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Return to : Izzo's Rebuttal by Analogy Catches Applicants' Attorneys' Attention

California -- Izzo's Rebuttal by Analogy Catches Applicants' Attorneys' Attention: *Top* [03/16/11]
By John P. Kamin, Legal Editor

A California Workers' Compensation Appeals Board panel decision stating that a well-known agreed medical evaluator rebutted the whole person impairment aspect of a permanent disability rating is attracting the attention of applicants' attorneys.

The WCAB's Feb. 7 decision in Laury v. R&W Concrete Contractors has been a popular point of discussion on applicants' attorneys' online forums, primarily because of the panel's discussion about whether Dr. Joseph Izzo rebutted the standard permanent disability rating with an Almaraz/Guzman analysis, attorney Ian Cooper said.

Cooper, the applicants' attorney on the case, attributed the panel decision's popularity to Izzo's use of Figure 15-19 from the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition. The figure, titled "Side View of Spinal Column," features an illustration of the spine divided into regions and suggests the maximum whole person impairment for each of the spine's major regions.

Izzo used "rating by analogy" to determine that the applicant's whole-person impairment for his lumbar spine injury was 54%.

"The doctor used a section of the guides that has been somewhat of a contentious approach," Cooper said. Both Cooper and the panel's majority noted Izzo's well-regarded expertise and neutrality, which may stem from his role as the physician in the controversial Diane Benson apportionment case.

After considering Figure 15-19, Izzo determined that the DRE and range-of-motion (ROM) methods did not fully reflect the applicant's impairment, despite the fact that both are acceptable methods for disability rating, Cooper said.

Instead, Izzo determined that Laury had lost 60% of use of his lumbar spine. Because Figure 15-19 states that the maximum WPI for the total loss of use for the lumbar spine is 90%, Izzo multiplied the 60% by 0.9, which resulted in a WPI of 54%.

Cooper explained that this approximately doubled his client's WPI. He pointed out that one of the reasons why the applicant, Donald Laury, has such extensive lumbar spine impairment is because he has undergone five spinal surgeries.

Commissioners Ronnie Caplane and Alfonso Moresi determined that Izzo's rating was appropriate, with Commissioner Deidra Lowe dissenting because she was not persuaded that Izzo's opinion was substantial evidence.

"This is a significant deal for applicants' attorneys, and defendants have argued that that is not really within the four corners of the AMA Guides," he said. The defendant insurer in the Laury case, State Compensation Insurance Fund, has steadfastly contested this point, Cooper noted.

In Commissioner Caplane's majority opinion, she explained why Izzo's rating was appropriate under recent case law.

"Clearly, Figure 15-19 is within the four corners of the Guides," Caplane wrote. "Moreover, in affirming our en banc holding in Almaraz/Guzman II, the Court of Appeal recently stated that 'the language of (Labor Code) Section 4660 permits reliance on the entire Guides, including a physician's 'use of clinical judgment in deriving an impairment rating in a particular case.'"

She pointed out that the 6th District Court of Appeal confirmed the Almaraz/Guzman II endorsement of allowing a physician to use judgment, experience, training and skill into assessing whole-person impairment.

Commissioner Lowe explained in her dissent why she believes Izzo's report did not constitute substantial evidence.

"First, Dr. Izzo does not explain how he determined that applicant lost 60% of the use of his lumbar spine, as

opposed to any other percentage," Lowe wrote. "Second, he does not explain why his rating by analogy produces a more accurate reflection of applicant's impairment. Third, while he concludes that the conventional AMA Guides rating fails to accurately characterize the impact of applicant's injury on his ability to perform work activities, he correctly distinguishes such activities from activities of daily living."

Lowe based her dissent upon language in both the WCAB's Almaraz/Guzman II decision and the Court of Appeal's Guzman decision, which both stated that a physician may not rate by analogy "simply to achieve a desired result." She felt that Izzo's rating was result-oriented, and concluded that this was inappropriate in the post-SB 899 climate.

Cooper noted that the panel decision also featured several issues of less significance. The panel also asked the workers' compensation judge to explain why he selected a specific "Ogilvie formula" and remanded the case for additional development of the record as to the applicant's sleep and arousal disorders.

State Fund spokeswoman Emily Gorin said that the insurer had not decided as of late Tuesday whether to challenge the panel decision. The insurer has until March 24 to file a petition for a writ of review with the 1st District Court of Appeal.

To read the panel decision, go here.

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Print News

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DONALD LAURY, *Applicant,* vs. R&W CONCRETE CONTRACTORS; STATE COMPENSATION INSURANCE FUND, *Defendants.*	Case No. ADJ3400378 (OAK 0323943) **OPINION AND ORDER GRANTING APPLICANT'S AND DEFENDANT'S PETITIONS FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

Applicant and defendant each seek reconsideration of the November 19, 2010 Findings and Award issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found, based on the parties' prior stipulations, that applicant, while employed as a cement mason on June 27, 2005, sustained industrial injury to his spine resulting in psychological disability and sexual dysfunction and that, at the time of the injury, applicant's earnings were $646.80 warranting a temporary disability indemnity rate of $431.20. The WCJ further found that applicant successfully rebutted the diminished future earnings capacity (DFEC) aspect of the 2005 Schedule for Rating Permanent Disability (2005 Schedule); that applicant did not rebut the whole-person impairment (WPI) aspect of the 2005 Schedule; that defendant waived the issue of applicant's entitlement to compensation for psychiatric injury based on applicant's less than six months of employment; and that the injury herein caused 75% permanent disability.

Applicant contends that the WCJ should have relied on the agreed medical examination (AME) opinion of Joseph Izzo, M.D., to find that the WPI aspect of the 2005 Schedule was rebutted by means of Dr. Izzo's analogous impairment rating of the lumbar spine. Applicant

further contends that the WCJ erred in not including the 20% permanent disability impairment rating related to applicant's sleep/arousal disorder in the permanent disability award.

Defendant contends that the WCJ erred in finding that defendant waived the issue of earnings and the issue of injury arising out of and occurring in the course of employment (AOE/COE) with regard to the psychiatric injury, arguing that applicant was employed for less than one month and arguing that, because of the short time of employment, the record does not support a finding that applicant's earnings were $646.80 per week at the time of injury. Finally, defendant contends that the WCJ did not sufficiently explain the reasons for finding that applicant rebutted the DFEC portion of the 2005 Schedule.

Defendant filed an Answer, and the WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we grant applicant's Petition for Reconsideration for the sole purpose of amending his decision to find that applicant sustained industrial injury in the form of sleep/arousal disorder and that we otherwise affirm his decision.

Based on our review of the record and for the reasons discussed below, we will grant both Petitions for Reconsideration, rescind the WCJ's decision, and return this matter to the trial level for further proceedings and decision by the WCJ.

RELEVANT FACTS

We incorporate the following recitation of facts by the WCJ in his Report:

> "Mr. Laury initially injured his back while lifting. He continued working for about a week before reporting to Highland Hospital, where he underwent surgery on August 18, 2005, described as a laminectomy at L5-S1. That was followed by leakage of spinal fluid, for which he underwent two follow-up procedures. After at least three further MRIs, an epidural steroid injection, at least two CT scans, electrodiagnostic testing, a myelogram and a discogram, Dr. Bruce McCormack, a neurosurgeon, recommended a second opinion regarding the possibility of a two-level fusion. The parties employed an agreed medical examiner (AME), Dr. Joseph Izzo, who reported, after discussing the case with Dr. McCormack, that the issue was complex and problematic, and that a less invasive procedure might best precede the proposed fusion. That report is dated April 2, 2007. On May 3, 2007, Dr. McCormack performed a microdiscectomy at L5-S1.

> "The surgery did not help sufficiently, and Dr. McCormack and, as well, Dr. Robert Rovner, recommended fusion and, in a report dated May 16, 2008, Dr. Izzo concurred. The following month, Dr. McCormack performed the fusion from L4 to S1. The AME declared applicant's condition permanent and stationary on June 10, 2009, describing permanent impairment using both a strict interpretation of the AMA Guides and by analogizing to overall spinal function." (Report, at pp. 2-3, footnote omitted.)

A mandatory settlement conference (MSC) was held on March 25, 2010. At that time, the parties stipulated, in relevant part, that applicant sustained injury AOE/COE to his "lumbar spine; psyche; spinal cord – sexual; arousal/sleep disorder" and that applicant's earnings were $646.80 per week warranting a temporary disability indemnity rate of $431.20. As relevant here, the parties raised the following issues: permanent disability, apportionment, "*Ovilvie,*" and "*Lebouff.*" At that time, the WCJ issued an order closing discovery.

This matter was tried over the course of two days on July 2, 2010 and November 2, 2010. On July 2, 2010, the parties' prior stipulations were read into the record with no significant changes as pertinent here. The issues framed for trial again included permanent disability, apportionment, the applicability of *Ogilvie II*, and whether defendant could raise, for the first time, an affirmative defense to the finding of psychiatric injury pursuant to section 3208.3(d) in that applicant was employed for less than 6 months of employment.

In relevant part, the parties submitted Dr. Izzo's June 10, 2009 AME report. (Defendant's Exhibit B.) Therein, he reported that:

> "It is my opinion that this gentleman is now permanent and stationary for rating purposes as of the date of my examination, June 1, 2009.
> "IMPAIRMENT, AMA GUIDES, 5TH EDITION:
>
> "Please note that WPI was determined both per the DRE and ROM method and the ROM yielded the higher result. Also note that I have analogized his sleep disturbance and sexual dysfunction which are a result of medication and pain in regard to sex function and the result of pain on movement during sleep in regard to sleep function.
>
> "Please see Return to Work section of this report for a discussion of the recent *Almarez/Guzman* decision as requested by Mr. Cooper.

* * *

"LUMBAR SPINE (Chapter-15, Tables 15-8/P.407, 15-9/P.409) ROM method was selected for the following reasons: Multilevel involvement in the same spinal region.

* * *

"Neurologic Sexual Impairment is Category I, 9% WPI (Chapter-15, Table 15-6f/P.396).

* * *

"Central And Peripheral Nervous System:

Arousal and Sleep Disorders is classified as Category II, 20% WPI (Chapter-13, Table 13-4/P.317).

* * *

"I can provide another Impairment rating "by analogy" that may be more in keeping with the actual impact on his ability to work. To do so I refer the parties to Figure 15-19 on page 427. The maximal WPI due to the lumbar spine is 90%. This man in my opinion has lost 60% of the use of his lumbar spine excluding the impact on his sexual function and sleep disorder. Therefore 60% of the lumbar spine function multiplied by .9 corresponds to a 54% WPI. If one then considers the 20% WPI for sleep and 9% WPI for sexual dysfunction this yields 66% WPI. This rating takes into account the method allowed by the recent Almaraz/Guzman decision.

* * *

"Considering the amount of work disability that this injury has imposed, it would seem that this is far and away in excess of the impairment rating noted by using the simple formulation noted in the AMA Guides. Consequently, it is my opinion that the impairment rating imposed has really resulted in a disability award that seems disproportionate to the amount of work limitation that has been imposed by this injury. The parties are well aware of the fact that the Guides address this issue and clearly point out that the impairment rating bears only on the impairment with regard to activities of daily living. In this particular case, work restrictions are certainly more than one would encounter with usual ADLs. Add to -that the fact that sexual function has absolutely nothing to do with the ability to work, and I think that one can see how the discrepancy arises.

> "In the final analysis, the Trier of Fact will have to make the decision as to whether there is a disproportion between the AMA Guides impairment and the actual work disability imposed by this injury." (Dr. Izzo's 6/10/09 AME rpt. at pp. 9-13.)

DISCUSSION

Initially, and with regard to defendant's first contention, we note that a stipulation, entered into is binding on parties absent good cause for setting aside the stipulation. (*County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114 [65 Cal.Comp.Cases 1].) At the March 25, 2010 MSC, defendant stipulated to applicant's level of earnings and to psychiatric injury AOE/COE. We find no good cause to relieve defendant from that stipulation. While defendant argues that the record does not support these findings, a stipulation need not be based on evidence. (*Weatherall, supra,* 65 Cal.Comp.Cases at p. 3].) Rather, a stipulation is an agreement between opposing parties, usually entered into in order to expedite hearings or to avoid delay, expense, or difficulty in the proceedings and serves "to obviate need for proof or to narrow range of litigable issues." (*Id.* at p. 3.) A stipulation may also lawfully include or limit issues or defenses to be tried and is not deemed amended to conform to proof because the point of a stipulation is to obviate the need for proof. (*Id.* at p. 4.)

Furthermore, defendant also failed to frame either of those as issues of contention or to raise the affirmative defense of applicant's less than six months of employment pursuant to section 3208.3(d). An issue is waived when it is not raised at the first hearing in which it may properly be raised. (Lab. Code, §5502(e)(3), see also *Gould v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1059 [57 Cal.Comp.Cases 157], *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260 [54 Cal.Comp.Cases 145].) We also note that discovery was ordered closed at the MSC. Based on these facts we are persuaded that defendant waived those issues.

With regard to defendant's second contention and without making a final decision on this issue, we are persuaded that there is substantial evidence supporting the WCJ's finding that applicant rebutted the DFEC portion of the 2005 Schedule pursuant to *Ogilvie II*. In his Report, the WCJ indicated that he relied on the report of Jeff Malmuth which he found to be substantial

evidence. We agree. However, we are persuaded that the WCJ did not sufficiently explain why he selected the formula that he used pursuant to *Ogilvie v. City and County of San Francisco* (2009) 74 Cal.Comp.Cases 1127 (Appeals Board en banc) (*Ogilvie II*).

Section 5313 provides that:

> "The appeals board or the workers' compensation judge shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon *and the reasons or grounds upon which the determination was made.*"
> (Lab. Code, § 5313, emphasis added.)

Moreover, in our en banc decision in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 (Appeals Board en banc), we stated that:

> "The WCJ is also required to prepare an opinion on decision, *setting forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on.* (Lab. Code, § 5313.) The opinion enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful. (See *Evans v. Worker's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755, 68 Cal.Rptr. 825, 826, 333 Cal.Comp.Cases 350, 351 [441 P.2d 633].) For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Hamilton v. Lockheed Corporation, supra*, 66 Cal.Comp.Cases at pp. 475 – 476, emphasis added.)

While we do not issue a final decision on this issue here, it appears, based on this record, that applicant has some future earning capacity. In his Opinion on Decision, the WCJ stated that "[Mr. Malmuth] ... concluded that applicant retained some earning capacity." (Opinion on Decision, at p. 5.) In *Almaraz/Guzman II*,[1] we emphasized that, in rebutting a scheduled permanent disability rating, the AMA Guides may not be used "simply to achieve a desired result," or to attempt to resurrect a prior Schedule. (*Almaraz/Guzman II, supra,* at p. 1087.) Therefore, upon this matter's return, the WCJ should readdress his *Ogilvie* analysis providing an

[1] Our decision in *Almaraz/Guzman II* was recently affirmed by the Court of Appeal, sub nom *Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].

explanation regarding the *Ogilvie* formula that he selects.[2]

Next, we turn to applicant's contention that the WCJ should have relied on Dr. Izzo's AME opinion to find that the WPI aspect of the 2005 Schedule was rebutted by means of Dr. Izzo's analogous impairment rating of the lumbar spine using Figure 15-19 (page 427) of the AMA Guides.

Without making a final decision on this issue here, we are persuaded that Dr. Izzo's use of Figure 15-19 was appropriate in this case and constitutes substantial evidence upon which the WCJ should have relied.

Section 4660 provides, in relevant part, as follows:

> "(a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity.
>
> "(b)(1) 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).
>
> "(2) For purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on empirical date and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. The administrative director shall formulate the adjusted rating schedule based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies.
>
> "(c) The administrative director shall amend the schedule for the determination of the percentage of permanent disability in accordance with this section at least once every five years. This schedule shall be available for public inspection and, without formal introduction in evidence, shall be

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[2] Applicant's vocational expert presented three formulas including an Actual Post-Injury Earnings Formula and two Projected Post-Injury Earnings Formulas.

> prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." (Lab. Code, § 4660.)

Moreover, subsection (d) of section 4660 provides that the "schedule shall promote consistency, uniformity, and objectivity."

In interpreting section 4660, the Appeals Board held en banc, that:

> "(1) the language of Labor Code section 4660(c), which provides that 'the schedule . . . shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule,' unambiguously means that a permanent disability rating established by the Schedule is rebuttable; (2) the burden of rebutting a scheduled permanent disability rating rests with the party disputing that rating; (3) one method of rebutting a scheduled permanent disability rating is to successfully challenge one of the component elements of that rating, such as the injured employee's whole person impairment (WPI) under the AMA Guides; and (4) when determining an injured employee's WPI, it is not permissible to go outside the four corners of the AMA Guides; however, a physician may utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee's impairment." (*Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084, 1086 (Appeals Board en banc) (*Almaraz/Guzman II*).)

Clearly, Figure 15-19 is within the four corners of the *Guides*. Moreover, in affirming our en banc holding in *Almaraz/Guzman II*, the Court of Appeal recently stated that "the language of section 4660 permits reliance on the entire *Guides*" including a physician's "use of clinical judgment, in deriving an impairment rating in a particular case." (*Milpitas Unified School District v. Workers' Comp. Appeals Bd.* (*Guzman III*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837, 839]. The Court further endorsed the conclusion of our en banc decision in *Almaraz/Guzman II* that a physician has latitude to use the four corners of the Guides, that a physician "is not inescapably locked into any specific paradigm for evaluating WPI under the Guides," and that section 4660 "does not mandate that the impairment for any particular condition must be assessed in any particular way under the Guides [or] relegate a physician to the role of taking a few objective measurements and then mechanically and uncritically assigning a WPI that is based on a rigid and standardized protocol and that is devoid of any clinical judgment. Instead, the AMA

Guides expressly contemplates that a physician will use his or her judgment, experience, training, and skill in assessing WPI." (*Guzman III, supra,* at p. 853.)

Figure 15-19 on page 427 of the AMA Guides, fifth edition, has an illustration of the spine divided into regions. Below the illustration of the spine, Figure 15-19 has text which states: "The whole spine divided into regions indicating the maximum whole person impairment represented by a total impairment of one region of the spine. Lumbar 90%, thoracic 40%, cervical 80%."

Here, applicant has undergone a total of five spinal procedures. First, he underwent a laminectomy at L5-S1 but suffered a spinal fluid leak. As a result, he underwent two follow-up surgeries. When his symptoms returned, he underwent a battery of diagnostic testing and received epidural steroid injections. Applicant then underwent a fourth procedure involving a microdiscectomy at L5-S1. Because that surgery did not alleviate applicant's symptoms, he then underwent a a fusion from L4 to S1.

In his final report, Dr. Izzo noted that despite applicant's extensive surgical treatment, his symptoms persist. Based on his evaluation, he opined that applicant has lost 60% of the use of his lumbar spine excluding the impact on his sexual function and sleep disorder. Dr. Izzo, further noted that DRE and ROM methods of rating do not fully reflect, and are disproportionate to, applicant's actual level of work impairment. Because of this discrepancy, Dr. Izzo provided an alternative method of rating applicant's disability using Figure 15-19. Dr. Izzo opined that, "[applicant] in my opinion has lost 60% of the use of his lumbar spine excluding the impact on his sexual function and sleep disorder. Therefore 60% of the lumbar spine function multiplied by .9 corresponds to a 54% WPI.

We are persuaded that Dr. Izzo's use of this alternate method is appropriate based on the facts of this case, based on his expertise as a physician and as an AME, and based on the fact that the parties chose him as the AME because of his expertise and neutrality. Therefore, his opinion should be followed unless there is good reason to find that opinion unpersuasive. (See *Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 929 [71

Cal.Comp.Cases 1687]; *Power v. Worker's Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775 [51 Cal. Comp. Cases 114].)

Finally, we turn to applicant's contention regarding applicant's sleep/arousal disorder. We note that the parties stipulated that applicant sustained a sleep/arousal disorder AOE/COE and that Dr. Izzo found permanent impairment related to this condition. However, we agree with the WCJ that the record must be developed in this regard. Due process requires the Appeals Board to fully develop the evidentiary record to enable a complete adjudication especially when the evidence available fails to adequately discuss the issues at hand. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394; [62 Cal.Comp.Cases 924]; *San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 935 [64 Cal.Comp.Cases 986].) The preferred method for development of the record is discussed fully in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138, 142.

Therefore, upon this matter's return to the trial level, the WCJ should conduct further proceedings as deemed necessary to comply with the provisions outlined above and to issue rating instructions to the DEU for a formal rating based on Dr. Izzo's analysis using Figure 15-19 as well as any evidence obtained related to applicant's sleep/arousal disorder, if any. The parties may have the opportunity to cross-examine the rater on the new rating upon timely.

Accordingly, for the reasons discussed herein, we will grant reconsideration of both Petitions for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's and defendant's Petitions for Reconsideration of the November 19, 2010 Findings and Award be and, the same hereby, are **GRANTED.**

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IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 19, 2010 Findings and Award be **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

RONNIE G. CAPLANE

I CONCUR,

ALFONSO J. MORESI

I CONCUR IN PART AND DISSENT IN PART (See attached Concurring and Dissenting Opinion),

DEIDRA E. LOWE, COMMISSIONER

WORKERS' COMPENSATION APPEALS BOARD EUREKA SEAL

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

FEB 07 2011

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

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LAW OFFICE OF JOHN HILL
DONALD LAURY

PAG/csl

CONCURRING AND DISSENTING OPINION

I concur in part and dissent in part. I concur with the majority's decision with exception of the issue of whether the whole person impairment (WPI) aspect of the 2005 Schedule was rebutted by means of Joseph Izzo, M.D.,'s analogous impairment rating of the lumbar spine using Figure 15-19 (page 427) of the AMA Guides. In this regard, I agree generally with the WCJ's reasoning on this particular issue and I would affirm his finding that applicant was not successful.

As stated by the majority, *Almaraz/Guzman II* held that:

> "(1) the language of Labor Code section 4660(c), which provides that 'the schedule . . . shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule,' unambiguously means that a permanent disability rating established by the Schedule is rebuttable; (2) the burden of rebutting a scheduled permanent disability rating rests with the party disputing that rating; (3) one method of rebutting a scheduled permanent disability rating is to successfully challenge one of the component elements of that rating, such as the injured employee's whole person impairment (WPI) under the AMA Guides; and (4) when determining an injured employee's WPI, it is not permissible to go outside the four corners of the AMA Guides; however, a physician may utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee's impairment. In light of these holdings, we now specifically reject the "inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability" standard set forth in our February 3, 2009 opinion." *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084, 1086 (Appeals Board en banc) (*Almaraz/Guzman II,* footnotes omitted.)

I also agree that in affirming the *Almaraz/Guzman II*, the Court of Appeal emphasized that departure from strict application of the Guides is appropriate "for cases that do not fit neatly into the diagnostic criteria and descriptions" and that the AMA Guides call for a physician to use clinical judgment to evaluate the impairment most accurately, even if that is possible only by resorting to comparable conditions described in the Guides. ." (*Milpitas Unified School District v. Workers' Comp. Appeals Bd.* (*Guzman III*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837, 839].

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However, *Almaraz/Guzman II* emphasized that:

> "[O]ur decision does *not* permit a physician to utilize any chapter, table, or method in the AMA Guides **simply to achieve a desired result, e.g., a WPI that would result in a permanent disability rating based directly or indirectly on any Schedule in effect prior to 2005.** A physician's opinion regarding an injured employee's WPI under the Guides must constitute substantial evidence; therefore, the opinion must set forth the facts and reasoning which justify it. Moreover, **a physician's WPI opinion that is not based on the AMA Guides does not constitute substantial evidence.**" *(Almaraz/Guzman II,* supra, 74 Cal.Comp.Cases at p. 1087, emphasis added.)

In its introduction, the AMA Guides state:

> **"Impairment percentages** or **ratings** developed by medical specialists are consensus-derived estimates that reflect the severity of the medical condition and the degree to which the impairment decreases an individual's ability to perform common **activities of daily living (ADL),** *excluding* work. Impairment ratings were designed to reflect functional limitations and not disability. The **whole person impairment percentages** listed in the *Guides* estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, *excluding work..." (AMA Guides, 5th ed., at p. 4,* all emphasis in original.)

Moreover, the *Guzman III* Court incorporated these principles from *Almaraz/Guzman II* and the AMA Guides noting that:

> "[*Almarez/Guzman II*] 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.' '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. (*Guzman III, supra,* at p. 851, citations omitted.)
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> * * *
>
> "The impairment ratings provided in the *Guides* 'were designed to reflect functional limitations and not disability.' (*Guides* § 1.2, p. 4.) They 'reflect the severity of the medical condition and the degree to which the

> impairment decreases an individual's ability to perform common activities of daily living (ADL), *excluding* work.' (footnote omitted.) (*Guides*, § 1.2, p.4.)
>
> "A permanent disability, on the other hand, 'causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market.' (Citation omitted.) (*Guzman III, supra*, at p. 845, citations omitted.)

Based on this authority, I am not persuaded that the AME's opinion on this issue is substantial evidence.

The WPI percentages used by the AMA Guides measure the degree to which a person has lost his or her ability to perform activities of daily living (ADLs). They do not measure work impairment which was previously measured in the 1997 Permanent Disability Rating Schedule (1997 Schedule).

In his June 10, 2009 AME report, Joseph Izzo, M.D., stated that:

> "I can provide another Impairment rating 'by analogy' that may be more in keeping with the **actual impact on his ability to work**. To do so I refer the parties to Figure 15-19 on page 427. The maximal WPI due to the lumbar spine is 90%. This man in my opinion has lost 60% of the use of his lumbar spine excluding the impact on his sexual function and sleep disorder. Therefore 60% of the lumbar spine function multiplied by .9 corresponds to a 54% WPI. If one then considers the 20% WPI for sleep and 9% WPI for sexual dysfunction this yields 66% WPI. This rating takes into account the method allowed by the recent Almaraz/Guzman decision."
>
> * * *
>
> RETURN TO WORK:
> He can return to work. However, it is going to have to be in a situation that allows him to do his work in either a sitting or a sometimes sitting and sometimes standing position with the ability to change positions at will. It should also be work that should demand a minimum amount of physical effort. These restrictions are, in some respects, actual, and to some extent also prophylactic given his age and the length of time he needs to survive with his back.
>
> Mr. Cooper has asked me to address his permanent disability with respect to the opinions discussed in the most recent decision by the WCAB regarding the Almaraz/Guzman decision.

> Even though his whole person impairment rating is fairly substantial when one looks at his sleep disturbance and sexual dysfunction, in my opinion it does not seem to fully reflect the **work impairment** that has been levied on this individual because of this injury and the subsequent treatment related to the injury.
>
> As an evaluator, it is difficult for me to assess this, simply because evaluators are not supposed to be privy to the formula used. The AMA impairment rating, I know, is a critical part of that. However, the formula used also relates to impact on earning capacity. There are so many variables involved in that that it would be impossible for me to assess it. I really do not know what is available to him in the job market.
>
> It is certain that he cannot go back to the job that he was in. I am also certain that he will have to earn his living with his brain and not with his back in the future.
>
> "Considering the amount of **work disability** that this injury has imposed, it would seem that this is far and away in excess of the impairment rating noted by using the simple formulation noted in the AMA Guides. Consequently, it is my opinion that **the impairment rating imposed has really resulted in a disability award that seems disproportionate to the amount of work limitation that has been imposed by this injury.** The parties are well aware of the fact that the Guides address this issue and clearly point out that the impairment rating bears only on the impairment with regard to activities of daily living. In this particular case, work restrictions are certainly more than one would encounter with usual ADLs. Add to that the fact that sexual function has absolutely nothing to do with the ability to work, and I think that one can see how the discrepancy arises.
>
> "In the final analysis, the Trier of Fact will have to make the decision as to whether there is a **disproportion between the AMA Guides impairment and the actual work disability imposed by this injury.** (Dr. Izzo's 6/10/09 AME rpt. at pp. 9-13, emphasis added.)

First, Dr. Izzo does not explain how he determined that applicant lost 60% of the use of his lumbar spine, as opposed to any another percentage. Second, he does not explain why his rating by analogy produces a more accurate reflection of applicant's impairment. Third, while he concludes that the conventional AMA Guides rating fails to accurately characterize the impact of

applicant's injury on his ability to perform *work activities*, he correctly distinguishes such activities from *activities of daily living*. Moreover, his reason for departing from a "strict" application of the AMA Guides appears to be applicant's work limitations and work disabilities which do not fairly reflect applicant's limitation as to ADLs. I believe this is inappropriate post-Senate Bill 899 and based on the authority quoted above. It is simply an attempt to achieve a desired result (i.e., a rating that more accurately reflects work preclusions) based, indirectly, on the 1997 Schedule.

Therefore, I would affirm the WCJ's finding that applicant did not rebut the WPI aspect of the 2005 Schedule.

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

FEB 07 2011

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

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