WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHONG WANG, *Applicant*

vs.

6 STARS CONSTRUCTION LLC;
insured by NORGUARD INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ13332511
San Francisco District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

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

Preliminarily, we note that former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

[1] All further statutory references are to the Labor Code, unless otherwise noted.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on February 11, 2025 and 60 days from the date of transmission is Saturday, April 12, 2025. The next business day that is 60 days from the date of transmission is Monday, April 14, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, April 14, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on February 11, 2025, and the case was transmitted to the Appeals Board on February 11, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on February 11, 2025.

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 14, 2025

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

CHONG WANG
SU LAW, APC
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP

PAG/bp

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION:

Defendants seek reconsideration of my January 6, 2025 Findings of Fact and Award (hereinafter "the F&A") wherein I found applicant sustained permanent total disability as a result of his industrial injury. In doing so, I followed the opinions of applicant's secondary treating physician and applicant's vocational expert. I rejected the opinions of the Qualified Medical Evaluator (QME) and defendants' vocational expert. On reconsideration, defendants contend that I acted in excess of my powers by relying on reports that do not constitute substantial evidence and that I applied the incorrect legal standard. The petition is timely and verified. Applicant did not file an answer.

FACTS

1. Procedural background.

Applicant a 44 year old construction laborer/carpenter, suffered an accepted left eye and psyche injury on November 14, 2019, when a metal staple flew into his eye. He has nearly complete blindness in his left eye. At trial on October 28, 2024, applicant relied on reports from the secondary treating physician, Robert Neger, M.D. and vocational expert Steve Ramirez. Applicant contended that he was permanently totally disabled. Defendants relied upon reports from QME Irina Ganelis and vocational expert Emily Tincher. Both parties filed trial briefs. Applicant testified. The primary issue was permanent disability. The matter was submitted October 28, 2024.

2. Evidence at trial and decision.

As summarized in pages 2 through 14 of the January 6, 2025 Opinion on Decision (hereinafter "the Opinion") there were fifteen exhibits offered in to evidence. Of those, four were joint exhibits: three QME reports from Dr. Ganelis; and a psychological QME report from Robert Perez, Ph.D.

Applicant offered 8 exhibits. Three were reports from the primary treating physician Michael Newman, D.C. requesting the secondary treating physician Robert Neger, M.D. to prepare a permanent and stationary report and requesting him to adopt Dr. Neger's report. Two were Dr. Neger's permanent and stationary report and a supplemental report. Two were vocational reports from Steve Ramirez. Defendant offered three vocational reports from Emily Tincher.

Applicant was the only witness. He testified credibly regarding his injuries and

disability. His testimony is summarized at pages 14 through 17 of the Opinion. I followed Dr. Neger's opinions regarding applicant's disability and functional limitations at work, including complete loss of depth perception, fatigue and slowness and the need to take breaks at will. I followed applicant's vocational expert Steve Ramirez opinions regarding applicant's amenability to vocational rehabilitation and disability. In the Opinion at pages 17 through 24, I stated:

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

Having carefully analyzed the record, I find that applicant has successfully rebutted the medical evidence of disability[1], on the basis that he is unable to either resume gainful employment or benefit from vocational retraining. See *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 48 Cal. Comp. Cases 587. Consequently, I conclude that applicant has sustained 100% permanent disability as a result of his industrial loss of vision. I based this finding on applicant's credible testimony, Steve Ramirez vocational reports and Dr. Neger's medical reports.

I found applicant's vocational reports thorough and persuasive. Steve Ramirez based his opinions on a sufficiently accurate history. His reports are substantial evidence. Mr. Ramirez based his opinions on the functional limitations identified by Dr. Neger. Dr. Neger stated that applicant suffered a complete loss of depth perception which affects many activities of daily living.

> The complete loss of depth perception affects a great many activities of daily life. The determination of the position objects in space is determined by depth perception. Walking down a staircase, stepping off a curb, parking a car depend upon high levels of depth perception. Pouring hot liquids as would occur with cooking are dependent upon stereopsis. The simple act of pouring water or reaching for an object in space are difficult and time consuming without depth perception. Certain activities such as using cutting tools, ladders, using machines with the potential for hand or arm injuries are precluded as too dangerous. Manual tasks without depth perception are performed at a much slower pace of necessity. A worker who performs manual tasks is less efficient and less competitive in work market place.
>
> In short, an active, young person in the construction industry become an occupational invalid. The loss of depth perception slows all mechanical activities. The worker becomes a less desirable employee as all tasks become much slower. He is unable to compete in the job market. The activity of restocking a shelf would require much more time with no depth perception than if depth perception was normal. (Applicant exhibit 5 p. 15).

---

[1] Drs. Ganelis and Dr. Neger agreed about the rating for applicant's loss of vision. They disagreed about the increased rating for stereopsis (loss of depth perception). Dr. Ganelis maintained that the maximum increase

allowed by the guides for stereopsis is 15%. She provided a 10% increase, without a discussion of why she chose 10% rather than 15% where applicant suffered a complete loss of depth perception. Dr. Ganelis provided a final rating of 30% WPI. Dr. Neger's rating was 65% WPI. Although Dr. Neger stated that he did not use Almaraz/Guzman in determining permanent disability, he did use an Almaraz/Guzman analysis. He explained how and why the standard AMA Guides rating is inaccurate and providing a more accurate rating, within the four corners of the guides, based on applicant's functional limitations. Dr. Perez provided an 8% rating, based on applicant's GAF score for the psyche. No combination of these ratings using the combined values chart would equal 100%.

Ramirez report (applicant exhibit 8) concluded:

> The salient matter at hand is Mr. Wang Wang's left eye injury which has resulted in a complete loss of depth perception.
>
> Dr. Ganelis issued work restrictions staring Mr. Wang Wang must wear polycarbonate wrap-around goggles while working in an environment where there can be exposure to high velocity projectiles, dust, fumes, and gases as well as marked changes in temperature and humidity. This can be easily accommodated and in his current employment, Mr. Wang Wang does wear wrap-around polycarbonate goggles.
>
> Dr. Ganelis also stated Mr. Wang Wang should be afforded two 10-minute rest breaks to allow for him to rest his eyes. This restriction can easily be accommodated with the normal work breaks. However, due to the ocular pressure and pain caused by exertion (i.e., lifting), Dr. Ganelis also precluded him from lifting more than 10 pounds. As such, he is limited to sedentary work.
>
> Dr. Neger issued formal work restrictions precluding Mr. Wang Wang from using cutting tools, welding tools, or machines that allow extremity exposure. He added Mr. Wang Wang should not climb on ladders or scaffolding as well as stating any type of occupation that uses tools or machines with the potential for a hand or extremity injury should be prohibited."
>
> For all intent and purposes, this eliminates virtually all construction-related, production, or manufacturing occupations. While this appears to be inconsistent with the fact that Mr. Wang Wang is in fact working in a construction laborer capacity, one has to consider the context of his work restrictions and the manner in which he is able to work.
>
> Mr. Wang Wang self-modifies to only do work which involves no cutting tools, moving machinery, climbing ladders or scaffolding, and no exposure to toxic chemicals or electrical work. He is given referrals by former co-workers who understand his limitations as well as his need to have an income to support himself and his two children in China.

His is paid by the job and not hourly due to the fact, that because of his lack of depth perception, he works at a much slower pace than would be expected in competitive employment as well as the fact that after an hour of work, he needs to take a 10-15-minute break to close his eyes and allow them to rest.

This is confirmed by Dr. Neger who stated, “Manual tasks without depth perception are performed at a much slower pace of necessity. A worker who performs manual tasks is less efficient and less competitive in the open labor market,” as well as, “The loss of depth perception slows all mechanical activities. The worker becomes a less desirable employee as all tasks become much slower.He is unable to compete in the job market.”

While Dr. Neger is offering a vocational opinion which is not within his scope of expertise, in this case he is correct.

It should be recognized that all jobs have a baseline level for productivity and a tolerance of off-task behavior which, based upon empirical peer-reviewed research studies, is 10-12% time off task.
Note the following:
In terms of time off-task, a research study titled Off Task and Lost Work Productivity: Why, How Much, and Implications for Vocational Expert Testimony (Vol. 26, Issue 2, 2018) was published in the *Rehabilitation Professional*. The results indicate there is no definitive answer as to what is acceptable off task time before being subject to termination.

This study further stated there have been no conclusive studies performed relative to time off-task in the private forensic vocational expert arena but studies of vocational experts who testify in Social Security Disability hearings revealed their opinions that somewhere between 10%-15% off task behavior is an acceptable amount of time off-task allowed by employers before the employee is subject to termination. (Marini, I., Preston, B., Pinon, R., & Antol, D. (2018). Off Task and Lost Work Productivity: Why, How Much, and Implications for Vocational Expert Testimony, Rehabilitation Professional, Vol. 26, Issue 2).

Note: As Dr. Marini noted, the only research related to employer tolerance for time off-task was performed in a study of vocational experts who testify in Social Security Disability cases. I reference a study performed by attorney Kevin Liebkemann, Chief Counsel Legal Services of New Jersey. In this study, he researched over 1,000 Social Security Disability cases which were litigated at the Federal Court level. In analyzing these cases, he found the preponderance of vocational experts testified employers will not tolerate time off-task of more than 10-12 percent of an 8-hour workday.

As Mr. Wang Wang was unable to maintain work from his previous employer due to his lack of depth perception, eye pain and need to take breaks to close and rest his eyes, the only way he has managed to sustain his self-employment is his self- accommodation of not taking jobs which require tools for cutting, sawing, working with machinery or around toxic chemicals or performing electrical work. He also must work at a much slower pace which has been accepted by his clients who understand his limitations, need to take breaks and at times leave work early as they do not pay him by the hour but only on completion of the job.

These self-accommodations would not be acceptable by employers in the open labor market where productivity, extra work breaks, leaving work early on an unpredictable basis, and calling in sick due to his eye pain 3-4 times per month would occur.

Further, as Mr. Wang Wang only works an average of 12-15 days per month for 3- 4 hours per day at what he approximated to be an hourly wage of $20.00 per hour, this equates to monthly earnings of between $720.00-$1,200.00 per month or $8,640.00-$14,400 annually which does not meet the California poverty threshold of $24,860 for a family of three (Mr. Wang Wang and his two children).Therefore, these earnings do not rise to the level of gainful employment.

If consideration is given to the possibility Mr. Wang Wang may be able to perform sedentary work, his lack of transferable skills and no formal education past middle school, would relegate him to unskilled sedentary jobs. His ability to perform these jobs is also highly problematic given his lack of depth perception.

The preponderance of these unskilled sedentary jobs are found in production, manufacturing, fabrication, assembly or bench work which require good visual acuity to work with and handle tools and small parts in a competitive manner.

I conducted a vocational analysis of each medical impairment for all work restrictions as well as medical findings/conclusions documented in the medical reports. I considered the vocational impact of each. Criterion-referenced measurement of an individual job is based upon the following:

Performance: Employee must be able to meet demands such as quality of work, appropriate behavior consistent with company structure, rules, and employment guidelines.

> Productivity: Employee must be able to meet the daily production demands as identified in each, individual job description. Production demands may be hourly, daily, weekly, monthly, or annually.
>
> Attendance: Employee must be able to meet the employer's demand for work schedule for any given job or occupation, in terms of work schedule (hourly, daily, monthly, etc.) and conform to the limits for vacation and sick leave.
> Establishing work disability is based on an individual's ability to meet the demands of competitive employment, given the vocational impact of the industrial injury and consequences of medical treatment.
>
> Determination of ability to work is the analysis of medical impairments associated with the industrial injury and consequences of medical treatment with the factors required for competitive employment.
> I utilized ophthalmological and visual factors as the criterion to consider as the most appropriate manner in which to perform the vocational assessment for potential work activities.
>
> Based upon a thorough review of the medical reports as well as my individualized analysis, I am of the opinion that the industrial injury, of 11/14/2019, had a significant impact on his work abilities. He experiences significantly diminished functioning in specific areas such as vision and depth perception both of which coalesce to produce a worker profile which, based upon reasonable vocational probability, eliminates any possibility Mr. Wang Wang could return to competitive employment.
> Therefore, it is my professional opinion that Mr. Wang Wang is 100% vocationally disabled and not amenable to rehabilitation.

Ramirez considered Dr. Neger's functional limitations as they affect applicant's ability to work. Applicant is effectively blind in the injured left eye. He suffered a complete loss of depth perception/stereopsis. More importantly, Ramirez adequately considered Dr. Neger's statements that applicant would work slowly and need to take breaks at will, in determining that applicant was unable to compete for and retain jobs in the open labor market. Ramirez' statements that employers will not tolerate slow work and the need to take breaks (off task) are realistic and persuasive. I chose to follow Ramirez in determining that applicant is permanently totally disabled.

Applicant was a credible witness. His testified that he has constant eye fatigue. He needs to rest after working for about an hour. It affects his ability to work. He cannot see clearly and must work very slowly. (Minutes of Hearing and Summary of Evidence p. 7:4-10).

Dr. Ganelis opined that applicant only needs two 10 minute breaks per day for ocular rest. This is inconsistent with applicant's credible testimony. Although Dr. Ganelis described significant limitations in applicant's activities of daily living2, she only provided limited work

[2] Self-care, personal hygiene: With some difficulty due to loss of binocularity and stereopsis - Take a shower, take a bath, wash & dry body, wash & dry face, turn on/off faucets, brush teeth, get on/off toilet, comb/brush hair, dress self, put on/off shoes/socks, open carton of milk, open a jar, lift glass/cup to mouth, make a meal, lift fork/spoon to mouth.
Physical activity: With some difficulty due to loss of binocularity and stereopsis - stand, sit, recline, rise from chair, get in/out of bed, climb flight of 10 stairs, work outdoors, light housework, shop/do errands, carry groceries, lift 30 lbs., walk, care for children/parents, engage in hobbies.

Communication: Without difficulty - use a telephone, speak clearly, hear clearly. With difficulty - watching TV screen, writing a note and reading text.

Sensory function: Without difficulty - Feel what he touches, taste what he eats, smell what he eats.

restrictions: wear goggles, two ten minute breaks per day for ocular rest and no lifting over ten pounds. I found Dr. Neger's descriptions of applicant's functional limitations more consistent with applicant's credible testimony about his slowness at work and need to take breaks.

I did not follow Emily Tincher's vocational opinions. Her reports appeared boilerplate in many places and she did not adequately consider Dr. Neger's opinions that applicant would work slowly and need to take breaks at will. I found Tincher's statement that, "Dr. Neger does not assign any restrictions on the amount of breaks needed per day", evasive. (Defendant exhibit A, p. 4). Instead of acknowledging that applicant needs to take breaks as needed per Dr. Neger, Tincher omitted Dr. Neger's discussion about need for breaks from her analysis. (Id. at 24-25). Tincher does not take into account important factors which affect applicant's employability.

2. Is there valid apportionment of the permanent disability?

i. Medical apportionment

Both Dr. Neger and Dr. Ganelis apportioned 100% of the visual disability to the instant industrial injury. Dr. Perez apportioned one-third of the psychological disability to non-industrial factors.

In finding 100% permanent total disability, I relied upon Steve Ramirez vocational reports. Although Ramirez reviewed Dr. Perez report, Perez report contained no work restrictions or other functional limitations. It merely provided a GAF score of 65. Ramirez based his opinions solely on the work restrictions from Dr. Ganelis and Dr. Neger. Accordingly, there is no medical apportionment of the total permanent disability.

ii. Vocational apportionment

Steve Ramirez found no vocational apportionment. He found that there was no vocational apportionment. He stated:

Travel: With difficulty - Driving a car, making right and left turns in the car, looking at the car dashboard.

Without difficulty - Get in/out of car, ride in a car, fly in plane.

Sexual function: Not applicable.

Sleep: Some difficulty getting to sleep and staying asleep.

> I considered Labor Code §4663 & §4664 and the *Benson* decision for causality and apportionment. I also considered the *Nunes* decision which directs me to consider the vocational impact of medical impairments and identify specifically the medical impairment(s) that is the cause of Mr. Wang Wang's vocational disability and the relative impact on his ability to compete in the open labor market.

- Dr. Ganelis concluded that the cause of Mr. Wang Wang's complete loss of depth perception was the industrial injury of 11/14/2019.
- Both Dr. Ganelis and Dr. Neger apportioned 100% of Mr. Wang Wang's left eye injury, eye pain and loss of depth perception to the 11/14/2019 injury. I considered the findings of the *Nunes* decision when analyzing Mr. Wang Wang's vocational disability and inability to compete in the open labor market. Mr. Wang Wang sustained a single trauma industrial injury to his left eye that resulted in a complete loss of depth perception that resulted in visual deficits at a level that eliminated his ability to function in a competitive work environment. This conclusion is supported by the medical analyses for causation and apportionment as documented by Dr. Ganelis and Dr. Neger. (Applicant exhibit 8 p. 10).

I found Emily Tincher's report confusing on this issue. (Defendants' exhibit A pages 31-33. She discussed the *Nunes* case in boilerplate fashion, without providing a direct opinion. At page 28 of her report, Tincher concedes that applicant is not amenable to vocational rehabilitation. However, Tincher asserts that but for applicant's ability to speak English and his lack of education, he would be amenable.

The Worker's Compensation Appeals Board rejected this argument in *Soormi v. Foster Farms*, 2023 Cal. Wrk. Comp. P.D. Lexis 170 and more recently in *Maria Pantoja v. Jack in the Box* (ADJ910410 – Opinion and Decision after Reconsideration September 9, 2024). In *Soormi*, the Board stated:

> To be abundantly clear, a person's ethnic origin is not a disability. A person's immigration status is not a disability. Whether a person can speak the English language is not generally a disability. A person's lack of education is not a disability. Mr. Simon's focus on applicant's lack of education and lack of English skills is not proper because neither of these factors were caused by a pre-existing disability and Mr. Simon did not explain why these factors were the sole cause of applicant's loss of earnings post-injury.

> It may be true that an unskilled worker is more susceptible to sustaining permanent total disability because such a person begins the analysis with a limited labor market. However, that is not a basis to discount applicant's level of disability. To be clear, the employer receives a discount in such cases. However, the discount is found, not in the percentage of disability, but in the rate of the permanent total disability award. Defendant will pay the permanent total disability award at a rate that is significantly lower than the state average because applicant was unskilled and paid at or around minimum wage.
>
> The analysis changes if applicant's pre-existing education or language ability is due to a disability. Like many states, California encourages employers to hire disabled workers. The State assures employers that they will not be held liable for pre-existing disabilities through multiple avenues. First, we have apportionment based on causation and apportionment based on prior awards. (§§ 4663, 4664.) Next, we have the Subsequent Injuries Benefits Trust Fund ("SIBTF"), which covers the employer for any increase in permanent disability that was amplified by a prior disability. (§§ 4751, et. seq.)
>
> Here, applicant is simply an unskilled worker. No issue of apportionment exists. The AME found the disability was 100% industrial. The work restrictions were 100% industrial. Defendant failed to show that any prior disability existed. Defendant received the benefit of cheap unskilled labor. Applicant's limitation on the open labor market was a risk that defendant assumed. Defendant must now accept the consequences. *Soormi v. Foster Farms*, 2023 Cal. Wrk. Comp. P.D. LEXIS 170.

I agree with the analysis in *Soormi*. The permanent total disability in this case derives from medical limitation, without apportionment. Applicant's lack of language skills and limited education are not disabilities. His total disability is based on medical functional limitations from his work injury. He is effectively blind in one eye. He has no depth perception. He is slow in performing tasks and must take breaks at will. These are the factors and reasons that he is now totally disabled Applicant, an unskilled worker, had a labor market available to him pre-injury and now has none. Following *Soormi*, I rejected Emily Tincher's opinion. There is no vocational apportionment.

3. Contentions on reconsideration.

Defendant contends that I relied on reports from Dr. Neger and Steve Ramirez, which do not constitute substantial evidence; and that the correct legal standard was not applied or followed.

DISCUSSION:

First, Defendant maintains that Dr. Neger's reporting is not substantial evidence because he improperly provided vocational opinions.

1. *Dr. Neger's reports constitute substantial evidence*.

Dr. Neger's reports are substantial evidence. Dr. Neger interviewed and examined applicant, reviewed all the records and issued reports addressing all the issues surrounding permanent disability. His conclusions are well reasoned. He addressed disability under the *AMA Guides*. He provided a thorough explanation of the strict rating, whether or not it was accurate and why an alternate rating was more accurate.

Defendants criticize Dr. Neger's description of the activities of daily living and opinions regarding applicant's work capacity. While Dr. Neger did not robotically describe the activities of daily living as enumerated in Table 1-2 (page 4) of the *AMA Guides*, Dr. Neger provided specific realistic examples, when he stated:

> The complete loss of depth perception affects a great many activities of daily life. The determination of the position objects in space is determined by depth perception. Walking down a staircase, stepping off a curb, parking a car depend upon high levels of depth perception. Pouring hot liquids as would occur with cooking are dependent upon stereopsis. The simple act of pouring water or reaching for an object in space are difficult and time consuming without depth perception. (7/31 p. 15, app exh 5)

Defendants object to Dr. Neger's further statements that:

> Certain activities such as using cutting tools, ladders, using machines with the potential for hand or arm injuries are precluded as too dangerous. Manual tasks without depth perception are performed at a much slower pace of necessity. A worker who performs manual tasks is less efficient and less competitive in work market place.
>
> In short, an active, young person in the construction industry become an occupational invalid. The loss of depth perception slows all mechanical activities. The worker becomes a less desirable employee as all tasks become much slower. He is unable to compete in the job market. The activity of restocking a shelf would require much more time with no depth perception than if depth perception was normal. (7/31 p. 15, app exh 5)
>
> During my evaluation of the applicant there was no mention that the ocular pain induced headaches. The issue sited (sic) is whether a future employer would be required to provide the applicant with regular, frequent breaks. The rational was that these breaks would help the applicant to "deal" with his severe ocular pain, headaches and fatigue. It would seem appropriate to provide breaks as needed. 1/12/23 p. 6 app exh 4

Defendant maintains that Dr. Neger was not permitted to provide vocational opinions.The only vocational opinion he provided is that applicant is unable to compete in the job market. I did not rely on that opinion. I relied on Dr. Neger's opinions about applicant's functional limitations that formed the basis for the vocational expert opinions. Dr. Neger opined that in addition to the limitations on activities requiring depth perception, *applicant would work slowly and need to take regular frequent breaks at will*. Dr. Neger's opinions are consistent with his obligation to address all aspects of permanent disability, including work limitations. His opinions are also consistent with Chapter 1 of the *AMA Guides* (Philosophy, Purpose, and Appropriate Use of the *Guides*.)

> If the physician has the expertise and is well acquainted with the individual's activities and needs, the physician may also express an opinion about the presence or absence of a specific disability. For example, an occupational medicine physician who understands the job requirements in a particular workplace can provide insights on how the impairment could contribute to a workplace disability. (Section 1.2b Disability, p. 8 AMA Guides).

Accordingly, I found that Dr. Neger's opinions constituted substantial evidence.

2. <u>Steve Ramirez vocational opinions constituted substantial evidence.</u>

Ramirez performed a standard vocational evaluation, reviewed all the relevant medical information and issued a well-reasoned report. Defendants contend that Ramirez opinions are not consistent with the law because he did not consider "other factors" including lack of education and language skills. *Argonaut Ins. Co. v. Industrial Acci. Com. (Montana)* (1962) 57 Cal.2d 59. Montana is distinguishable because the issue there was earning capacity for temporary disability under Labor Code section 4453. Temporary and permanent disability indemnity are distinct benefits with different purposes.

More importantly, the holding in (*Contra Costa County v. Workers' Comp. Appeals Bd.* (2015) (*Dahl*) 80 Cal.Comp.Cases 1119, expressly precludes the inclusion of other factors because the focus must be on applicant's individualized earning potential/labor market; not the earnings potential/labor market of similarly situated individuals who might be subject to different limitations.

> The first step in any *LeBoeuf* analysis is to determine whether a work-related injury precludes the claimant from taking advantage of vocational rehabilitation and participating in the labor force. This necessarily requires an individualized approach. For example, in *Gottschalks v. Workers' Comp. Appeals Bd.* (2003) 68 Cal.Comp.Cases 1714, 1716 (writ den.), one of the compensation cases cited in *Ogilvie*, the WCAB denied an employer's petition for reconsideration of a 100 percent disability rating where Oxycontin, a medication used to treat the claimant's industrial injury, had a "'severe [e]ffect'" on the claimant's ability to work. **The focus was on the limitations flowing from the claimant's particular condition, not the earning potential of similarly situated individuals who might be subject to different limitations**. It is this individualized assessment

> of whether industrial factors preclude the employee's rehabilitation that *Ogilvie* approved as a method for rebutting the Schedule (emphasis added).

(*Contra Costa County v. Workers' Comp. Appeals Bd.* (2015) (*Dahl*) 80 Cal.Comp.Cases 1119.

Applicant had an individual labor market available to him. Within that labor market, he had an excellent employment history as established by Mr. Ramirez report and applicant's credible testimony. If non-industrial factors such as language and education are introduced, we are comparing applicant to similarly situated employees with average language skills and education. Rehabilitation is an individualized assessment. Otherwise, we are creating skilled fictional workers for comparison. According to Ogilvie (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 76 Cal.Comp.Cases 624) and *Dahl*, the analysis post-injury must focus on the damages caused by the injury. For example, if an unskilled applicant has pre-injury access to 20% of the labor market and 15% post-injury, he or she cannot claim benefits for a loss of 85% access to the labor market. An award of 85% permanent disability would be inappropriate in such a case. The labor market loss must be individually focused. In the above example, applicant would have only lost access to 25% of her individual labor market due to the industrial injury.

The proper analysis for calculating the industrial loss of earnings/job market access post-injury is as follows:

1. What was applicant's labor market access/earnings capacity pre-injury including all non-industrial factors (i.e. economic conditions, education, skill, literacy)?[3]

2. What is applicant's labor market access/earnings capacity post-injury including all non-industrial factors (i.e. economic conditions, education, skill, literacy)?

3. What is the ration of the above?

Ramirez correctly used an individualized approach in analyzing applicant's amenability to rehabilitation and disability. Ramirez determined applicant's labor market access pre-injury (1,067 job matches) to his post-injury labor market access (zero job matches) (Applicant exhibit 8, Ramirez November 23, 2023 report, at page 9). Applicant had an individualized labor market available to him pre-injury. Now, due to the effects of the industrial injury, applicant has no labor market available. Ramirez report applied the correct legal analysis. I appropriately relied on Ramirez opinions in finding applicant permanently totally disabled.

Defendants' final contention is that *Soormi v. Foster Farms*, 2023 Cal. Wrk. Comp. P.D. LEXIS 170 does not apply because applicant earned more than minimum wage. The *Soormi* court discussed applicant's low wages as a rationale for its decision. This is not a requirement. Otherwise, whether education or language skills is a disability would turn on applicant's pre-injury

wages. The opinion clearly states that education and language skills are, generally, not a disability. *Soormi* is direct authority supporting my decision to award permanent total disability.

3 No person has access to 100% of the labor market. As pointed out in *Dahl*, we must start the analysis with an individual approach and calculate how much access applicant had the labor market pre-injury with applicant's individual traits, skills and characteristics. From there, we calculate how much labor market access applicant lost and how much loss of earnings capacity has resulted from the effects of his or her industrial injury.

RECOMMENDATION:

For the foregoing reasons, I recommend that DEFENDANTS' Petition for Reconsideration, filed herein on January 30, 2025, be denied. This matter is being transmitted to the Appeals Board on the service date indicated below my signature.

BARRY GORELICK
Workers' Compensation Judge
Workers' Compensation Appeals Board

The Report and Recommendation on Petition for Reconsideration was filed and served on all parties listed in the Official Address Record and the case was transmitted to the Appeals Board on this date.

Date: February 11, 2025
By: EFranklin

OPINION ON DECISION

Introduction and Procedural History:

Applicant suffered an accepted eye and psyche injury on November 14, 2019 while working as a construction laborer carpenter when a metal staple flew into his eye. He has effectively lost vision in his left eye.

The parties obtained Ophthalmology and Psychological QME reports. Applicant's primary treating physician issued reports.

Applicant contended, based on vocational evidence that he was permanently totally disabled. Defendant presented vocational evidence that applicant was not totally disabled because he does not speak English and has limited education.

Applicant was the only witness at trial. The matter was tried and submitted on October 28, 2024. The primary issue was permanent disability.

Documentary Evidence

There were four joint exhibits, eight applicant exhibits and three defense exhibits.

Joint exhibits

Joint exhibit 1 is a December 15, 2020 Panel QME report from Irina Ganelis, M.D. (Ophthalmology). This 78 page report is Dr. Ganelis initial evaluation report. She met with applicant, took a history, performed an examination, and reviewed extensive medical records. Dr. Ganelis' diagnoses for the left eye, including: ruptured globe, status post corneal laceration repair, corneal scar and opacity, traumatic cataract, tractional retinal detachment, visual loss, pupillary abnormality, visual discomfort, generalized contraction of visual field, and glaucoma secondary to eye trauma. In her discussion, commencing on page 50, Dr. Ganelis stated that the applicant sustained a specific injury when a metal staple flew into his left eye. He developed a ruptured globe with corneal laceration with severe vision loss necessitating a very complicated medical and surgical treatment course. He now complains of severe vision loss in the left eye to the level of light perception, difficulty seeing to the left side, problems related to coordination, binocularity and stereopsis (bumping into walls, hitting hand with the hammer), difficulty driving, left eye pressure, pain and sandiness sensation as well as fatigue and discomfort in the right eye. Applicant's symptoms and the pathophysiology of his disease are consistent with the injury and treatment he received. (p. 59). Dr. Ganelis concludes that he suffered a ruptured globe injury and

endophthalmitis requiring multiple surgeries and visual acuity of light perception in the left eye as compared to the right eye's visual acuity of 20/20. His condition is not yet permanent and stationary. (p. 60).

Joint exhibit 2 is Dr. Ganelis April 19, 2022 Panel QME supplemental evaluation report. Dr. Ganelis met with applicant, reviewed additional medical records, performed an examination and prepared this 33 page report. Dr. Ganelis reviewed a January 21, 2022 report from Lingman He, M.D. who opined that applicant has a very guarded visual prognosis because he still has significant corneal scarring. He might benefit from a PKP surgery but the benefit would be limited given the retinal damage. Applicant felt that his left eye was about the same as it was for the initial evaluation in December 2020. However, he felt that the loss of vision in the left eye is affecting his right eye. He cannot see anything with his left eye. He has to rely completely on his right eye. It is becoming difficult because at the end of the day, his right eye gets very tired and blurry. He is not currently working. He is not able to judge the distance and size of objects he works with and is worried that he may hurt himself. Anything where he needs to use his eyes, work and activities of daily living, including driving is difficult for him. He also has right eye fatigue which affects his ability to see and function. Because he is not able to see to the left side and from the left eye, he bumps into things and has bumped into doors and hit his hand with a hammer. He sometimes misses things when he reaches for them. He has to turn his head to see better when reaching and where he is going. (p. 7).

Activities of daily living (p. 9):

> Applicant has some difficulty with self-care and personal hygiene due to loss of binocularity and stereopsis -taking a shower or bath, washing and drying his body and face, turning on and off faucets, brushing his teeth, getting on/off the toilet, comb/brush hair, dress self, put on/off shoes and socks, open a carton of milk, open a jar, lift a glass/cup/fork/spoon to mouth, make a meal;
>
> Applicant has some difficulty with physical activity due to loss of binocularity and stereopsis – stand, sit, recline, rise from chair, get in/out of bed, climb flight of 10 stairs, work outdoors, light housework, shop/do errands, carry groceries, lift 30 lbs, walk, care for children/parents, engage in hobbies;
>
> Applicant has difficulty with communication – watching a TV screen, writing a note and reading text;
>
> Applicant has difficulty with travel – driving a car, making right and left turns, looking at the dashboard;
>
> Applicant has some difficulty with getting to sleep and staying asleep.

Dr. Ganelis found applicant's condition permanent and stationary on April 9, 2022. His condition was 100% industrial without apportionment. Dr. Ganelis provided an AMA Guides

rating of 30% for the left eye based on his visual acuity loss and visual field loss, including an increase for complete loss of stereopsis, loss of binocularity and increased glare sensation. Applicant will require future medical treatment. He should get a supplemental job displacement voucher. He was temporarily disabled from the date of injury to June 11, 2020 (six months after the date of the last procedure – other than periods of employment).

Dr. Ganelis work restrictions are: applicant must wear polycarbonate wrap-around goggles while working in an environment with exposure to high velocity projectiles, dust, fumes and gases and marked changes in temperature and humidity. He should be allowed two ten-minute breaks during his workday or a 10-minute break every four hours to provide ocular rest. No lifting over ten pound. She recommended a psychology or psychiatry QME.

Joint exhibit 3 is Dr. Ganelis's August 20, 2023 supplemental report written in response to a letter from applicant counsel. She reviewed additional records, including Dr. Neger's July 21, 2023 report. She found an earlier permanent and stationary dated, based on her examination of applicant on April 19, 2022. Dr. Neger's report does not change her opinion on the permanent and stationary date. Dr. Ganelis disagrees with Dr. Neger's permanent disability rating under Chapter 12 of the AMA Guides. They both agree that applicant has a 20% whole person impairment for vision loss in the left eye, given his visual acuity loss and visual field loss. They agree that an increase in the rating is order to account for additional functional limitations including applicant's difficulties with depth perception/loss of stereopsis. Dr. Neger increased the rating by 55% WPI, asserting that Table 12-10 more accurately takes into account applicant's limitations on activities of daily living. Dr. Ganelis disagreed. She pointed out Section 12.4b of the Guides states, "[t]he adjustment should be limited to an increase in the impairment rating of the visual system…by, at most, 15 points. She felt that the 10% WPI increase to 30% was correct. She noted her prior recommendation that applicant see an occupational therapist and/or certified orientation and mobility specialists to maximize existing skills and teach new skills in driving, performing ADLs and place of employment.

In Dr. Ganelis opinion, a 3% pain add-on should be based on a psychiatric evaluation and GAF score. Accordingly, she disagreed with Dr. Neger who provided a 3% pain add-on. Her opinions regarding work restrictions were unchanged. Applicant should be allowed two ten-minute breaks during his workday or a 10 minute every four hours to provide ocular rest, with a ten pound lifting restriction.

Joint exhibit 4 is a Robert Perez, Ph.D's September 26, 2022 Psychological Panel QME Evaluation report. Dr. Perez evaluated applicant in person on August 20, 2022 and via video on September 26, 2022. Dr. Perez took a history and reviewed medical records. Dr. Perez diagnosed Post-Traumatic Stress Disorder, providing a GAF score of 65 or 8% WPI. Dr. Perez attributed the disability to applicant's November 14, 2019 injury, directly; not as a compensable consequence. He apportioned one-third of the disability to the circumstances of applicant and his wife's immigration to the United States because of religious persecution.

Applicant exhibits

Applicant exhibit 3 is an April 7, 2023 primary treating physician report from Michael Newman, D.C. In this report, Dr. Newman designated Dr. Neger to provide a Primary Treating Physcian's Comprehensive Medical-Legal Report pursuant to Labor Code section 4061.5 on his behalf.

Applicant exhibit 5 is a July 31, 2023 Comprehensive Medical Legal Evaluation report prepared by Robert Neger, M.D. Dr. Neger evaluated applicant at the request and designation of his primary treating physician, Michael Newman, D.C. Dr. Neger interviewed applicant, examined him, reviewed medical records and prepared this report regarding applicant's visual disability. Dr. Neger found that the November 14, 2029 work injury caused the eye disability. He felt that there was an initial treatment delay that led to an infection and increased disability. Dr. Neger found applicant's condition permanent and stationary. He provided a 20% WPI rating, under Chapter 12 of the AMA Guides, for loss of visual acuity in the left eye considering the loss of vision and loss of visual field. Dr. Neger considered an increased impairment for loss of stereopsis (depth perception). He stated:

> The applicant functions at work in an occupation where the loss of depth perception puts him at undue risk for further injury or death. Prior to the injury he used cutting tools, was able to climb ladders or scaffolding however the complete loss of depth perception precludes these occupational tasks. The complete loss of depth perception affects a great many activities of daily life. The determination of the position objects in space is determined by depth perception. Walking down a staircase, stepping off a curb, parking a car depend upon high levels of depth perception. Pouring hot liquids as would occur with cooking are dependent upon stereopsis. The simple act of pouring water or reaching for an object in space are difficult and time consuming without depth perception. Certain activities such as using cutting tools, ladders, using machines with the potential for hand or arm injuries are precluded as too dangerous. Manual tasks without depth perception are performed at a much slower pace of necessity. A worker who performs manual tasks is less efficient and less competitive in work market place
>
> In short, an active, young person in the construction industry become (sic) an occupational invalid. The loss of depth perception slows all mechanical activities. The worker becomes a less desirable employee as all tasks become much slower. He is unable to compete in the job market. The activity of restocking a shelf would require much more time with no depth perception than if depth perception was normal.
>
> *The Guides* in the Visual System Chapter, Number 12 on page 298 has a Table 12-10 "Classification of Impairment of the Visual System and of the Whole Person". In this tabular guide the lower portion of the table has a section "Estimated ability to perform activities of daily living". <u>The table is the only section in the visual system section of The Guides that correlates visual functional loss with activities of daily living.</u>
>
> The chart is divided into two sections: "normal or near normal

> performance" or "restricted or failing performance". The applicant falls into the later. Under the "restricted performance section, the first category is "slower than normal, even with enhancement aids". There are no enhancement aids for the loss of stereopsis. 1n Table 12-10, Class 4 is the appropriate category for the applicant as it most clearly depicts the appropriate impairment. Class 4 assesses an impairment of 50-61% WPI. The applicant performs tasks more slowly than prior to the injury of note.
> In view of occupational demands and other activities of daily living in a young, active working person in the manual trades, it is appropriate and warranted to assess an impairment rating of 55% for the complete loss of stereopsis.
>
> I assess an impairment rating of 55% for the complete loss of depth perception in view of the profound impact on activities of daily living.

Dr. Neger also provided a 3% increase for pain based on the applicant's subjective complaints of significant daily left eye pain. Using the combined values chart, his total rating was 23% (visual acuity and pain) plus 55% for loss of stereopsis equals 65% WPI.

Dr. Neger's work restrictions:

> The applicant should avoid occupation using cutting tools, welding tools, machines that allow extremity exposure. He should not climb on ladders or scaffolding. Any type of occupational that uses tools or machine with the potential for a hand or extremity injury should be prohibited.

Applicant exhibit 2 is an August 21, 2023 primary treating physician report from Michael Newman, D.C. In this report, Dr. Newman confirms that he designated Dr. Neger to provide a Primary Treating Physcian's Comprehensive Medical-Legal Report pursuant to Labor Code section 4061.5. He reviewed Dr. Neger's (July 31, 2023) report and adopts it as his own.

Applicant exhibit 4 is a November 12, 2024 supplemental report from Robert Neger, M.D. in response to a request from applicant counsel. Dr. Neger reviewed Dr. Ganelis December 15, 2020 report. Addressing his own WPI rating, he stated:

> One of the accepted tenets of *The Guides* is allowing impairment ratings outside the strict tenets of *The Guides* if warranted by specific, individualized factors. The level of impairment is directly contingent upon the effects of the deficit on activities of daily living and occupational demands.
>
> Background Information for Question 3:

The case of the applicant is an apt example of when The Guides fail to give accurate assessment of impairment, The Guides strict interpretation limits impairment of the loss of stereopsis to 15%. The applicant cannot function as a construction worker without depth perception. From a work perspective alone, he is totally disabled as the use of cutting tool and climbing are precluded. A construction worker who can no longer can use cutting tools or climbing onto a ladder is unable to function normally. The Guides as the name implies is just that, an approximation of impairment. The assessment exceeds the strict. guidelines as the impairment affect activities of daily including occupational demands to a far greater extent than 15%.

The applicant by virtue of his complete loss of depth perception becomes an occupational invalid. The only tasks allowable in construction are now severely limited. Virtually any task involving manual labor tasks require much more time due to the loss of depth and the increased risk of additional injuries. The applicant is no longer an efficient worker in construction. As an immigrant with almost no English cognition, employment in other areas of endeavor become problematic.

The assessment of 55% of loss of stereopsis remains my assessment of permanent impairment. The assessment of greater impairment than allowed within the strict interpretation of The Guides reflects the limitations promulgated by The Guides narrow and inaccurate limitation for the loss of depth perception. The Guides fail to accurately quantify the effect of the loss of stereopsis on activities of daily living and occupational demands.

My initial evaluation and report delineate the methodology in establishing permanent impairment Stereopsis is a binocular visual function allowing the three-dimensional cerebral construct we call depth. Stereopsis give us the third dimension of depth perception. In the manual trades the complete loss of depth perception, is a life altering condition. Without stereopsis a construction worker is significantly disabled.

If the applicant was a computer engineer using a two- dimensional computer image at work and his or her only hobby was computer games, no impairment would be assessed even if all depth perception was lost.

The assessment of impairment is promulgated on the impact of depth perception (if any) on activities of daily living and occupational demands.

Pain Impairment, Question 4:

Dr. Ganelis in question four stated that "chronic pain disorder" qualifies as a bona fide psychiatric disorder which requires a GAF rating. She opined that a QME in psychology or psychiatry is indicated for the assessment of impairment.

I disagree that the appropriate specialty is psychiatry or psychology for the assessment of impairment of ocular pain. The assessment of impairment for pain assumes the pain exceeds the usual pain associated with the pathology. An ophthalmologist is the only person with the expertise to assess the usual pain associated with a specific, traumatic injury and the sequela thereof. In order to assess impairment of pain, the ophthalmologist must judge that the ocular pain when MMI is achieved exceeds the usual level of pain for the specific injury. It is only after the ophthalmologist establishes that the pain exceeds the level of pain that would be expected given the specific pathology, that impairment can be assessed. If the ophthalmologist iudges that the pain exceeds "the normal", impairment for pain can be assessed.

Permanent Work Restrictions (5):

During my evaluation of the applicant there was no mention that that ocular pain induced headaches. The issue sited is whether a future employer would be required to provide the applicant with regular, frequent breaks. The rational was that these work breaks would help the applicant to "deal" with his severe ocular pain, headaches, and fatigue.

It would seem appropriate to provide breaks as needed. Dr. Ganelis stated that applicant should receive two ten-minute breaks during his workday. This is the designated California standard for work breaks. I feel that the length and frequency of the breaks must be based upon the applicant's symptomology. Strict guidelines in this regard should be avoided.

Applicant exhibit 1 is a November 28, 2023 primary treating physician report from Michael Newman, D.C. In this report, Dr. Newman confirms that he designated Dr. Neger to provide a Primary Treating Physcian's Comprehensive Medical-Legal Report pursuant to Labor Code section 4061.5. He reviewed Dr. Neger's November 12, 2023 report and adopts it as his own.

Applicant exhibit 6 is Steve Ramirez August 8, 2024 supplemental vocational report. Ramirez reviewed Emily Tincher's July 2, 2024 report, he explains why his opinions remain unchanged.

Applicant exhibit 7 is Steve Ramirez June 5, 2024 supplemental vocational report. He reviewed defense vocational expert Emily Tincher's April 18, 2024 report and commented. Ramirez disputed: (1) Tincher's work histoy; (2) whether applicant could perform all the jobs identified by Tincher; and (3) he believed Ms. Tincher did not include Dr. Neger's comments that manual tasks without depth perception are performed at a much slower pace, which is less efficient and less competive in the open labor market.

Applicant exhibit 8 is a Novermber 8, 2023 Vocational expert report prepared by Steve Ramirez. Mr. Ramirez interviewed applicant, took a history, performed vocational testing, reviewed medical reports and issued this report addressing applicant's vocational feasibility. Mr. Ramirez limited vocational testing to non-verbal modalities because applicant is unable to read and write in English. Mr. Ramirez considered the disability set forth in Dr. Ganelis and Dr. Neger's reports in determining whether or not applicant was feasible for rehabilitation.1 Mr. Ramirez performed a transferable skills analysis. There were 1067 pre-injury job matches and for applicant and zero post-injury job matches. Mr. Ramirez stated:

> Vocational Causation and Apportionment:
>
> I considered Labor Code §4663 & §4664 and the *Benson* decision for causality and apportionment. I also considered the *Nunes* decision which directs me to consider the vocational impact of medical impairments and identify specifically the medical impairment(s) that is the cause of Mr. Wang Wang's vocational disability and the relative impact on his ability to compete in the open labor market.

• Dr. Ganelis concluded that the cause of Mr. Wang Wang's complete loss of depth perception was the industrial injury of 11/14/2019.

• Both Dr. Ganelis and Dr. Neger apportioned 100% of Mr. Wang Wang's left eye injury, eye pain and loss of depth perception to the 11/14/2019 injury.

> I considered the findings of the *Nunes* decision when analyzing Mr. Wang Wang's vocational disability and inability to compete in the open labor market. Mr. Wang Wang sustained a single trauma industrial injury to his left eye that resulted in a complete loss of depth perception that resulted in visual deficits at a level that eliminated his ability to function in a competitive work environment. This conclusion is supported by the medical analyses for causation and apportionment as documented by Dr. Ganelis and Dr. Neger.
>
> CONCLUSION:
>
> The salient matter at hand is Mr. Wang Wang's left eye injury which has resulted in a complete loss of depth perception.
>
> Dr. Ganelis issued work restrictions starting Mr. Wang Wang must wear polycarbonate wrap-around goggles while working in an

environment where there can be exposure to high velocity projectiles, dust, fumes, and gases as well as marked changes in temperature and humidity. This can be easily accommodated and in his current employment, Mr. Wang Wang does wear wrap-around polycarbonate goggles.

Dr. Ganelis also stated Mr. Wang Wang should be afforded two 10-minute rest breaks to allow for him to rest his eyes. This restriction can easily be accommodated with the normal work breaks. However, due to the ocular pressure and pain caused by exertion (i.e., lifting), Dr. Ganelis also precluded him from lifting more than 10 pounds. As such, he is limited to sedentary work.

Dr. Neger issued formal work restrictions precluding Mr. Wang Wang from using cutting tools, welding tools, or machines that allow extremity exposure. He added Mr. Wang Wang should not climb on ladders or scaffolding as well as stating any type of occupation that uses tools or machines with the potential for a hand or extremity injury should be prohibited."

For all intents and purposes, this eliminates virtually all construction-related, production, or manufacturing occupations.

While this appears to be inconsistent with the fact that Mr. Wang Wang is in fact working in a construction laborer capacity, one has to consider the context of his work restrictions and the manner in which he is able to work.

Mr. Wang Wang self-modifies to only do work which involves no cutting tools, moving machinery, climbing ladders or scaffolding, and no exposure to toxic chemicals or electrical work. He is given referrals by former co-workers who understand his limitations as well as his need to have an income to support himself and his two children in China.

His is paid by the job and not hourly due to the fact, that because of his lack of depth perception, he works at a much slower pace than would be expected in competitive employment as well as the fact that after an hour of work, he needs to take a 10-15-minute break to close his eyes and allow them to rest.

This is confirmed by Dr. Neger who stated, "Manual tasks without depth perception are performed at a much slower pace of necessity. A worker who performs manual tasks is less efficient and less competitive in the open labor market," as well as, "The loss of depth perception slows all mechanical activities. The worker becomes a less

desirable employee as all tasks become much slower. He is unable to compete in the job market."

While Dr. Neger is offering a vocational opinion which is not within his scope of expertise, in this case he is correct.

It should be recognized that all jobs have a baseline level for productivity and a tolerance of off-task behavior which, based upon empirical peer-reviewed research studies, is 10-12% time off task. Note the following:
In terms of time off-task, a research study titled Off Task and Lost Work Productivity: Why, How Much, and Implications for Vocational Expert Testimony (Vol. 26, Issue 2, 2018) was published in the *Rehabilitation Professional*. The results indicate there is no definitive answer as to what is acceptable off task time before being subject to termination.

This study further stated there have been no conclusive studies performed relative to time off-task in the private forensic vocational expert arena but studies of vocational experts who testify in Social Security Disability hearings revealed their opinions that somewhere between 10%-15% off task behavior is an acceptable amount of time off-task allowed by employers before the employee is subject to termination. (Marini, I., Preston, B., Pinon, R., & Antol, D. (2018). Off Task and Lost Work Productivity: Why, How Much, and Implications for Vocational Expert Testimony, Rehabilitation Professional, Vol. 26, Issue 2).

Note: As Dr. Marini noted, the only research related to employer tolerance for time off-task was performed in a study of vocational experts who testify in Social Security Disability cases. I reference a study performed by attorney Kevin Liebkemann, Chief Counsel Legal Services of New Jersey. In this study, he researched over 1,000 Social Security Disability cases which were litigated at the Federal Court level. In analyzing these cases, he found the preponderance of vocational experts testified employers will not tolerate time off-task of more than 10-12 percent of an 8-hour workday.

As Mr. Wang Wang was unable to maintain work from his previous employer due to his lack of depth perception, eye pain and need to take breaks to close and rest his eyes, the only way he has managed to sustain his self-employment is his self-accommodation of not taking jobs which require tools for cutting, sawing, working with machinery or around toxic chemicals or performing electrical work. He also must work at a much slower pace which has been accepted by his clients who understand his limitations, need to take breaks and at times leave

work early as they do not pay him by the hour but only on completion of the job.

These self-accommodations would not be acceptable by employers in the open labor market where productivity, extra work breaks, leaving work early on an unpredictable basis, and calling in sick due to his eye pain 3-4 times per month would occur.

Further, as Mr. Wang Wang only works an average of 12-15 days per month for 3-4 hours per day at what he approximated to be an hourly wage of $20.00 per hour, this equates to monthly earnings of between $720.00-$1,200.00 per month or $8,640.00-$14,400 annually which does not meet the California poverty threshold of $24,860 for a family of three (Mr. Wang Wang and his two children). Therefore, these earnings do not rise to the level of gainful employment.

If consideration is given to the possibility Mr. Wang Wang may be able to perform sedentary work, his lack of transferable skills and no formal education past middle school, would relegate him to unskilled sedentary jobs. His ability to perform these jobs is also highly problematic given his lack of depth perception.

The preponderance of these unskilled sedentary jobs are found in production, manufacturing, fabrication, assembly or bench work which require good visual acuity to work with and handle tools and small parts in a competitive manner.

I conducted a vocational analysis of each medical impairment for all work restrictions as well as medical findings/conclusions documented in the medical reports. I considered the vocational impact of each.

Criterion-referenced measurement of an individual job is based upon the following:

Performance: Employee must be able to meet demands such as quality of work, appropriate behavior consistent with company structure, rules, and employment guidelines.

Productivity: Employee must be able to meet the daily production demands as identified in each, individual job description. Production demands may be hourly, daily, weekly, monthly, or annually.

Attendance: Employee must be able to meet the employer’s demand for work schedule for any given job or occupation, in terms of work

schedule (hourly, daily, monthly, etc.) and conform to the limits for vacation and sick leave.

Establishing work disability is based on an individual's ability to meet the demands of competitive employment, given the vocational impact of the industrial injury and consequences of medical treatment. Determination of ability to work is the analysis of medical impairments associated with the industrial injury and consequences of medical treatment with the factors required for competitive employment.
I utilized ophthalmological and visual factors as the criterion to consider as the most appropriate manner in which to perform the vocational assessment for potential work activities.

Based upon a thorough review of the medical reports as well as my individualized analysis, I am of the opinion that the industrial injury, of 11/14/2019, had a significant impact on his work abilities. He experiences significantly diminished functioning in specific areas such as vision and depth perception both of which coalesce to produce a worker profile which, based upon reasonable vocational probability, eliminates any possibility Mr. Wang Wang could return to competitive employment.

Therefore, it is my professional opinion that Mr. Wang Wang is 100% vocationally disabled and not amenable to rehabilitation.

Defendants' exhibits

Defendants' exhibit A is Emily Tincher's April 18, 2024 vocational expert report. Ms. Tincher interviewed applicant, performed vocational testing, reviewed medical records and issued this report addressing applicant's employability and amenability to rehabilitation. Ms. Tincher reviewed applicant's transferable skills based upon preinjury employment as a carpenter helper, floor sander and finisher and brick salesman. She considered the functional limitations from Dr.Neger and Dr. Ganelis. Ms. Tincher opined that applicant could work as a security guard, usher, lobby attendant, ticket taker, telemarketer, receptionist, information clerk, general office clerk, dispatcher, inspector, cashier, information and records clerk, restaurant host, and customer service representative. Ultimately, Tincher concluded that applicant retains a reasonable opportunity to return to work in the open labor market, but for his inability to speak English and limited education. (pp. 28-29).

Defendants' exhibit B is Emily Tincher's July 2, 2024 supplemental report. She reviewed Steve Ramirez's Jun 5, 2024 report. Her opinions are unchanged. She believes applicant might benefit from the service of Lighthouse for the Blind, a non-profit. Defendants' exhibit C is Tincher's September 24, 2024 supplemental report. She reviewed Ramirez April 8, 2024 report. There is no change in her opinions.

Applicant Testimony

Applicant was born in China in 1981. He had nine years of compulsory education. He did not graduate from middle school. He finished the eighth grade in about 1998. After that, he had no further formal training. He went to an apprentice program where he learned to drive commercial vehicles–gravel trucks. It was actually on-the-job training. He got a commercial driver's license.

He drove for a construction company for about four to five years. He left that job because he found another job where he could work independently. He also apprenticed in plumbing and electrical work for two to three years. He didn't get a certification or license.

He bought gravel trucks and got jobs for about three years. Then his wife's relative got him a job in East Timor doing framing work, drywall, plumbing, et cetera, building a hospital. He spent seven or eight years doing that in Timor. He returned to China in 2015.

Back in China, he attended religious meetings where he got arrested by the Chinese government. They detained him a few days. He was forced to sign a confession and beaten. He was forced to pay $10,000 bail and released. He had to go to the hospital for his injuries. He came to the United States to escape religious persecution in 2015. He was afraid to stay in China.

After getting to the United States, he almost immediately started working doing remodeling jobs. He did remodeling including bathrooms, drywall, framing, painting, faucet installation, et cetera, without limitation. In November of 2018, he went to work for 6 Stars Construction. It was similar to the remodeling jobs he had been doing previously.

On November 14, 2019, he injured his left eye. He was removing some old wiring when a U-shaped staple popped out and hit him in his left eye. It was very painful. He told the employer. He couldn't drive. They took him to a Chinese medicine doctor who gave him some eye drops, which alleviated the pain for a while. They didn't immediately take him to the emergency room or hospital.

Two to three days later, his eye got worse. He was in a lot of pain and couldn't see. He was losing vision. He went to Santa Clara Valley Medical Center, the county hospital where they performed surgery. He has had three eye surgeries total.

His attorney referred him to Dr. Neger. He has seen Dr. Neger twice. According to Dr. Neger, he still has stitches in his left eye. He cannot see using his left eye. His left eye gets red and fatigued. Dr. Neger recommended that the stitches be taken out. That won't improve his vision but might relieve some of his symptoms.

He has the following symptoms in his left eye: He cannot gauge distance; he has constant fatigue; his eye gets tired; he gets headaches and has chronic fatigue. He needs to rest after working for about an hour. It affects his ability to work. He cannot see clearly and must work very slowly.

He has tried to drive since the accident. He's afraid because he's gotten in two motor vehicle accidents. His eyesight was fine before his eye injury. Now he has trouble gauging distance. He

cannot drive at night at all. His first accident involved scratching a car on the side because he couldn't gauge distance; in the second accident he rear-ended a car on the freeway.

He is unable to continue his construction work as usual because he cannot gauge distance. His left eye gets swollen and painful. Intense work causes fatigue. He needs to rest after about an hour.

He has tried to return to work. He got fired a couple of times since the injury because of poor performance because he couldn't gauge distance and needed breaks. First, he tried to return to 6 Stars Construction. He was there for several months. He worked too slow and needed to take breaks. He got fatigued. They fired him. The same thing happened when he tried to work for a different construction company. He was too slow and he needed breaks. He couldn't do it. Then he tried to work at a restaurant. It was kitchen work cutting vegetables, et cetera. The boss told him he was too slow. He cut himself. The hot and smokey environment fatigued his eyes and hurt them. After two days, he was let go.

When he returned to work at 6 Stars Construction, he hit his hand with a hammer because he couldn't judge the distance. He did lighter construction work: painting, a little wiring, basic plumbing, for example, installing a faucet. He tried to be cautious, but it was difficult with the depth perception problem. He worked very slow. He was slower than his coworkers.The other construction company he tried to work for also let him go. Employers expect a certain pace and he needed a break every hour.

He wanted to work to support his family. He has two boys, age 20 and 14. He got married in 2003. He came to the United States in 2015. He has not seen his kids since then. He never had a great relationship with his spouse. His family always took care of his kids. He does see them virtually. He doesn't think that not seeing his family for seven years is causing him a lot of stress now.

He has depression and anxiety from his left eye injury. It has affected his future work capability, his ability to support himself and his children. He is financially responsible for them. He tried to work and got let go. This has had a negative impact on him. This is what worries him.

When he saw applicant's vocational expert Steve Ramirez, he told him that he had done self-employment work 12 to 15 days per month. He needed to survive. He had been laid off two times and couldn't do restaurant work. He needed some income. He couldn't get hired so he looked for odd jobs. For example, changing faucets. He last did that about a year ago. He has found it difficult to find that work.

He wants to work. He would do odd jobs if they were available. Even then he was slow and handicapped. He couldn't tell them about his eye problem because he wouldn't get hired. He has not looked for non-construction jobs. His English skills are poor and he has limited education. He wants to work to survive and support his family. As he told Dr. Perez, he would be willing to do non-construction work. He's willing to do anything.

Asked whether he kept to Dr. Neger's work restrictions doing some construction work, he said that he worked to his own ability. He tried to do whatever he could, but was limited by the depth perception problem. He also did not want to hurt himself.

Regarding activities of daily living: He's able to dress himself. He can still take care of himself. He's worried about his job prospects. He wants and needs a job to take care of his kids. He would be willing to undergo job training. If there were a local job prospect with training, he would consider it. He's able to talk on the telephone in Chinese only. He doesn't know how to use a computer, but would be willing to have computer training.

He still drives during the day and locally. You need to drive in the United States. He cannot afford to get Uber all the time.

ANALYSIS

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

Having carefully analyzed the record, I find that applicant has successfully rebutted the medical evidence of disability[2], on the basis that he is unable to either resume gainful employment or benefit from vocational retraining. See *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 48 Cal. Comp. Cases 587. Consequently, I conclude that applicant has sustained 100% permanent disability as a result of his industrial loss of vision. I based this finding on applicant's credible testimony, Steve Ramirez vocational reports and Dr. Neger's medical reports.

I found applicant's vocational reports thorough and persuasive. Steve Ramirez based his opinions on a sufficiently accurate history. His reports are substantial evidence. Mr. Ramirez based his opinions on the functional limitations identified by Dr. Neger. Dr. Neger stated that applicant suffered a complete loss of depth perception which affects many activities of daily living.

> The complete loss of depth perception affects a great many activities of daily life. The determination of the position objects in space is determined by depth perception. Walking down a staircase, stepping off a curb, parking a car depend upon high levels of depth perception. Pouring hot liquids as would occur with cooking are dependent upon stereopsis. The simple act of pouring water or reaching for an object in space are difficult and time consuming without depth perception. Certain activities such as using cutting tools, ladders, using machines with the potential for hand or arm injuries are precluded as too dangerous. Manual tasks without depth perception are performed at a much slower pace of necessity. A worker who performs manual tasks is less efficient and less competitive in work market place.
>
> In short, an active, young person in the construction industry become an occupational invalid. The loss of depth perception slows all mechanical activities. The worker becomes a less desirable employee as all tasks become much slower. He is unable to compete in the job market. The

activity of restocking a shelf would require much more time with no depth perception than if depth perception was normal. (Applicant exhibit 5 p. 15).

2

Drs. Ganelis and Dr. Neger agreed about the rating for applicant's loss of vision. They disagreed about the increased rating for stereopsis (loss of depth perception). Dr. Ganelis maintained that the maximum increase allowed by the guides for stereopsis is 15%. She provided a 10% increase, without a discussion of why she chose 10% rather than 15% where applicant suffered a complete loss of depth perception. Dr. Ganelis provided a final rating of 30% WPI. Dr.Neger's rating was 65% WPI. Although Dr. Neger stated that he did not use Almaraz/Guzman in determining permanent disability, he did use an Almaraz/Guzman analysis. He explained how and why the standard AMA Guides rating is inaccurate and providing a more accurate rating, within the four corners of the guides, based on applicant's functional limitations. Dr. Perez provided an 8% rating, based on applicant's GAF score for the psyche. No combination of these ratings using the combined values chart would equal 100%.

Ramirez report (applicant exhibit 8) concluded:

> The salient matter at hand is Mr. Wang Wang's left eye injury which has resulted in a complete loss of depth perception
> Dr. Ganelis issued work restrictions staring Mr. Wang Wang must wear polycarbonate wrap-around goggles while working in an environment where there can be exposure to high velocity projectiles, dust, fumes, and gases as well as marked changes in temperature and humidity. This can be easily accommodated and in his current employment, Mr. Wang Wang does wear wrap-around polycarbonate goggles.
> Dr. Ganelis also stated Mr. Wang Wang should be afforded two 10-minute rest breaks to allow for him to rest his eyes. This restriction can easily be accommodated with the normal work breaks. However, due to the ocular pressure and pain caused by exertion (i.e., lifting), Dr. Ganelis also precluded him from lifting more than 10 pounds. As such, he is limited to sedentary work.
> Dr. Neger issued formal work restrictions precluding Mr. Wang Wang from using cutting tools, welding tools, or machines that allow extremity exposure. He added Mr. Wang Wang should not climb on ladders or scaffolding as well as stating any type of occupation that uses tools or machines with the potential for a hand or extremity injury should be prohibited."
> For all intents and purposes, this eliminates virtually all construction-related, production, or manufacturing occupations.
> While this appears to be inconsistent with the fact that Mr. Wang Wang is in fact working in a construction laborer capacity, one has to consider the context of his work restrictions and the manner in which he is able to work.
> Mr. Wang Wang self-modifies to only do work which involves no cutting tools, moving machinery, climbing ladders or scaffolding, and no exposure to toxic chemicals or electrical work. He is given referrals by former co-workers who understand his limitations as well as his need to have an income to support himself and his two children in China.

His is paid by the job and not hourly due to the fact, that because of his lack of depth perception, he works at a much slower pace than would be expected in competitive employment as well as the fact that after an hour of work, he needs to take a 10-15-minute break to close his eyes and allow them to rest.

This is confirmed by Dr. Neger who stated, "Manual tasks without depth perception are performed at a much slower pace of necessity. A worker who performs manual tasks is less efficient and less competitive in the open labor market," as well as, "The loss of depth perception slows all mechanical activities. The worker becomes a less desirable employee as all tasks become much slower. He is unable to compete in the job market."

While Dr. Neger is offering a vocational opinion which is not within his scope of expertise, in this case he is correct.

It should be recognized that all jobs have a baseline level for productivity and a tolerance of off-task behavior which, based upon empirical peer-reviewed research studies, is 10-12% time off task. Note the following: In terms of time off-task, a research study titled Off Task and Lost Work Productivity: Why, How Much, and Implications for Vocational Expert Testimony (Vol. 26, Issue 2, 2018) was published in the *Rehabilitation Professional*. The results indicate there is no definitive answer as to what is acceptable off task time before being subject to termination.

This study further stated there have been no conclusive studies performed relative to time off-task in the private forensic vocational expert arena but studies of vocational experts who testify in Social Security Disability hearings revealed their opinions that somewhere between 10%-15% off task behavior is an acceptable amount of time off-task allowed by employers before the employee is subject to termination. (Marini, I., Preston, B., Pinon, R., & Antol, D. (2018). Off Task and Lost Work Productivity: Why, How Much, and Implications for Vocational Expert Testimony, Rehabilitation Professional, Vol. 26, Issue 2).

Note: As Dr. Marini noted, the only research related to employer tolerance for time off-task was performed in a study of vocational experts who testify in Social Security Disability cases. I reference a study performed by attorney Kevin Liebkemann, Chief Counsel Legal Services of New Jersey. In this study, he researched over 1,000 Social Security Disability cases which were litigated at the Federal Court level. In analyzing these cases, he found the preponderance of vocational experts testified employers will not tolerate time off-task of more than 10-12 percent of an 8-hour workday.

As Mr. Wang Wang was unable to maintain work from his previous employer due to his lack of depth perception, eye pain and need to take breaks to close and rest his eyes, the only way he has managed to sustain his self-employment is his self-accommodation of not taking jobs which require tools for cutting, sawing, working with machinery or around toxic chemicals or performing electrical work. He also must work at a much slower pace which has been accepted by his clients who understand his limitations, need to take breaks and at times leave work early as they do not pay him by the hour but only on completion of the job.

These self-accommodations would not be acceptable by employers in the open labor market where productivity, extra work breaks, leaving work early on an unpredictable basis, and calling in sick due to his eye pain 3-4 times per month would occur.

Further, as Mr. Wang Wang only works an average of 12-15 days per month for 3-4 hours per day at what he approximated to be an hourly wage of $20.00 per hour, this equates to monthly earnings of between $720.00-$1,200.00 per month or $8,640.00-$14,400 annually which does not meet the California poverty threshold of $24,860 for a family of three (Mr. Wang Wang and his two children). Therefore, these earnings do not rise to the level of gainful employment.

If consideration is given to the possibility Mr. Wang Wang may be able to perform sedentary work, his lack of transferable skills and no formal education past middle school, would relegate him to unskilled sedentary jobs. His ability to perform these jobs is also highly problematic given his lack of depth perception.

The preponderance of these unskilled sedentary jobs are found in production, manufacturing, fabrication, assembly or bench work which require good visual acuity to work with and handle tools and small parts in a competitive manner.

I conducted a vocational analysis of each medical impairment for all work restrictions as well as medical findings/conclusions documented in the medical reports. I considered the vocational impact of each.

Criterion-referenced measurement of an individual job is based upon the following:

Performance: Employee must be able to meet demands such as quality of work, appropriate behavior consistent with company structure, rules, and employment guidelines.

Productivity: Employee must be able to meet the daily production demands as identified in each, individual job description. Production demands may be hourly, daily, weekly, monthly, or annually.

Attendance: Employee must be able to meet the employer’s demand for work schedule for any given job or occupation, in terms of work schedule (hourly, daily, monthly, etc.) and conform to the limits for vacation and sick leave.

> Establishing work disability is based on an individual's ability to meet the demands of competitive employment, given the vocational impact of the industrial injury and consequences of medical treatment. Determination of ability to work is the analysis of medical impairments associated with the industrial injury and consequences of medical treatment with the factors required for competitive employment.
> I utilized ophthalmological and visual factors as the criterion to consider as the most appropriate manner in which to perform the vocational assessment for potential work activities.
> Based upon a thorough review of the medical reports as well as my individualized analysis, I am of the opinion that the industrial injury, of 11/14/2019, had a significant impact on his work abilities. He experiences significantly diminished functioning in specific areas such as vision and depth perception both of which coalesce to produce a worker profile which, based upon reasonable vocational probability, eliminates any possibility Mr. Wang Wang could return to competitive employment. Therefore, it is my professional opinion that Mr. Wang Wang is 100% vocationally disabled and not amenable to rehabilitation.

Ramirez considered Dr. Neger's functional limitations as they affect affect applicant's ability to work. Applicant is effectively blind in the injured left eye. He suffered a complete loss of depth perception/stereopsis. More importantly, Ramirez adequately considered Dr. Neger's statements that applicant would work slowly and need to take breaks at will, in determining that applicant was unable to compete for and retain jobs in the open labor market. Ramirez statements that employers will not tolerate slow work and the need to take breaks (off task) are realistic and persuasive. I chose to follow Ramirez in determining that applicant is permanently totally disabled.

Applicant was a credible witness. His testified that he has constant eye fatigue. He needs to rest after working for about an hour. It affects his ability to work. He cannot see clearly and must work very slowly. (Minutes of Hearing and Summary of Evidence p. 7:4-10).

Dr. Ganelis opined that applicant only needs two 10 minute breaks per day for ocular rest. This is inconsistent with applicant's credible testimony. Although Dr. Ganelis described significant limitations in applicant's activities of daily living[3], she only provided limited work restrictions: wear goggles, two ten minute breaks per day for ocular rest and no lifting over ten pounds. I found Dr. Neger's descriptions of applicant's functional limitations more consistent with applicant's credible testimony about his slowness at work and need to take breaks.

[3]

Self-care, personal hygiene: With some difficulty due to loss of binocularity and stereopsis - Take a shower, take a bath, wash & dry body, wash & dry face, turn on/off faucets, brush teeth, get on/off toilet, comb/brush hair, dress self, put on/off shoes/socks, open carton of milk, open a jar, lift glass/cup to mouth, make a meal, lift fork/spoon to mouth.
Physical activity: With some difficulty due to loss of binocularity and stereopsis - stand, sit, recline, rise from chair, get in/out of bed, climb flight of 10 stairs, work outdoors, light housework, shop/do errands, carry groceries, lift 30 lbs., walk, care for children/parents, engage in hobbies.
Communication: Without difficulty - use a telephone, speak clearly, hear clearly.
With difficulty - watching TV screen, writing a note and reading text.
Sensory function: Without difficulty - Feel what he touches, taste what he eats, smell what he eats.
Travel: With difficulty - Driving a car, making right and left turns in the car, looking at the car dashboard.
Without difficulty - Get in/out of car, ride in a car, fly in plane.
Sexual function: Not applicable.
Sleep: Some difficulty getting to sleep and staying asleep.

I did not follow Emily Tincher's vocational opinions. Her reports appeared boilerplate in many places and she did not adequately consider Dr. Neger's opinions that applicant would work slowly and need to take breaks at will. I found Tincher's statement that, "Dr. Neger does not assign any restrictions on the amount of breaks needed per day", evasive. (Defendant exhibit A, p. 4). Instead of acknowledging that applicant needs to take breaks as needed per Dr. Neger, Tincher omitted Dr. Neger's discussion about need for breaks from her analysis. (Id. at 24-25). Tincher does not take into account important factors which affect applicant's employability.

2. Is there valid apportionment of the permanent disability?

a. Medical apportionment

Both Dr. Neger and Dr. Ganelis apportioned 100% of the visual disability to the instant industrial injury. Dr. Perez apportioned one-third of the psychological disability to non-industrial factors.

In finding 100% permanent total disability, I relied upon Steve Ramirez vocational reports. Although Ramirez reviewed Dr. Perez report, Perez report contained no work restrictions or other functional limitations. It merely provided a GAF score of 65. Ramirez based his opinions solely on the work restrictions from Dr. Ganelis and Dr. Neger. Accordingly, there is no medical apportionment of the total permanent disability.

b. Vocational apportionment

Steve Ramirez found no vocational apportionment. He found that there was no vocational apportionment. He stated:

> I considered Labor Code §4663 & §4664 and the *Benson* decision for causality and apportionment. I also considered the *Nunes* decision which directs me to consider the vocational impact of medical impairments and identify specifically the medical impairment(s) that is

the cause of Mr. Wang Wang's vocational disability and the relative impact on his ability to compete in the open labor market.

- Dr. Ganelis concluded that the cause of Mr. Wang Wang's complete loss of depth perception was the industrial injury of 11/14/2019.
- Both Dr. Ganelis and Dr. Neger apportioned 100% of Mr. Wang Wang's left eye injury, eye pain and loss of depth perception to the 11/14/2019 injury.

I considered the findings of the *Nunes* decision when analyzing Mr. Wang Wang's vocational disability and inability to compete in the open labor market. Mr. Wang Wang sustained a single trauma industrial injury to his left eye that resulted in a complete loss of depth perception that resulted in visual deficits at a level that eliminated his ability to function in a competitive work environment. This conclusion is supported by the medical analyses for causation and apportionment as documented by Dr. Ganelis and Dr. Neger. (Applicant exhibit 8 p. 10).

I found Emily Tincher's report confusing on this issue. (Defendants' exhibit A pages 31-33. She discussed the *Nunes* case in boilerplate fashion, without providing a direct opinion. At page 28 of her report, Tincher concedes that applicant is not amenable to vocational rehabilitation. However, Tincher asserts that but for applicant's ability to speak English and his lack of education, he would be amenable.

The Worker's Compensation Appeals Board rejected this argument in *Soormi v. Foster Farms*, 2023 Cal. Wrk. Comp. P.D. Lexis 170 and more recently in *Maria Pantoja v. Jack in the Box* (ADJ910410 – Opinion and Decision after Reconsideration September 9, 2024). In *Soormi*, the Board stated:

To be abundantly clear, a person's ethnic origin is not a disability. A person's immigration status is not a disability. Whether a person can speak the English language is not generally a disability. A person's lack of education is not a disability. Mr. Simon's focus on applicant's lack of education and lack of English skills is not proper because neither of these factors were caused by a pre-existing disability and Mr. Simon did not explain why these factors were the sole cause of applicant's loss of earnings post-injury.

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

> The analysis changes if applicant's pre-existing education or language ability is due to a disability. Like many states, California encourages employers to hire disabled workers. The State assures employers that they will not be held liable for pre-existing disabilities through multiple avenues. First, we have apportionment based on causation and apportionment based on prior awards. (§§ 4663, 4664.) Next, we have the Subsequent Injuries Benefits Trust Fund ("SIBTF"), which covers the employer for any increase in permanent disability that was amplified by a prior disability. (§§ 4751, et. seq.)
>
> Here, applicant is simply an unskilled worker. No issue of apportionment exists. The AME found the disability was 100% industrial. The work restrictions were 100% industrial. Defendant failed to show that any prior disability existed. Defendant received the benefit of cheap unskilled labor. Applicant's limitation on the open labor market was a risk that defendant assumed. Defendant must now accept the consequences. *Soormi v. Foster Farms*, 2023 Cal. Wrk. Comp. P.D. LEXIS 170.

I agree with the analysis in *Soormi*. The permanent total disability in this case derives from medical limitation, without apportionment. Applicant's lack of language skills and limited education are not disabilities. His total disability is based on medical functional limitations from his work injury. He is effectively blind in one eye. He has no depth perception. He is slow in performing tasks and must take breaks at will. These are the factors and reasons that he is now totally disabled Applicant, an unskilled worker, had a labor market available to him pre-injury and now has none. Following *Soormi*, I rejected Emily Tincher's opinion. There is no vocational apportionment.

3. What is the permanent and stationary date?

This issue is moot in light of my finding of permanent and total disability. I reviewed Dr. Ganelis and Dr. Neger's reports on this issue. Dr. Neger found applicant permanent and stationary at the time of his initial evaluation because applicant expressed a desire to settle his case. (Applicant exhibit 5 p. 13); Dr. Ganelis provided a more thorough discussion about whether further treatment may improve applicant's condition, on the issue. (Joint exhibit 2 pages 26-27). I find applicant's condition became permanent and stationary on April 19, 2022, per Dr. Ganelis.

4. Is applicant entitled to temporary disability indemnity benefits from April 20, 2022 through July 26, 2023?

Applicant sought an award of additional temporary disability in the event that applicant was not permanently totally disabled. In light of the finding of permanent total disability, no further temporary disability is payable. Permanent total disability benefits commence upon the last payment of temporary disability. Labor Code section 4650. *Brower v. David Jones Construction*

(2014) 79 Cal. Comp. Cases 550. Here, defendants last paid temporary disability benefits on April 19, 2022. Permanent total disability benefits commence the next day, April 20, 2022.

5. Is applicant's counsel entitled to a fee?

Applicant's representative provided competent and valuable representation in this matter. I find that applicant's counsel is entitled to a fee consisting of 15% of the indemnity awarded herein.

DATE: January 6, 2025

Barry Gorelick
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE