WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CUITLAHUAC VEGA, *Applicant*

vs.

ALLEN CADILLAC/GMC; ENDURANCE ASSURANCE, administered by MARKEL SERVICES, *Defendants*

Adjudication Number: ADJ6890372
Santa Ana 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, both of which are adopted and incorporated herein, and for the reasons stated below, we will deny reconsideration.

Labor Code section 4663(a) provides that "[a]pportionment of permanent disability shall be based on causation." (Lab. Code, § 4663(a).) Section 4664(a) states that "[t]he employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (Lab. Code, § 4664(a).) The defendant has the burden of proof on the issue of apportionment. (*Kopping v. Workers' Comp. Appeals Bd*. (2006) 142 Cal.App.4th 1099, 1114 [71 Cal.Comp.Cases 1229].)

We agree with the WCJ that the opinion of agreed medical examiner (AME) Barton Wachs, M.D., is not substantial medical evidence supporting a finding of apportionment. (*Hegglin v. Workers' Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Workers' Comp. Appeals Bd*. (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc) [a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth

reasoning in support of its conclusions].) In order to consist of substantial medical evidence on the issue of apportionment, a medical opinion

> [M]ust be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.
>
> For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability.
>
> And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.
>
> (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621-622 (Appeals Board en banc).)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 16, 2021

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

CUITLAHUAC VEGA
LAW OFFICES OF FRANK J. MASTRONI
STOCKWELL, HARRIS, WOOLVERTON & HELPHREY

PAG/abs

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

REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION

BACKGROUND:

After multiple trial days, the Court found that

> *Applicant, Cuitlahuac Vega-Sanchez, [redacted], while employed on July 6, 2008 as an automotive technician/mechanic (Occupational Group Number 370) by Allen Cadillac/GMC, sustained injury arising out of and during the course of employment to his*
>
> *a. low back,*
> *b. psyche*
> *c. urological system (voiding and erectile dysfunctions),*
> *d. vascular system (hypertension),*
> *e. head in the form of headaches, and*
> *f. sleep in the form of a sleep disorder.*
>
> [F&A P1-2]

Consequently, the Court found permanent disability, stating "*Applicant has 72% permanent disability, entitling him to 465.25 weeks of permanent disability indemnity payments at the rate of $270 per week in the total sum of $125,617.50, and thereafter a life pension….*" [F&A, P2].

In its Petition for Reconsideration Defendant takes issue with the Court's finding of injury to *urological system (voiding and erectile dysfunctions)* and *psyche* as well as the assessment of permanent disability associated with these parts of body. The petition is timely and verified. It is recommended that the petition be denied.

FACTS:

The Opinion on Decision in the course of some 30 pages outlines in detail the facts and assessment of the claim, to which the Board is respectfully referred.

In short, Applicant sustained an injury in July 2008 resulting in back surgery in 2010 after which he developed a series of medical and psychological issues resulting in evaluations by an orthopedist, psychiatrist, internist and urologist, all of whom submitted multiple reports over the course of time up to 2020. Additionally, defendant engaged in surveillance of Applicant multiple times over the years, obtaining video evidence of activity generally inconsistent with Applicant's presentation to the various evaluating physicians, causing them to alter their initial assessments. The Court found Applicant's credibility to be suspect.

With respect to the urological injury, Dr. Wachs initially diagnosed a neurogenic bladder based on results from diagnostic testing, namely a Cystometrogram [Ex A]. That diagnosis did not change despite the surveillance video, although his assessment of impairment did change [Ex UU, P3 and Ex F, P4]. He said there was no basis for apportionment of the disability from this condition

because the condition is due to the effects of the injury event and the subsequent surgery [Ex F, P3].

Dr. Wachs also diagnosed erectile dysfunction, which he thought was related in part to the injury/surgery and in part to medication for hypertension [Ex UU, P3]. He thought impairment was based on class I, at 10% [Ex UU, P3]. Later he reiterated that reviewing the video did not change his opinion and the ED condition was still in class I [Ex F, P3]. However, he said "*Approximately 50% of his erectile dysfunction complaints are nonindustrial (medical conditions, including medications)"* [Ex F, P3]. The Court did not adhere to the doctor's opinion on apportionment because the referenced medical conditions were found to be compensable.

As to the psychiatric injury, Dr. St. Martin determined that Applicant suffered from a major depressive disorder predominantly caused by the 2008 lumbar spine injury [Ex JJ, P5] with resulting unapportioned disability based on a GAF score of 57 [Ex JJ, P6]. After reviewing surveillance video, the doctor's assessment did not change [Ex II, P3].

DISCUSSION:

1. *Defendant contends that the medical reporting from Dr. Wachs does not support an award of erectile dysfunction impairment.*

For support, Defendant points to Dr. Barton Wachs June 18, 2020 report [Ex F] at page 2 where he states that, *"the Applicant's complaints of erectile dysfunction were not substantiated by objective findings"* and at page 5 where he says "*there is no erectile dysfunction or impotence findings these are all in subjective complaints*."

Defendant argues that Applicant's credibility is suspect, and it is. Yet, most importantly, Dr. Wachs thought the history he received was reliable [Ex UU, P1]. Despite his statements about sparse objective findings, Dr. Wachs noted various medications for depression as well as depression itself[1] do contribute to erectile dysfunction [Ex UU, P2]. He also opined that Applicant's complaints of erectile dysfunction in fact were related in part to the injury/surgery and in part to medication for hypertension[2] [Ex UU, P3]. He said "… *it is probable that the patient's medical conditions separately and in combination with each other will cause erectile dysfunction*" [Ex F, P3]. Consequently, he maintained that those complaints fell into class I, at 10% [Ex UU, P3; Ex F, P3].The doctor didn't guess or speculate. His opinion of injury and impairment clearly was based on probability, and on known medical conditions, not just on Applicant's subjective statements. The reported opinion of Dr. Wachs has sufficient probative value to support an award of erectile dysfunction impairment.

[1] There is no dispute that Applicant was diagnosed with depression.

[2] Which was found to be a consequence of Applicant's injury

2. Defendant contends that Apportionment for erectile dysfunction disability was not applied.

Defendant complains that although Dr. Barton Wachs concludes in his June 18, 2020 report that approximately 50% of applicant's erectile dysfunction complaints are non-industrial[3] the Judge didn't apply the apportionment because Dr. Wachs never expanded on what he meant by suggesting apportionment to non-industria1 causes. According to Defendant, Dr. Wachs did address the basis for apportionment on page 4 of his June 18, 2020 report wherein he indicates, "*I also believe that the patient's diabetes, obesity, hypertension, hyperdiploid lipidemia [sic], alcoholism and depression should be assessed with scrutiny and used for apportionment issues*."

Dr. Wachs indeed stated 50% of the disability for erectile dysfunction was "non - industrial", blaming a number of medical conditions [Ex F, P3]. In his earlier 6/22/15 report, he blamed blood pressure medication [Ex UU, P3]. However, since the hypertension here is injury related, that opinion on apportionment blood pressure medication won't change the rating. Likewise, of the items mentioned in his June 18, 2020 report, obesity is one of the consequences of the injury. It is undisputed that Applicant's weight has increased substantially over the years. Dr. Stewart believes inactivity and emotional eating (not to mention beer drinking to excess —which the psychiatrist blamed on effort to alleviate pain) contributed to the weight gain and the weight gain contributed to the development of hypertension [Ex A, P131]. Dr. Wachs also named depression as a basis for apportionment. However, depression is also injury-related [Ex MM, P2] as is the overuse of alcohol [Ex MM, P6].

So just about everything Dr. Wachs considered as a possible basis for apportionment of the erectile dysfunction disability is work-related[4]. Consequently, the opinion of Dr. Wachs on apportionment here cannot be a basis to apportion Applicant's erectile dysfunction disability.

3. Defendant contends that the medical reporting from Dr. Wachs does not support an award of voiding dysfunction impairment

Defendant argues that Dr. Wachs' opinion on Applicant's voiding dysfunction is not valid because it is based on: an approximately five year old physical examination and urodynamic study, and a false history provided by the applicant. Dr. Wachs clearly diagnosed a neurogenic bladder based on results from diagnostic testing, namely a Cystometrogram [Ex A]. He said afterwards that the condition is due to the effects of the injury event and the subsequent surgery [Ex F, P3]. He never varied from that opinion on causation.

As for the age of the testing, most of the reporting here is more than a year or two or older and if that was a problem for Defendant updated reports could have been obtained before trial. It should be pointed out that Dr. Wachs' reporting was as an AME [JT Ex TT—XX], and his 6/18/20 report [Ex F] was placed in evidence by Defendant. It was in that report where Dr. Wachs stated he was willing to rely on the testing from 2016—and if there was reason not to do so, one would expect the physician who is an expert in the specialty of urology to say so. Instead, he stated "… I *would place him in class II 16% impairment of the whole person based on his symptoms of urinary*

[3] He said "Approximately 50% of his erectile dysfunction complaints are nonindustrial (medical conditions, including medications)" [Ex F, P3].

[4] See, also: Dr. Stewart's comments in Exhibit A, P131

dysfunction and cooperated by the urodynamic study performed in 2016" [Ex F, P4 (emphasis added)].

As to the false history, Defendant does not point to any particular facts relied on by the physician that are patently false and that might have totally undermined the doctor's opinion. To say the doctor relied on false information without identifying that information is unhelpful. The Court notes that Dr. Wachs initially thought Applicant's voiding dysfunction would fall into Class II, rating at 20% [Ex UU, P3], although after reviewing the activities depicted in the surveillance videos he lowered the rating to 16% [Ex F, P4]. So if the activities depicted in the surveillance are the unstated "false history", the doctor took them into account and altered his opinion.

Under the circumstances the opinion of Dr. Wachs regarding the existence of a voiding dysfunction as work-related and as giving rise to disability is reliable and substantial support for the findings here.

4. Defendant contends Dr. St. Martin's reporting is not substantial medical evidence to support a finding of psychiatric injury or disability.

According to Defendant, applicant's subjective complaints cannot be the basis for the psychiatrist's impairment determination without independent verification or objective evidence supporting the same. Defendant argues that Dr. St. Martin's reporting ignores the applicant's veracity and instead gives him the benefit of the doubt despite the overwhelming evidence compiled by defendants calling into question Applicant's credibility.

The Court agrees the surveillance showed Applicant to be less than credible as a witness and that he misrepresented some of his presentation to the physicians. But what Defendant ignores is that the physicians saw the videos and properly made their own assessments regarding the medical reliability of Applicant's presentation. Moreover, if they had doubts, they altered their opinion accordingly. For example, Dr. Sherman did so [Ex EE, P2] as did Dr. Wachs [Ex F, P4].

Professionals in the mental health field are trained to make educated assessments based on information presented, and that information isn't always verbal—it's body language, how questions are answered, and whether the answers are consistent with or in accordance with the nature of the condition for which the person is being evaluated. Dr. St. Martin thought initially that Applicant was credible [Ex PP, P75, L24-25; P76, L1-2]. When deposed in September, 2019, Dr. St. Martin was asked by defense counsel about Applicant's veracity:

Q. Do you find applicant to be truthful?

A. Yes.

Q. Why?

MR. MASTRONI: Objection. Vague.

But you can answer, Doctor.

THE WITNESS: His -- I*'ve seen him three times. The complaints he gives me are consistent. I've looked at the videos. The videos did not show any – any evidence that was contrary to what he was telling me.*

[Ex NN, P13, L14-22]

It should be understood that Dr. Martin did not ignore the information he was provided. He reviewed video evidence and noted the factual inconsistencies and did revise the GAF score he initially issued [Ex LL, P5 & P6; Ex OO, P11, L14-19, P14, L16-21]. He changed the GAF score again in September 2017 due to the absence of medication and overuse of alcohol [Ex JJ, P6]. Defendant points to no evidence suggesting that alcohol use by Applicant wasn't excessive then[5], or that medication was available to Applicant then.[6] So what the doctor was told and what he relied on was accurate.

CONCLUSION:

Dr. Wachs was an AME. It is long established policy that the opinions of the AME (who serves as the evaluating expert for both parties) shall be followed unless there is significant error in their analysis. Dr. St. Martin was a Panel QME, presumably chosen because of his impartiality. Each saw Applicant multiple times and they prepared multiple reports. Additionally, Dr. St. Martin testified via deposition four times. They were more than familiar with the facts and circumstances of Applicant's case.

The opinions of Dr. Wachs and Dr. St. Martin as expressed in their multiple reports are not based on conjecture or a false history, nor are they speculative. They may not be entirely what Defendant was hoping for after multiple surveillance sessions, but the physicians observed the subrosa videos and commented on them, and altered their opinions where appropriate in response. Accordingly, the reports are substantial evidence upon which the findings and award are properly based.

RECOMMENDATION:

For the reasons stated herein, it is recommended that the Petition for Reconsideration filed by Defendant be denied.

DATE: April 22, 2021

Marco Famiglietti
WORKERS' COMPENSATION JUDGE

[5] Dr. Spokoyny also reported about excessive alcohol use in August 2017 [Ex 8].

[6] Dr. Spokoyny was asking for authorization for psych meds as early as June 2017, but no evidence was presented that they were provided then [Ex 9]

OPINION ON DECISION

FACTS

According to Applicant's Testimony:

Mr. Vega's injury occurred on or about July 6 or 8, 2008 [11/17/20 SOE P5, L23][1] when un-expectantly a co-worker jumped on his back [SOE P2, L21; P6, L3]. He felt a crack in his back [SOE P6, L4] and was in a lot of pain [SOE P6, L5]. His wife took him to Kaiser [SOE P6,L7-10; L22-24].

A doctor told him later that he had a compressed disc [SOE P2, L22]. He was referred to a back surgeon and eventually had surgery on April 27, 2010 [SOE P2, L1]. Metal bracing was put on his spine both front and back [SOE P3, L2]. Despite the surgery, he continued having problems with his back [SOE P3, L4] in the form of daily pain [SOE P9, L7], plus he developed and still has stomach problems and difficulty controlling his urine and bowel movements [SOE P3, L4-5; SOE P7, L16-23]. He also has erectile dysfunction, and believes a doctor commented on him having neurogenic bladder [SOE P3, L8]. Another doctor said he had hypertension and gastrointestinal issues because of his injury [SOE P4, L5-6]. One time his blood pressure was so high that he couldn't leave the doctor's office until his blood pressure was reduced. The doctor gave him medications and told him that he needed treatment for his hypertension [SOE P4, L11-13].

He did see a psychiatrist for evaluation [SOE P3, L13-14]. He explained that "[h]e *has emotional problems, because he's unable to help his family the way he wants to since the accident. He has tried suicide several times. He is depressed. He cries sometimes."* [SOE P3, L23-24].

Presently he treats with Dr. Spokoyny from whom he gets medication although for about two years when he wasn't getting medication, he used alcohol for pain relief [SOE P3, L9-12]. He still uses alcohol to deal with pain and alcohol use is a problem he didn't have before his injury [SOE P5, L5-6]. He stopped excessive drinking after the medications were received from Dr. Spokoyny [SOE P8, 15-16].

He did perform some occasional part-time work driving for a friend that had a construction company [SOE P3, L14-17]. The construction company is called Orange Tree Landscaping, and it is owned by his friend Jose Lopez [SOE P5, L12]. He helped Jose for the last three or four years, maybe more [SOE P5, L13]. He would drive an F-150 pickup truck owned by Mr. Lopez to pick up and deliver materials, such as loose sand, cement blocks, bricks, or whatever the job needs, all which would be loaded and unloaded by others [SOE P5, L16-22]. There were times when he might unload something such as a two-by- our or perhaps a piece of plywood because it would be difficult for a single worker to do this alone [SOE P10, L7-8]. He didn't recall ever lifting bags of cement [SOE P10, L19]. He told rehab counselors about this work [SOE P4, L24; P5, L3].

[1] All further references to Summary of Evidence (SOE) are from the proceedings on 11/17/20, the only day testimony was taken. However, Minutes of Hearing (MOH) will be referenced to one of the three hearing dates when minutes were recorded.

However, he stopped working for Jose maybe 13 months ago because the friend's business slowed down [SOE P9, L9-10]. He has not tried to find any work since then [SOE P9, L11]. He doesn't think he can work eight hours straight due to back pain and leg pains, stomach pain, as well as his bathroom issues both with urine and bowel movements [SOE P3, L18-19]. He did meet with vocational counselors, Ms. Winn [SOE P4, L23] and Mr. Wilkinson [SOE P5, L3] to whom he explained his situation.

<u>According to Surveillance Evidence:</u>

Defendant conducted extensive surveillance between 2013 and 2019. The viewed activities were inconsistent with many of Applicant's statements and presentations to examining physicians. Unfortunately, Applicant's credibility was seriously undermined as a consequence.

In November 2015 he saw Dr. Sherman who said Mr. Vega reported that he had "*constant severe pain in his low back*" with painful limited spine motion with pain increased by any standing, lifting, pushing or pulling activities [Ex DD, P3]. Yet, in December 2015 surveillance video shows Mr. Vega picking up a collapsed stroller or carriage and smoothly placing it up and into the bed of a pick-up truck, then leaning to reposition it. Later he is seen easily entering the truck cab on the passenger side and quickly crawling across the front seat to unlock the driver's door [Ex E, 12/19/15].

In April 2016 Applicant is filmed pulling and forcefully pushing a child on a swing; he is then seen kneeling and squatting for a while when repairing a lawn sprinkler [Ex E, 4/3/16]; carrying trash bags and pulling a wheeled trash can, and walking about, including a short jog, and also driving a vehicle [Ex E, 4/4/16]; and again walking, entering and exiting his vehicle repeatedly, driving to and walking near an auto repair shop [Ex E, 4/5/16]. Dr. Sherman later reviewed the video, noting that Mr. Vega "… *stands and walks easily and has no difficulty when resuming standing from a sitting position*" and that "… *he demonstrates an ability to squat and kneel without difficulty*" and that "… *he demonstrates a normal gait and a normal range of motion of the spine*" [Ex CC, P2]. Subsequently, Dr. Sherman commented that

> *After review of the entire medical records and the subrosa views of his back, it is clear to this examiner that Mr. Vega-Sanchez's subjective complaints and demonstrated limited spine motion at the time of my examinations do not represent his true spine condition. The subrosa views of his back demonstrate a spine that moves quickly and easily.*
>
> [Ex CC, P12]

In April and May 2017 Applicant was repeatedly filmed apparently while working for his friend. He testified to doing so, but not to the full nature or extent of the activities in which he apparently engaged. The activities each day lasted through a full day, from 7:30 or 8:00 AM to 3:30 or 4:00 PM.

On the first day he is seen reaching up and placing PVC pipe onto an overhead rack on the pick-up truck and then tying it down; after the bed is filled with sand, he is seen to use an air hose to clean sand off the vehicle, moving on foot forward, backward and side to side as needed, then he reaches to clean the back window and then enters the vehicle and drives off; later he exits vehicle,

spreads a tarp to cover the loose sand in the pick-up's bed, doing so while standing, slightly leaning repeatedly, then quickly reentering the vehicle and driving away; still later, he is filmed folding the tarp while workers empty the sand and he spends this time standing, walking about, and talking with the others before driving away [Ex E, 4/25/17].

The next day, he was observed to lift by himself a wooden pallet into the bed of a pick-up truck, and then to place a cinderblock into the bed as well, later standing for a time watching others unload a number of cinderblocks and talking with them; eventually driving away to home and exiting the truck, then using a tape measure in the bed of the truck. [Ex E, 4/26/17]. A day later he is noted to bend over to pick up an item in the street, and then to be carrying on his shoulder what appears to be some electrical cable; later he is at a sprinkler supply yard where he is observed to off-load some six or eight foot long 4" PVC pipes and to lift them up onto the pick-up's overhead rack, and then tie them down; still later he lifts what appears to be a wheel base for a cement or plaster mixer and places it up and into the truck bed, and then he picks up a wheel barrow, placing it in the truck bed, after which he uses tie-downs to secure the load; after subsequently driving he is seen off-loading items, helping another worker lift and carry the cement or plaster mixer barrel canister [Ex E, 4/27/17].

In mid-May he was filmed pulling trash cans, driving the pick-up, off-loading a package of bricks/stones from the pick-up bed, carrying PVC pipe and then lifting and carrying on his shoulder two 8ft 2x4 studs; later he is seen bringing by hand a bag of what seems to be plaster or cement after which he is observed climbing up onto and then off of the pick-up bed; then he helps to move a refrigerator or freezer, using push/pull/twist motions, after which he helps to empty the contents to trash, then using a hose to clean it out while alternately bending and standing [Ex E, 5/15/17].

The video was reviewed by various physicians who commented on it. Some comments were blunt. For instance, Dr. Stewart stated repeatedly that Applicant was malingering [Ex A, P36, P118, & P129]. Dr. Wachs agreed there may be malingering [Ex F, P4]. Dr. Sherman was clearly of the belief that Applicant flat-out lied and tried to and did fool him [Ex GG, P9, L17-20; Ex HH, P23, L24]. Dr. St. Martin agreed the activities depicted showed an ability to perform physical activity that was better than what Applicant reported [Ex LL, P5], and that there was a "*disconnect*" between subjective complaints and objective functioning [Ex LL, P6]. Dr. St. Martin also stated "… *it is evident that Mr. Sanchez-Vega's functional status has improved* …" [Ex KK, P6]. He even noted MMPI-2 results that were consistent with symptom magnification [Ex LL, P3].

In conclusion, Dr. Stewart summarized that "… *Dr. Saint Martin, Dr. Sherman and I are in accord that Mr. Vega-Sanchez' actions and movements on these sub rosa video recordings are incompatible with his history of symptoms and his office presentation*" [Ex A, P104].

According to Medical Opinions:

Urological injury and disability.

Dr. Wachs diagnosed a neurogenic bladder based on results from diagnostic testing, namely a Cystometrogram [Ex A]. That diagnosis did not change despite the surveillance video. Dr. Wachs stated

> *The videos, do not indicate his bladder capacity and bladder habits. Nor do they explain his erectile dysfunction, but do allude to the fact that he can do heavy work including lifting and pushing" ... "Urinary frequency, bladder capacity, and urge incontinence to that extent as demonstrated by my Urodynamic study would cause for restrictions and limitations at work. That is to say, he would benefit from having bathroom facilities every 2 hours accessible to him. From the review of records I understand that his fecal incontinence that was such a problem has resolved in 2017*"
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> [Ex F, P2].

With respect to whole person impairment under the AMA Guides, Dr. Wachs initially thought Applicant's voiding dysfunction would fall into Class II, rating at 20% [Ex UU, P3], although after reviewing the activities depicted in the surveillance videos he lowered the rating to 16% [Ex F, P4]. He said there is no basis for apportionment because the condition is due to the effects of the injury event and the subsequent surgery [Ex F, P3].

There were also complaints of erectile dysfunction which he thought was related in part to the injury/surgery and in part to medication for hypertension [Ex UU, P3]. As for complaints of erectile dysfunction, he thought they fell into class I, at 10% [Ex UU, P3] and he later reiterated that the video did not change his opinion and the ED condition was still in class I [Ex F, P3]. However, "*Approximately 50% of his erectile dysfunction complaints are nonindustrial (medical conditions, including medications)*" [Ex F, P3].

Orthopedic injury and disability.

Dr. Sherman originally rated Applicant's back impairment after a 2-level spinal fusion procedure at 31%. He explained that

> *Mr. Sanchez's lumbar spine is evaluated using page 384, Table 15-3, where his lumbar spine is best described as a DRE category V, representing a 28% impairment of the whole person. His fusion procedure has caused limited motion in the two lower segments of the lumbar spine, and there are symptoms and objective findings regarding radiculopathy, having definite intermittent control problems with his urination, pain and numbness involving the right leg, and an absent right Achilles reflex. He should be awarded a 28% impairment of the whole person regarding his lumbar spine.*
>
> *In this particular case, due to the extreme and persistent back pain, which so markedly limits his activities of daily living, an additional 3% whole person impairment should be awarded.*

> *Mr. Sanchez should be awarded a 31% whole person impairment regarding his lumbar spine. This level of impairment is consistent with the "Guzman" guidelines in that it is a fair and reasonable impairment rating.*
>
> [Ex FF, P5]

There was no basis for apportionment according to Dr. Sherman [Ex FF, P5].

Later, however, after initially viewing surveillance videos he changed his opinion, stating that the 3% add-on was no longer appropriate [Ex EE, P2] and that DRE Category IV, at 20%, was more appropriate [Ex EE, P2]. He then thought that the ROM method would be more accurate [Ex DD, P5] until he saw additional video and concluded that DRE IV was the best assessment because it would be unreasonable to rely on ROM method when there is unreliable range of motion due to the variance between exam findings and video activity there is no consistency in motion of the spine [Ex CC, P12]. The doctor opined that although it appeared that Applicant had a fairly good result from the surgery, he was still entitled to be rated for the two-level fusion, and he assessed 20% using DRE IV category in the AMA Guides [Ex CC P12-13]. He explained,

> *In this instance, it is this examiner's opinion that 20% whole person impairment is a reasonable impairment to be awarded for an individual who has undergone a spinal fusion procedure directed toward the lower two segments of the lumbar spine, but has had a good result from that surgery with evident neurologic or mechanical deficit resulting from that surgery. It is recognized that there is absence of an Achilles tendon reflex, which does represent a neurologic abnormality. However, the physical examination does not demonstrate a sciatic condition in that there is no muscle wasting or fasciculations in the lower extremities.*
>
> *After careful consideration, including consideration of the "Almaraz-Guzman decision," it is this examiner's opinion that a 20% whole person impairment should be awarded.*
>
> [Ex CC, P13].

He later re-examined Mr. Vega, again explained that the ROM method was not reliable in that "*[h]is demonstrated inconsistencies in exhibiting motions of the lumbar spine cause the range of motion model to be unsatisfactory when conducted for the impairment rating*" [Ex BB, P5]. He reiterated his opinion that the DRE method, category IV, at 20%, was the most accurate assessment of impairment [Ex BB, P6]. Again, he said there was no basis for apportionment [Ex BB, P6].

Psychiatric injury and disability.

Mr. Vega was seen on a number of occasions by Manuel St. Martin, a PQME in psychiatry. The earliest[2] report of Dr. St. Martin placed into evidence issued in September 2015. He interviewed Mr. Vega who described depression and suicidal thoughts due to physical problems and financial

[2] A deposition of Dr. St. Martin took place in July 2015 in which the doctor noted he first examined Applicant in August 2012 and that two reports had been submitted, one in August 2012 and a supplemental one in July 2013 [Ex QQ, P5, L10-22]. Neither of those reports were offered as evidence.

issues [Ex MM, P2]. He diagnosed Major Depression and alcohol dependence, with a GAF score of 45 [Ex MM, P5]. The depression was thought to be entirely due to chronic back pain, and the alcohol dependence was thought to be a result of overuse to ease pain in the absence of pain medication [Ex MM, P6]. Dr. St. Martin opined that use of medication for pain and depression would improve Applicant's GAF score [Ex MM, P6].
Applicant's GAF score [Ex MM, P6].

In April 2016, the doctor testified in a deposition about his September 2016 report. He admitted not assessing a prior GAF level [Ex PP, P55, L14-18], nor did he quantify the duration or frequency of the depressive symptoms reported by Applicant [Ex PP, P57, L24-25; P58, L1-2 & L19-23; P61, L4-6]. The doctor confirmed Applicant's memory was intact, and that concentration and judgement were normal [Ex PP, P68, L1-13]. No psychological tests were performed [Ex PP, P70, L7-16]. The doctor was able to provide no information other than Applicant's statement that supported a diagnosis of alcohol dependence [Ex PP, P74, L17-21], however, he thought Applicant was credible [Ex PP, P75, L24-25; P76, L1-2].

Applicant returned to Dr. St. Martin in October 2016 and in his report the doctor reviewed surveillance video, noting that it did not change his diagnoses with respect to depression and alcohol dependence [Ex LL, P5]. He did, however, note the inconsistency in activities between Applicant's self-report and what was depicted in the videos causing him to revise the GAF score to 65 [Ex LL, P5 & P6]. By way of explanation he said:

> *This record review indicates that Mr. Sanchez-Vega's global assessment of functioning score is higher than previously rendered when he was examined in 2015, The reason for revising the score is that there is a disconnect between Mr. Sanchez-Vega's subjective complaints and his objective functioning with respect to pain. If Mr. Sanchez-Vega was in as much pain as he stated during the 2015 evaluation, he would not be capable of the activities that are revealed in the videos. For example, he could walk without using a cane, interact with people and family members, drive a car and do yardwork. If Mr. Sanchez-Vega had as much depression as he stated in 2015, his daily activities as depicted in the videos would have been less. Also, the MMPI-2 performed by Dr. Flores indicated symptom exaggeration.*
>
> [Ex LL, P6].

He reiterated in a subsequent deposition that he changed the GAF score only because of the activities shown in the surveillance videos [Ex OO, P11, L20-25; P12, L1-16; P15, L10-11; P21, L20-25; P22, L1-4]. He did indicate that the score could decrease if Applicant still "… *was drinking alcohol all day*" [Ex OO, P22, L19-24]. Dr. St. Martin reiterated in yet another report regarding the video that he was convinced the GAF score needed to be increased to 65 from the 45 he assessed in 2015, although he was willing to see Applicant again [Ex KK, P6].

He did see Applicant in September 2017 and was told by Mr. Vega that medication is not available and Applicant drinks excessive amounts of beer to address his pain [Ex JJ, P3]. Diagnoses again was depression and alcohol dependence, and the assessment was that there was a deterioration due to lack of medication, although Applicant indicated he was on medication when the surveillance

was done.[3] Dr. St. Martin again reiterated that the depression was a response to the lumbar spine injury as is the alcohol dependence [Ex JJ, P5]. According to Dr. St. Martin Applicant's GAF score was now at 57 because of depressive symptoms, and lack of medication [Ex JJ, P6]. He said "*If medications are not going to be provided, then his GAF of 57 can be considered his permanent and stationary score"* although he also thought if medication is available, then GAF would increase to 60 [Ex JJ, P6]. There was no reason to apportion the psychiatric disability [Ex JJ, P7]. In a later deposition Dr. St. Martin stated the September 2017 report was the most accurate assessment [Ex NN, P8, L12-18].

In May 2020 Dr. St. Martin viewed surveillance video from 2019 and also reviewed some treatment reports [Ex II, P1-2]. His opinion was unchanged and he still thought a GAF score of 57 was correct. He felt Applicant was indeed at maximum improvement [Ex II, P3].

Internal/other injury.

Dr. Stewart reported as an AME in internal Medicine. His initial report issued in November 2018 after an examination of Applicant. There was a complaint of occasional chest pain and some shortness of breath [Ex B, P4] and daily gastrointestinal symptoms [Ex B, P5] as well as sleep disturbance [Ex B, P8] among others. Of the conditions Dr. Stewart diagnosed not already addressed by other physicians were hypertension, obesity, pre-diabetes, sleep apnea, and hyperlipidemia [Ex B, P12]. He pointed out the weight gain likely was a response to decreased activity and "*non-physiological eating behavior*" due to emotional distress, and the weight gain and emotional distress contributed to development of hypertension, whereas weight gain also contributed to conditions of pre-diabetes, hyperlipidemia and to sleep apnea, although the latter condition required a sleep study for confirmation [Ex B, P13]. All were considered work-related due to the injury [Ex B, P19-20]. Applicant was permanent and stationary [Ex B, P13]. No disability was assigned to any condition except possibly for hypertension and that assessment required an echocardiogram [Ex B, P14]. There was no basis for apportionment [Ex B, P20].

In a subsequent report, Dr. Stewart discussed the hypertension noting the echocardiogram still was pending [Ex A, P119]. Based on the class levels noted in the AMA Guides and the Applicant's blood pressure readings, he assigned class II, at 15% whole person impairment without apportionment [Ex A, P120-121].

Although he developed doubts[4] factually about the compensability of the original injury event due to questions of credibility consequent to malingering and discrepancies about the event in the initial Kaiser records, he nonetheless noted the following probable causative sequence:

> *The medical logic connecting this patient's history of back problems to his internal medicine issues would potentially be:*

[3] Dr. Spokoyny stated in June 2017 that medication hadn't been available for over 2 months—a period which appears to predate the April/May 2017 surveillance [See Ex 9].

[4] See Ex A, P129-130

Work-related event brings about what proves to be severely limiting, profound back pain

Back pain and related impairment leads to inactivity and emotional distress

Pain and emotional distress lead to heavy alcohol abuse
Inactivity, heavy alcohol use and emotional distress lead to weight gain

Weight gain, heavy alcohol use, and emotional distress lead to hypertension.

Heavy alcohol use and weight gain lead to elevated serum enzyme levels

Weight gain leads to prediabetes

Weight gain leads to hyperlipidemia.

[Ex A, P131]

There is no indication that the recommended echocardiogram was ever done. Nor was a sleep study done—at least there is no review of one in medical reports in evidence.

Applicant's current treating physician, Dr. Spokoyny reported in November 2019 that Mr. Vega was taking medication for his psychiatric issues, that he still had back pain and urinary and bowel issues, and consequently was incapable of competing in the labor market for work [Ex 2, P8].

According to Vocational Reports:

Reports were received from two vocational experts who were asked to address Applicant's amenability to vocational rehabilitation.

In December 2017 Ms. Kelly Winn reported on behalf of Applicant after interviewing him and reviewing medical reports, the last of which was from October 2016[5] [Ex 16, P3]. She noted Mr. Vega helps out a friend by driving a truck and delivering items, without loading or unloading [Ex 16, P10]. Ms. Winn did not view the surveillance video. Mr. Vega said he last took medication two years prior[6] to the December 2017 interview. Vocational testing and assessment was done [Ex 16, P12-16]. Ms. Winn found Mr. Vega lacked directly transferrable skills for immediate work, and new skills needed to be acquired for work [Ex 16, P19]. She didn't think his work for his friend was competitive employment [Ex 16, P19]. She thought his multiple medical problems would interfere with any rehabilitation effort, and was of the opinion there was a lack of sufficient reported work restrictions to use as a guideline [Ex 16, P19]. Ms. Winn found that Applicant is not amenable to vocational rehabilitation "*at this juncture*" [Ex 16, P21-22].

[5] Ms. Winn did review a deposition of Dr. Sherman from June 2017 but not his final report from August 2017, nor did she have final reports from Dr. Stewart, Dr. St. Martin, or Dr. Wachs.

[6] This admission refutes Mr. Vega's claim that he took medication when shown working while under surveillance in April/May 2017.

Mr. Keith Wilkerson also performed a vocational analysis at Defendant's request. He reviewed medical reporting from Dr. Sherman and Dr. St. Martin and also viewed the surveillance video. After interviewing Applicant and conduction some vocational testing and research, and using the physical restrictions recommended by Dr. Sherman, he thought there were a number of jobs Applicant could perform [Ex D, P41-46] and that Applicant could benefit from vocational rehabilitation [Ex D, P46-47].

He summarized his opinion:

> *Mr. Sanchez-Vega has been determined unable to return to his usual and customary occupation. The evaluee has non-industrial factors limiting his options, but there are jobs in the general labor market consistent with his work restrictions.*
>
> *In consideration of the medical and vocational evidence presented, it is my opinion based on a reasonable degree of vocational certainty Mr. Sanchez-Vega is not so impaired by the permanent physical and psychiatric effects caused by the injury of 7/7/2008 that he is not amenable to vocational rehabilitation. As noted, he is feasible for several of the return to work modalities customarily recommended by vocational rehabilitation counselors and vocational experts. He is capable of participating in and sustaining part-time or full-time employment in the open labor market and, as a result, Mr. Sanchez-Vega would not meet the criteria for total disability under LeBoeuf, and Labor Code 4662.*
>
> [Ex D, P2-3]

Mr. Wilkerson thought that Applicant was not so impaired by the effects of his injury so as to make him unable to be vocationally rehabilitated. He found Applicant feasible for return to work full-time or part-time and able to participate in and benefit from retraining [Ex D, P49].

DISCUSSION

Evidentiary matters

Kaiser records that initially were marked for ID as Ex C, were pared down and designated, and as such were admitted into evidence as Ex H.

The surveillance videos were by agreement collectively admitted into evidence as Ex E [2/4/21 MOH, P2, L9-11].

Applicant's deposition transcript, marked for ID only as Ex G, is not admitted into evidence.

Credibility of Applicant

Although Defendant accepted liability, a comparison of Applicant's statements recorded in the Kaiser records [Ex H] and the history of injury he subsequently provided does highlight the ongoing problem with accepting Applicant's statements at face value. He said he was injured on

July 8 (maybe the 6th) and went to the medical facility the same day . . . but the records note he was there on July 10 [Ex H].

His claim is based on an event where he said a co-worker jumped unexpectedly on his back, but the Kaiser records indicate he did not recall an injury or a strain and later that he had a 4-day history of back pain [Ex H]. Dr. Stewart commented on this [Ex A] and at trial Defense counsel inquired about the inconsistent information [SOE generally P5 L23 through P7, L13]. Applicant testified that his co-worker jumped on his back when he was walking toward his tools [SOE P2, L21] whereas he told Dr. Spokoyny that he was standing by a sink drying his hands when a co-worker jumped on him [Ex 8, P2].

More recently in time, in August 2017, Applicant told Dr. Sherman falsely that he "*has not worked since July 7, 2008*" [Ex BB, P3] when video depicted Applicant clearly performing work in April and May 2017. Moreover, Applicant testified[7] that he only drove a truck for his friend and did nothing else [SOE P5, L16] which is patently contrary to what the surveillance discovered. Applicant may have the Court believe that the investigators caught him being active on a good day, but the sheer number of days and variety of activities filmed sporadically over a number of years of surveillance belies any idea of such a unique coincidence.

A number of physicians who reviewed the extensive surveillance video concluded that Applicant was repeatedly less than straightforward both in his statements about his physical ability and in his movements during their examination. Some thought he was lying or malingering. Even the veracity of the facts about occurrence of the injury itself is suspect[8] after comparing Applicant's discrepant statements made to Kaiser, to Dr. Spokoyny, and in sworn testimony to the Court.

After viewing the video and the medical reports containing Applicant's representations and exam findings, the Court agrees that Mr. Vega was less than fully honest in his presentations to the examining physicians, affecting adversely the reliability of their initial findings and causing them to alter their opinions. He has repeatedly downplayed his actual abilities and seemingly exaggerated his limitations. Whether he has done so purposefully or inadvertently is of no consequence. Either way, this situation affects adversely the Court's willingness to rely wholeheartedly on Applicant's statements about his condition as recorded by the physicians or in his testimony at trial.

Parts of Body injured.

With respect to the dispute over parts of body injured, Defendant has already admitted to liability for injury to the back, psyche, and urological system (voiding and erectile dysfunction), as well as headaches and to Applicant's sleep function [7/21/20 MOH, P2, L4-5].

However, Applicant claims additional injury, specifically injury to his vascular system in the form of hypertension, and to his gastrointestinal system in the form of bowel voiding dysfunction [7/21/20 MOH, P3, L2-3].

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[7] He also made similar representations to the vocational counselors and to a number of physicians, in an effort to minimize a description of physical effort in relation to the work he actually did.

[8] Although liability was long ago admitted.

Applicant is required to prove injury to the additional body parts. Labor Code section 5705 states that *"[t]he burden of proof rests upon the party or lien claimant holding the affirmative of the issue"* [See also: Evid Code section 500]. Additionally, Labor Code section 3202.5 states that *"... parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence."* Moreover, Labor Code section 3600(a)(3) says the employer is liable if the injury is proximately caused by the employment. Section 3202.5 requires use of the preponderance of the evidence standard, which it defines as evidence that has more convincing force when weighed against the evidence opposed to it. Section 3202 requires the law to be liberally construed by the courts.

Nonetheless, an employee must present substantial medical evidence to establish industrial causation. In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. It is incumbent on the applicant to at least produce prima facie evidence proving an injury arose out of and occurred in the course of his or her employment. [See: *Wehr v. WCAB,* 1985 Cal. App. LEXIS 1708]. The evidence must be credible, and there should be a link between the factual assertions by testimony concerning the basis for injury and the assertions as to the cause of injury by medical opinion. [*Western Growers Ins. Co. v. WCAB (*1993) 58 CCC 323, 326].

An injured worker's credible testimony may be used to support a medical opinion, but by itself it cannot constitute substantial evidence to support a finding of causation [*Liberty Mutual Insurance Co. v. IAC (Serafin)* (1948) 13 CCC 267]. In other words, an applicant's testimony is not a substitute for medical proof [*Bstandig v. WCAB*, 42 CCC 114 (1977)].

Regarding hypertension, based on the reasonably probable medical opinion of Dr. Stewart regarding the sequence of injurious sequelae, the Court finds that Applicant developed hypertension as a compensable consequence of his back injury [Ex A, P131; Ex B, P13]. There is here a sufficient showing of a reasonable probability of industrial causation [See: *County of Los Angeles v. W.C.A.B. (Gleason)* (2002) 67 C. C. C. 1049]. "*All that is required is that the employment be one of the contributing causes without which the injury would not have occurred."* [*South Coast Framing v WCAB,* 80 CCC 489 (2015)].

It is undisputed that Applicant's weight has increased substantially over the years. Dr. Stewart believes inactivity and emotional eating (not to mention beer drinking to excess) contributed to the weight gain and the weight gain contributed to the development of hypertension [Ex A, P131]. Applicant testified to an episode with Dr. Stewart where his blood pressure was extremely high [SOE P8, L20-21] and in his November 2018 exam the doctor recorded blood pressure of 188/120 and 190/120 [Ex B, P10]. Dr. Stewart later noted reports from physicians in 2017 seeking authorization for diagnostic tests related to a diagnosis of hypertension [Ex A, P27 & 31]. In *Ramirez v. Altman Specialty Plants*, 2020 Cal. Wrk. Comp. P.D. LEXIS 31, the WCAB noted that when direct evidence of causation is unavailable, circumstantial evidence is sufficient to support an award, and it may be based upon the reasonable inferences that arise from the evidence; neither absolute certainty nor demonstration is required.

Regarding bowel dysfunction, based on the comments of Dr. Stewart and the absence of substantial medical evidence otherwise, the Court finds that Applicant has not sustained an injury to his gastrointestinal system in the form of bowel voiding dysfunction. Dr. Stewart stated, with regard Applicant's multiple gastrointestinal complaints, "*I find them to lack a cohesive, identifiable pattern to establish an internal medicine diagnosis*" [Ex A, P118]. He noted in some records he reviewed that a prior physician found no neurological deficits that would explain altered bowel functioning [Ex A, P93] despite repeated references to Applicant complaining about bowel urgency or even incontinence [Ex A, P16, 17, 18, & 27]. Other records were to the contrary [Ex A, P47, 49, 65, 69 & 70], including a denial by Applicant about such problems [Ex A, P59]. Dr. Stewart noted "*It is my view that fecal incontinence on the basis of his back surgery, as a complication of it, is highly, highly unlikely to be appearing at this point in time"* [Ex A, P69].

Moreover, Dr. Wachs examined the Applicant and determined that rectal sphincter tone was normal [Ex WW, P4]. Unlike Applicant's urinary voiding problem which was diagnosed as being related to his injury and surgery [Ex AA, P3] there is no diagnosis by any physician to support Applicant's subjective complaint of having a medically established bowel voiding dysfunction. According to Dr. Stewart's review a proctology exam was proposed by Dr. Majcher, apparently certified [Ex A, P104-105], but there is no record of it being done, or if done no results were placed into evidence. His current treating physician, Dr. Spokoyny mentions Applicant's complaint of urgency in a November 2019 report but states incontinence hasn't occurred since 2017[9] [Ex 2, P3] and rendered no diagnosis with respect to his subjective complaint [Ex 2, P7] although she suggested he return to Dr. Majcher [Ex 2, P8]. No evidence was offered to show that this was done. Medical evidence of a discrete gastro-intestinal injury or condition is insufficient here to support an award.

This is one of those situations where, in the absence of medical evidence, testimony—especially from an individual with tarnished credibility—cannot support by itself a finding of injury.

In summary, the Court finds that Applicant sustained injury to his vascular system in the form of hypertension, but not to his gastrointestinal system in the form of bowel voiding dysfunction.

Permanent Disability and Apportionment

The primary disability is due to Applicant's back injury. In that regard, Dr. Sherman stated his opinion that the DRE method, category IV, at 20% whole person impairment, was the most accurate assessment of impairment [Ex BB, P6; See also Ex CC, P13]. He said there was no basis for apportionment [Ex BB, P6]. Given Applicant's 2-level surgery, and Dr. Sherman's explanation, the Court finds this to be an appropriate assessment. The Court finds Dr. Sherman's opinion to be substantial evidence upon which it can rely for a rating.

Applicant has a disability caused by his consequential psyche injury. Dr. St. Martin opined that Applicant's level of functioning would support a GAF score of 57% which is based on moderate symptoms or difficulty [2005 PDRS, P1-14]. The doctor noted a GAF score of 57 was appropriate because of depressive symptoms, and lack of medication [Ex JJ, P6; Ex II, P3]. There was no

[9] Dr. Wachs commented similarly that the problem appears to have resolved in 2017 [Ex F, P2 & P4]. Applicant testified that he still has the problem [SOE P3, L5] which presents a credibility issue, not helped by his lack of reliability as a witness or reporter.

reason to apportion the psychiatric disability [Ex JJ, P7; Ex II, P4]. A GAF score of 57 is equivalent to 20% whole person impairment [2005 PDRS, P1-16].

With regard to disability from Applicant's hypertension, an echocardiogram was not done to establish a definite class level. Under the circumstances, Applicant has provided no evidence showing end-organ damage, such as left ventricular hypertrophy (LVH). Absent such evidence Applicant would fall into class 2 according to Dr. Stewart, and under that scenario Dr. Stewart recommended a 15% whole person impairment [Ex A, P121]. No basis for apportionment exists[10]. No other internal medical condition exists upon which to attribute a finding of whole person impairment.

According to Dr. Wachs, there is whole person impairment assigned to Applicants urinary voiding dysfunction and erectile dysfunction. In his June 18, 2020 report he reiterated an earlier opinion that the erectile dysfunction carried a 10% impairment level [Ex F, P3], and stated that the urinary voiding dysfunction would now be rated at 16% after a review of the surveillance suggested to him a bit of likely improvement [Ex F, P4].

Dr. Wachs thought the disability should be apportioned, yet he was never very clear as to the reason for that belief. He stated 50% of the disability for erectile dysfunction was "non-industrial", blaming unidentified medical conditions and medication [Ex F, P3]. In his 6/22/15 report he blamed blood pressure medication [Ex UU, P3]. However, since hypertension here is injury-related, that apportionment won't reduce the rating. As for the urinary voiding problem he said apportionment was not indicated [Ex UU, P3]. He tried to alter that opinion in June 2020 by suggesting apportionment to nonindustrial causes would be necessary [Ex F, P5], but never expanded on what he meant.

In *Escobedo v. Marshalls* (2005) 70 CCC 604 (*en banc*), the appeals board found the defendant must prove that non-industrial factors are attributable to the permanent disability provided for the industrial injury and as the beneficiary of apportionment to non-industrial factors, it has the burden of proving "by substantial medical evidence" the validity of the apportionment provided. Here Dr. Wachs opinion is speculative, and does not rise to substantial medical evidence to support the apportionment he vaguely described. Defendant has the burden of proving legally valid apportionment, and has not met its burden on that issue here.

With respect to Applicant's claim of permanent total disability, the Court is not persuaded. Under *LeBoeuf v. WCAB* [(1983) 48 CCC 587] an employee's inability to participate in vocational retraining is an important factor in determining permanent disability. An employee's infeasibility for vocational rehabilitation and inability to compete in the open labor market could support an award of permanent total disability. Some medical and vocational evidence here suggests total disability [Ex 2 & Ex 16], but the Court finds the opinion of Mr. Wilkinson [Ex D] to be substantial evidence in opposition to that perspective. Applicant's expert, Ms. Winn, didn't have all the medical reports current to the time of her report, and she didn't review the surveillance video. She didn't seem to thoroughly apply the work restriction suggested by Dr. Sherman, and finally it

[10] In his January 2019 report Dr. Stewart finds all conditions factually non-industrial because he doubts the back injury occurred as described [Ex A, P131], but liability was legally accepted and his comments do not change that reality. In his November 2018 report Dr. Stewart found the hypertension to be 100% "industrial" [Ex B, P20].

appears she thought Applicant's limitations might be temporary, stating that he wasn't amenable to vocational assistance "*at this juncture*" [Ex 16, P22].

Mr. Wilkinson's opinion utilized more recent medical reporting, applied the work limitation by Dr. Sherman and found jobs available within that limitation, and used his observation of Applicant's activities and abilities as disclosed in the video and presented at the interview as a basis to find Applicant was capable of working at least part-time if not full time in a suitable job, or being trained to do so [Ex D, P3 & 49]. The Court finds his report and opinion to be persuasive on the subject.

Ratings

Applicant is not permanently totally disabled.

The Court accepts the recommendation of the Disability Evaluation Unit with respect to an over-all rating of Applicant's disability pursuant to instructions issued, as follows:

72% permanent disability, equivalent to 465.25 weeks of disability payments at the rate of $270 per week in the total sum of $125,617.50, and a life pension thereafter of $92.77 per week to start.

Future Medical Treatment

Clearly future medical treatment is warranted for each of the injury-affected conditions or parts-of-body injured. No physician states otherwise.

Attorney fees

A reasonable attorney fee is awarded, 15% of the PD indemnity and life pension amounts, to be commuted as needed by uniform reduction on the side of the award, in accordance with DEU calculations.

Date: 4/7/21

Marco Famiglietti
WORKERS' COMPENSATION JUDGE