

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

CAROLE KAYEM, *Applicant*

vs.

**CHILDREN'S INSTITUTE INTERNATIONAL,
UNITED STATES FIRE INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ2958205 (MON 0353752)
Marina Del Rey 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 of Fact and Award of February 14, 2022, wherein it was found that while employed as an events and special projects coordinator during a cumulative period ending on July 21, 2007, applicant sustained industrial injury to her low back, psyche, neurological system, and in the forms of gastroesophageal reflux disorder (GERD) and sexual dysfunction, causing permanent disability of 76% and the need for further medical treatment. In finding permanent disability of 76%, it was found that "Applicant's occupational group number is determined to be dual, both 380 and 214." Additionally, the WCJ included findings of 13% GERD permanent disability, 6% sexual dysfunction permanent disability, and 7% sleep disorder permanent disability (after apportionment) in making his ultimate permanent disability findings. Finally, the WCJ's decision contains a clerical error referencing "45% industrial apportionment attributed to applicant's hypertension impairment" even though no hypertension injury or impairment was alleged or found.

Defendant contends that the WCJ erred in finding permanent disability of 76% arguing that (1) the WCJ erred in utilizing Occupational Group 380 in rating applicant's permanent disability, (2) the psychiatric impairment should have been apportioned to non-industrial factors, and (3) the impairments for sleep disorder, sexual dysfunction, and GERD were duplicative of impairments for applicant's underlying orthopedic and psychiatric injury. The Petition also states that the decision is unclear regarding whether defendant is being given credit for permanent disability

advances. Finally, the Petition points out the clerical error regarding the reference to a hypertension impairment.

We have received an Answer from the applicant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

As explained below, we will grant reconsideration, and amend the decision to defer the issue of permanent disability and attorney's fees so that permanent disability may be rerated without a separate rating for sleep disorder. Qualified medical evaluator neurologist Ezequiel Fink, MD opined that "the major contributing factors [of applicant's sleep disorder] are pain and psyche." (April 25, 2017 report at p. 29.) Dr. Fink said that 10% of her sleep disorder was because of nonindustrial pain, 45% was due to industrial psyche, which he felt overlapped with sleep disorder rated in the in applicant's psychiatric impairment, and 45% was due to industrial pain. While the WCJ 45% was included in her permanent disability rating as sleep disorder, sleep disorder caused by pain is encompassed by the underlying pain-causing impairment. (*Jones v. City of Long Beach* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 31 [Appeals Bd. panel]; *Frialde v. TJ Ward* (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 535 [Appeals Bd. panel]; *Masters v. State of California* (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 128 [Appeals Bd. panel].)

Accordingly, we will grant reconsideration and amend the decision to defer the issues of permanent disability and attorney's fees so that the permanent disability can be re-rated without the separate sleep disorder rating, which is duplicative of applicant's underlying orthopedic impairment. Since we defer the issue of permanent disability, we need not address whether any clarification of the permanent disability finding is necessary to account for permanent disability indemnity advances. Defendant may raise this issue in the further proceedings.

With regard to defendant's other contentions, we will amend the WCJ's decision to delete the reference to hypertension impairment, and otherwise affirm the other findings for the reasons stated by the WCJ in the Report, which we incorporate as quoted below:

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I
INTRODUCTION**

1. Applicant's Occupation: Event and Special Events Coordinator

- | | |
|--|---|
| 2. Applicant's Age: | 43 |
| 3. Dates of injury: | 9/15/2006 to 7/21/2007 |
| 4. Parts of Body Injured: | low back, psyche, sleep and internal (GERD) |
| 5. Parts of Body Alleged: | neurologic system and sexual dysfunction |
| 6. Manner in which injuries have occurred: | cumulative trauma |
| 7. Identity of Petitioner: | Defendant, Children's Institute Inc.; US Fire Insurance administered by Crum & Forster |
| 8. Timeliness: | The Petition was timely filed. |
| 9. Verification: | A verification is attached. |
| 10. Date of Findings and Award: | 2/14/2022 |
| 11. Petitioner's contentions: | <ol style="list-style-type: none"> 1. The WCJ acted in excess of her Powers. 2. The evidence does not support the Findings of Fact. 3. The Findings of Fact do not support the Order, Decision or Award. |

II FACTS

Applicant, Carole Kayem, while employed during the period 9/15/2006 through 7/21/2007, as an Event and Special Events Coordinator, Occupational Group Number in dispute, at Los Angeles, CA by Children's Institute international, sustained injury arising out of and in the course of employment to her low back, psyche, sleep and internal (GERD). Applicant claims to have sustained injury arising out of and in the course of employment to her neurologic system and sexual dysfunction.

This matter commenced trial on 12/2/2020 was continued to 1/26/2021 and was submitted pending submission to the DEU on 3/24/2021. The Applicant was the only witness to testify. A formal rating instruction and a formal rating were served on the parties on 6/16/2021. Defendant filed correspondence noting their objection to the rating calculation and requested an opportunity to cross-examine the rater on 6/23/2021.

The matter was then set on the trial calendar on 8/3/2021. On 8/2/2021 the parties appeared virtually and Defendant requested a continuance of the 8/3/2021 trial date due to a calendar conflict. The trial was then continued to 10/20/2021. Then the Applicant requested a continuance due to a calendar conflict on 10/20/2021 and the matter was continued to 11/3/2021. The parties appeared at the 11/3/2021 trial date and after a discussion with all parties and the WCJ, Defendant agreed to withdraw her request for cross-examination of the rater and reserve her right to challenge any additional issues on reconsideration. (See Minutes of Hearing (Further) dated 11/3/2021 page 2, lines 2 to 6) The matter was then re-submitted on 11/3/2021 without additional testimony or documentary evidence. On 12/13/2021 the WCJ issued an order vacating submission pending receipt of an amended rating form from the Disability Evaluation Unit. The Amended Formal Rating and Formal Rating Instruction was served on all parties on 12/13/2021. There was no objection filed in response to either. The WCJ issued her Findings of Fact and Award on 2/14/2022.

Defendant filed a timely, verified Petition for Reconsideration on 3/11/2022. Applicant filed a verified Answer to Petition for Reconsideration on 3/25/2022. The Petition for Reconsideration should be granted in part and denied in part for the reasons set forth below.

III DISCUSSION

Preliminarily in the Petition for Reconsideration, Defendant's argument identified as E takes issue with the fact that Findings of Fact #3 contains language pertaining to a claim for hypertension which is inapplicable to the instant case.

With regard to this issue, Petitioner is correct. This was a simple clerical error that contained language concerning hypertension that was not related to the Findings of Fact in the instant case. The Petition should be granted in part to correct this clerical error and the Findings of Fact and Award dated 2/14/2022 should be amended to read as follows:

3. There is 75% industrial apportionment attributed to applicant's lumbar spine impairment according to AME Dr. Steven Brouman. There is 100% apportionment attributed to applicant's psychiatric impairment according to the Panel QME Dr. Jacob Moussai. There is 100% apportionment attributed to applicant's internal (GERD) impairment according to the Panel QME Dr. Said Rabhan. There is 100% apportionment attributed to applicant's sexual dysfunction impairment according to the Panel QME Dr. Mark Vogel. [Reference to sleep disorder impairment and apportionment is redacted.]

The Petition for Reconsideration should be granted in part and the Findings and Award should be amended to reflect the language suggested above. The remainder of the Petition should be denied for the following reasons.

The WCJ erred in finding Applicant's Occupational Group Number was dual.

Defendant objects to the WCJ's finding of dual occupation between occupational group numbers 214 and 380. Defendant argues that occupational group number of 214 is the most applicable group number to Applicant's job as a Special Events Coordinator. However, the Defendants argument in this regard ignores both the trial testimony of the Applicant concerning her job duties and Applicant's amendments to the Job Analysis. The credible and un rebutted testimony of the Applicant and the entire record supports the WCJ's finding of dual occupation.

At trial, Applicant was the only witness to testify regarding her job duties and the manner in which she sustained her injuries. Applicant did not participate in the creation of the Job Analysis as she was not present as is noted on page 2 of Exhibit B. The Applicant prepared an addendum to the Job Analysis identified as Exhibit 1. The Addendum clarifies additional duties that were either not mentioned in the Job Analysis or incomplete. The Applicant testified that in the 8 to 9 weeks before the Christmas Party that she would lift 50 pounds up to 3 times a week. (See Minutes of Hearing (Further) and Summary of Evidence dated 3/24/2021 page 5 lines 3 to 4) Based on Applicant's credible and un rebutted testimony at trial concerning her job duties and the entire record, Applicant's job entailed duties from both occupational group numbers 214 and 380.

The WCJ erred by following the Panel QME reporting of Dr. Moussai regarding apportionment

Defendant challenges the apportionment determination of the panel QME Dr. Moussai. Applicant points out in her Answer that Defendant had the opportunity to change Dr. Moussai's opinion in his deposition set on 6/8/2020. This deposition transcript was admitted into evidence as Joint Exhibit Y.

The WCJ determined that the medical reporting of the Panel QME Dr. Moussai including his deposition testimony was substantial medical evidence regarding all of the issues he addressed including apportionment. The reporting and deposition of Panel QME Dr. Moussai is based on a thorough examination with an accurate history and his statement regarding apportionment is supported by substantial medical evidence. Defendant offered no documentary or testimonial evidence to rebut Dr. Moussai's opinion that Applicant's psychiatric permanent disability is 100% industrial. Ultimately, Defendant was unable meet

their burden that there was non-industrial apportionment for Applicant's psychiatric permanent disability.

The Impairment arising from Applicant's sexual dysfunction and digestive impairment (GERD) are not separate ratable disorders causing permanent disability.

[T]he permanent disability identified by the Panel QME's, Dr. Mark Vogel [and] Dr. Said Rahban, document separate and distinct injuries within their medical specialties which are entitled to separate permanent disability ratings.

As Applicant points out in her Answer, The Panel QME Dr. Mark Vogel indicates that Applicant's diagnostic impression of female sexual aversion occurred as a result of her lumbar spine surgery and the two surgeries to relieve her of the effects of the injury. He indicates that not all lumbar surgeries result in develops sexual dysfunction. Dr. Vogel's reporting supports permanent disability arising from a separate and distinct part of the body. (See Exhibit Q) Defendant did not provide any documentary or testimonial evidence to challenge Dr. Vogel's opinion.

The Panel QME Dr. Said Rahban identifies separate and distinct gastroenterological conditions, which resulted in his diagnosis of cyclic vomiting syndrome in his 5/17/017 report. Defendant did not provide any documentary or testimonial evidence to challenge Dr. Rahban's opinion.

[Discussions of sleep disorder permanent disability and the need for clarification for credit of permanent disability indemnity advances redacted.]

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of March 2, 2022 is **DENIED**.

IT IS FURTHER ORDERED that Defendant's Petition for Reconsideration of the Findings of Fact and Award of February 14, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Award of February 14, 2022 is **AMENDED** as follows:

JURISDICTIONAL FACTS

Applicant, Carole Kayem, while employed during the period 9/15/2006 through 7/21/2007, as an Event and Special Events Coordinator, Occupational Group Number in dispute, at Los Angeles, CA by Children's Institute

international, sustained injury arising out of and in the course of employment to her low back, psyche, sleep and internal GERD.

Applicant claims to have sustained injury arising out of and in the course of employment to her neurologic system and sexual dysfunction. The remaining stipulations are hereby admitted as fact.

FINDINGS OF FACT

1. Applicant sustained injury arising out of and in the course of her employment to her neurologic system and in the form of sexual dysfunction.

2. The issue of permanent disability is deferred, with jurisdiction reserved.

3. There is 75% industrial apportionment attributed to applicant's lumbar spine impairment according to AME Dr. Steven Brouman. There is 100% apportionment attributed to applicant's psychiatric impairment according to the Panel QME Dr. Jacob Moussai. There is 100% apportionment attributed to applicant's internal (GERD) impairment according to the Panel QME Dr. Said Rabhan. There is 100% apportionment attributed to applicant's sexual dysfunction impairment according to the Panel QME Dr. Mark Vogel.

4. Applicant's occupational group number is determined to be dual, both 380 and 214.

5. Applicant is in need of further medical treatment to cure or relieve from the effects of the industrial injuries herein.

6. It is found that Applicant may have incurred self-procured medical treatment for reasonable and necessary expenses payable by defendant in amounts to be adjusted by the parties.

7. EDD is entitled to reimbursement for amounts paid from 5/31/2007 to 5/28/2008.

8. The issue of attorney's fees is deferred, with jurisdiction reserved.

AWARD

AWARD IS MADE in favor of CAROLE KAYEM, against UNITED STATES FIRE INSURANCE COMPANY , as follows:

(a) Injury as provided in Finding number 1.

(b) Further medical treatment as provided in Finding number 5.

(c) Reimbursement of self-procured medical treatment as provided in Finding number 6.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 10, 2022

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

**BOBER, PETERSON & KOBY
CAROLE KAYEM
LESTER J. FRIEDMAN**

DW/oo

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