WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DOUGLAS HERB, *Applicant*

vs.

COUNTY OF LOS ANGELES, permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INCORPORATED, *Defendants*

Adjudication Number: ADJ14669607

Anaheim District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Order (F&O) issued on February 3, 2023, wherein the workers' compensation administrative law judge (WCJ) found that (1) applicant sustained injury arising out of and in the course of his employment to his internal system in the form of GERD, irritable bowel syndrome and hypertension, and to the head in the form of headaches and sleep; (2) the injury caused permanent partial disability of seventy-one percent without apportionment; (3) applicant is in need of further medical treatment to cure or relieve the effects of the industrial injuries; and (4) applicant is entitled to an attorney's fee of fifteen percent.

The WCJ ordered the matter off calendar, with jurisdiction reserved by the WCJ as to the issues of the value of the permanent partial disability, life pension, and attorney's fee.

Defendant contends that the WCJ erroneously found that applicant sustained injury to the head and sleep on the grounds that the reporting of Agreed Medical Evaluator (AME) Dr. Ronald Kent is unsupported by substantial medical evidence. Defendant further contends that Dr. Kent's reporting fails to show that the most accurate way to assess applicant's head injury impairment is to analogize to the AMA Guides' rating for trigeminal neuralgia.

We did not receive an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have reviewed the Petition and the contents of the Report. Based upon our review of the record, and for the reasons discussed below, we will deny reconsideration.

FACTUAL BACKGROUND

On December 15, 2022, the matter proceeded to trial as to the following issues:

1. Parts of body injured: Head and in the form of headaches and sleep being in dispute.
2. Permanent disability.
3. Apportionment.
4. Need for further medical treatment.
5. Attorney fees.

(Minutes of Hearing, December 15, 2022, p. 2:21-25.)

The parties stipulated that the permanent disability rating with headaches and without headaches would depend upon whether the medical reporting of AME Dr. Kent constitutes substantial medical evidence. (*Id*., p. 2:15-17.)

The WCJ admitted the May 12, 2022 Report of Dr. Kent. (*Id*., p. 3:18.) The report states as follows:

> REVIEW OF MEDICAL RECORDS
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> . . .
>
> October 1, 2021: Kenneth Nudleman, M.D. A nocturnalpolysomnogram report was provided from Breathe Diagnostic based on Mr. Herb's report of interrupted sleep. A history of hypertension was noted for which he was taking Losartan. The overnight sleep study revealed no evidence for significant obstructive sleep apnea. He had fractionated sleep which was consistent with insomnia.
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> . . .
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> DIAGNOSIS:
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> 1. Muscle contraction headache pain.
> 2. Insomnia.
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> CASE DISCUSSION:
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> Mr. Douglas Herb presents with a history of headache pain which he relates to job stress. He states that he experiences a mild headache one to two days per month on the average and severe headache three to five times per year, occurring randomly. Headache pain appears to Mr. Herb to be related to a constant, ongoing pressure-like sensation at the back of the neck. His mild headaches improve with Advil. When he experiences more severe headache, he will utilize medication and stop what he is doing to relax. On occasion, he has had to pull over in his vehicle to relax when he began to experience intense headache pain.
>
> . . .
>
> Dr. Meth provided an Internal Medicine Agreed Medical Evaluation and noted Mr. Herb's report of headaches in both the temporal and occipital areas of the head about once per month related to industrial stress. Mr. Herb also reported insomnia. Dr. Meth's impressions were hypertension; GERD; diarrhea; headaches secondary to

work-related stress; and insomnia, secondary to work-related stress. Dr. Meth recommended referral to a neurologist to address Mr. Herb's reported insomnia and headaches.

COMMENT:

Mr. Herb is symptomatic at this time with muscle contraction headache pain. He additionally describes sleep interruption at times of job stress . . .

. . .

[I]t is my opinion that both his muscle contraction headache pain and his difficulties with sleep inter-ruption are, in all medical probability, related to job stress, which he describes in a compelling fashion.

. . .

PERMANENT IMPAIRMENT PER AMA GUIDES:

Mr. Herb describes mild headache pain which occurs one to two days per month and more severe headache which occurs three to five times per year. On occasion, with more severe headache pain, he has to briefly diminish or stop his on-going activities.

Headaches are not well considered within the AMA Guides. The Guides indicate that when a condition is not addressed within the Guides, the examiner should provide a rating based on a comparison to similar conditions with similar effects on activities of daily living.

In the present case, Mr. Herb's headache pain is most accurately described by analogy to trigeminal neuralgia, as reflected in Table 13-11, on page 331 of the AMA Guides 5th Edition, entitled Criteria for Rating Impairment of Cranial Nerve V (trigeminal nerve). Class 1 of this table describes 0 to 14% impairment of the whole person, described as "mild uncontrolled facial neuralgic pain that may interfere with activities of daily living".

Within this class, it is my opinion that Mr. Herb's headache pain is most accurately described as a 3% impairment of the whole person.

Mr. Herb additionally describes difficulty with sleeplessness, which is intermittent, corresponding to stress on the job. He has no evidence of obstructive sleep apnea and, in fact, has an Epworth Daytime Sleepiness Scale score of 4 out of 24 points, which is well within normal limits.

It is my opinion that Mr. Herb's sleep disruption does not arise to a ratable level as described in Table 13-4, page 317 of the AMA Guides.
(Ex. 1, AME Report of Dr. Kent, May 12, 2022, pp. 6-14.)

The American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th ed., provides:

Chapter 13 The Central and Peripheral Nervous System

. . .

This chapter provides criteria for evaluating permanent impairments due to documented dysfunction of the brain, cranial nerves, spinal cord, nerve roots, and/or peripheral nerves and muscles.

. . .

13.4d Cranial Nerve V—the Trigeminal Nerve

The trigeminal nerve is a mixed nerve with sensory fibers to the face, cornea, anterior scalp, nasal and oral cavities, tongue, and supratentorial dura mater. The nerve also transmits motor impulses to the mastication muscles.

. . .

Brief episodic trigeminal neuralgia or postherpetic neuralgia that involves a branch of the trigeminal nerve may be very severe and uncontrolled. Because there usually is no documented neurologic impairment except for a trigger point with trigeminal neuralgia or allodynia with postherpetic neuralgia, severe, uncontrolled, typical pain may be the impairment. Both atypical, episodic facial pain and typical, neuralgic pain may be evaluated (see Table 13-11) if they have occurred for months and interfere with daily activities.

(*American Medical Association's Guides to the Evaluation of Permanent Impairment*, *5th ed*., pp. 305, 330-331.)

Chapter 18 Pain

. . .

This chapter provides information that will enable physicians to understand pain and develop a method to distinguish pain that accompanies illnesses and injuries from pain that has become an autonomous process, and provide physicians with a qualitative method for evaluating permanent impairment due to chronic pain.

This chapter has . . . a description of when to use the methods described in this chapter and how they can be integrated with the impairment rating methods used in other chapters of the Guides.

. . .

18.3a When This Chapter Should Be Used to Evaluate Pain-Related Impairment

Organ and body system ratings of impairment should be used whenever they adequately capture the actual ADL deficits that individuals experience. However, the organ and body system impairment rating does not adequately address impairment in several situations, discussed below.

When There Is Excess Pain in the Context of Verifiable Medical Conditions That Cause Pain

Individuals in this group have pain associated with medical conditions that are verifiable by objective means. . . .

When There Are Well-Established Pain Syndromes Without Significant, Identifiable Organ Dysfunction to Explain the Pain

Individuals in this group have pain syndromes that are widely accepted by physicians based on the individuals' clinical presentation but that are not associated with definable tissue pathology. These syndromes are not ratable under the conventional rating system and also they do not fit any of the other chapters in the Guides since there is no measurable organ dysfunction. Individuals with these well-established pain syndromes can be evaluated on the basis of concepts elaborated in this chapter. These individuals must have symptoms and signs that can plausibly be attributed to a well-defined medical condition. . . .

When There Are Other Associated Pain Syndromes

Use this chapter to evaluate pain-related impairment when dealing with syndromes with the following characteristics: (a) They are associated with identifiable organ dysfunction that is ratable according to other chapters in the Guides; (b) they may be associated with well-established pain syndromes, but the occurrence or nonoccurrence of the pain syndromes is not predictable; so that (c) the impairment ratings provided in other chapters of the Guides do not capture the added burden of illness borne by individuals who have the associated pain syndromes.

. . .

18.3b When This Chapter Should Not Be Used to Rate Pain-Related Impairment When Conditions Are Adequately Rated in Other Chapters of the Guides

Examiners should not use this chapter to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment rating systems given in other chapters of the Guides.
(*Id*., pp. 560, 570-571.)

In the Report, the WCJ states:

Applicant, Douglas Herb, while employed as a Deputy/Police Officer, sustained industrial injuries to his internal system in the form of GERD, irritable bowel syndrome, and hypertension; head in the form of headaches, and sleep during the period 11/01/1997 to 05/19/2021 while employed by defendant, County of Los Angeles; P.S.I.; and administered by Sedgwick.

. . .

The parties submitted Joint Exhibits of the internal AME reports by Dr. Robert Meth and applicant offered the neurologic AME report by Dr. Ronald Kent.

. . .

[T]he court finds the medical opinion by Dr. Kent to be substantial medical evidence because the report by Dr. Kent is not ambiguous, it is not based upon speculation or conjecture, the opinions are within the doctor's area of expertise, the opinions explain the basis and/or reasoning in support of the conclusions, the finds

> are persuasive on the medical issues in dispute . . . and is based upon reasonable medical probability.
> . . .
> In Dr. Kent's May 12, 2022 report, on page 11, he diagnoses applicant with "Muscle contraction headache pain and Insomnia." On page 13, he states:
>
> "it is my opinion that both his muscle contraction headache pain and his difficulties with sleep interruption are, in all medical probability, related to job stress, which he describes in a compelling fashion."
>
> On page 14, under the heading of "Causation" he states:
>
> "Mr. Herb's headache pain and sleep disorder are directly the result of his employment as a deputy sheriff for L.A. County Sheriff's Department."
>
> Dr. Kent continues on page 14 of his May 12, 2022 of his report, under the heading of "Apportionment," stating:
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> "In arriving at my conclusion regarding apportionment, I have taken into consideration any pre-existing or non-industrial causation…. and have provided my opinions based on a reasonable medical probability."
> . . .
> Dr. Kent addressed the medical issues in dispute in his report. Dr. Kent also addressed causation of injury and apportionment of permanent disability based upon reasonable medical probability in his report . . .
>
> Therefore, the court finds that applicant has met his burden of proof on injury AOE/COE to his head and in the form of sleep based upon the medical report by Dr. Kent.
> (Report, pp. 2-4.)

DISCUSSION

Defendant contends that the WCJ erroneously found that applicant sustained injury to the head and sleep on the grounds that the reporting of AME Dr. Kent is unsupported by substantial medical evidence. Specifically, defendant argues that the record contains "no substantial evidence to support findings of injury to headaches or sleep" because "there is no objective evidence cited that establishes the muscle contraction headaches are caused by any underlying physical conditions" and "no documented evidence that the applicant has what would be called a 'sleep disorder.'" (Petition, p. 6:11-23.)

All decisions by a WCJ must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal.Comp.Cases

310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [83 Cal. Rptr. 208, 463 P.2d 432, 35 Cal.Comp.Cases 16]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [262 Cal. Rptr. 537, 54 Cal.Comp.Cases 349].) Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566].) To constitute substantial evidence "… a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." *(Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [93 Cal. Rptr. 15, 480 P.2d 967, 36 Cal.Comp.Cases 93, 97].)

Here, we concur with the reasoning of the WCJ, as stated in the Report, that AME Dr. Kent's reporting constitutes substantial medical evidence. (Report, pp. 2-4.) Moreover, contrary to defendant's assertion that Dr. Kent is required to identify an "underlying physical condition[]" before determining that applicant sustained injury in the form of headaches, Labor Code section 4660.1[1] acknowledges that injuries not in the "nature of the physical injury or disfigurement" are subject to impairment ratings. (See § 4660.1(b)-(c)).

Similarly, while there is no legal support for defendant's assertion that Dr. Kent is required to identify a sleep disorder before finding injury in the form of sleep disturbance, Dr. Kent's finding that applicant has insomnia is supported not only by his own examination but also by Dr. Nudleman's reporting that applicant has fractionated sleep consistent with insomnia and Dr. Meth's impression that applicant has insomnia secondary to work-related stress. (Ex. 1, AME Report of Dr. Kent, May 12, 2022, pp. 7-8.)

On this record, it is clear that the WCJ was presented with no good reason to find AME Dr. Kent's opinion unpersuasive—and we too find none. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

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[1] Unless otherwise stated, all further statutory references are to the Labor Code.

Accordingly, we are unable to discern merit to defendant's contention that the reporting of AME Dr. Kent is unsupported by substantial medical evidence.

We next address defendant's contention that Dr. Kent's reporting fails to support his opinion that the most accurate way to assess applicant's head injury impairment is by analogy to the AMA Guides' rating for trigeminal neuralgia. Specifically, defendant argues that the reporting does not adequately explain Dr. Kent's reasons for rating applicant's muscle contraction headaches under chapter 13 instead of chapter 18 of the Guides.

In *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084, 1086 (Appeals Board en banc) (*Almaraz/Guzman II*).), the Appeals Board stated that "when determining an injured employee's WPI, it is not permissible to go outside the four comers of the AMA Guides; however, a physician may utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee's impairment. (*Id.* at p. 1086.)

In *Milpitas Unified School District v. Workers' Comp. Appeals Bd*. ((2010) 187 Cal.App. 4th 808 [75 Cal.Comp.Cases 837] (*Almarez/Guzman III*), the Court found that the overarching goal of rating permanent impairment is to achieve accuracy, stating:

> The Guides itself recognizes that it cannot anticipate and describe every impairment that may be experienced by injured employees. The authors repeatedly caution that notwithstanding its "framework for evaluating new or complex conditions," the "range, evolution, and discovery of new medical conditions" preclude ratings for every possible impairment. (Guides § 1.5, p. 11.) The Guides ratings do provide a standardized basis for reporting the degree of impairment, but those are "consensus-derived estimates," and some of the given percentages are supported by only limited research data. (Guides, pp. 4, 5.) The Guides also cannot rate syndromes that are "poorly understood and are manifested only by subjective symptoms." (Ibid.)
>
> To accommodate those complex or extraordinary cases, the Guides calls for the physician's exercise of clinical judgment to assess the impairment most accurately.
> (*Id*. at pp. 822-823.)

In other words, a physician "is not inescapably locked into any specific paradigm for evaluating WPI under the Guides, [and . . . is not] relegate[d] . . . to the role of taking a few objective measurements and then mechanically and uncritically assigning a WPI that is based on a rigid and standardized protocol and that is devoid of any clinical judgement. Instead, the AMA

Guides expressly contemplates that a physician will use his or her judgment, experience, training, and skill is assessing WPI." (*Id*., at p. 853.)

Here, Dr. Kent's reporting diagnoses applicant with muscle contraction headache pain based upon "a mild headache one to two days per month on the average and severe headache three to five times per year, occurring randomly"—without identifying any related symptomatology suggesting that the impairment should be rated under chapter 18; namely, excess pain in the context of a verified medical condition, a well-established pain syndrome, or an accompanying associated pain syndrome. (Ex. 1, AME Report of Dr. Kent, May 12, 2022, p. 11; *American Medical Association's Guides to the Evaluation of Permanent Impairment*, *5th ed*., pp. 570-571.) In other words, since applicant's headache pain was not diagnosed as an add-on to another condition or syndrome, Dr. Kent found that it should not be rated under chapter 18.

Dr. Kent's reporting also found applicant's headache pain to be similar to a condition with similar effects on activities of daily living described in chapter 13, and, therefore, rated the impairment under that chapter. (Ex. 1, AME Report of Dr. Kent, May 12, 2022, p. 13.) More specifically, Dr. Kent found that applicant's headache pain was reasonably akin to "mild uncontrolled facial neuralgic pain that may interfere with activities of daily living" and most accurately rated by analogy to trigeminal neuralgia, as set forth in Table 13-11. (*Id*.)

We view Dr. Kent's opinion regarding the most accurate way to rate applicant's impairment to be consistent with chapter 18's admonition that "[o]rgan and body system ratings of impairment should be used whenever they adequately capture the actual [activities of daily living] deficits that individuals experience." (*American Medical Association's Guides to the Evaluation of Permanent Impairment*, *5th ed*., p. 570.)

Accordingly, we are persuaded that Dr. Kent's reporting adequately explains his reasons for assessing applicant's headache pain impairment by analogy to the Guides' rating for trigeminal neuralgia set forth in chapter 13 instead of under chapter 18.

Accordingly, we will deny the Petition.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order issued on February 3, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 10, 2023

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

DOUGLAS HERB
LEGION LAW GROUP
LAW OFFICE OF DENNIS TRIPLETT

SRO/*cs*

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