

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

MICHELLE RICHMOND, *Applicant*

vs.

**SANTA ROSA TILE SUPPLY, insured by PROCENTURY INSURANCE,
administered by ILLINOIS MIDWEST, *Defendants***

**Adjudication Number: ADJ9385114
Santa Rosa District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of November 10, 2022, wherein it was found that while employed during a cumulative period ending on May 19, 2014 as a stocker/cashier, applicant sustained industrial injury to her elbows, arms, thumbs, wrists and to her right shoulder causing compensable permanent disability of 77%. In finding permanent disability of 77%, the WCJ found that the applicant rebutted the scheduled whole person impairment rating in the AMA Guides pursuant to *Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837]. Additionally, in making her permanent disability findings, the WCJ applied Labor Code section 4663 apportionment, but did not apply Labor Code section 4664 apportionment to a stipulated Award of September 10, 1991 for a cumulative injury through April 8, 1989.

Defendant contends that the WCJ erred in finding permanent disability of 77%, arguing that the WCJ erred in finding that the scheduled AMA Guides whole person impairment rating was properly rebutted and in not applying section 4664 apportionment to the September 10, 1991 stipulated Award. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report, which we adopt, incorporate, and quote below, we will deny the defendant's Petition for Reconsideration.

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Defendant, Illinois Midwest Insurance Agency, LLC on behalf of Star Insurance Company, through their attorney of record Law Offices of Bradford and Barthel filed a timely, verified Petition for Reconsideration challenging the Findings and Award dated November 10, 2022.

Applicant suffered an industrial injury to her bilateral elbows, arms, thumbs, wrists and right shoulder on a cumulative basis ending May 19, 2014, during the course of her employment as a stocker/cashier for the employer, Santa Rosa Tile Supply. The injury occurred as a result of repetitive job duties including rearranging pieces of tile that weighed approximately 5 pounds each. She was age 54 on the date of injury.

In the F&A, the undersigned WCJ found that the Applicant's injury caused partial permanent disability of 77%, after apportionment, based on the PQME Dr. Yung's *Almaraz/Guzman* analysis with the need for further medical treatment.

Petitioner contends:

- a. Dr. Yung's opinion on permanent disability is not consistent with the principles set forth in *Almaraz/Guzman*. *Petition page 5, line 2-page 9, line 9.*
- b. Permanent disability should be subject to additional apportionment either under Labor Code Section 4664 or Requires Further Development. *Petition page 9, line 10-page 10, line 19.*

II
FACTS

Applicant sustained a cumulative trauma to her bilateral elbows, arms, thumbs, wrists and right shoulder ending May 19, 2014 during the course of her employment as a stocker/cashier with Santa Rosa Tile Company as a result of repetitive job duties.

The applicant had a prior cumulative trauma injury of April 8, 1989 to her back, right arm, neck, right thoracic nerve, and right shoulder which was initially settled by Stipulations with Request for Award for 34:2% permanent disability and then later by Compromise and Release. (App. Exh. 1, Dr. Yung, January 27, 2015.)

Jeffrey Yung, M.D. was utilized as the Panel Qualified Medical Evaluator for the May 19, 2014 industrial injury. Over the course of this claim, he issued five evaluating reports, eight supplemental reports, and availed himself to two depositions.

In his evaluating report on August 1, 2017, Dr. Yung issued a 10% whole person impairment (WPI) for the right shoulder range of motion loss and 2% WPI for each thumb range of motion loss, as the strict AMA guides rating. (App. Exh. 7, Jeffrey Yung, M.D. August 1, 2017) Dr. Yung subsequently invoked *Almaraz/Guzman* to issue a 50% WPI based on Table 13-17 due to applicant's limitations of activities of daily living and difficulty with self-care activities. (Id.) Dr. Yung also imposed an additional 3% WPI based on chronic pain. He apportioned 10% of her right shoulder whole person impairment to her prior CT April 8, 1989 injury at Century Market. An additional 10% whole person impairment of her right wrist was apportioned to the applicant's prior fracture to the right wrist while roller blading and prior injury to the right wrist while working at Ray's Food. (Id.)

On January 9, 2020, Dr. Yung issued a supplemental report and maintained,

“In my opinion the use of table 13-17 is the best means to encapsulate the issues she has with ADLs in regards to her bilateral upper extremities and does resemble the ADL impairments one would see with patients that have nervous system issues. There is no orthopedic chapter that better reflects or describes the ADL issues that she as (sic).”

(App. Exh. 13, Dr. Yung, 1/9/20.)

The applicant was evaluated by two vocational rehabilitation experts, Thomas Sartoris as applicant's expert and Lisa Suhonos, as the defendant's expert. Mr. Sartoris concluded that the applicant is non-amenable to vocational rehabilitation and thus not employable. (App Exh. 14; App. Exh. 15.) Ms. Suhonos, on the other hand, opined that the applicant can perform light work and she is amenable to rehabilitation on a purely industrial basis. (Def. Exh. K.)

This matter was tried on the issues of permanent disability, apportionment, need for further medical treatment, attorney fees, vocational rehabilitation expert fees, the eligibility for the SJDB voucher, defendant's Petition to Strike the PQME and Applicant's Answer.

The applicant testified at trial in substance as follows. During her last year at Santa Rosa Tile she had difficulty lifting, putting items on shelves and concentrating because she hurt so bad, mostly in her right elbow. (MOH/SOE, p. 5, line 45- p. 6, line 2.) She used to be able to vacuum, dust, scrub tile and the bathtub and get down on the floor on her hands and knees to clean. She's not

able to do any of those tasks anymore. (MOH/SOE, p. 6, line 25-26.) The applicant cannot work on a computer very long, no more than half an hour to an hour because her shoulder hurts, and then the pain goes to her neck and causes a headache. (MOH/SOE, p. 6, lines 27-30.) The applicant testified that there has been improvement after the deposition with her surgeries and therapy but there are lots of things the applicant is unable to lift, so she has to be careful with what she's doing. (MOH/SOE, p. 8, lines 18-21.)

An F&A issued awarding permanent partial disability of 77%, after apportionment pursuant to Labor Code section 4663, based on Dr. Yung's application of *Almaraz/Guzman*. The undersigned WCJ concluded that Dr. Yung's rating by analogy is a more accurate measure of impairment.

It is from this Findings and Award that petitioner seeks reconsideration.

III **DISCUSSION**

A. THE OME JEFFREY YUNG'S ANALOGOUS RATING TO TABLE 13-16 IS APPROPRIATE UNDER THE ALMARAZ/GUZMAN DECISION.

A physician may utilize any chapter, table or method in the AMA Guides that most accurately reflects the injured employee's impairment. (*Almaraz/Guzman II* (2009) 74 Cal. Comp. Cases 1084 at 1114.) A physician may employ the four corners of the AMA guides in reporting an applicant's WPI as long as they provide appropriate justification for doing so.

According to the petitioner, the injury here and its effects on ADL do not rise to the level of such an injury in Table 13-17 which is a rating impairment due to a systemic issue originating in the brain with dysfunction "manifested by weakness, tremor, or pain that affects ADL" that results from "but is not limited to, traumatic brain injury, stroke, neurodegenerative disease, multiple sclerosis and sequelae of CNS infection." (Petition p. 7, lines 23-28.)

This argument ignores the basic tenet of *Almaraz/Guzman*. The plain language in the holding of *Almaraz/Guzman*, states that a physician may use any chapter, table, or method within the "four corners" of the Guides that most accurately affects the injured employee's impairment. The account to be taken of the nature of an employee's injury does not limit the examining physician to any particular chapter, table, or method of the guides. In reaching an impairment opinion that is not based on a strict application of the AMA Guides a physician may consider a wide variety of medical and non-medical information, including the applicant's subjective complaints.

Additionally, the petitioner's argument seeks to arbitrarily narrow the applicability of Table 13-17. Of course, a physician's use of Table 13-17 isn't confined to the specific neurological diseases listed by the petitioner. Instead, the impairment ratings provided in Table 13-17 is "determined from neurologic examination of motor strength, coordination, and dexterity. Functional activities such as buttoning a shirt, lacing shoes, writing, and performing a pegboard task can assess abilities needed for daily activities." (AMA Guides, p. 338.)

In his evaluating reports of August 1, 2017 and September 26, 2018, Dr. Yung noted the applicant's activities of daily living limitations regarding her right shoulder, right upper extremity, and left upper extremity. The applicant noted that writing, combing her hair, drying off from the shower, and washing her back cause her right shoulder pain. (App. Exh. 7, Dr. Yung, August 1, 2017; App. Exh. 11, Dr. Yung, September 26, 2018.) It was also noted that lifting, grasping, pulling, pushing and housework cause difficulty with her right shoulder. (Id.) The applicant noted that lifting and grasping cause left upper extremity pain. (Id.)

In *Guzman*, the court held that Dr. Feinberg was justified for his use of a higher WPI based on the effect of the injury on applicant's activities of daily living. (*Milipitas Unified School Dist. v. WCAB* (2010) 187 Cal. App. 4th 808.) In that case, the appellate court affirmed the Appeals Board's reliance on Dr. Feinberg's opinion.

This is precisely the method employed by Dr. Yung in this matter. The *Guzman* decision allows Dr. Yung to rely on the effects of the injury on applicant's activities of daily living to deviate from the strict AMA Guide and get a more accurate assessment. Dr. Yung operated entirely within the four corners of the AMA Guides, as set forth in *Almaraz/Guzman* and provided adequate justification for doing so. There is nothing in the petition to disrupt the finding of permanent partial disability of 77% based on Dr. Yung's cogent *Almaraz/Guzman* analysis.

B. THE COURT PROPERLY APPLIED APPORTIONMENT SOLELY ACCORDING TO LABOR CODE §4663.

Petitioner contends that the applicant's prior award of 34.5% should be conclusively presumed to exist and be subtracted from the current award of permanent disability. (Petition p. 10, lines 8-10.)

Labor Code section 4664 provides in relevant part,

(b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent

disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof. (Labor Code §4664(b).)

Defendant has the burden of proof to show there is overlap between the current disability and the disability that was the subject of the prior award. (*Kopping v. WCAB* (2006), 71 CCC 1229.) Defendant's burden of proving overlap is made even more challenging when the prior injury was rated using a different standard than the current injury, as in this case.

The applicant's prior cumulative trauma from April 9, 1988 through April 8, 1989 settled via Stipulations with Request for Award for 34:2% for her back, right arm, neck, right thoracic nerve, and right shoulder. (Def. Exh. C.) This industrial injury was rated under the 1997 permanent disability schedule and the current injury was rated under the 2005 Schedule using the AMA Guides.

The undersigned WCJ applied apportionment pursuant to Labor Code section 4663 according to Dr. Yung's opinion. Yet, the defendant failed to show overlap between the prior stipulated award and the cumulative trauma through May 19, 2014 pursuant to Labor Code section 4664. Dr. Yung failed to assess the applicant's whole person impairment from the prior injury under the AMA Guides. In fact, at petitioner's insistence, Dr. Yung repeatedly claimed that it would be speculative to rate the applicant's prior injuries under the AMA Guides. At his deposition, Dr. Yung specifically testified,

Q: Okay. And when looking at your work restrictions and comparing them with Dr. Kucera's for the right shoulder, is one more restrictive than the other, or are they the same?

A: I think it's very difficult to compare. I think when Dr. Kucera did his rating, it was under an entirely different system of rating when the one I have been asked to use. In my opinion it's comparing apples to oranges.

Q: Okay. Even though they are work restrictions and -

A: It meant a different thing back then. To write restrictions was directly related to the rating of the patient. I don't think you can compare his language with the language I have used. Apples to apples in my opinion.

Q: Now, would you be able to convert his opinion to something that would be apples to apples or?

A: I think that's extremely difficult. I think I addressed

apportionment in the best way I know how in one of my latter reports for her in regards to that specific injury.

(Def. Exh. L, Dr. Yung deposition, March 5, 2019, p. 12, line 25- p. 13, line 21.)

Petitioner seemingly ignores that the prior award does not specifically allocate percentages of permanent disability to the multiple body parts identified in the settlement. For example, back and right thoracic nerve are included within the 34:2% permanent disability award but neither body part are claimed as part of the current injury. In the absence of substantial medical evidence proving overlap, the prior award of permanent disability cannot be properly apportioned to the body parts in this case.

IV. RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award of November 10, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 3, 2023

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

**MICHELLE RICHMOND
FLUSS & WILLIAMS
LAW OFFICES OF BRADFORD & BARTHEL**

DW/ara

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