WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ELLEN BERGEN, *Applicant*

vs.

DEPARTMENT OF TRANSPORTATION – DISTRICT 11;
STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Numbers: ADJ3642528 (SDO 0296224); ADJ1253981 (SDO 0296225);
ADJ136560 (SDO 0296235)
San Diego District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the Answer, the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated in the WCJ's report and opinion, which are both adopted and incorporated herein, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 8, 2024

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

ELLEN BERGEN
O'MARA & HAMPTON
STATE COMPENSATION INSURANCE FUND

AH/*cs*

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

FIRST AMENDED JOINT OPINION ON DECISION

I. MEDICAL EVIDENCE

Pursuant to the parties' stipulations, the 1997 permanent disability rating schedule applies to all three of applicant's cases. (MOH/SOE, 2-2-23, 2:22, 3:20, 4:16.)

In the present case, the parties utilized agreed medical examiners to assess applicant Ellen Bergen's orthopedic, internal, psychiatric, and dental injuries. Parties typically select an AME because of the examiner's expertise and neutrality. (See, *Power v. WCAB* (1986) 179 Cal.App.3d 775, 782.) "[W]orkers' compensation law favors agreed medical examiners in resolving medical disputes fairly and expeditiously." (*Green v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1444, fn; omitted.) Thus, an AME's opinion should be followed, unless there is good reason to, find that opinion unpersuasive. (*Power v. WCAB* (1986) 179 Cal.App.3d
775, 782.)

The parties utilized Dr. Harvey Wieseltier as the orthopedic AME, Dr. Dominick Addario as the psychiatric AME, Dr. Daniel Bressler as the internal AME, and Dr. Jack Rosenson as the dental AME.

A. Permanent Disability Attributable to Applicant's February 1, 2002 Specific Injury Based on Applicant's Work Restrictions

The only medical opinions submitted by the parties concerning the applicant's orthopedic injuries are contained in the medical reports of Dr. Wieseltier (Joint Exhibits 1-13) and the transcripts from Dr. Wieseltier's depositions. (Joint Exhibits 14, 15 & 27.) During his deposition conducted on March 26, 2019, Dr. Wieseltier provided a work restriction for the lumbar spine of limited to part-time, sedentary work. (Joint Exhibit 14, 6:20-23.) The work restriction provided by Dr. Wieseltier results in a standard rating of 85% for the lumbar spine. During his deposition, Dr. Wieseltier also provided a work restriction for the neck of limited to part-time, sedentary work. (Joint Exhibit 14, 6: 15-19.) The work restriction provided by Dr. Wieseltier results in a standard rating of 85% for the cervical spine.

Rating the applicant's permanent disability based on a standard rating of 85% for the lumbar spine and 85% for the cervical spine would result in duplication. (See, Schedule for Rating Permanent Disability (hereinafter the "Schedule"), pages 1-9 & 1-10.) When addressing a situation where rating an applicant's permanent disability requires the rater to combine disabilities resulting from a single injury to the same body part, the Schedule states at page 1-9:

> [w]hen combining multiple factors of disability resulting from a single injury within an extremity, single body part, or multiple areas of the body, it is necessary to avoid duplication. Duplication occurs when the combining of different factors of disability does not further reduce an injured workers' ability to compete in an open labor market beyond that resulting from a single factor standing alone.

The Schedule provides an example of total duplication that is relevant in the instant case.

> Total duplication of disability exists in a single injury involving both the abdomen and heart, where each independently limits the injured worker to light work. The two restrictions to light work, having the same definition, totally duplicate one another and therefore do not result in a greater competitive handicap than does either standing alone. The disability number associated with the higher occupational variant would be/used for the final rating.

(Schedule for Rating Permanent Disability, p. 1-10.)

In the instant case, the disability provided by Dr. Wieseltier for the cervical spine and lumber spine completely duplicate each other because they both involve the same limitation; i.e., applicant is limited to part-time, sedentary work. In order to avoid duplication of the disabilities, the work restriction to the lumbar spine shall be rated alone. (Schedule for Rating Permanent Disability, p. 1-10.) The rating of the applicant's permanent disability to the lumbar spine per the opinion of Dr. Wieseltier is as follows: 12.1-85-351 G-86=87%. Dr. Wieseltier opines 100% of the applicant's lumbar spine disability is due to her specific injury on February 1, 2002. (Joint Exhibit 9, p. 36; Joint Exhibit 27, p. 26:4-17.) Therefore, the permanent disability attributable to applicant's lumbar spine injury on February 1, 2002, is 87%.

The medical opinions submitted by the parties regarding the applicant's psychiatric injury are contained in the medical reports and deposition testimony of agreed medical evaluator Dr. Addario. (Joint Exhibits 19, 20, 21 & 29.) Dr. Addario provides work function impairments in his June 11, 2018, report that result in a standard disability of 35%. (Joint Exhibit 20, p. 49.) During his deposition conducted on August 30, 2023, Dr. Addario amended his opinion as to work function 4. (Joint Exhibit 29, 14: 1-5.) Dr. Addario changes his assessment of work function 4 from slight impairment to moderate impairment. (Joint Exhibit 29, 14:1-5.) The change in work function 4 from slight to moderate does not alter the standard disability of 35%. Therefore, the applicant's permanent disability for her psychiatric injury based on the opinions of Dr. Addario is as follows: 1.4-35-351 G-38=40%.

Dr. Addario opines that 100% of the applicant's disability is a compensable consequence of her orthopedic injury on February 1, 2002, while employed with defendant Department of Transportation-District 11. (Joint Exhibit 29, 19:2-15.) Therefore, applicant's permanent disability attributable to her February 1, 2002 injury is 40%.

The medical opinions submitted by the parties regarding the applicant's accepted abdominal injury are contained in the medical reports and deposition testimony of agreed medical evaluator Dr. Bressler. (Joint Exhibits 16, 17, 18 & 28.) Dr. Bressler provides a work restriction of slight-to-moderate disability due to abdominal weakness. (Joint Exhibit 28, 16:18-18:4.) This disability equates to a standard disability of 20%; i.e., between a 30% standard disability for moderate disability due to abdominal weakness and a 10% standard disability for slight disability due to abdominal weakness.

Dr. Bressler also provides subjective and objective factors of disability. Dr. Bressler provides that applicant's subjective factors of disability are intermittent, moderate pain and constant moderate to severe constipation. (Joint Exhibits 16, p. 6; Joint Exhibit 28, 18:18-23.) Dr. Bressler indicates the applicant's objective factor of disability is significantly slowed colonic function despite medications initiated to reconstitute that function. (Joint Exhibits 16, p. 6; Joint Exhibit 28, 18:24-19:3.) The standard disability for intermittent, moderate pain is 25%; i.e., one-half of the standard disability for constant moderate pain. (Schedule for Rating Permanent Disability, p. 1-7 & 2-15.) There are no standard ratings in the Schedule for constant moderate to severe constipation or for significantly slowed colonic function. Based on the subjective/objective index, the applicant's standard disability is 25%.

The Schedule provides two distinct systems for describing disability; i.e., the objective/subjective index and the work capacity index. (Schedule for Rating Permanent Disability, p. 1-3.) In the event the two indexes provide different disability ratings, the Schedule provides that the index producing the higher rating should be used. On page 1-3, the Schedule for Rating Permanent Disability states:

> Two distinct systems are used to describe a disabling condition – the objective/subjective index and the work capacity index. Either or both indexes may be used to describe a particular condition, and each, when used, yields its own disability rating. When both are used, the index producing the higher rating is used.

In the present case, Dr. Bressler's assessment of the applicant's disability using the subjective/objective index provides the higher standard disability.

Based upon the reporting and deposition testimony of Dr. Bressler, the applicant's permanent disability for her internal injury rates as follows: 13.2-25-351 F- 25=27%.

The medical reporting submitted by the parties regarding the applicant's dental injury consists of the medical reporting of Dr. Rosenson. (Joint Exhibits 22, 23 & 24.) Dr. Rosenson concludes in his June 1, 2015 report that the applicant does not have any work restrictions as the result of her dental injury. (Joint Exhibit 22, p. 2.)

Applicant's permanent disability is calculated by combining the permanent disability ratings of her orthopedic, psychiatric, and internal injuries pursuant to the opinions of agreed medical evaluators Dr. Wieseltier, Dr. Addario, and Dr. Bressler. Combining the orthopedic disability (87%) with the psychiatric disability (40%) results in a rating of 96%. Combing the 96% disability with the internal disability (27%) results in a final rating of 100%, subject to apportionment, if any.

B. Permanent Disability Attributable to Applicant's Specific Injury on March 18, 2002 and Applicant's Cumulative Trauma Injury from April 22, 1990, through June 18, 2002 Based on Her Work Restrictions

Pursuant to the medical opinions of agreed medical evaluators Dr. Wieseltier (Joint Exhibit 9, pp. 35-36; Joint Exhibit 4, pp. 148-150; Joint Exhibit 2, pp. 54-55 & Joint Exhibit 1, pp.17-18), Dr. Addario (Joint Exhibit 29, 15:21-19:14), and Dr. Bressler (Joint Exhibit 16, p. 5 & Joint Exhibit 28, 10:22-13:2), applicant did not sustain any permanent disability from the specific injury sustained on March 18, 2002 or the cumulative trauma injury from April 22, 1990 through June 18, 2002.

II. APPORTIONMENT

The burden of proving that some portion of the applicant's permanent disability is due to factors other than the industrial injury rests with the defendant. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 613.) Moreover, in order for the WCJ to rely on an apportionment opinion in a medical report, the report must constitute substantial medical evidence. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 620-621.)

A medical report that makes an apportionment determination by simply identifying a percentage of permanent disability due to non-industrial causes, without more, is not substantial

medical evidence. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 620.) A medical report is not substantial medical evidence on the issue of apportionment unless it sets forth the reasoning supporting the doctor's opinion. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 621.) The doctor must explain the nature of the non-industrial condition, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for a percentage of the applicant's permanent disability. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 621.) In order for an apportionment opinion to be valid, it must be based on causation of the applicant's current disability, not based on causation of the injury or need for medical treatment. (*Torres v. Santa Barbara Community College District* (2021) 86 Cal. Comp. Cases 1075, 1090.) A medical analysis of apportionment that does not provide "an analysis of how and why nonindustrial factors were responsible for a specific portion of Applicant's current disability" is not sufficient to establish a basis for apportionment, and thereby entitles the applicant to an unapportioned award. (*City of San Jose Human Resources Department v. WCAB* (Junge) (2022) 87 Cal. Comp. Cases 502, 505.)

A. Orthopedic Disability

In the present case, Dr. Wieseltier first addresses the issue of apportionment in his November 12, 2015 report. (Joint Exhibit 9, pp. 33-36.) He then copies his apportionment opinion into his subsequent reports. (Joint Exhibits 1, pp. 17-18, 2, pp. 54-55 & 4, pp. 148-150.) Dr. Wieseltier opines there is no apportionment to other factors 1Jllith respect to the applicant's lumbar spine disability. (Joint Exhibit 9, p. 36; Joint Exhibit 27, p. 26:4-17.) However, he provides 20% apportionment to the cervical spine due to degenerative findings from a cervical spine MRI conducted on February 26, 2003, one year post injury. (Joint Exhibit 9, p. 34.) During his deposition on September 5, 2023, Dr. Wieseltier clarifies that the MRI conducted on February 26, 2003 reveals moderate bilateral uncovertebral spurring, resulting in foraminal stenosis that is severe on the right and moderate on the left. (Joint Exhibit 27, p. 11:4-20.) Dr. Wieseltier also opines in his November 12, 2015 report that, in his opinion, the changes 'at all levels of the cervical spine .from C3-4 through C6-7 would have become symptomatic and disabling absent the industrial injury. (Joint Exhibit 9, p. 34.) (*See, E.L. Yeager Construction v. WCAB (Gatten*) (2006) 145 Cal.App. 4th 922. 929-930- appropriate for medical-legal provider to rely on MRI studies and x-rays to support opinion ·on apportionment; see also, *Escobedo v. Marshalls (En Banc*) 70 Cal. Comp. Cases, 604, 622- medically probable the applicant would have had 50% of her current

disability even absent her industrial injury.) Based upon the opinion of agreed medical evaluator Dr. Wieseltier, the disability to applicant's cervical spine is subject to 20% apportionment to non-industrial factors.

Although the applicant's disability to the cervical spine is apportioned 20% to non-industrial factors, the disability to the cervical spine does not impact the rating of the applicant's lumbar spine. As set forth above, the work restrictions for the cervical spine and lumbar spine totally duplicate one another because they have the same definition. In other words, the disability to the cervical spine does not reduce the applicant's ability to compete in the open labor market beyond the disability resulting from the lumbar spine alone. (Schedule for Rating Permanent Disability, p. 1-10.) When total duplication exists, the disability providing the higher rating is used. (Schedule for Rating Permanent Disability, p. 1-10.) Therefore, the disability to the cervical spine is not taken into consideration in the rating of the applicant's disability. Because there is no apportionment to the lumbar spine, the final rating of the applicant's disability for her back remains 87%.

B. Psychological Disability

In his report dated June 11, 2018, Dr. Addario opines that 15% of the applicant's psychiatric disability is attributable to non-industrial causes. (Joint Exhibit 20, p. 50.) However, his opinion in the June 11, 2018 report is limited to the following analysis:

> I would apportion the remaining 15% to the preexisting history of mild, non-disabling depressive symptoms that she, at times, experienced.

(Joint Exhibit 20, p. 50.) In his final report dated April 7, 2022, Dr. Addario simply repeats the same percentage of apportionment without providing any analysis. (Joint Exhibit 19, p. 4.) "In regard to apportionment of psychiatric disability, I continue to apportion 85% to the claims of industrial factors and 15% to nonindustrial factors." (Joint Exhibit 19, p. 4.) A medical report that makes an apportionment determination by simply identifying a percentage of permanent disability due to non-industrial causes, without more, is not substantial medical evidence. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 620.)

As set forth above, the burden of proving that some portion of the applicant' permanent disability is due to factors other than the industrial injury rests with the defendant. (*Escobedo v. Marshalls* (2005) 70 CCC 604, 613.) A medical analysis of apportionment that does not provide "an analysis of how and why non-industrial factors were responsible for a specific portion of

Applicant's current disability" is no sufficient to establish a basis for apportionment, and thereby entitles the applicant to an unapportioned award. (*City of San Jose Human Resources Department v. WCAB* (Junge) (2022) 87 Cal. Comp. Cases 502, 505.)

The deficiencies in Dr. Addario's previously expressed opinions on the subject of apportionment were addressed by the parties in Dr. Addario's deposition conducted on August 30, 2023. (Joint Exhibit 29.) During the deposition, the parties provided Dr. Addario with additional medical records regarding the history of the applicant's mental health treatment at Kaiser Permanente for at least 10 years prior to her industrial injury on February 1, 2002. (Joint Exhibit 29, pp. 7:19-10:17.) Dr. Addario summarizes the applicant's consistent, ongoing, non-industrial mental health treatment involving anxiety, depression, alcohol dependency, a bad relationship with another alcoholic, an emergency room visit after being intoxicated and fighting with her boyfriend, threats to commit suicide, and medication use, including Trazodone, Paxil, and Prozac. (Joint Exhibit 29, pp. 9:5-10:17.) Based upon his review of additional medical records regarding the applicant's history of treatment of alcoholism, depression, and anxiety, Dr. Addario amended his opinion regarding apportionment to conclude that 40% of applicant's psychiatric disability is due to her addiction problems, chronic alcohol dependency, and longstanding, pre-existing depression complicated by a borderline personality disorder. (Joint Exhibit 29, 7:19-11:22.)

Following his review of the Kaiser records, Dr. Addario opines during his deposition on August 30, 2023, that 60% of applicant's permanent disability is due to her industrial disability arising out of her orthopedic injury on February 1, 2002 and multiple surgeries and medication use arising therefrom and 40% of her disability is due to her nonindustrial, pre-existing issues outlined above. (Joint Exhibit 29, pp. 16:21-17: 14 & p. 19:9-15.) Based on Dr. Addario's deposition testimony that thoroughly discusses the applicant's extensive history of mental health problems that pre-date her industrial injury by over 10 years, Dr. Addario's opinion regarding apportionment is found to be substantial medical evidence.

For the reasons set forth above, the defendant has met its burden of establishing that some portion of applicant's current psychiatric permanent disability is due to nonindustrial causes. After apportionment, the applicant's permanent disability attributed to her psychiatric injury is 24%.

C. Internal Disability

Dr. Bressler initially addressed applicant's permanent disability and apportionment in his report dated December 22, 2014. (Joint Exhibit 17.) However, his report assessed applicant's impairment and apportionment under the AMA Guides. (Joint Exhibit 17, p. 38-39.) In his medical report of November 16, 2022, Dr. Bressler, at the request of the parties, provided his assessment of the applicant's permanent disability under the Schedule. (Joint Exhibit 16, p. 6.) However, Dr. Bressler did not discuss the issue of apportionment. (Joint Exhibit 16.)

In order to address this issue, the parties conducted the deposition of Dr. Bressler on August 22, 2023. (Joint Exhibit 28.) During the deposition, Dr. Bressler clarified that the permanent disability attributable to applicant's internal injury was all attributable to the specific injury occurring on February 1, 2002, because the applicant's internal injury flows directly from the orthopedic injury on February 1, 2002. (Joint Exhibit 28, 10:22-13:2.) In his deposition, Dr. Bressler also clarifies the basis for his apportionment opinion based upon applicant's multiple pelvic ultrasounds on February 23, 1998, July 6, 2001, August 28, 2001, and October 30, 2001, and her treatment for right pelvic pain on June 27, 2001, all of which occurred before her industrial injury on February 1, 2002. (Joint Exhibit 17, pp. 7-10; Joint Exhibit 28, 25:3- 26:23.) Based upon his review of the applicant's medical records summarized in his medical reporting showing that the applicant had complaints of pelvic pain and medical treatment for her non-industrial condition prior to her industrial injury on February 1, 2002, he opined that one-third of the applicant's permanent disability is due to her pre-existing, nonindustrial condition and two-thirds of the applicant's permanent disability is attributable to her industrial medication usage. (Joint Exhibit 28, 26:24-28:8.) Based on Dr. Bressler's deposition testimony that sets forth the applicant's ongoing medical treatment for pelvic pain that precedes the applicant's industrial injury by at least three years, Dr. Bressler's medical opinion is found to be substantial medical evidence on the issue of apportionment. (*E.L. Yeager Construction v. WCAB (Gatten*) (2006) 145 Cal.App. 4th 922. 929-930.)

Based upon the opinions provided by Dr. Bressler in his medical reports and deposition testimony, applicant's permanent disability attributable to her internal injury, following apportionment, is 18%.

D. Permanent Disability Rating Following Apportionment

Following apportionment, the permanent disability ratings are as follows: 87% for the orthopedic disability, 24% for the psychiatric disability, and 18% for the internal injury. 'Combining the orthopedic disability (87%) with the psychiatric disability (24%) results in a rating of 92%. Combing the 92% disability with the internal disability (18%) results in a final rating of 95%.

III. NEUROLOGICAL/SEIZURES

The medical reports submitted into evidence by the parties do not evidence a diagnosis of injury AOE/COE by Dr. Wieseltier, Dr. Bressler, Dr. Addario, or Dr. Rosenson regarding the alleged neurological/seizures. There being no evidence to support such a finding by the Court, no such injury is found.

IV. PERMANENT DISABILITY BASED ON THE APPLICANT'S INABILITY TO COMPETE IN THE OPEN LABOR MARKET

During his deposition conducted on March 26, 2019, Dr. Wieseltier testified that he would like to re-evaluate the applicant and have her submit to a two-day functional capacity evaluation to allow him to determine whether the applicant could complete in the open labor market. (Joint Exhibit 14, 7: 16-8:25.) A functional capacity evaluation was completed on June 23, 2020, and June 24, 2020. (Exhibit A.)

Dr. Wieseltier re-examined the applicant on December 17, 2020 and issued a report dated January 15, 2021. (Joint Exhibit 4.) As part of the evaluation, Dr. Wielseltier reviewed the functional evaluation report from the two days of testing in June 2020. (Joint Exhibit 4, pp. 144-147.) Dr. Wieseltier's summary of the functional evaluation report notes the applicant is able perform activities of daily living but is selective in the chores she performs based on how her pain is during any particular day. (Joint Exhibit 4, p. 145.) Applicant reports she awakens around 7:00 a.m. daily, takes her medication, waits for the relief from the medication to start, and then spends the majority of the day transitioning between sitting and laying down, while occasionally attempting to perform light household chores. (Joint Exhibit 4, p. 145.)

Applicant's trial testimony was consistent with the activity level she reported during the functional capacity evaluation. At trial, the applicant testified to being stuck inside her apartment during an average day. (MOH/SOE, 2/2/23, 10:9-10.) Applicant's ability to perform chores is limited due to pain. (MOH/SOE, 2/2/23, 10:10-11.) She can only vacuum for a short period of time

before needing to sit down due to pain. (MOH/SOE, 2/2/23, 10:11-12.) She is unable to cook due to pain; therefore, the only cooking ~he does is when something can be placed in the oven and left until it is done cooking. (MOH/SOE, 2/2/23, 12:10-11.) She takes showers quickly because she cannot stand for a long period of time and it is uncomfortable to take a shower. (MOH/SOE, 2/2/23, 12:7-9.) The applicant's daughter does the shopping and laundry. (MOH/SOE, 2/2/23, 12:12.) The applicant can do a small load of laundry if necessary. (MOH/SOE, 2/2/23, 12:12-13.) The applicant is also unable to work on the computer because she is unable to stay seated for long periods of time. (MOH/SOE, 2/2/23, 10:20-21.) The applicant also testified that she is never pain free. (MOH/SOE, 2/2/23, 10:1-2.) She has been told by Dr. Chen that she will be unable to stop taking pain medication for the rest of her life. (MOH/SOE, 2/2/23, 10:2-3.) In weighing the credibility of the applicant, the WCJ finds the applicant to be a credible witness. (*Garza v. WCAB* (1970) 3 Cal.3d 312, 317-318.) As a general rule, the WCJ must accept as true the meaning of evidence that is uncontradicted and unimpeached. (*Ibid*.)

When discussing whether the applicant is permanently, totally disabled, Dr. Wieseltier discusses the applicant's narcotic medication usage on a daily basis:

> My understanding is that the purpose of today's examination is to determine if Ms. Bergen is permanently totally disabled. Her present narcotic medications are oxycontin 30 mg, which she takes at 7:00 AM and 4:00 PM daily, and oxycodone 10 mg 4.5 tablets per day, one tablet between 6:00 and 7:00 AM, one tablet at 1:00 PM, one tablet at 3:00 PM, one at 9:00 PM, and one half-tablet when she goes to bed or if she awakens.

(Joint Exhibit 4, p. 147.) After getting out of bed at 7:00 a.m., Ms. Bergen must return to bed around 10:00 a.m. to rest for one hour before getting out of bed again. (Joint Exhibit 4, p. 148.) She is generally able to stay out of bed until 7:00 p.m., but takes significant amounts of pain medication during the day. (Joint Exhibit 4, p. 148.) Based on the foregoing, Dr. Wieseltier concluded in his January 15, 2021, report that Ms. Bergen was permanently, totally disabled. (Joint Exhibit 4, p. 148.)

Dr. Wieseltier re-evaluated the applicant again on October 19, 2021. (Joint Exhibit 2.) He again concluded that Ms. Bergen was permanently, totally disabled and unemployable in the open labor market. (Joint Exhibit 2, p.54.) Specifically, his report states:

> Ms. Bergen is **Permanently Totally Disabled**. My opinion is based upon my prior evaluations, today's examination, review of her deposition testimony

> wherein her activities of daily living were described, furthermore her Neck Disability Index today and her Oswestry Low Back Pain Disability Questionnaire today are consistent with her physical examination findings. Namely, there are objective findings to substantiate her subjective complaints. It was and continues to be my opinion that Ms. Bergen is **Permanently Totally Disabled** an unemployable in the Open Labor Market.

(Joint Exhibit 2, p. 54, emphasis original.)

Dr. Wieseltier did not clarify in his October 19, 2021, report whether the applicant's permanent total disability was due to her cervical spine, her lumbar spine, or both her cervical spine and lumber spine when considered together. The parties requested that Dr. Wieseltier clarify this issue in a supplemental report. In his report of December 6, 2022, Dr. Wieseltier opined that both the cervical spine and lumbar spine, independently, precluded the applicant from working in the open labor market. (Joint Exhibit 1, p. 2.) In his December 6, 2022, report, Dr. Wieseltier states:

> I reiterate that Ms. Bergen had four cervical surgeries and had three levels fused. She has had six lumbar surgeries and has had four level fused. Her permanent total disability is secondary to both her cervical spine and lumbar spine conditions. In my opinion either spinal region's disability/impairment would preclude her from working in the open labor market.

(Joint Exhibit 1, p. 2.) Based on the unrebutted testimony of Ms. Bergen and the well-considered opinion of agreed medical evaluator Dr. Wieseltier, the applicant is permanently, totally disabled because she is precluded from working in the open labor market due to her disability to the lumbar spine sustained as a result of her industrial injury on February 1, 2002.

Dr. Wieseltier opined that there is no basis for apportionment of applicant's lumbar spine disability to causes other than the February 1, 2002, industrial injury. (Joint Exhibit 1, p. 18; Joint Exhibit 4, p. 150; Joint Exhibit 9, p. 36.) Therefore, pursuant to reporting of agreed medical evaluator Dr. Wieseltier, the applicant is found to be permanently, totally disabled due to her inability to compete in the open labor market as the result of her industrial injury to the lumbar spine on February 1, 2002.

Defendant asserts that a finding of permanent, total disability cannot be made without a vocational expert. The same argument was rejected by the Appeals Board in *Montiel v. Cal-Tech Precision* 2016 Cal. Wrk. Comp. P.D. LEXIS 328. The Appeals Board stated in *Montiel*: "[a] determination of an inability to compete in the open labor market is not solely within the province of a vocational expert. Clearly, where there is substantial evidence of significant impairment, a

medical expert's opinion regarding a patient's vocational capacity may be sufficient to establish total permanent disability." (*Montiel v. Cal-Tech Precision* 2016 Cal. Wrk. Comp. P.D. LEXIS 328; see also, *City & County of San Francisco v. WCAB (Gebresilassie*) (2006) 71 Cal. Comp. Cases 1154 [finding applicant permanently, total disabled based on the medical opinion of the orthopedic AME] and *California Indemnity v. WCAB (Marquez*) (2011) 77 Cal. Comp. Cases 82 [orthopedic and psychiatric AME reports both found the applicant to be permanently, totally disabled without a vocational rehabilitation report].)

"[W]orkers' compensation law favors agreed medical examiners in resolving medical disputes fairly and expeditiously." (*Green v. Workers' Comp. Appeals Bd*. (2005) 127 Cal.App.4th 1426, 1444, fn. omitted.) Thus, an AME's opinion should be followed, unless there is good reason to find that opinion unpersuasive. (*Power v. WCAB* (1986) 179 Cal.App.3d 775, 782.) There is no good reason to disregard the opinion of agreed medical evaluator Dr. Wieseltier in this case, especially in light of the fact that the applicant has undergone six lumbar surgeries, resulting in the fusion of four levels, and the applicant's ongoing narcotic medication usage.

V. ATTORNEY FEES

Based on Title 8, California Code of Regulations Section 10775 and the guidelines for awarding attorney fees found in Policy and Procedural Manual §1.140, a reasonable attorney's fee is found to be 15% of the permanent disability awarded. If applicant's attorney requests a lump sum payment of the attorney's fee, then applicant's attorney should submit a commutation request to the Disability Evaluation Unit.

VI. FURTHER MEDICAL CARE

Based on the medical reporting of Dr. Wieseltier, Dr. Bressler, Dr. Addario, and Dr. Rosenson, the applicant is in need of further medical care to her neck, back, knees, teeth, psyche, and abdomen to cure or relieve from the effects of the industrial injury.

Dated: February 1, 2024

DOUGLAS E. WEBSTER
WORKERS' COMPENSATION JUDGE

REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION

I. NATURE OF PETITION

On February 16, 2024, petitioner State of California, Department of Transportation, legally uninsured, administered by State Compensation Insurance Fund filed a timely, verified Petition for Reconsideration to the First Amended Joint Opinion on Decision (hereinafter the "Petition for Reconsideration") contending that: (1) by the award the workers' compensation judge acted without or in excess of his powers; (2) the evidence does not justify the findings of fact; and (3) the findings of fact do not support the award.

Applicant Ellen Bergen filed a timely, verified answer to the defendant's Petition for Reconsideration on February 23, 2024.

The Petition for Reconsideration raises two main arguments. First, that the Workers' Compensation Judge (hereinafter "WCJ") cannot make a finding of permanent, total disability based on the medical report of an agreed medical evaluator, without a vocational rehabilitation opinion. Second, the WCJ failed to apply non-industrial apportionment to applicant's permanent disability.

II. FACTS

Applicant sustained three separate injuries while employed as a Maintenance Equipment Operator for the California Department of Transportation:

1. ADJ1253981- on February 1, 2002, she sustained injury arising out of and in the course of employment to her neck, back, knees, teeth, psyche, and abdomen (MOH/SOE, 2/2/23, 3:10-12);
2. ADJ3642528- on March 18, 2002, she sustained injury arising out of and in the course of employment to the neck, back, teeth, and abdomen.(MOH/SOE, 2/2/23, 2:12-14); and
3. ADJ136560- during the period of April 22, 1990, through June 18, 2002, she sustained injury arising out of and in the course of employment to her psyche (MOH/SOE, 2/2/23, 4:6-8).

Although petitioner filed for reconsideration in all three cases, the only case that provides an award of permanent disability is case no. ADJ1253981.

III. DEFENDANT DISPUTES THE FINDING THAT THE APPLICANT IS UNABLE TO COMPETE IN THE OPEN LABOR MARKET

Defendant disputes the WCJ's finding that the applicant is unable to compete in the open labor market based on the opinion of Agreed Medical Evaluator Dr. Harvey Wieseltier. Defendant predominantly relies on the case of *Applied Materials v. WCAB* (2021) 64 Cal.App.5th 1042. *Applied Materials* is distinguishable from the present case because it concerns an assessment of impairment under the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (hereinafter ("AMA Guide's").

In *Applied Materials*, the court provides a thorough discussion of the history of Senate Bill 899, the revisions made to Labor Code section 4660, and the impact of those revisions. In *Applied Materials*, the applicant's impairment was assessed under the AMA Guides pursuant to the 2005 Schedule for Rating Permanent Disabilities (hereinafter the "2005 Schedule"). The court found that an assessment of applicant's permanent disability must be made pursuant to the 2005 Schedule using the AMA Guides, as required by Labor Code section 4660. The court then proceeds to explain how the injured worker in *Applied Materials* could have established a finding of 100% permanent disability under the 2005 Schedule using the AMA Guides. (*Applied Materials v, WCAB* (2021) 64 Cal.App.5th 1042, 1092.) Further, the court discussed the three ways to rebut the presumption of correctness of the 2005 Schedule, citing to *Almaraz v. Environmental Recovery Services* (2009) 74 Cal. Comp. Cases 1084, *Ogilvie v. WCAB* (2011) 197 Cal.App.4th 1262, and *Contra Costa County v. WCAB* (2015) 240 Cal.App.4th 746. The discussion regarding establishing permanent, total disability under the 2005 Schedule and the AMA Guides is not applicable to the present case because in the instant case the applicant's permanent disability is assessed under the 1997 Schedule for Rating Permanent Disabilities (hereinafter the "1997 Schedule"). At trial, the parties stipulated that the 1997 Schedule applies to the rating of applicant's permanent disability in the present cases. (MOH/SOE, 2/2/23, 2:22, 3:20, 4:16.)

Defendant also cites a list of cases to support its position. The cases cited by defendant are not persuasive because the cases are also distinguishable from the present case. In *Brown v. Southern California Permanente Medical Group*, 2012 Cal. Wrk. Comp. P.D. LEXIS 557, the court concluded the findings of the primary treating physician were inconsistent with a finding of permanent, total disability because the disability allegedly supporting the finding of permanent, total disability was subject to apportionment. *Gomez v. County of Los Angeles*, 2014 Cal. Wrk.

Comp. P.D. LEXIS 119, was returned to the trial level to develop the record because the WCJ's finding was not based on substantial medical evidence. *Ecoffey v. WCAB* (2014) 79 Cal. Comp. Cases 469 (writ denied) is a writ denied case without substantive analysis. In *Morris v. WCAB* (2014) 79 Cal. Comp. Cases 1348 (writ denied), the applicant's inability to work was due to the combined effect of three separate dates of injury. In *Gutierrez v. American Career College*, 2015 Cal. Wrk. Comp. P.D. LEXIS 433, the Appeals Board found the finding of permanent, total disability was not based on substantial medical evidence and failed to address the fact that the internal and psychiatric injuries supporting the opinion were both subject to apportionment. *Ancona v. Moreno Valley Chevrolet*, 2020 Cal. Wrk. Comp. P.D. LEXIS 134 concerned arguments from the injured worker that apportionment to his prior award should not be applied to his current case and his disability should be added rather than combined using the Combine Values Chart.

None of the cases cited above address a finding of permanent, total disability under the 1997 Schedule concerning a body part that is not subject to apportionment. Therefore, the cases do not support reconsideration of the finding of permanent, total disability in favor of applicant.

IV. DEFENDANT ASSERTS THAT THE FIRST AMENDED JOINT OPINION ON DECISION IGNORES THE APPORTIONMENT PROVIDED BY THE AGREED MEDICAL EVALUATORS

Defendant asserts that the First Amended Joint Opinion on Decision (hereinafter "First Amended Opinion on Decision") ignores the apportionment provided by each of the three Agreed Medical Evaluators. Defendant's assertion is disingenuous. The First Amended Opinion on Decision contains a six-page discussion addressing the apportionment opinions of each of the three agreed medical evaluators and then applies their opinions to the rating of the applicant's permanent disability. (First Amended Opinion on Decision, pp. 6-13.)

The First Amended Opinion on Decision first addresses the doctors' assessments, of the applicant's permanent disability pursuant to the work restrictions provided in the 1997 Schedule, prior to applying apportionment. The ratings are briefly summarized below.

A. Permanent Disability Prior to Apportionment

During his deposition conducted on March 26, 2019, orthopedic agreed medical evaluator, Dr. Harvey Wieseltier provided a work restriction for the lumbar spine of limited to part-time, sedentary work. (Joint Exhibit 14, 6:20-23.) The rating of the applicant's permanent disability to the lumbar spine per the opinion of Dr. Wieseltier is as follows: 12.1-85-351G-86=87%. Dr.

Wieseltier opines 100% of the applicant's lumbar spine disability is due to her specific injury on February 1, 2002. (Joint Exhibit 9, p. 36; Joint Exhibit 27, p. 26:4-17.) Therefore, the permanent disability attributable to applicant's lumbar spine injury on February 1, 2002, is 87%.

Psychiatric agreed medical evaluator, Dr. Dominic Addario provides work function impairments in his June 11, 2018, report that result in a standard disability of 35%. (Joint Exhibit 20, p. 49.) During his deposition conducted on August 30, 2023, Dr. Addario amended his opinion as to work function 4 from slight impairment to moderate impairment. (Joint Exhibit 29, 14:1-5.) The change in work function 4 from slight to moderate does not alter the standard disability of 35%. Therefore, the applicant's permanent disability for her psychiatric injury based on the opinion of Dr. Addario is as follows: 1.4-35-351G-38=40%. Dr. Addario opines that applicant's disability is a compensable consequence of her orthopedic injury on February 1, 2002, while employed with defendant Department of Transportation-District 11. (Joint Exhibit 29, 19:2-15.) Therefore, applicant's permanent disability attributable to her February 1, 2002 injury is 40%.

The medical opinions submitted by the parties regarding the applicant's accepted abdominal injury are contained in the medical reports and deposition testimony of agreed medical evaluator Dr. Daniel Bressler. (Joint Exhibits 16, 17, 18 & 28.) Dr. Bressler provides subjective and objective factors of disability. Dr. Bressler states that applicant's subjective factors of disability are intermittent, moderate pain and constant moderate to severe constipation. (Joint Exhibits 16, p. 6; Joint Exhibit 28, 18:18-23.) Dr. Bressler indicates the applicant's objective factor of disability is significantly slowed colonic function despite medications initiated to reconstitute that function. (Joint Exhibits 16, p. 6; Joint Exhibit 28, 18:24-19:3.) The standard disability for intermittent, moderate pain is 25%; i.e., one-half of the standard disability for constant moderate pain. (Schedule for Rating Permanent Disability, p. 1-7 & 2-15.) There is no standard rating in the Schedule for significantly slowed colonic function. Based on the subjective/objective index, the applicant's standard disability is 25%. During his deposition, Dr. Bressler clarified that the permanent disability attributable to applicant's internal injury was all attributable to the specific injury occurring on February 1, 2002, because the applicant's internal injury flows directly from the orthopedic injury on February 1, 2002. (Joint Exhibit 28, 10:22-13:2.) Based upon the reporting and deposition testimony of Dr. Bressler, the applicant's permanent disability for her internal injury rates as follows: 13.2-25-351F-25=27%.

Applicant's permanent disability is calculated by combining the permanent disability ratings of her orthopedic, psychiatric, and internal injuries pursuant to the opinions of agreed medical evaluators Dr. Wieseltier, Dr. Addario, and Dr. Bressler, prior to apportionment. Combining the orthopedic disability (87%) with the psychiatric disability (40%) results in a rating of 96%. Combing the 96% disability with the internal disability (27%) results in a final rating of 100%, subject to apportionment, if any.

After assessing the applicant's permanent disability prior to apportionment, the First Amended Opinion on Decision discusses the apportionment opinions of each agreed medical evaluator.

B. Permanent Disability Following Apportionment

Dr. Wieseltier first addresses the issue of apportionment in his November 12, 2015 report. (Joint Exhibit 9, pp. 33-36.) Dr. Wieseltier consistently opines there is no apportionment to other factors with respect to the applicant's lumbar spine disability. (Joint Exhibit 9, p. 36; Joint Exhibit 27, p. 26:4-17.) Therefore, the disability attributable to her lumbar spine is 85%.

In his report dated June 11, 2018, Dr. Addario opines that 15% of the applicant's psychiatric disability is attributable to non-industrial causes. (Joint Exhibit 20, p. 50.) However, his opinion in the June 11, 2018 report is limited to the following analysis:

> I would apportion the remaining 15% to the preexisting history of mild, non-disabling depressive symptoms that she, at times, experienced.

(Joint Exhibit 20, p. 50.) In his final report dated April 7, 2022, Dr. Addario simply repeats the same percentage of apportionment without providing any analysis. (Joint Exhibit 19, p. 4.) "In regard to apportionment of psychiatric disability, I continue to apportion 85% to the claims of industrial factors and 15% to nonindustrial factors." (Joint Exhibit 19, p. 4.) A medical report that makes an apportionment determination by simply identifying a percentage of permanent disability due to non-industrial causes, without more, is not substantial medical evidence. (*Escobedo v. Marshalls* (2005) 70.Cal. Comp. Cases 604, 620.)

The burden of proving that some portion of the applicant's permanent disability is due to factors other than the industrial injury rests with the defendant. (*Escobedo v. Marshalls* (2005) 70 CCC 604, 613.) A medical analysis of apportionment that does not provide "an analysis of how and why non-industrial factors were responsible for a specific portion of Applicant's current disability" is not sufficient to establish a basis for apportionment, and thereby entitles the applicant

to an unapportioned award. (*City of San Jose Human Resources Department v. WCAB* (Junge) (2022) 87 Cal. Comp. Cases.502, 505.)

The deficiencies in Dr. Addario's previously expressed opinions on the subject of apportionment were addressed by the parties in Dr. Addario's deposition conducted on August 30, 2023. (Joint Exhibit 29.) During the deposition, the parties provided Dr. Addario with additional medical records regarding the history of the applicant's mental health treatment at Kaiser Permanente for at least 10 years prior to her industrial injury on February 1, 2002. (Joint Exhibit 29, pp. 7:19-10:17.) Dr. Addario summarizes the applicant's consistent, ongoing, non-industrial mental health treatment involving anxiety, depression, alcohol dependency, a bad relationship with another alcoholic, an emergency room visit after being intoxicated and fighting with her boyfriend, threats to commit suicide, and medication use, including Trazodone, Paxil, and Prozac. (Joint Exhibit 29, pp. 9:5-10:17.) Based upon his review of additional medical records regarding the applicant's history of treatment for alcoholism, depression, and anxiety, Dr. Addario amended his opinion regarding apportionment to conclude that 40% of applicant's psychiatric disability is due to her addiction problems, chronic alcohol dependency, and longstanding, pre-existing depression complicated by a borderline personality disorder. (Joint Exhibit 29, 7:19-11:22.)

Following his review of the Kaiser records, Dr. Addario opines during his deposition on August 30, 2023, that 60% of applicant's permanent disability is due to her industrial disability arising out of her orthopedic injury on February 1, 2002, and multiple surgeries and medication use arising therefrom and 40% of her disability is due to her nonindustrial, pre-existing issues outlined above. (Joint Exhibit 29, pp. 16:21-17:14 & p. 19:9-15.) Based on Dr. Addario's deposition testimony that thoroughly discusses the applicant's extensive history of mental health problems that pre-date her industrial injury by over 10 years, Dr. Addario's opinion regarding apportionment is found to be substantial medical evidence.

For the reasons set forth above, the defendant has met its burden of establishing that some portion of applicant's current psychiatric permanent disability is due to nonindustrial causes. After apportionment, the applicant's permanent disability attributed to her psychiatric injury is 24%.

Dr. Bressler initially addressed applicant's permanent disability and apportionment in his report dated December 22, 2014. (Joint Exhibit 17.) However, his report assessed applicant's impairment and apportionment under the AMA Guides. (Joint Exhibit 17, p. 38-39.) In his medical report of November 16, 2022, Dr. Bressler, at the request of the parties, provided his assessment

of the applicant's permanent disability under the 1997 Schedule. (Joint Exhibit 16, p. 6.) However, Dr. Bressler did not discuss the issue of apportionment. (Joint Exhibit 16.)

In order to address the issue of apportionment, the parties conducted the deposition of Dr. Bressler on August 22, 2023. (Joint Exhibit 28.) During the deposition, Dr. Bressler clarified that the permanent disability attributable to applicant's internal injury was all attributable to the specific injury occurring on February 1, 2002, because the applicant's internal injury flows directly from the orthopedic injury on February, 1, 2002. (Joint Exhibit 28, 10:22-13:2.) In his deposition, Dr. Bressler also clarifies the basis for his apportionment opinion based upon applicant's pelvic ultrasounds on February 23, 1998, July 6, 2001, August 28, 2001, and October 30, 2001, and her treatment for right pelvic pain on June 27, 2001, all of which occurred before her industrial injury on February 1, 2002. (Joint Exhibit 17, pp. 7-10; Joint Exhibit 28, 25:3-26:23.) Based upon his review of the applicant's medical records summarized in his medical reporting showing that the applicant had complaints of pelvic pain and medical treatment for her non-industrial condition prior to her industrial injury on February 1, 2002, he opines that one-third of the applicant's permanent disability is due to her pre-existing, nonindustrial condition and two-thirds of the applicant's permanent disability is attributable to her industrial medication usage. (Joint Exhibit 28, 26:24-28:8.) Based on Dr. Bressler's deposition testimony that sets forth the applicant's ongoing medical treatment for pelvic pain that precedes the applicant’s industrial injury by at least three years, Dr. Bressler's medical opinion is found to be substantial medical evidence on the issue of apportionment. (*EL Yeager Construction v. WCAB* (*Gatten*) (2006) 145 Cal.App. 4th 922. 929-930.)

Based upon the opinions provided by Dr. Bressler in his medical reports and deposition testimony, applicant's permanent disability attributable to her internal injury, following apportionment, is 18%.

As discussed above, the defendant met its burden of establishing apportionment as to the permanent disability attributable to applicant's psychiatric and internal injuries. Following apportionment, the permanent disability ratings are as follows: 87% for the orthopedic disability, 24% for the psychiatric disability, and 18% for the internal injury. Combining the orthopedic disability (87%) with the psychiatric disability (24%) results in a rating of 92%. Combing the 92% disability with the internal disability (18%) results in a final rating of 95%. Contrary to the defendant's assertion, the issue of apportionment was addressed in the First Amended Opinion on

Decision. In fact, defendant agrees with the WCJ's opinion that after apportionment, the permanent disability rates to 95%. (Petition for Reconsideration, p. 15.)

C. Applicant Presented Substantial Medical Evidence to Rebut the 1997 Schedule

After analyzing the applicant's permanent disability pursuant to the 1997 Schedule prior to and follow apportionment, the First Amended Opinion on Decision addresses the issue of whether the applicant rebuts the 1997 Schedule to establish that she is permanently, totally disabled.

Defendant asserts that a finding of permanent, total disability cannot be made without a vocational expert. The same argument was rejected by the Appeals Board in *Montiel v. Cal-Tech Precision* 2016 Cal. Wrk. Comp. P.D. LEXIS 328. The Appeals Board stated in Montiel: "[a] determination of an inability to compete in the open labor market is not solely within the province of a vocational expert. Clearly, where there is substantial evidence of significant impairment, a medical expert's opinion regarding a patient's vocational capacity may be sufficient to establish total permanent disability." (*Montiel v. Cal-Tech Precision* 2016 Cal. Wrk. Comp. P.D. LEXIS 328; see also, *City & County of San Francisco v. WCAB* (*Gebresilassie*) (2006) 71 Cal. Comp. Cases 1154 [finding applicant permanently, totally disabled based on the medical opinion of the orthopedic AME], *California Indemnity v. WCAB* (*Marquez*) (2011) 77 Cal. Comp. Cases 82 (writ denied) [orthopedic and psychiatric AME reports both found the applicant to be permanently, totally disabled without a vocational rehabilitation report], and *Qualcomm, Inc. v. WCAB* (*Brown*) (2019) 84 Cal. Comp. Cases 531 (writ denied) [medical opinion of the psychiatric AME sufficient to rebut the scheduled rating by demonstrating the applicant was unable to return to gainful employment].) "Multiple cases have established that a finding of 100% permanent total disability is appropriate based upon a physician's statement that the injured employee is unable to compete in the open labor market. (citations omitted)" (*Gonzalez v. S. Martinelli & Co.* (2016) 2016 Cal. Wrk. Comp. P.D. Lexis 485.)

The 1997 Schedule repeatedly states that it is physicians that are responsible for determining an applicant's disability.

> The residual effects of industrial injury are ascertained and described by **physicians** when the employee's condition become "permanent and stationary."
>
> **Physicians** provide information about the injured employee's permanent impairment and limitations, whether objectively measurable (e.g., amputation, loss of motion) or subjective (e.g., disabling pain).**Physicians** may also indicate work restrictions are warranted either because the employee cannot perform

> certain functions or should not perform functions in order to prevent further injury.

(1997 Schedule, p. 1-2; emphasis added.) The 1997 Schedule also provides that an injured worker may be 100% disabled based upon a finding of an inability to complete in the open labor market:

> A rating can range from 0% to 100%. Zero percent signifies no reduction of ability to compete in an open labor market while 100% represents *legal* total disability. Total disability does not mean that the employee cannot work, but rather represents a level of disability at which an employee would not normally be expected to be able to successfully compete in an open labor market.

(1997 Schedule, p. 1-3; emphasis original.)

During his deposition conducted on March 26, 2019, Dr. Wieseltier testified that he would like the applicant to submit to a two-day functional capacity evaluation and then re-examine her to allow him to determine whether the applicant could compete in the open labor market. (Joint Exhibit 14, 7:16-8:25.) A functional capacity evaluation was completed on June 23, 2020, and June 24, 2020. (Exhibit A)

Dr. Wieseltier re-examined the applicant on December 17, 2020, and issued a report dated January 15, 2021. (Joint Exhibit 4.) As part of the evaluation, Dr. Wielseltier reviewed the functional capacity evaluation report from the two days of testing in June 2020. (Joint Exhibit 4, pp. 144-147.) Dr. Wieseltier's summary of the functional evaluation report notes the applicant is able perform activities of daily living but is selective in the chores she performs based on how her pain is during any particular day. (Joint Exhibit 4, p. 145.) Applicant reports she awakens around 7:00 a.m. daily takes her medication, waits for the relief from the medication to start, and then spends the majority of the day transitioning between sitting and laying down, while occasionally attempting to perform light household chores. (Joint Exhibit 4, p. 145.)

Applicant's trial testimony was consistent with the activity level she reported during the functional capacity evaluation. At trial, the applicant testified to being stuck inside her apartment during an average day. (MOH/SOE, 2/2/23, 10:9-10.) Applicant's ability to perform chores is limited due to pain. (MOH/SOE, 2/2/23, 10:10-11.) She can only vacuum for a short period of time before needing to sit down due to pain. (MOH/SOE, 2/2/23, 10:11-12.) She is unable to cook due to pain; therefore, the only cooking she does is when something can be placed in the oven and left until it is done cooking. (MOH/SOE, 2/2/23, 12:10-11.) She takes showers quickly because she cannot stand for a long period of time and it is uncomfortable to take a shower. (MOH/SOE, 2/2/23,

12:7-9.) The applicant's daughter does the shopping and laundry. (MOH/SOE, 2/2/23, 12:12.) The applicant can do a small load of laundry if necessary. (MOH/SOE, 2/2/23, 12:12-13.) The applicant is also unable to work on the computer because she is unable to stay seated for long periods of time. (MOH/SOE, 2/2/23, 10:20-21.) The applicant also testified that she is never pain free. (MOH/SOE, 2/2/23, 10:1-2.) She has been told by Dr. Chen that she will be unable to stop taking pain medication for the rest of her life. (MOH/SOE, 2/2/23, 10:2-3.) In weighing the credibility of the applicant, the WCJ finds the applicant to be a credible witness. (*Garza v. WCAB* (1970) 3 Cal.3d 312, 317-318.) As a general rule, the WCJ must accept as true the meaning of evidence that is uncontradicted and unimpeached. (*Ibid*.)

When discussing whether the applicant is permanently, totally disabled, Dr. Wieseltier discusses the applicant's narcotic medication usage on a daily basis:

> My understanding is that the purpose of today's examination is to determine if Ms. Bergen is permanently totally disabled. Her present narcotic medications are oxycontin 30 mg, which she takes at 7:00 AM and 4:00 PM daily, and oxycodone 10 mg 4.5 tablets per day, one tablet between 6:00 and 7:00 AM, one tablet at 1:00 PM, one tablet at 3:00 PM, one at 9:00 PM, and one half-tablet when she goes to bed or if she awakens.

(Joint Exhibit 4, p. 147.) After getting out of bed at 7:00 a.m., Ms. Bergen must return to bed around 10:00 a.m. to rest for one hour before getting out of bed again. (Joint Exhibit 4, p. 148.) She is generally able to stay out of bed until 7:00 p.m. but takes significant amounts of pain medication during the day. (Joint Exhibit 4, p. 148.) Based on the foregoing, Dr. Wieseltier concludes in his January 15, 2021, report that Ms. Bergen is permanently, totally disabled. (Joint Exhibit 4, p. 148.)

Dr. Wieseltier re-evaluates the applicant again on October 19, 2021. (Join Exhibit 2.) He again concludes that Ms. Bergen is permanently, totally disabled and unemployable in the open labor market. (Joint Exhibit 2, p.54.) Specifically, his report states:

> Ms. Bergen is **Permanently Totally Disabled**. My opinion is based upon my prior evaluations, today's examination, review of her deposition testimony wherein her activities of daily living were described, furthermore her Neck Disability Index today and her Oswestry Low Back Pain Disability Questionnaire today are consistent with her physical examination findings. Namely, there are objective findings to substantiate her subjective complaints. It was and continues to be my opinion that Ms. Bergen is **Permanently Totally Disabled** and unemployable in the Open Labor Market.

(Joint Exhibit 2, p. 54, emphasis original.)

Dr. Wieseltier did not clarify in his October 19, 2021, report whether the applicant's permanent total disability was due to her cervical spine, her lumbar spine, or both her cervical spine and lumber spine when considered together. The parties requested that Dr. Wieseltier clarify this issue in a supplemental report. In his report of December 6, 2022, Dr. Wieseltier opines that both the cervical spine and lumbar spine, independently, preclude the applicant from competing in the open labor market. (Joint Exhibit 1, p. 2.) In his December 6, 2022, report, Dr. Wieseltier states:

> I reiterate that Ms. Bergen had four cervical surgeries and had three levels fused. She has had six lumbar surgeries and has had four levels fused. Her permanent total disability is secondary to both her cervical spine and lumbar spine conditions. In my opinion either spinal region's disability/impairment would preclude her from working in the open labor market.

(Joint Exhibit 1, p. 2.) Further, Dr. Wieseltier opines that there is no basis for apportionment of applicant's lumbar spine disability to causes other than the February 1, 2002, industrial injury. (Joint Exhibit 1, p. 18; Joint Exhibit 4, p. 150; Joint Exhibit 9, p. 36.) Therefore, based on the unrebutted testimony of Ms. Bergen at trial and the well-considered opinion of agreed medical evaluator Dr. Wieseltier, the WCJ found the applicant to be permanently, totally disabled due to her inability to compete in the open labor market as the result of her industrial injury to the lumbar spine on February 1, 2002.

Pursuant to *LeBoeuf v. WCAB* (1983) 34 Cal.3d 234, a finding of vocational non-feasibility is equivalent to a 100% disability, thereby rebutting the scheduled rating. Although the applicant's permanent disability is determined by the 1997 Schedule and not the 2005 Schedule, Dr. Wieseltier's analysis is consistent with the analysis required by *Milpitas Unified School District v. WCAB* (*Guzman*) (2010) 187 Cal.App.4th 808; i.e., Dr. Wieseltier provides an assessment of the applicant's disability under the 1997 Schedule, and then provides his analysis to rebut the scheduled rating. Based upon the applicant's six lumbar spine surgeries (resulting in the fusion of four levels of her spine), the results of her two-day functional evaluation testing, applicant's narcotic medication usage on a daily basis in order to function, her need to constantly rest or lie down during the day, and his seven evaluations of the applicant over a ten year period, Dr. Wieseltier concludes Ms. Bergen is permanently, totally disabled and unemployable in the open labor market. (Joint Exhibit 2, p.54; Joint Exhibit 1, p. 2.)

[W]orkers' compensation law favors agreed medical examiners in resolving medical disputes fairly and expeditiously." (*Green v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1444, fn. omitted.) Thus, an AME's opinion should be followed, unless there is good reason to find that opinion unpersuasive. (*Power v. WCAB* (1986) 179 Cal.App.3d 775, 782.) In the present case, Dr. Wieseltier evaluated Ms. Bergen seven times, issued thirteen reports, and had his deposition conducted twice over a period of twelve years. Dr. Wieseltier is unquestionably familiar with the applicant's condition and the impact her injury has had on her ability to compete in the open labor market. Moreover, defendant did not present any evidence at trial to refute Dr. Wieseltier's opinion in this matter. There is no good reason to disregard the opinion of agreed medical evaluator Dr. Wieseltier in this case.

V. RECOMMENDATION

For the reasons set forth above, the WCJ respectfully recommends that the Petition for Reconsideration be denied.

Dated: March 1, 2024

DOUGLAS E. WEBSTER
WORKERS' COMPENSATION JUDGE