WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JULIE WILSON, *Applicant*

vs.

TAILORED BRANDS, INC.; SAFETY NATIONAL CASUALTY CORPORATION, administered by GALLAGHER BASSETT, *Defendants*

Adjudication Number: ADJ10804535
Oakland 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 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, we will deny reconsideration.

We have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id*.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 7, 2022

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

JULIE WILSON
BOXER & GERSON
SLADE J. NEIGHBORS LAW OFFICES

PAG/*cs*

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

REPORT AND RECOMMENDATION
ON DEFENDANT'S PETITION FOR RECONSIDERATION

INTRODUCTION

By a timely and verified Petition for Reconsideration (Petition) dated and e-filed on July 11, 2022, defense counsel Slade Neigbors seeks reconsideration of the Amended Findings & Award with Opinion on Decision (Amended F&A) dated and served on June 17, 2022, which found injury AOE/COE to Applicant's low back and bilateral hands and wrists, with permanent disability of 64%, based on the reporting of the AME, Steven Isono, M.D., and awarded further medical treatment for those body parts. That Amended F&A issued pursuant to Rule 10961(c) (Tit. 8, Cal.Code.Regs. §10961(c)),[1] in response to Applicant attorney's earlier Petition for Reconsideration dated June 2, 2022, filed in response to my original Findings and Award with Opinion on Decision dated June 2, 2022. In the Amended F&A, I changed my finding of the applicable occupational group from 212 to 360, which in turn resulted in a significant increase in the awarded PD from 56% to 64%.

Defendant's Petition alleges generally that: 1. the Findings and Award are without or in excess of the judge's powers; 2. that the evidence does not justify the Findings of Fact; and 3. the Findings of Fact do not support the Award. (Petition at p. 1.) In practical substance, defendant asserts and argues that I erred in finding the 360 occupational group applied because a 300 group level "contemplate[s] much heavier duties than those performed by the Applicant" and that merchandising was "not an integral part of her normal job duties" of the store manager, as "inferred" by Applicant's trial testimony. (***Id.*** at p. 4.) As will be discussed below, I disagree with both of these claims. The Petition also argues that the AME's *Almaraz/Guzman*[2] rating for the upper extremities, and his *Kite* opinion, under which adds the Applicant's upper extremity impairment to that for her low back to arrive at the he most accurate assessment of her disability, are insufficiently explained and do not constitute substantial medical evidence. I also disagree with this assertion as outlined below.

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[1] All further references to DWC Rules are from the same title of the California Code of Regulations.

[2] See *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School Dist.* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc), and *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808, 75 Cal.Comp.Cases 837.

Applicant's attorney e-filed an Answer to the Petition dated July 19, 2022. In that Answer, Applicant's attorney argues the Petition should be summarily denied on the basis it fails to fairly state the record pursuant to Rule 10945(a). (***Id.*** at p. 1.) He further argues that my findings regarding the applicable occupational group and that the *Almaraz/Guzman* and *Kite*[3] opinions of the AME Dr. Isono constitute substantial medical evidence are correct, and that I properly rated and the awarded the resulting PD. (***Id.*** at p. 2.) Applicant attorney asserts that the Petition at page 4, lines 9-25, misstates and mischaracterizes the Applicant's trial testimony with respect to her merchandising duties as part of her job as the manager of a Jos.

A. Bank clothing store, and that the record fully supports and documents the Applicant performed merchandising activities such as dressing, lifting, and placing mannequins, and unboxing, preparing, and displaying merchandise, which involved the moving of tables and the use of ladders. (***Id.*** at pp. 2-3.) The Answer also argues that the Applicant's trial testimony fully supports the notion that merchandising was an integral part of Applicant's occupation as the store manager, and that fact in combination with the applicable dual occupation rule, warrants my finding in the Amended F&A that the applicable occupational group was 360.

(***Id.*** at pp. 3-5.)

I apologize to the Board panel for the delay in submitting this Report and Recommendation.

BACKGROUND

A summary of the relevant facts follows, which is an abridged version of the facts outlined in the Amended F&A at pages 4-6. Applicant was employed as a men's clothing store manager by Jos. A. Bank. (MOH/SOE at p. 4, Joint 101, Report of 6/5/19 at p. 2.) She sustained an accepted low back injury on October 15, 2014, while lifting a box with a computer printer that she intended to install in her office in the store. She continued to work on nominal modified duty for a few months thereafter, but eventually had lumbar surgery on September 30, 2015 with Dr. Abid Quereshi. (Joint 106 at pp. 2-3.) At the time of her first

[3] See *Athens Administrators for East Bay Municipal Utility District v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213, 215 (writ den.)

AME exam with orthopedist Dr. Isono, on November 16, 2017, he concluded that her low back was not yet permanent and stationary (P&S), and that she required further medical treatment. (Joint 106 at p. 9.)

In approximately July of 2018, she fell, evidently because of a buckled left leg that Dr. Isono viewed as a compensable consequence of the back injury and related surgery, which resulted in new injuries to her bilateral wrists and hands and also to her ribs on the left side.

This fall was discussed in the Dr. Isono's report of the Applicant's re-exam on July 31, 2018. (Joint 105 at pp. 2-3.) In that report, he again concluded that both the spine and hands were not yet P&S and recommended further medical evaluation and treatment. (***Id.*** at p. 10.) As noted above, the hands/wrists were accepted as a compensable consequence injury based on the AME's opinions, and the rib injury seems to have resolved entirely and is not currently at issue.

In his report of the same date from the third re-exam on December 17, 2019, Dr. Isono noted and discussed a motor vehicle accident that the Applicant was involved in on March 1, 2018, and which oddly had not been referenced or noted in his prior report of July 31, 2018. (Joint 104.) In that accident, she was belted driver and her car was rear-ended at a reported 25-30 miles per hour and "totaled." (***Id.*** at p. 10.) She had additional medical treatment and diagnostics after the accident. (***Id.***) In any event, despite significant interim treatment, including a hand surgery consultation with Dr. Schwartz and continuing discussions about potential further surgery for the back and/or hand, Dr. Isono again indicated she was not yet P&S, although he commented that if she does not have any further surgery for either body part, that she would be P&S. (***Id.*** at p. 15.) Despite that conditional P&S finding, he deferred findings on impairment ratings and apportionment. (***Id.***)

By the time of Dr. Isono's fourth and final re-exam on May 4, 2021, the Applicant had undergone a left wrist and thumb surgery, which included a CMC resection, with Dr. Mathias Masem on May 27, 2020. Dr. Isono reviewed and discussed these procedures and related records in that report. (Joint 103 at pp. 2-3.) He also found Ms. Wilson to be P&S and provided impairment ratings and apportionment opinions. (***Id.*** at pp. 9-11.) Specifically, he used the ROM method to rate the lumbar spine at 22% whole person impairment (WPI), and provided a 3 WPI pain add on, which although not specifically

attributed to any one body part by the AME, by DEU custom and I applied to the highest rated body part, i.e., the lumbar spine, in rating Applicant's PD. (***Id.*** at p. 10.) With respect to the upper extremities, he felt a strict AMA rating was not accurate and that an *Almaraz/Guzman* rating was indicated, which included ROM and grip loss considerations. (***Id.***) Although he did not mention *Kite* or the adding of PD in his final P&S report dated May 4, 2021 (Joint 103), in two subsequent supplemental reports dated August 26, 2021 (Joint 101) and July 13, 2021 (Joint 102), after being asked about *Kite*, it is clear he believed and opined that the upper extremity impairment ratings should be added pursuant to that case, rather than combined.

The Applicant testified at trial and was cross-examined. (MOH/SOE at pp. 4-9.) I found her to be a sincere and credible witness. She was the store manager of a new flagship or "fishbowl" Jos. A. Bank store in Danville. (***Id.*** at p. 4.) Her duties managing the store included the hiring and firing employees, stocking product, merchandising, dressing mannequins, measuring customers as part of selling clothes, and steaming clothes. (***Id.*** at pp. 4-9.) She would periodically change the presentation and location of merchandise as directed by the corporate office, which was very specific and detailed as to how they wanted things displayed. The most she generally had to lift was 55-60 pounds. (***Id.*** at p. 7.) However, she would sometime have to carry dressed half mannequins, which weighed an estimated 17 pounds, up ladders to display locations on top shelves, which was "awkward." (***Id.*** at p. 6.) Occasionally, the display instructions required her to move heavy wooden display tables that weighed up to 400 pounds. (***Id.*** at p. 4.) She would not lift these tables but would have to push and "shimmy" them on carpet to move them into position even though they had wheels/rollers, and this took all her strength and energy. (***Id.*** at pp. 4, 8, 9.) Sometimes she would have assistance in moving the tables, but not always. (***Id.*** at p. 8.)

OCCUPATIONAL GROUP

The first specific allegation defendant's Petition is that it was error to find the appropriate occupational group for this applicant was 360. This claim is premised on defendant's assertion that the Applicant did not do merchandising herself, but merely directed others to do so, and/or alternatively that merchandising was not an integral part of her normal job duties. (Petition at p. 4.) As discussed in the Amended F&A, my original F&A dated May 13, 2022, made a finding that the correct occupational group was 212, which is the

scheduled group for Manger, Retail Store, as documented in the Schedule for Rating Permanent Disabilities 2005 (PDRS) at p. 3-15. At the time of trial, and up to the point of Applicant attorney's Petition for Reconsideration dated June 2, 2022, the Applicant had argued the applicable occupational group was 470 or 560. Based on the evidence, and as between 212 and 470 or 560, I found that the indicated occupational group on the facts in this case was 212, the scheduled group for retail managers. It was not until Applicant's Petition for Reconsideration that Applicant's attorney argued or asserted that 350 was indicated.

Although one could in theory argue or assert waiver on the part of Applicant for this reason, and interestingly that was not raised as an issue in the defendant's Petition, since occupational group was listed as an issue for determination at trial (See MOH/SOE at p. 2, Issue No. 1.), I did not think it was appropriate to bar or preclude consideration of this belated argument, especially when I concluded after a review of the record and the PDRS that it was factually correct. I was not personally aware until Applicant's Petition for Reconsideration, that there is in fact, a scheduled occupational group in the PDRS for the job of Displayer, Merchandise, in the retail trade industry, on page 3-8. Since I agreed with Applicant attorney's argument in that Petition that the evidence in the record, including Applicant's trial testimony clearly supported a finding or conclusion that merchandising was an integral part of the Applicant's job as the store manager, I concluded that the dual occupation rule, as discussed and outlined in cases such as *Dalen v. Workers' Comp. Appeals Bd.* (1972) 26 Cal.App.3d 497 [37 Cal.Comp.Cases 393], *Grossmont U.H.S. Dist. v. Workers' Comp. Appeals Bd. (Burns)* (1997) 62 Cal.Comp.Cases 687 (writ den.), *Adams v. City of Moreno Valley* (2009) 2009 Cal. Wrk. Comp. P.D. LEXIS 476, and *National Kinney v. Workers' Comp. Appeals Bd. (Casillas)* (1980) 111 Cal.App.3d 203 [45 Cal.Comp.Cases 1266], applied to this case. Under that rule, and because merchandising was an integral part of her job as store manager, as proven by the Applicant's trial testimony, and which she clearly regularly did herself, I found the use of the scheduled occupational group of 350 for a merchandiser should be used to calculate the Applicant's permanent disability rating. (See Amended F&A at p. 10-12.)

Although defendant's Petition asserts that Applicant because the Applicant would frequently direct store employees to merchandize and/or to move tables which displayed the merchandise, she herself "was not actually a merchandizer." (Petition at p. 4, line 13.) At least as to this issue, I agree with Applicant attorney's Answer that the Petition misstates or

mischaracterizes the Applicant's trial testimony, as reflected in the MOH/SOE dated February 3, 2022, by ignoring or minimizing large parts of her testimony on this issue. Before getting into details, I point out as referenced in the Amended F&A, that I found the Applicant to be a sincere and credible witness, and there is no reason to doubt her testimony, which stands unrebutted. Specifically, Applicant testified that, "Her [job] duties included merchandising." (MOH/SOE at p. 7, line 3.) She also would have to assist or stock product herself, including using the ladder to do so. (***Id.*** at p. 5, line 44, p. 6, lines 3-12.) While she acknowledged that store employees would frequently or most of the time, open packages of delivered merchandise and display it per her instructions or put it out where they knew it went, e.g., MOH/SOE at p. 7, line 5-7, it is clear and obvious from her testimony that she regularly, if not daily, was also involved in merchandising by unboxing and displaying product in the form of men's clothes and accessories, including the dressing and placement of half-mannequins that she would carry up ladders to display. (MOH/SOE at pp. 6-8.) It is also evident from her testimony that her merchandising was micromanaged by the corporate office and that they would frequently issue directives on how and where product should be displayed, which regularly changed with the season, and that she was expected as part of her job as manager to comply with those directives. (MOH/SOE at p. 5, lines 38, p. 7, lines 22-32.)

While the Petition attempts to minimize her lifting and argues generally that a store manager should not be considered analogous to other heavier jobs in the 300, 400, and 500 series of occupational groups, she did testify that her job required her to lift up to 55 or 60 pounds. (MOH/SOE at p. 7, lines 41-43.) She also regularly dressed the half-mannequins which weighed approximately 17 pounds and would have to climb ladders with them to place them on display shelves, which was physically awkward. (***Id.*** at p. 6, lines 5-12.) Finally, I point out that the Schedule in describing the 360 occupational group characterizes such jobs as involving "Significant lifting and carrying required; significant walking required; may occasionally climb at low levels." (PDRS at p. 3-34.) I find that the duties outlined by Ms. Wilson in her trial testimony, and particularly those related to merchandising which was clearly a big part of her job, and which she personally performed, even if she sometimes or even frequently delegated such tasks to other store employees, are consistent with the PDRS's description for this group.

ALMARAZ/GUZMAN AND KITE ISSUES

As I noted in the Amended F&A at page 6, any finding or award by a WCJ must be supported by substantial evidence in light of the entire record. (Labor Code section 5952(d); *Escobedo v. Marshalls* (2005) (Appeals Board en banc) 70 Cal.Comp.Cases 604, 620; *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310, 314]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500, 503]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16, 22].) To be substantial evidence, expert medical opinion must be framed in terms of reasonable medical probability, be based on an accurate history and an examination, and must set forth the reasoning used to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687, 1691]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Board en banc).) "[A] medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (Citations.)" (*Gatten*, *supra,* at p. 928.) As discussed below, I believe that on this record that those requirements were met by the AME in his reporting.

The second claimed substantive error in the Petition is really the intertwined issues of the AME Dr. Isono's *Almaraz/Guzman* rating for the bilateral upper extremities and his adding that impairment to his impairment for the low back pursuant to *Kite* rather than using the Combined Value Chart (CVC) of the PDRS. (Petition at pp. 5-7.) Rather than breaking these out as separate issues, the Petition lumps them together. (***Id.***) Although the Petition cites boilerplate authority, I agree and there is no dispute that it is Applicant's burden to rebut the presumed scheduled ratings and the use of the CVC, which applies when both *Almaraz/Guzman* and/or *Kite* are invoked by the medical-legal evaluator. However, after reviewing the record again in responding to the Petition, I remain convinced that Applicant has meet that burden in this case and that I was not mistaken in finding the opinions of the AME, Dr. Isono, to be substantial medical evidence on both those points.

First, it should be kept in mind as noted in the Amended F&A that Dr. Isono's opinions as an AME, as opposed to a QME, has special legal significance in California workers'

compensation law. Specifically, the opinions of AMEs should and will ordinarily be followed by a judge, unless there is good reason to find them unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775 [51 Cal.Comp.Cases 114]; *Siqueros v. Workers' Comp. Appeals Bd.* (1985) 60 Cal.Comp.Cases 150 (writ den.).) As a result, the opinions of Dr. Isono in this case have unique and special weight and should be followed absent a compelling reason and/or good cause not to do so. Since I believe he has sufficiently explained those opinions despite the Petition's conclusory assertions otherwise, they stand unrebutted and in my view constitute substantial medical evidence, which is why I used them to rate the Applicant's PD. I also note that Dr. Isono is a very experienced AME quality orthopedist who is well known and well respected at the Oakland Board, is used almost exclusively as an AME, and based on my six plus years of experience as a WCJ seeing him report in many cases, is an excellent physician who knows and is familiar with the relevant portions of California workers' compensation law related to medical/legal evaluations.

Second, the Petition alleges Dr. Isono does not explain why he applied *Almaraz/Guzman*, and by selective and in my view misleading quotations from the AME's reports, asserts, "the AMA [sic] believes *Almaraz* applies anytime an applicant has surgery" and that "he provides no other explanation." (Petition at p. 6, lines 2-4.) This is patently false and in my view is a misrepresentation of any fair reading of the record. As I summarize in the Amended F&A, his upper extremity *Almaraz/Guzman* rating was a combination of ROM measurements involving the upper extremities that were combined with grip loss ratings for the most accurate assessment of the upper extremity impairment. (Amended F&A at p. 7.) The Petition goes on to assert the grip loss data should not be used to rate because "[b]ased on current complaints, the Claimant would be able to apply maximal force during grip testing" and therefore "[i]mpairment for grip loss testing is not supported." Petition at p. 7, lines 5-7.)

However, with respect to his upper extremity rating, Dr. Isono in his report of May 4, 2021 (Joint 103, at p. 10), notes that a strict ROM rating would be 0 WPI for the right wrist/upper extremity and 5 WPI for the left wrist/upper extremity, which he did not feel was an accurate of the Applicant's upper extremity impairment. He then applies grip loss, specifically *indicating that the Jamar measurements were felt to be physiologic and reliable*, and he then incorporates the resulting rating of 6 WPI for each wrist into his other ROM rating for a combined *Almaraz/Guzman* rating. He explains the rationale by stating that in this

specific case, and considering "the surgery performed for the left hand and wrist," it was "medically appropriate and reasonable to assess the impairment for the grip strength loss of the Right and Left hands as a potential additional factor of impairment." (***Id.***) This explanation, I think factually rebuts the Petition's conclusory assertion that grip loss cannot or should not be used to rate in this case, and I find Dr. Isono's rationale for his upper extremities *Almaraz/Guzman* rating to be understandable, based on the evidence and the result of his extensive professional and clinical judgment and experience, and is sufficiently explained under the requirements of *Escobedo*. To restate the obvious, his opinions also have the additional weight and credibility of an AME, which have not been rebutted by any other medical reporting in the record.

Third, with respect to the *Kite* issue where Dr. Isono adds the upper extremity and low back impairments rather than applying the CVC, the Petition merely asserts, without any substantive analysis, that in his reporting in Joint 101 and Joint 102, the AME concluded *Kite* applies "because the injury was to both hands" and provided no other explanation for the use of *Kite*." (Petition at p. 5, lines 16-18.) As before, this again is a gross mischaracterization of the record. The Petition goes on to state, "the AME apparently believes that anytime you have both hands injured, the doctor must apply *Kite* by adding instead of combining in direct violation of the labor code [sic], AMA Guides and Rating Manual." (***Id.*** at p. 5, lines 19-21.) This is also patently false and willfully ignores large portions of the AME's reporting as any reasonable review of the record will document.

Although Dr. Isono does not explicitly mention or address the issue of *Kite* in his final P&S report (Joint 103), respective counsel wrote him asking him about that. The result was two supplemental reports dated July 13, 2021 (Joint 102) and August 26, 2021 (Joint 101), where he makes clear he believes that a *Kite* addition of the upper extremity rating with the low back rating is appropriate. While his July 13, 2021 report is a rather conclusory, with only two substantive sentences on the issue (Joint 102), he explains his rationale in more detail in his report of August 26, 2021. Specifically, in that latter report he states that *each upper extremity impairment is independent and stands alone, with the implication that there is no overlap, and he also notes that with injuries to both sides, the Applicant has no ability to compensate contralaterally for any pain or limitation she is experiencing on the other side.*

(Joint 101 at p. 1.) In my judgment, this rationale makes sense and is sufficiently explained under *Escobedo* to render this *Kite* opinion substantial medical evidence.

In sum, the Petition seems only to challenge my findings that the proper occupational group is 360, and that the AME's *Almaraz/Guzman* and *Kite* opinions are substantial medical evidence. Significantly, it does not appear to dispute my calculations of the resulting PD if those findings are found to be legally correct and/or are affirmed. My rating strings for those calculations can be found on pages 12-14 of the Amended F&A. For the reasons outlined above, I stand by my findings, and do not believe that the claims in defendant's Petition have merit and/or warrant reconsideration by the Board. As I concluded in the Amended F&A, "I find that in his discretion as the AME, Dr. Isono appropriately considered and applied both *Almaraz/Guzman* and *Kite* in providing what he felt was the most accurate rating of the Applicant's impairment/disability, and has sufficiently explained his rationale consistent with the *Escobedo* requirements, to establish those opinions as substantial medical evidence. It is evident from the context of the entirety of his reporting, that Dr. Isono felt and believes that his ratings are more appropriate and more accurate than a strict AMA rating, and considering his explanations, his experience and judgment as an expert orthopedist and medical legal evaluator who has examined the Applicant four separate times over four plus years, his review and summary of all the relevant medical records, and the fact that his reasoning and explanation makes sense to me, I will follow and not second guess his opinions." Amended F&A at pp. 9-10.)

RECOMMENDATION

In sum, for the reasons outlined and discussed above, I recommend that defendant's Petition for Reconsideration dated July 11, 2022 with respect to the Amended F&A dated June 17, 2022, be **DENIED**.

Dated: August 25, 2022

Thomas J. Russell, Jr.
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE