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

CASE NUMBER: ADJ630145

GREGORY NILSEN	**-vs.-**	**VISTA FORD;**
		PACIFIC COMPENSATION
		INSURANCE COMPANY;

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE: **William Carero**

DATE: JUNE 6, 2012

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

GREGORY NILSEN born on [redacted] while employed on 02-12-2007 as a service writer and advisor in occupational group no. 214 at Woodland Hills , California, by VISTA FORD, whose workers' compensation insurance carrier was PACIFIC COMPENSATION INSURANCE COMPANY, sustained injury arising out of and occurring in the course of employment to back, bilateral knees, psyche, gastrointestinal, high blood pressure, chronic pain, sexual dysfunction, neck, shoulders, right hand, headaches, eyes, sleep disorder and hearing. Petitioner-defendant seeks reconsideration of a determination that this cause permanent and total disability without apportionment.

II. CONTENTIONS

Petitioner contends that the testimony of the vocational counselor is not substantial evidence, and that an incorrect legal standard was applied in determining permanent and total disability.

III. FACTS

Applicant was working as an automotive repair service manager. He was standing on one of two wooden planks as a car was being driven into the shop, with the wheels rolling over the planks to raise it. The driver "gunned" the engine and the wheels propelled the plank against the wall of the shop and sending the injured worker backwards into a steel post and down to the floor. He sustained injury to his back, bilateral knees, psyche, gastrointestinal system, high blood pressure, chronic pain, sexual dysfunction, neck, shoulders, right hand, headaches, eyes, sleep disorder and hearing.

Apportionment is set forth in various individual medical reports in orthopedics (WCAB Exhibit GGG, Dr. Fields, 05/16/2010), and rheumatology – as to sleep disorder and sexual dysfunction – (WCAB Exhibit BBB, Dr. Levine, 02/27/2010).

Based on testimony and reporting (Applicant's Exhibit 12) of Enrique Vega, vocational expert, and considering the medical evidence and the testimony of applicant, the undersigned determined that applicant suffered 100% permanent and total disability due to a complete loss of future earning capacity and that this was caused by the portions of his disabilities as found by the medical experts attributable to the industrial accident. No apportionment of the PTD was found.

IV. DISCUSSION

Petitioner succinctly and correctly identifies that "The theme of this case is 'medical versus vocational apportionment.'"

The permanent and total disability determination herein is based on applicant's complete loss of earning capacity.

The pre-injury medical condition of the worker, whether constituting "disability" or not, did not keep applicant from an annual earning capacity of $100,000.00 to $120,000.00.

There is evidence that some parts of some of the impairments suffered by applicant were caused by factors other than the 02/12/2007 accident.

There is no evidence those non-industrial portions of impairments caused any part of the total loss of earning capacity. In fact, the unrebutted testimony and reporting of Mr. Vega demonstrated that he considered the medical reports and records and his evaluation of the injured worker and concluded that applicant's "pre-injury characteristics that did not cause a loss of earnings would not be considered for determining his present cause for loss of earning capacity." (Minutes of Hearing, 03/01/2012, page 17, lines 14 – 18).

Petitioner's assertion that the medical evidence is "overwhelming and uncontradicted" in establishing apportionment is a view of trees, not the forest. Any -- or even all -- medical experts can find some non-industrial cause for part of each body part or organ system impairment. The remaining purely industrial parts may still – and here did -- constitute the sole cause of the total loss of future earning capacity.

Petitioner contends that "it's for the medical experts…, not the rehabilitation counselor to establish apportionment to causation…" Petitioner next recounts that the expert here "correctly" deferred the determination of apportionment to causation to the medical experts.

The expert stated that he did not carve out the disability factors apportioned by the reporting physicians in evaluating the future earning capacity. Rather, he deferred apportionment to the treating physicians.

However, apportionment is a legal determination. While it is made based on medical evidence (or by statutory mandate), it is not the province of either the medical expert or the vocational expert to decide. Instead, these experts provide opinions, which are evidence. That evidence is analyzed, weighed and considered by the trier of fact and law.

Here, the precluders of future earnings identified by Mr. Vega are the inability to complete some tests, lack of stamina and pain. These are described as results of the vocational evaluation (Applicant's Exhibit 12, page 21). The genesis of these conditions, based on the medical evidence, is not shown to be anything other than the industrial accident.

Thus, neither the vocational expert nor the undersigned disregarded the medical opinions that some impairments are apportioned to non-industrial factors. However, the inquiry cannot end there. The question is whether the total lack of future earning capacity is presently caused by factors shown by medical evidence to be the result of anything other than the industrial accident. The answer is no.

Similarly, the fact that there is apportionment of the disability as to one (or more) parts of body does not mean that the totality of purely industrial factors cannot by themselves render a worker totally disabled.

The unrebutted opinion of the vocational expert sufficiently establishes a complete loss of earning capacity. Petitioner implies that Mr. Vega did not "consider a combination of industrial and non-industrial/other factors of causation that are not attributable to the employee's work related injury."

He did.

Applicant's Exhibit 12 includes detailed personal, social, medical, employment and current activities histories. The expert reviewed all of the medical reporting. He conducted extensive testing. He concluded that applicant lacked the physical capacity to perform even part-time sedentary work, effectively closing off his access to the labor market and leaving him with no future earning capacity.

Petitioner's assertion that the medical evidence is "overwhelming and uncontradicted" in establishing apportionment is a view of trees, not the forest. Any -- or even all -- medical experts can find some non-industrial cause for part of each body part or organ system disability. The remaining purely industrial parts may still – and here did -- constitute the sole cause of the total loss of future earning capacity.

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V. RECOMMENDATION

Based on the foregoing, the undersigned WCALJ recommends that the instant petition for reconsideration be DENIED.

DATE: 06/06/2012

WILLIAM M. CARERO
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

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PROOF OF SERVICE

REPORT AND RECOMMENDATION ON

PETITION FOR RECONSIDERATION

JUNE 7, 2012

Case Number: ADJ630145

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