WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERT KELLEY, *Applicant*

vs.

LAWRENCE BERKELEY NATIONAL LABORATORY, permissibly self-insured; c/o SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ15858070
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on January 29, 2024, wherein the WCJ found in pertinent part that while employed as a truck driver for defendant up to May 25, 2021, applicant sustained injury to his bilateral upper extremities; and that applicant's injury caused permanent disability of 12%.

Applicant contends that the report of Panel Qualified Medical Evaluator (QME) Michael Kulick, M.D., is not substantial evidence and that the report of Primary Treating Physician (PTP) Babak Jamasbi, M.D., is substantial evidence. Applicant further contends that the WCJ's permanent disability rating, which is based on Dr. Kulick's report, is not valid.

We received an answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied or, in the alternative, return to the trial level for further development of the record.

We have considered the allegations in the Petition, the answer, and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant the Petition, rescind the January 29, 2024 Findings and Award, and return the matter to the WCJ for further proceedings consistent with this decision.

BACKGROUND

We will briefly review the relevant facts.

Applicant claimed injury to bilateral upper extremities while employed by defendant as a truck driver, during the period through May 25, 2021.

On October 20, 2022, Jude Shadday, D.O., applicant's treating physician at the time, issued a report stating in relevant part that applicant was maximally medically improved. (Ex. F, report of Jude Shadday, D.O., October 20, 2022.) Dr. Shadday stated that applicant was having bilateral wrist pain with tingling into hands and fingers, difficulty with grasping, heaving lifting, and certain movements. (*Id*. at p. 3.) Dr. Shadday diagnosed applicant with bilateral carpal tunnel syndrome. (*Id*., p. 5.)

Dr. Shadday's report continues as follows:

> Discussion: In accordance with the Almaraz decisions, the AMA Guides are fair and appropriate as applied above. No rating by analogy or pain add on is required. The pain is imbedded in the nerve entrapment rating.
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> Impairment rating (AMA Guides to the Evaluation of Permanent Impairment, 5th ed.): Performed in accordance with the California Labor Code requiring use of the AMA Guides to Evaluation of Permanent Impairment, Fifth Edition, Upper extremity chapter 16. Mr. Robert T Kelley does not neurovascular injury. He did have carpal tunnel release surgery on bilateral wrists. He did not have tendon rupture, does not have intrinsic tightness, does not have complex regional pain syndrome. There is nerve entrapment impairment evaluation as below.

(Dr. Shadday's report of October 20, 2022, Ex. F, p. 5.)

> IMPAIRMENT RATING FOR Right Carpal Tunnel: Carpal Tunnel, page 495 translated to 5% impairment.
> IMPAIRMENT RATING FOR Left carpal Tunnel: Carpal Tunnel, page 495 translated to 5% impairment.
>
> COMBINED IMPAIRMENT RATING FOR upper extremity: 10%
>
> TOTAL WHOLE PERSON IMPAIRMENT (WPI): 6% per upper extremity conversion value table 16-3, page 439.

(Dr. Shadday's report of October 20, 2022, Ex. F, pp. 5-6.)

On January 9, 2023, qualified medical evaluator (QME) Michael Kulick, M.D., wrote a report stating in relevant part as follows:

> In checking for carpal tunnel syndrome, the patient had normal sensation in the median nerve distribution. Tinel's sign was equivocally positive bilaterally at the wrist. Phalen's test was negative bilaterally. Direct pressure on the median nerve at the wrist was negative bilaterally. There was no evidence of any intrinsic muscle atrophy or weakness. The basal joints of his thumbs were nontender to stress testing. Finkelstein's test was positive in his right wrist and negative in his left wrist. There was no flexor tendon triggering in any digits. There was no obvious dorsal or volar wrist ganglia. The patient had expressed pain when palpating the lateral elbow and medial elbow bilaterally. There was no evidence of any cubital tunnel syndrome.
>
> Grip strength: 10/5, 0/0, 5/0 (Palpation of the forearm musculature demonstrated no evidence of any muscle contraction, despite the patient being told to provide maximum grip strength. This is in complete contrast to his physical therapy records previously that had a significantly higher grip strengths. There should be no reason why the patient has evidence of such a loss of grip strength other than his pro-active fabrication intent.)
>
> Pinch strength: 12/11, 13/10, 12/11. (The patient had active muscle contraction in both of his forearms.)

(Dr. Kulick's report of January 9, 2023, Ex. G, pp. 10-11.)

Dr. Kulick's report continues as follows:

> Diagnosis: The patient had bilateral carpal tunnel syndrome. The patient's condition is permanent and stationary as of October 20, 2022.

(Dr. Kulick's report of January 9, 2023, Ex. G, p. 11.)

> Regarding the AMA Guidelines, 5th Edition, I agree that the patient's condition was permanent and stationary on October 20,2022. Given the information, providing the patient a 6% whole-person impairment via page 495, Table 16-3, would be appropriate as described by his treating physician.

(Dr. Kulick's report of January 9, 2023, Ex. G, p. 13.)

Applicant's current treating physician Babak Jamasbi, M.D., prepared a permanent and stationary report on October 4, 2023, stating in relevant part as follows:

> Tinel's were positive bilaterally. There was no sensory deficit in the hands to a pinprick.
>
> The patient's grip strength was measured using Jamar Dynamometer. The patient was blinded to the dial. The measurements were repeated and were reproducible.
> Right grip: 24 /16 / 22 kg.

Left grip: 24 / 28 / 24 kg.

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DISABILITY STATUS
This applicant has permanent disability/impairment as a result of his industrial injury. He has reached a point of maximal medical improvement and is permanent and stationary.

AMA IMPAIRMENT
He has had bilateral carpal tunnel releases with residual symptoms limiting him in terms of gripping, grasping, pulling, pushing. He has intermittent pain and numbness. Proceeding to Table 16.15, both upper extremities fall under the median nerve below mid forearm. This gentleman has primarily pain and numbness which falls under sensory deficit for pain. Proceeding to Table 16.10, the median nerve in both hands falls under Grade III with is consistent with slight pain that interferes with some activities. I would assign a 40% to both hands. Multiplying 40% x 39% from Table 16.15, generates 16% right upper extremity impairment and 16% left upper extremity impairment. A 16% upper extremity impairment generates a 10% whole person impairment for each upper extremity. The combination of 10% and 10% for both upper extremities generate a 19% whole person impairment. It is my medical opinion that this gentleman has a 19% whole person impairment pertaining to both upper extremities.

I have considered Almaraz-Guzman and I believe a 19% whole person impairment accurately reflexes this gentleman's overall level of impairment.

(Dr. Jamasbi's report of October 4, 2023, Ex. 1, pp. 16-17.)

Following an examination on December 11, 2023, Dr. Jamasbi made a request for authorization for a right 1st CMC joint cortisone injection and for medication refills. (Dr. Jamasbi's December 12, 2023 primary treating physician's progress report and request for authorization, Ex. 6 and Ex. 7.) Dr. Jamasbi's progress report contains the following diagnosis:

G56.03 Carpal tunnel syndrome, bilateral upper limbs
G89.4 Chronic pain syndrome
M 18.11 Unilateral primary osteoarthritis of first carpometacarpal joint, right hand

(Dr. Jamasbi's December 12, 2023 progress report, Ex. 6, p. 3.)

On January 23, 2024, the matter proceeded to trial on the following issues:

1. Permanent disability.
2. Need for further medical treatment.

3. Attorney fees.
4. In addition, applicant asserts that the reports of the Primary Treating Physician, Dr. Shadday, and Dr. Kulick are not substantial evidence because they did not address Almaraz/Guzman, and work restrictions from each doctor are inconsistent with each other.
(Minutes of Hearing and Summary of Evidence (MOH/SOE), January 23, 2024 trial, p. 2.)

DISCUSSION

As a preliminary matter, to be substantial evidence, a medical opinion must be well-reasoned, based on an adequate history and examination, and it must disclose a solid underlying basis for the opinion. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Bd. en banc); see also *E.L. Yeager Construction v. Workers' Comp. Appeals Bd*. (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687].) Conversely, 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. (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525]; *Zemke v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 794, 798.) A medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, and not merely their conclusions. (*Hegglin, supra*; *Granado v. Workmen's Comp. Appeals Bd*. (1970) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *Escobedo, supra*.)

The chief value of an expert's opinion rests upon the material from which their opinion is fashioned and the reasoning by which they progress from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based. (*Escobedo, supra,* at 621; *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144.) It is well-established that the Appeals Board may rely upon the relevant and considered opinion of one physician, though inconsistent with other medical opinions, so long as the reporting is based on substantial evidence. (*Smith v. Workmen's Comp. Appeals Bd*. (1969) 71 Cal.2d 588, 592 [34 Cal.Comp.Cases 424], see also *Place, supra*, at 378-379.)

The scheduled rating is prima facie evidence of an employee's permanent disability. However, the scheduled rating is rebuttable. (See *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Almaraz-Guzman III)* (2010) 187 Cal.App.4th 808, 852-853 [75 Cal.Comp.Cases

837].) Specifically, the WPI portion of the scheduled rating may be rebutted by showing that "a different chapter, table, or method of assessing impairment of the AMA Guides more accurately reflects the injured employee's impairment than the chapter, table, or method used by the physician being challenged." (*Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School Dist. (Almaraz-Guzman II)* (2009) 74 Cal.Comp.Cases 1084, 1106 (Appeals Bd. en banc).) Physicians must still evaluate permanent impairment while staying within the "four corners of the Guides" pursuant to the Labor Code. (Id. at 1101.)

The overarching goal of rating permanent impairment is to achieve accuracy. (*Almaraz-Guzman III, supra*, at 822.) A "strict" application of the Guides may not accurately reflect an injured employee's permanent impairment. The Court of Appeal in *Almaraz-Guzman III* acknowledged the Guides' limitations and specifically held that:

> 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.

(*Almaraz-Guzman III, supra*, at 823.)

The AMA Guides is thus not to be literally and mechanically applied. Instead, the evaluating physician may use his or her experience and expertise to interpret and apply any portion of the entire AMA Guides. A physician who departs from a strict application of the AMA Guides must explain why the departure is necessary and how the WPI rating was derived. (*Id*., at 828-829.) Consequently, although the evaluating physician may utilize the chapter, table or method in the AMA Guides "that most accurately reflects the injured employee's impairment," the physician's "opinion must constitute substantial evidence upon which the WCAB may properly

rely, including setting forth the reasoning behind the assessment." (*Almaraz-Guzman II, supra*, at 1104.)

To properly rate using *Almaraz-Guzman*, the physician is expected to: 1) provide a strict rating per the AMA Guides; 2) explain why the strict rating does not accurately reflect the employee's disability; 3) provide an alternative rating within the four corners of the AMA Guides; and 4) explain why the alternative rating most accurately reflects the employee's level of disability. (*Almaraz-Guzman III, supra*, at 828-829.)

It appears that Dr. Shadday's report contains a minimal history and, although he performed a physical examination, the brevity of the summary makes it difficult to evaluate the adequacy of either the history or the examination. Ultimately, however, Dr. Shadday's reports are conclusory and he does not provide a solid underlying basis for his opinions. Thus, Dr. Shadday's reports are not substantial medical evidence.

Dr. Kulick evaluated applicant, diagnosed with bilateral carpal tunnel syndrome, and agreed with Dr. Shadday that applicant's condition is permanent and stationary as of October 20, 2022. Regarding the AMA Guidelines, Dr. Kulick feels that a "6% whole-person impairment via page 495, Table 16-3, would be appropriate as described by his treating physician." (Ex G., p. 12, emphasis added.) Dr. Kulick did not review Dr. Jamasbi's reports, thus the basis of Dr. Kulick's opinion about the appropriateness of a 6% whole-person impairment is based on Dr. Shadday's report. Because Dr. Kulick does not disclose a solid underlying basis for his impairment rating, and to the extent that he bases his opinion on Dr. Shadday's reporting, his opinions are not substantial medical evidence.

Dr. Jamasbi performed physical and neurological examinations of applicant and took a detailed history. (Dr. Jamasbi's report of October 4, 2023, Ex. 1, pp. 13-16.) He reviewed the extensive medical record, including the results of various diagnostics, x-rays of applicant's right wrist and left wrist, both taken April 17, 2023, and provided an organized overview of his record review. (Dr. Jamasbi's report of October 4, 2023, Ex. 1, pp. 1-13.) However, to the extent that Dr. Jamasbi not explain why his departure from the strict application of the AMA Guides is necessary and he did not adequately explain how his whole-person impairment rating was derived, his rating is not substantial medical evidence.

The Appeals Board has the authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues.

(*McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141 (Appeals Bd. en banc); see also *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.)

The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The "Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee." (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd*. (*McKernan*) (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].)

As the WCJ noted the evaluating physician may use their experience and expertise to interpret and apply any portion of the entire AMA Guides. However, a physician who departs from a strict application of the AMA Guides must explain why the departure is necessary and how the WPI rating was derived. Under the circumstances of this matter, it appears that further development the record may be appropriate to obtain further reporting from Dr. Jamasbi. Upon return, we recommend that the WCJ set a status conference to determine how to proceed with further discovery.

Accordingly, we grant applicant's Petition, rescind the January 29, 2024 Findings and Award, and return the matter to the WCJ for further proceedings consistent with this opinion.

We note that applicant raises a legitimate concern about getting an EMG approved by utilization review based on the current record, and that the WCJ agreed in her Report that it may be helpful. To expedite this process, we strongly encourage defendant to authorize EMG testing, as well as sensory and motor nerve conduction studies.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued by the WCJ on January 29, 2024 is **RESCINDED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 8, 2024

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

ROBERT KELLEY
LAW OFFICES OF JEREMY SMITH
LAUGHLIN, FALBO, LEVY & MORESI

JB/*cs*

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