WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CECILE CONSTANTINO, ***Applicant,*** **vs.** **QUEENSCARE; ALEA NORTH AMERICA,** ***Defendants.***	**Case No. ADJ3525524 (LAO 0866019)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

Defendant seeks reconsideration of a Findings and Award of October 22, 2015, wherein it was found that, while employed as a department secretary on September 24, 2004, applicant sustained industrial injury to her back, right shoulder, and psyche, causing permanent disability of 70% and the need for further medical treatment. In finding permanent disability, the WCJ relied upon the opinions of agreed medical evaluators orthopedist Richard I. Fedder, M.D. and psychiatrist Khristine Eroshevich, M.D., Ph.D., other than declining to follow Dr. Fedder's and Dr. Eroshevich's apportionment to a prior 1993 industrial injury. Additionally, in making his findings regarding permanent disability, the WCJ found that the applicant had successfully rebutted the scheduled American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) component of the permanent disability rating pursuant to *Milpitas Unified School District v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837], and utilized an alternate method purportedly within the four corners of the AMA Guides to determine the applicant's low back whole person impairment. Finally, in the decision, the WCJ finds that the permanent disability indemnity due to applicant increased 15% pursuant to Labor Code section 4658(d)(2).

Defendant contends that the WCJ erred in (1) finding permanent disability of 70%, arguing that the WCJ erred in finding that the scheduled AMA whole person impairment rating was successfully rebutted pursuant to *Guzman, supra,* and arguing that the WCJ should have apportioned permanent

disability to the prior 1993 industrial injury and in (2) finding applicant entitled to a 15% increase in permanent disability indemnity pursuant to Labor Code section 4658(d)(2), arguing that the adjustment only applies to "injuries occurring on or after January 1, 2005," and not to this September 24, 2004 injury.

We have received an answer from the applicant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report). In the Report, the WCJ acknowledges that the Labor Code section 4658(d)(2) adjustment is not applicable to this case. The WCJ recommends that we grant reconsideration to remove the Labor Code section 4658(d)(2) adjustment, but otherwise affirm the decision.

As explained below, in addition to incorrectly applying section 4658(d)(2) to this case, we agree with defendant that the WCJ erred in finding that applicant rebutted the scheduled AMA Guides impairment rating and in declining to apportion to the 1993 industrial injury. We will therefore grant reconsideration, rescind the WCJ's decision, and issue a new decision which calculates the applicant's permanent disability by using applicant's scheduled AMA Guides low back rating, and incorporating Drs. Fedder's and Eroshevich's opinions regarding apportionment to the 1993 industrial injury.

With regard to the issue of whether the AMA Guides scheduled impairment for the low back was properly rebutted, Dr. Fedder wrote as follows in his December 20, 2013 report:

> Per Table 15-3, page 384, this patient is a DRE lumbar category V. She is status post fusion at two levels. She does have radiating pain to the right, lower extremity. On considering activities of daily living with regard to the DRE method, I would provide a 28% whole person impairment. Per Table 18-4, rating to determine impairment associated with pain, this patient has 59.32 points. I would add three points for pain, resulting in a 31% whole person impairment.
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> Considering the Almaraz-Guzman II decision, I do not feel that the impairment using the standard AMA Guides rating system is accurate. The Guides do not take into consideration pain or subjective factors, and does not take into consideration work restrictions or inability to resume the pre-injury occupation.
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> From Figure 15-19, page 427, the lumbar spine has a 90% maximal whole person impairment. This patient has lost 50% of her pre- injury capacity for use of the lumbar spine. Using the Almaraz- Guzman II decision, this patient has a 45% whole person impairment. That includes the pain rating.

In *Almaraz v. Environmental Recovery Services* (2009) 74 Cal.Comp.Cases 1127 (Appeals Board en banc) (commonly known as, and hereinafter referred to as *Almaraz II*), we held that a "scheduled permanent disability rating may be rebutted by successfully challenging the component element of that rating relating to the employee's WPI under the AMA Guides ... by establishing that another chapter, table, or method within the four corners of the Guides most accurately reflects the injured employee's impairment." (*Almaraz II*, 74 Cal.Comp.Cases at pp. 1095-1096.) However, although a physician is not locked in to any particular evaluation method found in the AMA Guides, his or her rating must still be based on and consistent with the AMA Guides, as read as a whole. As we explained, "A physician's WPI opinion that is not based on the AMA Guides does not constitute substantial evidence because it is inconsistent with the mandate of section 4660(b)(1)." (*Almaraz II*, 74 Cal.Comp.Cases at p. 1104.)

In *Guzman, supra*, the court of Appeal affirmed our decision in *Almaraz II*. In affirming our decision, the Court of Appeal, Sixth Appellate District expressly recited and adopted our emphasis on the fact that our "decision does not allow a physician to conduct a fishing expedition through the Guides 'simply to achieve a desired result'; the physician's medical opinion 'must constitute substantial evidence' of WPI and 'therefore ... must set forth the facts and reasoning [that] justify it.'" (*Guzman, supra*, 187 Cal.App.4th at p. 825.)

The Court of Appeal explained that, "'In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. [Citation.] Also, 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. [Citation.] Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citation.]'" (*Id.*)

The *Guzman* court held that "Simply presenting a view contrary to an established rating in the Guides ... would not be sufficient to rebut the PDRS rating. [A]n impairment rating that is inadequately supported by evidence and reasoning—and unquestionably, a rebuttal position arrived at by hunting through the Guides for a more favorable rating—will result in an opinion the [WCAB] will necessarily reject as insufficient evidence." (*Id.* at p. 828.)

Applying these principles to Dr. Fedder's report, we find that the AMA Guides impairment was not successfully rebutted. Dr. Fedder does not sufficiently explain why applicant's impairment is not adequately reflected by the AMA Guides. Dr. Fedder's criticism that the AMA Guides "The Guides do not take into consideration pain or subjective factors, and does not take into consideration work restrictions or inability to resume the pre-injury occupation," is directed at the AMA Guides as a whole, not the specific impairment applicable to this case. Additionally, Table 15-19 of the AMA Guides provides information on how to convert a whole person impairment to a regional estimate of spinal impairment. (AMA Guides, § 15.13, p. 427.) The table is not intended to be used as a rating mechanism and neither applicant nor Dr. Fedder specify where the rating method utilized (multiplying Dr. Fedder's assessment of the percentage of regional impairment by the body part's maximum impairment) is outlined in the AMA Guides. Accordingly, we find that the scheduled AMA rating was not properly rebutted, and we rate the applicant's impairment using the scheduled rating.

With regard to apportionment of the low back disability, applicant reported to Dr. Fedder that "in 1993 while working for Queens Care she slipped and twisted and then fell to the ground. She injured her lower back and received treatment. Surgery was recommended but she declined. She did file a Workers' Compensation claim and received a settlement of $7,000 or $8,000." (April 17, 2009 report at p. 2.) Dr. Fedder testified at his May 12, 2011 deposition that:

> And then I asked her if she continued to have problems with her low back bothering her up to the fall in September of '04. She said, no. she was no longer taking medication for back pain, and did not have any problems with her back until she fell at work in September of '04.
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> And then when we talked about in September of '04, she had the fall injuring her right shoulder primarily, but she also had some low back pain, and the back pain gradually worsened after that fall and, you know, so then as time passed, she had difficulty walking, with muscle spasm, she had treated at Kaiser.
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> So basically the information we now have is pretty similar to what I had before. And we are aware that the injury in '93 and the injury in September of '04 were both due to falls.
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> After the September '04, her primary problem was the right shoulder, which may have distracted her from the back pain, but as we see, the back pain got worse, and she developed radicular pain to the right lower extremity in 2009.

> So we see that her back pain got worse years after the fall, and the radiating pain didn't start until years after the fall. We're unaware of any interceding injuries or trauma so, you know, to try and change it based on what I know, again, leads me to the same place.
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> ***
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> [B]ecause of the lag time, particularly with regard to the onset of radiculopathy, a lot of her disability impairments are being attributed to the radiculopathy, I'm thinking that the significance of the significant 2004 fall contributed to the onset of the radiculopathy not as great as 75 percent, and I would apportion 60 percent to the fall at sort on September 24, '04 and 40 percent to the pre-existing industrial injury in '93 and the pre-existing degenerative changes and listhesis.
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> ***
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> I would divide that 20 to the 1993 injury and 20 to the degenerative changes and listhesis.

(May 12, 2011 Deposition pp. 15, 17-18.)

In addition to the history given directly by the applicant to Dr. Fedder, Dr. Fedder's review of records noted that applicant gave a similar history to other physicians. For instance, Dr. Fedder noted that in a July 17, 2007 pre-operative evaluation, applicant indicated that she injured her back in 1993 and continued to have intermittent, moderate low back pain. (December 20, 2013 report at p. 6.) Similarly, applicant told agreed medical evaluator Alvin Markovitz, M.D. on October 25, 2011 that she "slipped, twisted and fell" in 1993 and that "surgery was recommended but she declined." (December 20, 2013 report at p. 18.)

Labor Code section 4663(a) states that "apportionment of permanent disability shall be based on causation," and section 4663(c) states, in pertinent part, "In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries." The WCJ disregarded Dr. Fedder's apportionment to the 1993 injury because he deemed it speculative because Dr. Fedder did not review contemporaneous medical records related to the 1993

injury. However, giving an opinion based on the medical history presented to him and to other physicians by the applicant was squarely within Dr. Fedder's medical expertise. In reviewing the issues presented here, we presume that the agreed medical evaluator has been chosen by the parties because of his expertise and neutrality. "[W]orkers' compensation law favors agreed medical [evaluators] in resolving medical disputes fairly and expeditiously." (*Green v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1444 [70 Cal.Comp.Cases 294].) Therefore, an agreed medical evaluator's opinion should ordinarily be followed unless there is 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]; *Los Angeles Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Steele*) (2000) 65 Cal.Comp.Cases 300, 301 [writ den.]; *Siqueiros v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 150, 151 [writ den.].)

Dr. Fedder made a determination of the approximate percentage of the applicant's permanent disability caused by the 1993 incident based on the history given to him by the applicant and his medical expertise. "Section 4663, subdivision (c), requires no more." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 930 [71 Cal.Comp.Cases 1687].)

For the same reasons, we reincorporate Dr. Eroshevich's 14% apportionment to the 1993 injury. Dr. Eroshevich opined in her February 17, 2015 report that 70% of applicant's psyche disability was derivative of her orthopedic factors, including the 20% that Dr. Fedder attributed to the 1993 fall. Dr. Eroshevich thus apportioned 14% of applicant's psyche permanent disability (70% x 20%) to the 1993 fall. (February 17, 2015 report at p. 47.) The WCJ disregarded Dr. Eroshevich's apportionment determination because it was derivative of Dr. Fedder's apportionment determination, which the WCJ found speculative. Since, as explained above, Dr. Fedder's determination constituted substantial medical evidence, we also find apportionment based on Dr. Eroshevich's medical opinion.

We therefore grant reconsideration, rescind the Findings and Award of October 22, 2015, and issue a new decision which incorporates the apportionment to the 1993 injury found by Drs. Fedder and Eroshevich, finds permanent low back impairment in accordance with the scheduled AMA Guides rating, and does not contain any Labor Code section 4658(d)(2) adjustment. We have rated the applicant's permanent disability as follows:

Lumbar spine: 60% (15.03.01.00 – 31 – [5] 39 – 112D – 33 – 38) = 23%

Left shoulder: 85% (16.02.01.00/16.02.02.00 – 13 – [7] 18 – 112H[1] – 22 – 26) = 22%

Psyche: 60.5% (14.01.00.00 – 18 – [8] 25 – 112I – 33 – 38) = 23%

For the foregoing reasons,

IT IS ORDERED reconsideration of the Findings and Award of October 22, 2015 is hereby **GRANTED.**

IT IS FURTHER ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of October 22, 2015 is hereby **RESCINDED** and that the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Cecile Constantino born on , while employed on September 24, 2004, as a department secretary, group 112, at Los Angeles, California, by Queenscare, whose workers' compensation insurance carrier was Alea North America, sustained injury arising out of and occurring in the course of employment to her back, right shoulder and psyche.

2. Applicant's injury caused permanent disability of 54%, entitling applicant to permanent disability indemnity in the total amount of $63,600.00, which is now fully accrued.

3. Applicant will require further medical treatment to cure or relieve from the effects of this injury.

4. While the parties are to adjust the EDD lien as to temporary disability as per the trial minutes, no EDD benefits are payable from PD due.

5. The reasonable value of the services and disbursements of applicant's attorney is $9,540 to be held in trust by defendant pending resolution of the division of fees among applicant's current and former counsel.

AWARD

AWARD IS MADE in favor of CECILE CONSTANTINO against ALEA NORTH AMERICA of:

a. Permanent disability indemnity in the total amount of

[1] "The occupational variant used to rate an entire extremity shall be the highest variant of the involved individual impairments." (2005 Schedule for Rating Permanent Disabilities at p. 1-11.)

$63,600.00, less an attorney's fee of $9,540.00, resulting in a net amount of $54,060.00 due to applicant.

b. Future medical treatment reasonably required to cure or relieve from the effects of the injury herein.

c. Interest at the legal rate from the filing and making of this award.

ORDER RE ATTORNEYS' FEES

IT IS ORDERED that defendant hold the attorneys' fees of $9,540.00 in trust, pending resolution of the division of attorney's fees among applicant's current and former counsel either by agreement or by WCAB determination.

WORKERS' COMPENSATION APPEALS BOARD

KATHERINE ZALEWSKI

I CONCUR,

DEIDRA E. LOWE

CONCURRING, BUT NOT SIGNING

FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JAN 11 2016

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

CECILE CONSTANTINO
GEORGE HENDERSON
RICHARD T. FORT
EDD
JACOB BORENSTEIN
ROMAN MOSQUEDA

DW/oo

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