WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LISA MENDOZA, *Applicant*

vs.

STATE OF CALIFORNIA, Legally Uninsured, *Defendant*

Adjudication Number: ADJ10808820
Fresno District Office

OPINION AND ORDER DENYING
PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of August 20, 2024, wherein it was found that while employed as an office technician during a cumulative period ending April 27, 2026, applicant sustained admitted industrial injury to her hands, wrists, right thumb, and in the form of gastroesophageal reflux disorder (GERD) causing permanent disability of 91%. At trial, the parties "agree[d] that the problem in this case pertains to whether or not the case of *Kite* applies. There is a stipulation to the effect that if *Kite* does not apply, the permanent disability equals 72%. If *Kite* does apply, depending on how it's rated, there's a variety of ways to rate it." In this stipulation, the parties were referencing *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 (writ den.), which held that adding two different impairments rather than combining them per the method outlined in the 2005 Schedule for Rating Permanent Disabilities better reflected a worker's impairment when substantial medical evidence supported the notion that the two impairments had a synergistic effect where, in effect, the resultant impairment was more than the sum of the two impairments.

Defendant contends that the WCJ erred in finding permanent disability of 91%, arguing that the impairment ratings found by qualified medical evaluator chiropractor Timothy Walth, D.C. do not constitute substantial medical evidence and arguing that the WCJ erred in adding rather than utilizing the Combined Values Chart (CVC) to combine the applicant's upper extremity disabilities. We have not received an answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report quoted at the conclusion of this Opinion and for the additional reasons stated below, we will deny the defendant's Petition.

Preliminarily, we note that former Labor Code 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, Labor Code 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 Labor Code 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 Management 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 October 1, 2024, and 60 days from the date of transmission is Saturday, November 30, 2024. The next business day that is 60 days from the date of transmission is Monday, December 2, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Monday, December 2, 2024, so we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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

[1] 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.

Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on October 1, 2024, and the case was transmitted to the Appeals Board on October 1, 2024, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on October 1, 2024.

Turning to the merits, with regard to the argument that the Opinion on Decision did not adequately explain the WCJ's findings, the WCJ may cure the failure to provide the grounds for a decision by subsequently specifying the grounds in the report required by Appeals Board Rule 10962 (Cal. Code Regs., tit. 8, § 10962). (*Smales v. Workers' Comp. Appeals Bd.* (1980) 45 Cal.Comp.Cases 1026, 1027 [writ den.]; *Hoag Memorial Hospital Presbyterian v. Workers' Comp. Appeals Bd. (Giannini)* (1997) 62 Cal.Comp.Cases 1720, 1721 [writ den.].) In this case, to the extent that the WCJ did not adequately give the reasons behind the decision in the Opinion, the defect was cured by adequately explaining the bases for the findings in the Report.

As noted in the WCJ's Report, the Dr. Walth found that applicant's left arm impairment, after inclusion of a 1% WPI pain add-on rated at 20% WPI, applicant's right arm impairment rated after inclusion of a 2% pain add-on rated at 27% WPI. Applicant's right thumb impairment rated at 1% WPI and applicant's GERD impairment rated at 3% WPI. The WCJ listed applicant's permanent disabilities, after adjustment, as follows:

Left Arm CTS 1% pain	16.01.02.02 – 20 [1.4] – 28 – 112H – 34 – 39
Right Arm CTS 2% pain	16.01.02.02 – 27 [1.4] – 38 – 112H – 44 – 50
Right Thumb ROM	16.06.01.01 – 1 [1.4] – 1 – 112G – 2 – 3
GERD	06.01.00.00 – 3 [1.4] – 4 – 112F – 4 –5

"Impairments of an individual extremity are adjusted and combined at the whole person level with other impairments of the same extremity before being combined with impairments of other body parts." (2005 Schedule for Rating Permanent Disabilities at p 1-11.) Thus, the right

arm permanent disability is combined with the right thumb disability to yield right upper extremity permanent disability of 52%. If the CVC is then utilized, this 52% right upper extremity permanent disability is combined with the left arm permanent disability to yield 71% permanent disability, which is then combined with the GERD permanent disability to yield 72% permanent disability. (2005 Schedule for Rating Permanent Disabilities at pp. 8-1 to 8-3.)

By stipulating that applicant's permanent disability equaled 72% if the CVC was utilized, defendant expressly stipulated to the ratings above, with the only issue being whether body parts should be added or combined per the CVC. While defendant now attempts to argue that Dr. Walth's impairment ratings do not constitute substantial medical evidence, defendant has not set forth sufficient good cause to set aside its stipulation to the impairment ratings which adjust and combine to 72% permanent disability. In any case, if the defendant believed that Dr. Walth's ratings were legally or factually deficient, it should have sought a deposition or supplemental reporting from Dr. Walth. (*Foremost Dairies, Inc. v. Industrial Acc. Com.* (*McDannald*) (1965) 237 Cal.App.2d 560, 572 [30 Cal.Comp.Cases 320].) To the contrary, it stipulated to the correctness of the impairments, reserving only the issue of whether they should be added or combined.

We find that the WCJ correctly followed Dr. Walth in adding, rather than combining, the right upper extremity disability to the left upper extremity disability. In our en banc opinion *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686, 691 [Appeals Bd. en banc] we expanded on *Kite, supra*, and held that two different impairments may be added, rather than combined, even if the impairments impact the same activities of daily living (ADLs) when the impact to the ADLs caused by the two impairments overlap in a way that increases or amplifies the impact on the overlapping ADLs.

In his September 27, 2021 report, Dr. Walth wrote:

> In applying the Kite Analysis in consideration of adding the impairments as opposed to combining them, I have difficulty understanding why the framers and authors of The Guides would decrease the impairment when bilateral structures are involved. The loss of redundancy found within the Guides provides a decrease of impairment for the 2nd redundant structure. I can plausibly contemplate why the Kite Analysis was instituted and now utilized as I find the authors and framers of The Guides could not anticipate every situation and in this instance in particular, Ms. Mendoza's capability of working and competing in the open labor market having both hands subject to impairment and disability is decreased to a greater degree than having one structure involved

> and therefore I do not believe that combining the values and reducing her impairment provides for her an accurate and justifiable impairment and therefore I am adding the values associated with the compromise at her wrist structures for both her sensory and motor loss due to neurological compromise/compression.

(September 27, 2021 report at p. 5.)

Contrary to defendant's argument in its Petition, by referencing "bilateral structures," Dr. Walth was clearly stating that the opposite and corresponding disabilities should be added. Indeed, as noted above, defendant stipulated to the component disabilities. As noted by the WCJ in the Report, Dr. Walth's explanation complies with *Kite* and *Vigil*.

We otherwise deny the Petition for the reasons in the Report quoted below. We do not incorporate a sentence that questions why defendant agreed to admission of Dr. Walth's reporting if it found it deficient. Agreeing to admissibility of a report does not waive the argument that the report does not constitute substantial medical evidence, which is an issue of sufficiency of evidence rather than admissibility. Nevertheless, as noted above, here defendant stipulated to the component disability ratings.

> Defendant herein has filed a timely, verified Petition for Reconsideration of the Findings and Award issued by this Court, dated 8/20/2024. Applicant has not filed an answer. For the reasons indicated herein below, it is recommended that this petition be DENIED.
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> As the Minutes of Hearing dated June 6, 2024 state, the main issue herein is whether *East Bay Municipal Utility District v. Workers' Compensation Appeals Board (Kite) (2013)* 78 CCC 213 (writ denied) applies.
>
> This Court found that it did, because the explanation provided by the QME, Dr. Walth, was clear and logical. See Exh B, p 5 and Opinion on Decision p 4. In fact, this Board, on the matter of *Sammy Vigil v. County of Kern* ADJ11201607 and ADJ11201608 utilized an example of synergistic effect identical as the situation in the instant case. Vigil supra at p. 7. This Board went on to explain why a synergistic effect would take place if both upper extremities were compromised. That is the same analysis that Dr. Walth utilized. In his report, Exh b, supra.
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> Petitioner claims that Dr. Walth's reports do not constitute substantial medial evidence. Applicant claims that Dr. Walth generated 21 reports. Eight were jointly introduced into evidence. If defendant had a problem with Dr Walth's reporting, defendant had ample opportunity to inquire from the Dr. and correct any possible error. Defendant failed to do so before trial and now has filed a very

lengthy and complex Petition for Reconsideration raising numerous medical issues for rating purposes all of which should have been addressed prior to trial.

[Paragraph omitted.]

The Ratings utilized by this Court to arrive at the permanent disability findings are as follows:

Dr. Walth, 9/27/2021 report, Exh. B,

Left Ann-CTS 1 % pain	16.01.02.02-20-[1.4]-28-l 12-H- 34-39
Right Arm- CTS 2% pain	16.01.02.02-27-[1.4]-38-l 12-I-1-44-50
Right thumb- ROM	16.06.0 l.0l-1-[l.4]-1-112-G-2-3
GERD	06.01.00.00-3-[1.4]-4-112-F-4-5

Combined right upper extremity, 50 C 3 =52

Per Kite, 52+39 =91.

GERD does not change the formula. For the aforementioned reasons it is respectfully recommended that the Petition for Reconsideration be DENIED.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of August 20, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 2, 2024

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

LISA MENDOZA
LINDA BOSQUEZ
STATE COMPENSATION INSURANCE FUND

DW/oo

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