

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

KIMBERLY KIDD, *Applicant*

vs.

**ALAMEDA CONTRA COSTA TRANSIT DISTRICT, permissibly self-insured,
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ9105305
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Amended Findings & Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on June 24, 2021, wherein the WCJ found in pertinent part applicant's August 6, 2013, industrial injury caused 92% permanent disability.

Defendant contends that applicant's overall permanent disability should not be rated by adding the percentages of permanent disability caused by her orthopedic (54%) and psychiatric (38%) conditions, and instead should be rated by combining those percentages, using the Combined Values Chart in the 2005 Permanent Disability Rating Schedule.

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

We have considered the allegations in the Petition for Reconsideration (Petition) and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant claimed injury to her head, neck, back, shoulders, and psyche as a result of a motor vehicle accident while employed by defendant as a bus driver on August 6, 2013.

On August 27, 2014, applicant was evaluated by psychiatric agreed medical examiner (AME) Ann E. Allen, M.D. (Joint Exh. 111, Dr. Allen, August 27, 2014.) Dr. Allen took a history,

reviewed the medical record, and conducted various psychological tests. The diagnoses included post traumatic stress disorder and anxiety disorder not otherwise specified. (Joint Exh. 111, p. 19.) Dr. Allen assigned a Global Assessment of Function (GAF) score of 55 and concluded that “industrial factors predominate and meet 51% threshold for causation of psychiatric injury...” (Joint Exh. 111, p. 22.)¹

On December 10, 2014, chiropractic AME Moses Jacob, D.C., evaluated applicant. (Joint Exh. 105, Dr. Jacob, December 29, 2014.) Dr. Jacob examined applicant, took a history, and reviewed the medical record. He determined that applicant had reached maximum medical improvement/permanent and stationary status and diagnosed applicant as having cervical spine sprain/strain and right shoulder tendinosis. (Joint Exh. 105, pp. 11 and 13.) Dr. Jacob then stated that the injury caused 7% cervical spine whole person impairment (WPI), and 9% upper extremity (right shoulder) WPI, and included a 3% WPI pain add-on. (Joint Exh. 105, p. 14.)

Dr. Jacob re-evaluated applicant on November 9, 2017. (Joint Exh. 102, Dr. Jacob, November 9, 2017.)² The doctor re-examined applicant, took an interim history, and reviewed additional medical records. He noted that applicant had undergone a cervical spine fusion surgery at level C7 and that she had a right shoulder decompression surgery. (Joint Exh. 102, p. 8.) Dr. Jacob concluded that applicant’s disability had increased to 26% for the cervical spine and 10% for the right shoulder, plus the 3 % WPI pain add-on. (Joint Exh. 102, p. 8.)

On March 7, 2018, psychiatric AME Dr. Allen re-evaluated applicant. (Joint Exh. 110, Dr. Allen, March 7, 2018.) After taking an interim history, reviewing medical records, and considering the psychological test results, Dr. Allen again assigned a GAF score of 55. (Joint Exh. 110, p. 35.)

Dr. Allen’s deposition was taken on November 28, 2018. (Joint Exh. 112, Dr. Allen, November 28, 2018, deposition transcript.) Dr. Allen’s testimony indicated that she had not changed her opinions as stated in her March 7, 2018 report.

On April 24, 2019, Dr. Allen again re-evaluated applicant. (Joint Exh. 108, Dr. Allen, April 24, 2019.) Based on her examination of applicant, the interim history, and her review of the medical record, Dr. Allen again assigned a GAF score of 55. (Joint Exh. 108, p. 40.) She stated that 70% of applicant’s psychiatric disability was caused by the August 6, 2013 accident, 20% was

¹ On page 20 of the report the GAF score is identified as 58, but on pages 22 - 23 Dr. Allen explains why a GAF score of 55 is appropriate. (Joint Exh. 111, pp. 20, 22 – 23.)

² In his report Dr. Jacob noted that he had re-evaluated applicant on March 22, 2017 (Joint Exh. 102, p. 2) but that report was not submitted as an exhibit at trial.

due to the pain and physical problems caused by the accident, and 10% of her disability was caused by non-industrial factors. (Joint Exh. 108, p. 41.)

Applicant was re-evaluated by AME Dr. Jacob on March 5, 2020. (Joint Exh. 101, Dr. Jacob, March 5, 2020.) Dr. Jacob examined applicant, took an interim history, and reviewed the medical record. He concluded that applicant had again reached maximum medical improvement/permanent and stationary status, that she had 26% cervical spine WPI, and 10% right shoulder WPI, plus the 3 % WPI pain add-on. (Joint Exh. 101, p. 13.) Dr. Jacob then reiterated his opinion that all of applicant's orthopedic disability was caused by the August 6, 2013 injury. (Joint Exh. 101, p. 15.)

Dr. Allen was asked to address the issue of whether applicant's psychiatric disability and orthopedic disability should be added or combined. (See *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013 W/D) 78 Cal.Comp.Cases 213.) In her May 21, 2020 report Dr. Allen stated:

The physical and psychiatric disabilities are best approximated by adding rather than combining. There is a synergistic effect between the physical injury and the psychiatric injury in this case. Her pain and limitations from the orthopedic injuries result in diminished motivation to engage in activities, withdrawal, and diminished life enjoyment as well as anxiety about her future. The psychiatric symptoms lower effectiveness of medical intervention and contribute to self-limiting pain behavior. ¶ There is no overlap between the orthopedic disability rating and the psychiatric disability. The rating body parts are distinct and the psychiatric rating independent of the rating for pain and physical limitations. (Joint Exh. 106, Dr. Allen, May 21, 2020, p. 2.)

Dr. Allen was again deposed on September 2, 2020. (Joint Exh. 113, Dr. Allen, September 2, 2020, deposition transcript.) Her testimony regarding her "*Kite* analysis" included the following:

Q. Okay. So before your last -- before your last report, okay, in your analysis, you did not see a synergistic effect; is that correct? ...

THE WITNESS: I did not comment on whether or not there was a synergistic effect.

Q. Well, had you seen one, would you have commented on it?

A. No, because what I do is I give a report based on what is requested of me. Otherwise, I can comment on a lot of things, but I don't. I limit my report to what is requested of me at the time that I'm asked to do the report.

(Joint Exh. 113, pp. 16 – 17.)

Q. Okay. So my question is when you last evaluated the applicant, why didn't you provide a comment as to the synergistic effect between the orthopedic and the psychiatric?

A. Because I was not asked to comment on Kite.

Q. Okay. So the synergistic effect did not – did it not present itself when you last physically examined the applicant?

A. No. That would have been something that was occurring, but I was not making an analysis of that.

Q. Okay. So let's talk about the synergistic effect. When you -- in your last report when you stated that you thought the injury should be combined – or added instead of combined, what do you base that upon in the record?

A. That is based on her psychiatric diagnosis and the psychiatric symptoms and effects on her functioning as a result of the psychiatric diagnosis.

Q. Okay. Where in the record do you correlate the applicant's psychiatric condition and her neck as having a synergistic effect?

A. That I used the word "synergistic"?

Q. Well, something upon which you base your determination.

A. Well, I -- as I recall in my apportionment, I determined that there is an effect of her physical problems upon her residual psychiatric disability.

(Joint Exh. 113, pp. 18 – 19.)

Q. Okay. But you do not correlate any kind of synergistic effect when you had previously rated her, correct?

A. I did not comment on it, correct.

Q. Well, did it exist?

A. It existed, yes.

Q. Okay. So if it existed, I am going to ask you again why didn't you correlate in the record as to that effect?

A. Because I was not asked to comment upon that.

(Joint Exh. 113, p.20.)

The parties proceeded to trial on April 6, 2021. The issue submitted for decision included permanent disability/apportionment and whether the factors of disability would be added or combined. (Minutes of Hearing and Summary of Evidence, April 6, 2021.)

DISCUSSION

The disability values of multiple impairments may be added instead of combined using the Combined Values Chart if adding the impairments provides an accurate rating of the injured worker's disability, particularly when there is no overlap, and when the synergistic or additive effect of the multiple disabilities support that method of combination. (*Bookout v. Workers' Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595]; *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)*, *supra*; *De La Cerda v. Martin Selko & Co.* (2017 W/D) 83

Cal.Comp.Cases 567.) Defendant argues that the opinions of AME Dr. Allen are not substantial evidence that applicant's orthopedic and psychiatric impairments should be added, not combined.

As noted above, Dr. Allen examined applicant three times over an approximately five year period. She reviewed the extensive medical records, including the reports from AME Dr. Jacob (See e.g. Joint Exh.106, p. 2; Joint Exh. 108, pp. 11 – 36; Joint Exh. 111 pp. 8 – 19) and she performed numerous psychological tests. (See e.g. Joint Exh. 111 pp. 7 -8, Joint Exh.110, pp. 6 - 9; Joint Exh. 108, pp. 8 – 11.) In her May 21, 2020 supplemental report Dr. Allen explained that applicant's physical and psychiatric disabilities should be added because: applicant's pain and limitations caused by her orthopedic injuries result in diminished motivation to engage in activities, withdrawal, diminished life enjoyment and anxiety about her future; the psychiatric symptoms reduce the effectiveness of applicant's medical treatment and they contribute to her self-limiting pain behavior; and the ratings of the injured body parts are distinct and the psychiatric rating is independent of the rating for applicant's pain and physical limitations. (Joint Exh. 106, p. 2.) Also, at her second deposition, Dr. Allen clearly explained why she had not addressed the issue of whether applicant's factors of disability should be combined or added prior to her May 21, 2020 report, and she further explained why it was appropriate to add the orthopedic disability to the psychiatric disability. (See Joint Exh. 113 as quoted above.)

When a physician's report is well-reasoned, is based on an adequate history and examination and sets forth the reasoning behind the physician's opinion, not merely his or her conclusions; the report constitutes substantial evidence. (*Granado v. Workmen's Comp. Appeals Bd.* (1970) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660].) Further, the AMEs in this matter were presumably chosen by the parties because of his or her expertise and neutrality. Therefore, the AME's opinion should be followed unless there is a good reason to find that opinion unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114, 117].) Having reviewed the complete trial record, it is clear that Dr. Allen's reports and deposition testimony constitute substantial evidence regarding applicant's psychiatric disability and the issue of adding or combining applicant's overall disability. Thus, we see no reason to disturb the F&A.

Finally, defendant argues that, "Simply using the word 'synergistic' is not sufficient to meet the substantial evidence standard." (Petition, p. 7.) It is important to note that for the reasons discussed above, defendant's argument does not change the outcome of this matter. However,

defendant is correct that the use of the term “synergistic effect” is not a determinative factor as to the issue of adding or combining impairment. It has been held that the disability values of multiple impairments may be added instead of combined using the Combined Values Chart if adding the impairments provides an accurate rating of the injured worker’s disability, particularly when there is no overlap, and when the synergistic or additive effect of the multiple disabilities support that method of combination. (*Bookout v. Workers’ Comp. Appeals Bd.*, *supra*; *Athens Administrators v. Workers’ Comp. Appeals Bd. (Kite)*, *supra*; *De La Cerda v. Martin Selko & Co.* (2017 W/D) 83 Cal.Comp.Cases 567.) However, as we have previously explained:

The determination as to whether the final permanent disability is rated using the CVC [Combined Values Chart] or by addition is based upon the medical evidence. The issue is to determine the most accurate rating, not merely whether there is a synergistic relationship or absence of overlap between the impaired body parts. As explained by the Board panel in *De La Cerda v. Martin Selko & Co.* (2017) 83 Cal. Comp. Cases 567 (writ den.), the fact that a QME or AME report does “not use the term ‘synergistic’ to advocate for the use of the additive rating method is not determinative of the validity of using that method. The impairments may be added if substantial medical evidence supports the physician’s opinion that adding them will result in a more accurate rating of the applicant’s level of disability than the rating resulting from the use of the CVC.” (*Dufrene v. Cook Erectors* 2020 Cal Wrk Comp PD LEXIS 180.)³

Again, there is no requirement that a doctor quote the term “synergistic effect” to actually be substantial evidence. Rather, where a physician’s report is well-reasoned, is based on an adequate history and examination, and discloses a solid underlying basis for the opinion, the report is substantial evidence. (*Granado v. Workmen’s Comp. Appeals Bd.*, *supra*; *McAllister v. Workmen’s Comp. Appeals Bd.*, *supra*.) A medical evaluator is to provide the most accurate rating of the injured worker’s disability. (*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).)

³Although panel decisions of the Appeals Board are not binding precedent and have no stare decisis effect, they are citable to the extent they point out the contemporaneous interpretation and application of the workers’ compensation laws by the Appeals Board. (*Griffith v. Workers’ Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145, 147, fn. 2]; *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 [Appeals Board en banc].)

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Amended Findings & Award issued by the WCJ on June 24, 2021, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 7, 2021

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

**KIMBERLY KIDD
RATTO LAW FIRM
LAUGHLIN, FALBO, LEVY & MORESI**

TLH/pc

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

Applicant, **Kimberly Kidd**, while employed on August 6, 2013, as a bus driver, in Oakland, California, by Alameda Contra Costa Transit District, sustained injury arising out of and in the course of employment to her head, neck, back, shoulders and psyche as a result of a motor vehicle accident. Applicant never returned to her occupation as a bus driver and to her credit obtained employment elsewhere following her injuries.

The parties to their credit utilized the services of agreed medical examiners, Dr. Moses Jacob and Dr. Ann Allen. Unfortunately use of agreed medical examiners did not lead the parties to an informal resolution. Even a trial did not bring the case to finalization.

Although most issues have been addressed and put to rest through the trial process, there remains one dispute: Should applicant's orthopedic disabilities be added with the psychiatric disability or should the two be combined?

Defendant argues that Dr. Allen's analysis of Kite is not substantial medical evidence hence cannot be followed

Dr. Ann Allen, the psychiatric AME in her report of April 21, 2020 (joint Exhibit 106) said:

The physical and psychiatric disabilities are best approximated by adding rather than combining. There is a synergistic effect between the physical injury and the psychiatric injury in this case. Her pain and limitations from the orthopedic injuries result in diminished motivation to engage in activities, withdrawal, and diminished life enjoyment as well as anxiety about her future. The psychiatric symptoms lower effectiveness of medical intervention and contribute to self-limiting pain behavior.

There is no overlap between the orthopedic disability rating and the psychiatric disability. The rating body parts are distinct and the psychiatric rating independent of the rating for pain and physical limitations. Her psychiatric disability was based on the GAF score, utilizing the AMA Guides Table L4.1 to determine the degree of social and occupational dysfunction due to the psychiatric disorder. The psychiatric determination did not include impairment in functioning due to pain or physical limitations.

Having read Dr. Allen's report of April 21, 2020 and her deposition transcript

(Joint Exhibit 113) I concluded that Kite was properly applied by Dr. Allen, hence I formulated overall disability based on addition of the disabilities instead of using the combined values chart.

KITE analysis and its application:

In its response to the petition for reconsideration applicant stated the following:

Applicant cited *Athens Administrators, et al, v. Worker's Compensation Appeals Board* (Kite) (2013) 78 CCC 213 (writ denied) "Kite" in her trial brief. The Kite decision rests on the rationale of the *Alvarez/Guzman (Milpitas Unified School v WCAB (Alvarez/Guzman)* (2010) 187 Cal. App. 4th 808,812, 818-830; 75 CCC 837). The *Alvarez/Guzman* case requires the medical evaluator to provide the most accurate rating of the injured worker's disability. However, the medical evaluator, while fenced in by the so-called "four corners" of the AMA Guides, is allowed to utilize any chapter, table or method within the AMA Guides that would most accurately reflect the injured workers disability. Thus, the key point is that the rating must be medically the most accurate description of disability. (Page 5 response to petition for reconsideration).

To properly assess an injured worker's disability, an evaluating physician can utilize the entire AMA guides to address levels of disability. If the guides do not properly account for applicant's overall level of disability then the evaluator may turn to case law as Dr. Allen did in this case.

Dr. Allen explains in her report that there is no overlap between applicant's psychiatric disability and orthopedic disability. The psychiatric disability in and of itself creates a disability that is best accounted for by being added to the orthopedic disability.

Applicant in her response to petition for reconsideration correctly notes that the "important determination is the *accuracy of the rating* not merely whether there was a synergistic effect or overlap between impaired body parts. (*Dufrene v Cook Erectors* 2020 Cal Wrk Comp PD LEXIS 180 (Board Panel Decision)) (Page 6, response to petition for reconsideration).

Since Dr. Allen is an agreed medical examiner in this case, I am bound to follow her opinions unless I find something inaccurate. It was my ruling that Dr. Allen properly applied the AMA guides as well as current case law as it applied to her determination that the disabilities should be added instead of combined.

RECOMMENDATION

I recommend the Petition for Reconsideration filed by defendant be ***DENIED.***

DATE: 07/22/2021

Lilla J Szelenyi

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE