WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MONICA THIEDE, *Applicant*

vs.

OBE LABOR, INC., and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, *Defendants*

Adjudication Number: ADJ10261474
San Francisco 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 on Decision, which are both adopted and incorporated herein, we will deny reconsideration.

Defendant did not raise the issue of additional panel qualified medical examinations (PQMEs) at trial or in the second amend Pre-Trial Conference Statement (PTCS) (EAMS Document ID No. 74575629) submitted by the parties. Therefore, that issue was waived. Issues not raised at the first opportunity that they may properly be raised are waived. (Lab. Code, § 5502(e)(3), see also *Gould v. Workers' Comp. Appeals Bd*. (1992) 4 Cal.App.4th 1059 [57 Cal.Comp.Cases 157], *Griffith v. Workers' Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260 [54 Cal.Comp.Cases 145].)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 4, 2022

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

LAW OFFICES OF ARTHUR LEVY
LAURA CHAPMAN & ASSOCIATES
MONICA THIEDE

PAG/oo

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

INTRODUCTION

Defendants seek reconsideration of my November 10, 2021, Findings of Fact, Award, and Order. In relevant part, as explained in the accompanying Opinion on Decision (hereinafter "the Opinion"), I found that applicant's admitted industrial injury involves her nervous and circulatory systems, legs, face, and hearing, in addition to the previously accepted body parts. I also found that the injury has led to permanent total disability. Defendants are also aggrieved by an evidentiary ruling made on the day of trial. In their petition, they assert that, in issuing the findings and award, I acted without or in excess of the Appeals Board's powers, that the evidence does not justify my findings of fact, and that those findings do not support the award. The petition is timely and verified. Applicant has filed a verified answer.

FACTS

1. Procedural background.

The industrial injury underlying this case was a period of cumulative trauma that ended on December 16, 2013. By the time of trial, defendants admitted that applicant's lumbar spine, cervical spine, shoulders, and upper extremities were involved, but they disputed injury to the legs, nervous and circulatory systems, brain, face, and ears including hearing. The original application for adjudication was filed in 2016. It was amended at least once, in 2020, with much discovery in the interim.

In March 2020, applicant filed a Declaration of Readiness (DOR) to Proceed (EAMS Document ID No. 72517179), requesting a Mandatory Settlement Conference (MSC) on the issues of permanent disability, future medical care, and self-procured treatment. In their objection, defendants averred that they were in the process of obtaining vocational expert discovery. At the resulting MSC on May 13, 2020, the Honorable Colleen Casey indicated in the pre-trial conference statement (EAMS Document ID No. 72727441) that she was "setting the case for trial and not getting additional QMEs … over defendant's objection. Discovery remains open per stipulation of the parties, with the limitations we discussed at the MSC."

When the parties initially appeared for trial in my department on August 28, 2020, they jointly requested a continuance because defendants had not yet obtained a vocational expert report. The request was granted, with the following order memorialized in the minutes of hearing (EAMS Document ID No. 73190210): "Trial continued to allow (1) defendants to obtain vocational expert report from Ira Cohen and (2) applicant to obtain rebuttal report from her vocational expert. Discovery is otherwise CLOSED." A first amended pre-trial conference statement (PTCS) was submitted. Two further trial continuances were subsequently jointly requested and granted, as the parties engaged in settlement negotiations and court-facilitated mediation. Such efforts having failed, trial proceeded on August 13, 2021, at which time the parties filed a second amended PTCS (EAMS Document ID No. 74575629) reflecting appropriately pared lists of exhibits, stipulations, and issues.

2. Evidence at trial.

At trial, in addition to her testimony, applicant offered 17 exhibits, all but one of which were admitted (see 8/13/21 Minutes of Hearing at pp. 3-5; hereinafter "the Minutes").

Defendants offered seven exhibits (after one was withdrawn). As reflected on pages 5-6 of the Minutes, three were admitted over applicant's objection. Exhibit C, however, was excluded after applicant's objection was sustained. The exhibit comprised a supplemental report from defendants' vocational expert, issued on April 2, 2021 (as discussed below, exhibit B, which was admitted, contains the expert's comprehensive October 14, 2020, report). Applicant's counsel referenced the above-mentioned August 28, 2020, minute order closing discovery while allowing defendants to "obtain vocational expert report" with applicant thereafter permitted a "rebuttal report from her vocational expert." Mr. Levy's argument, documented on page 6 of the Minutes, was that the parties had not been allowed to obtain more than one report from their respective experts after the August 2020 hearing. Defense counsel's response is on pages 7-8 of the Minutes. Having considered the parties' respective arguments, I found that the later report from defendants' expert was, in fact, barred by the August 28, 2020, order closing discovery, which was limited only to the extent of one new vocational expert report for each side. Consequently, defendants' exhibit C was excluded.

Substantively, as discussed on pages 2-14 of the Opinion, the most probative evidence fell into four broad categories: (1) reporting and testimony from the parties' Qualified Medical Evaluator (QME) Moshe Lewis, M.D.; (2) reporting from applicant's primary treating physician

(PTP), Tracy Newkirk, M.D.; (3) reporting from other treating and evaluating physicians such as Dr. G. James Avery, Dr. John Carrigg, and Dr. Richard Fernandez; and (4) reporting from the parties' respective vocational experts: Maria Brady for the applicant and Ira Cohen for the defense.

Dr. Lewis's findings, which are contained in five reports and a deposition transcript, are summarized on pages 2-4 of the Opinion. In short, while he did not find applicant's condition permanent and stationary (P&S) when he initially examined her in 2018, the QME was asked for a P&S report several months later and he obliged, assigning 8 percent whole person impairment (WPI) for the cervical spine[1], plus a pain add-on of 3 percent. However, in all his subsequent reports and testimony, Dr. Lewis comments on applicant's treatment with Dr.

Newkirk for thoracic outlet syndrome ("TOS") and consistently defers to the PTP on a host of medical-legal issues including impairment, on the basis that Dr. Newkirk is an expert in the treatment and evaluation of the condition. Thus, the only independent comprehensive impairment assessment from the QME is the one found in exhibit 2.

Dr. Newkirk's findings are contained in eight reports comprising exhibit 11, summarized on pages 8-10 of the Opinion. These show that he diagnosed applicant with TOS immediately upon evaluating her in 2014. In March 2018, he issued a P&S report in which he finds that she had lost the use of both hands and give the following impairment opinion (as quoted on pages 8-9 of the Opinion):

> Ms. Theide [sic] is … totally and permanently disabled for any and all occupations. She is not a candidate for vocational rehabilitation because she is unable to reach repetitively, grip, finger, carry, sense light touch, or do any useful activity with either upper extremity for more than a minute. Furthermore any attempt to require or force her to try to do such activity, even rarely, will likely result in a marked increase in disability. She is at high risk for the Paget von Schroetter syndrome, which is effort thrombosis of the subclavian vein on either or both sides. If that were not enough of a danger, she has anatomic evidence for arterial compression, which is known to increase in direct proportion to the duration of reaching made yet worse if there is any load whatsoever. Accordingly her ongoing inability to reach for fear of major vein clotting is complicated by arterial claudication. No one can do any work with such high risk of serious complication.

[1] This is consistent with the 2016 impairment opinion from Dr. Richard Fernandez, whose single report is found in exhibit A and who was replaced by Dr. Lewis as the assigned QME, according to the parties.

In each subsequent report, Dr. Newkirk reiterates his opinion that applicant is totally disabled even while, on one occasion, providing AMA Guides-based impairments of 34% WPI for each upper extremity, 12% WPI for each lower extremity, 15% WPI for cerebral and neurologic conditions, 8% WPI for the cervical spine, 5% WPI for the lumbar spine, and 4% WPI for cardiac arrhythmias (which I did not find industrial, as explained on pages 16-17 of the Opinion). According to Dr. Newkirk's most recent report in evidence, issued in April 2019, he ultimately diagnosed applicant with (1) TOS, (2) bilateral brachial plexus injury, (3) four- extremity limb dystonia, (4) auditory symptoms, (5) cardiac arrhythmias, (6) lumbar disc disease, (7) oromandibular dystonia, and (8) cervical spine spasms. Also of note is the following opinion, given in an April 7, 2018, report (quoted on page 9 of the Opinion):

> It should be clearly and repeatedly emphasized that this patient is not suitable for vocational rehabilitation. Thoracic outlet syndrome is an occlusive vascular and neurogenic disorder that increases in severity in proportion to reaching with or without load. Any work-hardening program or employment trials will cause her additional injury. Numerous attempts combining medications with a large range of structural adjustments of the orthosis designed to achieve the highest functional capacity for bilateral scapular stability all failed. In effect, over-correction markedly aggravates the entire symptom set, an observation that is common in individuals who have costo-clavicular intervals at 6 mm or less, which is her situation- i.e. 5 and 4 mm. When she over-tightened the vest for better truncal stability she experienced all the negative symptoms including low back pain and increased dystonia in all four extremities.

Of the other reporting physicians, Dr. Carrigg's opinions are particularly helpful. Applicant saw him for an otolaryngology consultation due to her complaints of tinnitus. While he found no hearing loss as such, he attributed the tinnitus to her industrial injury: "I have no problem associating this patient's tinnitus with her accepted diagnosis of TOS and as such, it is my opinion that the tinnitus is industrial" (exhibit 13, discussed on pages 10-11 of the Opinion).

The vocational experts, not surprisingly, diverged in their conclusions regarding applicant's employment and retraining prospects. Applicant's expert, Ms. Brady, issued four reports between July 2018 and March 2021 (exhibits 7-10, respectively) and they are discussed on pages 4-7 of the Opinion. The most substantive of these is in exhibit 8. Ms. Brady details her own evaluation findings, as well as the medical history provided to her through applicant's self-reporting and the treating and forensic reports submitted for her review. Ms. Brady finds that applicant is unable to pursue any rehabilitation plans "for employment in the open labor market,"

which is to say "not vocationally feasible and … not amenable to rehabilitation. … her work-related medical status is inconsistent with the ability to maintain employment in the open, competitive labor market." The report in exhibit 10 is the rebuttal applicant was allowed to seek at the August 28, 2020, hearing. Indeed, Ms. Brady provides a detailed critique of the defense expert's report in exhibit B. The exhibit is summarized on pages 6-7 of the Opinion.

Mr. Cohen, the defense expert, produced a comprehensive report dated October 14, 2020, which is found in exhibit B and discussed on pages 11-13 of the Opinion. He takes issue with Ms. Brady's reliance on Dr. Newkirk's opinions regarding applicant's employability. Mr. Cohen's own analysis led him to conclude that applicant has the ability to work in positions such as event coordinator, marketing analyst, or telemarketer. He also finds that applicant is amenable to rehabilitation and consequently asserts that her scheduled disability rating has not been rebutted.

Applicant's trial testimony is summarized on pages 14-16 of the Opinion. She gave a detailed account of her daily activities and her symptoms, which she described as constant and affecting nearly her entire body. With respect to her involvement with a musical act, she testified that worked on an album with the band in 2015 and last performed with the group in 2016.

3. Trial decisions.

After carefully considering the entire record, I concluded that applicant met her burden of proof with respect to injury to her nervous and circulatory systems, consisting of Dr. Newkirk's reports which describe her condition as a "neurovascular compression syndrome." As mentioned above, I specifically excluded from this finding applicant's alleged cardiac arrhythmias. Likewise, I found sufficient support in Dr. Newkirk's reporting to deem applicant's legs and face compensable. And, on the basis of Dr. Carrigg's opinion in exhibit 13, I concluded that applicant's tinnitus arises from her industrially caused TOS and is therefore itself industrial. On the other hand, I found no compensable injury to the brain.

Turning to the appropriate level of permanent disability, I was persuaded by the opinions of Dr. Newkirk and Ms. Brady that applicant has become totally disabled as a result of her industrial injury. I rejected Mr. Cohen's conclusions primarily because they are largely based on his own observations regarding applicant's medical condition, which differ from those documented by Dr. Newkirk. As a result, I found that Mr. Cohen's findings here are predicated on a medical history that cannot be considered complete or accurate, since he is not a medical expert, rendering them less than substantial. I also saw no reason to apportion any of applicant's disability

to non-industrial factors, given the absence of any medical evidence capable of supporting a Labor Code section 4663 finding. On this record, applicant was awarded lifetime indemnity on the basis of permanent total disability, along with further medical care.

4. Contentions on reconsideration.

In their petition, defendants argue that I should not have followed Dr. Lewis's findings because his reports are not substantial evidence, that QMEs in additional specialties were necessary, that I improperly relied on Dr. Lewis's opinion regarding Dr. Newkirk's expertise in the treatment and evaluation of TOS, that applicant did not meet her burden of proof with respect to injury to the nervous and circulatory systems and hearing, and that I improperly excluded defense exhibit C.

DISCUSSION

1. The substantiality of Dr. Lewis's opinions is immaterial because they did not give rise to the findings on which the award is based.

Petitioners assert that the opinions set forth by the QME, Dr. Lewis, do not rise to the level of substantial medical evidence. They further allege that Dr. Lewis violated Labor Code section 4628 and Regulation 32 (Cal. Code Regs., tit. 8, § 32) when he deferred to Dr. Newkirk with respect to TOS-related impairment. While neither the statute nor the regulation appear to actually apply here, it is true that Dr. Lewis did not produce an impairment opinion that can be considered substantial evidence. The analysis in his 2018 report in exhibit 2 is outdated and incomplete in light of subsequent medical developments. In later reporting and testimony, he opted to rely on Dr. Newkirk's analysis in lieu of his own in a way that cannot be characterized as substantial.

Petitioners' ultimate contention is flawed, however, in that the record does include substantial medical evidence on the issue of impairment (the reports of Dr. Newkirk) as well as vocational expert opinions from Ms. Brady that are also substantial—a finding not challenged by defendants on reconsideration. If petitioners believed that Dr. Lewis failed to live up to the standard of a QME, they had ample time to seek a replacement QME panel from the DWC Medical Unit: Dr. Lewis has been deferring to Dr. Newkirk since the April 15, 2019, report in exhibit 3 and his deposition was taken about a week later, whereas applicant's DOR was not filed until the following March. Likewise, petitioners' argument that subdivision (e) of Labor Code section 4628

rendered Dr. Lewis's reporting[2] inadmissible is undercut by the fact that they did not object to the admission of applicant's exhibits 1-6 when they were introduced.

2. Additional QMEs were not required before submission.

Petitioners' argument that this trial should have been delayed for additional medical- legal discovery is unsupported by the existing evidence and by due process considerations. First, as noted above, the matter was ordered to trial by Judge Casey, who specifically rejected the request for new QMEs. The injury is now eight years old, applicant was first found P&S in 2016 (see Dr. Fernandez's report in exhibit A), and there has been evidence of her permanent total disability since March 2018 (see Dr. Newkirk's earliest P&S report found in exhibit 11). On the other hand, defendants have not put forth evidence of their attempts at obtaining QMEs in additional specialties and, more importantly, none of the reports in evidence demonstrates the need for such evaluations. In fact, contrary to petitioners' characterization, when Dr. Lewis was asked in deposition about the appropriateness of a neurology QME, he testified that one would be appropriate but likely inadequate to properly assess applicant's TOS (see page 15, lines 8-11 of the transcript in exhibit 4).

3. Applicant's objection to the admission of defense exhibit C was properly sustained.

While defendants were undoubtedly prejudiced by the exclusion of exhibit C from evidence, the ruling was appropriate based on the procedural record. As reflected in the August 28, 2020, minutes of hearing, the parties were given clear instructions as to what discovery could still be obtained: an initial report from the defense expert and a rebuttal from the applicant's. The rationale, needless to say, was two-fold. First, as the trial judge, I had an interest in ensuring a complete record while avoiding undue delay and endless rounds of responsive reporting. Second, since Ms. Brady had already issued three reports, the defense expert's opportunity to rebut her conclusions came with his initial evaluation, so there was no need for another rebuttal. The same cannot be said for applicant's expert, who obviously was not in a position to critique or rebut Mr. Cohen's findings at the time of her three earliest reports. When applicant objected to exhibit C on the day of trial, I did not find defense counsel's response to justify this attempt to circumvent the August 28, 2020, order closing discovery.

[2] To be precise, defendants assert, on page 5 of the petition, that "Dr. Lewis violated the Labor Code and thus his report should not be admissible," without specifying which of the five QME reports is at issue.

RECOMMENDATION

For the foregoing reasons, I recommend that defendants' Petition for Reconsideration, filed herein on December 6, 2021, be denied.

DATED: December 19, 2021

Eugene Gogerman
Workers' Compensation Judge
Workers' Compensation Appeals Board

OPINION ON DECISION

Introduction and Procedural History

Applicant sustained an admitted period of industrial cumulative trauma (CT) involving her shoulders and upper extremities, as well as the lower back and neck, with the following additional body parts and systems in dispute: brain, lower extremities, face, ears including hearing, nervous system, and circulatory system. The parties agree on applicant's job title and occupational group, her pre-injury earnings, and her entitlement to further medical care. Also, there is no dispute as to the date when her disability became permanent and stationary (P&S). The main area of disagreement, aside from nature-and-extent, is the appropriate level of permanent disability, with applicant contending that she is now permanently disabled as a result of the industrial injury. Secondarily, applicant raised entitlement to out-of-pocket medical expense reimbursement and her attorney seeks a fee on any recovery.

The evidence at trial consisted of 21 exhibits and the testimony of the injured worker. Judicial notice has been taken of the parties' respective trial briefs.

Documentary Evidence

1. Applicant's exhibits 1-6.

These exhibits relate to the involvement in the case of Panel Qualified Medical Evaluator (QME) Moshe Lewis, MD, comprising five reports and a deposition transcript. The earliest report, found in exhibit 1, is dated September 17, 2018. At the time of that evaluation, applicant reported symptoms in the upper and lower back, all extremities, central and peripheral nervous systems, and vascular system. She recalled that the lower back and right foot pain came on first, followed by "a fire-like pain" and swelling in the upper body and hands. Treatment with her personal physician in October and November 2013 did not keep her condition from deteriorating. Aside from pain and increased sensitivity, she developed problems with hearing and vision, as well as "very strong arrhythmias" and severe constipation. Consistent with applicant's presentation on the witness stand, she put together a printed timeline for the QME with a detailed account of medical treatment between 2013 and 2017. As to preexisting problems, she denied any history of injury or "difficulty with the stated area," though she acknowledged a "minor" automobile accident in 1993 with injuries to the neck. Dr. Lewis summarizes a large set of treatment records. Based on his

examination, he diagnoses applicant with 14 different conditions, beginning with bilateral thoracic outlet syndrome ("TOS"), appearing to find industrial causation as to all. Her condition had not yet stabilized.

About three months later, Dr. Lewis issued a supplemental report (exhibit 2). It appears that the requesting party made the representation that treatment recommended by the QME had not been authorized and asked him to perform an impairment analysis. He obliged: "Since a conservative approach to her care is not being authorized, I will declare the claimant MMI and issue a rating." He goes on to assign 8 percent whole person impairment (WPI) for the cervical spine, with a 3 percent pain add-on. According to exhibit 3, another supplemental report was issued on April 15, 2019, consisting of a review of "QME rebuttal" P&S reporting from Dr. Tracy Newkirk (see exhibit 11, infra). While reiterating his earlier impairment opinion, Dr. Lewis also writes, "Dr. Newkirk is the local expert on Thoracic Outlet Syndrome and its additional involvement into various body systems. He is the Neurologist who understands the ratings and their application in Thoracic Outlet Syndrome. I previously deferred additional impairments and subsequent treatments to other specialists and continue to do so."

Shortly after he issued the report in exhibit 3, Dr. Lewis gave deposition testimony; the resulting April 23, 2019, transcript is in applicant's exhibit 4. I found the following portions of his testimony particularly informative:

- Dr. Lewis agrees with Dr. Newkirk that applicant has work-related bilateral neurogenic, venous, and arterial TOS with complex expression including autonomic and lymphatic features; bilateral brachial plexus with autonomic features; limb dystonia; facial or mandibular dystonia; cervical spine muscle spasm; pronunciation; pulsatile tinnitus; and lumbar disc disease (page 7, line 8 of the transcript in exhibit 4 through page 8, line 11; hereinafter "7:8-8:11").

- Most of these conditions are not stand-alone diagnoses but rather are "in the category" of TOS (8:12-17).

- The QME does not have an opinion regarding cardiac arrhythmias: "[Dr. Newkirk] must be a cardiologist so we can get into that later" (8:5-9).

- There is no apportionment to nonindustrial causes (8:21-23).

- Dr. Lewis defers "to any other doctors that can render a better rating as more appropriate" (9:19-22).

- Dr. Newkirk is "considered to be an expert in [TOS] for pretty much the [W]est [C]oast" and the QME defers to him, as the thoracic expert, with regard to impairment (9:22-10:10).

- When presented with Disability Evaluation Unit consultative rating reports (which were excluded from evidence), Dr. Lewis was under the impression that the ratings were prepared by Dr. Newkirk: "I'm assuming he's a QME or be able to fill out the forms that the DEU has for issuing a rating" (10:24-11:5).

- Dr. Lewis is not an expert in TOS and prefers to "defer to Dr. Newkirk or QME" (14:20-22).

- A neurology QME panel "would be appropriate, but probably not adequate" for TOS (15:8-11).

The next supplemental QME report is dated August 14, 2019 (exhibit 5). Dr. Lewis reviews a number of medical reports, most of which he previously discussed, as well as his own deposition testimony. He goes on to state his "agreements" based on a number of queries from (presumably) applicant's counsel. Thus, in a somewhat unusual format, the QME opines that applicant suffered an industrial CT[1] resulting in TOS, with specific diagnoses including "bilateral neurogenic, venous and arterial thoracic outlet syndrome with complex expression including autonomic and lymphatic features, bilateral brachial plexus injury with autonomic features, acquired limb dystonia triggered by neurogenic TOS, facial oromandibular dystonia, muscle spasms in the cervical spine, migrainuos [sic] vertigo, tinnitus, cardiac arrhythmias and lumbar disc disease." He clarifies that not all the conditions are part of TOS. He again indicates that "the rating should be deferred to Dr. Newkirk" as an expert in TOS.

Exhibit 6 contains the most recent supplemental report from Dr. Lewis, dated December 14, 2019. As the only substantive content, the QME confirms that applicant's disability became P&S on December 18, 2018 (this is consistent with the parties' stipulation, which will be adopted).

2. Applicant's exhibits 7-10.

Each of these exhibits contains a report issued by applicant's vocational expert witness, Maria Brady. The earliest, dated July 17, 2018, and found in exhibit 7, is not very probative. It appears that Ms. Brady was provided with a few of Dr. Newkirk's treatment reports and, without

[1] Although Dr. Lewis uses the word "apportionment" here, his opinion relates to causation of injury, not disability: "Ms. Thiede's injury is an industrial injury as the injury arose out of the employment, occurred during the course of employment, and is 100% industrial in causation with no apportionment."

the benefit of any independent evaluation of the injured worker, she gives the "preliminary vocational opinion" that applicant was (1) not amenable to rehabilitation and (2) unable to compete in the open labor market.

Exhibit 8 comprises a more comprehensive report, dated November 1, 2019. The expert was provided with medical reports issued by Dr. Lewis and Dr. Newkirk, as well as the former's deposition testimony. According to this report, applicant was interviewed for over two hours and underwent three hours of vocational testing, inclusive of breaks. Ms. Thiede described symptoms in her feet, hands, neck, and back, along with headaches. She was able to stand for an hour at a time and walk for between 30 and 90 minutes, depending on the day. Sitting tolerance was about 90 minutes. She was able to bend, twist, squat, and climb stairs, but not crawl. She had difficulty kneeling, lifting, carrying, pushing, and pulling. She could not reach with her arms and had "trouble with the use of her hands and fingers." Driving was limited to 10 minutes. Applicant also complained of occasional dizziness and vertigo, loss of ability to concentrate, and memory problems. Of note, she told Ms. Brady that she had feelings of depression and anxiety and the expert notes that applicant appeared anxious and cried during the evaluation.[2]

Applicant's educational background consisted of a high school diploma and a college degree. Her employment history was in marketing and event production, with little full-time work reported after 2002, other than self-employment as a consultant. She told Ms. Brady that she did not feel capable of working. The vocational expert references the following portion of Dr. Newkirk's P&S report (discussed below):

> Dr. Newkirk reported that she is not able to do any of her usual and customary job duties. He identified work restrictions as: "no repetitive activity, including repetitive computer use, keyboarding, reaching, overhead activity, carrying, manipulating, gripping, grasping, lifting, pushing, and pulling. She is not able to return to work." Dr. Newkirk concluded that Ms. Thiede is not suitable for vocational rehabilitation, and stated, "any work-hardening program or employment trials will cause her additional injury." Dr. Newkirk opined that there is reasonable medical probability that the syndrome is going to worsen beyond her current status.

On this basis, Ms. Brady concludes that "there are no rehabilitation plan options to recommend for Ms. Thiede for employment in the open labor market." She also opines that applicant would be unable to maintain employment in the open labor market despite her vocational test scores. With

[2] Injury to the psyche is neither alleged nor admitted in this case.

respect to non-industrial medical apportionment, Ms. Brady writes that both Dr. Newkirk and Dr. Lewis (see fn.1 above) did not find any to be warranted. She also rules out any vocational apportionment on the basis of the so-called Montana factors. She sums up the report as follows:

> Ms. Thiede is not vocationally feasible and is not amenable to rehabilitation. As outlined in this report, her work-related medical status is inconsistent with the ability to maintain employment in the open, competitive labor market. Thus, Ms. Thiede's work injuries result in diminished future earning capacity of 100%, all of which is attributed to the cumulative trauma injuries through 10/15/13.

According to exhibit 9, Ms. Brady issued a brief supplemental report on February 7, 2020. After reviewing Dr. Lewis's report found in exhibit 6, she revised her opinion to reflect the QME's decision to defer to Dr. Newkirk and to clarify that Dr. Lewis also found applicant P&S.

Finally, on March 11, 2021, Ms. Brady issued a detailed supplemental report (exhibit 10) based on her review of the defense vocational expert report found in exhibit B, infra. In her opinion, part of the reason the two experts reached different conclusions regarding applicant's amenability to rehabilitation was Mr. Cohen's reliance on his own work capacity findings in lieu of those in Dr. Newkirk's reports. She also asserts that the defense expert's opinions are inconsistent with Dr. Newkirk's statements that (1) applicant's condition will deteriorate with time and (2) any attempts at employment or work hardening will cause further injury. Ms. Brady goes on to cite several additional diagnostic findings and descriptions from Dr. Newkirk's reporting that are allegedly ignored by Mr. Cohen.

Moving on to substantive opinions, Ms. Brady contends that the defense expert did not identify any suitable jobs applicant is capable of performing that do not involve repetitive computer work. Of note, she opines that Mr. Cohen incorrectly assumed that applicant is able to make use of voice recognition software because such technology is incompatible with jobs that already require the employee to wear a telephone headset to communicate with customers: "While use of voice recognition software can be an asset with word processing functions when not communicating by telephone at the same time, integrating such software with other types of applications can be challenging." Ms. Brady disagrees with Mr. Cohen's analysis of applicant's transferable skills on the basis that Ms. Thiede is allegedly precluded from applying those skills to a new job because of her medical problems, which include spending 20 hours a day in bed.

Ms. Brady concludes by reiterating her earlier opinions and specifically disagreeing with those given by the defense expert:

> Mr. Cohen ignores the medical complexity of Ms. Thiede's systemic neurovascular condition, disregarding Dr. Newkirk's medical restrictions and opinions about the medical inadvisability of attempting to work based on the totality of her condition. Instead, Mr. Cohen not only inappropriately recommends that she work1 but suggests occupations inconsistent with Ms. Thiede's upper extremity limitations. He identifies ergonomic equipment and general job accommodations for "persons similarly situated" who are actually dissimilar from Ms. Thiede. Throughout his report, Mr. Cohen minimizes Ms. Thiede's symptoms and deficits as reported by Dr. Lewis and Dr. Newkirk, and by Ms. Thiede during her vocational evaluations.

3. Applicant's exhibit 11.

This exhibit contains eight treatment reports from Dr. Newkirk, issued between 2014 and 2019. According to the earliest, applicant came to Dr. Newkirk for a neurological consultation in April 2014 because she was not improving from her work injury despite visits with several practitioners and the Stanford orthopedic department. Dr. Newkirk's initial assessment was as follows: "Chronic cervical, thoracic and lumbar strain[. ¶] Bilateral thoracic outlet syndrome which probably began with long hours at the key board and was markedly exacerbated by the effort put forth at the last marathon event." Subsequent progress reports describe persisting or increasing symptoms.

On March 2, 2018, Dr. Newkirk issued a P&S report based, in part, on "in-office testing" of applicant's functional capacity while wearing the orthosis he prescribed, "to determine if there was any potential for her to return to any occupation which would require intermittent or continuous reaching with or without load." Of note, applicant complained to Dr. Newkirk that this testing "really upset things" in her extremities. This report includes a formal diagnosis of "loss of use of both hands," among several other conditions involving the thoracic outlet, upper extremities, auditory symptoms, "not yet diagnosed" cardiac arrhythmias, and lumbar disc disease. Turning to impairment, the doctor writes,

> Ms. Theide [sic] is … totally and permanently disabled for any and all occupations. She is not a candidate for vocational rehabilitation because she is unable to reach repetitively, grip, finger, carry, sense light touch, or do any useful activity with either upper extremity for more than a minute. Furthermore any attempt to require or force her to try to do such activity, even rarely, will likely result in a marked increase in disability. She is at high risk for the Paget von Schroetter syndrome, which is effort thrombosis of the subclavian vein on either or both sides. If that were not enough of a danger, she has anatomic evidence for arterial compression, which is known to increase in direct

> proportion to the duration of reaching made yet worse if there is any load whatsoever. Accordingly her ongoing inability to reach for fear of major vein clotting is complicated by arterial claudication. No one can do any work with such high risk of serious complication.

Dr. Newkirk issued another "final evaluation" report on April 7, 2018. Without any apparent new examination findings, he revises the list of diagnosed conditions as follows: (1) TOS, (2) bilateral limb dystonia, (3) cryptogenic auditory symptoms, (4) undiagnosed cardiac arrhythmias, and (4) lumbar disc disease. The PTP references the impairment findings of Dr. Fernandez and opines that they are incomplete. While no longer formally diagnosing applicant with loss of use of both hands, Dr. Newkirk nevertheless concludes that, within the meaning of Labor Code section 4662, her condition has resulted in permanent total disability: "The general disability rating applies: 4662, meaning the loss of or the loss of use of both hands, the most applicable disability that automatically precludes her from all known jobs." At the same time, he gives a detailed impairment analysis using the AMA Guides, arriving at 34% WPI for each upper extremity plus 12% WPI for each lower extremity based on peripheral nervous and vascular system injury, 15% WPI for cerebral/neurologic conditions, 8% WPI for the cervical spine, 5% WPI for the lumbar spine, and 4% WPI for cardiac arrhythmias. In addition to reiterating his opinion that applicant is permanently totally disabled notwithstanding the impairment values, Dr. Newkirk writes,

> It should be clearly and repeatedly emphasized that this patient is not suitable for vocational rehabilitation. Thoracic outlet syndrome is an occlusive vascular and neurogenic disorder that increases in severity in proportion to reaching with or without load. Any work-hardening program or employment trials will cause her additional injury. Numerous attempts combining medications with a large range of structural adjustments of the orthosis designed to achieve the highest functional capacity for bilateral scapular stability all failed. In effect, over-correction markedly aggravates the entire symptom set, an observation that is common in individuals who have costo-clavicular intervals at 6 mm or less, which is her situation- i.e. 5 and 4 mm. When she over-tightened the vest for better truncal stability she experienced all the negative symptoms including low back pain and increased dystonia in all four extremities.

Yet another "final evaluation" report, essentially a response to Dr. Lewis's QME reports in applicant's exhibits 1 and 2, was issued on April 3, 2019. Dr. Newkirk opines that Dr. Lewis failed to rate the entirety of applicant's condition, which gave rise to the two evaluators' disagreement as to impairment. His updated diagnosis is (1) TOS, (2) bilateral brachial plexus injury, (3) four-

extremity limb dystonia, (4) auditory symptoms "that still defy analysis", (5) cardiac arrhythmias, (6) lumbar disc disease, (7) oromandibular dystonia, and (8) cervical spine spasms. The impairment analysis is essentially identical to the earlier report, with the addition of a three-page section captioned "Supporting Evidence for Permanent, Total Disability." As to apportionment, Dr. Newkirk writes, "Causation is 100% attributed to her work-related injury … because there were no symptoms or disabilities present prior to the work-related injury as described above."

4. Applicant's exhibits 12-15.

These exhibits comprise additional treatment reports and, to the extent they add to the evidentiary picture, they will be discussed in chronological order. Exhibit 14 contains a bilateral upper extremity MRI and MRA study report issued by Dr. Scott Werden at Dr. Newkirk's request on July 18, 2014. The findings appear consistent with the history reported by Dr. Newkirk and the document is not otherwise probative to a lay factfinder. On February 12, 2015, also at Dr. Newkirk's referral, applicant was seen by G. James Avery, M.D. (pages 2-5 of exhibit 12), who agreed with the TOS diagnosis, but noted atypical features to applicant's presentation, as well as atypical response to Kinesio taping.

Exhibit 13 contains a March 22, 2016, report from John Carrigg, M.D., an ENT specialist according to his letterhead, who saw applicant with regard to her complaints of tinnitus. Dr. Carrigg found that applicant had no hearing loss and her tinnitus was of obscure etiology:

> It is impossible to say where the origin of this patient's tinnitus is…. … In my opinion, a good bet is autonomic overload….
>
> I have had a very personal observation of TOS and in my opinion; this patient not only suffers from TOS but has had RSD (Complex regional pain syndrome) symptoms as well. The literature is full of patients with TOS complaining of tinnitus so I have no problem associating this patient's tinnitus with her accepted diagnosis of TOS and as such, it is my opinion that the tinnitus is industrial.

Exhibit 15 contains a Holter testing report from Gordon Fung, M.D., dated July 27, 2017, which is not probative in the absence of any professional interpretation of the results. Finally, on January 30, 2018, applicant returned to Dr. Avery (pages 6-8 of exhibit 12), who now felt that surgery would be appropriate, given the lack of improvement over the years. It does not appear that applicant actually proceeded with any operation.

5. Defendants' exhibit A.

This report contains a QME report issued by Dr. Richard Fernandez on August 24, 2016. As reflected in the trial minutes, the parties agreed that Dr. Fernandez was replaced by Dr. Lewis after he evidently stopped reporting. As such, I did not find it appropriate to exclude Dr. Fernandez's report from evidence, but its probative value is diminished by the staleness of his findings, which were superseded by years of subsequent treatment and evaluation. According to this report, Dr. Fernandez concurred in the TOS diagnosis and found applicant's condition P&S with 8% WPI for the upper extremities and no basis for non-industrial apportionment.

6. Defendants' exhibits B and D.

As mentioned above, defendants obtained vocational expert reporting from Ira Cohen. According to exhibit D, he advised applicant in May 2020 of an upcoming three-hour "interview and testing session" and provided her with questionnaires to complete in advance. The report is found in exhibit B. It is dated October 14, 2020, weighs in at 59 pages, and is accompanied by a $6,900 bill from the expert. In addition to investigation reports, deposition testimony, and other medical records, Mr. Cohen summarizes Dr. Newkirk's report of April 3, 2019. While that report is undoubtedly comprehensive, it is unclear whether Dr. Newkirk's earlier "final evaluation" reports were also provided to the expert, who describes the medical picture as "a challenging set of circumstances … under which to conduct a vocational analysis." Mr. Cohen points out that applicant is a college graduate and had a history of jobs that "did not likely exceed" semi-sedentary or light work demands. In his opinion, she remains capable of working in a sedentary or semi-sedentary position. Mr. Cohen notes that applicant reported being able to sit up to 90 minutes, depending on the chair, which is inconsistent with the 30 minutes reported by Dr. Newkirk. Similarly, the expert cites his observations of applicant during the evaluation to the extent they contradict the PTP's findings. In addition, he specifically critiques and rejects Dr. Newkirk's opinion that applicant is incapable of participating in the labor market.

Mr. Cohen concludes that applicant may optimally work part-time, meaning fewer than 35 hours per week, including home-based employment (emphasis removed):

> Based on the overall medical evidence, it is this consultant's opinion that, despite her significant impairments and related functional losses, Ms. Thiede possesses sufficient residual abilities such that they will allow her to perform selected Sedentary and Semi-sedentary jobs in the open labor market. While cognitive deficits are also documented, I have seen no evidence that it is employment

> disabling, indeed Ms. Thiede earned very satisfactory vocational aptitude test scores. Therefore, Ms. Thiede possesses the "Ability to Work."

The report identifies the following "medically and vocationally appropriate" jobs for applicant: event coordinator, public relations specialist, advertising and promotions manager, marketing analyst, customer service representative, telemarketer. Having found her employable, Mr. Cohen also concludes that applicant is amenable to rehabilitation and that, as such, the scheduled disability rating has not been rebutted on a vocational basis. He makes a legal argument as to why he disagrees with Ms. Brady on these issues, asserting that her findings are inappropriately predicated on Dr. Newkirk's opinion that applicant is unemployable and unamenable to rehabilitation because such findings are the province of vocational experts and not physicians.

7. Defendants' exhibit E.

This exhibit comprises a set of medical records from Barbara Newlon, DO. The majority of the documents consist of handwritten visit notes. Although there is a New Patient Information sheet dated November 11, 2013, the notes appear to reflect visits going back to at least 1999. They document complaints and treatment relating to a wide variety of body parts over the years: hips and legs; back and neck (including "neural buzzing"); shoulders, arms, wrists and thumbs; head and facial bones; ribs and abdominal muscles; and uterine fibroids.

Occasionally, applicant complained about her work hours and being stressed by or dissatisfied with her job, in addition to various personal and family stressors. In 2003, Dr. Newlon notes that applicant had been out of work and on unemployment. About a year later, applicant reported doing a lot of seated computer work. In 2006, she complained about working 20-hour shifts at a computer. By 2008, she was looking for work again and, in April of that year, she reported having steady employment. The following year, applicant felt that she developed strep throat because of how hard she was working and, shortly thereafter, she reportedly lost that job. In 2010, Ms. Thiede complained that her hearing was "off" after a blow to the back of the head.

8. Defendants' exhibits F and G.

The documents in these two exhibits consist of letters from defense counsel to Dr. Fernandez pertaining to video footage evidently sent to him for review. The footage itself is not in evidence and there are no reports from Dr. Fernandez issued subsequent to the letters, so they have no probative value here.

Applicant's Testimony

At the time of her injury, she was working on the Nike Women's Marathon as a warehouse product manager. She did a lot of computer work, as well as manual labor such as handling boxes and instructing the crew on shipments. In the weeks leading up to the event, she worked 80-hour weeks, six or seven days a week. As a result of these work activities, she developed increasing symptoms in the lower back, right foot, neck, upper back, shoulders, forearms, and right hand. The week of the race, her hands became swollen. On November 11, she woke up with her arms numb and her hands feeling like they were being stung by bees. She had no grip strength and felt pain in the balls of both feet.

By April, she developed weakness in the legs and couldn't feel her arms when walking. Her hands were swollen, turned purple and red, and had a pins-and-needles sensation. She also experienced arrhythmias and awoke at night choking and gasping for air because she had stopped breathing. She felt tingling around the corners of her eyes and nostrils. Her hands were stuck flexed at about 90 degrees at the metacarpophalangeal joints.

Later, she developed a painful crushing sensation in her feet and pain in the hands if they were bumped. She had stabbing pain in all extremities at random times. Occasionally, her groin felt numb when getting out of a car. She felt an internal tremor and pulsing. In late 2015, she woke up one night hearing popping in her ears. She subsequently developed tinnitus. In 2016, she developed episodes of vertigo and her ears started popping every time she swallowed. Once, she awoke with her heart pounding hard and fast and feeling vertiginous. Later, she noticed her face muscles pulling down, making her face look different. While asleep, she could feel her jaw snapping shut and her body jerking.

She still has vertigo and tinnitus. She wears prescription glasses due to vision problems, but sometimes things are blurry when she tries to read. Reaching causes tingling and numbness in the leg, as well as stabbing pain around the clavicle or hands. Typing leads to these symptoms in the feet, along with severe back pain. She suffers from dystonia. If she tries to write or grip, her hands get stiff. She has constant pain in the hands and feet. Her arms, legs, torso, and mouth still jerk while she is asleep. During the day, her jaw is very tight and the upper lip very stiff. She has neck spasms.

She told Dr. Newlon that she experienced neck pain since college. She also said that lifting 60 lbs hurt her neck and described electrical nerve pain in the neck. She remembers telling Dr.

Newlon in May 1999 that her neck pain had been very bad and she felt "zinging" in the nerves. She saw Dr. Newlon for many years for this problem. She did tell Dr. Newlon about a car accident in 1992, which resulted in cervical whiplash. She had an earlier accident while in high school as well. She saw Dr. Newlon for body work after being active and falling while snowboarding or running. She suffered a minor left wrist and thumb injury. She recalls an incident at home when she bent down and bumped her head, after which she had a funny feeling like ringing or a tickle in the ears. This went away. She has not sustained a blow to the head other than that bump.

On a typical day, she wakes up between 8:00 and 10:00 a.m., but stays in bed until noon. After getting up, she spends time with her mother at breakfast, then watches television news until around 2:00 p.m. She almost always naps between 4:00 or 5:00 and 7:00 p.m. She is extremely tired because her sleep is disrupted every night. After the nap, her friend picks her up. They have dinner and watch TV at his house, after which he takes her home. The only form of exercise she does now is walking. She goes hiking on trails or on dirt paths around the neighborhood. Depending on how she feels, she sometimes walks for less than 30 minutes, sometimes longer than an hour. Her hikes are usually on flat terrain.

She can't do her job because movements that irritate the clavicle region set off her symptoms. This includes reaching with either arm and looking in the same direction for too long. The symptoms occur all day, every day. They affect her brain, hearing, vision, face, mouth, neck, arms, hands, heart rhythms, digestion, legs, and feet. She has not attempted to enroll in any classes or applied for any jobs since the injury. She sings in a band, but has not performed since 2016. When she was performing, she averaged between two and ten shows each year. The band released an album in 2015, which took about two weeks of eight-hour days in the studio. She has not done any recording recently.

Analysis

1. Did applicant sustain a compensable injury to the nervous and circulatory systems?

Although the medical evidence does not contain specific references to a nervous system or circulatory system injury as such, Dr. Newkirk has consistently and persuasively characterized TOS as a "neurovascular compression syndrome." He has also documented symptoms and impairments relating to applicant's peripheral vascular and nervous systems in connection with

the TOS diagnosis. Thus, I find that both the nervous system and the circulatory system are compensable components of the industrial injury herein.

It must be noted, however, that applicant did not meet her burden of proof with respect to her alleged cardiac arrhythmias, in that none of the reporting physicians appears to give a competent opinion as to their cause. Dr. Fung's Holter testing report in exhibit 15 lacks any diagnosis or causation analysis and Dr. Newkirk deals with the issue in a conclusory manner, without setting forth his rationale or his bona fides with respect to a cardiologic condition.

2. Did applicant sustain a compensable injury to the brain?

I am unable to identify substantial medical evidence capable of establishing industrial injury to the brain. None of the reporting or treating physicians whose findings are in evidence appear to diagnose a brain injury attributable to applicant's job duties. Consequently, I find that the brain is not a compensable part of the claim.

3. Did applicant sustain a compensable injury to the legs?

Here, I find that Dr. Newkirk provided sufficient justification for a finding of injury to the lower extremities when he diagnosed applicant with four-extremity dystonia. The existence of this separate diagnosis connotes a condition unto itself, as opposed to lower extremity symptoms originating with another body part. To this limited extent, then, the legs are a compensable body part.

4. Did applicant sustain a compensable injury to the face?

Like the legs, the face is part of the diagnostic impression in a number of Dr. Newkirk's report. In addition, Dr. Lewis, in the report in exhibit 5, agreed that applicant's industrial condition affects her facial and mandibular muscles. On this basis, I find it appropriate to include the face among the compensable body parts.

5. Did applicant sustain a compensable injury to the ears, including her hearing?

Here, although Dr. Lewis did not address the hearing problems and Dr. Newkirk repeatedly wrote that they "defy analysis," Dr. Carrigg's report in exhibit 13 contains a professional medical opinion attributing applicant's tinnitus to her TOS and expressly finding it industrial in origin. Thus, while there may not be injury to the ears per se, applicant does suffer from hearing difficulty in the form of tinnitus and the condition is a compensable component of the industrial CT.

6. What is applicant's level of permanent disability?

Having carefully analyzed the evidence, I conclude that applicant met her burden of proof with respect to permanent total disability arising from the industrial injury herein. Dr. Newkirk's findings and opinions are not only unequivocal with regard to her symptoms and limitations, they are also unrebutted, given Dr. Lewis's complete abdication of his reporting responsibilities in favor of deferring to the PTP. And while a physician's opinion regarding someone's lack of employment prospects cannot, in most instances, form the only basis for a finding of total disability absent a concordant scheduled rating, Dr. Newkirk's opinions are persuasive, easy to follow, and consistent with the reporting of Dr. Avery and, to a large extent, Dr. Lewis as well.

More importantly, I find Ms. Brady's conclusions to be compelling, in that they reflect the actual medical evidence of applicant's physical limitations and the real-world prospects of someone in applicant's position seeking employment accommodations. To the extent Mr. Cohen opted to disregard some of Dr. Newkirk's findings because his own observations or interview conclusions yielded different results, I find it inappropriate for a vocational expert to substitute his own opinions for what is clearly a medical determination. In other words, Mr. Cohen's report does not suffice to invalidate Dr. Newkirk's examination findings and observations over his years-long tenure as applicant's PTP. That being the case, it was up to the vocational experts to accept the medical evidence of physical limitations and apply their expertise to it with respect to employment and retraining prospects. In this instance, Mr. Cohen went too far beyond such an approach. And, with respect to the jobs he proposes for applicant, I am persuaded by Ms. Brady's critique regarding the difficulty someone in Ms. Thiede's position would encounter trying to find reliable employment on a part-time basis and with numerous adaptations required. It also bears noting that multiple reporting physicians have documented facial spasms as a symptom of applicant's industrial TOS and it would be naïve to expect this to have no effect on a job applicant in fields like public relations, marketing, or customer service, which all entail significant face time with strangers. In all, I am not persuaded by Mr. Cohen's opinion that applicant is capable of maintaining part-time employment and amenable to rehabilitation.

Although defendants produced some evidence of preexisting medical problems, in the form of Dr. Newlon's notes found in exhibit E, they have not met their burden of proof with respect to non-industrial apportionment. It was incumbent on defendants to convince Dr. Newkirk and/or Dr. Lewis of the applicability of such apportionment here and, in reality, both evaluators expressly attributed the entirety of applicant's disability to the industrial injury. As a lay person, I am not in

a position to draw any medical conclusions from the visit notes in exhibit E, though I note that the frequency and breadth of applicant's complaints do paint a picture of someone extremely preoccupied with her health even before the work injury, which appears to have continued through the present—Mr. Cohen commented on applicant's disability-mindedness and I certainly observed her all but directing her attorney in the course of this trial, demonstrating a thorough knowledge of the evidence if not the applicable legal principles.

7. Is applicant entitled to reimbursement for out-of-pocket medical expenses?

Applicant has not met her burden of proof with respect to any such reimbursement and I find that none is warranted.

8. Is applicant's attorney entitled to a fee?

In light of the competent and diligent representation provided to the injured worker in connection with this dispute, I find that applicant's counsel is entitled to a fee consisting of 15 percent of the indemnity being awarded herein. Given the existence of an attorney fee lien, applicant's counsel will be ordered to hold all fees in trust, with jurisdiction reserved as to this and any other liens that may arise.

DATE: November 10, 2021

Eugene Gogerman
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE