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**WORKERS' COMPENSATION APPEALS BOARD**  
**STATE OF CALIFORNIA**

**JAMES BURR,**

*Applicant,*

**vs.**

**THE BEST DEMOLITION & RECYCLING  
CO., INC.; STATE COMPENSATION  
INSURANCE FUND,**

*Defendants.*

Case No. **ADJ6860504**  
(Van Nuys District Office)

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

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1 For the foregoing reasons,

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

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4 **WORKERS' COMPENSATION APPEALS BOARD**

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9 **MARGUERITE SWEENEY**

10 **I CONCUR,**

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12 **ANNE SCHMITZ** **DEPUTY**

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15 **KATHERINE ZALEWSKI** **CHAIR**



18 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

19 **APR 19 2018**

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

22 **JAMES BURR**  
23 **KOSZDIN, FIELDS, SHERRY & KATZ**  
24 **STATE COMPENSATION INSURANCE FUND**

25 **bea**

26  
27 **BURR, James**

**CASE NO. ADJ6860504**

**JAMES BURR**

**- vs. -**

**THE BEST DEMOLITION &  
RECYCLING CO., INC.;  
STATE COMPENSATION  
INSURANCE FUND**

**ADMINISTRATIVE LAW JUDGE:**

**S. MICHAEL COLE**

**TRIAL DATE: 12/12/17**

**REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION**

**I**

**INTRODUCTION**

The undersigned issued his Opinion on Decision and Findings of Fact & Award on 2/6/18. Applicant, James Burr, has filed a timely, verified Petition for Reconsideration on 2/22/18.

Applicant contends that:

1. The Appeals Board acted without or in excess of its power,
2. The evidence does not justify the Findings of Fact,
3. The Findings of Fact do not support the Order, Decision or Award.

The undersigned found that applicant was entitled to a permanent disability award of 88%. Applicant contends that the undersigned committed err by failing to find that he is entitled to an award of 100% permanent total disability (PTD) without apportionment.

In his petition, applicant makes the same three arguments that he made at the time of trial herein to support his claim to entitlement to a 100% PTD award: (1) that he meets the statutory criteria of L.C. §4662(a)(3) of "near total paralysis", (2) vocational reporting supports his claim that he is unable to work due solely as a result of his work injury, and (3) his medical condition following his most recent lumbar surgery, is an entirely new condition and diagnosis caused by the surgery which precludes apportionment pursuant to Hikida. The undersigned disagrees with applicant's analysis.

## II FACTS

Applicant, James Burr, began his employment with The Best Demolition & Recycling Co., Inc. (Demolition) in February 2008. His job duties involved walking a potential customer's work site, providing estimates on requested demolition work, and oversight of contracted demolition work.

During June and July 2008, only four months after starting his employment with Demolition, applicant was hospitalized on a non-industrial basis at Los Robles Hospital. He presented at that time with a complicated medical condition initially identified as a bladder infection resulting in sepsis. Additional testing and reporting included diagnoses of right shoulder cellulitis and abscess (applicant had two prior non-industrial right shoulder surgeries – detailed below), chronic back pain, and what was characterized in the medical reporting herein as “multiple system dysfunction including hypokalemia, hyponatremia, hypophosphatemia, hypomagnesemia, seizure disorder, acute renal failure, tubular necrosis, and attendant encephalopathy”. During his hospitalization, applicant underwent thoracic/lumbar decompression/laminectomy at T11-L3, foraminotomies at T12-L2, additional procedures to address discitis due to an epidural abscess and sepsis, as well as identified kyphotic deformity at T12-L3, and chronic diminished bone mineral density resulting in osteoporosis. The surgeries were performed by applicant's private orthopedist, Kapil Moza, M.D.

Despite the extensive treatment, following a period of post-surgery recovery, applicant was able to return to his usual and customary work duties with Demolition by September 2008.

Less than three months later, on 12/1/08, while at work, applicant fell backwards onto his back at a demolition work site. Although the fall was witnessed, it appears from the history contained in the submitted medical reporting that applicant did not initially report an injury associated with the fall. Nearly two months later, however, applicant returned to Dr. Moza, complaining of severe back pain. Following diagnostic testing that was interpreted to evidence a progression of the deformity at T12-L1, applicant was hospitalized and underwent a spinal fusion at T10-L3 on 1/27/09. Approximately six weeks later, applicant was hospitalized again due to increasing pain and underwent a revision fusion procedure this time encompassing T8-L3.

Applicant subsequently obtained representation and filed his claim herein. The claim was initially denied by defendants. The parties eventually agreed to use Lee Wood, M.D. as an orthopedic agreed medical evaluator (Court Exhibits 1-9).

By 2012, applicant's pain levels were chronicled at 9-10 out of 10 with radiculopathy into the feet making ambulation difficult. Additional surgery was recommended at that time.

A prior trial was held herein before WCJ Cohn (now retired) on 3/26/13 on the issue of whether applicant sustained a compensable injury. Following trial, WCJ Cohn issued his Opinion on Decision and Findings and Award dated 4/16/13 finding in relevant part that applicant sustained a compensable injury as alleged. This Award was subsequently rescinded and then reinstated with amendments based upon the parties' stipulations on 6/11/13.

Over the intervening years, applicant has continued to treat for his thoracic/lumbar condition, as well as for compensable consequence injuries to his psyche, gastrointestinal system, urologic (bladder and testicles), aggravation of preexisting diabetes, and hypertension. Urinary incontinency and sexual dysfunction were noted in the medical reporting by 12/9/09. Around the same time anxiety and depression were noted, although it does not appear that applicant received any psychiatric treatment until 2015.

Due to increasing back related symptoms, applicant underwent additional surgery on 4/26/14 that resulted in a fusion from T8-L5. The surgery was complicated by osteomyelitis discitis at L3-4 with abscess. Post-surgery applicant developed an infection at the surgery site that resulted in numerous additional surgeries as well as hospitalization for nearly four months. Increased loss of lower extremity strength, sensation, and pain resulted in applicant having to utilize a wheelchair. Following that period of hospitalization, and after additional treatment failed to alleviate severe pain symptoms, applicant underwent additional surgery for the placement of a pain pump.

Other potentially relevant medical/social/litigation history includes: (1) dropped out of school after the 11<sup>th</sup> grade and joined the U.S. Marines wherein he served from 1972-73, (2) father died from cancer at age 75, mother died from cancer at age 84 and brother died of a heart attack at age 60, (3) history of alcohol abuse with abstinence beginning in 2011, (4) married for 25+ years with three children, (5) prior (date unspecified) suicide attempt utilizing cleaning fluid, (6) 2002 diagnosis of bipolar disorder, (7) 2002 history of prior gram positive sepsis was noted, (8 ) prior history of hypercholesterolemia, hypertriglyceridemia, anxiety disorder, liver

disease with possible cirrhosis, cellulitis, hypokalemia, hyperglycemia, renal insufficiency, and rhabdomyolysis, (9) 9/30/03 assaulted by neighbor resulting in traumatic brain injury due to right side skull fracture, multiple rib fractures, skilled nursing required for a number of months with residual memory issues, (10) 5/21/04 suicide attempt by overdose, (11) 10/28/04 right shoulder replacement surgery, with diagnosis of severe degenerative arthritis, (12) 1/8/05 right shoulder subscapularis tendon repair.

Following trial, the undersigned issued his Opinion on Decision and Findings of Fact and Award on 2/6/18, finding in relevant part that applicant was entitled to a permanent disability indemnity award of 88% after apportionment. In relationship to that finding, the undersigned also found that applicant did not meet the statutory requirements of "near total paralysis" pursuant to L.C. §4662(A)(3), that applicant's vocational reporting was not substantial evidence to support his claim that he was permanently totally disabled solely due to his work injuries herein, and that the decision in Hikida was not applicable to the facts of this case. It is from this finding that applicant has petitioned for reconsideration.

### III

#### DISCUSSION

##### **A. DID THE UNDERSIGNED COMMIT ERR BY FAILING TO FIND THAT APPLICANT MET THE STATUTORY REQUIREMENTS OF L.C. §4662(a)(3)?**

Applicant contends that he is entitled to a conclusive presumption of total disability pursuant to L.C. §4662(a)(3), alleging that his injury herein has resulted in "practically total paralysis". In this case applicant's limitations are based upon his lumbar spine injury which has affected his bilateral lower extremities. AME, Dr. Woods has concluded that applicant is medically a paraplegic based upon his bilateral lower extremity leg weakness (resulting in the inability to weight bear), lack of sensation, and high levels of pain, all of which result in his need to use a wheelchair. No such findings were made with respect to the upper extremities. Applicant testified at trial that he is able to transfer from his wheelchair to the toilet, or to the shower, utilizing a board.

In the WCAB panel decision of Kit Dawson v. San Diego Transit, 2015 Cal. Wrk.Comp. P.D. LEXIS 745, the applicant was found to be "near quadriplegia" based on

complete paralysis of three extremities and near paralysis of the fourth. L.C. §4662(a)(3) requires "practically total paralysis", which the undersigned interprets requires a finding that functionally equates to "near quadriplegia." In this case, although applicant is not totally paralyzed in his bilateral lower extremities, and clearly suffers from functional or "near paraplegia", the undersigned does not believe that his industrial injury has resulted in practically total paralysis.

Based on the foregoing, the undersigned found that applicant did not meet the definition of "practically total paralysis" and as a result further found that L.C. §4662(a)(3) was not applicable to applicant's injury/impairment. The undersigned does not believe that he committed err in having made those findings.

**B. DID THE UNDERSIGNED COMMIT ERR IN FINDING THAT APPLICANT'S VOCATIONAL REPORTING WAS NOT SUBSTANTIAL TO SUPPORT HIS CLAIM THAT HE HAD NO EARNING CAPACITY DUE SOLELY TO HIS INDUSTRIAL INJURY?**

In the alternative, applicant contends that the reporting from his vocational consultant, Gail Maron, M.A. CRC, SDMS, CCM (Applicant Exhibit 17), is substantial evidence to support a finding that applicant would be unable to return to employment based upon industrial factors only. A substantial opinion in this regard could support a finding that applicant was permanently totally disabled according to the fact pursuant to L.C. §4662(b).

Ms. Maron notes at page 12 of her report that: "It was difficult to sort out the non-industrial and apportionment issues on this case vocationally". At page 14 in the final paragraph of her report, she erroneously states: "Taking into consideration Labor Code Section 4662, it appears that Mr. Burr meets the definition of 100% conclusively disabled without regard to apportionment issues due to his paraplegia." Then in her final sentence she adds: "However, even taking apportionment into consideration, Mr. Burr would still not be able to benefit from vocational rehabilitation and return to employment from the industrial factors alone, for reasons explained in this report." The undersigned was not able to identify the purported "reasons explained in this report" to support Ms. Maron's opinion.

Based on the foregoing, the undersigned did not find Ms. Maron's opinion relating to the applicability of L.C. §4662(a)(3), or her cursory opinion that the industrial injury alone without consideration of apportionment (which she found "difficult to sort out") rendered

applicant unemployable, to be substantial evidence on that issue. As a result, the undersigned did not rely upon her opinion.

**C. DID THE UNDERSIGNED COMMIT ERR BY FAILING TO FIND THAT APPORTIONMENT OF IMPAIRMENT WAS NOT PERMISSIBLE PURSUANT TO HIKIDA?**

Finally, applicant contends that the holding in Hikida is applicable to bar apportionment to non-industrial factors pursuant to L.C. §4663. In Hikida, the applicant sustained an industrial injury to her bilateral upper extremities in the form of carpal tunnel syndrome. Credible medical opinion concluded that 10% of the carpal tunnel impairment was due to non-industrial factors. Following industrial surgery to address the carpal tunnel condition, applicant developed a chronic pain disorder. She did not have this disorder prior to the surgery and competent medical opinion concluded that the condition arose solely because of the treatment/surgery, and that the impairment related solely to the chronic pain syndrome rendered applicant permanently totally disabled. No apportionment was allowed in Hikida because the chronic pain syndrome was due to the surgery/treatment which was found not to be apportionable.

Unlike the facts in Hikida, in this case applicant already had a lumbar spine injury, including one non-industrial and two industrial complex spine surgeries, including multi-level fusions, prior to the last surgery in 2014. He was already experiencing severe lower extremity pain and weakness prior to the 2014 surgery, as well as urinary incontinency and sexual dysfunction. The undersigned notes that AME Woods concluded in 2012, prior to the last surgery, that unless applicant underwent another surgery that "substantially improved his condition", it was medically probable that he would not be able to return to the workplace (Court Exhibit WCAB 5, page 11). Dr. Woods noted at that time that applicant spent a substantial portion of his day in bed, could only ambulate on a limited basis with a cane, and that many of his activities of daily living were severely compromised. Unlike in Hikida where the surgery caused the entire new onset of chronic pain syndrome which standing alone rendered applicant permanently totally disabled, in Mr. Burr's case the 2014 surgery alone did not result in applicant being permanently totally disabled.

Although applicant correctly notes that he wasn't wheelchair bound prior to the last surgery, but has essentially been so since the surgery, there is no substantial medical opinion

in the record to substantiate that the last surgeries alone caused that change. As noted above, applicant had very minimal ambulatory capacity prior to the last surgery(s). There is no substantial evidence in the record to show that being functionally paralyzed in the lower extremities was solely due to the last surgeries.

Based on the foregoing, the undersigned does not believe that he committed error in finding that applicant's lumbar spine impairment was properly subject to apportionment pursuant to L.C. §4663.

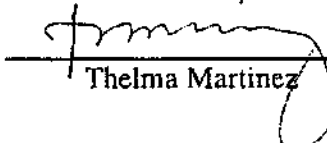
**IV**  
**RECOMMENDATION**

It is respectfully recommended that applicant's Petition for Reconsideration be denied.

Dated: 2/24/18

  
S. MICHAEL COLE  
Workers' Compensation Judge

Filed and Served by mail on all  
parties shown on the Official  
Address Record on 2/27/18

By:   
Thelma Martinez