

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

Case No. ADJ9910337

**RAFAEL SANDOVAL,**

*Applicant,*

vs.

**THE CONCO COMPANIES and ZURICH  
INS. CO., administered by ATHENS  
ADMINISTRATORS,**

*Defendants.*

**REPORT AND RECOMMENDATION ON  
PETITION FOR RECONSIDERATION**

**INTRODUCTION**

By a timely and verified Petition for Reconsideration (Petition) filed on October 13, 2017, defendant seeks reconsideration of my September 21, 2017 Findings and Award and Order, wherein I found, among other things, that applicant, while employed on January 23, 2015 as an iron worker at Sunnyvale, California by The Conco Companies, sustained injury arising out of and occurring in the course of employment to his cervical spine and lumbar spine, causing permanent disability of 100%. I also found that there is no basis for defendant's objection to the admissibility of the report of applicant's vocational expert, Eugene Van de Bittner, and that defendant is liable for payment of Mr. Van de Bittner's report.

Defendant contends: (1) applicant is not entitled to a vocational expert for his 2015 injury because of the legislative changes found in Labor Code section 4660.1, applicable to injuries after January 1, 2013; (2) applicant cannot be found to be 100% permanently disabled because he is amenable to retraining; (3) the WCJ should have relied on the sound report of

defendant's vocational expert, Thomas Linder, and not on the unreliable report of applicant's vocational expert, Mr. Van de Bittner; and (4) defendant should not have to pay for Mr. Van de Bittner's report, which also should not have been admitted into evidence.

I have reviewed defendant's Petition, the Answer, and the entire record in this matter. Based upon my review, I recommend that reconsideration be denied.

### FACTUAL BACKGROUND

The factual background of this case, as set forth at pages 1-4 of the Opinion on Decision (Opinion), is as follows (emphasis in original):

At trial, applicant testified credibly that he currently lives in Pittsburg, California with his wife, his 8-year-old son and his 11-year-old daughter, and that he last worked on approximately January 23, 2016. His typical day now starts when he gets up at the same time as his children before they go to school. He does his exercises/therapy in the morning, then has to lay down because of pain. He can shower by himself, but needs help afterwards putting on his socks. He can manage to put on his shoes on his own.

He is right handed, and now cannot extend the fingers on his right hand fully. *(He has demonstrated for the Court that he is able to move his middle knuckle to approximately 50 percent of what would be expected.)* He needs to massage his hands, as they have spasm when he extends them too much. He also has leg spasms every morning, in the back and in the front. He needs help to massage the spasms in his legs. This occurs throughout the day. He cannot put weight on his right leg when it is spasming. *The Judge noted that he is using a cane at the time of the trial.*

Applicant has difficulty with urination and defecation. He gets a feeling like "butterflies" in his stomach regarding his bladder issues. He cannot feel if he has completely urinated or not, when he attempts to do so. He does not have full control of his bladder. He has been using a catheter for approximately the past two months, which he can use on his own. He does not have to have a bag for the catheter yet. Regarding defecation, he has

constipation from the medication he is taking. He is unable to fully clean himself after defecating and needs to go into the shower in order to do so after each defecation. In order to work, he would need to have a job which had a bathroom with a shower as part of the facility. He has soiled his pants due to his defecation issues.

His pain on a scale of one to ten is a six at a minimum and goes up to nine even with his medication. He is currently taking only one Norco pain pill per day, as he has to pay for this on his own. His most recent treating physician has denied him any further pain pills.

After his kids leave for school, he goes from the bed to the chair to the floor, where he has to lie down as this is the only way to control his pain. He is unable to make his own lunch, and one occasion recently he burned his hand on a small oven when he tried to make his own sandwich. He also has spasms in his left hand and in his neck. After lunch, he goes from the floor to his bed. In the evening, he will lie on the floor in order to control the pain. He goes to bed at approximately 9:00 p.m. and is able to sleep seven or eight hours.

He testified on one recent incident when he went to Costco, he had to use one of the electric carts or scooters that they provided. He cannot cook his own dinner.

He can drive from his home as far as his children's school, which is approximately five miles away. He does not want to drive any further because of spasms in his foot, and his foot falling asleep.

He cannot do chores inside or outside of the house due to his pain. When his pain is eight or nine, he will then be on the floor in order to decrease the pain. He will sometimes have to be there on the floor for three or four hours in order to decrease the pain. He has not attempted to ride a bus in the past 30 years.

He can walk two blocks, but then needs to sit on his walker, which has a built-in bench and hand breaks. He can walk at home without the use of a cane or walker, because he is able to hold on while he is moving around his house.

He was seen by his vocational expert (Mr. Van de Bittner), as well as the defense vocational expert (Mr. Linder), and answered truthfully regarding questions posed by both of the

vocational experts. He does not believe that he can hold a job at this point for numerous reasons, including difficulty with driving, inability to walk more than two blocks and his mouth getting dry. *(He had to stop testimony at this point in order to get water to continue testifying.)* He cannot perform activity without getting exhausted, his need to lie down, the fact that getting up from a seated or lying down position is extremely difficult, problems with the toilet and his increasing pain with activity.

He also related that recently he attempted to hook up his cable, but was unable to do so because of his condition. His children had to complete the work for him. (Minutes of Hearing and Summary of Evidence [MOH/SOE], June 21, 2017 at pp. 5-7.)

On cross-examination, he stated that, regarding his bladder and bowel issues, he does not recall being asked about this by Dr. Mandell. He noted that he believed that there were records of him having these problems at the time of the examination by Dr. Mandell. *(The Court's attention was then brought to page 3 of Dr. Mandell's August 18, 2016 report [Joint Exhibit 101] at paragraph 3, where Dr. Mandell indicated that his bladder and bowel problems were not as extensive as applicant's testimony at trial.)*

Applicant was then asked about the Functional Capacity Evaluation from Rachel Feinberg (Exhibit B). He did not talk with her about the test results.

In applicant's job as an iron worker, he would go all over the Bay Area. All of his work as an iron worker was physical work, and he was not a supervisor. In a prior job at Bechtel, he was a supervisor where he managed employees, did paperwork and worked on a computer. He had 30 days of computer training. He worked on site, but had an office. He does not have a computer degree or certification.

He taught himself English, which is not his native language. He only finished a sixth grade education. He met with his vocational expert in the expert's office in Walnut Creek.

He was then asked about records from his prior family physician, Dr. Kassel. There is an entry at page 20 of these records on November 3, 2014 (Exhibit A) which is a massage therapy note. He recalled receiving massage, but did not recall if it was to his low back, as the note indicates. He believes that the

notes from Dr. Kassel would be correct. At page 34 of the records of Dr. Kassel, an entry of November 22, 2011 indicated that he had low back pain in 2011. Applicant agrees with the statement in Dr. Kassel's report, although he could not recall it specifically.

Applicant has not looked for work since the date of injury, due to his disability and his focus on getting better. He knows how to use the Internet.

Applicant's wife drove him today. He did not bring a walker with him to trial, just his cane. (*MOH/SOE, supra*, at pp 7-8.)

### DISCUSSION

My review of defendant's Petition does not cause me to change my opinion. In addition to the reasoning and rationale set forth in the Opinion on Decision, I make the following observations.

With respect to defendant contention that the legislative changes for injuries on or after January 1, 2013 mean that applicant is not entitled to a vocational expert, I disagree. The main thrust of defendant position is that Labor Code section 4660.1 (applicable for injuries on or after January 1, 2013) does not refer to either "diminished ability to compete in the open labor market" or "diminished future earning capacity (DFEC)." There is, however, a reference to an "adjustment factor" of 1.4 for all body parts in subsection (b) of Labor Code section 4660.1, which, when read in the context of Labor Code section 4660 and the entire permanent disability scheme premised on the AMA Guides, refers to the DFEC. This was recognized by the Appeals Board in *Robles v. State of California*, 2015 Cal. Wrk. Comp. P.D. LEXIS 697, which states, "For injuries on or after January 1, 2013, section 4660.1 set the DFEC multiplier to 1.4 for all injuries."

Lastly, I find no support for defendant's contention that notice of a vocational expert appointment should be subject to the same requirements as notice of a QME examination. The

case of *Costa v. Hardy Diagnostic* (2007) 72 Cal. Comp. Cases 1492 (Appeals Board en banc decision), cited by defendant in support of its position, refers to the standard for costs of a vocational expert report, but not to the procedure to obtain such a report. Applicant correctly points out in his Answer that there is no statute, rule or regulation which supports this assertion of defendant.

**RECOMMENDATION**

Based upon the foregoing, it is respectfully recommended that reconsideration be denied.

Dated: November 29, 2017



**JAMES GRIFFIN**  
**WORKERS' COMPENSATION**  
**ADMINISTRATIVE LAW JUDGE**

**SERVICE:**

ON: 11/29/17 BY: *Lily Acosta*

**PARTIES:**

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