WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

APRIL NESS, *Applicant*

vs.

COUNTY OF HUMBOLDT, Permissibly Self-Insured, administered by CORVEL CORPORATION, *Defendants*

Adjudication Number: ADJ12887588
Eureka 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.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

DEIDRA E. LOWE, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 25, 2022

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

APRIL NESS
WELLS LAW TRINIDAD
HANNA, BROPHY, MACLEAN & JENSEN

PAG/*pc*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

Defendant, County of Humboldt, PSI, administered by Corvel Corporation, through their attorney of record Lawrence Hamby, filed a timely, verified Petition for Reconsideration challenging the Findings and Award dated February 2, 2022.

Applicant suffered an industrial injury to her neck and thoracic spine, as a result of a specific injury on October 12, 2018, during the course of her employment as a mental health case manager for the employer County of Humboldt. The injury occurred when the applicant was rear-ended in a school parking lot. She was age 38 on the date of injury.

In the F&A, the undersigned WCJ found that the Applicant's injury caused a combined permanent disability of 52%, based on *Almaraz/Guzman*. The undersigned WCJ found that there was insufficient evidence to support industrial injury to the applicant's headaches and sleep.

Petitioner contends:

a. The defendant contends that the evidence does not justify the finding of fact because the Workers' Compensation Judge (WCJ) mistakenly applied *Almaraz/Guzman* without any explanation to rebut the AMA Guides. *Petition, page 3, line 17 to page 5, line 15*.

b. The Findings and Award does not support the decision since the level of permanent disability is inconsistent with other evidence in the record. *Petition, page 5, line 17 to page 7, line 11.*

c. The Honorable Judge acted without or in excess of her powers because she gave full faith and credit in reliance on the report of PQME Dr. Hanley which is not substantial medical evidence and is fundamentally unfair. *Petition p. 7, line 14, p. 9, line 10.*

II FACTS

On October 12, 2018, Applicant sustained an industrial injury to her neck and thoracic back when she was rear-ended in a school parking lot during the course of employment as a mental health case manager for the County of Humboldt.

Michael Hanley, D.C. was utilized as the Panel Qualified Medical Evaluator. Over the course of this case, he issued two evaluating reports, one supplemental report and availed himself to a deposition at defendant's request.

In his initial evaluating report of December 10, 2019 found industrial causation and diagnosed cervical cephalgia, cervical dystonia/torticollis and upper thoracic myospasms. (App. Exh. 3, Dr. Hanley, 12/10/19.) The applicant had not yet reached maximum medical improvement. According to Dr. Hanley, the applicant's inability to obtain authorized therapeutic treatment caused a worsening of her condition. (Id.)

The applicant was deemed permanent and stationary at her re-evaluation with Dr. Hanley on November 10, 2020. (App. Exh. 2, Dr. Hanley, 11/10/20.) In terms of activities of daily living, it was reported that the applicant is only able to tolerate her unsupported head and neck for a few minutes before she has to rest her head either on a headrest of a car, on her bent arm and hands, against the wall, a pillow, etc. (App. Exh. 2, Dr. Hanley, 11/10/20.) Dr. Hanley noted that the applicant awakens three to six times a night and, occasionally, she is unable to sleep. (Id.) She finds twisting and turning of her upper thorax and neck very difficult. (Id.)

Dr. Hanley initially provided a whole person impairment of DRE II 8% based on a strict AMA Guides rating for the applicant's cervical spine. (App. Exh. 2, Dr. Hanley, 11/10/20.) However, Dr. Hanley opined that the DRE category II 8% does not account for the applicant's ankyloses nor does it accurately classify the significance of her impairment of whole person. (App. Exh. 2, Dr. Hanley, 11/10/20.)

Due to the applicant's clinical ankyloses and loss of motion, Dr. Hanley invoked *Almaraz/Guzman* to provide a whole person impairment of38% utilizing Table 15-13 of the AMA guides. (App. Exh. 2, Dr. Hanley, 11/10/20.) There was no apportionment to non-industrial factors. (App. Exh. 2, Dr. Hanley, p. 11/10/20.)

Subsequently, Dr. Hanley's deposition was obtained at defendant's request. In his deposition, Dr. Hanley testified as follows:

> Q: Then what was the basis for the range of motion?
>
> A: As I stated earlier, I-the basis for range of motion considered in Almaraz-Guzman rating analogy, range of motion was the most effective way for me to accurately, objectively measure what her physical impairment is. Because I can put goniometers on her head, have her perform range of motion, and I can document that. And I

> felt that was the most accurate and most appropriate method in her case to use.
>
> (Def. Exh. G., deposition, p. 32, line 19-p. 33. line 3.)

In a supplemental report, Dr. Hanley corrected his prior error of not including flexion/extension measurements into the final impairment calculation. The final cervical impairment rating pursuant to *Almaraz/Guzman* was 41% whole person impairment. (App. Exh. 1, Dr. Hanley, 4/18/21.) The applicant's thoracic spine was provided an 8% whole person impairment. (Id.)

This matter was tried on the issues of parts of body injured, permanent disability, apportionment, need for further medical treatment, attorney's fees, whether the PQME reporting is substantial medical evidence and whether the back impairment for the thoracic spine is a consequence of the neck injury per Dr. Hanley.

At trial, the applicant credibly testified that she has to rest her head on her hand when doing everyday tasks. (MOH/SOE p. 4, lines 38-39.) The applicant is able to drive, but she has to put her head on the headrest. (MOH/SOE, p. 4, lines 42-43.) It is hard for the applicant to do things such as take notes at work due to the spasms in her shoulder. (MOH/SOE, p. 5, lines 2-3,) She has tightness in her upper back stemming from her neck and it is tense all the time. (MOH/SOE p. 5, lines 4-5.) The applicant credibly testified that the Activities of Daily Living (ADL) section within Dr. Hanley's report of November 10, 2020 is an accurate reflection of the impact on her AD L's. (MOH/SOE, p. 4, lines 31-34.)

The applicant testified that she received no temporary disability for this injury. According to both her PTP and PQME, she can continue to do her usual and customary duties. (MOH/SOE p. 6, lines 25-27.)

Jo Wattle also offered testimony at trial. Ms. Wattle is the Senior Automotive Service Technician for the County of Humboldt. (MOH/SOE p. 8, lines 19-20.) On October 12, 2018, Ms. Wattle did not recall that the applicant was hurt or needed to see a doctor. (MOH/SOE, p. 8, lines 27-28.) There was no work estimate for the car involved in the accident because there was no damage. (MOH/SOE p. 8, lines 32-34.)

An F&A issued finding Dr. Hanley's reporting constituted substantial medical evidence and applicant's industrial injury resulted in combined permanent disability of 52% for the applicant's cervical and thoracic spine pursuant to *Almaraz/Guzman*.

It is from this Findings and Award that petitioner seeks reconsideration.

III

DISCUSSION

A. DR. HANLEY PROPERLY APPLIED *ALMARAZ/GUZMAN.*

A physician may utilize any chapter, table or method in the AMA Guides that most accurately reflects the injured employee's impairment. (*Almaraz/Guzman* II (2009) 74 Cal. Comp. Cases 1084 at 1114.) A physician may employ the four corners of the AMA guides in reporting an applicant's WPI as long as they provide appropriate justification for doing so.

In a salient part of *Almaraz/Guzman*, the court stated:

> "In order to support the case for rebuttal, the physician must be permitted to explain why departure from the impairment percentages is necessary and how he arrived at a different rating. That explanation necessarily takes into account the physician's skill, knowledge, and experience, as well as other considerations unique to the injury at issue .... If the explanation fails to convince the WCJ or WCAB that departure from strict application of the applicable tables and measurements in the Guides is warranted in the current situation, the physician's opinion will properly be rejected."
> (*Almaraz/Guzman II* (2009) 74 Cal. Comp. Cases 1084.)

Here, Dr. Hanley found that the applicant's limited cervical range of motion and ankylosis warranted deviation from the strict rating of the DRE method. Dr. Hanley credibly testified as follows:

> Q: So you rarely find it?
>
> A: I rarely use *Almaraz/Guzman*. I only use that it if it's absolutely necessary and I cannot describe the impairment accurately in the method.
>
> Q: So if you could, in a nutshell, please, Doctor, explain to me why *Almaraz/Guzman* should be applicable to give April Ness 40 percent WPI for this very minor motor vehicle accident with a few scratches on her bumper.
>
> A: We covered the mechanism of injury already. Using the range of motion method, this is the number that I get using Almaraz/Guzman. It is what it is. It's high. I'll give you that. But she has lost over 50 percent of her range of capacity for sue of her cervical spine and neck. If cervical spine makes up 80 percent of that region, you use

> the chart on page 427, figure 15-19, 50 percent times 80 percent, that puts her right at 40 percent impairment. So based on the range of motion method, it is high, it is-it's 40 percent. I can't get by that. (Deposition p. 35, line 14-p. 36, line 7.)

Contrary to the petitioner's allegation, it is the physician, not the court, who is tasked with explaining the 'how or even why this rating accurately reflects the level of permanent disability". (Petition, p. 3, lines 26-28.) When a physician evaluates an injured employee's WPI(s), the physician must explain how he or she arrived at the WPI(s) so that the parties and the WCAB can determine whether the WPI(s) are consistent with the AMA Guides. *(Blackledge v. Bank of America* (2010) 75 CCC 613, 619-21 (appeals board en bane).)

Labor Code §5952(d) requires an award of the appeals board to be "supported by substantial evidence." Here, Dr. Hanley operated entirely within the four corners of the AMA Guides, as set forth in *Almaraz/Guzman* and provided adequate justification for doing so, Dr. Hanley's reporting, which the court found substantial, served the basis for the award of 52% permanent disability.

B. THE COURT'S AWARD OF PERMANENT DISABILITY PURSUANT TO THE PERMANENT DISABILITY RATING SCHEDULE IS SUPPORTED BY SUBSTANTIAL MEDICAL EVIDENCE.

Labor Code section 4660.1(b) requires the

> "...nature of the physical injury or disfigurement" to incorporate "the descriptions and measurements of physical impairment and the corresponding percentages of impairments published in the American Medical Association (AMA) guides to the evaluation of permanent impairment (5th edition)."

Petitioner relies on the specific circumstances surrounding applicant's injury to bolster the claim for 14% permanent disability based on a strict AMA Guides rating. Specifically, the following facts are reiterated twice within the petition: 1) applicant's car was going 5 miles per hour, 2) her seat belt was fastened, 3) the airbags did not deploy, 4) there was little damage to the car, 5) out of seven people involved in the car, no one was injured, and 6) no one else called an ambulance at the time of the accident. (Petition p.4, line 1-9/p. 6, line 8-16.)

Petitioner apparently ignores that applicant's claim is accepted and the mechanism of injury is not in dispute. Additionally, permanent disability cannot be measured at the time of injury but only until the injured worker's medical

condition becomes permanent and stationary. (CCR§10152.) Here, the applicant was deemed permanent and stationary over two years after sustaining the injury. (App. Exh. 2, Dr. Hanley, 11/10/20.) The medical record and applicant's credible trial testimony show that the applicant suffered a worsening of her physical condition during this time period. (Id.) Accordingly, any reliance on the relatively insignificant or benign facts surrounding the industrial injury, two years prior, are immaterial to the assessment of applicant's permanent disability pursuant of the AMA Guides and the Permanent Disability Rating Schedule.

In an attempt to question the veracity of the court's award of 52% permanent disability, petitioner emphasizes that the applicant has not been temporarily disabled and can continue to do her usual and customary duties. (Petition. p. 6, lines 17-19.) In fact, it is asserted that "the PQME's reporting is not consistent with 52% permanent disability on a ***no lost time*** case for an orthopedic injury". (Petition p. 5, lines 12-13 (emph, added).) Yet, this argument seeks to apply an incorrect legal standard. Applicant's ability to perform her usual and customary duties is not germane to her residual handicap and impairment of function.

Impairment percentages estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, excluding work. (AMA Guides, p. 4.) Impairment ratings within the AMA Guides are not intended to use direct determinants of work disability. (AMA Guides, p. 5.) As such, in determining permanent disability, whether the applicant lost time from work due to the injury is immaterial. Similarly, the speculation that if this were a civil case, it "would be worth a nuisance value at best" cannot serve as the basis to award, or deny, a certain level of permanent disability.
(Petition, p. 8, lines 8-9.)

The petitioner, without evidence, suggests that Dr. Hanley "had his mind made up ahead of time to achieve the desired result regarding the level of permanent disability". (Petition, p. 6, line 28-p. 7, line 2.) In support of this claim, it is asserted that 'during the cross-examination of the PQME, he stubbornly refused to give apportionment to any of these prior incidents or treatment involving the applicant's neck in the months prior to this industrial injury". (Petition, p. 6, lines 25-28.)

Even a cursory review of the record renders these accusations futile. At the deposition, the petitioner, himself, extensively questioned Dr. Hanley regarding potential apportionment with specific references to applicant's prior chiropractic visits, prior injuries involving a trampoline, stairs, a treadmill, and a kettle ball, as well as a subsequent motor vehicle accident. (Def. Exh. G, Dr. Hanley deposition, p. 17, line 18- p. 26, line I 0.) Dr. Hanley credibly concluded that these events did not contribute to the applicant's permanent disability, (Id.)

Regardless, a medical report is not rendered unsubstantial because the physician does not find apportionment. According to Labor Code §4663(c), it is sufficient for Dr. Hanley to carefully consider the non-industrial events and include an apportionment determination within his reporting, as here.

Petitioner's contention that Dr. Hanley's report is 'fundamentally unfair' is insufficient to order a replacement QME or appoint a regular physician per Labor Code §5701. (Petition p. 8, line 26- p. 9, line 3 .) A physician is not guilty of being 'unfair' merely because his medical opinions run contrary to a party's position. Dr. Hanley had ample and sufficient information about the applicant's condition to reasonably opine about her level of function. Any alleged deficiencies within Dr. Hanley's opinions were adequately addressed in his deposition testimony and supplemental report. The undersigned WCJ considers Dr. Hanley's copious reporting to be substantial evidence.

Further, on questions of credibility, judgement is deferred to the WCJ, who is in the best position to observe the demeanor of the witness. (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal. 3d 312, 318.) Having the opportunity to observe the applicant's conduct at trial, her testimony is considered reliable and credible. Defendant failed to provide sub rosa videos or any other evidence that would contradict or impeach the applicant's testimony regarding her pain level or its impact on her daily ability to function.

IV.
RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Dated: March 2, 2022

Katie F. Boriolo
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE