

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

ANA FIGUEROA GARCIA, *Applicant*

vs.

**ALUM ROCK UNION ELEMENTARY SCHOOL DISTRICT and WESTPORT
INSURANCE CORP., *Defendants***

**Adjudication Number: ADJ3516476 (SJO 0229773)
San Jose District Office**

**OPINION AND ORDERS
DENYING DEFENDANT'S PETITION
FOR RECONSIDERATION;
GRANTING APPLICANT'S PETITION
FOR RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

We have considered the allegations of the Petitions 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 as quoted below, we will deny defendant's Petition for Reconsideration, grant applicant's Petition for Reconsideration, rescind the February 4, 2021 Findings and Award, and substitute it with new Findings of Fact, amending the finding of permanent disability based on the WCJ's recommendation, and amending attorney fees accordingly. We will otherwise restate the WCJ's findings of fact and return this matter to the trial level for the issuance of a new award that will now include a life pension and for a new commutation of attorney fees.

We adopt and incorporate the following quote from the WCJ's report:

INTRODUCTION

1. Applicant, Ana Figueroa Garcia, while employed on 11/26/2001 as a driver (group 250) at San Jose, California, by Alum Rock Union Elementary School Dist., insured for worker's compensation liability by Westport Insurance Corp., successor by merger sustained specific injury arising out of and in the

course of this employment to her lumbar spine, right shoulder, headaches, and gastrointestinal distress.

2. Petitions for Reconsideration have been filed by both parties. The Petitions were timely filed, and verified in accordance with law. Neither party has yet filed an Answer.
3. The Parties seek Reconsideration from a Findings and Award which issued 2/4/2021, which awarded, among other things, 67% PD and further medical care to body parts which had been in dispute.
4. Applicant seeks Reconsideration based upon use of the CVC instead of the Multiple Disabilities Table. Applicant is [] correct. Defendant contends that (1) it was improper to rely upon the report of Dr. Ng, which is alleged to be insubstantial, and (2) it was improper to rely upon the report of Dr. Graubard, which is alleged to be insubstantial, and (3) it was improper to rely upon the report of Dr. Gravina, which is alleged to be insubstantial.

II SUMMARY OF FACT

The history of this case may be briefly stated. During most of the time after the 2001 injury, Applicant continued to work. There were brief periods of TTD, the past ending 11/8/2012. The Applicant was declared P&S as to all body parts on 9/16/2019. The parties agreed that the injury has produced problems with headaches, right shoulder, lumbar spine, and gastrointestinal system. Three separate physicians were selected to examine these various body parts, with Dr. Gravina, a neurologist, examining as to headaches; Dr. Graubard, an orthopedist, examining as AME for the lumbar spine and right shoulder; and Dr. Ng, an internist, examining the gastrointestinal system.

[T]he matter came to trial for the first time on 7/23/2020. At trial Defendant argued, essentially, that the opinions of Drs. Ng and Graubard were not sufficiently explained. Dr. Ng was criticized for his description of ratable factors of disability. Dr. Graubard was claimed by defendant to have endorsed apportionment of 20% of the PD to ‘natural progression’, although it was unclear as to the ‘natural progression’ of what, precisely. After trial, the record seemed sufficiently ambiguous to warrant development, so submission was vacated and the parties ordered to depose both Dr. Ng and Dr Graubard, which was done. Upon receipt of these depositions, the matter was reset for trial. Defendant moved that the reports of Dr. Graubard be deemed insubstantial because of his opinions on apportionment and requested appointment of a new orthopedic examiner.

This latter request was denied, and the matter was re-submitted for decision. A Findings Award issued 2/4/2021 awarding 67% based upon the reports of Drs. Ng, Graubard, and Gravina as written and modified by deposition. The PD

award was based upon the PD described by the three examiners and combined using the CVC [sic]. From this F&A, both sides sought Reconsideration.

III DISCUSSION

Defendant's first contention is that it was improper to issue a rating based upon the reports of Dr. Ng because he suggested a rating based upon an analogy to the 2005 PDRS. Defendant states that because Dr. Ng did not utilize a scheduled rating from the 1997 PDRS, that the correct result would have been [not to rely on] his opinion that disability exists and [to] substitute for medical evidence the legal fiction that the permanent disability is zero. The primary argument in favor of this approach is twofold; that the 1997 PDRS relies upon work preclusions, and that the reports on Applicant's gastrointestinal distress described no impact on ADL's, no physical or work preclusions, and no prophylactic work preclusions. Defendant also states that, since it has been ruled impermissible to rate from the 2005 PDRS using the 1997 PDRS by analogy, the reverse must be true as well.

Two points raised in the Opinion on Decision have managed to escape direct response in the Petition. The first is that both unscheduled ratings and rating by analogy were very, very commonly upheld under the 1997 PDRS. There was no rule similar to that now in place under Guzman that ratings must be taken from a chart 'within the four corners' of the 1997 PDRS. The second is that many, many cases under the 1997 PDRS were resolved based upon ratings of purely subjective complaints. Indeed the rating arrived at by Dr. Ng is basically the same as often used for 'constant slight back pain', which was rated at 10%. While no such scheduled disability existed for gastrointestinal distress, the existence of such a rating demonstrates the care used by Dr. Ng in arriving at an appropriate analogy. Far from prohibited under the 1997 schedule, such subjective ratings were commonplace.

Defendant next [alleges] Dr. Ng [used] the analogy he arrived at 'in order to achieve a desired numerical result'. Tellingly, The Petition refers to no evidence in the record tending to prove that Dr. Ng, a highly respected physician whose reputation often results in his use as an AME, was somehow 'seeking a desired result' by setting forth his opinion. Defendant's attempt to argue this point under subheading (b) (it appears from the bottom of page 4 onto the middle of page 5, although the pages are numbered) is a mere repetition of the canard that purely subjective complaints were not ratable under the 1997 PDRS. There is no evidence advanced to even suggest that Dr. Ng was seeking to justify a pre-determined result.

The next contention is that Dr. Ng was prohibited, or ought to be prohibited, from using the 2005 PDRS by analogy under the 1997 schedule. [] Defendant was unable to cite any authority for this proposition. I also researched this issue and was unable to find any case law answering the question either way. []

Defendant [raised] a number of rhetorical questions which would have been better put to Dr. Ng at the deposition which was ordered to permit Defendant to make these very inquiries after similar arguments were raised at the first trial. I have reviewed the explanations set forth in Dr. Ng's deposition and found them satisfactory.

Defendant's second contention is that Dr. Graubard's reports support 20% apportionment, citing Exhibit A-4. This is, basically, a request that the WCAB [not rely on] the available evidence. The passage referred to supports apportionment only in the most oblique, strained fashion. Given the ambiguity of this passage, I directed the parties to depose Dr. Graubard on this subject, which they did. This deposition fully supported my reading of the report referred to, which was that Dr. Graubard felt that no apportionment was proper.

Defendant's next contention is that the right shoulder disability described by Dr. Graubard is entirely subsumed by the spinal disability. Defendant does not actually refer to those portions of the shoulder disability defendant believes to be included in the spinal PD. I have re-read those portions of the Graubard reports and they do not seem to overlap.

Defendant's final contention is that the opinion of AME Gravina does not sufficiently support his opinion regarding Applicant's headaches. Based upon a physical examination, a detailed history, and many [years of] experience, Dr. Gravina describes the headaches Applicant suffers from as slight to moderate. I do not understand Defendant's unsupported contention that further explanation is warranted. Defendant's argument that the rating was invalid because [it was] inconsistent with the AMA Guides is incomprehensible....

Applicant's sole contention is that the [CVC] was used to combine the various disabilities found in place of the MDT. I have reviewed my notes, and find no explanation other than simple error for my failure to apply the MDT. The MDT calculations contained in Applicant's Petition appear to be entirely correct. I therefore recommend that Reconsideration be granted for the purpose of amending the Award from 67% to 72% as requested in the Petition.

The parties selected the following doctors as agreed medical examiners (AMEs): David Graubard, M.D., in orthopedics; Jonathan Ng, M.D., in internal medicine; and Richard Gravina, M.D., in neurology. The WCJ properly relied upon the opinions of the AMEs, who the parties presumably chose because of the AMEs' expertise and neutrality. The WCJ was presented with no good reason to find the AMEs' opinion unpersuasive, and we also find none. (See *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

Lastly, we note that defendant bears the burden of proof on apportionment and failed to meet that burden in this case. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114 [71 Cal.Comp.Cases 1229].)

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the February 4, 2021 Findings and Award is **DENIED**.

IT IS FURTHER ORDERED that applicant's Petition for Reconsideration of the February 4, 2021 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the February 4, 2021 Findings and Award is **RESCINDED** and **SUBSTITUTED** with new Findings of Fact, as provided below, and that this matter is **RETURNED** to the trial level for further proceedings as deemed appropriate by the WCJ for the issuance of the Award consistent with this opinion.

FINDINGS OF FACT

1. Ana B. Figueroa-Garcia, while employed on November 26, 2001 at San Jose, California, by Alum Rock Union Elementary School District, insured for workers' compensation liability by Westport Insurance Corp., successor by merger to Coregis Insurance Co., sustained a specific injury arising out of and in the course of this employment to her lumbar spine, right shoulder, headaches, and gastrointestinal distress.
2. The Applicant had sufficient earnings on the date of injury to produce a maximum PD rate of \$170.00 per week.
3. Applicant was adequately compensated for all claimed TTD to date. TTD was last paid on 11/8/2012.
4. The Applicant does require further medical care as the result of this injury.

5. The Applicant has sustained permanent partial disability of 72%, payable beginning 11/9/2012.
6. Applicant's attorney, Mr. Johnson, has provided services to Applicant with a reasonable value of 15%.
7. All other issues have been deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER



/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 23, 2021

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

**ANA FIGUEROA GARCIA
BUTTS & JOHNSON
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN**

PAG/ara

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