WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SUSAN GARIBAY, *Applicant*

vs.

SCIENTIFIC DRILLING INTERNATIONAL, INC. and ZURICH NORTH AMERICA INSURANCE, *Defendants*

Adjudication Number: ADJ15533334

San Luis Obispo District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact, Award and Order issued by the workers' compensation administrative law judge (WCJ) on December 29, 2023, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her left thumb and in the form of chronic regional pain syndrome as a compensable consequence of the thumb injury.

Defendant contends that hand surgery qualified medical examiner (QME) Dr. Michael J. Behrman's diagnosis of chronic regional pain syndrome did not comply with the requirements of the AMA Guides so applicant's permanent disability should be rated at 17%.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant claimed injury to her left thigh, left wrist, left hand, and in the form of complex regional pain syndrome (CRPS) on her left side while employed by defendant as a device assembler on December 4, 2018.

QME Dr. Behrman evaluated applicant on July 7, 2022. Dr. Behrman examined applicant, took a history and reviewed the medical record. The diagnoses included: "1. Status post trapezium excision arthroplasty. 2. Status post left thumb A1 pulley release. [and] 3. Probable chronic regional pain syndrome secondary to industrial injury as well as surgery for industrial injury." (Joint Exh. 4, Michael J. Behrman, M.D., July 7, 2022, p. 5.) In the Discussion section of his report Dr. Behrman stated:

> Ms. Garibay suffered significant industrial injury from overuse involving her left arm. I will not comment further on the right arm. She has developed some subsequent issues on the right side, but the main problem here is the left. While the surgery that Dr. Simon performed was completely appropriate, she unfortunately has not had a good result. She shows clinical evidence of chronic regional pain syndrome on exam. Additionally, she had relief from the one stellate ganglion block that she has had. This is further evidence to support the diagnosis of chronic regional pain syndrome. She has residual tenosynovitis in the index, middle and ring fingers. She shows evidence of scarring on the radial sensory nerve. I do not believe she is permanent and stationary at this time.
> (Joint Exh. 4, p. 6.)

Dr. Behrman re-evaluated applicant on October 31, 2022. He determined that applicant had reached permanent and stationary status, and he rated her impairment as follows:

> Ms. Garibay's impairment can be evaluated based on AMA Guidelines. Ms. Garibay's trapezium excision arthroplasty rates an 11% upper extremity impairment as per table 16-27 page 506 of the AMA Guidelines. Ms. Garibay's chronic regional pain syndrome is rated as per Guidelines on page 496 of the AMA Guidelines. These require use of table 16-l0A. As per this table, I believe Ms. Garibay rates a grade 3 impairment at the level of 50%. This would equate to a 50% upper extremity impairment. Combined with the trapezium excision arthroplasty, this gives a 56% upper extremity impairment, which in turn converts to a 34% whole person impairment. I believe this is the appropriate impairment rating in this case.
> (Joint Exh. 3, Michael J. Behrman, M.D., October 31, 2022, pp. 1 – 2.)

In his February 1, 2023 supplemental report, Dr. Behrman stated:

> I am writing in response to your letter of January 18, 2023. I am well versed with the AMA guidelines list of objective diagnostic criterias for CRPS. While I am in agreement with this table overall, one thing that it does not deal with is the response to stellate ganglion blocks. Stellate ganglion blocks involve blocking the sympathetic nerves. A positive response to a block would be considered pain relief for anywhere from 24 hours to several weeks. Ms. Garibay had a stellate ganglion block done because of suspected CRPS. She had significant pain relief after that block for several weeks. Unfortunately, further blocks and treatment for her CRPS were not authorized. In the face of her clinical findings, I believe this response to the block absolutely makes the diagnosis of chronic regional pain syndrome. In fact, Ms. Garibay also has cool skin temperature and dry skin on the left side. She does show trophic changes. The most significant issue here though is her pain level and her short-term response to stellate ganglion blocks. I believe this definitively makes the diagnosis of chronic regional pain syndrome, I stand by my findings in my QME reports of July 7, 2022 and October 31, 2022.
> (Joint Exh. 2, Michael J. Behrman, M.D., February 1, 2023.)

The doctor's response to another request for a supplemental report included: "... I believe that the chronic regional pain syndrome is the appropriate diagnosis here and I have given my reason why I believe that. ... I believe a 10% whole person impairment rating would be the appropriate impairment rating if Ms. Garibay did not have chronic regional pain syndrome." (Joint Exh. 1, Michael J. Behrman, M.D.)

The parties proceeded to trial on December 14, 2023. The WCJ's summary of applicant's testimony included:

> When asked about her job duties, she said she assembled 15 gyroscopes, and she worked under a microscope using tweezers and 16 wire strippers. It was a full-time job, and there was overtime. ¶ The witness is still having problems with her upper extremity. She has not returned to work. She has had surgery.
> (Minutes of Hearing and Summary of Evidence, (MOH/SOE) December 14, 2023, p. 4.)

The issues submitted for decision included permanent disability/apportionment. (MOH/SOE, p. 2.)

DISCUSSION

Pursuant to Labor Code section 4660.1:

> (a) In determining the percentages of permanent partial or permanent total disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and the employee's age at the time of injury.
> (b) For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) with the employee's whole person impairment, as provided in the Guides, multiplied by an adjustment factor of 1.4.
> (Lab. Code, § 4660.1, underlining added.)

Defendant argues that Dr. Behrman incorrectly diagnosed applicant as having CRPS because he did not identify eight Objective Diagnostic Criteria from Table 16-16 (page 496) of the AMA Guides. However, Labor Code section 4660.1 specifically states that AMA Guides are to be used for the purpose of determining the percentages of permanent disability caused by the physical injury at issue.

Further, the 2005 permanent disability rating schedule (PDRS) states that:

> The calculation of a permanent disability rating is initially based on an evaluating physician's impairment rating, in accordance with the medical evaluation protocols and rating procedures set forth in the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment, 5th Edition* (hereinafter referred to as the "AMA Guides"), which is hereby incorporated by reference.
> (PDRS, p. 1 – 2.)
> Use of the AMA Guides - The AMA Guides are used by evaluating physicians to determine the extent of an individual's impairment. The AMA Guides use different scales to describe impairment for different parts and regions of the body.
> (PDRS p. 1 – 3.)

As quoted, the Labor Code and the PDRS clearly state that the AMA Guides are to be used in determining the level of permanent disability caused by an industrial injury i.e. the AMA Guides are not used for the purpose of diagnosing an injury. Thus, there is no legal support for defendant's argument.

Also, as noted above, in his February 1, 2023 report, Dr. Behrman stated that he was "well versed" with the AMA Guides criteria for diagnosing CRPS, but the AMA Guides do not consider or deal with the effects of stellate ganglion blocks which involve blocking the sympathetic nerves. He then explained, "In the face of her clinical findings, I believe this response to the block absolutely makes the diagnosis of chronic regional pain syndrome." (Joint Exh. 2.)

The Sixth District Court of Appeals quoted the following portion of the AMA guides:

> "The physician's judgment, based upon experience, training, skill, thoroughness in clinical evaluation, and ability to apply the Guides criteria as intended, will enable an appropriate and reproducible assessment to be made of clinical impairment. Clinical judgment, combining both the 'art' and 'science' of medicine, constitutes the essence of medical practice." (Guides, § 1.5, p. 11.) ... "The physician must use the entire range of clinical skill and judgment when assessing whether or not the measurements or tests results are plausible and consistent with the impairment being evaluated. If, in spite of an observation or test result, the medical evidence appears insufficient to verify that an impairment of a certain magnitude exists, the physician may modify the impairment rating accordingly and then describe and explain the reason for the modification in writing." (Guides, p. 19.)
> (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808, 823 [75 Cal.Comp.Cases 837].)

The Court then explained that application of the AMA Guides must take into account the instructions on its use, which clearly prescribe the exercise of clinical judgment in the impairment evaluation, even beyond the descriptions, tables, and percentages provided for each of the listed conditions. (*Id* at 824.)

Based on our review of the reports from Dr. Behrman, it is clear that he complied with the requirements of the AMA Guides and the PDRS, and that his reports constitute substantial evidence. Therefore, we see no basis for disturbing the WCJ's decision.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant 's Petition for Reconsideration of the Findings of Fact, Award and Order issued by the WCJ on December 29, 2023, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 15, 2024

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

SUSAN GARIBAY
SPATAFORE & GRANT
LAW OFFICES OF DOUGLAS G. MACKAY

TLH/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Zurich American Insurance Company by and through of their attorney of record, filed timely and verified Petition for Reconsideration challenging the decision issued by WCJ John Durr alleging that that the evidence does not justify the by the fact. Specifically, that the impairment for CRPS is not substantial evidence or in accordance with the Labor Code and AMA Guides and therefore is not valid as ratable impairment. As this argument is not supported by the facts and case law it is recommended that the Petition for Reconsideration be denied.

II
FACTS

This matter went to trial on December 14, 2023 with a decision issuing [issued on] December 29, 2023. At issue, relevant to the Petition for Reconsideration, was whether or not the applicant suffered a compensable consequence injury of complex regional pain syndrome effecting the left arm. It was found that there was substantial medical evidence warranting a finding of complex regional pain syndrome effecting [affecting] the left arm, resulting in a permanent disability award of 65%.

III
DISCUSSION

The recent case of *Scatena v. Tower of Hillsborough,* 2021 Cal. Wrk. Comp. P.D. LEXIS 42 is almost exactly on point with the instant case. In the Discussion section, taken from the incorporated Report and Recommendation on Petition for Reconsideration, it states:

> The *AMA Guides* represent an impairment rating methodology that is currently one of the means of establishing PPD under the Labor Code. They are not, however, a diagnostic tool. *MV Transportation v. Workers' Comp. Appeals Bd.* (Williams) (2010) 75 Cal. Comp. Cases 656,659. Thus, while it is undisputed that the medical evidence does not reflect eight or more of the 11 criteria being documented on examination, the question before me was whether substantial medical evidence supports the allegation that applicant suffers from CRPS.

> In *Williams, supra,* 75 Cal. Comp. Cases 656, as here, several physicians concurred with the CRPS diagnosis and the parties' Agreed Medical Evaluator ruled out other possible ways to account for the applicant's presentation. The Board in *Williams* found it appropriate to view the CRPS-based rating through the lens of *Guzman, supra,* 187 Cal. App. 4th 808, even in the absence of an explicit expert opinion invoking that "alternative rating" methodology.... . This is certainly within the spirit of *Guzman.* Moreover, the QME specifically testified that his impairment findings would not change depending on the diagnosis, which demonstrates that he assessed applicant's actual disability and did not apply some cookie-cutter CRPS rating. *Scatena, supra.*

Here, the defendant is raising the argument that Dr. Behrman is precluded from using the diagnosis of CRPS as there was not an identification of eight (8) or more of the Objective Diagnostic Criteria from Table 16-16 on page 496 of the AMA Guides. Dr. Behrman provided a diagnosis of chronic regional pain syndrome albeit not meeting the AMA Guides CRPS diagnostic criteria. There was no rebuttal regarding the expert opinion on either a medical or testimonial basis, however the doctor's opinion must still be evaluated as to being substantial medical evidence. That determination was made in the underlying decision, but in the interest of clarity, the factors will be reiterated: 4740 San Luis Obispo[.]

The first report of Dr. Behrman dated July 7, 2022 (exhibit #4) was the initial evaluation where the doctor reviewed 278 pages of treatment records. Dr. Behrman reports the results of a comprehensive bilateral upper extremity physical examination including abnormal findings on the left upper extremity. The doctor provides an impression which includes a, "Probable chronic regional pain syndrome secondary to industrial injury as well as surgery for industrial injury." The doctor finds the applicant not to be permanent and stationary and that:

> She shows clinical evidence of chronic regional pain syndrome on exam. Additionally, she had relief from the one stellate ganglion block that she has had. This is further evidence to support the diagnosis of chronic regional pain syndrome ... She also shows evidence of chronic regional pain syndrome and will need ongoing pain management and will require somewhere between 3 and 6 stellate ganglion blocks over several months.

Dr. Behrman then goes on to take exception with a report from Dr. Miller (apparently on causation which was not placed into evidence). He discusses the need for surgery for CMC arthritis and that the surgery was done on an industrial basis and as a sequela of that surgery included the development of chronic regional pain syndrome as a result of the industrial medical treatment.

The second report of Dr. Behrman, dated October 31, 2022 (exhibit #3) was a supplemental evaluation with an additional 8 pages of medical records. Also, additional medical tests were performed subsequent to the July 7, 2022 evaluation to aid the doctor in focusing the diagnosis. There is a discussion of a nerve conduction study performed by Dr. Citek. That evaluation showed evidence of cubital tunnel syndrome but does not show evidence of carpal tunnel syndrome and does not show any evidence of radial nerve injury. At this point the doctor provides 3 diagnoses including: Chronic regional pain syndrome, which is secondary to the underlying industrial injury as well as to the surgery for the industrial injury. Based on the diagnosis he indicates a need for future medical care which should include ongoing pain management for chronic regional pain syndrome.

Pursuant to Labor Code section 4660.l(d), the scheduled rating is prima facie evidence of an employee's percentage of permanent disability. (Lab. Code, § 4660.l(d).) However, the scheduled rating is rebuttable. (See *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Almaraz-Guzman 111)* (2010) 187 Cal. App, 4th 808 [115 Cal. Rptr. 3d 112, 75 Cal. Comp. Cases 837, 852-853]; see also Lab. Code,§ 4660.l(h) ["In enacting the act adding this section, it is not the intent of the Legislature to overrule the holding in *Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal. App. 4th 808, 115 Cal. Rptr. 3d 112."].) Specifically, the whole person impairment (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 JI)* (2009) 74 Cal. Comp. Cases 1084, 1106 (Appeals Board en bane).) Physicians must still evaluate permanent impairment while staying within the "four corners of the Guides" pursuant to the Labor Code. *(Id.* at p, 1101.)

As part of their October 31, 2022 (exhibit #3) report Dr. Behrman provided a rating based on the diagnosis of chronic regional pain syndrome, They appropriately went to the AMA Guides 16.5e which begins with the diagnostic criteria for CRPS, Having already made a clinical diagnosis of chronic regional pain syndrome, they went to the impairment evaluation instructions on page 496 which state in part: Rate the upper extremity impairment resulting from sensory defects and pain according to the grade that best describes the severity of the interference with the activities of daily living as described in Table 16-l0a. Use clinical judgment to select the appropriate grade. The doctor reports that they went to Table 16-10a on page 482 and determined that a Grade 3 was appropriate as they found (as later clarified in the report of February 1, 2023) cool skin temperature and dry skin on the left side, also showing trophic changes. The most significant issue is the pain level and short-term response to stellate ganglion blocks. Grade 3 has a range of 26 to 60% and based on clinical judgment the doctor determined that 50% upper extremity impairment was where the applicant fell in that range for the chronic regional pain syndrome.

Dr. Behrman issued a supplemental letter to the defense attorney on February 1, 2023, in response to a request regarding the diagnosis of chronic regional pain syndrome. The doctor indicated issues with the diagnostic criteria in the AMA Guides for diagnosing CRPS. Specifically identifying a failure of the Table (16-16; page 496) to deal with the results of a response to stellate ganglion blocks. Stellate ganglion blocks involve blocking the sympathetic nerves. A positive response to a block would be considered pain relief for anywhere from 24 hours to several weeks. Ms. Garibay had a stellate ganglion block done because of suspected CRPS. She had significant pain relief after that block for several weeks. He identifies the clinical findings and the response to the block solidified the diagnosis of chronic regional pain syndrome. Again, reiterating that the short-term response to the stellate ganglion blocks were the most significant issue in the diagnosis of chronic regional pain syndrome.

Dr. Behrman rebutted the scheduled rating by a identifying and rebutting a component of the WPI rating as it related to chronic regional pain syndrome by rating it as complex regional pain syndrome (CRPS). Dr. Behrman provided a "straight rating" based on the previous trapezium excision arthroplasty of 11% upper extremity WPI with an add-on for pain resulting in a I 0% WP! if the applicant did not have chronic regional pain syndrome. However, finding this absurd as chronic regional pain syndrome is the appropriate diagnosis. (Exhibit#1)

Dr. Behrman's combined medical reporting, stemming from 2 physical examinations, the review of 286 pages of treatment records, and the response to queries from the defense attorney combined to create substantial medical evidence. The diagnosis of chronic regional pain syndrome was rated by analogy using Table 10-10a. This is consistent with the labor code, the AMA guides as interpreted by case law. The resulting 50% upper extremity impairment for the analogous CRPS component remains unrebutted by any medical, documentary or testimonial evidence.

IV
RECOMMENDATION

Dr. Behrman's combined medical reporting, stemming from two (2) physical examinations, the review of two hundred eight six (286) pages of treatment records, and the response to queries from the defense attorney are substantial medical evidence of the diagnosis of chronic regional pain syndrome. This was rated by analogy using table 10-10a. The resulting 50% upper extremity impairment, for the CRPS, and was unrebutted by any medical, documentary or testimonial evidence.

It is recommended that the Petition for Reconsideration be denied.

January 29, 2024
DATE

Respectfully submitted,

JOHN E. DURR
Worker's Compensation Judge