WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GABRIELA BARAJAS, ***Applicant***

vs.

GRUMA CORPORATION/MISSION FOODS; ACE AMERICAN INSURANCE COMPANY, administered by GALLAGHER BASSETT, ***Defendants***

Adjudication Number: ADJ11076763
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Gruma Corporation/Mission Foods, insured by ACE American Insurance Company (defendant) seeks reconsideration of the June 26, 2024 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a packer from June 9, 1986 to September 27, 2017, sustained industrial injury to her cervical spine, lumbar spine, left shoulder, right shoulder, left knee, and in the form of fibromyalgia, hypertension, cognitive impairment and acid reflux. The WCJ, in relevant part, found that applicant had developed fibromyalgia as a result of her injuries, and awarded permanent disability based on the addition of certain impairments rather than by using the Combined Values Chart (CVC).

Defendant contends that the evidentiary record does not support the ratings methodology used by the Agreed Medical Evaluator (AME) in orthopedics; that the record does not support the WCJ's findings regarding fibromyalgia; and that the applicant's various disability percentages should be combined rather than added.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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 discussed below, we will grant reconsideration, rescind the F&A, and substitute new findings of fact restating the WCJ's findings of injury and temporary disability, but deferring permanent disability and attorney fees. We will also order that the matter be returned to the trial level for development of the record and further proceedings.

FACTS

Applicant sustained injury to her cervical spine, lumbar spine, left shoulder, right shoulder, and left knee, and claims to have sustained injury to the stomach, skin, right wrist, right knee, and dental, and in the form cognitive impairment, hearing loss, fibromyalgia, and high blood pressure, while employed as a packer by defendant Gruma Corporation/Mission Foods from June 9, 1986 to September 27, 2017.

The parties have selected Peter Newton, M.D., as the Agreed Medical Evaluator (AME) in orthopedic medicine, Stuart Silverman, M.D., as the Qualified Medical Evaluator (QME) in rheumatology, and Eli Hendel, M.D., as the QME in internal medicine. Applicant's treating and consulting physicians include Kourosh Noorman, M.D., as a primary treating physician, and Allen Salick, M.D., as consulting rheumatologist.

On January 31, 2024, the parties proceeded to trial, framing issues in relevant part of permanent disability and apportionment. The parties offered no witness testimony, and the WCJ ordered the matter submitted for decision the same day. On February 29, 2024, the WCJ ordered the submission vacated to obtain ratings from the Disability Evaluation Unit (DEU). On March 5, 2024, the WCJ served the resulting ratings on parties.

On May 9, 2024, the WCJ ordered the matter submitted for decision.

On June 26, 2024, the WCJ issued his F&A, determining in relevant part that applicant's injuries resulted in 88 percent permanent disability. The Opinion on Decision explained that the WCJ relied on the opinions of AME Dr. Newton, which rated applicant's spinal disability using a ROM methodology. Additionally, Dr. Newton opined that the most accurate rating of applicant's disability would require adding the cervical and lumbar spine impairments before combining the resulting disability with other body parts. (Opinion on Decision, at p. 2.)

Defendant's Petition for Reconsideration (Petition) contends the medical records do not substantiate the application of the ROM methodology to rate applicant's spinal impairment; that equity requires consideration of the February 5, 2021 report of Dr. Silverman, mistakenly not listed on the pretrial conference statement; that the reporting of Dr. Salick is no longer germane; and that the medical evidence does not justify the addition of certain disabilities.

DISCUSSION

I.

Former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board." Here, according to Events, the case was transmitted to the Appeals Board on July 30, 2024, and the next business day that is 60 days from the date of transmission is September 30, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is

[1] All further references are to the Labor Code unless otherwise noted.

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

issued by or on the next business day after September 30, 2024, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, the Report is dated July 26, 2024. In Events, it shows that the Report was uploaded into FileNet on July 26, 2024. The Proof of Service states that it was served on July 29, 2024, but on the face of the Report, it states that the Report was served on July 30, 2024. There is nothing in Communications in EAMS to indicate when the Report was served. The case was transmitted to the Appeals Board on July 30, 2024. Therefore, it is unclear if service of the Report was actually effectuated on the same day that the case was transmitted to the Appeals Board.

Thus, we cannot determine whether service of the Report provided accurate notice of transmission under section 5909(b)(2). It is axiomatic that it is legally impossible to give notice of an action that has not yet occurred, here the transmission. While this possible failure to provide accurate notice does not alter the time for the Appeals Board to act on the petition, service of the Report may not have provided actual notice to the parties as to the commencement of the 60-day period on July 30, 2024.

II

Defendant challenges the methodology used in the rating of applicant's permanent disability. Defendant contends the AME's opinion that applicant's spinal impairment should be added to, rather than combined with, her other impairments is not supported in the record. (Petition, at p. 4:8.)

Pursuant to section 4660, the Permanent Disability Rating Schedule (PDRS) is prima facie evidence of an injured employee's permanent disability. (Lab. Code, § 4660; cf. *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1274–1277 [76 Cal.Comp.Cases 624] (*Ogilvie*).) The PDRS provides that the ratings for multiple body parts arising out of the same injury are "generally" combined using the Combined Values Chart (CVC), which is appended to

the PDRS. (2005 PDRS, at p. 1-10.) Yet, because it is part of the PDRS, the CVC is rebuttable and a reporting physician is not precluded from utilizing a method other than the CVC to determine an employee's whole person impairment so long as the physician's opinion remains within the four comers of the AMA Guides. (Lab. Code, § 4660; *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808, 818–829 [75 Cal.Comp.Cases 837].)

Accordingly, the use of the multiple disabilities table is discretionary depending upon whether it produces a rating that fully compensates an applicant for the effects of his or her injury. (*Mihesuah v. Workers' Comp. Appeals Bd.* (1976) 55 Cal.App.3d 720, 728 [41 Cal.Comp.Cases 81, 87] (*Mihesuah*).) Indeed, as is noted in American Medical Association Guides to the Evaluation of Permanent Disability, 5th Edition (AMA Guides):

> A scientific formula has not been established to indicate the best way to combine multiple impairments. Given the diversity of impairments and great variability herein in combining multiple impairments, it is difficult to establish a formula that accounts for all situations. A combination of some impairments could decrease overall functioning more than suggested by just adding the impairment ratings for the separate impairments (e.g. blindness and inability to use both hands). When other multiple impairments are combined, a less than additive approach may be more appropriate. … Other options are to combine (add, subtract, or multiply) multiple impairments based upon the extent to which they affect and individual's ability to perform activities of daily living …
>
> (AMA Guides, pp. 9-10.)

In *Kite v. East Bay Municipality Util. Dist.* (December 5, 2012, ADJ6719136) [2012 Cal. Wrk. Comp. P.D. LEXIS 640) (writ den. sub nom. *Athens Administrators v. Workers' Comp. Appeals Bd.* (*Kite*) (2013) 78 Cal.Comp.Cases 213 [2013 Cal. Wrk. Comp. LEXIS 34] (*Kite*)), applicant underwent industrial bilateral hip replacement surgeries. The evaluating orthopedic QME opined that "there is a synergistic effect of the injury to the same body parts bilaterally versus body parts from different regions of the body," and that "the best way to combine the impairments to the right and left hips would be to add them versus using the combined values chart, which would result in a lower whole person impairment." (*Id.* at p. 5.) Accordingly, the WCJ determined that the most accurate rating of applicant's permanent disability would be achieved by adding the impairment for each hip, rather than by combining the respective impairment percentages under the CVC. Following defendant's petition for reconsideration, we affirmed the WCJ's decision that the "QME has appropriately determined that the impairment resulting from applicant's left and

right hip injuries is most accurately combined using simple addition than by use of the combined-values formula." (*Id.* at p. 10.)

Here, defendant contends that the AME opinion regarding addition of the impairments is conclusory. Defendant notes that "AME Dr. Newton simply stated that individual with injuries to both side of the upper extremities will significantly more disabled with activities of daily living," and that the bilateral shoulder and spinal injuries "have a synergistic effect on one another." (Petition, at p. 4:16.)

In *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 [2024 Cal. Wrk. Comp. LEXIS 23] (Appeals Board en banc), we discussed the two primary ways in which the *Kite* analysis had been applied to permanent disability disputes:

> In the first approach, the CVC has been rebutted where there was evidence showing no actual overlap between the effects on ADLs as between the body parts rated. In the second approach, the CVC has also been rebutted where there is overlap, but the overlap creates a synergistic effect upon the ADLs.
>
> **a. No overlap of ADLs.**
>
> The first method for rebuttal of the CVC is to show that the multiple impairments, in fact, have no overlap upon the effects of the ADLs. (See e.g., *Devereux v. State Comp. Ins. Fund*, 2018 Cal.Wrk.Comp. P.D. LEXIS 592; *Guandique v. State of California*, 2019 Cal.Wrk.Comp. P.D. LEXIS 53.) We believe that one significant point of confusion on the issue of overlap is that the analysis should focus on overlapping ADLs, not body parts. Although the formula for the CVC is from the AMA Guides, the chart used to calculate the CVC is from the PDRS.
>
> In determining whether the application of the CVC table has been rebutted in a case, an applicant must present evidence explaining what impact applicant's impairments have had upon their ADLs. Where the medical evidence demonstrates that the impact upon the ADLs overlaps, without more, an applicant has not rebutted the CVC table. Where the medical evidence demonstrates that there is effectively an absence of overlap, the CVC table is rebutted, and it need not be used.
>
> …
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> **b. Overlapping ADLs with a Synergistic Effect**
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> The next method for rebutting the CVC was first discussed in *Kite*, where applicant was awarded permanent disability by adding the impairment to each hip and not by combining the impairments as ordinarily required by the PDRS

under the CVC. (*Kite, supra*, 78 Cal.Comp.Cases 213.) In *Kite*, the CVC was rebutted by substantial medical evidence showing the synergistic effect of the two impairments on applicant.

'Synergy' is "(1) the interaction of two or more agents or forces so that their combined effect is greater than the sum of their individual effects; or (2) Cooperative interaction among groups. . . that creates an enhanced combined effect." (American Heritage Dict. (Fifth Edition, 2022).) In some cases, two impairments overlap with one another in their effect on ADLs to the extent that they amplify one another to cause further impairment than what is anticipated in the AMA Guides. Thus, it is permissible to add impairments where a synergistic amplification of ADLs is shown. For example, if applicant had an impairment in the dominant hand, an evaluator might find that the impairment impacts the ADL of non-specialized hand activities, such as being able to button a shirt. If applicant's impairment was to both hands, one might expect the ability to button a shirt to be even more difficult. The purpose of the CVC, avoiding duplication, does not apply in such cases as the impairments are not duplicative, because the two impairments together are worse than having a single impairment.

We cannot emphasize enough that 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), (emphasis added).) The term 'synergy' is not a "magic word" that immediately rebuts the use of the CVC. Instead, a physician must set forth a reasoned analysis explaining how and why synergistic ADL overlap exists. If parties are searching for a magic word to use during a doctor's deposition, that word is "Why?". Rather than focusing on whether a specific term, including the term synergy, was used, it is imperative that parties focus on an analysis that applies critical thinking based on the principles articulated in Escobedo to support a conclusion based on the facts of the case. Such an analysis must include a detailed description of the impact of ADLs and how those ADLs interact.

(*Vigil, supra*, at pp. 691-693.)

We thus held in *Vigil* that where an applicant seeks to rebut the CVC, they must establish the following:

1. The ADLs impacted by each impairment to be added, and
2. Either:
    a. The ADLs do not overlap, or

b. The ADLs overlap in a way that increases or amplifies the impact on the overlapping ADLs.

(*Id.* at pp. 688-689.)

Our en banc decision in *Vigil* issued on June 10, 2024, and is mandatory authority on all WCJs and WCAB panels. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236]; see also Govt. Code, § 11425.60(b).)

Following our independent review of the record, we believe that the AME reporting should be developed to address our holdings in *Vigil, supra*, as relevant to the issue of the methodology by which the various impairments are added or combined. In addition, and pursuant to our discussion in *Vigil* that medical reporting "must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions," the AME should specifically address his reasoning as to the most accurate way of combining applicant's various impairments.

Accordingly, we will grant reconsideration, rescind the award of permanent disability, and defer the issue, pending development of the record. Upon return of this matter to the trial level, we recommend the WCJ direct the parties to obtain supplemental reporting or deposition testimony that specifically addresses the analysis required under *Vigil, supra*. We reiterate that to constitute substantial medical evidence, the AME's 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." (*Vigil, supra*, at p. 693; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

Defendant also observes that the AME has assessed applicant's spinal impairment using both a ROM and a Diagnosis-related Estimate (DRE) methodology. Defendant contends that the AME has not adequately explained the rationale for using a ROM methodology. In *Milpitas Unified School District v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837], the court of appeal addressed the issue of "whether section 4660 … permits deviation from a strict application of the descriptions, measurements, and percentages contained in the [AMA] Guides for purposes of determining the impairment resulting from an employee's

workplace injury." (*Id.* at p. 846.) The court observed that the overarching goal of rating permanent impairment is to achieve accuracy, and that:

> The [AMA] Guides itself recognizes that it cannot anticipate and describe every impairment that may be experienced by injured employees. To accommodate those complex or extraordinary cases, it calls for the physician's exercise of clinical judgment to evaluate the impairment most accurately, even if that is possible only by resorting to comparable conditions described in the Guides. The PDRS has expressly incorporated the entire Guides, thereby allowing impairment in an individual case to be assessed more thoroughly and reliably.
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> *(Id.* at p. 855.)

Thus, upon return of this matter to the trial level, the parties may wish to address the issue of the most accurate measure of impairment with the AME in order to obtain additional evidence responsive to the issue. (*Id.* at p. 849 ["the Guides calls for the physician's exercise of clinical judgment to assess the impairment most accurately].)

Finally, we acknowledge defendant's contention that the WCJ erred in relying on the 2018 reporting of Dr. Salick because the 2021 reporting of Dr. Silverman more accurately reflects applicant's current condition. (Petition, at p. 3:19.) We note, however, that other than the passage of time, defendant's Petition does not offer any specific argument as to why either of the reports more accurately reflects applicant's current condition. Because we are returning this matter to the trial level for development of the record regarding permanent disability, we do not reach a determination on the issue. However, we remind the parties that the question is appropriately analyzed as an issue of substantiality. In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) 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] (italics added); *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].) Following development of the record, the parties may wish to specifically frame and submit the issue of the substantiality of the reporting, including the reporting in the field of rheumatology.

In summary, defendant's Petition challenges the addition rather than combination of certain impairments herein. Because we recently clarified the analysis necessary to adding versus combining impairments in *Vigil, supra*, and because the AME opinion predates our en banc decision, we will grant reconsideration and rescind the F&A. We will substitute a new decision affirming the WCJ's F&A with the exception of permanent disability and attorney fees, which we will defer. We will then return this matter to the trial level for development of the record. We note that in developing the record, the parties may wish to address related issues of permanent disability to the AME, including the appropriate methodology used for rating applicant's spinal impairment, and the substantiality of the rheumatology reporting.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of June 26, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of June 26, 2024 is **RESCINDED,** with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Gabriela Barajas, while employed from June 9, 1986, to September 27, 2017, as a packer, Occupational Group Number 360, at Rancho Cucamonga, California, sustained injury arising out of and in the course of employment to her cervical spine, lumbar spine, left shoulder, right shoulder, left knee, and in the form of fibromyalgia, hypertension, cognitive impairment and acid reflux, and did not sustain injury arising out of and in the course of employment to her right wrist, right knee, and dental.
2. At the time of injury, the employee's earnings were $630.50 per week, warranting indemnity rates of $420.30 for temporary disability and $290.00 for permanent disability.
3. The employer has furnished some medical treatment.
4. The primary treating physician is Dr. Michael Mauro.
5. No attorney fees have been paid and no attorney fee arrangements have been made.
6. The injury resulted in temporary disability from October 21, 2017, to January 2, 2018, payable at the rate of $420.30 per week, less amounts paid on account thereon, less a reasonable attorney fee of 15% to be taken from the accrued TD.
7. The issues of permanent disability and attorney fees are deferred.

8. Applicant will require further medical treatment to cure or relieve from the effects of her injury.
9. Jurisdiction is reserved over outstanding medical-legal/or self-procured treatment liens of record with the parties to attempt informal resolution of said lien issues, or to be determined in supplemental proceedings upon the filing of a declaration of readiness to proceed.

AWARD

AWARD IS MADE in favor of **GABRIELA BARAJAS** against **MISSION FOODS/GRUMA CORPORATION** of:

a. Temporary disability, in accordance with Findings of Fact No. 6.
b. Further medical treatment, in accordance with Findings of Fact No. 8.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 27, 2024

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

GABRIELA BARAJAS
BARKHORDARIAN LAW FIRM
CHOU LAW GROUP

SAR/abs

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