

AP/LLA

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

3
4 **MARIA LOPEZ,**

5 *Applicant,*

6 vs.

7 **GENERAL WAX CO. INC.; TRAVELERS**
8 **PROPERTY CASUALTY COMPANY OF**
9 **AMERICA,**

10 *Defendants.*

Case No. **ADJ9365173**
(Van Nuys District Office)

OPINION AND
ORDER DENYING
PETITION FOR
RECONSIDERATION

11
12 Defendant seeks reconsideration of the Findings and Award and Order (F&A) issued on April 17,
13 2017, by the workers' compensation administrative law judge (WCJ), which found, in pertinent part, that
14 applicant sustained injury arising out of and in the course of employment (AOE/COE) to her right upper
15 extremity, right index finger, hypertension, upper and lower gastrointestinal system, and psyche, which
16 caused permanent total disability (100%) and that applicant was entitled to temporary disability for the
17 period of February 28, 2014, through August 21, 2015.

18 Defendant contends that the award of permanent disability is not based upon substantial medical
19 evidence because the internal Qualified Medical Evaluator (QME) should have reviewed additional
20 records on the issue of apportionment and another report relied upon was stale, and that the award of
21 permanent and temporary disability from applicant's psychiatric injury was in error because applicant's
22 psychiatric injury did not constitute a "violent act" within the meaning of Labor Code¹ section 4660.1(c),
23 rendering the impairment for applicant's psychiatric injury not compensable. Defendant further contends
24 that the reports of applicant's vocational rehabilitation expert did not constitute substantial evidence
25 because the evaluator failed to adequately comment upon the issues of apportionment and alternate
26 available work.

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¹ All future references are to the Labor Code unless noted.

1 We have received an answer from applicant. We received a Report and Recommendation on
2 Petition for Reconsideration (Report) from the WCJ recommending that we deny reconsideration.

3 We have considered the allegations of the Petition for Reconsideration, the answer, and the
4 WCJ's Report. Based on our review of the record, for the reasons discussed in the WCJ's Report, which
5 we adopt and incorporate, and for the reasons discussed below, we will deny defendant's Petition for
6 Reconsideration.

7 **FACTUAL AND PROCEDURAL BACKGROUND**

8 Applicant worked as a candle maker for defendant for approximately 14 years and sustained an
9 admitted industrial injury on February 28, 2014, when her right index finger became stuck in a machine
10 and subsequently a piece of her finger was chopped off resulting in a partial amputation of the finger.
11 Applicant also suffered compensable injuries to her psyche, gastrointestinal system, and in the form of
12 hypertension.

13 Applicant produced vocational expert testimony that applicant's injury has resulted in a complete
14 loss of earnings capacity. Defendant did not provide any testimony in rebuttal. The WCJ relied upon
15 applicant's vocational expert and found that applicant suffered a permanent and total disability.

16 While many issues were tried, a significant issue was the compensability of applicant's
17 impairment to her psyche. Applicant argued that the act of having one's finger partially severed
18 constituted a "violent act" within the meaning of section 4660.1(c) and that an amputation constitutes a
19 "catastrophic injury". Applicant also argued that her injury to the psyche was caused directly by the
20 events of employment and not as a compensable consequence of her physical injury.

21 Applicant was evaluated by an Agreed Medical Evaluator (AME), David Glaser, M.D., who
22 diagnosed applicant with major depressive disorder and post-traumatic stress disorder, and opined that
23 applicant's psychological factors may be affecting her physical condition and that she may also suffer
24 from a pain disorder. (Exhibit Y1, Report of David Glaser, M.D., September 11, 2015, p.42.) Dr. Glaser
25 opined on the causation of applicant's psychiatric injury as follows:

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1 [T]he predominant AOE/COE cause (over 50%) of the development of the
2 claimant's Major Depressive Disorder, single episode; Posttraumatic Stress
3 Disorder, in partial remission; Psychological Factors Affecting Medical
4 Factors and a General Medical Condition, was the sudden, discrete
5 traumatic injury that occurred on February 28, 2014, resulting in the
6 amputation of part of the claimant's right index finger and sequelae of
7 chronic pain and functional limitations.

8 (*Id.* at pp. 56-57.)

9 DISCUSSION

10 I.

11 SECTION 4660.1(c) DOES NOT APPLY TO PSYCHOLGICAL INJURIES DIRECTLY 12 CAUSED BY EVENTS OF EMPLOYMENT

13 Applicant's injury occurred in 2014, which is subject to section 4660.1(c) and limits the
14 compensability of permanent disability resulting from certain injuries as follows:

15 (c) (1) Except as provided in paragraph (2), there shall be no increases in
16 impairment ratings for sleep dysfunction, sexual dysfunction, or
17 psychiatric disorder, or any combination thereof, arising out of a
18 compensable physical injury. Nothing in this section shall limit the ability
19 of an injured employee to obtain treatment for sleep dysfunction, sexual
20 dysfunction, or psychiatric disorder, if any, that are a consequence of an
21 industrial injury.

(2) An increased impairment rating for psychiatric disorder shall not be
subject to paragraph (1) if the compensable psychiatric injury resulted
from either of the following:

(A) Being a victim of a violent act or direct exposure to a
significant violent act within the meaning of Section 3208.3.

(B) A catastrophic injury, including, but not limited to, loss
of a limb, paralysis, severe burn, or severe head injury.

22 Here, the WCJ found that applicant sustained an industrial injury to her psyche. Applicant argued
23 that the impairment caused by applicant's psychiatric disorder was compensable pursuant to section
24 4660.1(c) because the injury, which caused a partial amputation of the index finger, was the direct cause
25 of her psychiatric injury and, in the alternative, that the injury constituted both a "violent act" and a
26 "catastrophic injury".

27 / / /

1 Section 4660.1(c) does not preclude increases in impairment ratings when the psyche injury arises
2 directly from the events of employment. (See *City of Los Angeles v. Workers' Comp. Appeals Bd.*
3 (*Montenegro*) (2016), 81 Cal.Comp.Cases 611 (writ den.) [holding that impairment caused by sexual
4 dysfunction arising directly from the industrial injury is not precluded under section 4660.1(c)] See also,
5 *Russell Madson v. Michael J. Cavaletto Ranches*, (2017), 2017 Cal. Wrk. Comp. P.D. LEXIS 95
6 [holding that impairment to the psyche caused directly by the events of employment is compensable].)²

7 It is not possible to determine on the present medical record whether applicant's impairment to
8 the psyche was caused directly by events of employment, or as a result of applicant's compensable
9 physical injury, or a combination of the two. The psychiatric AME diagnosed applicant with both a
10 major depressive disorder and post-traumatic stress disorder. The AME opined that the cause of
11 applicant's psychological injury was a combination of both the direct trauma and the chronic pain that
12 later developed. The AME opined that the causation of applicant's psychiatric impairment is entirely
13 industrial, but did not delineate further what percentage of impairment may have been caused by direct
14 events of employment and what percentage was caused as a compensable consequence of the resulting
15 physical injury. Without such an opinion, we cannot decide what portion of applicant's psychiatric
16 impairment arose directly from events of employment.

17 Although the medical record is not clear on this issue and for the reasons discussed in part II of
18 this opinion, because we are finding that applicant's mechanism of injury constituted a violent act, all of
19 applicant's psychiatric impairment is compensable regardless of whether it was directly caused by the
20 events of employment or whether it was caused as a compensable consequence to applicant's physical
21 injuries. Thus, further development of the medical record is not needed in this case.

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24 ² Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v.*
25 *Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions
26 are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on
27 issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76
Cal.Comp.Cases 228, fn. 7 (Appeals Board En Banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260,
1264, fn. 2, [54 Cal.Comp.Cases 145].) Here, we refer to *Montenegro* and *Madson, supra*, because they considered a similar
issue. We recommend that practitioners proceed with caution when citing to a panel decision and verify its subsequent history.

1 II.

2 **APPLICANT'S INJURY CONSTITUTES A VIOLENT ACT AND APPLICANT'S**
3 **PSYCHIATRIC IMPAIRMENT IS COMPENSABLE**

4 Applicant contends that her psychiatric permanent disability is compensable under section
5 4660.1(c) because the mechanism of applicant's injury constituted a "violent act" as intended by the
6 Legislature in drafting section 4660.1.

7 We are persuaded by the reasoning in the panel decisions in *Larsen v. Securitas Security Services*
8 and *Russell Madson v. Michael J. Cavaletto Ranches*, both of which defined the term "violent act" for
9 purposes of section 4660.1 as an act that is characterized by either strong physical force, extreme or
10 intense force, or an act that is vehemently or passionately threatening. (2016 Cal. Wrk. Comp. P.D.
11 LEXIS 237; 2017 Cal. Wrk. Comp. P.D. LEXIS 95.)

12 Defendant argues that the use of the word 'act' in section 4660.1 indicates the Legislature's intent
13 that a violent act be perpetrated by a third party as part of a criminal act. Defendant's definition is too
14 narrow when compared to the words used in the statute. Although an 'act' may be done by a person, the
15 word 'act' is used throughout the practice of law and it's commonsense meaning does not require that an
16 'act' be completed by a person. (See "act", [noun, "1. a thing done; a deed."] Merriam-Webster Dict,
17 retrieved June 15, 2017, from <http://www.merriam-webster.com> (emphasis added).) For example, an 'act
18 of nature' is a frequently used term, which requires no action by any person.

19 Defendant next argues that we adopt the definition of 'violent act' that is contained in California
20 Business and Professions Code, section 7500.1(z), which states: "'Violent act' means any act that results
21 in bodily harm or injury to any party involved." However, as we stated in footnote 2 of *Larsen, supra*,
22 the definition of violent act contained in the Business and Professions Code is too broad. Such a
23 definition would create an exception to section 4660.1(c) that would swallow the rule.

24 As noted in *Larsen* and *Madson*, we again emphasize that had the Legislature intended a violent
25 act to constitute a perpetrated act of violence, the Legislature could have included such language in the
26 statute. For example, section 4650.5 states:

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1 Notwithstanding Section 4650, in the case of state civil service employees,
2 employees of the Regents of the University of California, and employees
3 of the Board of Trustees of the California State University, the disability
4 payment shall be made from the first day the injured employee leaves work
5 as a result of the injury, if the injury is the result of **a criminal act of
6 violence against the employee.**

7 (§ 4650.5 (emphasis added).)

8 The Legislature could have used similar language in section 4660.1, but did not.

9 Here, a portion of applicant's finger was chopped off by a machine, which resulted in applicant
10 sustaining a partial amputation of the finger. Under these circumstances, applicant's injury can be
11 characterized as resulting from extreme or intense force. Applicant's mechanism of injury constitutes a
12 'violent act' within the definition of section 3208.3(b). Thus, applicant's psychiatric impairment is
13 compensable.

14 III.

15 WHETHER APPLICANT'S INJURY CONSTITUTED A CATASTROPHIC INJURY

16 Having determined that applicant's mechanism of injury constituted a violent act and that
17 applicant's psychiatric impairment is compensable, the issue of whether applicant's injury also
18 constituted a catastrophic injury is moot.

19 IV.

20 SECTION 4660.1(c) DOES NOT PRECLUDE RECOVERY OF TEMPORARY DISABILITY 21 BENEFITS

22 Defendant argues that applicant is not entitled to temporary disability from her psychiatric injury
23 pursuant to section 4660.1(c). First, as explained above, applicant's injury constituted a violent act and
24 thus applicant is within the exception of section 4660.1(c). However, it is important to clarify that
25 section 4660.1(c) is a statute governing the collection of permanent disability benefits. The statute does
26 not preclude the collection of temporary disability benefits. Even if applicant's injury had not constituted
27 an exception to section 4660.1(c), any temporary disability would be compensable.

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V.

SKELETAL ARGUMENTS AND FAILURE TO PROPERLY CITE THE RECORD

We note that the Petition for Reconsideration contains the following two arguments under the heading "Travelers' Contentions":

5. THE VOCATIONAL REHABILITATION REPORT BY ENRIQUE N. VEGA WHICH FAILED TO ANALYZE WHY AN EMPLOYER OFFERED MODIFIED JOB AS A "BOTTLE FILLER" WAS NOT FEASIBLE EMPLOYMENT FOR APPLICANT (*sic*) WAS CONCLUSORY AND LACKED ANY ANALYSIS AND IS NOT SUBSTANTIAL EVIDENCE TO BE RELIED UPON BY THE COURT.

6. THE VOCATIONAL REHABILITATION REPORT BY ENRIQUE N. VEGA WHICH FAILED TO INCLUDE AN APPORTIONMENT ANALYSIS AS REQUIRED ON ALL VOCATIONAL REHABILITATION REPROTS (*sic*) IS NOT SUBSTANTIAL EVIDENCE.

(Defendant's Petition for Reconsideration, April 19, 2017, pp. 2-3.)

Nowhere in the remainder of the petition does defendant explain the factual or legal basis for either of these arguments. Defendant does not discuss the above contentions at all in the body of its petition.

A petition for reconsideration must fairly state all of the material evidence relative to the point or points at issue. (Lab. Code, § 5902; Cal. Code Regs., tit. 8, § 10842(a).) Each contention contained in a petition for reconsideration must be stated separately and clearly set forth. (*Id.*) The petition shall support its evidentiary statements with specific references to the record. (Cal. Code Regs., tit. 8, § 10842(b).) "Where reconsideration is sought on the ground that findings are not justified by the evidence, the petition shall set out specifically and in detail how the evidence fails to justify the findings." (Cal. Code Regs., tit. 8, § 10852.) "A petition for reconsideration . . . may be denied or dismissed if it is unsupported by specific references to the record and to the principles of law involved." (Cal. Code Regs., tit. 8, § 10846.)

The requirements of rule 10842 regarding specific references to the record are consistent with case law regarding proper citation to the record in appellate proceedings. (Cal. Code Regs., tit. 8, § 10842; *Flores v. Cal. Dept. of Corrections and Rehab.* (2014) 224 Cal.App.4th 199, 204 ("an appellant

1 must do more than assert error and leave it to the appellate court to search the record ... to test his
2 claim”); *City of Santa Maria v. Adam* (2012) 211 Cal. App.4th 266, 287 (“[r]ather than scour the record
3 unguided, we may decide that the appellant has waived a point urged on appeal when it is not supported
4 by accurate citations to the record”); *Salas v. Cal. Dept. of Transp.* (2011) 198 Cal.App.4th 1058, 1074
5 (“[w]e are not required to search the record to ascertain whether it contains support for [plaintiffs’]
6 contentions”); *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 (“[t]he appellate court is not required to
7 search the record on its own seeking error” and “[i]f a party fails to support an argument with the
8 necessary citations to the record, ... the argument [will be] deemed to have been waived”); *Nielsen v.*
9 *Workers’ Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 923 [50 Cal.Comp.Cases 104] (“Instead of a
10 fair and sincere effort to show that the trial court was wrong, appellant’s brief ... is an attempt to place
11 upon the court the burden of discovering without assistance from appellant any weakness An
12 appellant is not permitted to evade or shift his responsibility in this manner.”); see also Cal. Rules of
13 Court, Rule 8.204(a)(1)(C) (“Each brief must ... [s]upport any reference to a matter in the record by a
14 citation to the volume and page number of the record where the matter appears”).) Moreover, “[t]he
15 larger and more complex the record, the more important it is for the litigants to adhere to appellate rules.”
16 (*City of Santa Maria v. Adam, supra*, 211 Cal.App.4th at p. 287.)

17 Here, the WCJ found that applicant was permanently and totally disabled based upon unrebutted
18 vocational rehabilitation evidence. Defendant’s arguments regarding the substantiality of the vocational
19 rehabilitation evidence are not supported by citations to the record and thus, they are skeletal.
20 Furthermore, we can find no evidence in the record regarding any offer of modified duty. To the extent
21 that defendant argues that the vocational rehabilitation expert failed to discuss apportionment, that
22 argument is directly contradicted by the record. The expert commented upon apportionment as follows:

23 Medical records have noted some apportionment related to Ms. Lopez’s
24 medical impairment. Dr. Rosenberg reported no apportionment on an
25 orthopedic basis. Dr. Glaser deferred comment on apportionment, but did
26 note that Ms. Lopez developed several psychiatric diagnoses following her
injury. Dr. Lonky noted some apportionment related to Ms. Lopez’s upper
gastrointestinal tract, but reported no work restrictions related to that
impairment.

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1 It should be considered that vocational apportionment does not necessarily
2 follow medical apportionment. For most if not all individuals, medical
3 impairment naturally develops as we age (i.e. degenerative disc disease,
4 hypertension, etc.). Other individuals have long-standing impairments that
5 are with them throughout much of their life. However, medical
6 impairment does not always result in work disability. Often individuals
7 with medical impairment are able to cope with any symptoms they may
8 have and function in a workplace without impediment; in such a case,
9 there is medical impairment, but no work disability.

6 Based on the opinions of medical evaluators, the vast majority of
7 Ms. Lopez's orthopedic and psychiatric impairments are industrially
8 related. Based on Ms. Lopez's work history, I find no evidence that she
9 had any work disabilities prior to her industrial injuries. In all likelihood,
10 Ms. Lopez would still be working today if not for her industrially related
11 injuries; her work-related injuries are what have removed her from the
12 labor market.

10 As such, I find that 100% of her loss of earning capacity is industrial in
11 nature.

12 (Exhibit 6, Report of Enrique Vega, M.S., May 2, 2016, pp. 23-24.)

13 We admonish defense counsel, Maurice Harrison of Trinidad & Associates, that failure to cite the
14 record accurately could be construed as bad faith or frivolous conduct, which may be sanctioned.
15 (§ 5813.)

16 To the extent that defendant argues that the F&A was not based upon substantial medical
17 evidence or that certain reports were stale, the WCJ addressed those arguments in his Report.

18 To the extent that defendant claims that applicant is exaggerating her injuries, we have given the
19 WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the
20 demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35
21 Cal.Comp.Cases 500, 504-505].) Furthermore, we conclude there is no evidence of considerable
22 substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id.*)

23 Accordingly, we deny defendant's Petition for Reconsideration of the Findings and Award and
24 Order issued on April 17, 2017, by the WCJ.

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1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant's Petition for Reconsideration of Findings and Award and
3 Order issued on April 17, 2017, by the WCJ is **DENIED**.

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5 **WORKERS' COMPENSATION APPEALS BOARD**

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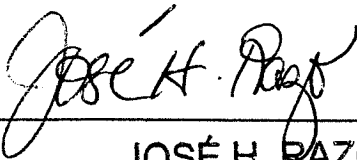
DEPUTY

8 RICHARD L. NEWMAN

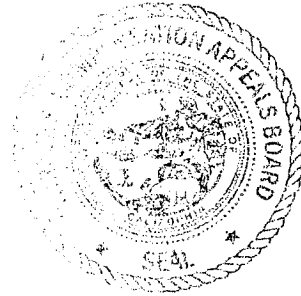
9 **I CONCUR,**

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13 FRANK M. BRASS

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16 JOSÉ H. RAZO



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

19 JUN 19 2017

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

23 **LAW FIRM OF ROWEN, GURVEY & WIN**
24 **MARIA LOPEZ**
25 **TRINIDAD & ASSOCIATES**



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27 *EDL:acw*