WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JEANETTE ATILANO, *Applicant*

vs.

UC SAN FRANCISCO, PERMISSIBLY SELF-INSURED, ADJUSTED BY SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ12300876
Oakland 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 and opinion, which are both adopted and incorporated herein, we will deny reconsideration.

It is well established that "[t]he trier of fact may accept the evidence of any one expert or choose a figure between them based on all of the evidence." (*Liberty Mut. Ins. Co. v. Industrial Acci. Com.* (*Serafin*) (1948) 33 Cal.2d 89, 93-94 [199 P.2d 302] (*Serafin*).) Moreover, "although it encourages the demonstration of the truth of the issues before a court by any means which are generally accepted as tending to prove the facts in dispute, 'when there is a conflict between scientific testimony and testimony as to facts, the jury or trial court *must determine the relative weight of the evidence*.'" (*Serafin*, *supra*, at p. 94, quoting *Rolland v. Porterfield*, 183 Cal. 466 [191 P. 913], italics added.)

Here, the WCJ has considered and weighed all of the evidence presented, and further had the opportunity to evaluate applicant's testimony in trial proceedings. We accord to the WCJ's credibility determinations the great weight to which they are entitled. (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500] (*Garza*).) Based on that review, the WCJ has awarded disability to body parts/conditions that were identified by in part by the Qualified Medical Evaluator, and in part by the Primary Treating Physician.

In his Report, the WCJ explained in detail why he found that portions of each report were persuasive, and why he relied upon both reports in the final determination of permanent disability. Accordingly, the WCJ has reviewed the testimony of the witnesses, and has further reviewed and weighed the medical and medical-legal evidence, and thereafter applied his expertise to determine the extent of applicant's disability. (*U.S. Auto Stores v. Workers' Comp. Appeals Bd.* (*Brenner*) (1971) 4 Cal.3d 469 [36 Cal.Comp.Cases 173]; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Morgan*) (1996) 61 Cal.Comp.Cases 1332 [1996 Cal. Wrk. Comp. LEXIS 3459] (writ denied); *Rialto Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Kryitis*) (1995) 60 Cal.Comp.Cases 893 [1995 Cal. Wrk. Comp. P.D. LEXIS 3825] (writ denied).) When a WCJ's findings are supported by solid, credible evidence, they are to be accorded great weight by the Board and rejected only on the basis of contrary evidence of considerable substantiality. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza, supra*, at p. 318.)

Following our review of the entire record occasioned by defendant's Petition, we agree with the WCJ's determination that the evidentiary record supports the award of disability to the thoracic spine and right shoulder, and further agree with the WCJ's decision to award permanent disability based in part on the opinions of the QME, and in part on the opinions of applicant's treating physician. We affirm the decision of the WCJ, accordingly.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

JOSEPH V. CAPURRO, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 15, 2023

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

JEANETTE ATILANO
BOWER & GERSON
LAUGHLIN, FALBO, LEVY & MORESI

SAR/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

By timely, verified petition filed on July 19, 2023, defendant seeks reconsideration of the decision filed herein on June 26, 2023, in this case, which arises out of admitted injury, cumulatively, during the period of employment ending August 1, 2018, to the neck and wrists of a 51-year-old laboratory assistant. Petitioner, hereinafter defendant, contends that it was error to rely, in part, on a treating physician's report of permanent impairment, particularly when some of that doctor's opinions had been rejected in favor of those outlined by a qualified medical evaluator. Applicant has not filed an answer.[1] I will recommend that reconsideration be denied.

BACKGROUND

The salient facts are summarized in the opinion on decision:

> Applicant Jeanette Atilano began work as a lab assistant for the University of California, San Francisco, in 2000, as a temporary employee and, five months later, on a permanent basis. She worked in various departments, ultimately in the Zebra Fish Core Facility, where she spent her last three years. In that capacity, she was charged, generally, with cleaning the many small fish tanks and feeding the many more tiny fish.
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> The fish tanks were arrayed, both horizontally and vertically, on racks or shelves. In order to change the water and clean the tanks, she had to take them from those racks, remove the fish and transport the tanks to a cleaning room downstairs from the facility. The tanks had to be scrubbed and sanitized. Then she would refill them and replace the fish. She prepared fish food and added it to the tanks of fish. Some of the tanks were located above applicant's reach, and she used a step ladder to remove and replace them.
>
> Reportedly, Ms. Atilano began developing symptoms, primarily in her upper extremities, about a year before she reported a work-related injury in August, 2018. First, she saw her primary-care physician. After she reported the injury,

[1] Although a party is not required to file an answer to a petition for removal or reconsideration, it is commonly viewed as an appropriate practice. See, California Workers' Compensation Practice, Continuing Education of the Bar, § 21.44; State Farm Fire and Cas. Co. v. Wkrs. Comp. Appeals Bd. (Felts) (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622]. The appeals board and appellate courts are "not required to search the record in an attempt to develop answers to the contentions of the petitioner and [are] entitled to assume that the petitioner's statement of facts is accurate and that the contentions advanced are meritorious." Id., citations omitted. Any answer must be filed within ten days of service of the petition (§ 5905), and if service is by mail five days are added (§ 5316, Cal. Code Regs., Tit. 8, § 10605). However, the judge's report and recommendation is due 15 days after the filing of the petition, so as a practical matter if the responding party uses all of the allotted time to file an answer, including the extension, it is impossible for the trial judge to consider it when preparing that report. This report was delayed, in the misguided hope that an answer would be filed. All statutory references not otherwise identified are to the California Labor Code.

she came under the care of doctors in her employer's provider network. She underwent a carpal tunnel release, on the left, by Dr. Richard Sherwood, in July, 2019, which afforded considerable relief of the numbness and tingling in that limb, and she returned to modified work. Symptoms in the right upper extremity, the neck, and the upper back continued.

For approximately the last three and one-half years, applicant's primary treating physician has been Dr. Matthew Johnson, who has prescribed chiropractic, physical therapy, acupuncture, and medications. The first report by Dr. Johnson in evidence is dated December 10, 2019. Since then, Ms. Atilano has reported some improvement, but ongoing problems. She was taken off work before her surgery in 2019 and has not returned [to her regular job].

The parties engaged a qualified medical evaluator (QME), Dr. James Shaw, whose first report is dated March 9, 2020. There, he recounts the relevant history, describes his findings on examination, and concludes that further treatment and medical discovery would be needed before applicant's condition could be said to have stabilized. (Exh. D)

The next QME report is dated October 7, 2020. (Exh. C) At this point, Dr. Shaw finds Ms. Atilano to be maximally improved from her injuries, with residual impairment. Significantly, he concludes that her condition had become permanent and stationary on June 29, 2020, a date when an earlier treating physician, Dr. Gregory Horner, had reportedly[2] released her to return to work. (Dr. Horner had assumed the role of treating orthopedist after Dr. Sherwood retired.) Defendant did not end payments of temporary disability indemnity upon Dr. Horner's reporting, presumably because Dr. Johnson continued to report temporary (partial) disability status.

Dr. Shaw authored a supplemental report dated February 28, 2021. Despite being asked specifically about his endorsement of Dr. Horner's release as a permanent and stationary date, the QME does not appear to have addressed that issue. Instead, he modifies the impairment ratings expressed in his previous report. (Exh. B)

Dr. Shaw's final report is dated July 12, 2022, following a reëxamination. On the topic of when Ms. Atilano reached permanent and stationary status, he here acknowledges the question: "It is reasonable to assume RTW [return to work] is [ ] problematic, and that Dr. Horner was only narrowly addressing his surgical decompression of the right carpal tunnel, and did not thoroughly assess the patient's subjective complaints, and [ ] for that matter the chronic pain

[2] According to the QME's review of records. That summary includes, in the entry for June 24, 2020 (five days before the effective date of the release to return to work), that the employee had relief from a cortisone injection and the doctor would follow up in six weeks. In the meantime: "Work status: Observation at this time – full work duty 6/29/2020 for the current pathology."

> syndrome."[3] Later in that report, he states that, when Dr. Horner released applicant to return to work, "there was no evidence that the patient was a candidate to undergo any further invasive medical treatment. The medical treatment is palliative at this time, and as such the patient would be considered stable." (Exh. A, emphasis added) In that report, he further concludes that applicant would be unable to return to her usual and customary job duties.
>
> In the meantime, Dr. Johnson prepared a narrative report, dated April 15, 2022, declaring applicant's condition permanent and stationary as of that date and outlining his conclusions about permanent impairment. (Exh. 1)

Following trial, in which applicant was the only witness, I awarded permanent disability based in part on Dr. Johnson's conclusions and in part on those of Dr. Shaw.

DISCUSSION

Defendant contends, first, that it was error to rely on Dr. Johnson's assessment of permanent impairment in the thoracic spine and right shoulder because he fails adequately to explain how those regions were injured in the course of Ms. Atilano's employment.[4] To an extent, and perhaps this is an inference, the explanation is found in Dr. Johnson's report of April 15, 2022, where he states that "90% of the permanent disability/whole person impairment in this case is due to the industrial injury of 08/01/2018" and "10% of the permanent disability/whole person impairment in this case is due to non-industrial issues including the degenerative joint disease and degenerative disc disease found on imaging." (Exh. 1, pg. 8)

However, we also have Dr. Shaw's explanation, which is found in his initial evaluation, quoted above: There, the QME acknowledges complaints involving the shoulders and thoracic spine, and concludes that they are due to pathology in the neck. In fact, that opinion underpins the conclusion reached in the decision under study, that applicant did not sustain injury, per se, directly to those disputed body parts. This is probably the central issue here. Without quite saying so, defendant is essentially challenging the finding that this employee could have impairment in a region of the body that is caused by an injury to a related region. However, I remain persuaded that a worker whose neck injury produces symptoms, findings and ratable impairment in her thoracic spine and shoulders is entitled to compensation for that impairment if permitted by the

[3] As stated, the carpal tunnel release was of the left wrist and was performed by Dr. Sherwood.
[4] Defendant variously states that I made a finding that there was no injury to the thoracic spine and right shoulder (e.g., at pg. 3) and that I found that there was such injury (pg. 8). The former is correct; the latter is not.

AMA Guides. That is, she is more impaired than an employee whose neck injury produces no such impairment.

As for the extent of that impairment, Dr. Shaw says nothing, by the same logic defendant now urges: The shoulders and upper back were not themselves injured, so no impairment may be found there.

Dr. Johnson's final report is not, as defendant contends, without findings on examination of the disputed areas of the body: As to both the shoulders and the upper spine, he reports tenderness to palpation (sometimes abbreviated "ttp"), along with spasms in the spine.

Moreover, the fact that I found the QME's opinions more convincing in some respects, including the method of combining multiple impairments and apportionment thereof, does not, in my opinion, invalidate those of the treating doctor. (Obviously, I found Dr. Johnson's conclusions more accurate in other respects.)

Finally, defendant contends that it was error, in adopting some of the treating physician's conclusions, to accept his rationale for departing from a "strict AMA Guides rating." I must point out that both evaluating doctors felt that such a rating did not fairly and adequately capture applicant's impairments. Some cases simply do not fit neatly into the portions of those Guides directly applicable to the body parts and systems affected by a work injury. This is such a case.

RECOMMENDATION

I recommend that reconsideration be denied.

Respectfully submitted,

August 9, 2023

Christopher Miller
Workers' Compensation Judge

OPINION ON DECISION

This matter arises out of an admitted injury, cumulatively, during the period of employment ending August 1, 2018, to the neck and wrists of a 51-year-old laboratory assistant. Chief among the issues submitted for decision are disputed injuries to additional body parts, the extent of permanent disability, and a claim of credit for allegedly overpaid temporary disability indemnity.

FACTS

Applicant Jeanette Atilano began work as a lab assistant for the University of California, San Francisco, in 2000, as a temporary employee and, five months later, on a permanent basis. She worked in various departments, ultimately in the Zebra Fish Core Facility, where she spent her last three years. In that capacity, she was charged, generally, with cleaning the many small fish tanks and feeding the many more tiny fish.

The fish tanks were arrayed, both horizontally and vertically, on racks or shelves. In order to change the water and clean the tanks, she had to take them from those racks, remove the fish and transport the tanks to a cleaning room downstairs from the facility. The tanks had to be scrubbed and sanitized. Then she would refill them and replace the fish. She prepared fish food and added it to the tanks of fish. Some of the tanks were located above applicant's reach, and she used a step ladder to remove and replace them.

Reportedly, Ms. Atilano began developing symptoms, primarily in her upper extremities, about a year before she reported a work-related injury in August, 2018. First, she saw her primary-care physician. After she reported the injury, she came under the care of doctors in her employer's provider network. She underwent a carpal tunnel release, on the left, by Dr. Richard Sherwood, in July, 2019, which afforded considerable relief of the numbness and tingling in that limb, and she returned to modified work. Symptoms in the right upper extremity, the neck, and the upper back continued.

For approximately the last three and one-half years, applicant's primary treating physician has been Dr. Matthew Johnson, who has prescribed chiropractic, physical therapy, acupuncture, and medications. The first report by Dr. Johnson in evidence is dated December 10, 2019. Since then, Ms. Atilano has reported some improvement, but ongoing problems. She was taken off work before her surgery in 2019 and has not returned.

The parties engaged a qualified medical evaluator (QME), Dr. James Shaw, whose first report is dated March 9, 2020. There, he recounts the relevant history, describes his findings on examination, and concludes that further treatment and medical discovery would be needed before applicant's condition could be said to have stabilized. (Exh. D)

The next QME report is dated October 7, 2020. (Exh. C) At this point, Dr. Shaw finds Ms. Atilano to be maximally improved from her injuries, with residual impairment.

Significantly, he concludes that her condition had become permanent and stationary on June 29, 2020, a date when an earlier treating physician, Dr. Gregory Horner, had reportedly[1] released her to return to work. (Dr. Horner had assumed the role of treating orthopedist after Dr. Sherwood retired.) Defendant did not end payments of temporary disability indemnity upon Dr. Horner's reporting, presumably because Dr. Johnson continued to report temporary (partial) disability status.

Dr. Shaw authored a supplemental report dated February 28, 2021. Despite being asked specifically about his endorsement of Dr. Horner's release as a permanent and stationary date, the QME does not appear to have addressed that issue. Instead, he modifies the impairment ratings expressed in his previous report. (Exh. B)

Dr. Shaw's final report is dated July 12, 2022, following a reëxamination. On the topic of when Ms. Atilano reached permanent and stationary status, he here acknowledges the question: "It is reasonable to assume RTW [return to work] is [ ] problematic, and that Dr. Horner was only narrowly addressing his surgical decompression of the right carpal tunnel, and did not thoroughly assess the patient's subjective complaints, and [ ] for that matter the chronic pain syndrome."[2] Later in that report, he states that, when Dr. Horner released applicant to return to work, "there was no evidence that the patient was a candidate to undergo any further invasive medical treatment. The medical treatment is palliative at this time, and as such the patient would be considered stable." (Exh. A, emphasis added) In that report, he further concludes that applicant would be unable to return to her usual and customary job duties.

[1] According to the QME's review of records. That summary includes, in the entry for June 24, 2020 (five days before the effective date of the release to return to work), that the employee had relief from a cortisone injection and the doctor would follow up in six weeks. In the meantime: "Work status: Observation at this time – full work duty 6/29/2020 for the current pathology."

[2] As stated, the carpal tunnel release was of the left wrist and was performed by Dr. Sherwood.

In the meantime, Dr. Johnson prepared a narrative report, dated April 15, 2022, declaring applicant's condition permanent and stationary as of that date and outlining his conclusions about permanent impairment. (Exh. 1)

Applicant urges reliance on Dr. Johnson's opinions of permanent impairment, defendant on Dr. Shaw's.

DISCUSSION

Disputed body parts

Defendant has admitted the injury involving the cervical spine and wrists, leaving claimed injuries to the shoulders and thoracic spine at issue. Defendant contended at trial that the disputed regions were not mentioned in treatment records until Dr. Johnson's permanent and stationary report. Looking at Dr. Johnson's initial narrative report, dated April 3, 2019, this argument appears to be incorrect. The doctor states:

> "[Ms. Atilano] presents with complaints of pain in her head, neck, upper back, lower back, bilateral shoulders, bilateral arms, and bilateral wrists."

That a patient presents to a physician with pain complaints does not, of course, mean or imply that the pain stems from work activities.

Dr. Shaw addresses the question of injury to the thoracic spine and shoulders in his first report (Exh. D). As to the spine, he states: "Although the patient has reported and described thoracic spine pain i.e. upper thoracic back pain the complaints are most consistent with referred pain from the neck." [sic] Likewise, the right and left shoulder pain "is most consistent with referred pain from her neck." I do not believe this opinion is effectively countered by Dr. Johnson's reporting, which does not squarely address the causation of symptoms in the upper back and shoulders. Consequently, I have concluded that these body parts were not themselves injured.

That symptoms do not stem from an injury to the symptomatic body part, per se, but rather from another injured body part, does not mean or imply that those symptoms are not compensable, in the sense of permanent impairment or need for medical care.

Combining impairments

Dr. Johnson has concluded that the wrist impairments should be added, rather than combined (reduced) using the "combined value chart," or CVC. Dr. Shaw is silent on the topic.

With respect to the most appropriate method of combining multiple impairments, the AMA Guides[3] are instructive:

> A scientific formula has not been established to indicate the best way to combine multiple impairments. Given the diversity of impairments and great variability inherent in combining multiple impairments, it is difficult to establish a formula that accounts for all situations. A combination of some impairments could decrease overall functioning more than suggested by just adding the impairment ratings for the separate impairments (e.g., blindness and inability to use both hands). When other multiple impairments are combined, a less than additive approach may be more appropriate. States also use different techniques when combining impairments. Many workers' compensation statutes contain provisions that combine impairments to produce a summary rating that is more than additive. Other options are to combine (add, subtract, or multiply) multiple impairments based upon the extent to which they affect an individual's ability to perform activities of daily living.

The rating schedule based on those Guides provides: "Impairments and disabilities are generally combined using the [reduction] formula…"[4] PDRS, page 1-10, emphasis added. Finally, the enabling statute, section 4660, states (at subd. (c)) that the rating schedule "shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." In other words, the schedule provides evidence that is rebuttable.

Applicant urges that the disabilities resulting from her wrist injuries not be reduced by application of the combined values chart. The argument relies on the decision in *Athens Administrators, et al., v. Wkrs. Comp. Appeals Bd.* (*Kite*) (2013) 78 Cal.Comp.Cases 213 (writ denied), in which the disabilities from a left hip injury and a right hip injury were added, without reduction by means of that chart, because of the synergistic effects of the two injuries upon one another.

While it makes sense that impairments involving opposite extremities, as in *Kite*, would interact in such a way that does not diminish their value, Dr. Johnson provides essentially no

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[3] American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Ed., incorporated into the Schedule for Rating Permanent Disabilities (PDRS) effective January 1, 2005, by Lab. Code § 4660, at subd. (b).

[4] The chart is found in the Schedule for Rating Permanent Disabilities (PDRS), at pp. 8-2, et seq., and is derived from the AMA Guides. In essence, it is a method of reducing the combined ratings from two parts of the body. It is commonly abbreviated "CVC."

rationale for departing from the standard method of calculating multiple impairments. For this reason, I have declined to apply the *Kite* ruling in this case.

Occupational classification

The parties disagree with respect to which occupational variant ought to be used in calculating applicant's permanent disability. Applicant contends that group 340 is more accurate, defendant group 212. The rating schedule includes listings for "laboratory assistant, blood and plasma," and for "laboratory equipment cleaner." Either title might appear to apply here. The former uses group 212, the latter group 340.

Where more than one occupational variant could apply to an employee's job duties ("dual occupation"), the permanent disability should be rated using the category that produces the higher rating. *Dalen v. WCAB* (1972) 26 Cal.App.3d 497 [37 Cal. Comp. Cases 393]. No precise percentage of time is required; rather, the inquiry should focus on whether the higher-rating job duty is an "integral part of the worker's occupation." *National Kinney v. WCAB* (*Casillas*) (1980) 111 Cal.App.3d 203 [45 Cal. Comp. Cases 1266]. Consideration may be given the occupation in which the applicant was engaged at the time of injury, *Colton Unified School District v. WCAB* (*Corwin*) (1981) 46 Cal.Comp.Cases 302 (writ denied), as well as actual job duties that may make a different modifier more appropriate than the result of a scheduled occupation. *Zenith National Ins. Co. v. WCAB* (*Higgins*) (1975) 40 Cal.Comp.Cases 566 (writ denied), *Solar Turbines Intl. v. WCAB* (*Bigford*) (1979) 44 Cal.Comp.Cases 158 (writ denied). If an occupation is not scheduled, the next step is to look for an alternative job title. The 1997 rating schedule provided that if no alternative title is found, one must "determine the basic functions and activities of the occupation and choose a scheduled occupation and/or occupational group that is comparable." Schedule for Rating Permanent Disabilities (1997), page 1-14. The 2005 rating schedule provides that if the occupation cannot be identified either directly or by an alternative title, "an appropriate occupational group is determined by analogy to a listed occupation(s) based on a comparison of duties." PDRS (2005), page 1-8.

Group 340 is described in the rating schedule as applied to "mostly cleaners," for "work [that] involves cleaning equipment and/or buildings; operation of cleaning devices, some lifting, some climbing… " and lists typical occupations of "auto washer & polisher, janitor, nurse aide." Group 212, for "mostly professional and medical occupations," includes "work predominantly

performed indoors, but may require driving to locations of business…" and lists "chemist, dialysis technician, secondary school teacher." PDRS, pages 3-29 and 3-33. This employee certainly cleaned equipment and did some climbing. She worked "predominantly…indoors," but so does a janitor. The work was not heavy, as the fish tanks were small. Nonetheless, it would appear that the worker should get the benefit of the doubt, and I have used group 340 in rating her disability.

Factors of impairment

The two doctors whose opinions on permanent impairment are to be considered have disagreed, modestly, about the degree of impairment in the right and left wrists and the cervical spine. Both apportion some of that to nonindustrial causes, with Dr. Johnson apportioning 10% to "issues including the degenerative joint disease and degenerative disc disease seen on imaging," without differentiating among body parts, while Dr. Shaw apportions 5% of impairment to each wrist to "pre-existing non-industrial medical conditions-BMI> 30," [sic] but none of the neck impairment. Both physicians include a 3% "add-on" for pain not accounted for by the standard ratings. In addition, Dr. Shaw provides an alternative rating of the right wrist, by analogy, based on a fraction of the rating for the maximum value of the wrist found in the AMA Guides. Likewise, Dr. Johnson has used an analogy in rating the thoracic spine. Both feel those ratings to be more accurate than a strict application of those Guides. This is pursuant to established case law (*Milpitas Unified School District v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837]; *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (appeals board en banc) (*Almaraz/Guzman II*); *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 201 (appeals board en banc) (*Almaraz/Guzman I*)).

In this matter, I find Dr. Shaw's rationale for departing from a "strict rating" persuasive. All told, the QME has provided a thorough analysis of the application of the AMA Guides to the impairment involving the wrists and neck.

However, presumably based on Dr. Shaw's opinion on causation of symptoms in the shoulders and thoracic spine – as stated, that those problems emanate from the neck – he has included no impairment for them, and no further explanation for such omission. On this count, I believe Dr. Johnson's conclusions to be more accurate. As mentioned above, it is not necessary for there to be an injury directly to the bodily region in question for there to be compensable

impairment in that region, if such impairment is caused as an indirect consequence of a work-related injury. Moreover, the treating physician's findings with respect to the shoulders (only one of which has ratable impairment) and thoracic spine find support in applicant's testimony, which I found to be credible.

Thus, I am left to incorporate Dr. Johnson's ratings of the shoulders and thoracic spine with those of Dr. Shaw concerning the admitted body parts. I recognize that this is unusual. However, the Supreme Court has recognized the degree of difficulty in assessing permanent disability when presented with widely disparate expert opinions. "Applicable here is the rule followed in other cases where the trier of fact does not adopt exactly the view of any expert witness as to value. The trier of fact may accept the evidence of any one expert or choose a figure between them based on all the evidence." *Liberty Mutual Ins. Co. v. IAC* (Serafin) (1948) 33 Cal. 2d 89 [13 Cal.Comp.Cases 267, 270], citations omitted. Many cases have followed this "range of evidence" rule. See, e.g*., Rios v. SCIF* (2002) 30 Cal.Workers'Comp.Rptr. 17. The judge is therefore not compelled to endorse all factors of disability described by an evaluating physician in order to employ some of them, as corroborated by testimony and the rest of the record. "It is not necessary that there be evidence of the exact degree of disability." *U.S. Auto Stores v. WCAB* (*Brenner*) (1971) 4 Cal. 3d 469 [36 Cal.Comp.Cases 173, 176], citing *Serafin, supra*. Further, a workers' compensation judge is seen as an expert in rating permanent disability, "capable of (making) his own appraisal of the extent of applicant's disability." *Brenner, supra,* at 177.

I have not found it necessary in this case to refer the permanent disability to the Disability Evaluation Unit for a formal rating, and, with the help of the ratings calculated by the parties at trial (with some modifications) I have rated the disability as follows:

Right wrist

.95 (16.04.02.00 -12 [1.4] 17 – 340F – 17 – 19) 18 (includes 3% for pain)

Left wrist

.95 (16.04.02.00 – 3 [1.4] 4 – 340F – 4 – 5) 5

Neck

15.01.01.00 – 8 [1.4] 11 – 340G – 13 – 15

Thoracic spine

.9 (15.02.01.00 – 8 [1.4] 11 – 340G – 13 – 15) 14

Right shoulder
.9 (16.02.02.00 – 5 [1.4] 7 – 340F – 7 – 8) 7

Using the CVC: 18 c 15 c 14 c 7 c 5 = 47%

Overpayment/credit

Defendant seeks credit, against its liability for permanent disability indemnity, for allegedly overpaid temporary disability benefits for the period following Dr. Horner's reported release to return to work.

Credit is commonly allowed, under section 4909[5], for overpaid temporary disability indemnity against the ultimate liability for permanent disability indemnity. See, e.g., *Cordes v. General Dynamics-Astronautics* (1966) 31 Cal.Comp.Cases 429 (board panel decision). This is discretionary, however, and may be denied if the equities disfavor depriving applicant of indemnity for his or her permanent disability. *California Indemnity Ins. Co. v. Workers' Comp. Appeals Bd.* (*Estrella*) (2003) 68 Cal.Comp.Cases 233 (writ denied). Factors to consider include the relative fault of the parties (*id*.; *Chrysafides v. Royal Ins. Co.* (1985) 13 Cal.Workers'Comp.Rptr. 191), and the significance of the overpayment *(Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827 [45 Cal.Comp.Cases 1106] (credit for large overpayment disallowed where it would significantly disrupt flow of benefits, especially where fault lay with the employer)). *Maples* also emphasized the disparate purposes served by temporary versus permanent disability indemnity. It is generally the employer's burden to establish its right to credit. Section 5705.

As discussed above, the QME's endorsement of that date as one of maximal medical improvement is undercut by his later explanation that Dr. Horner was looking at Ms. Atilano's recovery from carpal tunnel surgery and not her overall condition, and, as well, by Dr. Shaw's conclusion that she would be unable to return to her regular job. Thus, there is considerable doubt that there was an overpayment at all, before reaching whether defendant should receive credit for it against permanent disability indemnity. I have not awarded the credit.

[5] All statutory references not otherwise identified are to the Labor Code.

Further medical treatment

The physicians reporting in this case both feel that applicant requires further care. I concur.

Attorney fees

A fifteen-percent fee is justified by the complexity of the case.

Date: June 26, 2023

Christopher Miller
Workers' Compensation Judge