

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

EFRAIN CHAVARRIA, *Applicant*

vs.

**STATE OF CALIFORNIA, CAL FIRE; STATE COMPENSATION
INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ9800707
Fresno District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Appeals Board's Opinion and Decision After Reconsideration of December 20, 2021, in which we found, pursuant to *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] ("*Almaraz-Guzman*"), that the assessment provided by Agreed Medical Evaluator (AME) Dr. Alpern for additional impairment resulting from applicant's reproductive injury rebutted the strict application of the AMA Guides, and that the industrial injury to applicant's abdomen, groin, testicular cancer, and heart during the period ending December 11, 2014 resulted in permanent disability of 71 percent. Accordingly, we amended the Findings and Award issued by the Workers' Compensation Judge (WCJ) on November 30, 2020, wherein the WCJ had found that there was no *Almaraz-Guzman* rebuttal, and that the injury in question resulted in permanent disability of 65 percent.

Defendant contends that we erred in relying upon *City of Sacramento v. Workers' Comp. Appeals Bd. (Cannon)* (2013) 222 Cal.App.4th 1360 [79 Cal.Comp.Cases 1] because the case is factually distinguishable, that we failed to recognize that functional loss is covered by the "strict rating" for reproductive impairment provided by the AMA Guides, that we failed to recognize that the values in the AMA Guides for impairment resulting from testicular disease are standardized for applicant's age and gender, and that we erred in relying upon Dr. Alpern because he did not

explain how and why applicant's pre-injury reproductive capacity and/or hormonal function was above the population norm.

Applicant filed an answer.

We have considered the contentions of defendant's Petition for Reconsideration, and we have revisited the record in order to evaluate the merits of the contentions. Based on our re-review of the record, and for the reasons stated below and in our Opinion and Decision After Reconsideration of December 20, 2021, which we adopt and incorporate, we will deny reconsideration.

Defendant is correct that the facts of this case are different from those of *City of Sacramento v. Workers' Comp. Appeals Bd. (Cannon)* (2013) 222 Cal.App.4th 1360 [79 Cal.Comp.Cases 1]. However, we did not rely on *Cannon* for its facts but for its legal holding that the goal of formulating a valid impairment rating under *Almaraz-Guzman* is to approximate the rating that most accurately reflects the injured employee's actual impairment. In objecting to our reliance upon the *Cannon* case, defendant's Petition for Reconsideration does not address the issue of why the AMA Guides "strict rating" of impairment resulting from applicant's testicular injury is the one that most accurately reflects his actual impairment.

Defendant further relies upon the general statement on page four of the AMA Guides that the evaluation of impairment under the Guides includes functional loss. According to defendant, this statement "demonstrates that the loss of reproductive function and inability to produce testosterone have already been considered and incorporated in the AMA rating for anatomic loss of the testicles or absence of hormonal function, [so] an increase in impairment based on these factors is not warranted in [this] case." (Petition for Reconsideration, p. 6:6-9.) The contention is unpersuasive because it is unsupported by reference to medical evidence of record in this case. Otherwise, it appears the contention is based upon defense counsel's unqualified medical opinion, which is not substantial evidence upon which the Board may properly rely to determine the issue of permanent impairment.

The same is true of defendant's allegation that "there is no increase or decrease [of testicular impairment] for applicants 40 to 65 years old [under Chapter 7, Table 7-7 of the AMA Guides], because they are precisely the group that was considered in determining the impairment criteria and ranges in the rating tables for the male reproductive organs." (Petition for Reconsideration, p. 6:21-24.) Furthermore, the allegation is rebutted by Dr. Alpern's medical

opinion. As explained on page three of our prior opinion, Dr. Alpern testified in his deposition that because applicant is a younger man, “there should be an increase in impairment because of his younger age and loss of reproductive activity. Therefore, on that basis [under] *Alvarez-Guzman* and using this concept of increasing the percentage, while it may not be another 10 percent added, I would say at least something, and I would add 8 percent impairment to the whole person.”

We also reject defendant’s allegation that Dr. Alpern failed to explain how and why applicant’s pre-injury reproductive capacity and/or hormonal function was above the population norm. Defendant evidently did not raise the issue of “population norms” when Dr. Alpern testified in his deposition that there should be an increase in impairment because of applicant’s younger age and loss of reproductive activity. The doctor’s testimony on this point is unrebutted and we remain persuaded it is substantial evidence on the issue of permanent impairment. (*Place v. Workers’ Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 2, 2022

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

**EFRAIN CHAVARRIA
LEWIS MARENSTEIN, WICKE, SHEWIN & LEE
STATE COMPENSATION INSURANCE FUND**

JTL/ara

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

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Award of November 30, 2020, the Workers' Compensation Judge (WCJ) found that applicant, while employed as a fire apparatus engineer during the cumulative trauma period ending December 11, 2014, sustained industrial injury to his abdomen, groin, testicular cancer, and heart, causing permanent disability of 65%. In connection with the latter finding, the WCJ also determined that the assessment of additional impairment for applicant's reproductive injury, as described by Dr. Alpern, Agreed Medical Evaluator (AME), did not rebut the strict application of the AMA Guides per the requirements of *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] ("*Almaraz-Guzman*").

Applicant filed a timely petition for reconsideration of the WCJ's decision. Applicant contends, in substance, that the WCJ erred in rejecting Dr. Alpern's Whole Person Impairment (WPI) add-ons for applicant's reproductive injury under *Almaraz-Guzman*, and that an 8% add-on for reproductive impairment and 1% add-on for lifetime testosterone replacement should be included in applicant's permanent disability award.

Defendant filed an answer.

The WCJ submitted a Report and Recommendation (Report).

Based on our review of the record and applicable law, we are persuaded that applicant is entitled to a permanent disability award that includes the *Almaraz-Guzman* impairment rating add-ons described by Dr. Alpern to compensate for the effects of applicant's testicular cancer. We will amend the WCJ's decision accordingly.

The sole issue upon reconsideration is the nature and extent of applicant's permanent disability, which proceeded to telephonic trial before the WCJ on September 22, 2020. As noted above, the WCJ found that the industrial injury to applicant's abdomen, groin, testicular cancer, and heart resulted in permanent disability of 65%. The WCJ relied upon the "strict" WPI ratings for applicant's hypertensive cardiovascular disease and reproductive system injury under the AMA Guides, consistent with part of the medical opinion of Dr. Alpern, AME in internal medicine and cardiovascular disease. (See WCJ's Opinion on Decision, pp. 2-3.) Upon reconsideration, the permanent disability rating of 51% for applicant's hypertensive cardiovascular disease is not challenged; only the impairment rating for injury to his reproductive system remains in dispute.

Although Dr. Alpern authored six narrative reports that were admitted into evidence as exhibits A through F, the doctor did not provide a WPI rating for applicant's reproductive system injury until his deposition of May 27, 2016. (Exhibit G.) On pages 16-18 of his deposition, Dr. Alpern testified that under Table 7-7 of the AMA Guides (Criteria for Impairment Due to Testicular, Epididymal and Spermatic Cord Disease), applicant has a WPI rating of 20% as a result of his testicular cancer. This is the "strict rating" under the AMA Guides.

However, Dr. Alpern also provided an *Almaraz-Guzman* impairment rating in his deposition testimony. At pages 19:16 through 23:17 of his deposition, Dr. Alpern testified in response to questioning by applicant's attorney as follows:

Q. Okay. Okay. Let's go back to this. So I notice table 7-7 is what you used for impairment. This is not any reference to table 7-6 concerning scrotum loss; this is a separate chapter - - excuse me - - a separate table used with respect to the testicles?

A. Correct.

Q. Okay. And also referring to page 156 of the AME guides concerning the male reproductive organs, I noticed that this man at the time of at least the date of injury is 40 years old. On page 156 here, we see this provision that a man who is younger than 40, that the percentage of impairment is increased by 50 percent, considering the age of impact upon - - I believe it's sexual function - - as an average daily living activity.

Would that apply here - - by my counts here, this man was just 40 years old as of the date of injury that we filed upon. Would this 50 percent addition apply to this applicant?

A. Well, he was over 40, and if - - since we generally, for all things in the AME guides, look at precise numbers - - even if I thought he had some increase, generally, I'm not prone to do it because of the precise number of usage in the AME guides.

Q. Right. How about in terms of evaluating applicant's accurate assessment of whole-person impairment pursuant to the *Almaraz-Guzman* line of cases, allowing a physician to use a clinical judgment and expertise to accurately evaluate impairment using any table and chapter in guides?

A. I say it's reasonable because this is a younger man, and if we don't go by the precise numbers, I would say there should be an increase in impairment because of his younger age and loss of reproductive activity. Therefore, on that basis about *Almaraz-Guzman* and using this concept of increasing the percentage, while it may not be another 10 percent added, I would say at least something, and I would add 8 percent impairment to the whole person.

Q. Okay. And just to be clear, I believe what this allows us to do is take - - so another 8 [percent]. Oh. I see what you did there. That completely makes sense. You did the math faster than I was

evaluating how it would apply to this provision in this chapter. Thank you for that. 8 [percent.] That's excellent. Okay.

In page 160, there's an example 7-35. And this 7-35, this refers to an individual - - of course these examples don't apply perfectly, but this refers to an individual who's lost both testicles as well. I understand that. And down here, you see in the "Impairment Rating Section," it also indicates you can combine with impairments to scrotal loss and endocrine loss for the whole-person impairment.

A. It's the same.

Q. We already touched on the issue of - -

A. It is exactly the same situation.

Q. Right. Right. So in combining these impairments, did you find an additional impairment applicable with regard to scrotal loss pursuant to table 7-6 where this man is either - - look at this first. "Partial Scrotal Loss, Class 2" involves a total scrotal loss. And in this particular situation, do you feel any provision of this particular table 7-6 applies to this man as well?

A. No.

Q. Okay. Moving onto the endochronic gland. I noticed at page - - let me get my notes here. Okay, Page 212 of the guide. Through the discussion - - and this is at page 212 on the left-hand column towards the bottom here. There's a paragraph that starts discussion disorders resulting in either the increased or decreased secretion of a particular hormone. And as I understand it - - correct me if I'm wrong, Doctor - - the testicles are what produce testosterone in a man, correct?

A. Yes. I'm not taking this into consideration because his testosterone is being replaced. So he's - - you - - he essentially has the same amount of testosterone that he would have otherwise. There's no loss. And it's not involving the pituitary because he's receiving this testosterone. So the pituitary would not be involved in a response.

Q. Right. Right. I'm not asking about the pituitary. At the very top of the right-hand column on page 212, it talks about, even with appropriate medication, is debatable whether the individual has regained a previous state of good health. And this is not, you know, a whole lot here, but it says the examiner may increase the

impairment by rating a small percentage of 1, 2, 3 percent for an incomplete return to a condition of normal health.

Now, setting that, my question in this respect is - - my understanding is this man is taking an artificial replacement medication to artificially replace testosterone that his body can no longer produce. And as a factor of impairment, basically, my question: Would he qualify for an additional 1, 2, 3 percent impairment, considering that his body is no longer able to naturally produce this testosterone?

A. Given the fact that he's not taking it by injection and he is taking it by skin application, and given the fact that it's a messy thing to do, and given the fact that he's close to his spouse, she could get testosterone effects from touching him. And given that this is all part of his functioning, I would add 1 percent under this chapter.

Based on our review of the medical record, including Dr. Alpern's deposition testimony as set forth above, we are persuaded that the doctor's *Almaraz-Guzman* impairment rating for applicant's reproductive system injury is substantial evidence that justifies its inclusion in the permanent disability award. We reach this conclusion because the opinion expressed by Dr. Alpern in his deposition concerning the residual effects of the injury to applicant's reproductive system provides the most accurate assessment of impairment, consistent with *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Almaraz-Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].

In *Almaraz-Guzman*, the Court of Appeal concluded that the language of Labor Code section 4660 permits reliance on the entire AMA Guides, including the instructions on the use of clinical judgment, in deriving an impairment rating in a particular case. The Court stated in relevant part, "the physician must be permitted to explain why departure from the impairment percentages is necessary and how he or she arrived at a different rating. That explanation necessarily takes into account the physician's skill, knowledge, and experience, as well as other considerations unique to the injury at issue." (75 Cal.Comp.Cases at 854.)

In *City of Sacramento v. Workers' Comp. Appeals Bd. (Cannon)* (2013) 222 Cal.App.4th 1360 [79 Cal.Comp.Cases 1], the Court of Appeal provided further guidance on application of the principles discussed in *Almaraz-Guzan*. In *Cannon*, the Court concluded that a police officer's plantar fasciitis, manifested only by his subjective experience of pain, fell into the *Almaraz-Guzman* category of cases. In such cases, the AMA Guides call for the physician's exercise of clinical judgment to assess the impairment most accurately. (Emphasis added.) In *Cannon*, the Court found no fault with the AME's conclusion that the police officer's plantar fasciitis was equivalent to a limp with arthritis, resulting in a 7 percent WPI for purposes of determining permanent disability. The *Cannon* case illustrates the kind of explanation a medical evaluator must provide in order to arrive at a valid assessment of WPI in an "*Almaraz-Guzman*" situation.

In *Cannon*, the AME, Dr. Ramsey, explained in supplemental reports that at first he could not give any impairment rating based upon a strict interpretation of the AMA Guides (5th Ed.) because the

applicant had some tenderness in his foot but no objective abnormalities. However, Dr. Ramsey noted that heel pain and other aspects of pain, without other objective abnormalities, do not generate an impairment rating under AMA Guides, regardless of whether such problems interfere with the injured employee's activities. Therefore, a strict interpretation of the AMA Guides does not always accurately reflect the injured employee's problems. For these reasons, Dr. Ramsey found it acceptable to characterize the applicant's residual medical condition by analogy to a gait derangement abnormality. The doctor noted that the applicant's left heel pain interfered with weight-bearing activities and running, so he recommended an impairment rating based on Table 17-5 of the AMA Guides (Gait Derangement, p. 529). Dr. Ramsey believed that the applicant's condition was comparable to that of a person having a permanent limp, despite the fact that the applicant had no arthritic changes in adjacent joints. According to Dr. Ramsey, this equated to a WPI of 7% under Table 17-5, and the Court of Appeal agreed. (*Cannon, supra*, 222 Cal.App.4th at 1364-1365.) In other words, the goal of formulating a valid impairment rating under *Almaraz-Guzman* is to approximate the rating that accurately reflects the injured employee's actual impairment, which may or may not be the highest rating, depending on the facts of the case at hand.

In this case, Dr. Alpern explained in his deposition that at 40 years old at the time of injury, applicant was at a relatively young age to lose his reproductive capacity. The doctor testified that it is reasonable to add 8% impairment to the strict AMA Guides WPI rating, because applicant "is a younger man, and [even] if we don't go by the precise numbers...there should be an increase in impairment because of his younger age and loss of reproductive activity. Therefore, on that basis [under] *Almaraz-Guzman* and using this concept of increasing the percentage, while it may not be another 10 percent added, I would say at least something, and I would add 8 percent impairment to the whole person." (Exhibit G, pp. 20-21.)

In her Opinion on Decision, the WCJ states that Dr. Alpern failed to explain how he derived the 8% add-on and why applicant's reproductive impairment is not adequately reflected by strict application of the AMA Guides. We disagree. It is clear from Dr. Alpern's deposition testimony that he believes strict application of the AMA Guides rating, at 20% WPI, is inaccurate because of applicant's loss of reproductive activity at the relatively young age of 40. The fact that Dr. Alpern estimated the appropriate add-on at 8%, rather than the whole 10% increase (50 percent of the "strict" WPI of 20%) indicated on page 156 of the AMA Guides, shows that the doctor was exercising his 'skill, knowledge, and experience, as well as other considerations unique to the injury at issue,' consistent with the approach approved by the Courts of Appeal in *Almaraz-Guzman* and *Cannon*. Further, Dr. Alpern's opinion should be followed, absent a compelling reason to the contrary, because of his presumed expertise and neutrality in his role as the Agreed Medical Evaluator. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

We reach the same conclusion concerning Dr. Alpern's deposition testimony that an additional 1% is appropriate because applicant has lost the ability to naturally produce testosterone, as authorized by the AMA Guides, page 212. The doctor explained that this 1% add-on to the WPI rating is appropriate because applicant was taking testosterone by skin application, which is messy and could result in his spouse getting testosterone effects from touching him, all of which "is...part of his *functioning*[".]" (Exhibit G, p. 23.)

As noted before, the goal of formulating a valid impairment rating under *Almaraz-Guzman* is to approximate the rating that accurately reflects the injured employee's actual impairment. Here, there is no basis to second-guess Dr. Alpern's deposition testimony that the rating that most accurately reflects applicant's actual impairment includes accounting for the relatively young age at which he lost reproductive capacity and the loss of functioning occasioned by his inability to naturally produce testosterone. Therefore, we will follow Dr. Alpern's *Almaraz-Guzman* impairment add-ons in rating the permanent disability that has resulted from applicant's industrial testicular cancer:

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The combined rating is 51 C 41: 71% permanent disability.

Finally, we also agree with the WCJ that applicant's attorney should be allowed a reasonable fee equivalent to 15% of the value of the permanent disability award, including the life pension. However, it will be appropriate for the parties and the WCJ to consider a "horizontal" commutation of the award in order to account for the attorney's fee. (*Navarro v. McClarty Farms & State Compensation Ins. Fund* (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 537.) Therefore, the award will be subject to adjustment pending further proceedings on the attorney's fee, with assistance from the Disability Evaluation Unit as necessary or appropriate.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of November 30, 2020 is **AFFIRMED**, except that Findings 2 and 3, and paragraphs (a.) and (b.) of the Award, are **RESCINDED**, and the following Findings 2 and 3, and paragraphs (a.) and (b.) of the Award, are **SUBSTITUTED** in their place:

FINDINGS OF FACT

2. Dr. Alpern's *Almaraz-Guzman* assessment of additional impairment for applicant's reproductive injury rebuts the strict application of the AMA Guides.
3. The injury caused permanent disability of 71%, indemnity for which is payable for 449.25 weeks at \$290.00 per week until the total sum of \$130,282.50 is paid, followed by a life pension of \$85.04 per week subject to Cost of Living Adjustments pursuant to *Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434 [76 Cal.Comp.Cases 71], less a reasonable attorney's fee equivalent to 15% of the permanent disability award, with the award subject to adjustment to satisfy the attorney's fee, which shall be determined by the WCJ with assistance from the Disability Evaluation Unit as necessary or appropriate, jurisdiction reserved.

AWARD

...

- a. Permanent partial disability as set forth in Finding 3.
- b. Reasonable attorney's fees as set forth in Finding 4 and paragraph a. of the Award.