WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ROBERT JUNGE, *Applicant*

vs.

CITY OF SAN JOSE; Permissibly Self-Insured, *Defendant*

Adjudication Number: ADJ10496163
Van Nuys District Office

OPINION AND ORDERS DENYING PETITION FOR RECONSIDERATION, GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant Robert Junge, and Defendant City of San Jose, permissibly self-insured, seek reconsideration of the Findings and Award, issued June 15, 2021, wherein a workers' compensation administrative law judge (WCJ) found that as the result of an admitted cumulative trauma injury to his psyche while employed as a 911 Operator over the period July 20, 2003 through October 19, 2015, applicant sustained 70% permanent disability, after 30% apportionment to non-industrial causes.

Applicant contests the award of 70% permanent disability, contending that he is entitled to an award of permanent total disability as the WCJ erred in apportioning 30% of applicant's permanent disability to non-industrial causes, because Dr. Aparna Dixit, the Qualified Medical Evaluator (QME) failed to adequately explain how non-industrial factors caused a percentage of his permanent disability. Applicant argues that Dr. Dixit's 20% apportionment to non-industrial personal factors causing mild depression was unrelated to his PTSD, and not proportional to his overall permanent disability. Applicant further argues that the WCJ improperly relied upon Dr. Dixit's 10% apportionment to his chronic neck and shoulder pain, as that pain was causally related to his work, and because Dr. Dixit did not explain how this factor caused 10% of his permanent disability.

Defendant contends that the award of permanent disability was improperly based upon the WCJ's opinion that applicant was permanently totally disabled before applying apportionment, as the WCJ found applicant had rebutted the scheduled permanent disability rating per *LeBoeuf*.

Defendant argues that there is no substantial medical evidence that establishes applicant is not amenable for vocational rehabilitation, or substantial vocational evidence to support a rebuttal of his scheduled rating.

We have not received an Answer from defendant and have reviewed applicant's Answer to defendant's Petition for Reconsideration. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petitions be denied.

With regard to defendant's Petition for Reconsideration, we have considered the allegations and arguments of the Petition for Reconsideration, as well as the Answer thereto, and have reviewed the record in this matter and the WCJ's Report of July 15, 2021, which considers, and responds to, each of the defendant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's Report, concluding with the discussion of permanent disability in Section III of the Report, which we adopt and incorporate as the decision of the Board, we will deny defendant's Petition for Reconsideration and affirm the WCJ's Findings and Award as it pertains to the issue of applicant's permanent total disability.

With regard to applicant's Petition for Reconsideration, we find Dr. Dixit's apportionment determination does not constitute legal apportionment as she does not adequately support the apportionment to pre-existing conditions. Accordingly, we will grant applicant's Petition for Reconsideration and amend the Findings and Award to award applicant an unapportioned award of permanent disability. We will return this matter to the trial level for a new award of permanent total disability.

I. APPLICANT'S PETITION FOR RECONSIDERATION

Dr. Dixit, in addition to finding applicant is not capable of meeting the vocational requirements for participating in the labor market identified by defendant's vocational expert, determined that applicant's permanent disability was subject to apportionment to his pre-existing depression, as well as to his chronic pain from his cervical condition.

In her initial evaluation dated February 25, 2016, Dr. Dixit identified as one of "a few variables worthy of mention," applicant's self-report of problems dealing with the anniversary of the death of his daughter, who passed away more than 20 years before. "The demise of his daughter did result in continual emotional stress for Mr. Junge. Subjective and objective factors indicate

that these factors continue to play a small part in his psychological symptoms at this time." (Ex. T. 2/25/16 QME Report, p. 8.)

> Mr. Junge reported that despite having worked successfully in his job for several years, each year in and around November, he recognized signs of psychological decompensation within himself. He reported that the only times he has been "verbally sanctioned" on the job for not performing his job duties satisfactorily was around November when he was struggling through the grieving of his daughter's passing. (Ex. T. 2/25/16 QME Report, p. 4.)

Dr. Dixit noted that the year 2015 was "especially difficult" due to the deaths of his brother-in-law, niece and cousin.

> These losses proved significantly difficulty for Mr. Junge to adjust to, in addition to the work stress. He continued to plough through his emotional reaction to these losses and his work stress. However, when the year-end of 2015 approached, he started decompensating under the stress he usually experiences at that time of the year, due to the grief reaction to his daughter's passing. Mr. Junge was not able to handle the stress and sought the treatment of a psychologist in late 2015.
> (Ex. T. 2/25/16 QME Report, p. 4.)

Reviewing his medical history, Dr. Dixit noted that applicant attributed his chronic pain condition, for which he had surgical treatment of cervical discectomy and foraminotomy, to his employment as a 911 operator, "watching several computer screens at one time with severe neck strain. He informed that he filed a work claim for this physical injury." Apparently the claim was denied, but applicant had obtained an orthopedic QME who found industrial causation. (Ex. T, 2/25/16 QME Report, p. 7.)

Dr. Dixit's first discussion of apportionment is found in her second evaluation, dated September 25, 2016. First, addressing industrial causation, Dr. Dixit noted the factors that caused his industrial injury:

> Mr. Junge is currently experiencing symptoms of depression and anxiety that are predominantly a consequence of his industrial injury of 10/20/15. There is evidence to indicate that there are non-industrial factors, preceding his industrial injury that play a part in his current psychological distress. These take the form of a depression resulting from the passing of his daughter several years ago. It appears that Mr. Junge continues to be mildly adversely affected by that loss at this time. This issue is discussed under Apportionment.
> (Ex. U, 9/25/16 QME Report, p. 6.)

Then in her apportionment discussion, she fails to state a rationale for apportioning to his depression and anxiety:

> Mr. Junge is currently experiencing symptoms of depression and anxiety that are predominantly a consequence of his industrial injury of 10/20/15. Apportionment to the pre-existing, non-industrial injury sustained by Mr. Junge would be 20%.
> (Ex. U, 9/25/16 QME Report, p. 8.)

Dr. Dixit re-evaluated applicant a third time and issued a report on June 12, 2018. She largely repeated her discussion of non-industrial factors related to industrial causation, stating:

> Mr. Junge is currently experiencing symptoms of depression and anxiety that are predominantly a consequence of his industrial injury of 10/20/15. There is evidence to indicate that there are non-industrial factors, preceding his industrial injury that play a part in his current psychological distress. These continue to take the form of a low-grade depression resulting from the passing of his daughter several years ago. It appears that Mr. Junge continues to be mildly adversely affected by that loss. In addition, a part of Mr. Junge's psychological distress is attributable to his chronic physical pain in his upper body-bilateral shoulders and neck. The pain is attributed to repetitive cumulative trauma of staring at multiple computer screens for long periods of time causing neck damage and data entry, while balancing the hands-free phone device. This issue is discussed under Apportionment.
> (Ex. V, 6/12/18 QME Report, p. 16.)

Regarding apportionment, Dr. Dixit states in full:

> Mr. Junge is currently experiencing symptoms of depression and anxiety that are predominantly a consequence of his industrial injury of 10/20/15. Apportionment to the pre-existing, non-industrial injury sustained by Mr. Junge due to the passing of his daughter years ago, remains at 20%. 10% of his psychological distress is attributed to his chronic neck and shoulder pain, caused by industrial factors from his job with the City of San Jose. The rest, 70% of his current psychological distress is due to the nature of his work with the City of San Jose.
> (Ex. V, 6/12/18 QME Report, p. 17.)

Dr. Dixit authored a supplemental report dated May 4, 2019, in which she reviewed additional medical records from applicant's treatment for orthopedic complaints at Kaiser between 2009 and 2016.

In her medical record review, Dr. Dixit references applicant's chronic pain, noting applicant's 2009 diagnosis of cervical radiculopathy, and medical records in 2016 referencing

bilateral shoulder pain. The medical records reviewed included applicant's July 30, 2014 statement to a Kaiser doctor: "Patient informed Dr. David Danzeisen that he had spoken with his work supervisor and she thinks patient's neck/shoulder issue may have been caused or made worse by constant moving of his neck back and forth in the viewing of 4 computer monitors used at work and use of key board in his "high stress" job. There have been numerous persons at work with similar problems. She recommends filling out workers comp papers." Applicant was placed off work for 6 weeks in October of 2014. He had cervical fusion surgery on June 30, 2010.

Dr. Dixit's review of applicant's Kaiser medical records shows that applicant was receiving ongoing treatment for his orthopedic condition, including regular prescription refills for pain medication between 2009 and 2014. A December 5, 2014 Kaiser entry listed applicant's then "active problems":

> Active problem list: spinal stenosis of cervical spine, left shoulder internal impingement, history of cervical spine surgery, myelopathy, cervical, cervical radiculopathy, cervical spondylosis, granuloma of lung, trigger finger, GERD, hyperlipidemia, dypuytrens contracture.
> (Ex. W. 5/4/19 QME Supp. Report, p. 5.)

Discussing apportionment to applicant's chronic pain issues, Dr. Dixit reiterated her 10% apportionment, stating:

> New medicals inform that chronic shoulder and cervical pain have been part of Mr. Junge's life for a long time. I note the diagnosis of cervical radiculopathy in records as early as 3/4/09 and continuing on until August 2016. In an office visit note dated August 2016, Mr. Junge had reported having bilateral shoulder pain which was impacting his ability to play golf. While I will let Mr. Junge's orthopedic QME opine on the relevant orthopedic injuries, considering that Mr. Junge's employment with City of San Jose began in 2003 and after reviewing his report to me of the physical strain the job caused to his neck and back, it remains my opinion that his upper body pain continued to impact his psychological wellbeing to the extent of l0% as of the last time I evaluated him.
> (Ex. W. 5/4/19 QME Supp. Report, p. 7.)

Dr. Dixit prepared two additional supplemental reports on August 28, 2019, and December 1, 2020, reviewing the vocational evidence, but did not further address apportionment.

In her deposition testimony, when asked about her 20% apportionment to pre-existing factors, Dr. Dixit agreed that her apportionment was to the death of his daughter and his history of

being raised by an abusive grandmother. (Ex. Z. 9/17/18, 19:1-7.) She did not offer any further analysis for her apportionment determination.

II. Discussion

Under section 4663, apportionment is based on the causation of the permanent disability and the trier of fact must determine what approximate percentage of the permanent disability was caused by the direct result of the injury and what approximate percentage of the permanent disability was caused by "other factors." (Lab. Code, § 4663(a), (b), & (c); *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [Appeals Board en banc].)

To constitute substantial evidence on the issue of apportionment, a physician's report must be framed in terms of reasonable medical probability, must not be speculative, must be based on pertinent facts and on an adequate examination and history, and must set forth reasoning in support of its conclusions. (*Escobedo, supra*; *E.L. Yeager Construction v. Workers' Comp. Appeals Bd*. (*Gatten*) (2006) 145 Cal. App. 4th 922 [71 Cal. Comp. Cases 1687].)

> The physician must arrive at his opinion to a "reasonable medical probability," and not on "surmise, speculation, conjecture, or guess." (*Escobedo v. Marshalls*, *supra*, 70 Cal.Comp.Cases at pp. 620–621.) For example, it is insufficient for a physician and Board to say only that some given percentage is "fair," without providing some pertinent information which supports that determination. (*Id*., at p. 621.) The physician should show the reasoning or basis for his or her conclusions, by providing germane facts discovered from an examination of the applicant, his or her medical history, or other pertinent materials. (*Id*., at pp. 620–622.) The physician should also discuss the nature of the disease; why it is responsible for the approximate percentage of the PD. (*Id*., at p. 621.) (*Andersen v. Workers' Comp. Appeals Bd*. (2007) 149 Cal.App.4th 1369 [72 Cal. Comp. Cases 389, 397]

However, the fact that an apportionment determination is "not precise and require[s] some intuition and medical judgment … does not mean [the] conclusions are speculative [where the physician] stated the factual bases for his determinations based on his medical expertise." (*Anderson*, 149 Cal.App.4th at 1383.)

In *City of Petaluma v. Workers' Comp. Appeals. Bd*. (*Lindh*) 2018) 29 Cal.App.5th 1175 [83 Cal.Comp.Cases 1869], the court required apportionment to an asymptomatic preexisting condition where it was demonstrated by substantial medical evidence that the applicant's disability from an industrial eye injury was in part due to an underlying "vasospastic" condition. The court

rejected the Board's finding that the underlying vasospastic condition was a non-industrial risk factor that the doctor confused with the cause of the injury, and not disability. The court found the doctor had adequately explained that he attributed the applicant's impaired vision disability to the injury and his underlying condition that had placed the applicant under a higher risk of suffering that impaired vision.

Similarly, in *City of Jackson v. Workers' Comp. Appeals. Bd*. (*Rice*) (2017) 11 Cal.App.5th 109 [82 Cal.Comp.Cases 437], the court reversed a finding of no apportionment for an industrial neck injury, where a QME apportioned to degenerative disc disease caused by heredity or genetics. The court held:

> Dr. Blair's reports meet all of the requirements of *Escobedo*. Dr. Blair expressly stated that confidence in her opinion was predicated on a reasonable degree of medical probability. Dr. Blair gave the reasoning behind her opinion—the published medical studies—and even named the studies and the pages relied upon. Her opinion disclosed familiarity with the concept of apportionment. . . .
>
> Dr. Blair's reports reflect an understanding that apportionment is based on the cause of the disability, and the necessity of determining what percentage was caused by Rice's employment. She explained that the causation of his disability stemmed from work activities with the City, prior work activities, prior personal injuries, and personal history. Included in the causes listed as personal history were "heritability and genetics" as supported by medical studies, Rice's brief history of smoking, and his prior diagnosis of lateral epicondylitis.
>
> Dr. Blair's reports reflect, without speculation, that Rice's disability is the result of cervical radiculopathy and cervical degenerative disc disease. Her diagnosis was based on medical history, physical examination, and diagnostic studies that included X-rays and MRI's (magnetic resonance imaging scans). She determined that 49 percent of his condition was caused by heredity, genomics, and other personal history factors. Her conclusion was based on medical studies that were cited in her report, in addition to an adequate medical history and examination. Dr. Blair's combined reports are more than sufficient to meet the standard of substantial medical evidence.
> (*Rice*, 11 Cal.App.5th at 121.)

The case of *deGaribaldo v. Workers' Comp. Appeals Bd*. (2008) 73 Cal. Comp. Cases 508 (writ den.) is illustrative of the type of analysis found to be substantial medical evidence to support apportionment of permanent disability of an injury to the psyche.

In *deGaribaldo*, the WCJ followed the opinion of a defense QME who apportioned 20% of the applicant's disability to her asymptomatic "personality pathology," and explained how the

applicant's inflexible and rigid personality traits played a role in her chronic pain, noting the disparity between her behavioral presentation, subjective complaints and objective findings, and why these contributed to her poor adjustment. The case summary quoted the QME's report at length.

> In summary, the psychological testing clearly documents a lack of resilience and substantial personality pathology. There are indications of exaggeration and embellishment geared to portray herself as psychologically disturbed, while at the same time, attempting to present herself in a favorable light. As noted, testing suggests a psychologically unsophisticated individual with very poor coping resources. She has underlying passive-dependent tendencies which appear to have been activated. These have resulted in problems with her personality functioning and very limited coping abilities, which in part have caused her permanent psychiatric disability. Under SB899, this personality pathology constitutes an asymptomatic condition which is apportionable. As I opined in my initial report, I apportioned 80% of her permanent psychiatric disability to her industrial injury. I apportioned only 20% of her permanent psychiatric disability to her inflexible and rigid personality traits.

The QME's opinion was found to be substantial medical evidence as it was based on specific evidence of the applicant's pre-existing condition and his medical expertise in evaluating the significance of these facts.

Here, Dr. Dixit apportioned 20% of applicant's permanent disability to pre-existing depression associated with the death of his daughter. Her reporting indicated that applicant received negative criticism of his work performance on the days he exhibited his depression. That applicant suffered depression on the anniversary of his daughter's death was cited as a non-industrial source in Dr. Dixit's analysis of the cause of his injury. However, throughout her reporting, and without any additional analysis, Dr. Dixit also cited it as grounds for apportionment.

She also apportioned 10% of applicant's disability to the chronic pain applicant suffered from an apparent industrial orthopedic injury for which applicant never filed a claimed. She stated "after reviewing his report to me of the physical strain the job caused to his neck and back, it remains my opinion that his upper body pain continued to impact his psychological wellbeing to the extent of l0% as of the last time I evaluated him."

In contrast to the medical reporting found to constitute substantial medical evidence to justify apportionment in *Lindh*, *Rice* and *deGaribaldo*, where the doctors provided an analysis of how and why the non-industrial factors were responsible for a specific portion of the current

disability, Dr. Dixit's apportionment analysis merely repeats her causation analysis without distinguishing between the two. For example, in her final evaluation on June 12, 2018, she states, with regard to the cause of his industrial injury:

> Mr. Junge is currently experiencing symptoms of depression and anxiety that are predominantly a consequence of his industrial injury of 10/20/15. There is evidence to indicate that there are non-industrial factors, preceding his industrial injury that play a part in his current psychological distress. These continue to take the form of a low-grade depression resulting from the passing of his daughter several years ago. It appears that Mr. Junge continues to be mildly adversely affected by that loss. In addition, a part of Mr. Junge's psychological distress is attributable to his chronic physical pain in his upper body-bilateral shoulders and neck. The pain is attributed to repetitive cumulative trauma of staring at multiple computer screens for long periods of time causing neck damage and data entry, while balancing the hands-free phone device. This issue is discussed under Apportionment.
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Regarding apportionment, Dr. Dixit states:

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> (Ex. V, 6/12/18 QME Report, p. 17.)

She does not provide any reasoning for her conclusion that applicant's pre-existing depression and chronic pain caused the attributed level of apportionment. She offers no discussion of how these factors are responsible for any specific level of disability, but merely repeats the fact that she found these factors to be the cause of the industrial injury, and therefore subject to apportionment. This appears to reflect a lack of familiarity with the concept of apportionment. In the absence of a sufficient analysis of the basis for apportionment, applicant is entitled to an unapportioned award of 100% permanent disability.

Accordingly, we will deny defendant's Petition for Reconsideration and grant applicant's Petition for Reconsideration. We will amend the Findings and Award to reflect applicant's

permanent total disability and return this matter to the trial level for a new award of permanent disability and attorney fees.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award, issued June 15, 2021, is **DENIED**.

IT IS FURTHER ORDERED that applicant's Petition for Reconsideration of the Findings and Award, issued June 15, 2021, is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the June 15, 2021 Findings and Award is **AMENDED** as follows, and the matter is **RETURNED** to the trial level for a new award of permanent total disability.

FINDINGS OF FACT

1. Robert Junge, while employed during the period 7/20/2003 through 10/19/2015, as a 911 operator, Occupational Group # 112, at San Jose, California, by the City of San Jose, sustained injuries arising out of and in the course of his employment to his psyche.
2. At the time of the injury the employer was permissibly self-insured.
3. At the time of the injury the employee's earnings were $1,386.09 per week warranting a compensation rate of $924.06 per week.
4. The injury caused temporary total disability for the period 10/20/2015 through 8/27/2016 payable at the rate of $924.06 per week
5. The injury became permanent and stationary on 8/27/2016.
6. The injury caused permanent total disability.
7. There is no legal apportionment of applicant's permanent disability.
8. The injury caused a need for future medical treatment.
9. Applicant's attorney is entitled an award of reasonable fees, to be determined when the award of permanent total disability is made, and shall be commuted laterally from the award of permanent disability utilizing the Uniform Reduction Method.
10. The lien of the Standard Insurance Co. is deferred.
11. The Defendant's entitlement to credit for overpayment of temporary disability is deferred.
12. The Defendant shall withhold payment for any additional temporary disability pending resolution of the lien of Standard Ins. Co.
13. Interest under Cal. Lab. Code sec. 5800 shall not accrue on any additional temporary disability pending the resolution of the disputes in Paragraphs 11 and 12 above.

AWARD IS MADE in favor of **ROBERT JUNGE** against **CITY OF SAN JOSE** of:

a. Temporary disability per Paragraph 4 above,
b. Permanent total disability in an amount to be determined at the trial level.
c. Future medical care per Paragraph 8 above,
d. Attorneys' fees per Paragraph 9 above.

ORDERS

1. Defendants are ordered to withhold any payments of additional temporary disability pending resolution of the Standard Ins. Co. lien
2. Interest on any additional temporary disability is deferred pending resolution of the Standard Ins. Co. lien.
3. The case is returned to the trial level for a new award of permanent total disability and an attorney's fee.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 30, 2021

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

ROBERT JUNGE
SHATFORD LAW
D'ANDRE LAW

SV*/pc*

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Both parties herein have filed timely and verified Petitions for Reconsideration.

1. The Defendant is claiming that the undersigned erred in finding the Applicant to be permanently and totally disabled (before apportionment). No other issues are raised.
2. The Applicant is claiming that the undersigned erred in apportioning 30% of Applicant's disability to non-industrial causes under Cal. Lab. Code sec. 4663.No other issues are raised.

The undersigned will recommend that both Petitions be denied.

CLERICAL ERROR: The case that was tried is a cumulative trauma case of ADJ 10496163. As the facts will readily disclose, this is a cumulative trauma case. Case ADJ10496156 was not tried nor brought to anyone's attention at the time of trial. This is a specific injury. Nonetheless, Applicant's Petition for Reconsideration bears ADJ10496156 on it in addition to ADJ10496163. ADJ10946156 was not tried. Applicant's petition deals exclusively with the findings in ADJ10496163.

II. STATEMENT OF FACTS

The Applicant herein worked for the employer as a full time 911 operator for twelve years culminating in cumulative psychiatric injury. The claim was admitted by the Defendant who provided temporary disability benefits. The injury was admitted to thepsyche. There are no other allegations of injury. The Applicant took emergency phone calls on the 911 system from people who were "having the worst day of their lives." This was fulltime employment.

Dr. Michael Henry Ph.D was the treating physician who issued several reports. (App's. Exs. 1 to 5). Temporary disability was paid based upon his reporting wherein he diagnosed major depression and Post Traumatic Stress Disorder (App's Ex. 1).

The parties ultimately agreed to a psychiatric panel and selected Dr. Aparna Dixit Psy.D. as the QME. She issued several reports and had her deposition taken on 9/17/2018 (Court's Exs. T through Z). She agreed that the Applicant suffered from PTSD, anxiety and depression (Court's Ex. T). She declared the Applicant to be permanent and stationary on 8/27/2016 (Court's Ex. U).

In these reports the Applicant recorded a history of non-industrial emotional problems stemming from the death of an adult child, multiple losses of family members, childhood abuse as well as chronic and severe cervical spine pain stemming from multiple necks surgeries. The Applicant's initial visit with Dr. Henry on or about 10/1/2015 (App's Ex. 1) sets forth pre-existing problems:

"…

Trauma history: Physical and emotional abuse as a child. Family
Psychiatric History: Depression in family of origin.
Medical Conditions & History: Neck surgery due to stress at work.
…
Family History: Unpredictable, broken home, victim of abuse.
Social History: Married, had daughter who passed away as an adult.
…"

Dr. Henry notes in his report of 2/16/2018 (App's Ex.4):

> "…also he has physical symptoms associated with his mental illness; severe back neck and shoulder pain, headaches."

Dr. Henry did not address the issue of apportionment.

Dr. Henry saw the patient for three years. Dr. Henry declared the patient to be permanent and stationary on or about 2/16/2018 (App's Ex. 4). In that report he assessed the Applicant to have a GAF rating of 45 (40% wpi). He goes on to state:

> "The results of the MMPI and the most recent clinical interview performed on February 8, 2018, indicate an increase in the severity of symptoms and a lower GAF score than was observed and assessed approximately one year ago. With regard to the four areas of functioning considered by the AMA Guidelines (activities of daily living, social functioning, concentration, persistence and pace and adaptation), it is clear that there has been further deterioration and decompensation for Mr. Junge. Therefore, Mr. Junge is 100% disabled and would not be able to work at anytime, anywhere, even under supervision without a serious possibility of him dissociating and decompensating."

Dr. Dixit concluded that Applicant could not successfully work in any capacity in her report of 6/12/2018 (Court's Ex. V). She concluded thusly:

> "…Hence, after reviewing the psychotherapy notes made available to me and reflecting on my own clinical interpretations of Mr. Junge's presentation, it is my opinion that Mr. Junge is permanently disabled from working productively in any type of work setting. It is safe to hypothesize that it will be markedly difficult for him to function with intact cognition and interpersonal skills in anywork setting, without bringing upon himself a psychological relapse or getting into a provocative situation with others. In addition, due to the considerable amount of internal preoccupation he experiences as a result of low confidence and self-doubt, it is reasonable to conclude that he will have marked difficulty completing work in a timely manner. The ability to work under the pressure of time is something that is common to all work settings as is the ability to work interpersonally with others, no matter how isolative the job may be. Mr. Junge appears impaired in these domains as well. In sum, from a

psychological standpoint, I do not believe it will be productive or safe situation for Mr. Junge or for potential co-workers for Mr. Junge to function as part of any work force in the foreseeable future."

Both parties obtained vocational reports. Laura Wilson (reporting for Applicant) simply agreed with Dr. Henry that Applicant could not compete in the open labor market considering all his limitations coupled with medication reactions.

Christopher Meyers (reporting for Petitioner) found that Applicant may be employable as a night file clerk or nighttime stocker (Df's Ex. D.)

However, Dr. Dixit indicates in her report of 8/28/2019 (Court's Ex. X) that such an occupation would require a 1:1 aide. Furthermore she opines:

"Considering the nature of his psychiatric symptoms which include sleep dysfunction and continuing nightmares, I do not believe that any job which requires working the night shift will be conductive to Mr. Junge's mental health. With an already fragile sleep-wake pattern that impacts his mood adversely, it will be psychologically detrimental to have him work the night shift and leave him to adjust to finding restful sleep during the day….In the case of Mr. Junge who already comes with psychological residuals, working the night shift will be a set up for serious psychological decompensation."

In her report of 12/1/2020 (Court's Ex. Y) Dr. Dixit wrestles with a job description proposed by Mr. Meyers describing a "file clerk." Her analysis is lengthy and can be summarized as requiring the following if Applicant were to try such a job:

(1) No critical thinking
(2) No problem solving
(3) No engaging the public
(4) No engaging co-employees
(5) Minimal supervision
(6) Must be left alone
(7) Informed and sympathetic supervisors
(8) No learning
(9) Simple repetitive tasks only
(10) No training
(11) No stress
(12) Allowing loss of time

She concludes,

"Should a prospective job not consider the factors and restrictions noticed above, I anticipate that the risk of psychiatric decompensation for Mr. Junge ishigh and

> almost certain. In my assessment of him, the closest analogy I can draw of a person similar of Mr. Junge psychiatrically would be a combat veteran with severe Posttraumatic Stress Disorder, someone who has been engaged in treatment for years, but who continued to struggle with functioning interpersonally and cognitively given situations involving the factors outlined above."

Dr. Dixit indicated in more than one report that the GAF rating was only 63. However in deposition she explained that when taking into consideration his ability to perform any employment his GAF was only 40 (wpi 51%)(Court's Ex. Z).

When asked about this discrepancy in deposition at p.32 she responds:

> "I knew this would come up, because there's a discrepancy there. Sixty-one to seventy (GAF) is a mild range, and yet, I go ahead and say this person is not going to be able to work at any kind of job. I tried very hard to reconcile the two, sort of, issues. And I will share my thinking with you.
>
> If I – this is an individual, to my understanding of him, who is able to get by in life as a retired person. He has mild symptoms. They're manageable with psychotherapy, with counselling. Even without, he will get by. But when you factor in any kind of an occupational environment where he has to interface with people—and I can't think of any job where you wouldn't have to interfacewith co-workers, if not the general public—his short fuse would become very apparent.
>
> So if I only focus on the occupational aspect, his GAF would be 40. …"

The Applicant lost a daughter 29 years ago that resulted in depression (Summ/Evid. 5/26/2021, p.7, 1ines 17 to20). In Dr. Dixit's initial report of 2/25/2016 (Court's Ex.T) she states:

> "One of the factors complicating Mr. Junge's reaction to the difficult nature ofhis work was the demise of his daughter 20 year ago, on November 15. Mr. Junge reported that despite having worked successfully in his job for several years, each year in and around November, he recognized signs of psychological decompensation within himself. He reported that the only times he has been 'verbally sanctioned' on the job for not performing his job duties satisfactorily was around November when he was struggling through the grieving of his daughter's passing. …
>
> The year 2015 was especially difficult for Mr. Junge as it brought stress of a magnitude that was way over what he normally went through each year in relation to his daughter's death anniversary. Mr. Junge's stress reaction was compounded in 2015 with the demise of his brother-in-law in mid-2015. In addition, he was faced with multiple deaths of his family members. Within months of the demise of his brother-in-law, his niece and his cousin passed away. These losses proved significantly difficulty (*sic*) for Mr. Junge to adjust to, in addition to the work stress.

> He continued to plow through his emotional reaction to these losses and his work stress. However, when the year-end of 2015 approached, he started decompensating under the stress he usually experiences at that time of the year, due to the grief reaction to his daughter's passing…."

In her P&S report of 8/27/2016 (Court's Ex.U) the QME briefly repeats that the Applicant suffers from depression and anxiety for which 20% was caused by non-industrial factors.

In her report of 6/12/2018 (Court's Ex. T) Dr. Dixit is presented with voluminous medical records for the first time. Those records are seen in App's Ex. 11 demonstrating neck surgery and accompanying complaints only months before Mr. Junge ended his employment. She states:

> "In terms of ADL's, Mr. Junge reported that he continues to perform all ADL's, with limitations from the pain he experiences in his shoulders bilaterally and neck."

It was Dr. Dixit's conclusion that chronic severe neck complaints caused 10% of hisoverall psychiatric impairment. When asked about the records in deposition (Court's Ex. Z, p.41) she notes:

> "Q. So when you were going through these records, were you looking at that correlation that at that time he said he really felt he started to decompensate that he was also having severe problems with his cervical spine?
>
> A. I did not. My attention is brought to it by your questioning right now.
>
> What I did understand from him in my most recent meeting with him is that pain is a big part of his life, or, I should say, has continued to be a big part ofhis life."

Based upon this observation Dr. Dixit apportioned 10% of his overall disability to chronic pain.

Based upon the above opinions the undersigned determined that the Applicant was permanently and totally psychiatrically disabled from competing in the open labor market. In essence he has lost all his income producing ability. The undersigned also determined that 30% of the disability was caused by non-industrial factors hence resulting in a permanent disability rating of 70% in this case.

Issues of temporary disability and earnings were also resolved, but these issues are not part of this appeal.

III. DISCUSSION

Permanent Disability

The only issue appealed by Defendant is the finding of permanent total disability (100%)

which was reduced to 70% by means of apportionment.

Unless a total disability falls under the presumptions set forth in Cal. Lab. Code sec.4662(a), any finding of total disability shall be determined "in accordance with the facts." Cal. Lab. Code sec. 4662(b).

The case of *Department of Corrections v. WCAB (Fitzpatrick)* (2018) 27 Cal. App. 5th607; 83 CCC 1680 made it clear that sec. 4662(b) did not establish a second and independent manner in which to determine permanent total disability. The Court of Appeal indicated that the legislature set forth the only method for determining permanent disability in Cal. Lab. Code sec. 4660.1 wherein utilization of the AMA Guidelines (5th ed.) would be the determining device.

However, the Court also indicated that the Guides were rebuttable. The Court pointed out:

> "A scheduled rating (under the AMA Guides) has been effectively rebutted when the injury to the employee impaired his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating."

In short, the medical evidence must set forth the AMA Guide impairments as required by sec. 4660.1. However, that rating can go to 100% if the medical evidence shows that the actual disability exceeds the rating.

As set forth above, Dr. Henry, after treating the patient for three years, indicated that the Applicant's inability to function in his activities of daily living, his adaptability, his social functioning and his pace coupled with his MMPI results dictate that he will not be able to work "anytime, anywhere" without serious decompensation. (App's Ex. 4).

Hence Dr. Henry assessed the AMA Guides but argued that other clinical factors and testing resulted in the inability to work productively.

Dr. Dixit was far more detailed in her analysis. Admittedly it was very surprising to see her original analysis under the Guides to at a GAF score of 63 only to then conclude he was unable to work at all. This conflict led to much questioning as one would expect.

However, Dr. Dixit did analyze the AMA Guides more accurately when she described the GAF rating of only 40 when one considered the Applicant's ability to work productively. When one reviews the Global Assessment of Functioning Scale located in the Schedule for Rating Permanent Disabilities a GAF rating of 40 is described as follows:

> "Some impairment in reality testing or communication (e.g. speech is at times illogical, obscure, or irrelevant) or major impairment in several areas *such as work,* or school, family relations, judgement thinking, or mood (e.g. depressedman avoids friends, neglects family *and is unable to work;…)."* (emphases added).

Hence under the AMA Guides themselves which rely on the GAF ratings, an inability to

work is in the description of the rating given by Dr. Dixit. Utilizing the AMA Guides rating from Dr. Dixit and employing the rating scheme one can conclude that the rating strictly under 4660.1 would come out as follows:

14.01.00.00 51 (1.4) 71 112 I 78 85%

Dr. Dixit fully agreed that she would consider what the VR experts might discover in working with Mr. Junge.

Laura Wilson completely agreed that the Applicant was unemployable.

Christopher Meyers believed that a nighttime job working alone as a file clerk or stocker was feasible, and hence the Applicant was employable and amendable thereto.

However Dr. Dixit sets forth numerous restrictions as set forth in her reports. Those restrictions are such that it is inconceivable that Applicant could successfully be employed. Most of all Dr. Dixit rejects the idea that Applicant can work the night shift. This fact alone convinced the undersigned that the efforts to find employmentwas untenable since working at night seemed to be the defining element of Mr. Meyers' analysis.

Furthermore, the fact that Applicant would require 1:1 assistance does not seem to be a reasonable accommodation to Mr. Junge's disability. Instead, 1:1 assistance coupled with all of the added restrictions, accommodations, and severe limitations really define what is often referred to as a "sheltered shop" rather than open market employment. *Garden Grove Unified School District v. WCAB (Moore)* 75 CCC 521,*writ denied.*

Hence Mr. Meyers' conclusion that "Mr. Junge displays no outward signs of disabilitywhich would contribute to negative employer attitudes,'" seems unsupportable (Def's Ex. E, p.39). Dr. Dixit specifically refutes this assertion by Mr. Meyers once the Applicant attempts to re-enter the labor market.

On the contrary Dr. Dixit's voluminous statements as to the difficulties and limitations involved fully support the finding of fact by the undersigned that Mr. Junge is totally disabled and that the opinions of both Dr. Henry and Dr. Dixit have successfully rebutted the AMA Guides ratings in favor of a finding of 100% total disability.

More importantly, they have discussed fully the GAF ratings and explained why they do not adequately assess the Applicant's actual disability. Hence the evidence complies with *Fitzpatrick.* The preponderance of the evidence supports a finding of total disability under sec. 4662(b) . . .

Date: July 15, 2021
Dean M. Stringfellow
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE