCJ improperly failed to include the permanent impairment provided by the neurological QME Dr. Wang for headaches, disfigurement and right leg pain. However, with respect to the impairment rating Dr. Wang provided for her sleep disorder, the record does not reflect that applicant has pled injury AOE/COE for sleep dysfunction. (See Minutes of Hearing and Summary of Evidence, January 25, 2021, p. 2.) Due process requires that defendant be given notice and an opportunity to be heard before an award for injury AOE/COE in the form of sleep dysfunction or an increased permanent disability rating for sleep may be made. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805], citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21].) Moreover, Dr. Wang's reporting attributed applicant's sleep disorder to chronic pain. Per section 4660.1(c), applicant may not receive an increased impairment rating for her sleep disorder since it was considered a compensable consequence of her physical injury.

In conclusion, we will rescind the F&A and return this matter to the trial level for further proceedings consistent with this opinion.

⁷ As discussed above, applicant did not meet her burden of proving her injury qualified for the exception in section 4660.1(c)(2)(A).

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Award and Opinion on Decision issued by the WCJ on May 11, 2021 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 12, 2021

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

**GROVE LAW FIRM
PARKER KERN NARD & WENZEL
SOLEDAD GARCIA**

AI/pc

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