

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

CLEMENCIA CANELA, *Applicant*

vs.

**COUNTY OF SACRAMENTO, permissibly self-insured;
administered by COUNTY OF SACRAMENTO
WORKERS' COMPENSATION, *Defendants***

**Adjudication Number: ADJ11066092
Sacramento 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 and the Opinion on Decision 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 and Opinion on Decision, both of which we adopt and incorporate, we will deny reconsideration.

We observe, moreover, it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 9, 2022

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

**CLEMENCIA CANELA
MASTAGNI HOLSTEDT
TWOHY, DARNEILLE & FRYE**

PAG/abs

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

DISCUSSION

PETITIONER FAILED TO ESTABLISH A BASIS FOR RECONSIDERATION PURSUANT TO LABOR CODE § 5903(a)

The basis for Petitioner asserting a Labor Code § 5903(a) argument is unclear. The Board has jurisdiction over controversies between an employer and employee and shall resolve the disputes upon request of either party.¹ The parties clearly submitted the issues of permanent disability and apportionment to the WCJ for decision. (MOH Page 3 Line 3) Title 8 CCR § 10330 states:

In any case that has been regularly assigned to a workers' compensation judge, the workers' compensation judge shall have full power, jurisdiction and authority to hear and determine all issues of fact and law presented and to issue interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case, including the fixing of the amount of the bond required in Labor Code section 3715. Orders, findings and decisions and awards issued by a workers' compensation judge shall be the orders, findings, decisions and awards of the Workers' Compensation Appeals Board unless reconsideration is granted. (Title 8, CCR § 10330)

Petitioner has not established that the issuance of a determination that Applicant has permanent disability exceeds the authority of the WCJ. Therefore, Petitioner failed to establish a basis for granting reconsideration pursuant to Labor Code § 5903(a).

THE EXPERT MEDICAL OPINION OF PQME DR. MANIJEH RYAN, M.D. PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT APPLICANT HAS 28% WHOLE PERSON IMPAIRMENT FOR HER LEFT ANKLE INJURY PURSUANT TO THE AMA GUIDES 5th EDITION

Applicant established by a preponderance of the evidence that she uses a cane and an AFO (ankle foot orthosis) support in the form of a compression sock as a result of the injury to her left ankle. (SOE Page 7 Lines 10 – 13) Dr. Ryan has explained both how and why she reached her expert medical opinion that Applicant's use of a cane and AFO support produce 28% WPI pursuant to Table 17-5 of the AMA Guides 5th Edition and that there was no basis for apportionment of the permanent partial disability. (OOD Pages 5 – 6) She also explained why she did not use range of motion measurements to establish Applicant's WPI during her deposition and chose to use Table 17-5 of the AMA Guides 5th Edition. (Joint Ex. 1 Pages 8 – 14)

The parties disputed Applicant's Occupational Group Number and the WCJ determined OGN 111 is appropriate (FOF 1). This finding has not been appealed. Therefore, Dr. Ryan's level of WPI adjusted as follows:

17.01.07.00-28-[1.4] 39-111D-33-40

¹ Labor Code §4604

The expert medical opinion of Dr. Timmy Thomas did not address Whole Person Impairment pursuant to Table 17-5 of the AMA Guides 5th Edition. Applicant is entitled to have the whole of the AMA Guides considered when a physician is determining her WPI. There is no evidence in the record contradicting the determination Applicant uses a cane and AFO support. Dr. Thomas' finding of 3% WPI was found to be insubstantial because he has not considered all of the AMA Guides 5th Edition to establish his expert medical opinion.

Defendant holds the affirmative on the issue of apportionment of Applicant's permanent partial disability. Dr. Ryan found no basis for apportionment and Dr. Thomas testified at his deposition that an apportionment analysis would require speculation. (OOD Page 6, Def. Ex. D Pages 21 – 22) Therefore, Defendant failed to prove by a preponderance of the evidence that apportionment of Applicant's left ankle.

CONCLUSION

Applicant was found to have shown she has 48% permanent partial disability as a result of her industrial injury. (FOF 5) Her level of permanent partial disability was based on application of the Combined Values Chart to the permanent partial disability that resulted from kidney damage and the permanent partial disability that resulted from her use of a cane and AFO support. Petitioner has not appealed the finding of WPI and related permanent partial disability caused by the damage to Applicant's kidneys.

Dr. Ryan explained both how and why she reached her expert medical opinion that Applicant's use of a cane and AFO support produce 28% WPI pursuant to Table 17-5 of the AMA Guides 5th Edition. Her expert opinion is based on an accurate history, her examination of Applicant and the medical records provided.

Dr. Thomas' expert medical opinion did not address Applicant's well documented, and confirmed at trial by credible testimony, use of a cane and AFO support. His decision to disregard a directly applicable portion of the AMA Guides 5th Edition was found to be improper. His testimony at deposition that his apportionment analysis was based on speculation also contributed to the WCJ's determination his reports do not constitute substantial medical evidence on the issues of WPI and apportionment. (OOD Page 6)

The evidence does support the finding that Applicant has 48% permanent partial disability after appropriate adjustments. This finding combined with the parties' stipulations to Applicant's Average Weekly Wage support the Award of Permanent Partial Disability Indemnity. Making these determinations, findings and awards is within the authority of the Board. Therefore, Petitioner failed to establish a basis for reconsideration pursuant to Labor Code Section 5903 (a), (c) or (e).

DATE: March 17, 2022

Christopher Brown
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

[BURDEN] OF PROOF

The party holding the affirmative on an issue bears the burden of proving it by a preponderance of the evidence.¹ Defendant has accepted that Applicant suffered an injury arising out of and in the course of her employment to her left ankle on June 15, 2017. Defendant denied liability for Applicant's claim of injury to her kidneys as a compensable consequence of her admitted industrial injury. Applicant bears the burden of proving by a preponderance of the evidence that her kidneys were injured as a compensable consequence of her industrial injury.

The parties did not stipulate to Applicant's Occupational Group Number (OGN). Applicant asserted OGN 214 is appropriate and Defendant asserted OGN 111 is appropriate. The appropriate OGN must be established by a preponderance of the evidence.

The parties did not stipulate to Applicant's level of permanent partial disability. Applicant holds the affirmative on her level of disability. Defendant holds the affirmative on the issue of apportionment of Applicant's permanent disability.

OCCUPATIONAL GROUP NUMBER 111 WAS SHOWN BY A PREPONDERANCE OF THE EVIDENCE TO BE THE APPROPRIATE OCCUPATIONAL GROUP NUMBER

Applicant's Occupational Group Number (OGN) used for rating her level of permanent partial disability must be established by a preponderance of the evidence. Applicant asserted OGN 214 is appropriate. The 2005 Schedule of Rating Permanent Disabilities describes OGN 214 as:

Clerical (physically active) Occupations; Educators, & Retail Sales Occupations. Very high demand for speech, hearing and vision; high demand for fingering and handling; spine and leg demands at highest level for 200 series. Typical occupations: Auto Shop Estimator, Elementary School Teacher, Retail Sales Clerk (2005 SRPD 3-30)

Defendant asserted OGN 111 is appropriate. The 2005 Schedule of Rating Permanent Disabilities describes OGN 111 as:

Professional and Clerical Occupations Substantial use of keyboards; greater demands for standing and walking than 112 and 120. Typical occupations: Accountant, Claims Clerk, Reservations Agent (2005 SRPD 3-29)

This distinction has no impact on the rating of Applicant's kidney problems, but it would affect the rating of her ankle impairment.

Applicant worked as an Eligibility Specialist II/Human Services Specialist II at the time of her injury. This was the same position but the name was changed while she worked for Defendant. She credibly testified that she would spend six hours each day sitting and two hours per day being up doing other things. She would see between three and five applicants for benefits each day

¹ Labor Code §§ 3202.5 and 5705

(clients). She would get a client's file from the clerical department which was about two hundred feet from her office. The files were the size of legal paper and averaged about one inch in thickness. She would return to her office to review the file then go to the reception area to meet the client and conduct the eligibility interview. She did not identify any additional physical requirements and indicated her job was mainly computer work. (SOE Pages 5 – 6)

Applicant's testimony regarding her job duties and job activities on a daily basis are a better fit with OGN 111 than OGN 214. There is no evidence contradicting Applicant's credible testimony. Therefore, a preponderance of the evidence establishes that OGN 111 is appropriate for rating Applicant's permanent partial disability.

**APPLICANT PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT THE
DAMAGE TO HER KIDNEYS IS A COMPENSABLE CONSEQUENCE OF HER
INDUSTRIAL INJURY**

Applicant asserted that her use of Ibuprofen to treat the pain caused by her admitted ankle injury caused damage to her kidneys that is a compensable consequence of her industrial injury. Defendant denied liability for the damage to Applicant's kidneys. Applicant holds the affirmative on this issue.

Applicant was evaluated by Dr. Scott Anderson, M.D. as a Panel Qualified Medical Examiner regarding internal medicine issues. Dr. Anderson performed an examination on February 12, 2021 and issued a report with that date. (App. Ex. 2) Dr. Anderson was deposed on September 20, 2021. (Joint Ex. 2) Dr. Anderson's records review documents Applicant's treatment with Kaiser between 1980 and 2020. (App. Ex. 2 Pages 11- 46) Dr. Anderson summarized this history when he said:

The records document a history of diabetes, hypertension and other internal medicine issues. It appears that with respect to her creatinine that there has been a gradual increase over time but that it went up fairly precipitously after the injury. (App. Ex. 2 Page 46)

Dr. Anderson was asked at his deposition if Applicant's use of Ibuprofen contributed to her kidney disease and gave his expert medical opinion stating;

I still believe the Ibuprofen due to the injury contributed to her renal disease. The degree to which it contributed to it, I might be willing to reconsider. But I still believe it played a role because of the effect of using the medication more intensively, and using it at a point where she was older, and where her body was 5 more vulnerable to side effects from medication. (Joint Ex. 2 Page 36 Lines 1 – 9)

Dr. Anderson's expert medical opinion is based on his review of Applicant's medical history as documented in his report and during his deposition. He explained both how and why he determined Applicant's use of pain medication for her accepted industrial ankle injury caused damage to her kidneys resulting in decreased function. His report is found to be substantial medical evidence that

proved by a preponderance of the evidence that Applicant's kidney damage is a compensable consequence of her industrial ankle injury.

APPLICANT PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT SHE HAS 48% PERMANENT PARTIAL DISABILITY AFTER APPROPRIATE ADJUSTMENTS AS A RESULT OF HER INDUSTRIAL INJURY

The parties did not agree on Applicant's level of Whole Person Impairment (WPI) and resulting permanent partial disability caused by her industrial injury. Applicant holds the affirmative on the issue of the level of her permanent partial disability. Defendant holds the affirmative on the issue of apportionment of Applicant's permanent partial disability.

Applicant's industrial left ankle injury is being treated by Dr. Timmy Thomas, M.D. (MOH Page 2 Lines 19 – 20) Defendant asserts that Dr. Thomas's finding regarding Applicant's level of WPI and apportionment should be followed. Applicant's industrial left ankle injury was evaluated by Dr. Manijeh Ryan, M.D. as a Panel Qualified Medical Examiner. Applicant asserts the reports of Dr. Ryan should be followed.

Dr. Ryan gave her expert medical opinion that Applicant has 30% WPI based on her need to use a cane for walking and a short leg brace (AFO) based on Table 17-5 of the AMA Guides. (App. Ex. 1 Page 46) Dr. Ryan confirmed her expert medical opinion at her deposition confirmed her finding of 30% WPI based on Applicant's combined use of a cane and AFO when she stated:

Well, there's a section in the AMA Guides, the gait derangement, which is the actual use of assistive device, which says "use of cane and AFO," which is why I chose that. Because usually we don't rate for one body part two separate assistive devices. We always use a combination. That is why I chose that section. (Joint Ex. 1 Page 52 Lines 19 – 25)

At her deposition, Dr. Ryan adjusted her expert medical opinion regarding Applicant's WPI after questioning and stated:

A. So, in her testimony, she uses a cane outside, so – and I believe she's truthful about that. So I have to – when I rate her, I am going to use the 15 percent for C and the 15 percent for D, which is the AFO use, and combine them. That would be 28%, which would be the – I think reflective of what she actually does.

Q. BY MR AMICK: So that's a change in your written report; is that correct?

A. Change to the rating, yes. (Joint Ex. 1 Page 54 Lines 14 – 25)

Dr. Ryan determined there was no basis for Apportionment of Applicant's left ankle disability. (App. Ex. 1 Page 46) Based on the stipulations to Applicant's date of birth and date of injury, and the determination that OGN 111 is the appropriate modifier Dr. Ryan's 28% WPI adjusts as follows:

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Dr. Thomas issued a PR-4 dated May 4, 2018. (Defendant's Ex. A) Dr. Thomas' PR-4 indicates that Applicant is using a cane and a brace. His report gives his expert medical opinion that Applicant has 3% WPI base Ankle Motion Impairment pursuant to Table 17-11 of the AMA Guides. His finding on WPI is found to lack consideration of Applicant's use of a cane and brace. Dr. Thomas apportionment analysis indicates there is 20% apportionment to comorbidities, but does not explain how or why he has picked this number. (Def. Ex. A)

Dr. Thomas was deposed on two occasions. During the second deposition Dr. Thomas states he would not be considering Table 17-5 of the AMA Guides. (Def. Ex. 2 Pages 19 - 21) When asked by Defense Counsel if he can give a reasonable approximation of apportionment he states:

I'm not sure how I would answer that.

Once again, that's kind of a hard thing to estimate. Yeah, I would be speculating.
(Def. Ex D Pages 21 -22)

Based on Dr. Thomas rejection of Table 17-5 when Applicant's use of a cane and ankle support is well documented and his deposition testimony indicating the apportionment analysis requires speculation the reports are not found to be substantial medical-legal evidence on the issues of WPI and apportionment.

Applicant credibly testified at trial that she does use a cane when walking outside her house and a compression sock for her left ankle. (SOE Page 7 Lines 10 – 13) The report and deposition of Dr. Ryan combined with Applicant's credible testimony prove by a preponderance of the evidence that she has 28% WPI for her left ankle. Defendant did not prove by a preponderance of the evidence legally valid apportionment.

As discussed above, Applicant proved by a preponderance of the evidence that the medications taken to cure or relieve the pain caused by her accepted industrial injury damaged her kidneys. Dr. Anderson, the PQME for internal medicine issues, gave his expert medical opinion that Applicant has 40% WPI based Table 7-1 of the AMA Guidelines. (Applicant Ex. 2 Page 50) Dr. Anderson's opinion is based on an accurate history from Applicant and an extensive review of the medical records. Dr. Anderson initially determined apportionment of the damage to Applicant's kidneys was appropriate with 40% attributed to the industrial injury. Dr. Anderson adjusted his apportionment analysis at his deposition and attributed 20% of Applicant's kidney damage to the industrial ankle injury. (Joint Ex. 2 Pages 36 – 38)

Dr. Anderson has explained both how and why he apportions Applicant's kidney damage to her non-industrial diabetes and hypertension and use of Ibuprofen prior to Applicant's industrial ankle injury. Therefore, Defendant did prove by a preponderance of the evidence that 80% of Applicant's kidney damage should be apportioned to factors other than her industrial ankle injury. Based on the parties stipulations and the finding OGN 111 is appropriate Applicant's kidney damage WPI adjusts as follows:

$$(20\%)(7.01.00.00-40-[1.4] 56-111F-56-64) = 13\%$$

Applicant's 40% industrial permanent partial disability for her ankle and 13% industrial permanent partial disability for her kidneys combine as follows:

$$40C13 = 48\% = 257.00 \text{ weeks @ } \$290.00 \text{ per week} = \$74,530.00$$

The parties stipulated that February 15, 2019 is the appropriate date for continuation of permanent disability advances. (MOH Page 2 Lines 23 – 25)

THE PARTIES' STIPULATION THAT APPLICANT REQUIRES FURTHER MEDICAL CARE IS SUPPORTED BY THE MEDICAL RECORD

The parties stipulated that an Award of future medical care for Applicant limited to the scope of her industrial injury is appropriate. (MOH Page 2 Lines 22 23) This stipulation is supported by the reports of Dr. Ryan, Dr. Anderson and Dr. Timmons. Therefore, Applicant is entitled to an Award of future medical care.

APPLICANT'S ATTORNEY PROVIDED VALUABLE SERVICES BEFORE AND AT TRIAL OF APPLICANT'S CLAIM WITH A REASONABLE VALUE OF \$8,943.60

Applicant's Attorney provided valuable services before and at trial of Applicant's claim. \$8,943.60, 12% of the Permanent Partial Disability Indemnity being Awarded, is a reasonable fee when consideration is given to the time spent, responsibility assumed, care given and results obtained by Applicant's Attorney.