WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARTIN SCHMIDT, *Applicant*

vs.

FREMONT SWIM SCHOOL, SECURITY NATIONAL INSURANCE COMPANY, administered by AMTRUST N.A., *Defendants*

Adjudication Number: ADJ12311590
Sacramento District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by applicant Martin Schmidt. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the August 24, 2021, Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) found that applicant is not entitled to the Supplemental Job Displacement Benefit (SJDB) voucher because there is no substantial medical evidence of permanent partial disability.

Applicant contends that there is substantial evidence that applicant was an employee of defendant and sustained an industrial injury. Applicant further contends that his employment resignation has no bearing on his entitlement to a voucher. Lastly, applicant contends that defendant has the burden to obtain the Physician's Return to Work & Voucher Report (Form DWC-AD 10133.36).

We have not received an answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied. The WCJ noted that there are no findings with respect to applicant's resignation or with respect to the Physician's Return to Work & Voucher Report and asks that should we find that there is permanent partial disability, that the matter be remanded to the trial level to determine these issues.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we rescind the August 24, 2021 Findings of Fact and return this matter to the trial level for further proceedings consistent with this Opinion.

FACTS

The WCJ stated the following facts:

> Applicant sustained an industrial injury on September 15, 2015. Applicant had industrially related hernia surgery on October 23, 2015. After the surgery applicant returned to work, working modified duties. Applicant was having difficulty performing his job and thus voluntarily resigned in June 2018.
>
> The parties utilized Dr. Davidson as the PQME. Dr. Davidson issued a report dated December 3, 2019 in which he found that applicant sustained 0% permanent disability on a strict AMA Guides analysis and further provided an *Almarez/Guzman* [*sic*] analysis opining that applicant sustained 10% impairment. Dr. Davidson did not provide a Physicians Return to Work form and defendant did not provide an offer of alternative or modified work. The parties ultimately settled the case in chief via Compromise & Release on September 9, 2020.
>
> The parties disputed if applicant was eligible for supplemental job displacement benefits. Defendant argued that Dr. Davidson's *Almarez/Guzman* [*sic*] analysis was flawed and thus applicant's level of permanent disability was zero, applicant disagreed. Applicant also argued that because he was not offered alternative or modified work, he was entitled to the voucher. The matter was therefore set for trial on these issues. The Court ruled that there was no substantial evidence that applicant sustained permanent partial disability and thus applicant was not entitled to the benefits. Applicant appeals this ruling. (Report, pp. 1-2.)

DISCUSSION

The WCJ provided the following reasons to support the finding that applicant did not sustain permanent partial disability.

> Defendant argues that applicant is not eligible for the benefits because there is no substantial evidence that applicant sustained any permanent disability. Dr. Davidson found that on a strict analysis of the AMA Guides applicant sustained 0% WPI under Table 6-9. However he noted that applicant has surgical scarring and constant persistent pain. He did not

> believe that applicant's strict rating was an accurate assessment of his level of permanent disability and therefore found impairment under *Almarez/Guzman* [*sic*]. However, Dr. Davidson's analogy is also under Table 6-9. Dr. Davidson opined that applicant's impairment involved the second criteria under Class 2 which is "frequent discomfort, precluding heavy lifting but not hampering some activities of daily living." Essentially, Dr. Davidson eliminated the first requirement of Class 2 impairment under Table 6-9 (requiring palpable defect in supporting structures of abdominal wall). *Almarez/Guzman* [*sic*] allows a physician to analogize applicant's impairment to any table in the AMA Guides. Dr. Davidson first states that applicant has no disability utilizing Table 6-9 and then tries to "analogize" applicant's disability to the exact same table; this is not what *Almarez/Guzman* [*sic*] envisioned. Dr. Davidson's analysis is therefore not substantial medical evidence. (Opinion on Decision.)

In *Almaraz v. Environmental Recovery Servs.* (*Almaraz/Guzman II*) (2019) 74 Cal.Comp.Cases 1084, 1086-1087 [2009 Cal. Wrk. Comp. LEXIS 219] (Appeals Board en banc), we held that:

> (1) the language of Labor Code[1] section 4660(c), which provides that "the schedule . . . shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule," unambiguously means that a permanent disability rating established by the Schedule is rebuttable; (2) the burden of rebutting a scheduled permanent disability rating rests with the party disputing that rating; (3) one method of rebutting a scheduled permanent disability rating is to successfully challenge one of the component elements of that rating, such as the injured employee's whole person impairment (WPI) under the AMA Guides; and (4) when determining an injured employee's WPI, it is not permissible to go outside the four corners of the AMA Guides; however, a physician may utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee's impairment. (Footnote not in original.)

We then explained that while the AMA Guides provide the analytical framework for assessing WPI, the Guides do not restrict a physician to mechanically and uncritically assign a WPI; that, instead, the AMA Guides contemplates that a physician use his or her judgment, experience, training, and skill in assessing WPI. (*Almaraz/Guzman II, supra,* at pp. 1103-1104.)

> Therefore, based upon the physician's judgment, experience, training, and skill each reporting physician (treater or medical-legal evaluator) should

[1] All future statutory references are to the Labor Code unless otherwise indicated.

> give an expert opinion on the injured employee's WPI using the chapter, table, or method of assessing impairment of the AMA Guides that most accurately reflects the injured employee's impairment. (See *Glass, supra,* 105 Cal.App.3d at p. 307 [45 Cal.Comp.Cases at p. 449] ("The Board may not rely upon alleged limitations in the Rating Schedule to deny the injured worker a permanent disability award which accurately reflects his true disability.").) This does not mean, of course, that a physician may arbitrarily assess an injured employee's impairment. As stated by the AMA Guides, "[a] clear, accurate, and complete report is essential to support a rating of permanent impairment" and the report should "explain" its impairment conclusions. (AMA Guides, § 2.6, at pp. 21–22.) In other words, a physician's WPI opinion must constitute substantial evidence upon which the WCAB may properly rely, including setting forth the reasoning behind the assessment. (*See Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620–621 (Appeals Board en banc).) (*Almaraz/Guzman II, supra,* 74 Cal. Comp. Cases at p. 1104.)

Here, Dr. Davidson explained that a strict application of the AMA Guides results in applicant having a 0% WPI because applicant no longer has a palpable defect or hernia due to surgical treatment. (Applicant Exhibit 1, Dr. Davidson report dated December 3, 2019, p. 8.) However, applicant does have surgical scarring and constant persistent pain. (*Id.* at p. 9.) Dr. Davidson did not believe that a strict application of the AMA Guides is an accurate depiction of applicant's permanent impairment. (*Ibid*.) Dr. Davidson identified Class 2 from Table 6-9 as the most accurate description of applicant's permanent impairment, resulting in a rating of 10% WPI. (*Ibid.*) In other words, Dr. Davidson provided an explanation as to why he deviated from the Permanent Disability Schedule, stayed within the AMA Guides framework, and used his judgment, experience, training and skill to determine a more accurate WPI for applicant. This is exactly what *Almaraz/Guzman II* required him to do. Therefore, we find his reasoning and conclusions to be substantial medical evidence.

Lastly, considering the arguments in the Petition, we provide the following guidance with respect to applicant's claim for a SJDB voucher. Applicant is entitled to a SJDB voucher upon showing that he sustained permanent partial disability and the employer failed to show that it offered regular, modified, or alternative work, regardless of whether the record contains a Physician's Return to Work & Voucher Report. (§§ 4658.7(b), 5705; *Opus One Labs v. Workers' Comp. Appeals Bd. (Fndkyan)* (2019) 84 Cal. Comp. Cases 634, 636 [2019 Cal. Wrk. Comp. LEXIS 51] (writ denied) [the burden of proof remains with defendant to show that it offered regular, modified or alternative work, irrespective of whether defendant received a Physician's

Return to Work & Voucher Report so long as defendant was apprised of applicant's permanent disability status and work preclusions].)

Moreover, applicant's resignation has no bearing on his entitlement to a voucher. (*Dennis v. State of* California (April 30, 2020) 85 Cal.Comp.Cases 389, 406 [2020 Cal. Wrk. Comp. LEXIS 19] (Appeals Board en banc) ["Thus, absent a bona fide offer of regular, modified, or alternative work, regardless of an employer's ability to make such an offer, and regardless of an employee's ability to accept such an offer, an employee is entitled to a SJDB voucher."])

Accordingly, we rescind the August 24, 2021 Findings of Fact and return this matter to the trial level for further proceedings consistent with this Opinion.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that applicant Martin Schmidt's Petition for Reconsideration of the August 24, 2021 Findings of Fact is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 7, 2022

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

MARTIN SCHMIDT
LAW OFFICE OF WILLIAM R. ORR
HANNA BROPHY SACRAMENTO

LSM/*pc*

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