

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

MARIA MAGDALENA GOMEZ, *Applicant*

vs.

**SWEETWATER UNION HIGH SCHOOL DISTRICT, Permissibly Self-Insured,
*Defendant***

**Adjudication Number: ADJ11196484
San Diego District Office**

**OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of January 29, 2024, wherein it was found that while employed on May 2, 2017 as a substitute teacher, applicant sustained admitted industrial injury to her left knee, right hip, right knee, and ankles causing permanent disability of 39% and the need for further medical treatment.

Defendant contends that the WCJ erred in finding permanent disability of 39%, arguing that the rating is not based on substantial medical evidence. Defendant argues that substantial medical evidence supports a finding of 26% permanent disability. We have not received an answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we agree that the WCJ's findings are not based on substantial medical evidence. We therefore grant reconsideration and amend the WCJ's decision to reflect that applicant's injury caused 26% permanent disability.

Applicant was initially evaluated by panel qualified medical evaluator orthopedist Jon P. Kelly, MD and primary treating physician pain management specialist Michael Moon, MD. Dr. Kelly rated applicant's permanent impairment based on mild reduced flexion in the left knee (4% WPI) as well as a pain add-on (3% WPI) for a total of 7% WPI. Dr. Kelly also noted that applicant had a healed patella fracture and muscle atrophy which were ratable under the AMA Guides, but could not be combined with the reduced range of motion impairment per the AMA Guides instructions. (October 11, 2021 report at pp. 19-21.) Dr. Moon agreed with Dr. Kelly's impairment

ratings but said that combining the patella fracture and muscle atrophy ratings with the range of motion impairment and pain add-on would better reflect the applicant's level of permanent disability, notwithstanding the AMA Guides' instructions to the contrary. Dr. Moon thus opined that applicant's injury caused 10% WPI. (January 15, 2020 report at pp. 7-8.)

The matter went to trial on the issues of permanent disability and need for further medical treatment on June 6, 2022. However, on June 15, 2022, the WCJ vacated the order submitting the matter, and ordered further development of the record. On July 13, 2022, the WCJ appointed pain management specialist Blake Thompson, M.D. as independent medical evaluator pursuant to Labor Code section 5701.

In his September 23, 2022 report of his September 1, 2022 evaluation, Dr. Thompson wrote:

The patient presents with a single point cane that she uses in her right hand. She walks slowly and carefully with an antalgic gait with a decreased stance phase on the left. She has difficulty with attempts at raising up on heels because of pain in the left knee. She is able to raise up on her toes. She has difficulty with tandem gait. She is limited to one-quarter squat because of left knee pain.

(September 23, 2022 report at p. 26.)

Dr. Thompson wrote in that report that applicant "walks with a cane and indicates that she really cannot walk much without the cane." (September 23, 2022 report at p. 31.) Dr. Thompson opined in his September 23, 2022 report that applicant's impairment be rated at 23% WPI, explaining as follows:

Left Knee 23% WPI:

As noted above in my discussion, as well as in the separate PTP and QME MMI Reports, per the strict application of the Guides, the patient can be rated with noncombinable separate impairments for quadriceps atrophy, patellar fracture, decreased motion, and pain. If the Guides are followed and these are not combined, the maximum would be 4% impairment per decreased range of motion. An additional 3% would be added to make a 7% whole person impairment. This was indicated in the last Qualified Medical Evaluation by Dr. Kelly. However, in my opinion, 7% does not accurately reflect the patient's overall condition. She has had chronic pain and *she has regular use of a cane.*

Additionally, in looking at examples in the AMA Guides, example 17-5 on page 532 describes a 10% impairment due to muscle weakness from a patella fracture. In this example, the patient had a fractured patella, however, the symptoms were

only occasional discomfort about the knee; inability to walk fast or run, pain after long periods of sitting with the knee flexed and a general weakness of the leg. In my opinion, the patient in this example is less disabled than Ms. Gomez. In another example 17-2 on page 529, it describes 20% impairment due to gait derangement from hip pain. In the example it is noted that there is difficulty walking for more than 5 blocks, *needs a cane when walking outside of her home*, and can no longer play tennis or run. That patient had degenerative changes of the hip and was given a 20% impairment of the whole person. In this example, the gait derangement was used per Table 17-5, 20% is “*requires routine use of cane, crutch or long-leg brace.*” Additionally, there can be consideration of rating for chronic pain per Chapter 13. On page 343 section 13.8, the criteria for rating impairments related to chronic pain discusses utilizing Table 13-15 for lower extremity posttraumatic neuralgia. In this Table, Class III (20%-39%) describes: “rises and maintains standing position with difficulty; *cannot walk without assistance.*” Class II (10%-19%) describes “rises to standing position, walks some distance with difficulty and *without assistance*, but is limited to level surfaces.” Overall, considering all of these descriptions, it is my opinion that the patient is most accurately rated toward the lower end of a Class III in Table 13-15 on page 336 for a 23% whole person impairment. In my opinion, this would also take into consideration elements of pain, as well as the right hip, right knee and both ankles.

(September 23, 2022 report at pp. 36-37 [italics added].)

At Dr. Thompson’s March 29, 2023 deposition, Dr. Thompson explained that the statement in his report that she “walks with a cane and indicates that she really cannot walk much without the cane” “would infer that she does occasionally not use it, since she says she cannot walk too far and that’s consistent with what my impression would be. That most of the time, she would use it. She could probably walk a little bit without it, but in general, she would be using it most of the time.” (March 29, 2023 deposition at p. 15.)

Explaining at her deposition why he rated her under Class III of Table 13-15 rather than Class II, Dr. Thompson testified, “So in looking at that, in the description, you know, walks some distance, but with difficulty or without assistance, in my opinion, she cannot walk very far without assistance. So I think in her condition is a little bit worse and she does need some assistance.” (March 29, 2023 deposition at p. 24.) Dr. Thompson clarified that “assistance” meant the use of the cane. (*Id.*) At the conclusion of the deposition, the following exchange took place between the defense attorney and Dr. Thompson:

Q. Okay. So it seems like the difference, really, between Class 2 and Class 3 is whether or not that person can walk without a cane at all. In my reading of it. Is that your reading?

A. Yes.

Q. So would it be important for you to know whether she is using a cane at all times or if she's avoiding the use of a cane at home, for instance, or at work or even out in the public?

A. Well, my impression of her and from her exam is that she can – she can walk a little bit without a cane, you know, a few steps. You know, maybe around a classroom, having the ability to have furniture or other things to rely on, but I would not expect her to be able to walk any significant distance, you know, more than like – so I would not expect her to walk a significant distance without the cane.

Q. And “a significant distance,” in your opinion, would be how far?

A. Would be maybe – maybe like 50 feet.

Q. Okay. So if evidence were presented to you that she's able to walk that far or longer or further without the cane, would that change your opinion as to Class 2 and Class 3?

A. It might.

(March 29, 2023 deposition at pp. 27-28.)

Subsequent to the deposition, Dr. Thompson was provided with surveillance footage of applicant. According to Dr. Thompson's May 31, 2023 supplemental report, while the surveillance footage showed applicant limping and having the cane on her person, she was shown mostly walking without the assistance of a cane.

Dr. Thompson wrote in his report:

In reviewing the sub rosa videos, it is noted that Ms. Gomez is able to walk without the cane. Most of the observed video she did not use the cane. While she did not use the cane, it is noted that she did not do a lot of walking, she walks slowly, she did not do any vigorous activity, and she did have occasional use of the cane. It is noted that for the most part, she is seen walking on level surfaces with only rarely stepping over a curb.

It is noted in my report of September 23, 20022, that it was my opinion that the patient was determined to have permanent impairment for and was best rated as a Class III described in Table 13-15, as “rises and maintains standing position with difficulty, cannot walk without assistance.” However, after reviewing the multiple sub rosa videos, it is my opinion that the patient can walk without assistance and would be better placed in the Category II (10-19%) that is

described as “rises to standing position, walks some distance with difficulty and without assistance but is limited to level surfaces.” For comparison, the gait derangement described in Table 17-5, indicates a 15% impairment for mild gait derangement described as “individual requires part-time use of a cane or crutch for distance walking but not usually at home or in the workplace.”

Therefore, assuming that the woman identified by me in the picture is in fact the patient and that the activity and ambulation observed reflects her usual and typical daily activities, | would change my opinion. **Based on this review, it is my opinion that the patient is more accurately described as a 15% whole person impairment based on essentially the middle of Class II in Table 13-15 of 15% and also confirmed and supported by Table 17-5 which also describes 15% whole person impairment for part-time use of a cane.**

(May 31, 2023 report at p. 3.)

At the December 18, 2023 trial, the applicant testified as follows:

She does not use her cane at home. She always takes her cane when she goes outside her house. She does not always need the cane to walk. She needs it when she has problems with pain or when she is not feeling secure or when crossing a street.

She uses the cane approximately 50 to 60 percent of the time. Lately it has been more like 70 percent of the use of the cane. It has recently increased because she has to stand and walk a lot at work. She does use a cane at work. Sometimes she doesn't use it at work if she is not around a lot of people and the distance is not far.

(Minutes of Hearing and Summary of Evidence of December 18, 2023 trial at p. 4.) According to the Summary of Evidence, applicant concluded her testimony by stating that, “She carries her cane but uses her cane only when necessary” and that “she carries a cane, but she only uses the cane when she needs to use it for security purposes.” (Minutes of Hearing and Summary of Evidence of December 18, 2023 trial at pp. 5-6.)

However, despite the updated reporting from Dr. Thompson and the applicant's trial testimony that she sometimes walked without a cane, the WCJ rated applicant's permanent disability utilizing the impairment found in Dr. Thompson's initial report. The WCJ explained in the Opinion on Decision:

The video tape is consistent with her testimony at trial (MOH December 18, 2023 4:15; 4:23-43; 5:4-18; 5:26-42). The applicant has injuries to her left knee, post traumatic CRPSI, and compensable consequence injuries to her bilateral ankles, knees and right hip. The limited video-tape is not a well-reasoned basis

to reduce her impairment. Therefore, it is found that Dr. Thompson's first report (Jt. Ex. 7) is the better reasoned report.

(Opinion on Decision at p. 6.)

All findings of the WCAB must be based on substantial evidence. (*Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620 [Appeals Bd. en banc].) As the Court of Appeal wrote in *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687], "In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. [Citation.] Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. [Citation.] Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citation.]"

"Expert testimony is necessary 'where the truth is occult and can be found only by resorting to the sciences.' [Citation.]" (*Peter Kiewit Sons v. Ind. Acc. Com. (McLaughlin)* (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188].) A decision must be based on legally competent evidence, not on the WCAB's lay belief regarding matters requiring an expert opinion. (*City & County of San Francisco v. Ind. Acc. Comm. (Murdock)* (1953) 117 Cal.App.2d 455, 460 [18 Cal.Comp.Cases 103]; *Bstanding v. Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988, 996 [42 Cal.Comp.Cases 114].) In the specific context of AMA Guides permanent impairment ratings, WCJ it is the physician's role to assess an injured worker's whole person impairment. (*Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 619-621 [Appeals Bd. en banc].) "[T]o constitute substantial evidence regarding a WPI, a physician's opinion must comport with the AMA Guides, including as applied and interpreted in published appellate opinions and en banc decisions of the Appeals Board." (*Id.* at p. 20.)

Here, Dr. Thompson's initial impairment rating was based on the understanding that applicant used the cane to walk almost all the time. However, Dr. Thompson's subsequent report and applicant's trial testimony clarified that applicant was sometimes able to walk without a cane. Therefore, Dr. Thompson's initial impairment rating no longer constituted substantial medical evidence because it was based on facts that were no longer germane, and Dr. Thompson adequately explained why Class 2 of Table 13-15 better reflected applicant's permanent impairment. The

issue of applicant’s permanent impairment was a matter expert scientific knowledge, and the WCJ erred in rejecting the expert evidence. (*E.L. Yeager Construction v. Workers’ Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 930 [71 Cal.Comp.Cases 1687].) Even if the surveillance footage were disregarded, applicant’s own trial testimony is consistent with Dr. Thompson’s placement of her impairment into Class 2 of Table 13-15, which is classified as “Rises to standing position; walks some distance with difficulty and without assistance, but is limited to level surfaces.” (AMA Guides, Table 13-15, p. 336.) The WCJ’s placement of applicant into Class 3 which states that applicant “cannot walk without assistance” (*id.*) was not based on substantial medical evidence.

We therefore grant reconsideration and amend the WCJ’s decision to reflect that applicant’s injury caused 26% permanent disability, based on Dr. Thompson’s ultimate finding of 15% WPI.¹

For the foregoing reasons,

IT IS ORDERED that Defendant’s Petition for Reconsideration of the Findings and Award of January 29, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board that the Findings and Award of January 29, 2024 is **AMENDED** as follows:

I STIPULATED FACTS

1. Applicant MARIA MAGDALENA GOMEZ, age 60 on the date of injury, while employed on May 2, 2017 as a substitute teacher, Occupational Group No. 214 at San Diego, California by the SWEETWATER UNION HIGH SCHOOL DISTRICT, sustained injury arising out of and in the course of employment to her left knee, right hip, right knee, and bilateral ankles.

2. At the time of injury, the employer was legally self-insured through San Diego and Imperial Schools JPA.

3. At the time of injury, the employee’s earnings were \$495.87 per week warranting indemnity rates of \$330.58 per week for temporary disability and \$290 per week for permanent disability.

4. The employee has been adequately compensated for all periods of

¹ 13.08.00.00 – 15 [1.4] 21 – 214F – 21 – 26

temporary disability claimed through 10/30/2019.

5. The employer has provided some medical treatment.

II FINDINGS OF FACT

1. The applicant did not sustain injury to her psyche and left foot.
2. The applicant is not entitled to further medical treatment for the psyche or left foot.
3. The applicant sustained permanent disability of 26% equating to 106.75 weeks at \$290.00 per week, or \$30,957.50 less amounts previously paid thereon, and less attorneys' fees.
4. Applicant's counsel has performed services entitling them to reasonable attorneys' fees in the amount of \$4,643.63. Defendants to hold the attorneys' fees in trust pending resolution of the attorneys' fees lien.

AWARD

AWARD IS MADE in favor of MARIA MAGDALENA GOMEZ and against SWEETWATER UNION HIGH SCHOOL DISTRICT permissibly self-insured of:

- A. Permanent disability at 26% equating 106.75 weeks at \$290.00 per week, or \$30,957.50 less amounts previously paid therefor and less attorneys' fees.
- B. Attorneys' fees in the amount of \$4,643.63. Fees are to be held in trust pending resolution of the attorneys' fee lien.

C. There is need for further/future medical treatment for the left knee, right hip, right knee, and bilateral ankles.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 22, 2024

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

**MARIA MAGDALENA GOMEZ
CASTILLO & ASSOCIATES
DIETZ, GILMORE, CHAZEN**

DW/oo

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