WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

YOUARASH SOORMI, ***Applicant***

vs.

FOSTER FARMS, PERMISSIBLY SELF-INSURED; ADMINISTERED BY GALLAGHER BASSETT, ***Defendants***

Adjudication Number: ADJ12546390
Sacramento District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report 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, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 19, 2023

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

YOUARASH SOORMI
EASON & TAMBORNINI
SINGERMAN LAW

SAR/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

On April 20, 2023, defendant filed a timely and verified Petition for Reconsideration from the Findings and Award issued on March 30, 2023, which found, in pertinent part, that applicant sustained permanent total disability as a result of his August 22, 2019 industrial injury to the right hand and fingers.

Defendant argues that I failed to properly analyze whether applicant's inability to rehabilitate to a new career is due to applicant's ethnic origin, immigration status, and/or inability to speak English.

Having thoroughly reviewed the contents of the Board's file and the Petition for Reconsideration, I respectfully recommend that defendant's Petition for Reconsideration be **DENIED.**

FACTUAL AND PROCEDURAL BACKGROUND

This matter proceeded to trial on the issues of permanent disability, with applicant claiming 100% permanent total disability, occupational group code, attorney's fees and the costs of applicant's vocational expert evaluation. (Minutes of Hearing and Summary of Evidence (MOH/SOE), February 16, 2023, p, 2, lines 33-44.) Defendant only seeks reconsideration as to the finding of 100% permanent total disability. (See generally, Petition for Reconsideration, April 20, 2023.)

Applicant worked as a laborer and machine operator at a meat packing facility. (MOH/SOE, supra. at p. 2, lines 6-10.) Applicant was evaluated by Agreed Medical Evaluator, Leonard Gordon, M.D., who took the following history of injury to the right hand:

> [Applicant] states that on 8/22/2019, he was wearing work gloves and was sent over to a machine that he had to try to fix. He states the machine was supposed to be turned off and somehow remained on with his hand inside, and. the vacuum and the heating element crushed his right hand including the index long, long, ring, and small fingers. His coworker shut off the machine and pulled his hand out, and his hand had sustained burns. He noted the long finger was deviated radially and the index finger was deviated ulnarly, and all the fingers were crushed and burned.

(Joint Exhibit 101, pp. 2-3.)

Applicant had multiple fractures, which Dr. Gordon described as follows:

> X-rays were taken which showed multiple fractures with a displaced fracture' of the second metacarpal, an undisplaced fracture of the third finger middle phalanx, a comminuted fracture of the ring finger middle phalanx , and a comminuted fracture of the small finger middle phalanx.

(*Id.* at p. 3.)

Applicant proceeded to surgery the next day. (*Ibid.*) Applicant proceeded with follow up care and was diagnosed with chronic regional pain syndrome in November 2019. (*Ibid.*) Applicant is right hand dominant, but now uses the left hand for all activities. (*Id.* at pp. 2, 4.)

Dr. Leonard opined on causation and apportionment as follows:

> The problems he has are fully the result of the injury, as described. There are no factors outside of this injury that initiated or aggravated the problem. There are no ongoing disease processes or subsequent injuries, and there are no factors of apportionment that apply.

(*Id.* at p. 10.)

Dr. Leonard suggested further treatment for applicant's chronic regional pain syndrome in the form of stellate blocks, but applicant did not wish to proceed with this treatment. (Joint Exhibit 102, p. 2.) Dr. Gordon found applicant to be permanent and stationary following the declension of treatment. (*Ibid.*) Thereafter, Dr. Gordon reevaluated applicant and issued a ratings report. (Joint Exhibit 103.)

At the reevaluation, Dr. Gordon noted the following:

> Currently, the patient states he continues to be unable to use his right hand to lift anything. He has very limited strength in the right hand. He cannot apply pressure to the hand. He has markedly decreased range of motion. He is unable to make a fist. He is unable to work or use the hand for daily activities such as holding utensils, dressing, self-care, etc.

(*Id.* at pp. 3-4.)

Dr. Gordon assigned 24% whole-person impairment to the right hand. (*Id.* at p. 11.) Dr. Gordon provided work restrictions which precluded "activities that require gripping, manipulating, or dexterous tasks using the right hand." (*Id.* at p. 11.)

Dr. Gordon reviewed subrosa video, but it did not cause him to change any of his opinions in the case. (See generally, Joint Exhibit 104.)

Applicant credibly testified at trial that he has difficulty grabbing items, lifting a chair or a gallon of milk. (MOH/SOE, supra at p. 5, lines 1-3.) He cannot use a keyboard or mouse. (*Id.* at p. 5, line 5.) He cannot grasp a knife to cut vegetables. (*Id.* at p. 5, lines 7-8.) He has daily pain that makes it difficult to focus. (*Id.* at p. 5, lines 10-16.) He cannot use the right hand. (*Ibid.*) He does not speak English. (*Id.* at p. 5, line 13.)

Applicant obtained a vocational report from Enrique Vega. (Applicant's Exhibit 1.) Mr. Vega noted that applicant emigrated from Iran to the U.S. in March 2008. (*Id.* at p. 3.) His highest level of formal education was the ninth grade in Iran. (*Id.* at p. 5.)

Mr. Vega conducted a battery of vocational exams. Nearly every test had applicant scoring amongst the lowest percentile. (*Id.* at pp. 6-8.) Applicant's best result was a 23rd percentile rating in math computation. (*Id.* at p. 7.) Applicant was administered a hand-tool dexterity test, which placed him at the bottom percentile of industrial applicants. (*Ibid.*) Mr. Vega noted:

> Mr. Soormi scored in the very low range on this test of hand-tool aptitude. This result suggests that Mr. Soormi has below average hand-tool aptitude. Mr. Soormi was observed to struggle with his right hand as it visibly shook during the test. He had difficulty manipulating smaller nuts and bolts. At times he used the wrong tools during the test. Given that he was a maintenance electrical motor repairer, this result is very telling of his diminished ability to use tools when bilateral use of the arms and hands is required.

Mr. Vega concluded as follows:

> A transferable skills analysis produced no reasonable occupational options for Mr. Soormi. When opening the analysis to all occupations in the labor market, skilled and unskilled, there are also no results. Mr. Soormi has substantial barriers to returning to work. He continues to experience pain in his right upper extremity that can become severe. He has difficulties performing activities of daily living and tasks around his home. He avoids using his right hand for basic activities due to pain and limitations. He has problems using his right hand for simple tasks such as feeding himself and writing. Dr. Gordon noted that Mr. Soormi has limitations related to gripping, manipulation, and dexterous tasks with his right hand. Dr. Jones noted that Mr. Soormi has limitations related to fingering, grasping, fine manipulation, writing, keyboarding, lifting, pushing, pulling, climbing, and exposure to cold or vibrations. Dr. Jones found that Mr. Soormi is unable to maintain employment due to his symptoms.
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> Mr. Soormi's performance on vocational testing was consistent with the findings of medical evaluators. He struggled to perform simple physical tasks in a controlled testing environment. He exhibited significant problems with pain. He

> scored poorly for vocational aptitudes and abilities due to his significant industrially related problems. Mr. Soormi would have difficulty keeping up a work pace or meeting deadlines due to his problems. He has an uncompetitive vocational profile. Mr. Soormi would not benefit from vocational rehabilitation services aimed at returning him to work. The medical evidence and the results of vocational testing support that Mr. Soormi has poor vocational aptitudes and significant work disabilities such that he has no access to the labor market. In essence, any tasks that requires the use of his right hand (such as writing, fingering, gripping or grasping) or any bilateral activity is not going to get accomplished.

(*Id.* at p. 2.)

Mr. Vega performed a transferrable skills analysis and reported as follows:

> Pre-injury, Mr. Soormi had access to a wide band of occupational titles in the medium, light, or sedentary exertion levels. In fact, an analysis using his employment history reveals that preinjury, he had access to 569 skilled and unskilled labor occupations in the open labor market. As noted above, a transferable skills analysis produced no reasonable occupational options. When opening the analysis to all occupations in the labor market, skilled and unskilled, there are also no results.

(*Id.* at p. 12.)

Defendant used Scott Simon as its vocational expert. Mr. Simon's vocational testing generally concurred with Mr. Vega's assessment that applicant had minimal skills. Throughout his report, Mr. Simon focuses on the fact that applicant was an unskilled worker pre-injury.

> [D]ue to preexisting nonindustrial factors, of limited formal education and language limitations this applicant had maximal access to only 4% of the overall labor market prior to this current industrial injury.

(Defendant's Exhibit A, p. 16.)

Mr. Simon initially concluded that applicant cannot be vocationally rehabilitated, but opined it was due to what he described as nonindustrial factors of limited formal education and illiteracy. (*Id.* at p. 19.) Mr. Simon did not analyze or opine on whether applicant's work restrictions and loss of use of his dominant upper extremity impacted applicant's ability to rehabilitate. (See generally, *Id.*) Later in the same report, Mr. Simon found that applicant is amenable to rehabilitation and has only lost 19% of his earning capacity. (*Id.* at p. 25.)

Mr. Simon noted that applicant is restricted from activities requiring gripping, manipulating, or dexterous tasks in the right hand. (*Id.* at p. 28.) He noted that applicant was right hand dominant. (*Id.* at p. 3.) Mr. Simon listed several jobs under occupational matches for applicant. (*Id.* at pp. 11-12.) For example, without commenting upon applicant's work injuries, Mr. Simon opined that applicant is capable of grinding and polishing work by hand. (*Id.* at p. 12.)

DISCUSSION

A. Legal Standard for Finding Permanent Total Disability

As our Supreme Court has explained:

> Permanent disability is understood as the irreversible residual of an injury. (Citation.) A permanent disability is one which causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market. (Citation.) Thus, permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity.

(*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 (*Brodie*).)

The court in *Ogilvie* reinforced this idea that disability is rebuttable.

> Thus, we conclude that an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating.

(*Ogilvie v. Workers' Comp. Appeals Bd.,* 197 Cal. App. 4th 1262, 1277.)

The Appeals Board has provided the following guidance in finding permanent total disability:

> The proper legal standard for determining whether applicant is permanently and totally disabled is whether applicant's industrial injury has resulted in applicant sustaining a complete loss of future earning capacity. (§§ 4660.1, 4662(b); see also 2005 PDRS, pp. 1-2, 1-3.) . . .

> A finding of permanent total disability in accordance with the fact (that is complete loss of future earnings) can be based upon medical evidence, vocational evidence, or both. Medical evidence of permanent total disability could consist of a doctor opining on complete medical preclusion from returning to work. For example, in cases of severe stroke, the Appeals Board has found that applicant was precluded from work based solely upon medical evidence. (See i.e., *Reyes v. CVS Pharmacy,* (2016) 81 Cal. Comp. Cases 388 (writ den.); see also, *Hudson v. County of San Diego*, 2010 Cal. Wrk. Comp. P.D. LEXIS 479.)
>
> A finding of permanent total disability can also be based upon vocational evidence. In such cases, applicant is not precluded from working on a medical basis, per se, but is instead given permanent work restrictions. Depending on the facts of each case, the effects of such work restrictions can cause applicant to lose the ability to compete for jobs on the open labor market, which results in total loss of earning capacity. Whether work restrictions preclude applicant from further employment requires vocational expert testimony.
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> . . . [P]er Ogilvie and as described further in Dahl, the non- amenability to vocational rehabilitation must be due to industrial factors. (Contra Costa County v. Workers' Comp. Appeals Bd., (Dahl) 240 Cal. App. 4th 746, 193 Cal. Rptr. 3d 7.)

(*Wilson v. Kohls Dep't Store*, 2021 Cal. Wrk. Comp. P.D. LEXIS 322, *20-23 (Cal. Workers' Comp. App. Bd. December 6, 2021)

B. Applicant is permanently totally disabled.

Applicant is permanently totally disabled because he is not capable of working in the open labor market due to the industrial injury and he is not capable of rehabilitation into the open labor market due to the industrial injury.

To constitute substantial evidence an expert's opinion must not be speculative. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) 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. (*Ibid.*) "When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

The reporting of applicant's vocational expert constitutes substantial evidence as it is based upon an adequate history of applicant's industrial work restrictions, which have the actual effect of precluding applicant from gainful employment. Applicant is an unskilled worker. He does not speak English and has very limited formal education having grown up in Iran. Prior to the industrial injury, he had access to about 4% of the open labor market based upon his skills.

Applicant placed his dominant hand inside a machine, which burned, crushed, and mangled the hand. Applicant is medically precluded from using his dominant hand to work. This preclusion prevents applicant from working on the open labor market and prevents applicant from rehabilitating into another career field. Accordingly, he is permanently and totally disabled.

The reporting of defendant's vocational expert does not constitute substantial evidence. In large part, Mr. Simon omits any significant discussion of the effects of applicant being precluded from using his dominant hand for work or daily activities. Instead of discussing what, if any, impact the industrial injury has on rehabilitation, Mr. Simon concludes that it is applicant's language ability and lack of formal education that preclude him from rehabilitation.

Mr. Simon's opinion is conclusory without an adequate explanation. Mr. Simon's implication is that loss of use of a dominant upper extremity has no impact on one's ability to rehabilitate. He has not adequately explained how this is true. Mr. Simon needed to explain how it is possible for applicant to rehabilitate and find work, without using his dominant hand. Mr. Simon failed to provide a proper analysis on this point.

Next, there are contradicting conclusion in Mr. Simon's reporting. At various points he finds that applicant is capable of rehabilitation. At other points, he says applicant is not capable of rehabilitating, but fails to discuss what impact the industrial injury has on rehabilitation. The contradictory conclusions further cause me to find the report insubstantial.

Next, Mr. Simon's proposed job matches do not appear to make any sense and do not appear to account for the work restrictions provided in this case. For example, Mr. Simon fails to explain how applicant, with restricted use of his dominant hand, is capable of grinding and polishing materials for work. Without an adequate explanation, Mr. Simon's opinions are again, conclusory.

When you analyze permanent total disability, you are first looking at the industrial injury and the work preclusions assigned to applicant. You then analyze whether those work preclusions were caused by the industrial injury. You then determine whether those work preclusions prevent

applicant from gainful employment on the open labor market, which includes an analysis of whether applicant can be rehabilitated to a new career. Where applicant is not capable of rehabilitation and employment, and absent apportionment, applicant is permanently totally disabled.

Both experts agree that applicant had limited access to the open labor market pre- injury. However, the reasons that applicant had limited access were not due to pre-existing disabilities. To be abundantly clear, a person's ethnic origin is not a disability. A person's immigration status is not a disability. Whether a person can speak the English language is not generally a disability.[1] A person's lack of education is not a disability.[2] Mr. Simon's focus on applicant's lack of education and lack of English skills is not proper because neither of these factors were caused by a pre-existing disability and Mr. Simon did not explain why these factors were the sole cause of applicant's loss of earnings post-injury.

It may be true that an unskilled worker is more susceptible to sustaining permanent total disability because such a person begins the analysis with a limited labor market. However, that is not a basis to discount applicant's level of disability. To be clear, the employer receives a discount in such cases. However, the discount is found, not in the percentage of disability, but in the rate of the permanent total disability award. Defendant will pay the permanent total disability award at a rate that is significantly lower than the state average because applicant was unskilled and paid at or around minimum wage.

The analysis changes if applicant's pre-existing education or language ability is due to a disability. Like many states, California encourages employers to hire disabled workers. The State assures employers that they will not be held liable for pre-existing disabilities through multiple avenues. First, we have apportionment based on causation and apportionment based on prior awards. (§§ 4663, 4664.) Next, we have the Subsequent Injuries Benefits Trust Fund ("SIBTF"), which covers the employer for any increase in permanent disability that was amplified by a prior disability. (§§ 4751, et. seq.)

[1] There are certainly exceptions, for example, if applicant were mute or if applicant had cognitive deficits interfering with speech. Where the inability to speak English is due to someone immigrating from a non-English speaking country and not learning the language, it is not a disability.

[2] Again, to be clear, I am speaking of lack of education via lack of opportunity or failure to pursue an education and not, for example, a cognitive disability interfering with education.

Here, applicant is simply an unskilled worker. No issue of apportionment exists. The AME found the disability was 100% industrial. The work restrictions were 100% industrial. Defendant failed to show that any prior disability existed. Defendant received the benefit of cheap unskilled labor. Applicant's limitation on the open labor market was a risk that defendant assumed. Defendant must now accept the consequences.

> A corollary of the no-fault principles of workers' compensation is that an employer takes the employee as he finds him at the time of the employment. Thus, an employee may not be denied compensation merely because his physical condition was such that he sustained a disability which a person of stronger constitution or in better health would not have suffered.

(*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 299.)

Applicant began working for defendant as an unskilled, but non-disabled person. The industrial injury precludes applicant from using his dominant hand in the workplace. This industrial work restriction precludes applicant from rehabilitation due to the industrial injury and precludes applicant from employment on the open labor market. A finding of permanent total disability issued accordingly.

C. Defendant's Petition for Reconsideration

I decline to address the portions of defendant's petition beginning at p. 7, line 17, through p. 9, line 7, which discusses *Hertz Corp. v. Workers' Comp. Appeals Bd. (Aguilar)*, 169, Cal.App.4th 232. That case was ordered depublished by the Supreme Court on March 24, 2009. (*Hertz Corp. v. Workers' Comp. Appeals Bd. (Aguilar)*, 2009 Cal. LEXIS 3438, 203 P.3d 1112, 91 Cal. Rptr. 3d 515.) Pursuant to California Rules of Court, depublished cases cannot be relied upon and shall not be cited by parties as authority except in extremely limited situations, none of which exist here. (Cal. Rules of Court, Rule 8.1115.) I would admonish defendant that it may not cite to unpublished cases in pleadings. I would further admonish defendant that if they are citing unpublished cases, they must note this fact in the citation to avoid making misrepresentations of law.

Defendant's primary argument is that I misapplied the holding in *Ogilvie, supra*. Defendant cites the following passage of *Ogilvie*:

> While some of the briefing provided to the court may be read to suggest that under *LeBoeuf* a disability award may be affected when an employee is not amenable to vocational rehabilitation for any reason, the most widely accepted view of its holding, and that which appears to be most frequently applied by the WCAB, is to limit its application to cases where the employee's diminished future earnings are directly attributable to the employee's work-related injury, and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education. (Citations.)

(*Ogilvie, supra* at 1274-1275 (citations omitted).)

Applicant's inability to speak English, his ethnic origin, and his immigration status all existed prior to this industrial injury. These factors were not disabilities. With these factors in place, applicant could earn $559.60 per week. With applicant unable to use his dominant upper extremity, he can earn $0.00 per week. The reason applicant dropped from $559.60 per week to nothing is not due to his education or ability to speak English. It was due to the work injury.

With limited education and limited English, applicant worked for Foster Farms for 11 years pre-injury. (MOH-SOE, p. 4, line 43.) Applicant was trained to work the machines on Foster Farms production line, notwithstanding his pre-injury limitations on education and English. Applicant was employable and he was trainable pre-injury. Defendant's expert does not discuss any of these facts. He concludes, without explanation, that applicant is suddenly incapable of training or working only because applicant lacks education and English skills. The fact that applicant worked for 11 years pre-injury directly contradicts this conclusion. The reason applicant cannot train today, and the reason he cannot work today is because he has lost the use of his dominant upper extremity.

Defendant cites *Acme Steel v. Workers' Comp. Appeals Bd. (Borman)*, 218 Cal. App. 4th 1137. However, this case is easily distinguishable. *Borman* dealt with an award of total disability based on applicant sustaining 100% loss of hearing. The medical evaluator provided apportionment to applicant's loss of hearing.

Here, defendant presents no evidence of apportionment. The AME found applicant's injury 100% industrial. There was no apportionment of applicant's work restrictions, which are also

100% industrial. Defendant argues to apportion applicant's award, but defendant presented no apportionment evidence at trial. The parties presumably choose an AME because of the AME's expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd*. (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) The Appeals Board will follow the opinions of the AME unless good cause exists to find the opinion unpersuasive. (*Ibid.*)

Defendant argues that when applicant is an unskilled non-English speaking immigrant, there must be vocational apportionment, and thus, by implication, all such individuals should be precluded from obtaining permanent total disability awards. Defendant's argument is contrary to the expressed policy of this State. (Cal. Lab. Code, § 1171.5.)

Defendant hired unskilled labor and gained the benefit of paying such labor at or near minimum wage. "He who takes the benefit must bear the burden." (Cal. Civ. Code, § 3521.)

Date: April 27, 2023

Eric Ledger
Workers' Compensation
Administrative Law Judge