

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **RAFAEL SANDOVAL,**

5 *Applicant,*

6 **vs.**

7 **THE CONCO COMPANIES; ZURICH**
8 **INSURANCE COMPANY, administered by**
9 **ATHENS,**

10 *Defendants.*

Case No. **ADJ9910337**
(Oakland District Office)

OPINION AND DECISION
AFTER RECONSIDERATION

11 We granted reconsideration in this matter to provide an opportunity to further study the legal and
12 factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our
13 Decision After Reconsideration.

14 Defendant, The Conco Companies, by and through its insurer, Zurich Insurance Company, filed a
15 Petition for Reconsideration from the Findings, Award and Order, issued September 21, 2017, in which a
16 workers' compensation administrative law judge (WCJ) found applicant Rafael Sandoval sustained 100%
17 permanent disability as a result of a January 23, 2015 admitted industrial injury to his cervical and lumbar
18 spine while employed as an iron worker. The WCJ also found no basis for defendant's objection to the
19 admissibility of applicant's vocational expert's report, and ordered defendant to pay the cost of his report.

20 Defendant contests the WCJ determination, contending first, that the WCJ erred in relying upon
21 the report of applicant's vocational expert because under Labor Code section 4660.1, which removed
22 language giving consideration to diminished future earning capacity, such reports are not valid for
23 determination of permanent disability for injuries occurring after January 1, 2013. Second, defendant
24 argues that the WCJ erred in relying upon applicant's lack of amenability to benefit from vocational
25 rehabilitation, under *Ogilvie v. Workers' Comp. Appeals. Bd.* (2011) 197 Cal.App.4th 1262 [76
26 Cal.Comp.Cases 624], arguing that the evidence establishes applicant is amenable to vocational
27 rehabilitation, and the WCJ relied upon a factor not supported by the medical evidence, to wit, applicant's

1 claimed need to be in close proximity to a toilet due to problems with his bowels. Third, defendant contends
2 the reporting of applicant's vocational expert is not substantial evidence because he did not review the
3 deposition of the Agreed Medical Examiner (AME), and thus did not consider the AME's finding that
4 applicant was entitled to the Supplemental Job Displacement Benefit, or his review of applicant's
5 Functional Capacity Evaluation. Defendant asserts that the report of its vocational expert should have been
6 relied upon. Defendant also argues that applicant's vocational expert's report should have been excluded,
7 and defendant should not be required to pay for the report, since applicant failed to provide defendant with
8 advance notice of the vocational evaluation, based upon the notice requirements for QME examinations in
9 Rule 34.

10 Applicant has filed an Answer to defendant's Petition for Reconsideration. The WCJ has prepared
11 a Report and Recommendation on Petition for Reconsideration, in which he recommends that
12 reconsideration be denied.

13 We have considered the allegations and arguments of the Petition for Reconsideration, as well as
14 the answer thereto, and have reviewed the record in this matter and the WCJ's Report and Recommendation
15 on Petition for Reconsideration of November 29, 2017, which considers, and responds to, each of the
16 defendant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's
17 Report, which we adopt and incorporate as the decision of the Board, we will, as our Decision After
18 Reconsideration, affirm the WCJ's Findings, Award and Order.

19 The finding of permanent total disability due to applicant's inability to return to gainful
20 employment or benefit from vocational rehabilitation is based upon the physical limitations described in
21 the medical record, the vocational evidence and applicant's credible and un rebutted testimony, as detailed
22 in the WCJ's Report and Opinion on Decision.

23 Dr. Mandell, the AME in orthopedics, described applicant's injury as severe spinal stenosis and
24 disc herniation in the cervical spine and lumbar disc disease with radiculopathy, requiring four level
25 laminoplasty from C3-C7, with hardware implantation, as well as a subsequent cervical discectomy. Dr.
26 Mandell apportioned 10% of applicant's neck disability to congenital spinal stenosis, and found all of his
27 lumbar disc disability to be industrial. Dr. Mandell reported applicant's subjective complaints of constant

1 neck pain, with stiffness and loss of motion, trapezii and bilateral shoulder pain, and numbness in both
2 upper limbs. Applicant described pain with pushing, pulling, lifting and carrying. He cannot lift anything
3 heavier than a gallon of milk. Applicant also complained of constant low back pain in the right lower back,
4 radiating down the right leg, with pain from the thigh to the knee. He has numbness and weakness in the
5 right leg. Dr. Mandell also reported applicant has a problem with constipation, but no other bowel or
6 bladder problems.

7 However, at trial applicant testified to having problems with urination and defecation, explaining
8 that he lacks full control over his bladder and he cannot feel if he has completed urinating. He has been
9 using a catheter on his own for the previous two months. He also testified to having constipation due to his
10 medications. Because he cannot completely clean himself after a bowel movement, he needs to take a
11 shower each time. He has also soiled his pants due to his problem with defecation.

12 Applicant described limitations in the use of his right dominant hand, as he cannot fully extent his
13 fingers. In his Summary of Evidence, the WCJ indicated that applicant could move his middle knuckle to
14 approximately 50% of what would be expected. He has spasms when he attempts to extend his hands too
15 much. He also reported having leg spasms in the morning and throughout the day, and cannot put weight
16 on his right leg when it is spasms. The WCJ noted that applicant was using a cane at trial.

17 Applicant testified that his pain is at minimum a 6 out of 10, and goes up to 9, even when he is
18 taking his medication. He lies down on the floor, sometimes up to 3 to 4 hours, to relieve his pain. He is
19 unable to do chores at home due to his pain, and he requires assistance putting on socks. According to the
20 WCJ's summary of evidence, applicant testified:

21 He does not believe that he can hold a job at this point for numerous reasons,
22 including difficulty with driving, inability to walk more than two blocks and
23 his mouth getting dry. (He had to stop testimony at this point in order to get
24 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.

25 Mr. Van de Bittner, applicant's vocational expert, evaluated applicant on December 15, 2016, and
26 issued a report on applicant's vocational feasibility, employability and earning capacity. The evaluation
27 considered the AME's medical report as well as the results of a functional capacity evaluation performed

1 in October of 2016. The FCE was consistent with the limitations described by the AME as well as
2 applicant's trial testimony. Applicant had performed heavy to very heavy work as an ironworker, but his
3 functioning was reduced to a semi-sedentary level of physical functioning due to his low tolerance for
4 prolonged activities.

5 Based on the outcome of the functional capacity testing, Mr. Sandoval
6 demonstrated the ability to lift 10 lbs. on an occasional basis. He is unable
7 to perform bilateral hand carry tasks at this time due to his balance issues
8 and dependence on a single point straight cane for ambulation. He is able to
9 unilaterally carry 5 lbs. while using his single point straight cane in the non-
10 active hand on an occasional basis. He is able to sit, stand and walk on a
11 frequent basis throughout the day to build up his physical conditioning and
12 endurance. He requires the use of a single point cane when ambulating and
13 his current walking tolerance is 600 feet. He was able to push/pull 30 lbs. on
an occasional basis. He was able to negotiate stairs using the handrail and
his single point straight cane with a slow speed. He had moderate difficulty
with kneeling and squatting activities. Mr. Sandoval demonstrated mild
difficulty with gripping, grasping, reaching, pinching, fine manipulation
dexterity and medium motor dexterity. He fatigues quickly and his
coordination declined rapidly. Mr. Sandoval is right hand dominant and is
significantly weaker on his right upper quarter compared to his left upper
quarter.

14 Applicant described his problem with urination, that he has a lack of sensation as to when he has
15 completed urination, such that he will continue to urinate after he gets up from the toilet. This happens
16 about 3 times per day or night, requiring him to change his underwear.

17 Mr. Van de Bittner concluded that applicant was not capable of returning to the labor market due
18 to his physical limitations, noting that he lacked transferrable skills without consideration of non-industrial
19 factors, per the requirements of *Ogilvie*. When considering applicant's vocational feasibility and
20 amenability to rehabilitation, Mr. Van de Bittner found:

21 In summary, when considering the opinions of Dr. Mandell, Ms. Semplinski,
22 and Dr. Rachel Feinberg in combination, Mr. Sandoval has a very limited
23 medical capacity and functional capacity to benefit from vocational
24 rehabilitation and to be amenable to rehabilitation. However, when
25 considering the opinions of Dr. Mandell, Ms. Semplinski, and Dr. Rachel
Feinberg in combination with all of the vocational factors described above,
Mr. Sandoval is unable to benefit from vocational rehabilitation services and
lacks the capacity to be amenable to rehabilitation for regular jobs in the
open labor market either full-time or part-time.

26 On this record, we concur with the WCJ's determination that applicant is permanently totally
27 disabled based upon his physical restrictions and the vocational evidence that establishes applicant's

1 industrial limitations preclude him from benefiting from vocational rehabilitation. For the reasons
2 discussed in the WCJ's determination and in his Report, we concur that the vocational evidence is
3 admissible to address the issue of applicant's amenability to vocational services. Additionally, there is no
4 requirement that applicant provide notice to defendant prior to scheduling a vocational evaluation, as the
5 rule defendant cites, Rule 34 (Cal. Code Regs., tit. 8, § 34.) is applicable to QME evaluations, not
6 vocational evaluations.

7 Accordingly, we affirm the WCJ's determination.

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For the foregoing reasons,

IT IS ORDERED as our Decision After Reconsideration that the Findings, Award and Order,
issued September 21, 2017, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD



MARGUERITE SWEENEY

I CONCUR,



DEIDRA E. LOWE



JOSÉ H. RAZO



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUG 12 2018

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

**RAFAEL SANDOVAL
APPEL LAW FIRM
LAW OFFICE OF VINCENT PURINTON**

SV/pc

