

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

**LAWRENCE ONTELL, *Applicant***

**vs.**

**LABORATORY CORPORATION OF AMERICA HOLDINGS and  
ACE AMERICAN INSURANCE COMPANY, administered by  
BROADSPIRE SERVICES, INC., *Defendants***

**Adjudication Number: ADJ12841348**

**Santa Rosa District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on March 14, 2023, wherein the WCJ found in pertinent part that applicant's injury caused 17% permanent disability, after application of *Almaraz/Guzman* and apportionment.<sup>1</sup>

Defendant contends that orthopedic qualified medical examiner (QME) Ronald B. Wolfson, M.D., did not include any work restrictions so he did not do a proper *Almaraz/Guzman* analysis and applicant's permanent disability should be rated at 13%.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the 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, and for the reasons discussed below, we will affirm the F&A except that we will amend the F&A to defer the issues of the permanent disability caused by applicant's injury (Finding of Fact 3); and the value of the services provided by applicant's attorney (Finding of Fact 6); based thereon we will amend the Award and return the matter to the WCJ for further proceedings consistent with this opinion.

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<sup>1</sup> *Almaraz v. Environmental Recovery Services / Guzman v. Milpitas Unified School Dist.* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) (*Almaraz/Guzman*); affirmed by the Sixth District Court of Appeals in *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].

Additionally, it has come to the attention of the Appeals Board that the Opinion and Order Granting Petition for Reconsideration issued on June 5, 2023, contains a clerical error in that it was not stamped with the official seal of the Workers' Compensation Appeals Board. We will correct this clerical error by virtue of this order, as such errors may be corrected without further proceedings at any time. (*Toccalino v. Worker's Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 558 [47 Cal.Comp.Cases 145]; see also 2 Cal. Workers' Comp. Practice (Cont. Ed. Bar, March 2018 Update) Supplemental Proceedings, § 23.74, p. 23-76.) Accordingly, we will also issue an Order correcting this clerical error.

### **BACKGROUND**

Applicant claimed injury to his right shoulder and right hand while employed by defendant as a PST (patient services technician) specialist on October 29, 2019.

QME Dr. Wolfson evaluated applicant on April 7, 2020. Dr. Wolfson examined applicant, took a history, and reviewed the medical record. He diagnosed applicant as having an "industrially related" right shoulder sprain with inflammation and capsulitis, mild acromioclavicular joint osteoarthritis, and limitation of motion. (Joint Exh. J6, Ronald B. Wolfson, M.D., April 7, 2020, p. 8.) Dr. Wolfson concluded that applicant's condition had not reached maximum medical improvement (MMI). (Joint Exh. J6, p. 9.)

On January 12, 2021, applicant underwent a right shoulder arthroscopic surgery with decompression and rotator cuff repair. (Joint Exh. J3, Ronald B. Wolfson, M.D., July 14, 2021, p. 8, medical record review.) QME Dr. Wolfson re-evaluated applicant on July 14, 2021, but applicant's condition was not permanent and stationary. (Joint Exh. J3, p. 22.)

Dr. Wolfson again re-evaluated applicant on June 21, 2022, and he found that applicant's condition had reached permanent and stationary status. (Joint Exh. 2, Ronald B. Wolfson, M.D., June 21, 2022, p. 27.) Regarding applicant's whole person impairment (WPI), Dr. Wolfson concluded:

Using the *Guides to the Evaluation of Permanent Impairment*, Mr. Ontell does have, using Figure 16-40, page 476 through 16-46 page 479, 1% upper extremity impairment for loss of flexion, 1% for loss of extension, 1% for loss of abduction and 3% for loss of internal rotation. That is 6% upper extremity motion impairment, and he also has Category IV weakness in abduction strength and Category IV weakness in flexion strength using Almaraz/Guzman. That should be combined with the motion impairment since the weakness is the major part of the impairment. Using Table 16-35, page 510, that would give him a 9% upper

extremity impairment combined with a 6% upper extremity impairment for motion which would give him a 15% upper extremity impairment which would equal a 9% whole person impairment using the conversions tables on 16-3 and 16-2 and of course they should be added. I am combining them using the Almaraz/Guzman rule, 10% whole person impairment. He should have an add-on for pain. I would give him 2% WPI add-on for pain, giving him a total of 12% WPI.

(Joint Exh. 2, p. 27.)<sup>2</sup>

The parties proceeded to trial on March 6, 2023. The issues submitted for decision included permanent disability and the “Strict AMA Guides rating versus application of *Almaraz/Guzman*.” (Minutes of Hearing and Summary of Evidence, March 6, 2023, p. 2.)

## DISCUSSION

In her Report, the WCJ explains:

The petitioner asserts that "Dr. Wolfson's failure to provide any work restrictions is clear evidence that there was no substantiation to the *Almaraz/Guzman* argument, as Applicant's weakness was not bad enough to warrant a work restriction". (Petition, p. 4, lines 10-12.) ¶ Petitioner's argument confuses impairment and disability. Impairment ratings are not intended to [be] used as direct determinants of work disability. (AMA Guides, p. 5.) In fact, impairment percentages estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, excluding work. (AMA Guides, p. 4, emph. added.) The court is not aware of any legal requirement, nor is any cited by the petitioner, that mandates the imposition of work restrictions to render a physician's *Almaraz/Guzman* analysis substantial. (Report, p. 3.)

We agree with the WCJ that there is no statutory or case law requiring the “imposition of work restrictions” in order for a reporting physician to make a valid *Almaraz/Guzman* analysis. However, to properly rate an injured worker’s disability by applying an *Almaraz/Guzman* analysis, the doctor is expected to: (1) provide a strict rating per the AMA Guides; (2) explain why the strict rating does not accurately reflect the applicant’s disability; (3) provide an alternative rating using the four corners of the AMA Guides; and (4) explain why that alternative rating more accurately reflects the injured worker’s level of disability. (*Milpitas Unified School Dist. v. Workers’ Comp. Appeals Bd.* (2010) 187 Cal.App.4th 808, at 828-829 [75 Cal.Comp.Cases 837].)

In his June 21, 2022 report, as quoted above, Dr. Wolfson stated that applicant had, “...6% upper extremity motion impairment and he also has Category IV weakness in abduction strength

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<sup>2</sup> The doctor’s reference to “Almaraz/Guzman” is in regard to the Appeals Board en banc decision, see footnote 1.

and Category IV weakness in flexion strength using Almaraz/Guzman. ... I am combining them [weakness and motion impairment] using the Almaraz/Guzman rule ....” (Joint Exh. 2, p. 27.) Having reviewed his report, it is not clear what aspect of the *Almaraz/Guzman* analysis Dr. Wolfson was referring to, but it does not appear that he utilized the four-step analysis noted above. Absent that analysis, Dr. Wolfson’s report does not constitute substantial evidence. (*Milpitas Unified School Dist. v. Workers’ Comp. Appeals Bd.*, *supra.*)

It is well established that an award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) The Appeals Board has the discretionary authority to further develop the record where there is insufficient evidence to determine an issue that was submitted for decision. (Lab. Code, §5701, 5906; *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].)

As discussed herein, Dr. Wolfson’s reporting does not constitute substantial evidence regarding the issue of applicant’s permanent disability. Under the circumstances of this matter, upon its return to the WCJ, we recommend the parties request that Dr. Wolfson issue a supplemental report clarifying his opinion as to applicant’s permanent disability, including a proper *Almaraz/Guzman* analysis if he believes such an analysis is necessary to accurately describe applicant’s disability caused by his October 29, 2019, injury.

Accordingly, we affirm the F&A, except that we amend the F&A to defer the issues of the permanent disability caused by applicant’s injury; and the value of the services provided by applicant's attorney. Based thereon we amend the Award and return the matter to the WCJ for further proceedings consistent with this opinion. We also issue an Order correcting the clerical error of the failure to affix the seal of the Workers’ Compensation Appeals Board.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 14, 2023, Findings and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

**FINDINGS OF FACT**

\* \* \*

3. The issue of the permanent disability caused by applicant's October 29, 2019; injury is deferred.

\* \* \*

6. The issue of the value of the services provided by applicant's attorney is deferred.

**AWARD**

\* \* \*

a. The award of permanent disability indemnity and attorney fees based thereon is deferred pending further development of the record.

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**IT IS FURTHER ORDERED** that the clerical error of omission of the seal of the Workers' Compensation Appeals Board in the Opinion and Order Granting Petition for Reconsideration issued by the Workers' Compensation Appeals Board on June 5, 2023, is **CORRECTED** to include the seal.

**IT IS FURTHER ORDERED** that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**KATHERINE A. ZALEWSKI, CHAIR**  
**CONCURRING NOT SIGNING**



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

**July 10, 2023**

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

**LAWRENCE ONTELL  
KNEISLER & SCHONDEL  
SAVAGE LAW FIRM, APC**

**TLH/mc**

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