

1 **WORKERS' COMPENSATION APPEALS BOARD**  
2 **STATE OF CALIFORNIA**

3  
4 **KATHLEEN NUTT,**

5 *Applicant,*

6 **vs.**

7 **TEHACHAPI VALLEY HEALTH CARE**  
8 **DISTRICT; ALPHA FUND,**

9 *Defendants.*

Case Nos. **ADJ4585939 (VNO 0527178)**  
**ADJ2581067 (VNO 0527236)**

**OPINION AND ORDER  
GRANTING RECONSIDERATION  
AND DECISION AFTER  
RECONSIDERATION**

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11 We have considered the allegations of the Petition for Reconsideration and the contents of the  
12 Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our  
13 review of the record and for the reasons stated in said Report which we adopt and incorporate, we will  
14 grant reconsideration, amend the WCJ's decision as recommended in his Report, and otherwise affirm  
15 the decision of October 25, 2013.

16 For the foregoing reasons,

17 **IT IS ORDERED** that reconsideration of the decision of October 25, 2013, be, and the same  
18 hereby is, **GRANTED.**

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**IT IS FURTHER ORDERED** that as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the decision of October 25, 2013, be, and the same hereby is, **AFFIRMED, EXCEPT** that it is **AMENDED** in the following particulars:

## AWARD

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“(b) Applicant is entitled to further medical treatment to cure and relieve From the effects of the industrial psychiatric injury, industrial hypertension, fibromyalgia, sleep disorder and irritable bowel syndrome.”

## WORKERS' COMPENSATION APPEALS BOARD

**I CONCUR.**

**FRANK M. BRASS**

RONNIE G. CAPLANE

ALFONSO J. MORESI



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**JAN 02 2014**

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

**KATHLEEN NUTT  
LAW OFFICES OF ULRIC USHER  
WILLIAMSON AND ASSOCIATES**

**ebc**

**STATE OF CALIFORNIA  
WORKERS COMPENSATION APPEALS BOARD**

**CASE NUMBERS:** ADJ4585939 (VNO0527178);  
**APPLICANT:** KATHLEEN P. NUTT  
**DEFENDANT:** TEHACHAPI VALLEY HEALTHCARE DISTRICT  
ALPHA FUND  
**JUDGE:** LINDA DAVIDSON-GUERRA

**REPORT AND RECOMMENDATION  
ON PETITION FOR RECONSIDERATION**

**I.  
INTRODUCTION**

Defendant, Tehachapi Valley Healthcare District administered by Alpha Fund filed a timely and verified Petition for Reconsideration on November 12, 2013. Defendant contends the findings were in error because the evidence does not justify the findings of fact and the award was in excess of the powers of the board. Specifically, Defendant argues that: 1) Under the AMA Guides fibromyalgia is not a ratable disability; 2) the opinion incorrectly cites to Applicant's "sleep disturbance" and Chapter 13 of the Guides relates to "sleep disorders"; 3) Dr. Betancourt, the QME internist found Applicant's sleep disturbance is accounted for in the 3% add-on given by the AME psychiatrist, Dr. Raymond Friedman; and 5) Defendant objected to the admissibility of the AME reports of Dr. Levine on the Pre-Trial Conference Statement.

**II.  
STATEMENT OF FACTS**

Applicant, Kathleen P. Nutt, born . while employed during the period October 2004 through October 2005, as a Medical Records Clerk II, at Tehachapi, California, by the Tehachapi Valley Healthcare District, sustained injury arising out of and in the course of

employment to the back and psyche. She alleged industrial hypertension, fibromyalgia, sleep arousal disorder and irritable bowel syndrome. The petition although listing both case numbers is limited to the CT claim [ADJ4585939].

Applicant also filed a specific injury claim [ADJ2581067] wherein she sustained injury to the lower extremities on October 3, 2005.

The parties utilized Agreed Medical Examiner Dr. Raymond Friedman in psychology, Agreed Medical Examiner Dr. Roger Sohn in orthopedics, Panel QME Dr. Seymour Levine in rheumatology and Panel QME Dr. Maria Betancourt in internal medicine. Dr. Sohn concluded that the Applicant sustained no cumulative trauma orthopedic injuries on an industrial basis and found no impairment as a result of the October 3, 2005 injury. Dr. Maria Betancourt, Dr. Raymond Friedman and Dr. Seymour Levine all agreed Applicant had industrial fibromyalgia and assessed impairment for hypertension, sleep arousal disorder, irritable bowel syndrome and psyche. After apportionment the Applicant was found to have permanent disability of 25% to the psyche, 5% permanent disability from hypertensive cardiovascular disease, 30% permanent disability from a sleep and arousal disorder which was a consequence of the industrial fibromyalgia and 3% permanent disability from a colonic and rectal disorder. None of these physicians rated the fibromyalgia alone. A finding of 52% permanent disability was issued and Applicant was awarded further medical treatment of the internal, sleep and psychiatric injuries.

### **III** **DISCUSSION**

1. **Dr. Levine's analysis and use of Chapter 13 to rate Applicant's sleep and arousal disorder was an appropriate use of the AMA Guides.**

The essence of Defendant's argument is that fibromyalgia is not a ratable disability under the AMA Guides because it is not an objectively verifiable condition. Therefore, it was error to

adopt the opinion of the PQME in rheumatology Dr. Levine and find that Applicant had a sleep impairment under Chapter 13 of the Guides. It is true the AMA Guides do not provide a specific method for rating fibromyalgia but there are references to fibromyalgia specifically in the Guides.<sup>1</sup> There is significant disagreement over whether fibromyalgia which is diagnosed based on subjective reports of widespread pain is in fact a ratable disability. In the instant case however, Applicant was not rated by the physicians for fibromyalgia but rather for impairments as a result of the fibromyalgia using the AMA Guides by analogy.

In *Milpitas Unified School District v. Workers Compensation Appeals Board (Guzman)*(2010) 75 Cal. Comp. Cases 837, the Court of Appeal held that in determining an employee's impairment rating consideration may be given to the instructions on use of the AMA Guides as found in Chapter 1 of the AMA Guides. Specifically, the Court found that a physician may take into account his or her skill, expertise and clinical judgment in application of the AMA Guides. A physician may also consider the four corners of the AMA Guides to provide an impairment and is not limited to a strict application of the Guides. Thus to ensure a fair and accurate assessment of impairment physician may rate medical conditions not listed in the AMA Guides by analogy.<sup>2</sup> In order to support the physician's opinion however, it is necessary that the physician explain why the deviation from a strict application of the Guides is a more accurate reflection of the impairment.

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<sup>1</sup> Chapter 18 of the AMA Guides at pages 568 and 569 specifically addresses the difficulty is assessing fibromyalgia as there is presently no specific biological abnormality to explain the subjective complaints of widespread pain and tenderness.

<sup>2</sup> The AMA Guides at Chapter 1, Section 1.5 support this interpretation. The section states, "Given the range, evolution, and discovery of new medical conditions, the *Guides* cannot provide an impairment rating for all impairments. Also since some medical syndromes are poorly understood and are manifested only by subjective symptoms, impairment ratings are not provided for these conditions. The *Guides* nonetheless provides a framework for evaluating new or complex conditions. ...In situations where impairment ratings are not provided, the *Guides* suggests that physicians use clinical judgment, comparing measurable impairment resulting from similar conditions with similar impairment of function in performing activities of daily living."

In the present case, Dr. Betancourt and Dr. Levine are in agreement that the Applicant meets the criteria for a sleep arousal disorder that is a consequence of the industrial fibromyalgia. There is also agreement that Applicant's sleep disorder is significant enough to warrant a ratable impairment under the AMA Guides. The record clearly established that the Applicant's fibromyalgia had resulted in an industrial sleep disturbance that manifested objectively through sleep studies. Both AME Dr. Levine and QME Dr. Betancourt reviewed and commented upon the sleep studies. Dr. Levine stated in his August 14, 2010 report:

"As pointed out by Dr. Betancourt, this patient did undergo a polysomnogram on January 27, 2010. Findings included alpha wave intrusion into delta sleep which is classic for patients with fibromyalgia...It was the opinion of Dr. Betancourt that this patient's disorder sleep (sic) resulted from her fibromyalgia and not the other way around. I am completely in agreement with her." [WCAB Exhibit W-1]

Where the doctors differ is whether the impairment is a stand alone impairment or whether it is included as part of another existing impairment. Dr. Betancourt opined that the etiology of Applicant's chronic pain is "multifactional, but primarily attributable to anxiety". In her October 8, 2012 report, Dr. Betancourt stated that since Applicant's sleep disorder was predominately attributable to anxiety the sleep impairment should be included in her psychiatric rating. In her deposition of November 30, 2012 Dr. Betancourt explained her rationale. At page 73, lines 11-25 the doctor testified:

"Q. ...There is no obstructive sleep apnea, but there is definitely a vigilance, which comes from the psychiatric standpoint, and there is low efficiency, which contributes, again, to the fibromyalgia. I consider that ratable under the psychiatric rating, so that we're all clear on that.

Q. Okay.

A. And then the---

Q. So that would be within Dr. Freman's (sic) analysis?

A. He said 46 percent. I think that's pretty—I think he included the anxiety, he included vigilance, he included everything that contributes to the sleep disorder or the sleep inefficiency.

Q. Okay.

She therefore believed that any impairment for the sleep disorder has been adequately addressed by the 46% psychiatric impairment found by the psychiatric AME, Dr. David Freidman. [WCAB Exhibit W-3] In reaching this conclusion however, Dr. Betancourt mistakenly believed the GAF score of 53 given by Dr. Friedman, resulted in a 46% whole person impairment. [WCAB Exhibit X-6] Dr. Friedman in his November 18, 2008 report stated the GAF score of 53 actually results in a WPI of 26% not 46% and he corrected his prior report. It therefore appears Dr. Betancourt offered her opinion based on a misunderstanding of the rating given by Dr. Freidman. Additionally, Dr. Betancourt did not explain her assumption that any impairment for sleep was subsumed into the psychiatric impairment which was based upon the methodology of the GAF score of 53. Therefore Dr. Betancourt's belief that the Applicant was adequately given an impairment for sleep within a finding of 46% permanent disability was incorrect and Dr. Betancourt's report could not be relied upon for a proper assessment of Applicant's sleep impairment disorder.

Dr. Levine on the other hand opined that the sleep disturbance resulted in a stand alone Class 2 impairment per Table 13-4, page 317. This would equal a 20% WPI to which the doctor applied a 3% add on for significant fatigue and problems with Activities of Daily Living. [WCAB Exhibit W-2] In his deposition of November 30, 2012 Dr. Levine provided additional rationale for why sleep was a separate component that should be rated out directly. At page 10, lines 20-25, and page 26, lines 1-3 the doctor testified:

A. Well this patient has a sleep and arousal disorder. By definition, they include that in Chapter 13 of the Guides. That is a neurological manifestation of this

patient's fibromyalgia syndrome. It's well recognized. Patients with fibromyalgia quite often have a sleep and arousal disorder. This is discussed in Chapter 13. I relied upon that table to describe the patient's impairment in terms of a sleep and arousal disorder."

The doctor added at page 14, lines 11-23:

"Q. ... What was the basis for your concluding that she was a Class 2 as opposed to a Class 1?

A. The basis was on her fatigue severity scale, which indicated rather significant fatigue, and that is on page 11 of the report. And this is a very typical fibromyalgia pattern. Generally people don't say they're falling asleep all day under the Epworth Sleepiness Scale, which is a measure of daytime sleepiness. What they complain about is this pervasive fatigue. And she also has problems with activities of daily living. And it's really a clinical call, clinical interpretation of what the patient had to say. That's how I arrived at Class 2 for this particular patient." [WCAB Exhibit W-2]

Taking into consideration the totality of the medical evidence including the complaints of fatigue and abnormal sleep patterns which have affected Applicant's ADL's, I felt an impairment rating of 23% WPI was appropriate. I found that on the limited issue of the correct impairment to be used for Applicant's sleep and arousal disorder, the opinion of Dr. Levine was more persuasive. The doctor's use of Chapter 13, Table 13-4, page 317 of the AMA Guides was found to be allowable here as there was objective evidence of a sleep disorder via a formal sleep study and a direct causal relationship between the Applicant's well documented industrial fibromyalgia. It was also documented that Applicant's sleep disorder interfered with the performance of some ADLs. Dr. Levine's use of Table 13-4 to establish Applicant's sleep disorder as a stand alone impairment coupled with the opinions of Drs. Betancourt and Friedman provides a more accurate assessment of Applicant's permanent disability. As stated in *Milpitas*



*supra* at p. 823, quoting from the AMA Guides directly, "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 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.*) This was a situation where the Guides allow the physician to use clinical judgment and analyze ratable impairment by analogy in order to assess an appropriate level of impairment and it was not error to rely on Dr. Levine's report.

**2. It was not error to admit the reports of Panel QME Dr. Seymour Levine.**

Defendant also contended in their petition that the reports of Dr. Seymour Levine, Panel QME in rheumatology, were not admissible because they fail to properly utilize the AMA Guides. Additionally, Defendant argues they objected to the admissibility of the reports on the Pre-Trial Conference Statement.

The report is admissible and in fact was properly admitted without objection at the time of trial. *Minutes of Hearing Summary of Evidence, February 7, 2012, page 4*. While it is true Defendant raised the issue on the PTC Statement, when the exhibits were read into the record

Defendant did not object. Defendant stipulated to the admission of the reports though they did raise the issue of whether they will constitute substantial evidence. Under *Cal. Code Regs. 10566; WCAB Policy and Procedure Manual §1.45B* the admissions and stipulations of the parties are finalized on the record at trial. As Defendant did not object to admission of the reports at the time of trial this issue is deemed waived.

Even assuming that the objection was made at trial the report would be admissible as Dr. Levine did comply with the AMA Guides and his analysis was within the four corners of the Guides as his opinion on impairment was tied to Chapter 13 as discussed above.

### **3. Correction of clerical error**

The Award of future medical care finds Applicant is entitled to medical treatment "to cure or relieve from the effects of the internal and psychiatric industrial injuries" but given the multiple conditions here should have been more explicit. Therefore, the Award at paragraph 5 is hereby corrected to reflect that Applicant is entitled to further medical treatment to cure and relieve from the effects of the industrial psychiatric injury, industrial hypertension, fibromyalgia, sleep arousal disorder and irritable bowel syndrome.

## **IV. RECOMMENDATION**

It is respectfully recommended the Defendant's Petition for Reconsideration be DENIED for the reasons stated above.

Dated: November 26, 2013

Filed and served by mail on  
all parties as shown on the  
Official Address Record  
On: 11/27/2013

By: Laura Mejia Laura Mejia



LINDA DAVIDSON-GUERRA  
Workers Compensation Administrative Law Judge