

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

**MARION AGRO, *Applicant***

**vs.**

**MACY'S, INC., permissibly self-insured,  
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ11889290  
Oxnard 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 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, which we adopt and incorporate, and for the reasons discussed below, we will deny reconsideration.

Pursuant to Labor Code section 4660.1(d), the scheduled rating is prima facie evidence of an employee's permanent disability. However, the scheduled rating is rebuttable. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Almaraz-Guzman III)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837, 852–853].) 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 II)* (2009) 74 Cal.Comp.Cases 1084, 1106 (Appeals Board en banc).) Physicians must still evaluate permanent impairment while staying within the “four comers 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.*) A “strict” application of the Guides may not accurately reflect an injured employee's permanent impairment. The Guides expressly recognizes its limitations in Chapter 1:

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 those conditions. The Guides nonetheless provides a framework for evaluating new or complex conditions. (AMA Guides, p. 11.)

*Almaraz-Guzman II* acknowledged this and specifically held that

... while the AMA Guides often sets forth an analytical framework and methods for a physician in assessing WPI, the Guides does not 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. (*Almaraz-Guzman II, supra*, at pp. 1103–1104.)

Thus, the AMA Guides are 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. (*Almaraz-Guzman III, supra*, at p. 854.) 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.)

In this case, we find no basis to second-guess the opinions of neurologist panel qualified medical examiner Robert Shorr, M.D., and optometrist agreed medical examiner (AME) Carl Garbus, D.O. (See *City of Sacramento v. Workers’ Comp. Appeals Bd. (Cannon)* (2013) 222 Cal.App.4th 1360 [79 Cal.Comp.Cases 1][police officer’s plantar fasciitis, manifested only by his subjective experience of pain, fell into the *Almaraz-Guzman* category of cases wherein the AMA Guides call for the physician’s exercise of clinical judgment to assess the impairment most accurately]. For the reasons stated by the WCJ in the Report, we agree that the opinions Dr. Shorr and Dr. Garbus are substantial medical evidence upon which he properly relied. (See *Power v. Workers’ Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

For the foregoing reasons,

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

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ DEIDRA E. LOWE, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



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

**July 19, 2021**

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

**MARION AGRO  
LAW OFFICES OF EDWIN STONE  
GOLDMAN MAGDALIN & KRIKES**

**PAG/00**

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

**REPORT AND RECOMMENDATION**  
**ON PETITION FOR RECONSIDERATION**

**I**  
**INTRODUCTION**

- |   |  |
|---|--|
| 1. Date of Injury:                        | 11/1/2016  |
| Applicant's age:                          | 53   |
| Occupation:                               | Retail sale clerk  |
| Body Parts Injured:                       | Neck, back, head, headaches, vision, brain and psyche  |
| 2. Identity of Petitioner:                | Defendant  |
| 3. Timeliness:                            | The Petition was timely filed on 5/20/2021   |
| 4. Verification:                          | The Petition is verified   |
| 5. Date of Finding and Award:             | 4/30/21  |
| 6. <u>The Petitioner [c]ontends that:</u> | the evidence did not justify the findings of fact and the findings of fact did not support the decision. <u>More Specifically:</u> Defendants felt the court erred in utilizing the rating given on the cranial nerves (Post Traumatic Visual Syndrome – PTVS) given by PQME Neurologist, Dr. Shorr. Defendant believes the court should have ordered further development of the medical record on that issue. |

**II**  
**BACKGROUND**

The main dispute in this case was the final P.D. Rating, after an initial consultative rating by the DEU. The case initially was heard on 10/27/2020. A formal rating was requested and issued on 11/23/2020.

Defendants objected to the rating, requesting a cross examination of the rater, which took place on 3/18/2021. Long discussions as to the method utilized by Dr. Shorr were had off the record, as there wasn't any real dispute regarding whether the rater correctly rated the formal rating request given by the Judge. The issue was with whether the Doctor correctly formulated the rating in his reporting. The defendants believing that the rating by Dr. Shorr should have utilized a class 1, not a class 2 impairment in Table 12-4. This was because comment was made by Dr. Shorr, that if the applicant were to be given prism glasses, his "visual acuity" may then fall into the class 1 category. Defendants further argued that Dr. Garbus, an O.D. to whom Dr. Shorr referred the applicant to confirm the P.T.V.S. felt her visual acuity was near normal and under Class I was 0%.

This court did miss the apportionment given on the "cognitive" rating to which the parties stipulated to was 10% to non-industrial at the cross examination on 3/18/2021. When applied that reduced the overall rating from 72% to 70%, which was this court's final finding.

However, this court did not change the rating given on the Cranial Nerves (P.T.V.S.), believing it to be the equivalent of an Almarez-Guzman type rating, as the rating was meant to encompass not only the “visual acuity”, but the entire Vision Syndrome effected by the cranial nerves. The rating was a 15% W.P.I. before being string rated out.

It is for this finding of a final P.D., the 15% W.P.I. for the P.T.V.S. and for which the overall P.D. rated to 70% that the defendants have filed this Petition for Reconsideration.

### III DISCUSSION

The parties at the conclusion of the Cross Examination of the Rater were given until 3/26/2021 to file a brief on the issue of the cranial nerve (PTVS) P.D. rating issue. Both sides did file a brief. In conclusion this court issued its F&A and in the Opinion on Decision noted:

*The court has considered the Defendants position with respect to the issue of P.D. for the Cranial Nerves (PTVS- Post Traumatic Visual Syndrome) The court is rejecting the Defendants argument for various reasons, first, at the time of trial, approximately 4 years after the date of injury, no “prism” lenses had been provided to the Applicant, let alone tested to insure their efficacy. Therefore, to reduce the P.D. would be speculative. Further, the disability provided by the QME was the equivalent of an Almarez-Guzman rating, even if not defined as such, since there is no AMA guide for the cranial nerves effecting the eyes and or eye perception. Dr. Shorr referred to the problem as a P.T.V.S.- Post Traumatic Visual Syndrome. It wasn’t singularly defined as double vision which may speculatively have been corrected by prism glasses. Further, whether the eye acuity should have been classified as a Class I or a Class II, assumes that was the only issue as well. It was not, therefore this court believes that when considering all the effects of the P.T.V.S. Dr. Shorr purposefully used the Class II, basically as the Almarez-Guzman equivalent to encompass the applicants entire Syndrome. Further a Class II includes an acuity of 20/60 or better. So it would also include a Class I acuity, but it not limited to a Class I. Again, acuity was not the only concern.*

*P.T.V.S. is more clearly explained in the AME report of Dr. Garbus, (Exhibit G). Dr. Garbus clearly explains that the AMA Guides do not address the vision conditions outside of visual acuity and visual field loss. The Applicant clearly had multiple symptoms of P.T.V.S., including but not limited to Visual Midline Shift, vertical heterophoria that decompensates to double vision, dizziness/disorientation, abnormal balance/unsteady gait, abnormal visual evoked response, visual discomfort/photosensitivity and tilted optic nerves.*

As can clearly be seen in the explanation of the various problems created by a P.T.V.S they are not just limited to double vision or vision acuity. Had they been limited to just those symptoms, defendant’s position would have had more persuasion.

Dr. Shorr was the Neurologist on this case. He enlisted the help of Optometrist Dr. Garbus to confirm the P.T.V.S. Dr. Garbus did in fact confirm the P.T.V.S.

Dr. Shorr had to consider all aspects of the P.T.V.S. In his report of 5/20/2020 (Exhibit D, EAMS I.D. 33954184). At page 17, Dr. Shorr gave his assessment of the applicant overall as follows:

1. Status Post closed-head trauma with mild traumatic brain injury.
2. Post-traumatic head syndrome with aggravation of pre-existing migraine headaches, cognitive difficulties, and resolving dizziness.
3. Cervical and lumbar myoligamentous strains, deferred to Theodore Georgis, Jr. M.D., the orthopedic panel AME in this case.
4. Neurocognitive disorder, adjustment disorder, post-traumatic stress disorder, and insomnia, per neuropsychological assessment, Ines Monguio, PhD, November 1, 2019.
5. Post-traumatic visual syndrome with abnormal visual-evoked potential studies, visual-spatial deficit, dizziness and giddiness, vertical heterophobia, abnormal gait, myopia bilateral, and regular astigmatism, per neuro-optometric evaluation, Carl Garbus. OD.

Dr. Shorr further commented: The Claimant has undergone a neuro-optometric evaluation with Carl Garbus, OD, who has confirmed post-traumatic visual syndrome. Dr. Garbus advised yoked prisms to help with the navigation and visual-spatial problems; however, this apparently was denied by the carrier. It is not clear on what basis this was denied; however, without the lenses with prisms, the claimant's overall impairment will be significantly higher.

At the time of trial, 10/27/2020, as noted in the Opinion on Decision, it was 4 years post the date of injury. The applicant had not been provided the Prism Glasses and it would have been speculative for the court to assume if they had been given they would have helped. Why were they not given prior? Why didn't the defendants dispose Dr. Shorr and/or Dr. Garbus, if this were an issue? Why wait until now to request further development. At the time of trial there was no evidence the glasses were tried let alone successful. Further as pointed out, this was only one aspect of the P.T.V.S. and there was no clear way to rate a P.T.V.S. other than by analogy.

Despite this, Dr. Shorr did discuss the rating he gave the applicant regarding the P.T.V.S. at page 19 of his 5/20/20 report: He stated:

“Regarding the claimant's post-traumatic visual syndrome, I am referring to page 330, §13.4c, cranial nerves III, IV and VI, the oculomotor, trochlear, and abducens nerves. There are no rating guides other than rating by analogy and AMA guides advise using the impairment rating based on visual acuity loss in Chapter 12, pages 284-285. If diplopia exists, this also would be based on well-documented individualized considerations as discussed Chapter 12. Referring to Table 12-4 on page 285 and 12-10 on pages 298, the claimant would be considered a Class II, which allows for a 10-29% impairment of the whole person for visual acuity as she does have near normal vision. Taking into consideration that the claimant has diplopia when not corrected, whole-person impairment would be calculated per Table 12-10 to be 15% impairment of the whole person without corrective lenses. If the claimant were to have corrective lenses with prisms, she would fall into a Class I, which is 0-9% impairment of the whole person.”

As can be seen, there was no way to rate the P.T.V.S. other than by the analogy using the visual acuity chapters, which Dr. Shorr points out. He clearly knows she has near normal visual acuity, which defendants argue is why he should have used Class one. However, Dr. Shorr clearly used Class II and further indicated that if she were to have corrective lenses with prisms, then she would fall into a Class I with a range of 0-9%. So he made no mistake placing her into a Class II. And as pointed out prior, the prism glasses had not been given her and it would be speculative at the time of trial to assume they would have worked.

It would appear that the Defendants want the court to shore up this case for them by allowing them to now provide prism glasses and then have the applicant reevaluated, hoping to reduce the overall P.D. assessment. However, as noted above there are more symptoms than the visual acuity, and/or double vision. Perhaps Dr. Shorr by using Chapter 12 inadvertently cut short the applicant's P.D. for the P.T.V.S. since the focus by Defendant then became limited to the visual acuity and double vision.

#### **IV** **RECOMMENDATION**

For the reasons stated herein, in the Findings and Award, and in the Opinion on Decision, this court recommends that the Petition for Reconsideration be denied.

**Robert M. Mays**  
**WORKERS' COMPENSATION**  
**ADMINISTRATIVE LAW JUDGE**  
**05/28/2021**