

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

MARIA CARMEN JIMENEZ, *Applicant*

vs.

**STATE OF CALIFORNIA/IN-HOME SUPPORTIVE SERVICES, legally uninsured,
administered by YORK RISK SERVICES GROUP, INC., *Defendants***

**Adjudication Number: ADJ6805309
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings of Fact, Award and Orders (F&A) issued by the workers' compensation administrative law judge (WCJ) on February 11, 2020, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her low back, left hip (trochanteric bursitis), and psyche, and in the form of hypertension/hypertensive cardiovascular disease and sleep disorder; that applicant's earnings at the time of the injury were \$148.98 per week, warranting the statutory minimum indemnity rates; that the sleep disorder did not cause any permanent disability; and that the injury caused 63% permanent disability, including 14% low back disability.

Applicant contends that her low back injury caused 39% permanent disability, that her sleep disorder caused 6% permanent disability, and that her weekly earning capacity is \$482.78.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.¹

We have considered the allegations in the Petition and the Answer and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&A except that we will amend the F&A to find that applicant's lumbar spine injury caused 39%

¹ We note that defendant's Answer is not signed. We have accepted and considered the Answer, but counsel is reminded that pursuant to WCAB Rule 10510(d) the Answer is required to be signed. (Cal. Code Regs., tit. 8, § 10510(d).)

permanent disability, that the issue of whether applicant's sleep disorder caused permanent disability is deferred, that the issue of the overall level of permanent disability caused by the December 22, 2008 injury is deferred (Finding of Fact 5); and that the reasonable value of the services of applicant's attorney is deferred (Finding of Fact 9). The Award and the Order of Commutation will be amended based thereon, and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to her psyche, low back, coccyx, gastrointestinal system, and in the form of hypertension and sleep disorder, while employed by defendant as a caregiver on December 22, 2008.

Orthopedic agreed medical examiner (AME) Lee Carl Woods, M.D., evaluated applicant on April 11, 2011. Dr. Woods examined applicant, took a history, and reviewed various diagnostics, including lumbar MRI and CT scan reports. (Joint Exh. 4, Dr. Woods, April 11, 2011, p. 3.) He diagnosed applicant as having an L2 compression fracture, lumbar strain superimposed on degenerative lumbar conditions, and left trochanteric bursitis (left hip pain). (Joint Exh. 4, p. 9.) Dr. Woods agreed with Bryan Aun, D.C., that applicant's condition had become permanent and stationary on November 3, 2009, and regarding her impairment he stated:

Based upon the traditional interpretation of the Guides to Evaluation of Permanent Impairment, 5th edition, Ms. Jimenez would experience an 8% impairment of the whole person based upon DRE Lumbar Category II, table 1.5-3, page 384 of the Guides. ¶ However, based upon the multiplicity of findings that contribute to the pain including the documented evidence of facet arthropathy and now old L2 compression fracture, sacroiliac arthritis, and probable secondary left trochanteric bursitis, the traditional interpretation does not accurately reflect impairment in this case. ¶ It is a more accurate interpretation that permanent impairment would include figure 15-9, page 427 of the Guides. Ms. Jimenez in all medical probability has lost approximately 30% of her lumbar pre-injury capacity which would result in an 18% impairment of the whole person in reference to the lumbar spine based upon the use of the Almaraz Guzman Decision.
(Joint Exh. 4, p. 11.)

Dr. Woods then apportioned, "... 90% of impairment, to the incident of December 22, 2008, and 10% to the underlying condition in the absence of any prior history of injury, or treatment to the underlying condition." (Joint Exh. 4, p. 12.)

On May 5, 2011, applicant was evaluated by internal medicine AME Stanley J. Majcher, M.D. Dr. Majcher examined applicant, took a history, and requested that he be provided additional medical records to review. (Joint Exh. 8, Majcher, May 5, 2011, p. 18.)

Psychology qualified medical examiner (QME) Charles Kodimer, Ph.D., evaluated applicant on September 7, and September 21, 2011. After taking a history, reviewing medical records, and performing psychiatric tests, Dr. Kodimer concluded that applicant's psychiatric condition had not reached maximum medical improvement/permanent and stationary (MMI/P&S) status. (Joint Exh. 13, Dr. Kodimer, September 26, 2011, p. 18.)

In his December 2, 2011 supplemental report, orthopedic AME, Dr. Woods stated that in addition to the lumbar spine whole person impairment (WPI) he had previously assigned, applicant had 3% WPI as a result of her trochanteric bursitis, caused by the December 22, 2008 injury. (Joint Exh. 3, Dr. Woods, December 2, 2011, p. 2.) On December 8, 2011, Dr. Woods' deposition was taken. During the deposition, Dr. Woods testified that the 18% lumbar spine WPI as stated in his April 11, 2011 report was a "typographical error" and based on Figure 15-19 of the American Medical Association Guides to the Evaluation of Permanent Impairment, (AMA Guides), applicant actually had 27% lumbar spine WPI. (Joint Exh. 2, Dr. Woods, December 8, 2011, deposition transcript, p. 8.)

After reviewing the additional medical records, in his supplemental report internal medicine AME Dr. Majcher stated:

The applicant has been exposed to stresses associated with industrial injuries, and stress contributes to high blood pressure. ¶ The applicant's hypertension is attributable to a combination of nonindustrial and industrial factors, notably industrial aggravation of an underlying, nonindustrial metabolic/genetic disorder.

(Joint Exh. 7, Dr. Majcher, October 30, 2014, p. 7.)

On August 4, 2016, Dr. Majcher re-evaluated applicant. After examining applicant and reviewing the interim medical record, Dr. Majcher diagnosed: hypertensive cardiovascular disease causing 30% WPI, 50% caused by applicant's industrial orthopedic injury and 50% caused by non-industrial factors; and an upper gastrointestinal/digestive system injury causing 9% WPI, 50% due to applicant's injury and 50% caused by non-industrial factors. (Joint Exh. 6, Dr. Majcher, August 4, 2016, p. 13.)

Psychology QME Dr. Kodimer re-evaluated applicant on August 2, 2017. Dr. Kodimer reviewed the interim medical record and again performed various psychiatric tests. Regarding the cause of applicant's psychiatric condition, Dr. Kodimer stated:

The psychological injury accompanying the physical injury is work related. Absent the physical injury at work, she would not have any adjustment reaction (and current depression, anxiety) to the injury itself. The situation meets the criteria of 51 % causation.

(Joint Exh. 9, Dr. Kodimer, September 1, 2017, p. 30.)

He concluded that applicant's psychiatric major depressive disorder had reached MMI/P&S status and that applicant's Global Assessment of Function (GAF) score was 53, converted to 26% WPI. (Joint Exh. 9, p. 29.)

On September 14, 2018, Dr. Majcher's deposition was taken. (Joint Exh. 5, Dr. Majcher, September 14, 2018, deposition transcript.) He testified regarding applicant's sleep disorder as follows:

Q. And when you evaluated my client, was she complaining of any issues with sleep?

A. As I recall, yes, Counsel, but let me be sure.

Yes, she was complaining of some issues of sleep, and that's reflected in her Epworth sleep scale, which she completed on 8/4/16.

Q. And is part of her issue with sleep her gastrointestinal complaints?

A. As I recall her problems with sleep, Counsel, had to do with pain associated with her orthopedic injuries. That's what I recall, Counsel.

(Joint Exh. 5, p. 11)

Q. So would you defer sleep to the orthopedist, or is that something that you would be able to address?

A. I address it commonly. If you want me to do so, I will.

Q. If you feel comfortable at this time, please.

A. Absolutely. Per Table 13-4, Page 317 of the AMA Guides, her Epworth score is 3/24, and I would rate her at 5 percent whole person impairment.

Q. And would you impose apportionment or find apportionment with regard to that impairment?

A. No.

(Joint Exh. 5, pp. 12 – 13.)

The parties proceeded to trial on December 2, 2019. The WCJ's summary of applicant's testimony included:

She doesn't remember exactly how many hours a week she worked for Mr. Cairns in 2008, but she was making \$450 per week during that time. The \$450 was partially paid in cash and the other part was paid by the state. The state paid her in checks. Ian, James's son, paid her the cash. ¶ ... She was paid \$9 per hour which would equate to \$234 per week. IHSS paid her about \$230 a week to care for Mr. Cairns. Additionally, she was paid cash by James's son, Ian. (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 2, 2019, p. 8.)

The issues submitted for decision included parts of body injured, earnings, and permanent disability/apportionment. (MOH/SOE, p. 3.)

DISCUSSION

Labor Code section 4453 states in part:

(c) Between the limits specified in subdivisions (a) and (b), the average weekly earnings, except as provided in Sections 4456 to 4459 , shall be arrived at as follows: ...

(3) If the earnings are at an irregular rate, such as piecework, or on a commission basis, or are specified to be by week, month, or other period, then the average weekly earnings mentioned in subdivision (a) shall be taken as the actual weekly earnings averaged for this period of time, not exceeding one year, as may conveniently be taken to determine an average weekly rate of pay.

(Lab. Code, § 4453(c)(3).)

The WCJ's finding that applicant earned \$148.98 per week was based on the two W-2 forms submitted into evidence. (Joint Exh. 14.) The W-2 forms show that applicant earned \$7,747.20 for the year 2008, indicating an average weekly wage of \$148.98.

Applicant argues that she was paid \$234.00 per week by IHSS for caring for James Cairns (Joint Exh. 15), she was paid \$216.00 per week by Ian Cairns, James Cairns son, (App. Exh. 1), and that she was paid \$32.78 per week by IHSS for caring for Guadalupe Robles (Joint Exh. 14). (Petition, pp. 6 – 7.)

As explained by the WCJ in the Report, the letter from Ian Cairns, App. Exh. 1, could not be authenticated because Mr. Cairns was not present to testify. Also, the letter was not verified under penalty of perjury and it states that applicant was paid \$450.00 cash per week. That is inconsistent with applicant's testimony that she was paid a total of \$450.00 per week:

The \$450 was partially paid in cash and the other part was paid by the state.... IHSS paid her about \$230 a week to care for Mr. Cairns. Additionally, she was paid cash by James's son, Ian.
(MOH/SOE, p. 8.)

We agree with the WCJ that App. Exh. 1 is not substantial evidence, and that the only substantial evidence in the trial record as to applicant's earnings and/or earning capacity is the W-2 forms submitted by the parties as Joint Exh. 14. The WCJ's finding that applicant earned \$148.98 per week is based on substantial evidence, is consistent with the provisions of Labor Code section 4453 as quoted above, and will not be disturbed.

Regarding applicant's lumbar spine disability, Dr. Woods was chosen by the parties to examine applicant as the orthopedic AME. He was presumably chosen by the parties because of his expertise and neutrality. Therefore, his opinions should ordinarily be followed unless there is a good reason to find his opinions unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114, 117].)

We note that Dr. Woods' reference to "the Almaraz Guzman Decision" is in regard to the Appeals Board en banc decision which was affirmed by the Sixth District Court of Appeal, wherein the Court explained that the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides) provide guidelines for the exercise of professional skill and judgment which, in a given case, may result in ratings that depart from those based on the strict application of the AMA Guides. (*Almaraz v. Environmental Recovery Services / Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) (*Almaraz/Guzman II*) affirmed by *Milpitas Unified School Dist. v. Workers' Compensation Appeals Board* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] (modified on other grounds on September 1, 2010).) In his April 11, 2011 report, Dr. Woods provided a strict application of the AMA Guides using the DRE (diagnosis related estimates) method of rating applicant's lumbar spine impairment and then explained why that was not an accurate rating of applicant's impairment. He then stated that applicant had lost approximately 30% of her lumbar spine pre-injury capacity which equated to 27% lumbar spine WPI.² (Joint Exh. 4, p. 11.) Thus, Dr. Woods' conclusions stated in his report (and deposition testimony) are substantial evidence that applicant sustained 27% lumbar spine WPI, and we see no reason to find his opinions unpersuasive. He also concluded that 90% of the lumbar spine impairment was caused by the December 22, 2008 injury. (Joint Exh. 4, p. 12.) Based thereon, applicant's lumbar spine disability, caused by her December 22, 2008 injury, is rated as follows: 90% (15.03.01.00 - 27 (5) 34 - 340G - 37 - 43) 39% PD

² As quoted above, at his deposition Dr. Wood corrected the "typographical error" on page 11 of the April 11, 2011 report that said 30% loss of lumbar spine capacity resulted in 18% lumbar spine WPI. (Joint Exh. 2, p. 8.)

Finally, as to the issue of applicant's sleep disorder, any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) To be substantial evidence a medical opinion must be based on pertinent facts and on an adequate examination and history, and it must set forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, our review of the trial record indicates that the only medical report that addresses a sleep disorder is the Epworth Sleepiness Scale attached to Dr. Majcher's August 6, 2016 report. Based on that document, it appears that applicant said she had a "Slight chance of dozing" while "Sitting and reading ... Watching TV ... [and] Lying down to rest in the afternoon." (Joint Exh. 6, EAMS p. 31, attachment.) At his deposition, Dr. Majcher stated:

A. ... Per Table 13-4, Page 317 of the AMA Guides, her Epworth score is 3/24, and I would rate her at 5 percent whole person impairment.

Q. And would you impose apportionment or find apportionment with regard to that impairment?

A. No.

(Joint Exh. 5, p. 13.)

Dr. Majcher did not explain why the Epworth Sleepiness Scale, in and of itself, would be an appropriate and accurate measure of applicant's impairment caused by her sleep disorder. Nor did he set forth the analysis and/or reasoning that was the basis for his opinion. The doctor's conclusion that he would "rate her at 5 percent whole person impairment" does not constitute substantial evidence. (*Escobedo v. Marshalls, supra.*)

The Appeals Board has the discretionary authority to further develop the record where there is insufficient evidence to decide an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) As explained above, Dr. Majcher stated that applicant had disability as a result of her sleep impairment, but his conclusion that applicant had "5 percent whole person impairment" as a result of her sleep impairment does not constitute substantial evidence. However, as the internal medicine AME, Dr. Majcher's opinions are an important factor to be considered in addressing the issue of applicant's disability. Under these circumstances, Dr. Majcher should be given the opportunity to review the medical record, to

determine the level of impairment caused by the sleep disorder, to determine whether applicant's injury was a factor in causing her sleep disorder, and to explain the basis for his conclusions. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

Accordingly, we amend the F&A to find that applicant's lumbar spine injury caused 39% permanent disability, that the issue of whether applicant's sleep disorder caused permanent disability is deferred, that the issue of the overall level of permanent disability caused by the December 22, 2008 injury is deferred (Finding of Fact 5); and that the reasonable value of the services of applicant's attorney is deferred (Finding of Fact 9). The Award and the Order of Commutation are amended based thereon; and we return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact, Award and Orders issued by the WCJ on February 11, 2020, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. Applicant's lumbar spine injury caused 39% permanent disability, the issue of whether applicant's sleep disorder caused permanent disability is deferred, the issue of the overall level of permanent disability caused by the December 22, 2008 injury is deferred, pending development of the record.

* * *

9. The reasonable value of the services of applicant's attorney is deferred.

AWARD

* * *

b. The award of permanent disability indemnity and attorney's fees based thereon is deferred pending development of the record.

ORDER OF COMMUTATION

IT IS ORDERED that the commutation of attorney's fees is deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 31, 2021

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

**MARIA CARMEN JIMENEZ
LAW OFFICES OF SOLOV & TEITELL, APC
MICHAEL SULLIVAN & ASSOCIATES**

TLH/pc

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