

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

JOSE MENDEZ, *Applicant*

vs.

**SUN AND SANDS ENTERPRISES, LLC, and INSURANCE COMPANY OF THE WEST,
*Defendants***

**Adjudication Number: ADJ10809397
Riverside District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on July 2, 2021, wherein the WCJ found in pertinent part that applicant's injury caused 45% permanent partial disability.¹

Defendant contends that the reports from internal medicine – pulmonary disease qualified medical examiner (QME) James F. Lineback, M.D., are not substantial evidence regarding permanent disability and applicant's non-orthopedic injury should be rated at 0% disability.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received a Response (Answer) from applicant.

We have considered the allegations in the Petition for Reconsideration (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 deny reconsideration.

BACKGROUND

Applicant claimed injury to his chest, left shoulder, and lumbar spine while employed by defendant as an irrigator on December 30, 2016.

¹ We note that defendant was ordered to serve the F&A. Appeals Board Rule 10629 states that a party may be ordered to serve an order that the Appeals Board is "not required to serve in accordance with rule 10628." Appeals Board Rule 10628 states that the Appeals Board will serve "any final decision or award issued by it on a disputed issue" and that the Appeals Board "shall not designate a party" to serve any final order, decision or award relating to a submitted issue. (Cal. Code Regs., tit. 8, §§ 10628, 10629.)

On April 12, 2018, applicant was evaluated by QME Dr. Lineback. (Joint Exh. 3, Dr. Lineback, April 12, 2018.) Dr. Lineback examined applicant, took a history, and reviewed the medical record. The diagnoses included post blunt chest trauma, history of pneumothorax (collapsed lung) with chest tube placement, low back pain, history of rib and clavicular fractures, and left shoulder pain. (Joint Exh. 3, pp. 16 – 17.) Regarding the cause of applicant’s condition, Dr. Lineback stated:

The medical records pertaining to this case clearly show this patient suffered a severe chest injury. The clavicular fracture appeared to be displaced and the patient appeared to have landed on his left shoulder. The cause of his pneumothorax was felt to be traumatic. Clearly, this patient's chest symptoms are a direct result of the blunt chest trauma that he sustained on December 20, 2016. Therefore, his chest symptoms should be considered job related and should be treated on an industrial basis.

(Joint Exh. 3, p. 17.)

Dr. Lineback re-evaluated applicant on August 13, 2019. Dr. Lineback re-examined applicant, read additional medical records, and determined that applicant was, “Temporarily Totally Disabled until pulmonary function tests are scheduled and completed.” (Joint Exh. 2, Dr. Lineback, August 13, 2019, p. 9.)

After reviewing the pulmonary function test results Dr. Lineback concluded:

Fortunately, this patient's pulmonary function tests are entirely within normal limits, essentially ruling out obstructive airways disease. That is to say, that in spite of smoking for 20 years and being exposed to pesticides for a number of years, his pulmonary function tests are within normal limits, essentially ruling out any industrial injury to his lungs. ¶ As stated previously, this patient sustained a severe injury to his chest in December of 2016 He also developed a pneumothorax that required chest tube placement. He continued to experience persistent chest pain in August 2019, nearly three years after his industrial injury. (Joint Exh. 1, Dr. Lineback, March 19, 2020, p. 2.)

Regarding the whole person impairment (WPI) caused by applicant’s injury, Dr. Lineback stated:

Unfortunately, no AMA criteria address chest wall pain. Since this is, indeed, a chest injury, the AMA Guidelines for the respiratory system will be utilized. This patient fits the criteria for Class 2 (15%) impairment of the whole person as per the AMA Guidelines pertaining to the respiratory system using Table 5-10 and 5-12. ¶ There is no basis for apportionment in this case to nonindustrial factors pertaining to this patient's chest pain. One hundred percent of his

disability with respect to chest pain should be apportioned to his industrial chest injury.
(Joint Exh. 1, p. 3.)

When asked to further explain his rating of applicant's disability, in his supplemental report Dr. Lineback explained:

As I stated in my initial report from this office dated April 12, 2018, this gentleman continues to experience chronic chest pain that is associated with shortness of breath. His exercise tolerance is limited as a result of that chest pain which can be duplicated by palpation of the chest on physical exam. He also has a surgical scar from previous chest tube placement in the left thorax that is moderately tender to palpation. ¶ Unfortunately, no AMA Guidelines exist for chronic injuries to the chest wall and so a rating using the principles of the Almaraz Guzman decisions is in order; the only possible way to rate his disability is by analogy. Therefore, the use of the AMA Guidelines pertaining to the respiratory system seems to [be] the most logical substitute. Due to the severity of this patient's chest injury, as well as the severity of his chest wall pain that has become chronic, he best fits the criteria for Class 2 (15%) impairment of the whole person as per the AMA Guidelines pertaining to chest wall pain even though his pulmonary function tests are within normal limits. I suppose if this analogy is unacceptable, one could use Chapter 6, Table 6-9, Class 2 which states, "Palpable defect in supporting structures of abdominal wall (and substitute chest) **AND** frequent discomfort precluding heavy lifting but not hampering some activities of daily living." I would still leave his Whole Person Impairment at 15%. Either way, the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition do not adequately address the disability Mr. Mendez was left with which impair his activities of daily living and work activities.

(Joint Exh. 5, Dr. Lineback, November 30, 2020, p. 2, emphasis in original.)

The parties proceeded to trial on August 5, 2020, and the matter was submitted. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 5, 2020.) The WCJ issued an Order Vacating Submission pending further development of the record. On April 1, 2021, the WCJ issued a Findings and Award, and issued an Order setting aside the Findings and Award on April 2, 2021.

On June 22, 2021, the parties again proceeded to trial. (MOH/SOE, June 22, 2021.) The issues submitted for decision included permanent disability. (MOH/SOE, August 5, 2020.)

DISCUSSION

We note that Dr. Lineback's reference to "the Almaraz Guzman decisions" is in regard to the Appeals Board en banc decision which was affirmed by the Sixth District Court of Appeal,

wherein the Court explained that the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides) provide guidelines for the exercise of professional skill and judgment which, in a given case, may result in ratings that depart from those based on the strict application of the AMA Guides. (*Almaraz v. Environmental Recovery Services / Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) (*Almaraz/Guzman II*) affirmed by *Milpitas Unified School Dist. v. Workers' Compensation Appeals Board* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] [hereafter *Almaraz/Guzman*] (modified on other grounds on September 1, 2010).) The Court further explained that application of the AMA Guides must take into account the instructions on its use, which clearly prescribe the exercise of clinical judgment in the impairment evaluation, even beyond the descriptions, tables, and percentages provided for each of the listed conditions. (*Id.* at 824.)

Defendant argues that Dr. Lineback failed to address the four requirements, stated in *Almaraz/Guzman*, necessary to rebut the strict application of the AMA Guides: (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 most accurately reflects the applicant's level of disability. Defendant is correct that *Almaraz/Guzman* specifies the four requirements. However, defendant is incorrect in its argument that Dr. Lineback did not address those factors in reaching his conclusion as to rating applicant's disability.

First, Dr. Lineback clearly stated that "Unfortunately, no AMA criteria address chest wall pain" (Joint Exh. 1, p. 3), and "... no AMA Guidelines exist for chronic injuries to the chest wall." (Joint Exh. 5, p. 2.) Based on our review of the AMA Guides, we agree with Dr. Lineback that they do not contain any criteria for addressing applicant's chest injury. Thus, there is no means by which the doctor could provide a strict rating and in turn he could not explain why a strict rating would not be accurate. Under these circumstances, Dr. Lineback must exercise his professional skill and judgment to determine an accurate rating of applicant's disability. Also, Dr. Lineback did provide an alternative rating "within the four corners of AMA Guides" by analogizing applicant's chest injury with "the AMA Guidelines pertaining to the respiratory system" (Joint Exh. 5, p. 2.) He then explained why applicant's symptoms were consistent with "the criteria for Class 2 (15%) impairment of the whole person..." (Joint Exh. 5, p. 2.) For these reasons, we agree with the WCJ

that Dr. Lineback's reports, and his opinions stated therein as to applicant's disability constitute substantial evidence. (See F&A, p. 4, Opinion on Decision.)

Finally, defendant argues that because Dr. Lineback relied "only on subjective complaints" his reports are not substantial evidence. The 3rd District Court of Appeal affirmed the Appeals Board's decision that an applicant's foot condition resulted in a 7% whole person impairment for the purposes of determining permanent disability when the impairment was based on an analogy to a gait derangement abnormality, even though no objective abnormalities were found. The court held that the lack of objective abnormalities did not preclude a rating by analogy under *Almaraz/Guzman* based solely on subjective complaints of pain. The court also held that a rating by analogy was not limited to complex or extraordinary cases, but was permissible if the physician exercises clinical judgment to assess the impairment most accurately. (*City of Sacramento v. Workers' Comp. Appeals Bd. (Cannon)* (2013) 222 Cal.App.4th 1360 [79 Cal.Comp.Cases 1].)

As discussed above, Dr. Lineback appropriately exercised his clinical judgment in rating applicant's disability by analogy based on his examination of applicant and his review of the medical record. His reports constitute substantial evidence and we see no basis for disturbing the WCJ's F&A.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued by the WCJ on July 2, 2021, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 17, 2021

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

**JOSE MENDEZ
LAW OFFICES OF PHILIP H. FLICKINGER
DAVIDSON, CZULEGER & BLALOCK**

TLH/pc

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