

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

SCOTT REISINGER, *Applicant*

vs.

**TUCKER LATH & PLASTERING;
EVEREST PREMIER INSURANCE COMPANY,
adjusted by AMERICAN CLAIMS MANAGEMENT, *Defendants***

**Adjudication Number: ADJ15225348
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and the Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and the Opinion on Decision, both of which we adopt and incorporate, we will deny reconsideration.

Preliminarily, we note that the proper citation for the case the WCJ refers to as "*Almaraz/Gusman III*," is *Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman III)* (2010) 187 Cal. App. 4th 808, 75 Cal.Comp.Cases 837, (6th DCA), rev. denied 11/10/10. The case involving injured worker Mario Almaraz was not part of *Guzman III*.

For the reasons stated in the WCJ's report, we agree that the opinions of panel qualified medical examiner (PQME) Rommel Hindocha is substantial medical evidence upon which the WCJ properly relied. To be considered substantial evidence, a medical opinion "must be predicated on reasonable medical probability." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-17, 419 [33 Cal.Comp.Cases 660].) A physician's report must also be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and

history, and it must set forth reasoning in support of its conclusions. (*Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc), 70 Cal.Comp.Cases 1506 (writ den.); see also (See *Guzman III*, supra, 187 Cal.App.4th 808 [an evaluating physician may deviate from a "strict" application of the AMA Guides in order to provide a rating within the four corners of the Guides that more accurately reflects the employee's impairment based on the physician's judgment, training and experience].)

Finally, we have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id.*)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 12, 2023

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

**SCOTT REISINGER
GEARHEART & SONNICKSEN
LAUGHLIN, FALBO, LEVY & MORESI**

PAG/abs

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

INTRODUCTION

1. Applicant's Occupation: Lather/Plasterer
Applicant's Age at DOI: 55 years old
Date of Injury: 6/21/21
Parts of Body Injured: Right Shoulder
Manner in which injuries alleged to have occurred: Specific incident
2. Identity of Petitioner: **Defendant** filed the Petition.
Timeliness: The petition was timely filed.
Verification: A verification is attached to the petition.
3. Date of Finding and Award: September 18, 2023
4. Petitioners contentions: The defendant request a finding that the Almaraz/Guzman rating is not substantial medical evidence and that the straight rating applies:

FACTS

On June 21, 2021, Applicant, Scott Reisinger, injured his right shoulder while performing work as a plasterer.

Applicant was evaluated by QME Dr. Hindocha on December 27, 2021 who issued an initial report. There were three subsequent supplemental reports. Applicant ruptured three out of four right-sided shoulder rotator cuff tendons and right sided intra-articular biceps tendons. Applicant had two surgeries to repair his right shoulder and underwent physical therapy. Dr. Hindocha found applicant MMI in the fourth report and issued an AMA rating as well as an Almaraz/Guzman rating.

The matter preceded to trial on September 6, 2023 in which the parties agreed Dr. Hindocha's reports rated to 32% pursuant to the AMA guides and 74% if the Almaraz/Guzman rating is substantial medical evidence.

Minutes of Hearing/Statement of Evidence were served and parties requested clarification regarding whether there was a warm up period prior to the measurements with Dr. Hindocha. A review of the undersigned notes confirmed the testimony in the MOH/SOE and a subsequent letter was provided to the parties confirming and instructing how to obtain a transcript. The finding and award was issued on September 18, 2023 finding the Almaraz/Guzman rating was substantial medical evidence.

Defendant has filed a timely verified petition for reconsideration arguing that the Almaraz/Guzman rating is not substantial medical evidence. Applicant has filed a response.

II **DISCUSSION**

It is Petitioner's burden to prove by a preponderance of the evidence that the award made and filed by the workers' compensation judge acted without or in excess of its powers, that the evidence does not justify the findings of fact, and/or the findings of fact do not support the order, decision, or award.

Here, defendant specifically argues Dr. Hindocha failed to explain "why" for the straight rating did not apply and the need to provide an alternate rating pursuant to Almaraz/Guzman. It appears, that defendant particularly argues that the inability to do 7/8 ADLs being used to provide a 3 WPI and for the application of the Almaraz/Guzman. However, a doctor is required to provide a rating pursuant to the AMA Guides, also known as a straight rating. The straight rating also provides a doctor should look at a pain increase. Under chapter 18 of the AMA guides the pain limitation is only 3%. Dr. Hindocha appropriately applied the maximum pain allowed under chapter 18 for the straight rating based on the ADLs and applicant's pain. That same criteria can be used to establish that even with 3% the straight rating does not accurately reflect applicant's disability and provide an alternate rating. That is exactly what Dr. Hindocha did in this case.

Dr. Hindocha provided the following analysis for the Almaraz/Guzman rating

The patient reports significant limitations in 7 /8 ADL categories. The patient is severely limited in his ADL's, with respect to his right upper extremity. The patient had the following relevant surgical procedures: right-sided supraspinatus, right-sided infraspinatus and right-sided subscapularis repair and a revision surgery for his right-sided subscapularis. The patient's supraspinatus and infraspinatus muscles are atrophied. Evidently, the revision surgery was not successful and the patient's subscapularis remains torn, retracted and non-functional. The patient underwent a distal clavicle resection and acromioclavicular joint arthroplasty with respect to his right acromioclavicular joint. The patient had an anterior dislocation of his right glenohumeral joint and a right-sided acromioclavicular joint sprain (shoulder separation) with respect to his right acromioclavicular joint.....It is this examiner's opinion that the "strict" method of rating does not fully encompass the patient's right-sided shoulder substantial physical limitations. The "strict" method of rating encompassed range of motion deficits, in addition, to a rating provided for a distal clavicle resection. Therefore, the Almaraz/Guzman rating provided above most accurately reflects the patient's current condition and functional status. The patient's right supraspinatus and right infraspinatus muscles are markedly atrophied, his right subscapularis tendon: remains unattached and retracted, he has had a distal

clavicle resection and his right acromioclavicular joint remains separated. (Exhibit 101 pg 15- 16)

This analysis explains why the strict AMA rating does not apply with specific examples of the atrophy of his supraspinatus and infraspinatus muscles, the unsuccessful surgeries and the extent of issues with applicant's ADLs. The Almaraz/Guzman rating is substantial medical evidence to support the [sic]

III
RECOMMENDATION

For the above reasons, I recommend the petition for reconsideration be denied.

DATE: October 20, 2023

Erin Finnegan
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

STATEMENT OF FACTS

The matter was set for trial on September 6, 2023. Minutes of Hearing/Statement of Evidence were served on September 6, 2023. Parties requested clarification regarding whether there was a warm up period prior to the measurements with Dr. Hindocha. A review of the undersigned notes confirmed the testimony in the MOH/SOE and a subsequent letter was provided to the parties confirming and instructing how to obtain a transcript.

Applicant was evaluated by Dr. Hindocha on December 27, 2021 who issued an initial report. There were three subsequent supplemental reports. Applicant ruptured three out of four right-sided shoulder rotator cuff tendons and right sided intra-articular biceps tendons. Applicant had two surgeries to repair his right shoulder and underwent physical therapy. Dr. Hindocha found applicant MMI in the fourth report and issued an AMA rating as well as an Almaraz/Guzman rating.

The matter preceded to trial on September 6, 2023 in which the parties agreed Dr. Hindocha's reports rated to 32% pursuant to the AMA guides and 74% if the Almaraz/Guzman rating is substantial medical evidence.

DECISION

Pursuant to section 4660.1(d), the scheduled rating is prima facie evidence of an employee's permanent disability. However, the scheduled rating is rebuttable. (See *Almaraz-Guzman III, supra*, at pp. 852-853.) Specifically, the 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-Guzman II, supra*, at p. 1106.) Physicians must still evaluate permanent impairment while staying within the "four corners of the Guides" pursuant to the Labor Code. (*Id.* at p. 1101.)

The overarching goal of rating permanent impairment is to achieve accuracy. (*Almaraz-Guzman III, supra*, at p. 822.) A "strict" application of the Guides may NOT accurately reflect an injured employee's permanent impairment. The Court of Appeal in *Almaraz-Guzman III* acknowledged the Guides' limitations and specifically held that

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.*)

To accommodate those complex or extraordinary cases, the *Guides* calls for the physician’s exercise of clinical judgment to assess the impairment most accurately.

(*Id.* at p. 823.)

The AMA *Guides* is thus not to be literally and mechanically applied. Instead, the evaluating physician may use his or her experience and expertise to interpret and apply *any portion* of the entire AMA *Guides*. A physician who departs from a strict application of the AMA *Guides* must explain why the departure is necessary and how the WPI rating was derived. (*Id.* at pp. 828-829.) Consequently, although the evaluating physician may utilize the chapter, table or method in the AMA *Guides* “that most accurately reflects the injured employee’s impairment,” the physician’s “opinion must constitute substantial evidence upon which the WCAB may properly rely, including setting forth the reasoning behind the assessment.” (*Almaraz-Guzman II, supra*, at p. 1104.)

To properly rate using *Almaraz-Guzman*, the physician is expected to: 1) provide a strict rating per the AMA *Guides*; 2) explain why the strict rating does not accurately reflect the employee’s disability; 3) provide an alternative rating within the four corners of the AMA *Guides*; and 4) explain why the alternative rating most accurately reflects the employee’s level of disability. (*Almaraz-Guzman III, supra*, at pp. 828-829.)

In *City of Sacramento v. Workers’ Comp. Appeals Bd. (Cannon)* (2013) 222 Cal.App.4th 1360, the Court of Appeal addressed whether a physician could provide a permanent impairment rating utilizing *Almaraz-Guzman* based purely on the employee’s subjective complaints without objective findings. The police officer in *Cannon* had plantar fasciitis, which has no standard rating in the AMA *Guides*, but caused the officer to have heel pain. The AME provided a WPI rating by analogy to a limp (gait derangement abnormality) due to the heel causing weightbearing problems. (*Id.* at p. 1365.) The City of Sacramento argued that “a rating by analogy under *Almaraz/Guzman* is permissible only in complex or extraordinary cases.” (*Id.* at p. 1372.) The Court specifically rejected this argument and determined that “this is an unwarranted interpretation of the Sixth District’s decision in *Milpitas Unified*.” (*Id.*) The Court further stated that “the Sixth District was using the term ‘complex or extraordinary cases’ to describe syndromes that are poorly understood and are manifested only by subjective symptoms, which the AMA *Guides* do not, and cannot rate.” (*Id.* (internal quotations omitted).)[]

As discussed in *Cannon*, the Court of Appeal in *Almaraz-Guzman III* used the term “complex or extraordinary” to describe “syndromes that are poorly understood and are manifested only by subjective symptoms,” not in order to limit the evaluating physician’s use of a different chapter, table, or method of assessing impairment in the AMA *Guides* to *only* those cases deemed complex or extraordinary. There are also several panel decisions rejecting this interpretation of *Almaraz-Guzman III*. (See *Maggard v. Kings Canyon Unified Sch. Dist.* (August 29, 2013,

ADJ3288062, ADJ1081299, ADJ4249956) [2013 Cal. Wrk. Comp. P.D. LEXIS 497] [the panel upheld a WCJ's finding that nothing in *Almaraz-Guzman III* requires a determination by the physician that the case is "complex or extraordinary"]; *Strawberry v. California Dept. of Corrections and Rehabilitation* (November 28, 2016, ADJ7438046) [2016 Cal. Wrk. Comp. P.D. LEXIS 624, *11] (the panel overturned a WCJ's rejection of the physician's rating because the injuries were not deemed "complex or extraordinary" and opined that the *Cannon* Court "rejected the theory that an *Almaraz/Guzman* analysis of disability may only be used in a 'complex or extraordinary' case"); *Diaz v. The Gainey Vineyard* (April 11, 2017, ADJ8558787) [2017 Cal. Wrk. Comp. P.D. LEXIS 154, *16] [the panel found "no requirement that a physician proclaim the case to be complex or extraordinary in order to justify a rating by analogy, provided that the rating is based upon the Guides"]; and *Rice v. Procut, LLC* (May 28, 2013, ADJ7558401) [2013 Cal. Wrk. Comp. P.D. LEXIS 334, *12] [the panel ordered further development of the record on the *Almaraz-Guzman* rating, but also opined that neither the *Almaraz-Guzman* "Court nor the AMA Guides limit the cases in which a physician may exercise his or her clinical judgment by resorting to comparable conditions only to complex and extraordinary cases"].]

Dr. Hindocha's report dated May 17, 2023

provided a range of motion to his shoulder of Shoulder range of motion: Shoulder range of motion is expressed in right/left/normal: Flexion 124/ 1 70/ 180, extension 50/50/50, abduction 82/ 170/ 1 80, adduction 40/50/50, internal rotation 20/7 5/90, external rotation 60/75/90. The patient reported pain during flexion, abduction and internal rotation. (Exhibit 101 pg 12)

Testimony indicated that applicant did not warm up during an evaluation, he did get measured three times (MOH SOE pg 4 line 13-14). While applicant did participate in physical therapy and had ongoing treatments, neither party provided those reports to contradict the range of motions above. Further, the measurements on May 17th were markedly better than in the previous evaluation on October 11, 2022 when he issued provisional ratings.

Shoulder range of motion: Shoulder range of motion is expressed in right/left/normal: Flexion 65/160/180, extension 50/50/50, abduction 50/175/180, adduction UTP/50/50, internal rotation UTP/80/90, external rotation 30/80/90. The patient reported pain during flexion, abduction and external rotation. External rotation was performed with the patient's right upper extremity fully adducted against the torso. (Exhibit 102 pg 15-16)

In defendant's much appreciated trial brief they cite page 16 of Dr. Hindocha's report in that there was not an explanation as to why the AMA guides were not appropriate. However, the explanation as to rebutting the scheduled guides is contained in page 15 in which he explains the significant limitations in performing the ADLs and the unsuccessful revision surgery are the basis for the alternate rating.

The patient reports significant limitations in 7 /8 ADL categories. The patient is severely limited in his ADL's, with respect to his right upper extremity. The patient had the following relevant surgical procedures: right-sided supraspinatus, right-sided infraspinatus and right-sided subscapularis repair and a revision surgery for his right-sided subscapularis. The patient's supraspinatus and infraspinatus muscles are atrophied. Evidently, the revision surgery was not successful and the patient's subscapularis remains torn, retracted and non-functional. The patient underwent a distal clavicle resection and acromioclavicular joint arthroplasty with respect to his right acromioclavicular joint. The patient had an anterior dislocation of his right glenohumeral joint and a right-sided acromioclavicular joint sprain (shoulder separation) with respect to his right acromioclavicular joint.

The patient's current condition and functional limitations with respect to his right shoulder (glenohumeral and acromioclavicular joint) are consistent with table 16-18, page 499. (Exhibit 101 pg 15)

Dr. Hindocha further provided an Almaraz/Guzman rating because of the significant limitations in 7/8 ADL categories. This is supported by the undisputed testimony that applicant had difficulties getting dressed, frequently woke up in the middle of the night due to pain, his limitations doing housework and yardwork (MOH SOE pg 3-4 lines 19-25; 1-4).

The above Almaraz/Guzman analysis comports with applicant's testimony at trial and is substantial medical evidence. Therefore, pursuant to the agreement of the parties the permanent disability is 74%.

Date: September 18, 2023

Erin Finnegan
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE