

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **THOMAS HASSON,**

5 *Applicant,*

6 **vs.**

7 **ANN TAYLOR; TRAVELERS INSURANCE,**

8 *Defendants.*

Case No. **ADJ8393129**
(Oakland District Office)

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

9
10 Defendant, Ann Taylor, by and through its insurer, Travelers Insurance, seeks reconsideration of
11 the Findings and Award, issued December 12, 2019, in which a workers' compensation administrative law
12 judge (WCJ) found applicant Thomas Hasson is permanently totally disabled as a consequence of an
13 industrial cumulative trauma injury to his back and bilateral hips, over the period of his employment
14 through August 30, 2011, while employed as a stocker. The WCJ awarded permanent total disability from
15 July 2, 2015, at the rate of \$148.00 per week, and further medical treatment. All other issues were deferred.

16 Defendant contests the finding that applicant is permanently totally disabled, contending that the
17 reporting of Dr. Knight, applicant's treating physician, upon which the WCJ relied, is not substantial
18 medical evidence because he failed to adequately address the issue of causation of applicant's permanent
19 disability, and did not provide a sufficient explanation of the findings in the residual functional capacity
20 evaluation he completed. Defendant further contends the WCJ erred in disregarding Dr. Knight's
21 determination to apportion applicant's hip disability to non-industrial pre-existing condition. Finally,
22 defendant contends the WCJ erred in relying upon the vocational evidence from Mr. Diaz, arguing that his
23 opinion was based upon an inaccurate medical history, cited impermissible factors in concluding applicant
24 was not able to return to the open labor market, and cited medical issues not found in the medical record.
25 Defendant argues that the vocational evidence from its expert, Mr. Simon, establishes that non-industrial
26 factors impair applicant's ability to work, that he is amenable to vocational rehabilitation and is not
27 permanently totally disabled.

1 Applicant has filed an Answer to defendant's Petition for Reconsideration. The WCJ has prepared
2 a Report and Recommendation on Petition for Reconsideration, in which she recommends that the petition
3 be denied.

4 We have considered the allegations and arguments of the Petition for Reconsideration, as well as
5 the answer thereto, and have reviewed the record in this matter and the WCJ's Report and Recommendation
6 on Petition for Reconsideration of January 22, 2020, which considers, and responds to, each of the
7 defendant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's
8 Report, which we adopt and incorporate as the decision of the Board, we will affirm the WCJ's Findings
9 and Award, and deny the petition for reconsideration.

10 Additionally, we address defendant's contentions regarding the substantiality of the medical and
11 vocational evidence that the WCJ relied upon to determine that applicant is permanently totally disabled.

12 Both Dr. Knight, applicant's primary treating physician, and Dr. Rovner, the Qualified Medical
13 Evaluator, found applicant sustained an industrial cumulative trauma injury to his lumbar spine and
14 bilateral hips as a result of working 18 years as a stock clerk for Ann Taylor, a job that required repetitive
15 strenuous lifting and bending. (Jt. Exh. 101, 11/17/15 QME Report; Exh. 3, 6/25/18 Dr. Knight Deposition
16 Transcript, 9:12-22.) The injury to his lumbar spine and bilateral hips caused marked limitations in his
17 ability to return to the open labor market. The record establishes that applicant's 2014 right hip arthroplasty
18 was not successful, as applicant's right hip pain subsequently increased. Two and a half years post
19 arthroplasty, applicant was described by Dr. Knight as being in "moderate to severe pain in the right hip
20 with limited range of motion," and was "quite limited in this ability to do prolonged walking, standing or
21 other activities." (Jt. Exh. 102, 6/22/17, p. 1.) He concluded applicant was "incapable of returning to work
22 as a result of his ongoing pain." (Jt. Exh. 102, 6/22/17, p. 2.)

23 Dr. Rovner provided the following evaluation of applicant's physical limitations:

24 Insofar as the lumbar spine is concerned, Mr. Hasson should be precluded
25 from work that involves excessive lifting, repetitive bending, prolonged
26 sitting or standing. A work capacity evaluation could be obtained if
27 necessary to quantify these restrictions further.

For the hip pathology and surgery, Mr. Hasson should be precluded from
excessive or prolonged standing or walking, precluded from squatting,
twisting, kneeling, crawling, or engaging in other activities in which he

1 might potentially dislocate his right hip or sustain a fall resulting in a
2 periarticular fracture.
(Jt. Exh. 101, 11/17/15 QME Report.)

3 After reviewing Dr. Knight's reporting, Dr. Rovner deferred the determination of applicant's
4 factors of disability, permanent disability rating, vocational rehabilitation and apportionment with regard
5 to the hips to Dr. Knight, and stated that his previously expressed opinions regarding the lumbar spine were
6 unchanged. (Exh. 5, 9/20/19 QME Supplemental Report.)

7 Dr. Knight completed a Residual Functional Capacity evaluation, a form that required him to
8 indicate applicant's physical capacity to perform specific functions. (Exh. 1, 1/15/18.) Dr. Knight found
9 applicant was only capable of sitting, standing, walking or driving for less than one hour in an 8 hour
10 workday. Applicant could not lift, carry, push or pull over 10 pounds, and for under 10 pounds, he was
11 limited to less than five minutes. He further indicated that applicant would experience fatigue due to the
12 side effects of his Norco medication, which would moderately impair his ability for concentration,
13 persistence and pace. He further indicated that there is a reasonable medical probability that applicant's
14 fatigue would reduce his exertional capacity to sit, stand, walk, lift, carry, push, and/or pull.

15 Dr. Knight's functional capacity evaluation further indicated that to manage his pain, applicant
16 would need to take medications, lie down, rest, alternative positions, avoid prolonged and offending
17 activities. He stated applicant would need to be able to alternate positions at will, and would be limited to
18 less than five minutes each for sitting, walking and standing. He would also need to lie down for five
19 minutes every two hours, and would need to be able to take unscheduled breaks for five minutes every
20 hour. He also estimated that applicant would continuously experience fatigue so severe as to interfere with
21 his attention and concentration to perform even simple work tasks for two-thirds of the work day or more.
22 He found applicant was not capable of working even "low stress" jobs. He found applicant would likely
23 be absent from work more than four days per month.

24 Dr. Knight concluded the functional capacity evaluation by stating: "Patient unable to do work of
25 any kind at this point."

26 When given the opportunity to question Dr. Knight at his deposition on June 25, 2018, defendant
27 had no questions concerning the findings stated in his Residual Functional Capacity evaluation.

1 Applicant obtained a vocational evaluation from Mr. Frank Diaz, who found that as a consequence
2 of the disability from his cumulative trauma injury, applicant was not amenable to vocational rehabilitation
3 and had lost his ability to return to the labor market.

4 Mr. Diaz conducted interviews and vocational testing with applicant over several days, as applicant
5 was unable to complete the evaluation on the first day due to the severity of his pain. Mr. Diaz took a
6 history of applicant's background, education and work history, evaluated applicant's physical tolerances
7 and administered vocational tests. He reviewed the medical records that detailed applicant's work
8 restrictions, and summarized them as follows:

9 As noted above, Dr. Rovner indicates that in regard to the lumbar spine Mr.
10 Hasson is precluded from work that involves prolonged sitting. Sedentary
11 work requires prolonged sitting. There is Sedentary work that can be
12 modified to accommodate Mr. Hasson's need to alternate between sitting and
standing through the use of a sit/stand work station; therefore, for the sake
of this report I considered Mr. Hasson's work restrictions per Dr. Rovner as
Sedentary with the need to alternate between sitting and standing.

13 Dr. Rovner indicates that for the hip pathology and surgery Mr. Hasson
14 should be precluded from excessive standing or walking. This becomes a
15 more difficult functional limitation to accommodate in the open labor
16 market. Typically a worker in a Sedentary position performs work at a desk
17 or table which could be elevated to allow for alternating between sitting and
18 standing. However, Dr. Rovner introduces the aspect of alternating between
standing and walking. Walking would remove Mr. Hasson from a work
station, and thereby, would not allow him to complete his job duties.
Typically a functional limitation that requires the need to alternate between
standing and walking eliminates a significant portion of the labor market.

19 Based upon the functional limitations as set forth by Dr. Knight, Mr. Hasson
20 is not competitive in an open labor market. The functional limitations as set
21 forth by Dr. Knight in his Residual Functional Capacity (RFC) to Lower
Extremities Form dated January 15, 2018 clearly indicate that Mr. Hasson is
unable to work greater than one (1) hour a day, and that Mr. Hasson will
likely be absent from work more than four (4) days per month.

22 An inability to work greater than one (1) hour a day and absence from work
23 more than four (4) days per month cannot be accommodated by employers
24 in the open labor market. An employer would require Mr. Hasson to
complete job duties in a timely manner, which he clearly could not do given
a one (1) hour work day, and absence of more than four (4) days of work per
month.

25 Dr. Knight goes on to indicate extensive functional limitations in that Mr.
26 Hasson's fatigue or other symptoms are severe enough to interfere with
27 attention and concentration needed to perform even simple tasks for two-
thirds (2/3rd) of the day or more. The combination of Mr. Hasson's
functional limitations will interfere with his ability to sustain competitive

1 work is also two-thirds (2/3rd) of the day or more. When taking into account
2 the totality of the functional limitations as set forth by Dr. Knight, clearly
3 Mr. Hasson is not competitive in the open labor market.
(Exh. 4. 1/29/19, Diaz Vocational Report, p. 4.)

4 Mr. Diaz also cited the medical record that indicated applicant's severe pain is his greatest limiting
5 factor. Mr. Diaz noted that applicant exhibited pain behavior which limited his ability to participate in the
6 vocational evaluation. He found that the physical limitations resulting from applicant's chronic pain would
7 preclude applicant from engaging in competitive employment. He concluded:

8 Mr. Hasson is not amenable to rehabilitation taking into account the
9 functional limitations as set forth by Drs. Rovner and Knight. Based upon
10 my review of Mr. Hasson's file, I am of the opinion that Mr. Hasson is not
amenable to rehabilitation taking into account the functional limitations as
set forth by Drs. Rovner and Knight.

11 I am of the opinion that when conducting an individualized analysis of Mr.
12 Hasson's amenability to rehabilitation, I must take into account his age,
13 individualized work history, transferability of skills, accommodations, and
14 medical functional limitations and opinions as set forth by the medical
practitioners in his case. When I complete my vocational profile of Mr.
Hasson, I come to the conclusion that Mr. Hasson, with his advanced age,
significant functional limitations, and chronic pain, does not possess the
ability to sustain suitable gainful employment in the open labor market.
(Exh. 4. 1/29/19, Diaz Vocational Report, p. 6.)

16
17 The WCJ correctly determined that applicant is permanently totally disabled, based upon
18 substantial evidence in the record that establishes that applicant is unable to benefit from vocational
19 rehabilitation or return to full time employment in the labor market.

20 Labor Code section 4660 provides that permanent disability is determined by consideration of
21 whole person impairment within the four corners of the AMA Guides to the Evaluation of Permanent
22 Impairment, Fifth Edition (AMA Guides), the proper application of the PDRS in light of the medical record
23 and the effect of the injury on the worker's future earning capacity. (*Brodie v. Workers' Comp. Appeals*
24 *Bd.* (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565] ["permanent disability payments are intended
25 to compensate workers for both physical loss and the loss of some or all of their future earning capacity"];
26 *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd. (Fitzpatrick)* (2018) 27
27 Cal.App.5th 607, 614 [83 Cal.Comp.Cases 1680]; *Almaraz v. Environmental Recovery Service/Guzman v.*

1 *Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) as affirmed by
2 the Court of Appeal in *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187
3 Cal.App.4th 808 [75 Cal.Comp.Cases 837] (*Almaraz/Guzman*). It may also be shown by rebutting the
4 diminished future earning capacity factor supplied by the PDRS. (*Ogilvie v. Workers' Comp. Appeals Bd.*
5 (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] (*Ogilvie*); *Contra Costa County v. Workers'*
6 *Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119]; c.f. *LeBoeuf v. Workers'*
7 *Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587].)

8 To rebut a scheduled permanent disability rating, applicant must establish that his future earning
9 capacity is actually less than that anticipated by the scheduled rating. The court in *Ogilvie, supra*, addressed
10 the question of: "What showing is required by an employee who contests a scheduled rating on the basis
11 that the employee's diminished future earning capacity is different than the earning capacity used to arrive
12 at the scheduled rating?" (*Ogilvie*, 197 Cal.App.4th at p. 1266.) The primary method for rebutting the
13 scheduled rating is based upon a determination that the injured worker is "not amenable to rehabilitation
14 and, for that reason, the employee's diminished future earning capacity is greater than reflected in the
15 scheduled rating." The employee's diminished future earnings must be directly attributable to the
16 employee's work-related injury and not due to nonindustrial factors such as general economic conditions,
17 illiteracy, proficiency in speaking English, or an employee's lack of education. (*Ogilvie*, 197 Cal.App.4th
18 at pp. 1274–1275, 1277.) The evidence in the record here is not sufficient to rebut the scheduled rating.

19 The issue here is whether the vocational evidence constitutes substantial evidence to support the
20 conclusion that applicant was permanently totally disabled due to his inability to benefit from vocational
21 rehabilitation, per *Ogilvie v. Workers' Comp. Appeals Bd.*; *Contra Costa County v. Workers' Comp.*
22 *Appeals Bd. (Dahl)* and *LeBoeuf v. Workers' Comp. Appeals Bd.*

23 In *Dahl*, the Court of Appeal held that to rebut the scheduled rating, applicant must prove that the
24 industrial injury precludes vocational rehabilitation, writing in pertinent part as follows:

25 The first step in any *LeBoeuf* analysis is to determine whether a work-related
26 injury precludes the claimant from taking advantage of vocational
27 rehabilitation and participating in the labor force. This necessarily requires
an individualized approach...It is this individualized assessment of whether
industrial factors preclude the employee's rehabilitation that *Ogilvie*

1 approved as a method for rebutting the Schedule.
2 (*Dahl*, 80 Cal.Comp.Cases at 1128.)

3 The vocational evidence the WCJ relied upon, the reporting of Mr. Diaz, indicates that applicant is
4 not amenable to vocational rehabilitation and that Dr. Knight's and Dr. Rovner's work restrictions preclude
5 applicant from returning to full time employment. Mr. Diaz's "individualized assessment" of the vocational
6 factors affecting applicant's ability to return to work shows that the medical restrictions do preclude
7 applicant from gainful employment. We find his analysis of applicant's vocational limitations to constitute
8 substantial evidence to support the WCJ's determination.

9 Accordingly, we will affirm the WCJ's determination and deny defendant's Petition for
10 Reconsideration. The WCJ relied upon substantial evidence to conclude applicant rebutted the scheduled
11 rating of his permanent disability and that applicant is permanently totally disabled on the grounds that he
12 is not amenable to benefiting from vocational rehabilitation.

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1 For the foregoing reasons,

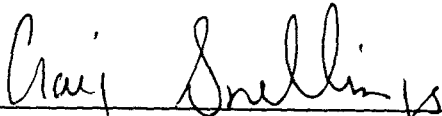
2 **IT IS ORDERED** that the Petition for Reconsideration, filed December 24, 2019, is **DENIED**.

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4 **WORKERS' COMPENSATION APPEALS BOARD**

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8 **MARGUERITE SWEENEY**

9 **I CONCUR,**

10
11 
12 **CRAIG SNELLINGS**

13 **PARTICIPATING, BUT NOT SIGNING**
14

15 **DEIDRA E. LOWE**



16
17 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

18 **FEB 24 2020**

19
20 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**
21 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

22 **THOMAS HASSON**
23 **BOXER & GERSON**
24 **HOMAN & STONE**

25 **SV/pc**
26
27



**STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board**

Thomas Hasson, applicant

vs.

Ann Taylor and Travelers Insurance; Defendant

LILLA J. SZELENYI

WORKER'S COMPENSATION ADMINISTRATIVE LAW JUDGE

ADJ8393129

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

Defendant filed a timely, verified, petition for reconsideration from my finding that applicant is totally permanently disabled. Applicant filed a timely verified answer.

QUESTIONS PRESENTED

Is applicant permanently totally disabled?

Is the apportionment provided by Dr. Knight substantial medical evidence.

INTRODUCTION

Thomas Hasson, applicant, was employed by Anne Taylor as a stocker. Applicant filed a claim for injury to his bilateral hips and back alleging that the cumulative trauma of his work as a stocker during the time period of January 1, 1993 until August 30, 2011 caused the physical problems he is experiencing with his hips and back. The carrier denied liability to applicant's left hip but accepted liability for the right hip as well as the back.

It was my finding that both hips and back were injured on a cumulative trauma basis.

Although applicant was evaluated by Dr. Rovner in the capacity of a panel qualified examiner, the parties agreed to use Dr. Knight, the applicant's treating physician to address applicant's level of permanent disability as it pertains to the hips (See Minutes of Hearing, June 7, 2017).

Because of the agreement of the parties, I issued my finding based on Dr. Knight's opinion, not on Dr. Rovner.

Dr. Knight on June 22, 2017 issued a report in which he declared applicant's condition to be permanent and stationary. In addition to providing ratable factors of impairment under the AMA guides, the doctor stated that "Tom remains incapable of returning to work as a result of ongoing pain."

From a medical perspective, relying on Dr. Knight's report, applicant is totally permanently disabled.

Dr. Knight apportioned 50% of applicant's permanent disability to preexisting conditions by stating "I would apportion 50% to pre-existing conditions and 50% to aggravation from work activity".

I found that Dr. Knight's apportionment conclusions as stated in his report of June 22, 2017 is not substantial medical evidence since the doctor never explained in his report what preexisting conditions caused 50% of applicant's disability.

In addition I noted in my opinion on decision that total permanent disability finding does not have to be issued on a medical basis alone. It can also be issued on a vocational basis. In this case the applicant was found to be totally disabled from a vocational perspective as well by Mr. Diaz. Mr. Diaz issued a report on January 29, 2019. In his report Mr. Diaz states that applicant does not possess the ability to successfully interview for jobs in the open labor market. Applicant suffers from significant pain as discussed by the two evaluating physicians, Dr. Knight and Dr. Rovner. This pain impacts his ability to sit, stand and walk. The pain requires him to use a walker or a cane to ambulate. (See Diaz report page 34). Mr. Diaz concludes his report by stating that were it not for the cumulative trauma injury, applicant would have continued to work in his usual and customary occupation.

DISCUSSION

I do not believe there is any other way than to interpret Dr. Knight as stating applicant is permanently totally disabled. In addition to stating that applicant is unable to return to work because of his pain, in his deposition of June 25, 2018, (Applicant's Exhibit 3), Dr. Knight states that applicant could not return to the open labor market (page 14, lines 8-10). Dr. Knight agreed that applicant would not be able to work for even as long as an hour in an 8 hour work day and would have difficulty with sitting, standing, walking and driving for even less than an hour (page 14, lines 15-20).

As far as apportionment is concerned, the Appeals Board, En Banc in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, held that "Because the language of [Labor Code] section 4663 does not limit the types of "other factors" that may be considered as a non-industrial cause of permanent disability, then the 'other factors' now may include pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions, provided there is substantial medical evidence establishing that these other factors have caused permanent disability". (*Escobedo, supra*, 70 Cal.Comp.Cases at page 617). The Board concluded in *Escobedo* that apportionment "now can be based on non-industrial pathology, if it can be demonstrated by substantial medical evidence that the non-industrial pathology has caused permanent disability." (*Escobedo, supra*, 70 Cal.Comp.Cases at page 618).

Prior to 2004, a disability resulting from industrial and nonindustrial causes was only apportionable if part of the disability would have resulted from the normal

progress of the underlying nonindustrial diseases. If the disability arose in part from an interaction between an industrial and a nonindustrial cause, but the nonindustrial cause would not have given rise to a disability, no apportionment would have been allowed. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313). The Brodie court created a new approach to apportionment. According to this court, one must look at the current disability and parcel out its causative sources and decide what amount is directly caused by the current industrial source. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1328).

E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (2006) 145 Cal.App.4th 922, 927 held that "apportionment may be based on pathology and asymptomatic prior conditions".

In order for apportionment to be legal, the medical report of the evaluating physician must be substantial medical evidence on the issue of apportionment. Dr. Knight's report is substantial medical evidence on the issue of overall permanent disability but is not substantial medical evidence on the issue of apportionment.

Dr. Knight apportioned 50% of applicant's permanent disability to preexisting conditions by stating "I would apportion 50% to pre-existing conditions and 50% to aggravation from work activity".

Dr. Knight's apportionment conclusion as stated in his report of June 22, 2017 is not substantial medical evidence since the doctor never explained in his report what preexisting conditions caused 50% of applicant's disability. When questioned about his apportionment finding, Dr. Knight in his report of February 26, 2018 stated "Mr.

Hasson had likely some pre-existing conditions that predisposed him to the development of arthritis". Again Dr. Knight's apportionment is not substantial medical evidence since he does not state what pre-existing condition predisposed applicant to arthritis. In fact Dr. Knight proceeds to say that "there was no clear evidence of degenerative condition prior to his employment" and concludes by saying that "development of arthritis would not be unexpected given the nature of his work".

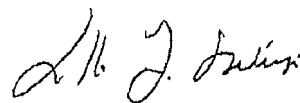
In other words, Dr. Knight appears to be saying that applicant's disability should be 50% apportioned to non-industrial factors (arthritis) yet concludes that it is the work activity that caused the arthritis to exist.

In his deposition, applicant's exhibit 3, Dr. Knight muddies his apportionment theory further by stating that "most apportionment is speculation." (See deposition of Dr. Knight, June 25, 2018, page 24, line 8).

RECOMMENDATION

I recommend the Petition for Reconsideration filed by defendant be *DENIED*.

.DATE: 01/22/2020



Lilla J Szelenyi
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:
ANN TAYLOR, US Mail
BOXER GERSON OAKLAND, US Mail
HOMAN STONE REDLANDS, US Mail
THOMAS HASSON, US Mail
TRAVELERS WALNUT CREEK, Email

PARTIES SERVED AS INDICATED
ON THE OFFICIAL ADDRESS RECORD.

DATE:

BY:

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ADJ8393129

1/22/20 Chh

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