WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DARRIN BRAATEN, *Applicant*

vs.

LLOYD W. AUBRY COMPANY, INC.;
THE HARTFORD, *Defendants*

Adjudication Number: ADJ9665055
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision after Reconsideration.

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers compensation administrative law judge (WCJ) on November 3, 2022, wherein the WCJ found that applicant while employed on January 29, 2014 as a journeyman millwright sustained injury arising out of and in the course of employment to his right upper extremity, right elbow, right hand, right wrist, right shoulder, and neck due to a sudden and extraordinary event, resulting in a 100 percent permanent and total disability. The WCJ's findings were based upon reports from evaluating physicians and applicant's vocational expert.

Applicant filed an Answer and the WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied.

We have considered the Petition, the Report, and have reviewed the record in this matter. Based upon our review of the record, and for the reasons stated in the WCJ's Report, which are adopted and incorporated herein, we are affirming the WCJ's October 14, 2022 Findings and Award.

On June 23, 2023, we issued our en banc opinion in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 (Appeals Board en banc) (*Nunes I*) and on August 29, 2024, we issued our en banc opinion denying reconsideration of the June 23, 2023 opinion. (*Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 (Appeals

Board en banc) (*Nunes II*). Defendant's Petition was received during the period after our en banc opinion in *Nunes I* but before we issued our opinion denying reconsideration in *Nunes II*.

In *Nunes I*, the panel Qualified Medical Evaluator (QME) found impairment for the cervical spine, left upper extremity, and carpal tunnel syndrome. (*Nunes I*, supra, at p. 3.) The QME apportioned 40 percent of the cervical spine disability to preexisting degenerative factors and 60 percent of the carpal tunnel disability to nonindustrial diabetes. (*Id*.) In a supplemental report, the QME indicated that applicant would not be employable in the open labor market. (*Id*.) This was confirmed by applicant's vocational expert who found a 100 percent loss of access to the open labor market. (*Id*. at p. 4.) The vocational expert acknowledged the QME's apportionment findings but indicated that "vocational apportionment is not the same as medical apportionment." (*Id*.) He concluded that since applicant was able to work in her usual and customary position without impediments until the September 13, 2011 specific injury, 100 percent of her loss of future earning capacity was industrial. (*Id*. at p. 5.) Defendant's vocational expert similarly found a 100 percent loss of access to the open labor market. (*Id*.) However, he also concluded that at least 10 percent vocational apportionment from non-medical factors was attributable to applicant's inability to compete in the open labor market and participate in vocational rehabilitation services. (*Id*.) At trial, the WCJ found that applicant had sustained a 100 percent permanent and total disability without apportionment because there was no evidence of previous loss of earning capacity. (*Id*. at pp. 2, 6.)

Upon review, we held that:

1. Section 4663 required a reporting physician to make an apportionment determination and prescribes the standard for apportionment. The Labor Code makes no statutory provision for "vocational apportionment."

2. Vocational evidence may be used to address issues relevant to the determination of permanent disability.

3. Vocational evidence must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment.

(*Id*. at p. 2.)

Our decision in *Nunes I* clarified that vocational experts are to address apportionment, particularly in cases where medical apportionment has been provided by an evaluating physician.

However, they are not to use "vocational apportionment" as such apportionment is inconsistent with the law and invalid. For the same reasons, "vocational apportionment" cannot be used as a replacement for valid medical apportionment. Vocational evidence, however, can still be used as a factor in determining permanent disability. Indeed, notwithstanding the apportionment findings of the various evaluating physicians, applicant's vocational expert in *Nunes I* found a 100 percent loss of future earning capacity on an industrial basis which ultimately led to the WCJ's finding of a 100 percent permanent and total disability.

In *Nunes II*, we denied applicant's petition for reconsideration and confirmed our findings in *Nunes I*, with some clarifications. We rejected applicant's contention that evaluating physicians are ill-equipped and unwilling to assess vocational evidence and noted that "treating and evaluating physicians regularly review, assess, and opine on vocational issues, from the gathering of vocational information relevant to the determination of causation, to the final assessment of permanent disability and work restrictions." (*Nunes II*, *supra*, at p. 9.) We noted that vocational evidence is an important factor in preparing medical-legal reports and emphasized that valid medical apportionment discussed in vocational reporting is not what we would consider "pass-through[1]" apportionment as the vocational evaluator is not statutorily authorized to render an opinion on apportionment. (*Id.* at pp.10-11.)

In the instant case, we believe that the findings of the WCJ and the basis for the decision as set forth in the Report are well supported by the evidence. As such, we will not disturb the WCJ's decision.

[1] The term refers to apportionment adopted by one expert from another without (the second expert) providing a rationale or basis for adopting the first expert's findings.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the October 14, 2022 Findings and Award is **AFFIRMED**.

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

March 20, 2024

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

DARRIN BRAATEN
BOXER & GERSON
LAW OFFICES OF MELODY COX/LAKEESHA JEMERSON

RL/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

I. INTRODUCTION

Date of Injury:	January 29, 2014
Party of Body Injured:	right upper extremity, right elbow, right hand, right wrist, right shoulder, neck, and psychiatric
Petitioner:	Defendant The Hartford
Timeliness:	The petition, filed on 08-10-2022 timely
Verification:	The petition is verified

Petitioner's Contention: Defendant The Hartford seeks reconsideration of the Findings that applicant Darrin Braaten's injury was caused by a sudden and extraordinary event; that applicant's earnings at the time of injury were $1,807.74 per week; and that applicant's injury caused 100% permanent total disability.

II. FACTS

Applicant Darrin Braaten was employed as a journeyman millwright for defendant Lloyd W. Aubrey Co. on January 29, 2014, when he suffered a severe industrial injury to his right upper extremity, right elbow, right hand, right wrist, right shoulder, and neck. The injury was accepted by defendant The Hartford but the parties disputed the nature and extent of the injury and defendants raised the six month employment rule to deny liability for psychiatric injury. The AME for orthopedic body parts is Dr. Steven Conrad and the panel QME for psychiatric injury is Dr. Luigi Piciucco.

Defendant-employer Lloyd W. Aubry Company (Aubry) is a general mechanical contractor specializing in the fabrication, installation, modification, and maintenance of industrial processing plant equipment. Applicant was injured when he was working at the Kellogg Company (Kellogg) in San Jose, California, cleaning equipment used to manufacture Eggo frozen waffles. Defendant Aubry has a longstanding relationship with Kellogg. Once a month, the Kellogg facility would shut down in order to allow Aubry's millwrights to service and maintain the facility to keep it in proper working order. The Kellogg facility has industrial sized waffle cooking griddles to manufacture the Eggo waffles. Cooking oil was sprayed onto the griddles to cook the waffles and in the process, a mist of cooking oil would end up on the floor of the facility.

Applicant testified that on the day of injury, the floor was slippery with oil as his co-worker had to "pivot tires" on the slippery walkway. (Minutes of Hearing/Summary of Evidence, hereinafter "MOH/SOE" dated July 19, 2022, at p. 9/lines 16-33.) As applicant was pulling a cart loaded with tools, he turned to move a step ladder out of the way, he took a very hard fall, shattering his right elbow. (Id.) Applicant was bleeding and in a pool of blood and could neither move his arm nor stand up due to the excruciating pain and the shock of the incident; he was in "shock and disbelief" because the accident was so sudden. (Id.) An ambulance was called, and the emergency

personnel administered morphine. (Id., at p. 10/1-3.) Applicant's initial hospital stay was five days; he had five major breaks in his arm and had the first of many surgeries.

After two unsuccessful surgeries, applicant was then referred to Dr. Lattanza at UCSF who wanted to "go directly into surgery." (MOH/SOE July 19, 2022, at p. 10/lines 1-29.) Applicant was hesitant, but eventually agreed to surgery. Applicant understood that Dr. Lattanza was to perform a bone graft from his pelvis, but when he came to from surgery, he discovered that his elbow had been completely removed and his arm shortened, due to the bone dying. (Id.) His palm was facing upward, like a cadaver. (Id.) At that juncture, he lost all functionality of his upper extremity.

A fourth surgery was undertaken whereby an artificial elbow was implanted. (MOH/SOE July 19, 2022, at p. 10/ 26-42.) After the implant, applicant's arm was weak and his neck, shoulder, wrists, and all fingers were in pain. (Id.) He suffers from burning and numbness, has lost almost all grip strength and "struggles with the simplest movements" required of his arm, wrists, and fingers. (Id.) The right shoulder has no range of motion and is shortened and atrophied due to the tightening of his tendons. (Id.) There is a serious threat of amputation of the right arm. (Id., at p. 12/ 5-7.) At the time of trial, applicant was not actively seeking treatment, as he had plateaued and mentally, cannot deal with any more medical treatment due to the results of the medical care. Applicant suffers from flashbacks of the injury and nightmares, and anxiety as the result of the failed course of medical treatment, as well as the prospect of losing his limb. (Id., at p. 12/ 9-25.) He testified that he has difficulty with most aspects of daily living. (Id., at p. 12/ 27-40.) Applicant's right arm essentially has no function.

The AME in this case is Dr. Stephen Conrad. The AME endorses applicant's testimony completely. Due to the severity of the elbow injury, Dr. Conrad finds the right hand, right shoulder and neck as compensable consequence injuries. The AME characterizes the result of the elbow surgeries as "poor," indeed, the bone of the right upper extremity was shortened and replacement of the elbow joint failed, thus resulting in difficulties with *almost all* activities of daily living according to the AME. (Ex. 104 at p. 5-6.) As applicant's right upper extremity is shortened and functions poorly there are limitations defined by the AME to preclude lifting greater than 2 pounds and preclusion of all work above shoulder level, with no pushing, pulling, and torquing greater than 5 pounds, and a limit of fine manipulation (e.g., writing) to no greater than 15 minutes per hour. (Id., at p. 5.) Dr. Conrad opines that it is appropriate to invoke the "*Almaraz/Guzman*" decision to rate by analogy. *Almaraz v. State Comp. Ins. Fund and Guzman v. Milpitas Unified School Dist.* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc), (*Almaraz/Guzman II).* The AME provides 34% WPI for the right elbow, 9% WPI for the right forearm, hand and wrist; 8% WPI for the right shoulder; and 7% WPI for the cervical spine. (Id., at p. 5-8.) The parties agree that combining of these ratings per the CVC results in 66% permanent disability. There is no apportionment. (Id., at p. 6.)

Applicant amended his Application for Adjudication to allege psychiatric injury and was evaluated by QME Dr. Luigi Piciucco. Dr. Piciucco finds causation and a need for further medical care. (Ex. 108 at pp. 3, 4, 53.) Applicant is impaired in his activities of daily living, social functioning, concentration/pace, and ability to perform in a work-like setting. (Id., at p. 8.) He suffers from a depressive disorder and anxiety disorder as the result of the injury. (Id., at p. 58.)

Applicant's GAF score is 56, translating into a WPI of 21%, and the parties agree that this which adjusts to 35% permanent disability before apportionment. Dr. Piciucco concludes:

> **"Lastly, Mr. Darrin Braaten is not capable of returning to work with or without modifications and perform usual occupational functions given his current symptoms of Posttraumatic Anxiety and depression which causes depression, anxiety, hypervigilance, reduced ability to concentrate and pay attention."**

(Id., at p. 55, boldface emphasis in original.)

QME Dr. Piciucco apportioned 20% of the resitudal disability to episodic alcohol abuse but there was no explanation as to how and why this condition caused any portion of the impairment. Dr. Piciucco further opined that the orthopedic and psychiatric injuries are synergestic, do not overlap, and should be added rather than combined to achieve the most accurate method of calculating permanent disability.

The severity of this injury was career ending. Applicant is unable to return to gainful employment. Applicant retained vocational expert Scott Simon who opined that applicant is not amenable to rehabilitation and has sustained a 100% loss of future earnings capacity and labor market access. He concludes that applicant should be considered totally disabled without any vocational apportionment.

Applicant's average weekly wage also remains at issue. Defendants contend that once a month, millwrights are hired from the union hall to clean and maintain the Kellogg facility for a three-day contract at $39.65 per hour, plus overtime. Shifts at the Kellogg facility were typically 12 hours. Defendants contend that once the three-day contract is over, so is the employment with Aubry. Applicant was injured on day one of a three-day contract. In the prior year, in July of 2013, applicant was hired and worked a three-day contract at Kellogg.

Findings and Award issued on October 14, 2021, wherein it was determined that applicant sustained a compensable injury to the psyche, his earnings at the time of injury were $1,807.74 per week, temporary disability was owed from January 30, 2014 to December 11, 2018, and the applicant is 100% permanently, totally disabled. Defendant, after substitution of counsel on October 25, 2022, filed a Petition for Reconsideration on all issues. An Answer was filed on November 17, 2022.

III. DISCUSSION

The evaluation of the evidence and findings of a Workers' Compensation Judge are to be accorded great weight. *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal. 3d 312. On appeal, the court must determine whether the evidence, when viewed considering the entire record, supports the award. *Keulen v. Workers' Comp. Appeals Bd.* (1998) 66 Cal. App. 4th 1089, 1095-96. In the instant case, Defendant failed to present persuasive evidence, or on some points any

evidence at all, to refute applicant's arguments that ultimately lead to issue findings on psychiatric compensability, wages, additional periods of temporary disability, and an Award of permanent, total disability.

A. Applicant's Psychiatric Injury is Compensable Under the Sudden and Extraordinary Exception

Psychiatric injury in this case is denied on the basis that applicant had less than six months of employment. An injured worker must be employed by the employer for at least six months to have a compensable psychiatric injury unless the injury was caused by a sudden and extraordinary employment condition. *Labor Code Section 3208.3(d).* To determine the sudden and extraordinary element, the Board has excepted injuries that were not caused by a regular or routine employment event. *Matea v. Workers' Comp. Appeals Bd.* (2006) 71 Cal. Comp. Cases 1522. The court in *Matea* defined "sudden" as "happening without previous notice or with very brief notice: coming or occurring unexpectedly; not foreseen [sic] or prepared for." The court then defined "extraordinary" as "going beyond what is usual, regular, common, or customary" and "having little or no precedent and usu[ally] totally unexpected." Based on this definition, the court stated, "[I]f an employee carries his or her burden of showing by a preponderance of the evidence that the event or occurrence that caused the alleged psychiatric injury was something other than a regular and routine employment event or condition, that is, that the event was uncommon, unusual, and occurred unexpectedly, the injury may be compensable even if the employee was employed for less than six months." *Matea* at 1532.

The Appeals Board has provided further guidance finding that a determination on the sudden and extraordinary exception should consider an injured workers' regular job duties in assessing whether the psychiatric injury is compensable. *McKee v. Aerotek, Inc.* (2021) 86 Cal. Comp. Cases 1055 (panel decision). The court found that if the injury is caused by an act that is not the type of routine physical exposure that one would experience in a given occupation, then it should be compensable. *Id; See also, Portusach v. SFO Good Nite, dba Citi Garden Hotel,* 2012 Cal. Wrk. Comp. P.D. LEXIS 431.

There is no doubt that applicant's fall was sudden. Applicant provided *unrefuted* testimony that he fell to the ground causing "shock and disbelief because it was so sudden." (MOH/SOE of July 19, 2022, at p.9, line 29.) Defendant did not put on any evidence to refute the sudden nature of the fall, including any evidence that falls were common or expected in the employment setting.

In addition, the fall was extraordinary under industry standards. Applicant's position of a Millwright did not contemplate working on slippery surfaces while performing his job duties. Applicant presented evidence from a qualified health and safety expert, Gerald Fulghum, who opined "The conditions at the Kellogg's factory at the time of the subject injury were not regular, routine, or ordinary in that they did not comport with the typical work area for a Millwright, nor did they comply with Health & Safety standards covering a typical work area for a Millwright." (Ex. 23, Offer of Proof of Mr. Fulghum dated 09/16/2022, Page 3, Para. 14, Lines 3-6.) Mr. Fulghum's testimony was via offer of proof due to medical unavailability, and in the Answer, applicant advises that Mr. Fulgham has passed away since this matter was submitted.

Applicant also provided credible testimony that the conditions at the Kellogg facility were slippery. (MOH/SOE July 19, 2022, at p. 9/16-23.) He further testified that during the performed maintenance, the Kellogg factory started partial production, which was not typical. (Id., at p. 10/5-10.)

Moreover, the evidence establishes that Kellogg and Lloyd Aubrey violated Cal/OSHA Regulation Section 3272(d), which requires that a work setting for an aisle, walkway, and crawlway have protection against slipping if such conditions exist. (Ex. 23, Offer of Proof of Mr. Fulghum dated 09/16/2022, Page 2, Para. 6-11.) They further violated Cal/OSHA Regulation Section 3273(a), which requires that permanent floors and platforms be free of dangerous conditions, including reasonably free of oil, grease, or water. (Id.) The presence of oil and water on the floor of the injury site created an unabated hazard in patent violation of Sections 3272 and 3273. (Id.)

The expert evidence shows that this environment was not usual for millwright duties and that defendant failed to comply with Cal/OSHA guidelines to prevent injuries in the course of ordinary work. Citations were issued for these violations. Defendant's failure to provide an environment consistent with the job, as well as meet safety guidelines, is evidence that the hazard was extraordinary to the work. Those deviations make the work environment irregular, unusual, and unordinary.

To refute the expert testimony and undisputed safety violations, defendant produced a sole unqualified, percipient witness who admittedly did not know about, investigate, or report on the injury at the time it occurred. (MOH/SOE September 19, 2022, at p.4/36-39.) Rather, he did not even learn of the injury until more than a year later. (Id., at p. 5/26.) He provided inconsistent statements regarding his actual knowledge surrounding the conditions of the work site. (Id., at p. 5/1-8.) Based on the totality of the evidence, the injury was sudden and extraordinary.

B. The Psychiatric Impairment Was Directly Caused by the Injury

Labor Code Section 4660.1(c) indicates that add-on claims for psychiatric impairment are prohibited only when they arise from compensable "physical" injuries. However, it does not apply to injuries directly caused by events of employment. *Wilson v. State of CA Cal Fire* (2019) 84 Cal. Comp. Cases 393, 403.

In the instant case, the applicant sustained a traumatic fall where his elbow was shattered, and he was left in a pool of blood until the paramedics arrived. (MOH/SOE July 19, 2022, at p. 9-10.) He experienced brutalizing pain that necessitated morphine just to move his body onto the gurney. (Id., at p. 10/2.) His psychiatric diagnoses include depression *and* post-traumatic anxiety. QME Dr. Picuicco documents symptoms from the time of injury "sitting a pool of blood" resulting in visual flashbacks, nightmares, intrusive recollections of the accident, avoidance behavior, nightmares, vigilant behaviors, sympathetic hyperresponsiveness when exposed to actual or symbolic reminders of the industrial accident, and sleep disturbance, among other things. (Ex. 108 at 10-11, 47.) These issues are all borne directly from the industrial injury rather than a consequence of applicant's physical condition.

C. The Injury Sustained by Applicant Qualified for the Catastrophic Injury Exception

Applicant's case also qualifies for the catastrophic injury exception which allows for compensable psychiatric impairment due to a "catastrophic injury" as defined by Labor Code Section 4660.1(c)(2)(B). This code section specifically indicates the loss of a limb triggers the catastrophic injury exception.

The Appeals Board has held that the determination of whether an injury is catastrophic focuses on the nature of the injury, rather than the mechanism of the injury. *Wilson, supra.* This is a fact driven inquiry considering relevant factors including the intensity and seriousness of treatment, the ultimate outcome, the severity of the injury and its impact on the employee's activities of daily living, whether it is analogous to one of the injuries specified in the statute, and if the physical injury is incurable or progressive.

Applicant's injury is "analogous to a loss of a limb" based on the medical reporting of AME Dr. Conrad. Applicant underwent four failed surgeries with intense periods of recovery, and as a result, his right arm is over three inches shorter than his left arm. (MOH/SOE July 19, 2022, at p. 11/16-24.) applicant testified "there was no more blood flow" and his bone was dissolving into his body. (Id.) Removal of the bone resulting in shortening of the limb in this case qualifies as an amputation. Applicant testified that his right upper extremity functions poorly and causes him to struggle with simple movements. (Id.) He has pain, burning, numbness, and loss of range of motion. (Id.) Indeed, applicant's appearance at trial confirmed a shortened and atrophied right arm, and slumped, atrophied right shoulder with total loss of functionality. Based on the credibility of the AME reports and testimony, applicant's condition is appropriately analogized to an amputation.

D. The Apportionment Opinion of Dr. Piciucco Is Not Substantial Evidence

The trier of fact may exercise discretion in finding the psychiatric apportionment does not constitute substantial evidence. A medical opinion must disclose the underlying basis for its conclusions to constitute substantial evidence. *Zemke v. Workers' Comp. Appeals Bd.* (1968) 33 Cal. Comp. Cases 358, 361. On issues of apportionment, the physician must explain *how and why* the disability is casually related to the apportionable condition. *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604 (*en banc)*.

Dr. Piciucco indicated that the applicant did not have any pre-existing psychiatric injury or illness. (Ex. 108 at 9.) Despite this opinion, he apportioned 20% of the psychiatric impairment to a history of alcohol abuse. (Id., at 8-9.) The QME indicates applicant consumes a large amount of beer on a regular basis but does not offer time frame or context for this. The QME failed to provide further rationale. He did not explain how or why the applicant's alcohol consumption affected his life, the GAF score, or applicant's level of functioning. It is unclear that applicant's beer consumption negatively impacted applicant's past work history or if it is situational subsequent to the 2014 accident.

Dr. Picuicco's apportionment is qualified as to "applicant's partial permanent disability residuals." (Id., at 55.) But in a latter paragraph on the same page, the QME opines that applicant **"is not capable of returning to work with or without modifications and perform usual occupational functions given his current symptoms of post traumatic anxiety and depression."** (Id., emphasis in original.) When an injured worker is not capable of returning to work, this corresponds with permanent and *total* disability not *partial* permanent disability. As such, it is unclear if the QME intended for apportionment to apply at all.

Therefore, the conclusory statement on apportionment to partial permanent disability and the contradictory statement precluding applicant from the labor force does not constitute substantial medical evidence. The burden of proof is on the party arguing in favor of apportionment. Here, the QME's opinion cannot withstand the scrutiny of the substantial medical evidence requirement and so defendant has not met its burden of proof.

E. The Medical Experts Support a Finding of Permanent Total Disability Via The Addition Method

The total loss of a use of a dominant upper extremity, including loss of function of the wrist and digits, resulting in inability to use a computer, pen, and essentially any activity involving fine manipulation, and applicant's incumbent pain issues in this part of his body is a total impediment to vocational rehabilitation for most people. Applicant's catastrophic injury.

In the alternative, the medical evidence supports a finding of 100% permanent, total disability using the addition method. The Board has found that the rating schedule is rebuttable, and the trier of fact has the discretion to determine the most appropriate combination method for multiple impairments. The Board has held the combination of impairments via addition, rather than using the combined values chart, is appropriate if supported by the medical evidence. *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* 78 Cal. Comp. Cases 213. In the *Kite* case, the medical reporting indicated a synergistic effect between impairments. When adjusted for age and occupation, Dr. Conrad's reporting rates to 66% plus Dr. Piciucco's reporting of 35% equals 101% permanent disability.

F. In Awarding 100% Permanent, Total Disability, The WCJ Considered And Weighed The Vocational Evidence Presented By Both Parties.

Moreover, evaluation of applicant's the vocational evidence, including credibility of the vocational reporting, supports a finding that applicant is not vocationally feasible and not amenable to rehabilitation. The California Supreme Court has held "[a] permanent disability rating should reflect as accurately as possible an injured employee's diminished ability to compete in the open labor market." *LeBoeuf v. Workers' Compensation Appeals Board*, (1983) 48 Cal. Comp. Cases 587. The court went on to state, "The fact that a worker has been precluded from vocational retraining is a significant factor to be taken into account in evaluating his or her potential employability." The court concluded that any permanent disability award that fails to consider these factors is inadequate.

In *Ogilvie v. Workers' Compensation Appeals Board*, (2011) 76 Cal. Comp. Cases 624, the Court of Appeal held that despite changes to Labor Code Section 4660, the scheduled rating can still be rebutted. The *Ogilvie* court went on to delineate three methods to rebut the scheduled rating, including the presentation of evidence that an employee is not amenable to rehabilitation due to an industrial injury, and therefore suffers a greater loss of future earning capacity than reflected in the scheduled rating.

Scott Simon reported on behalf of applicant as a vocational expert. Mr. Simon reviewed the pertinent medical treatment reporting and extrapolated the work restrictions/capacities for the applicant's orthopedic and psychiatric conditions. Mr. Simon concluded that the applicant is not amendable to rehabilitation or sustained employment in the open labor market. He opined that Mr. Braaten would not be able to reliably participate day after day due to issues related to managing his ADLs, pain, and multiple effects of the impairments directly stemming from the industrial injury alone. (Ex. 7 at 28.) He noted the psychological impairment was over and above his being permanently, totally disabled on an orthopedic basis alone. (Id., at p. 32.)

Defendant relies on the reports of James Westman, who provides a flawed analysis with internally inconsistent opinions regarding applicant's post-injury labor market access based on orthopedic factors alone. He fails to account for Dr. Conrad's opinion on upper extremity residual capacity and the ability to use only one arm in sedentary and light level work conditions. He also does not incorporate the requirement of five-minute breaks every hour, sit/stand at will, and lapses in attention and concentration into his analysis. (Id. at p. 5-6.) After evaluating the evidence and creditability of the experts, the WCJ correctly concluded that Mr. Simon is the only vocational expert to comprehensively evaluate the true constraints of returning to the open labor market and found permanent, total disability.

G. The Finding Regarding The Average Weekly Wage Considers All Relevant Factors And Evidence.

Finding of Fact number 2 states that applicant's an average weekly wage of $1,807.74 and this is in accord with Labor Code Section 4453(c)(4). This subsection indicates if none of the other enumerated methods of calculation cannot be reasonably or fairly applied, the earnings shall be taken as 100% of the sum which reasonably represents the average weekly earnings capacity at the time of injury.

The applicant was referred to work at defendant Aubrey starting January 29, 2014, for a three-day, 12 hour per day assignment. (Ex. 18.) His injury occurred on the first day. Defendant Aubry went on to pay applicant 24 hours of wages for that week totaling a gross of $1,205.16, which translates to $50.22 per hour. (Ex. 17.) Applicant's previous three-day stint with Aubry in 2013 also broke down to $50.22 per hour and totaled $1,807.74 for 36 hours of work. (Ex. D.) Thus, applicant the hourly rate for all time worked was $50.22, multiplied by the number of anticipated hours of work the week of injury (i.e., 36 hours, the same as his previous assignment by Aubrey) produced a fair and equitable determination regarding earnings capacity.

This rationale lines up with the temporary disability benefits paid by defendant, which used maximum earnings for purposes of calculating undisputed periods of temporary disability. (Ex.

11, Ex. 12, and Ex. 20.) It also considers the credible testimony of the applicant regarding earnings capacity, as well as the documentary evidence submitted by defendant showing that they continued to have work available to the applicant on a full-time, full-wage basis that would have fulfilled the anticipated earnings. (Ex. D at p. 3, Letter of Al Moresi.)

The Award and Finding of Fact number 3 finds unpaid periods of temporary disability payable at 2022 maximum rates, which would be subject to the earnings determination.

IV. RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be **DENIED**.

DATE: 11-22-2022

Therese Da Silva
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE