WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

AURORA MORALES, ***Applicant***

vs.

AO-CAL POLY CORPORATION, Permissibly Self-Insured, Administered By SEGWICK CLAIMS MANAGEMENT, INC., ***Defendant***

Adjudication Number: ADJ7383708
San Luis Obispo District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award[1] of October 18, 2021 wherein it was found that, while employed on November 5, 2008 as a cook, applicant sustained industrial injury to her left knee, cervical spine, lumbar spine, right shoulder, psyche, stomach, face, and chin, but not to her left ankle, right knee and right wrist. As relevant to the instant Petition for Reconsideration, it was found that applicant's injury caused permanent disability of 64%. Additionally, the WCJ found "There is no basis for an increase of permanent disability benefits under Labor Code Section 4658(d)(2) because the defendant had a reasonable, though incorrect, belief that applicant had voluntarily left her employment. Applicant was no longer employed with the employer." In finding 64% permanent disability, the WCJ combined 47% psyche permanent disability, 17% compensable left knee permanent disability, 12% right shoulder permanent disability and 8% lumbar spine permanent disability utilizing the Combined Values Chart in the 2005 Schedule for Rating Permanent Disabilities. (2005 Schedule for Rating Permanent Disabilities at pp. 8-1 – 8-4.) In rating applicant's permanent disability, the WCJ declined to include a 3% whole person impairment (WPI) add-on for pain, as recommended by panel qualified medical evaluator psychologist Joan E. Erwin, Ph.D. Additionally, in rating the psychiatric permanent disability, the WCJ utilized the WPI derived from the scheduled Global Assessment of Functioning (GAF) scale (2005 Schedule

[1] Despite being captioned Findings and Award, the WCJ's decision does not include an Award.

at pp. 1-13 – 1-16) rather than the alternative rating purportedly utilizing the Table 13-8 of the AMA Guides.

Applicant contends that the WCJ erred in (1) not finding applicant entitled to an increase in permanent disability indemnity pursuant to Labor Code section 4658(d), (2) utilizing the Combined Values Chart to combine applicant's orthopedic and psychiatric permanent disability, rather than adding the two values as recommended by Dr. Erwin, (3) not adopting the nonscheduled rating suggested by Dr. Erwin, and in (4) not including a 3% add-on for pain. We have received an Answer from the defendant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We will grant reconsideration and amend the WCJ's decision to reflect that applicant is entitled to a 15% increase in permanent disability indemnity pursuant to Labor Code section 4658(d). We will otherwise affirm the WCJ's decision for the reasons stated by the WCJ in his Report, the relevant portions of which we will quote below, and for the additional reasons stated below.

Labor Code section 4658(d)(2), applicable to dates of injury from January 1, 2005 to December 31, 2012, states, "If, within 60 days of a disability becoming permanent and stationary, an employer does not offer the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, each disability payment remaining to be paid to the injured employee from the date of the end of the 60-day period shall be paid in accordance with paragraph (1) and increased by 15 percent. This paragraph shall not apply to an employer that employs fewer than 50 employees." This provision does not contain any exception for an employee who has retired or taken another position. Previous decision have held that, in order to avoid liability for a Labor Code section 4658(d)(2) increase, an employer is required to make an offer of work regardless of whether the applicant has retired. (*University of California v. Workers' Comp. Appeals Bd. (Sedlack)* (2020) 85 Cal.Comp.Cases 311 [writ den.]; *Kings County v. Workers' Comp. Appeals Bd. (Revious)* (2011) 76 Cal.Comp.Cases 378 [writ den.]; *Visalia Unified School Dist. v. Workers' Comp. Appeals Bd. (Marshall)* (2011) 76 Cal.Comp.Cases 1255 [writ den.].)

The WCJ appears to have found that applicant was not entitled to an increase pursuant to section 4658(d)(3)(B), which states, "If the regular work, modified work, or alternative work is terminated by the employer before the end of the period for which disability payments are due the

injured employee, the amount of each of the remaining disability payments shall be paid in accordance with paragraph (1) and increased by 15 percent. An employee who voluntarily terminates employment shall not be eligible for payment under this subparagraph. This paragraph shall not apply to an employer that employs fewer than 50 employees." However, this subparagraph only applies when an employer has made the initial requisite offer of work and the worker voluntarily terminates their employment during a period that permanent disability indemnity is being paid.

Accordingly, we will grant reconsideration and amend the decision to reflect that applicant is entitled to an increase pursuant to Labor Code section 4658(d)(2).

With regard to the issue of adding the psychiatric permanent disability to the orthopedic permanent disability rather than combining them utilizing the Combined Values Chart, we affirm the WCJ for the reasons stated in the Report other than any discussion of "overlap" which we have omitted from the quoted portion of the Report below. An overlapping or duplicative disability is not included in a permanent disability rating, and is usually not pertinent to the issue of whether permanent disabilities should be combined or added. Under the 2005 Schedule and the AMA Guides, impairments that are used as a basis for ratings are tied to a specific condition or body part, and thus do not usually overlap with any other condition or body part. The Guides contain instructions regarding which impairments overlap with others, and these duplicative impairments are generally not utilized unless a medical evaluator states that they do not overlap in a particular case.

In *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 (writ den.), we held that adding, rather than combining, two different impairments better reflected a worker's impairment when substantial medical evidence supported the notion that the two impairments had a synergistic effect where, in effect, the resultant impairment was more than the sum of the two impairments. In *Kite*, the evaluator explained why the disparate impairments were not actually disparate, and the impairments in question were all under the physician's expertise. In contrast, here one specialist is suggesting that we add impairments found by her in her own specialty to impairments in a completely different body system found by a different specialist. Dr. Erwin did not give any compelling medical reason why these separate psyche and orthopedic impairments should be added rather than combined, and questions beyond applicant's

psychological impairment are beyond Dr. Erwin's expertise. (*Applied Materials v. Workers' Comp. Appeals Bd. (D.C.)* (2021) 64 Cal.App.5th 1042, 1097 [86 Cal.Comp.Cases 331].)

With regard to the WCJ's rejection of the alternate psychiatric impairment rating, to the extent that presenting a rating outside the GAF is even allowable[2], the impairment found by Dr. Erwin does not match Table 13-8. Dr. Erwin wrote, "Ms. Morales' impairment in the category of Activities of Daily Living is rated in Class 3, Moderate Impairment, which ranges between 30 and 69 percent." (September 3, 2019 report at p. 22.) In fact, Table 13-8 states that "moderate limitation of some activities of daily living and some daily social and interpersonal functioning" constitutes Class 2, and is to be rated between 15 and 29 percent WPI. Dr. Erwin continues, "Ms. Morales' impairment in the Social Functioning category ranges between Class 2, Mild Impairment (as she was able to function during the evaluation) to Class 3, Moderate Impairment (when she is in some social and physical environments that could trigger increased pain and decreased cognitive and social/emotional functioning." However, under Table 13-8, "mild" is actually class 1 (0-14% WPI), and, as noted above, moderate is actually class 2 (15-29% WPI). Dr. Erwin then gives "severe" ratings for ""Concentration, Persistence and Pace," and "Deterioration or Decompensation in Complex or Work-Lite Settings." However, Table 13-8 speaks only of daily activities and social functioning. Thus, even assuming a psychologist can give impairments that differ from the GAF scale, Dr. Erwin's 75% WPI alternate impairment analysis does not constitute substantial medical evidence, and was correctly rejected by the WCJ.

With regard to the issue of the 3% pain add-on, again assuming that a psychologist is allowed to include an AMA Guides pain add-on (see note 1, *ante*), here Dr. Erwin did not opine that applicant's psychiatric condition was causing physical pain which was otherwise not accounted for. Rather she testified at deposition that this add-on is, "an emotional response to the pain and her having to on a daily basis endure the pain and focusing on her treatment." (March 7, 2019 deposition at p. 32.) However, as acknowledged by Dr. Erwin, the GAF rating already takes into account applicant's emotional response to pain. (March 7, 2019 deposition at pp. 33-36.)

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[2] We note that Labor Code section 4660, which governs this case, states that the AMA Guides are to be utilized in rating "*physical* injury or disfigurement." (Emphasis added.) Labor Code section 3208.3(a) states, "A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2…." Labor Code section 139.2(j)(4) states that the Administrative Director has the power to adopt regulations concerning "[p]rocedures to be used in determining the compensability of psychiatric injury." The 2005 Schedule adopted by the Administrative Director states that the GAF "shall" be used to rate psychiatric impairment. (2005 Schedule at p. 1-12.)

Thus, any additional impairment overlaps the impairment already given, and was properly rejected by the WCJ.

Accordingly we will grant reconsideration and amend the WCJ's decision to reflect that applicant is entitled to an increase in permanent disability indemnity pursuant to Labor Code section 4658(d)(2). We also include an Award, which was omitted by the WCJ, and clarify that permanent disability indemnity liability starts two weeks after the cessation of temporary disability as provided by Labor Code section 4650. Additionally, two-thirds of applicant's average weekly wage of $488.00 equals $325.33 rather than the $326.96 found by the WCJ, so we have utilized the correct figure to determine applicant's award of temporary disability indemnity. We will otherwise affirm the decision for the reasons stated above and for the reasons stated in the quoted portions of the WCJ's Report below:

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

> Applicant, Aurora Morales, has caused to be filed a Petition for Reconsideration requesting reconsideration of four findings by the workers' compensation judge. The WCJ shall address those claimed grievances in the order presented by applicant's counsel in his Petition. The first grievance cited was the WCJ's determination that Labor Code Section 4658(d)(2) and the increase described therein did not apply to applicant's permanent disability. The remaining three issues involve the workers' compensation judge's findings of psychiatric permanent disability and the inadequacies of the psychiatric reporting and the lack of substantial evidence of such report.
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> [Discussion of Labor Code section 4658(d)(2) omitted.]
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> The next three findings appealed by the applicant involve the quality and nature of the reporting by psychiatric examiner, Dr. Joan Erwin. With all due candor, it was determined by the workers' compensation judge that the reporting of Dr. Erwin, in her medical reports and in her deposition, narrowly escaped being struck from the evidentiary record as not substantial evidence. Virtually the only finding by Dr. Erwin that was factually supported, usable and believable by the Court was the GAF score identified by Dr. Erwin.
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> Applicant asserts that Dr. Erwin's conclusory finding that all impairments should be added together despite the well-reasoned opposite finding by Dr. Fisher is untenable. Dr. Erwin's rambling and factually unsupported finding was just not believable. She … shows little knowledge of the factors necessary to employ a *Kite* formula as opposed to utilizing the Combined Values Chart. She does not address synergistic relationships between [impairments]….

Dr. Erwin's conclusions are further called into question by her underlying bases for drawing many of her conclusions. She seems to generalize about Ms. Morales' cultural beginnings, making comments on the basis of her cultural heritage as being Hispanic. She appears to refer to Hispanics as being bad at math, arithmetic, and not understanding depression. Such a reasoning basis appears unsupported and somewhat irrational.
Accordingly, Dr. Erwin's final conclusion that the impairments should be added did not appear factually supported and was not substantial evidence,

Applicant's assertion that Dr. Fisher was unaware of the psychiatric impairments when he addressed usage of the Combined Values Chart appears hollow and disingenuous. Dr. Fisher reported for the parties several times after the 2017 issuance of the report of Dr. Erwin. If Dr. Fisher was unaware of the report of Dr. Erwin, it certainly was not clear in the reporting. Dr. Fisher rep1ied several times on the issue and was deposed on the issue in 2020. Dr. Erwin's psyche report issued in 2017. If applicant's counsel questioned whether Dr. Fisher, and his conclusions regarding the *Kite* case did not include Dr. Erwin's findings, it certainly was his duty to provide such reporting to Dr. Fisher and inquire at the deposition.

Accordingly, it does appear as though Dr. Fisher's finding that usage of the Combined Values Chart would be appropriate is the better reasoned opinion.

With respect to applicant's assertion on appeal that a pain add-on to the GAF score should be allowed, it was the WCJ's belief that Dr. Erwin, when she calculated the GAF score or global assessment of function, had already incorporated such factors. After all, it is a global assessment. Further, Dr. Erwin herself opined that the three percent (3%) add-on for pain should be determined by the trier of fact. In that regard, there was no factual evidence presented supporting the add-on in the testimony by the applicant. Applicant's testimony was of questionable credibility at the time of trial.

Finally, applicant's assertion that Dr. Erwin's factually unsupported conclusion that applicant's true disability should be somewhere over seventy-five percent (75%) under *Almaraz-Guzman* was plucked from the ecosphere, as was much of Dr. Erwin's reporting. She did not rate such purported *Almaraz-Guzman* increase within the four corners of the Guides as is required. She did not attach them to any restrictions to the applicant.

Again, the only portion of Dr. Erwin's report that barely passes scrutiny under the substantial evidence test is the GAF score which has been utilized.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Award of October 18, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of October 18, 2021 is **AMENDED** as follows:

FINDINGS OF FACT

1. All items of evidence identified in the minutes of record are admitted into evidence including the medical reports of Drs. Ferro and Moelleken. There is no impediment to admissibility as applicant designated such physicians appropriately for treatment as defendant did not have an MPN.

2. The applicant, Aurora Morales, while employed on November 5, 2008 as a cook, occupational group number 322, at San Luis Obispo, California, sustained injury arising out of and in the course of her employment to her left knee, cervical spine, lumbar spine, right shoulder, psyche, stomach, face and chin. Applicant did not suffer injury to her left ankle, right knee and right wrist as a compensable consequence of her industrial injuries. Such finding is made pursuant to the reports of Dr. Fisher and his deposition reporting.

3. Applicant's earnings are found to be $488.00 per week based upon her credible assertion of earnings of $12.20 per hour, 40 hours per week at the time of injury. Applicant's temporary disability rate is, therefore, two-thirds of her average weekly wage or $325.33 per week.

4. Applicant is entitled to temporary total disability indemnity for the period February 22, 2013 through November 5, 2013 based upon the medical reporting of both Dr. Ferro, who performed her surgery on an industrial basis to her left knee on February 22, 2013, and the reporting of Dr. Moelleken. Such amount shall be paid at the temporary disability rate, less fifteen percent (15%) reasonable attorney's fees awarded to applicant's counsel.

5. Applicant became maximally medically improved on April 14, 2014.

6. Based upon the credible testimony of the applicant, and the supporting document in the personnel file, defense Exhibit "G," which documents hostility in the workplace toward the applicant, as well as difficulty in applicant physically performing her work duties, it is found that applicant's "retirement" of July 24, 2012 was not voluntary. She is therefore entitled to temporary disability.

7. Applicant is entitled to permanent disability of sixty-four percent

(64%), equivalent to 383.25 weeks of indemnity payable at the rate of $230.00 per week for payments due prior to June 13, 2014, and at the rate of $264.50 per week for payments due on or after June 13, 2014, commencing November 19, 2013, less reasonable attorney's fees of fifteen percent of the amount awarded.

8. Permanent disability is calculated as follows:

Psychiatric: 14.00.00 - 26 - [8] 36-322G-39-47
No add-on for pain.
Left knee: 60% (17.05.10.08-20-[2] 23-322F-23) 17
Lumbar: 15.03.01.00 - 5 [8] 6 - 322F - 6 - 8
Shoulder: 16.02.03.00-6 [7] 8-322G-9 - 12
47C17C12C8 = 64 final permanent disability.

9. Dr. Erwin's analysis regarding *Kite* is rejected as untenable. Dr. Fisher's finding that the *Kite* case is not applicable is hereby adopted as well as his reasoning.

10. The employer did not offer applicant regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, within 60 days of applicant's disability becoming permanent and stationary. Thus every indemnity payment corresponding to the period on or after June 13, 2014 is increased by 15 percent.

11. Applicant is entitled to future medical care to cure or relieve the effects of the industrial injuries.

12. The medicals from Dr. Ferro and Dr. Fisher were valid treating doctor reports having appropriately been designated as treating physicians and are therefore admissible.

13. The apportionment described by Dr. Fisher is valid and his findings and reasoning are hereby incorporated in this decision.

AWARD

AWARD IS MADE in favor of AURORA MORALES against AO-CAL POLY CORPORATION as follows:

(a) Temporary disability indemnity in the accrued amount of 11,944.26, less credit for any payments already made, less an attorneys' fee of $1,791.64, payable to James P. Harvey, whose lien is allowed.

(b) Permanent disability indemnity in the accrued amount of $100,852.13, less credits for payments already made and less an attorney's fee in the amount of $15,127.82 payable to James P. Harvey, whose lien is allowed.

(c) All further medical treatment reasonably necessary to cure or relieve from the effects of the injury herein.

(d) Interest at the legal rate from the filing and making of this Award.

WORKERS' COMPENSATION APPEALS BOARD

/s/ _KATHERINE A. ZALEWSKI, CHAIR________

I CONCUR,

/s/ _JOSÉ H. RAZO, COMMISSIONER________

/s/ _DEIDRA E. LOWE, COMMISSIONER_____

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 11, 2022

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

AURORA MORALES
JAMES HARVEY
TOBIN LUCKS

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