

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 **Case No. ADJ1735018 (LBO 0375311)**

4 **CYNTHIA BLACKLEDGE,**

5 *Applicant,*

6 **vs.**

7 **BANK OF AMERICA; and ACE AMERICAN**
8 **INSURANCE COMPANY,**

9 *Defendant(s).*

OPINION AND DECISION
AFTER
RECONSIDERATION
(EN BANC)

10
11 We granted the petition for reconsideration filed by defendant, ACE American Insurance
12 Company (ACE). Thereafter, to secure uniformity of decision in the future, the Chairman of the
13 Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a
14 whole for an en banc decision¹ on the respective roles of the evaluating physician, the workers'
15 compensation administrative law judge (WCJ), and the disability evaluation specialist (rater) in
16 determining whole person impairment (WPI) under the AMA Guides.²

17 We hold:

18 (1) the physician's role is to assess the injured employee's whole person
19 impairment percentage(s) by a report that sets forth facts and reasoning to

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23 ¹ En banc decisions of the Appeals Board (Lab. Code, § 115) are binding precedent on all Appeals
24 Board panels and workers' compensation judges. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v.*
25 *Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109,
26 120, fn. 5] (*Garcia*); *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67
Cal.Comp.Cases 236, 239, fn. 6].) In addition to being adopted as a precedent decision in accordance with
Labor Code section 115 and Appeals Board Rule 10341, this en banc decision is also being adopted as a
precedent decision in accordance with Government Code section 11425.60(b).

27 ² All references to the "AMA Guides" or "the Guides" are to the American Medical Association's
Guides to the Evaluation of Permanent Impairment (5th Edition, 2001). (See Lab. Code, § 4660(b)(1).)

1 support its conclusions and that comports with the AMA Guides and case
2 law;³

3 (2) in the context of a formal rating, the WCJ's role is to frame instructions,
4 based on substantial medical evidence, that specifically and fully describe
5 the whole person impairment(s) to be rated; in addition, a WCJ's
6 instructions may ask a rater to offer an expert opinion on what whole
7 person impairment(s) should or should not be rated;

8 (3) in the context of a formal rating, the rater's role is to issue a recommended
9 permanent disability rating based solely on the WCJ's formal rating
10 instructions; unless specifically instructed to do so, a rater has no authority
11 to issue a rating based on the rater's own assessment of whether the whole
12 person impairment rating(s) referred to in the WCJ's instructions are
13 based on substantial evidence or are consistent with the AMA Guides;

14 (4) a WCJ is not bound by a rater's recommended permanent disability rating
15 and a WCJ may elect to independently rate an employee's permanent
16 disability; however, a WCJ's rating still must be based on substantial
17 evidence;

18 (5) potential AMA Guides rating problems may be minimized by the early
19 and proper use of non-formal ratings; and

20 (6) in the context of a formal rating, there must be no ex parte communication
21 between the WCJ and the assigned rater.

22 ³ Presently, this case law includes our joint opinion in *Almaraz v. Environmental Recovery Services*
23 *& Guzman v. Milpitas Unified School Dist.* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc)
24 (*Almaraz/Guzman II*). A petition for writ of review is pending before the Fifth Appellate District in
25 *Almaraz* (F058698, petn. filed October 19, 2009) and a writ of review has been granted by the Sixth
26 Appellate District in *Guzman* (H034853, writ issued February 23, 2010). However, an en banc decision of
27 the Appeals Board remains binding precedent in workers' compensation proceedings even though a petition
for writ of review has been filed or a writ of review has been granted, unless and until an appellate court
either issues an opinion that explicitly or implicitly overrules the en banc decision or stays or suspends
operation of the en banc decision prior to the court's issuance of opinion. (*Diggle v. Sierra Sands Unified*
School Dist. (2005) 70 Cal.Comp.Cases 1480 (Appeals Board significant panel decision); Lab. Code,
§ 5956.)

1 In light of these holdings and our application of them to this case, we will amend the
2 WCJ's November 19, 2009 decision to defer the issues of permanent disability and attorney's fees
3 and remand these issues to the trial level. The WCJ, in his discretion, may direct further
4 development of the record. After the further proceedings, if any, the WCJ shall issue a new
5 decision consistent with this opinion.

6 **I. BACKGROUND**

7 Applicant, Cynthia Blackledge (Blackledge), sustained an admitted industrial injury to her
8 low back and her right wrist, hip, and knee on October 26, 2005 when she slipped while
9 descending a flight of stairs.

10 The parties selected David B. Pechman, M.D., as the agreed medical evaluator (AME) in
11 orthopedics. Dr. Pechman evaluated Blackledge and issued a report on May 14, 2007. Dr.
12 Pechman's report concluded by stating, "I have completed an AMA impairment rating, which is
13 attached to the body of this report. Total whole person impairment is 10% WP – SEE
14 ATTACHED."

15 With regard to the low back, Dr. Pechman opined in his Impairment Rating Report that
16 applicant "qualifies for ... DRE [Lumbar] Category II, which allows a 5%-8% WP impairment."
17 In concluding that DRE Lumbar Category II (DRE II) applied, Dr. Pechman referred to Chapter 15
18 of the AMA Guides, pages 384 to 386 and Table 15-3. Dr. Pechman said the "calculated" WPI
19 using DRE II was 5%, but the "assigned" WPI was 8%, adding that "some ADL [activities of daily
20 living] changes are noted."

21 For the right wrist, Dr. Pechman's Impairment Rating Report found no impairment.

22 For the right hip and knee, Dr. Pechman's Impairment Rating Report found 5% lower
23 extremity impairment based on patellofemoral pain syndrome, referring to Chapter 17 of the AMA
24 Guides, at pages 544-545 and Table 17-31. This equated to a WPI of 2%.

25 At trial, Dr. Pechman's report was admitted in evidence. Ultimately, the WCJ issued
26 formal rating instructions to the Disability Evaluation Unit (DEU). In issuing these instructions,
27 the WCJ used a "fill in the blanks" template available to WCJs within the Electronic Adjudication

1 Management System (EAMS). The instructions were as follows, with the underscored text being
2 the filled-in language:

3 “PLEASE DETERMINE THE PERCENTAGES OF PERMANENT
4 DISABILITY BY TAKING INTO ACCOUNT THE NATURE OF THE
5 PHYSICAL INJURY OR DISFIGUREMENT INCLUDING
6 THE DESCRIPTIONS AND MEASUREMENTS OF PHYSICAL
7 IMPAIRMENTS AND THE CORRESPONDING PERCENTAGES OF
8 IMPAIRMENTS PUBLISHED IN THE AMERICAN MEDICAL
9 ASSOCIATION (AMA) GUIDES TO THE EVALUATION OF
10 PERMANENT IMPAIRMENT (5TH EDITION)
11 FOR THE Low Back, Right Wrist, Right Hip and Right Knee .
12 {body part(s)}

13 IN REPORT OF: David B. Pechman, M.D. DATED: May 14, 2007

14 ADDITONAL [sic] INSTRUCTIONS:

15 (X) Consider a 3% add-on for pain.

16 ATTACH PERMANENT DISABILITY RATING BASED ON ABOVE
17 INSTRUCTIONS”

18 Subsequently, the rater issued a formal recommended rating stating that Dr. Pechman’s
19 report “rates 0% final PD [permanent disability].”

20 Blackledge made a timely request to cross-examine the rater regarding the 0%
21 recommended rating.

22 At his cross-examination, the rater testified that he received the WCJ’s rating instructions
23 but that he “had to exercise some judgment” and, therefore, he “mechanically applied the AMA
24 Guides” to find no ratable permanent disability. Notwithstanding the 8% WPI found by Dr.
25 Pechman based on DRE II, the rater testified that he “assessed” a 0% WPI based on his conclusion
26 that, pursuant to page 384 of the AMA Guides, DRE II requires disc disease and “radiculopathy,
27 spasm, and loss of motion.” The rater acknowledged that Dr. Pechman had found lumbar disc
disease, but the rater implicitly concluded that Dr. Pechman had not found “radiculopathy, spasm,
and loss of motion.” Similarly, the rater assigned 0% WPI for patellofemoral pain syndrome, even
though Dr. Pechman had found 2% WPI. The rater said that, per Table 17-31 at page 544 of the
AMA Guides, “direct trauma” is required for patellofemoral pain syndrome. The rater then

1 testified: “In reviewing the Pechman report, [he] did not see a direct trauma. It must be a direct
2 trauma. If a direct trauma were found, then the rating indicated by Pechman would be
3 appropriate.”

4 On November 19, 2009, the WCJ issued the Findings and Award from which ACE sought
5 reconsideration. In relevant part, the WCJ found that Blackledge’s low back and right wrist, hip,
6 and knee injury caused 10% permanent disability. The WCJ’s Opinion on Decision explained that
7 he instructed the rater to rate Dr. Pechman’s May 14, 2007 report using the AMA Guides and to
8 “consider” a 3% add-on for pain. The rater then issued his 0% recommended rating, which the
9 WCJ rejected because the rater testified he had “mechanically applied” the AMA Guides.
10 Therefore, the WCJ rated Blackledge’s permanent disability himself using the 10% WPI found by
11 Dr. Pechman in his report, which the WCJ then adjusted for diminished future earning capacity,
12 occupation, and age in accordance with the 2005 Schedule for Rating Permanent Disabilities (the
13 Schedule or 2005 Schedule).

14 ACE then filed its petition for reconsideration. ACE contends that the WCJ should have
15 accepted the rater’s expert opinion of 0% permanent disability. In support of this contention, ACE
16 argues that Dr. Pechman inappropriately relied on a “computerized impairment rating” that “does
17 not reflect Dr. Pechman’s opinion at all but attempts to take the objective factors of disability in
18 Dr. Pechman’s report and apply these objective factors to the AMA Guides.” ACE also relies on
19 the rater’s testimony that Dr. Pechman’s report does not support a DRE II rating for the low back
20 and that Dr. Pechman’s right lower extremity rating is not justified because there was no direct
21 trauma. ACE further contends that the 10% permanent disability rating is not justified under the
22 Appeals Board’s en banc decision in *Almaraz/Guzman II*.

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1 Blackledge filed an answer to the petition for reconsideration. The WCJ filed a Report and
2 Recommendation (Report) recommending denial of ACE’s petition.⁴

3 On February 4, 2010, we granted reconsideration to further study the factual and legal
4 issues presented. We now issue our Decision After Reconsideration.

5 **II. DISCUSSION**

6 **A. The Physician, the WCJ, and the Rater Have Distinct Roles in Determining Whole**
7 **Person Impairment under the AMA Guides**

8 For a great many years, permanent disability was based on a rating of either the employee’s
9 work restrictions or the employee’s objective and subjective factors of disability; this “standard”
10 rating was then adjusted based on the employee’s occupation and age at the time of injury. (See
11 1997 Schedule, at pp. 1-3 – 1-4, 1-7 – 1-8; 1988 Schedule, at p. 1.)⁵ Because the “old” system for
12 rating permanent disabilities had been in place for a very long time most physicians, WCJs, and
13 raters were familiar and comfortable with it.

14 In 2004 the Legislature enacted Senate Bill 899 (SB 899), which mandates that the AMA
15 Guides be used as a component element of an injured employee’s permanent disability rating. SB
16 899 did not change the portion of Labor Code section 4660(a) that provides “[i]n determining the
17 percentages of permanent disability, account shall be taken of the nature of the physical injury or
18 disfigurement ...,” however, SB 899 added section 4660(b)(1) to state that “[f]or purposes of this
19 section, the ‘nature of the physical injury or disfigurement’ shall incorporate the descriptions and
20 measurements of physical impairments and the corresponding percentages of impairments
21 published in the [AMA Guides].”⁶ On January 1, 2005, a new Schedule was adopted which

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23 ⁴ Pursuant to Appeals Board Rule 10848 (Cal. Code Regs., tit. 8, § 10848), ACE requested
24 permission to file a supplemental pleading in reply to Blackledge’s answer and the WCJ’s Report. ACE’s
25 request is denied and the proposed pleading is deemed not to have been filed. (*Id.*) Although supplemental
26 pleadings are occasionally accepted (e.g., where a WCJ’s Report raises new points of fact or law to which a
27 party requests an opportunity to respond), defendant’s proposed pleading adds nothing of substance to its
petition for reconsideration.

⁵ The 1997 Schedule appears at <http://www.dir.ca.gov/DWC/PDR1997.pdf> and the 1988 Schedule
appears at <http://www.dir.ca.gov/DWC/PDRSpre1997.pdf>.

⁶ Stats. 2004, ch. 34, § 32.

1 incorporates the AMA Guides. (Cal. Code Regs., tit. 8, § 9805.) The first component element of
2 the Schedule’s rating formula is the injured employee’s WPI based on the AMA Guides. (See 2005
3 Schedule, at pp. 1-2, 1-3, & 1-4 – 1-5.)⁷

4 Although determining WPI under the AMA Guides is new to the California workers’
5 compensation system, the *procedure* for rating permanent disability has not changed and
6 pre-SB 899 case law on rating procedure remains relevant. Relying on long-standing legal
7 principles, this opinion will set out the respective roles and responsibilities of the physician, the
8 WCJ, and the rater in assessing an injured employee’s WPI under the AMA Guides, with
9 particular focus on formal permanent disability ratings such as the one issued by the rater here.
10 (See Cal. Code Regs., tit. 8, §§ 10602, 10150(a), 10156.)

11 **B. The Physician’s Role Is To Assess the Injured Employee’s Whole Person Impairment**
12 **Percentage(s) by a Report that Sets Forth Facts and Reasoning to Support its Conclusions**
13 **and that Comports with the AMA Guides and Case Law**

14 The first step in assessing an injured employee’s permanent disability has long been a
15 comprehensive medical-legal report prepared by a treating or evaluating physician. (See generally,
16 e.g., Lab. Code, §§ 4061(c) & (d), 4061.5, 5703(a); Cal. Code Regs., tit. 8, § 10606(h).) The basic
17 elements of an AMA Guides compliant medical report are set forth in the Guides. (See AMA
18 Guides, § 2.6, at pp. 21-22; see also “Sample Report for Permanent Medical Impairment” (Sample
19 Report), at pp. 23-24.) These elements are substantially the same as those that have long been set
20 forth in WCAB Rule 10606. (Cal. Code Regs., tit. 8, § 10606.)

21 Under the AMA Guides, a physician performs an evaluation to determine the WPI(s) for
22 the injured employee’s medical condition(s), expressed as a percentage. (AMA Guides, § 2.1, at p.
23 18.) The impairment evaluation includes a discussion of the employee’s history and symptoms,
24 the results of the physician’s examination, the results of various tests and diagnostic procedures,
25 the diagnosis, the anticipated clinical course, the need for further treatment, and the residual

26 ⁷ The 2005 Schedule appears at <http://www.dir.ca.gov/DWC/PDR.pdf>. The 2005 Schedule also
27 assigns eight-digit “impairment numbers” that identify each injured body part or organ system. The first
two digits correspond to the chapter of the AMA Guides relating to the particular body part or organ
system. (2005 Schedule, at pp. 1-4 & 2-1 – 2-5.)

1 functional capacity and ability to perform activities of daily living (ADLs). (*Id.*, §§ 2.6a.1–2.6a.8,
2 at pp. 21-22; Sample Report, at pp. 23-24.) After considering all of these factors, the physician
3 compares the medical findings for each condition with the impairment criteria listed within the
4 Guides and then calculates the appropriate impairment rating(s) for the condition(s). (*Id.*, § 2.6b, at
5 p. 22; see also §§ 2.5, 2.6c.1, 2.6c.2, at pp. 19-20, 22.) The physician’s report should include a
6 summary list of the impairments and impairment ratings by percentage, together with a calculation
7 of the final WPI, and a statement of the rationale underlying the WPI opinion. (*Id.*, § 2.6c.2, at p.
8 22; Sample Report, at p. 24 [“Impairment Rating and Rationale” section].)

9 It is essential for a medical report to state the physician’s actual WPI rating for each
10 medical condition because WPI ratings cannot be mechanically assigned merely by reviewing the
11 medical findings contained in the report. This is in part because many medical conditions listed in
12 the AMA Guides have a range of WPI percentages that can be assigned, depending on the factors
13 listed in the paragraph above.⁸ It is also because the Guides does not address all medical
14 conditions. (AMA Guides, § 1.5, at p. 11.) If a condition is not covered by the Guides, the
15 physician compares measurable impairment resulting from the non-covered condition to the
16 measurable impairment resulting from other conditions with similar impairment of function in
17 performing ADLs. (AMA Guides, § 1.5, at p. 11.) Accordingly, for both these reasons, the WPI
18 percentage to be assigned to a condition is dependent, to some extent, on the physician’s judgment,
19 training and experience. (AMA Guides, §§ 1.2a, 1.2b, 1.5, 2.3, 2.5c, at pp. 5, 8, 11, 18, 19.)

20 The expert opinion of a single physician may establish an injured employee’s WPI,
21 provided that the opinion constitutes substantial evidence. (*Place v. Workmen’s Comp. Appeals*
22 *Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525, 529-530].) Among other things, to
23 constitute substantial evidence regarding WPI a physician’s opinion must comport with the AMA
24 Guides, including as applied and interpreted in published appellate opinions and en banc decisions

25 ⁸ For example, there are four Classes of impairment for valvular heart disease (Classes 1, 2, 3, and 4).
26 The WPI rating within each Class can fall anywhere within a range depending on the physician’s
27 assessment. Specifically, the WPI rating for valvular heart disease can range from 0% to 9% for Class 1,
10% to 29% for Class 2, 30% to 49% for Class 3, and 50% to 100% for Class 4. (AMA Guides, § 3.2a, at
p. 30, Table 3-5.)

1 of the Appeals Board.⁹ (*Hegglin v. Workmen’s Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36
2 Cal.Comp.Cases 93, 97] (*Hegglin*) (“Medical reports and opinions are not substantial evidence ...
3 if they are based ... on incorrect legal theories”); *Zemke v. Workmen’s Comp. Appeals Bd.* (1968)
4 68 Cal.2d 794, 799 [33 Cal.Comp.Cases 358, 360] (*Zemke*) (“an expert’s opinion which ...
5 assumes an incorrect legal theory cannot constitute substantial evidence”).¹⁰ Also, a physician’s
6 opinion regarding WPI must set forth the physician’s reasoning, not merely his or her conclusions.
7 (*Granado v. Workers’ Comp. Appeals Bd.* (1970) 69 Cal.2d 399, 407 [33 Cal.Comp.Cases 647,
8 653] (a physician’s “mere legal conclusion” not sufficient); *Zemke*, 68 Cal.2d at pp. 799, 800-801
9 [33 Cal.Comp.Cases at pp. 361, 363] (an opinion that fails to disclose its underlying basis and
10 gives a bare legal conclusion does not constitute substantial evidence); see also *People v. Bassett*
11 (1968) 69 Cal.2d 122, 141, 144 (the chief value of an expert’s testimony rests upon the material
12 from which his or her opinion is fashioned and the reasoning by which he or she progresses from
13 the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus,
14 the opinion of an expert is no better than the reasons upon which it is based).)

15 Accordingly, when a physician evaluates an injured employee’s WPI(s), the physician must
16 explain how he or she arrived at the WPI(s) so that the parties and the WCAB can determine
17 whether the WPI(s) are consistent with the AMA Guides.

19 ⁹ For example, in *Almaraz/Guzman II*, the en banc Appeals Board determined that “a physician is not
20 inescapably locked into any specific paradigm for evaluating WPI under the Guides.” (74 Cal.Comp.Cases
21 at p. 1103.) That is, although a physician may not go outside the four corners of the AMA Guides in
22 determining an injured employee’s WPI, a physician may utilize any chapter, table, or method in the AMA
23 Guides that most accurately reflects the injured employee’s impairment. (74 Cal.Comp.Cases at pp. 1086-
24 1087, 1095-1096, 1101-1104.) In this regard, the WPI(s) listed in the Guides estimate the degree to which a
medical condition impairs an individual’s overall ability to perform ADLs, excluding work. (AMA Guides,
§ 1.2a, at p. 4.) Therefore, where an employee’s medical condition impairs his or her ability to perform
ADLs in the same or similar manner as another medical condition, it may be appropriate for the physician
to utilize the WPI for that other medical condition by analogy.

25 ¹⁰ Of course, a physician will not necessarily be able to produce a legally proper report without some
26 assistance from the parties. (See *Gay v. Workers’ Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555, 563-564
27 [44 Cal.Comp.Cases 817, 822] (“We do not comprehend how the parties can expect any physician to
properly report in workers’ compensation matters unless he is advised of the controlling legal principles. ...
[H]ere, the failure of Dr. Naftulin to [report] in terms of the proper legal standard is not actually his fault but
that of the parties.”).)

1 **C. In the Context of a Formal Rating, the WCJ's Role Is To Frame Instructions, Based on**
2 **Substantial Medical Evidence, that Specifically and Fully Describe the Whole Person**
3 **Impairment(s) To Be Rated; In Addition, a WCJ's Instructions May Ask a Rater to Offer an**
4 **Expert Opinion on What Whole Person Impairment(s) Should or Should Not Be Rated**

5 It is the duty of the WCAB to make “findings upon all facts involved in the controversy.”
6 (Lab. Code, § 5313; see also Lab. Code, § 133; Cal. Code Regs. tit. 8, § 10348.) An injured
7 employee’s permanent disability rating and each component element of that rating are questions of
8 fact to be resolved by the WCAB. (*Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615, 618
9 [20 I.A.C. 390, 391-392]; *Subsequent Injuries Fund v. Industrial Acc. Com. (Rogers)* (1964) 226
10 Cal.App.2d 136, 152 [29 Cal.Comp.Cases 59, 69].) Accordingly, after reviewing the evidence, it
11 is the WCJ’s function to formulate rating instructions, which “are, in effect, tentative findings of
12 fact.” (*State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd. (Stapp)* (1978) 81 Cal.App.3d 586,
13 587 [43 Cal.Comp.Cases 658, 658] (*Stapp*); see also *Hegglin*, 4 Cal.3d at p. 169 [36
14 Cal.Comp.Cases at p. 97]; *Fidelity & Casualty Co. v. Workmen’s Comp. Appeals Bd. (Ratzel)*
15 (1967) 252 Cal.App.2d 327, 331 [32 Cal.Comp.Cases 271, 273] (*Ratzel*).

16 The rating instructions “may refer to an accompanying medical report or chart for the sole
17 purpose of describing measurable physical elements of the conditions that are clearly and exactly
18 identifiable”; in every other respect, however, the rating instructions “shall describe the factors of
19 disability in full.” (Cal. Code Regs., tit. 8, § 10602; see also *Hegglin*, 4 Cal.3d at p. 174 [36
20 Cal.Comp.Cases at p. 101] (“We hold that ... the Board must, in any instructions it may direct to
21 the rating bureau, fully describe each separate factor of disability”).) Therefore, a WCJ’s rating
22 instructions are required to specify the WPI(s) to be rated. A WCJ may direct a rater to rate the
23 injured employee’s permanent disability specifying the WPI percentage to be used for each injured
24 body part or may instruct the rater to utilize the WPI(s) contained in clearly identified portions of a
25 specified report or reports by delineating the date of the report, the author and specific page
26 references.

27 Formal rating instructions are tentative findings of fact and must be based on substantial
medical evidence. When a WCJ instructs a rater to utilize particular WPI ratings, *the WCJ has*

1 *concluded that all of those WPI ratings are based on substantial medical evidence.* Accordingly,
2 when framing formal rating instructions, it is incumbent on the WCJ to carefully review the
3 report(s) or portions of report(s) of the physician(s) upon whom the WCJ intends to rely and
4 determine whether the WPI ratings comport with the AMA Guides, including as interpreted by
5 appellate and en banc decisions.

6 Nevertheless, although a WCJ's rating instructions must fully describe the WPI(s) to be
7 rated, this does not absolutely preclude a WCJ's instructions from also seeking the assistance of a
8 rater. A WCJ's rating instructions are merely "tentative" findings of fact. (*Stapp*, 81 Cal.App.3d at
9 p. 587 [43 Cal.Comp.Cases at p. 658]; see also *Hegglin*, 4 Cal.3d at p. 169 [36 Cal.Comp.Cases at
10 p. 97]; *Ratzel*, 252 Cal.App.2d at p. 331 [32 Cal.Comp.Cases at p. 273].) Moreover, a rater of the
11 DEU "is an expert ... in the application of the rating schedule" (*Aliano v. Workers' Comp. Appeals*
12 *Bd.* (1979) 100 Cal.App.3d 341, 373 [44 Cal.Comp.Cases 1156, 1177] (*Aliano*)) and "a rating
13 specialist's expert opinion [can] be of assistance to the Board." (*Johns-Manville Products Corp. v.*
14 *Workers' Comp. Appeals Bd. (Carey)* (1978) 87 Cal.App.3d 740, 752 [43 Cal.Comp.Cases 1372,
15 1379] (*Carey*)). Therefore, *in addition to fully describing the WPI(s) to rate*, a WCJ's rating
16 instructions may further direct the rater to use his or her expertise to assess whether a specified
17 medical report accurately applies the AMA Guides and, if not, to separately give an opinion on
18 whether the WPI(s) should be higher or lower and why. If the rater believes that the physician's
19 report does not correctly apply the AMA Guides, then the rater can communicate any concerns to
20 the WCJ by memorandum in accordance with Section 1.50 of the WCAB/DWC Policy and
21 Procedure Manual.¹¹ If the WCJ is persuaded by the rater's memorandum the WCJ can either
22 issue new rating instructions that take the rater's concerns into account or take other appropriate
23 action, such as directing further development of the record to clarify the proper WPI(s).

24
25 ¹¹ Section 1.50 of the Policy and Procedure Manual can be viewed at:
26 http://www.dir.ca.gov/WCAB/WCAB_Policy_ProcedureManual/WCABPolicy_ProcedureIndex.html. Any
27 memoranda between a WCJ and a rater must be served on the parties, together with the original and any
revised rating instructions. (*Id.*; see also Cal. Code Regs., tit. 8, § 10602; Lab. Code, § 5704 ("copies of all
reports and other matters added to the record, otherwise than during the course of an open hearing, shall be
served upon the parties to the proceeding").)

1 Seeking the assistance of the rater should occur infrequently and under no circumstances
2 should the WCJ abdicate responsibility for the comprehensive assessment of the employee's
3 WPI(s) to the rater under the guise of asking for the rater's expert assistance. The assistance of the
4 rater should be sought only after the WCJ has thoroughly reviewed the physician's report(s) in
5 conjunction with the AMA Guides and has fully described the WPI(s) to be rated to the best of the
6 WCJ's understanding, yet, the WCJ still is uncertain whether the physician's report(s) comport(s)
7 with the AMA Guides.

8 **D. In the Context of a Formal Rating, the Rater's Role Is to Issue a Recommended**
9 **Permanent Disability Rating Based Solely on the WCJ's Formal Rating Instructions; Unless**
10 **Specifically Instructed to Do So, a Rater Has No Authority to Issue a Rating Based on the**
11 **Rater's Own Assessment of Whether the Whole Person Impairment Rating(s) Referred to in**
12 **the WCJ's Instructions Are Based on Substantial Evidence or Are Consistent with the AMA**
13 **Guides**

14 A rater "is an expert witness *only in the application of the rating schedule*" (*Aliano*, 100
15 Cal.App.3d at p. 373 [44 Cal.Comp.Cases at p. 1177] (emphasis added)) and "is required to make
16 his [formal rating] recommendation *solely on the information provided by the [WCJ.]*" (*Stapp*, 81
17 Cal.App.3d at p. 587 [43 Cal.Comp.Cases at p. 658] (emphasis added).)¹² The rater "must
18 consider *no more and no less* than the [instructions] provided ... by the [WCJ]." (*Ratzel*, 252
19 Cal.App.2d at p. 333 [32 Cal.Comp.Cases at p. 275] (emphasis added).)¹³ A rater is *not* a trier of
20 fact and has *no* fact-finding power. (*Mihesuah v. Workers' Comp. Appeals Bd.* (1976) 55
21 Cal.App.3d 720, 728 [41 Cal.Comp.Cases 81, 87] (*Mihesuah*) ("A [DEU] specialist who is
22 consulted by the Board, for the purpose of evaluating one or more permanent disabilities in a
23 worker's compensation proceeding, is not the trier of fact in the proceeding."); *Carey*, 87
24 Cal.App.3d at p. 749 [43 Cal.Comp.Cases at p. 1378] ("the rating specialist is not a trier of fact").)

23 ¹² See also *Aliano*, 100 Cal.App.3d at p. 373 [44 Cal.Comp.Cases at p. 1177] ("The rater's role is to
24 apply the rating schedule to the factors of permanent disability as found by the WCJ or the WCAB. ... [H]e
25 is an expert witness only in the application of the rating schedule."); *Morgan v. Workers' Comp. Appeals*
26 *Bd.* (1978) 85 Cal.App.3d 710, 725 [43 Cal.Comp.Cases 1116, 1125] ("Of course, the rater only computes
27 percentage of disability based upon the factors of disability stated by the board in the rating instructions.")

26 ¹³ Accord: *Dalen v. Workmen's Comp. Appeals Bd.* (1972) 26 Cal.App.3d 497, 503 [37
27 Cal.Comp.Cases 393, 397]; *Frierson v. Workmen's Comp. Appeals Bd.* (1971) 22 Cal.App.3d 164, 167-168
[36 Cal.Comp.Cases 787, 790].

1 A rater cannot depart from the rating instructions or omit any factors of disability described therein
2 from the recommended rating. (*Pence v. Industrial Acc. Com.* (1965) 63 Cal.2d 48, 51 [30
3 Cal.Comp.Cases 207, 209] (rater’s failure to rate in accordance with rating instructions entitled
4 party to present rebuttal evidence on what proper rating would have been under the instructions);
5 *Industrial Indemnity Co. v. Industrial Acc. Com. (Hicks)* (1961) 57 Cal.2d 123, 126 [26
6 Cal.Comp.Cases 246, 247] (rater could not “go beyond” rating instructions and substitute a
7 different occupational group number based on rater’s own reading of the record).)

8 Once a WCJ has prepared formal rating instructions, a rater must recommend a permanent
9 disability rating based *strictly* on those instructions. If a rater’s recommended rating disregards or
10 departs from the instructions, then the WCJ may direct the rater to re-rate in accordance with the
11 instructions.

12 As discussed in Section II-C, there may be *occasional* instances where a WCJ is uncertain
13 whether a physician’s report is entirely consonant with the AMA Guides. In these instances after
14 fully describing the WPI(s) to be rated, the WCJ may also request the rater’s expertise in assessing
15 whether the report(s) relied upon properly applied the AMA Guides. In these limited
16 circumstances, the rater, after issuing a recommended rating using the specified WPI(s), may also
17 give an opinion explaining whether the WPI(s) should be increased or decreased and the rationale
18 therefor.¹⁴ However, because a rater is an expert witness only in the application of the rating
19 schedule, the rater cannot substitute his or her lay judgment *on medical issues* for that of the
20 reporting physician.

21 In the absence of a specific request from the WCJ, under no circumstances may a rater
22 either deviate from the WCJ’s formal rating instructions or offer an unsolicited opinion regarding
23 the appropriate WPI(s). Permitting a rater to do so would mean that the rater would effectively
24 displace the WCJ as the trier of fact. If the WCJ does not request assistance from the rater, then it
25 is the responsibility of one of the parties, *not the rater*, to point out any errors in the WCJ’s formal

26
27 ¹⁴ As observed above (see fn. 11, *supra*), any memorandum from the rater to the WCJ regarding
higher or lower WPI(s) must be served on the parties.

1 rating instructions. (See generally *Ratzel*, 252 Cal.App.2d at pp. 332-333 [32 Cal.Comp.Cases at
2 pp. 274-275]; 2 *Cal. Workers' Comp. Practice* (Cont. Ed. Bar, June 2009 Update) Trial, § 18.75,
3 pp. 1592-1593.)

4 **E. A WCJ Is Not Bound by a Rater's Recommended Permanent Disability Rating and a**
5 **WCJ May Elect to Independently Rate an Employee's Permanent Disability; However, a**
6 **WCJ's Rating Still Must Be Based on Substantial Evidence**

7 “[T]he relationship of the judge (or the board) to the rating specialist is one of fact finder to
8 expert witness.” (*Stapp*, 81 Cal.App.3d at p. 590 [43 Cal.Comp.Cases at p. 661].) Therefore, a
9 WCJ is free to reject a rater's opinion regarding the proper permanent disability rating. (*Mihesuah*,
10 55 Cal.App.3d at p. 728 [41 Cal.Comp.Cases at p. 87] (“A [DEU] specialist ... is not the trier of
11 fact He is an expert witness whose testimony consists of the rating he recommends and the
12 Board, which *is* the trier of fact, is not bound by it.” (emphasis in original; internal citations
13 omitted)); *Carey*, 87 Cal.App.3d at p. 749 [43 Cal.Comp.Cases at p. 1378] (“the rating specialist is
14 not a trier of fact and the appeals board is not bound by his recommendation”).) A WCJ has
15 special expertise in rating and he or she may rate an employee's permanent disability without a
16 formal rating. (*Heggin*, 4 Cal.3d at p. 172 [36 Cal.Comp.Cases at p. 100] (“the Board may not be
17 required in all cases to obtain a recommended rating from the rating bureau”).)¹⁵ Nevertheless,
18 when the WCJ personally rates a case, the rating must be based on substantial evidence.

19 **F. Potential AMA Guides Rating Problems May Be Minimized by the Early and Proper Use**
20 **of Non-Formal Ratings**

21 Nothing in our discussion of formal ratings is intended to discourage the WCJ or the parties
22 from obtaining non-formal ratings. To the contrary, the timely and proper use of non-formal
23 ratings may ultimately facilitate a proper formal rating in a case.

24 There are three types of non-formal ratings: summary rating determinations, consultative

25 ¹⁵ See also *Cruz v. Workers' Comp. Appeals Bd.* (2002) 67 Cal.Comp.Cases 953, 955 (writ den.);
26 *West America Insurance Co. v. Workers' Comp. Appeals Bd. (Lopez)* (1983) 48 Cal.Comp.Cases 652 (writ
27 den.); *American Motorists Insurance Co. v. Workers' Comp. Appeals Bd. (Henderson)* (1982) 47
Cal.Comp.Cases 1209 (writ den.); *City of Los Angeles v. Industrial Acc. Com. (Pendergraph)* (1965) 30
Cal.Comp.Cases 230 (writ den.); *Cal. Casualty Indemnity Exch. v. Industrial Acc. Com. (Peak)* (1948) 13
Cal.Comp.Cases 258 (writ den.).

1 rating determinations, and informal rating determinations. (See Cal. Code Regs., tit. 8, § 10150 et
2 seq.)¹⁶ Although the stage of the proceedings at which each of these non-formal ratings may issue
3 varies somewhat, all non-formal ratings may be obtained by the parties well before trial, including
4 before or at a mandatory settlement conference (MSC) or rating mandatory settlement conference
5 (Rating MSC).¹⁷ Indeed, the very purpose of a Rating MSC is to facilitate the determination of
6 permanent disability through the use of informal ratings, where permanent disability and further
7 medical treatment are the only disputed issues. (Cal. Code Regs., tit. 8, §§ 10301(aa), 10210(cc).)

8 For all three non-formal ratings, the rater should rate the WPI percentages specified in the
9 physician's report. Additionally, however, the rater may use his or her expertise *to annotate any*
10 *errors or defects* that the rater believes exist in the report and *to annotate the higher or lower*
11 *WPI(s) that would result if the AMA Guides was applied correctly.*

12 An annotated non-formal rating can alert the parties of the need to obtain a supplemental
13 report from and/or depose the physician to clarify the physician's assessment of the injured
14 employee's WPI, at least if the case has not reached the stage of an MSC or Rating MSC. Even at
15 an MSC or Rating MSC, however, if the annotated rating identifies potential defects in the
16 physician's application of the AMA Guides a WCJ may order a case off calendar or continue the
17 hearing to allow the parties to obtain a clarifying supplemental report or to depose the physician.
18 (Lab. Code, § 5502.5; Cal. Code Regs., tit. 8, §§ 10243, 10353(b).)

19 Accordingly, the use of annotated non-formal ratings can help ensure that, if a case does go
20 to trial, the reports used by the WCJ to frame rating instructions will be substantial evidence.

21
22 ¹⁶ By rule, consultative rating determinations are expressly inadmissible in WCAB proceedings (Cal.
23 Code Regs., tit. 8, § 10166(b)); however, there is no statutory basis for the admission of *any* non-formal
rating. (Lab. Code, § 5703.)

24 ¹⁷ Informal ratings may be obtained on request before an application is filed. (Cal. Code Regs., tit. 8,
25 § 10167(a).) For the most part, summary rating determinations may be obtained in cases where the
26 employee is not represented and an application has not been filed. (Cal. Code Regs., tit. 8, §§ 10160.1,
27 10160.5, 10161(b) & (c), 10162.) A consultative rating determination may be obtained before or after an
application has been filed, regardless of whether the employee is represented; however, in a non-
represented case, it cannot substitute for a summary rating determination and, in any case, authorization
must be obtained from the WCAB or an Information and Assistance officer if an application has been filed.
(Cal. Code Regs., tit. 8, § 10166.)

1 Also, annotated non-formal ratings may help obviate the delays and additional expense caused by
2 challenges to the rating instructions or the rating.

3 Of course, in utilizing his or her expertise, a rater is not free to disregard the law. Thus,
4 even when issuing a non-formal rating, a rater must follow published appellate decisions and en
5 banc decisions of the Appeals Board. In this regard, the Appeals Board’s en banc decisions (see
6 Cal. Code Regs., tit. 8, § 10341) have the same binding effect in workers’ compensation matters as
7 a published appellate opinion. (*Signature Fruit Co. v. Workers’ Comp. Appeals Bd. (Ochoa)*
8 (2006) 142 Cal.App.4th 790, 796, fn. 2 [71 Cal.Comp.Cases 1044, 1047, fn. 2]; *City of Long*
9 *Beach v. Workers’ Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 316, fn. 5 [70
10 Cal.Comp.Cases 109, 120, fn. 5].)

11 **G. In the Context of a Formal Rating, There Must Be No Ex Parte Communication between**
12 **the WCJ and the Assigned Rater**

13 Once a case has reached the stage of a formal rating, there shall be no ex parte
14 communication between the trial judge and the rater who will be preparing the formal rating.

15 A WCJ must subscribe to the Code of Judicial Ethics and shall not directly or indirectly
16 engage in conduct contrary to that Code or its commentary. (Lab. Code, § 123.6(a); see also
17 *Fremont Indemnity Co. v. Workers’ Comp. Appeals Bd. (Zepeda)* (1984) 153 Cal.App.3d 965, 973
18 [49 Cal.Comp.Cases 288, 293-294] (*Zepeda*); *Robbins v. Sharp Healthcare* (2006) 71
19 Cal.Comp.Cases 1291, 1303 (Appeals Board significant panel decision).) Therefore, a WCJ
20 cannot have any ex parte communication with an expert witness. (Code of Judicial Ethics, Canon
21 3B(7); *Zepeda*, 153 Cal.App.3d at pp. 971-972 [49 Cal.Comp.Cases at pp. 292-293].) In the
22 context of a formal rating, a rater is an “expert witness.” (*Stapp*, 81 Cal.App.3d at pp. 587, 590 [43
23 Cal.Comp.Cases at pp. 658, 661]; *Mihesuah*, 55 Cal.App.3d at p. 728 [41 Cal.Comp.Cases at p.
24 87].)

25 Indeed, WCAB/DWC Policy and Procedure Manual Section 1.50 specifically prohibits ex
26 parte communications between a WCJ and a rater in the context of a formal rating. Section 1.50
27 provides that “the WCJ shall not discuss the instructions or any other aspect of the case with the

1 assigned disability evaluator, except to clarify or correct clerical or technical errors or omissions.”
2 Furthermore, although Section 1.50 permits the WCJ and the rater to exchange memoranda
3 regarding the rating, it further requires that these memoranda be served on the parties to the case.

4 We emphasize, however, that the prohibition against a trial judge having any ex parte
5 communication with the “expert witness” rater who is preparing a formal rating does not mean that
6 no WCJ may ever informally consult with any rater. This is because “[a] judge may consult with
7 court personnel whose function is to aid the judge in carrying out the judge’s adjudicative
8 responsibilities” (Code of Judicial Ethics, Canon 3B(7)(b); see also *Zepeda*, 153 Cal.App.3d at
9 p. 973 [49 Cal.Comp.Cases at p. 294].) Thus, a WCJ not assigned for trial who is reviewing a
10 proposed settlement for adequacy may informally consult with a rater. (Cf. Cal. Code Regs., tit. 8,
11 § 10166(a) & (b).) Similarly, an MSC judge or Rating MSC judge may informally consult with a
12 rater. Indeed, the free exchange of information and views between WCJs and raters at non-trial
13 proceedings may facilitate the expeditious resolution of cases.

14 **III. APPLICATION OF THESE PRINCIPLES TO THIS CASE**

15 **A. The WCJ’s Rating Instructions Did Not Fully and Specifically Describe the WPIs To Be** 16 **Rated; However, to the Extent that the WCJ Intended to Instruct the Rater to Utilize the** 17 **WPIs in Dr. Pechman’s Report, It Was Error for the Rater to Reject those WPIs**

18 The WCJ used a “fill in the blanks” rating instruction template from EAMS. As relevant
19 here, the template essentially begins with language extracted from Labor Code section
20 4660(b)(1)¹⁸ and then it has blanks for the WCJ to fill in on the report(s) and body part(s) to be
21 rated. There is also a check-box for additional rating instructions. When the WCJ filled in the
22 blanks on the template, he merely referenced the low back, right wrist, right hip and right knee in
23 Dr. Pechman’s May 14, 2007 report. He also directed the rater to “consider” a 3% WPI add-on for
24 pain.

25 ¹⁸ That is, the template begins by stating, “Please determine the percentages of permanent disability
26 by taking into account the *nature of the physical injury or disfigurement* including *the descriptions and*
27 *measurements of physical impairments and the corresponding percentages of impairments published in the*
American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition).”
All of the italicized language is directly from section 4660(b)(1).

1 It is entirely appropriate to use a standardized rating instruction template to set out basic
2 information such as the employee's date of birth, date of injury, occupation, and earnings. (See
3 Cal. Code Regs., tit. 8, § 10602 [the Administrative Director may adopt a formal rating form].)
4 Nonetheless, it is still *the WCJ's responsibility* to "describe the factors of disability in full." (Cal.
5 Code Regs., tit. 8, § 10602; see also *Hegglin*, 4 Cal.3d at p. 174 [36 Cal.Comp.Cases at p. 101]
6 ("the Board must, in any instructions it may direct to the rating bureau, fully describe each
7 separate factor of disability".)) The template used by the WCJ does not accomplish this. It does
8 not specifically instruct the rater which WPIs to use for each injured body part or, alternatively,
9 give clear and specific page references from Dr. Pechman's report to the rater.

10 The main part of the instructions relates to the WPIs for various body parts discussed in Dr.
11 Pechman's May 14, 2007 report. Yet, it is not clear from these instructions: (1) whether the WCJ
12 was solely instructing the rater to determine applicant's permanent disability using the actual
13 WPI(s) in Dr. Pechman's report, i.e., 8% WPI based on a DRE II and 2% WPI based on
14 patellofemoral pain syndrome; or (2) whether the WCJ was also directing the rater to
15 independently review the descriptions and measurements of physical impairments in Dr.
16 Pechman's report and offer an opinion on whether Dr. Pechman's impairment ratings were
17 consistent with the AMA Guides. If the WCJ intended the former, he simply should have
18 expressly instructed the rater to rate those specific WPIs, as discussed in Section II-C, above. If
19 the WCJ intended the latter, then the WCJ should have thoroughly reviewed Dr. Pechman's report
20 in conjunction with the AMA Guides and then prepared rating instructions that fully described the
21 WPI(s) to be rated to the best of the WCJ's understanding but additionally asked the rater to use
22 his expertise to assess whether Dr. Pechman's impairment ratings are consistent with the AMA
23 Guides.

24 The other part of the instructions asked the rater to "consider" a 3% add-on for pain.
25 Again, however, it is uncertain (1) whether the WCJ was instructing the rater to actually include a
26 3% WPI add-on for pain in the rating; or (2) whether the WCJ was also directing the rater to assess
27 whether a 3% WPI add-on for pain would be consistent with the AMA Guides. Again, if the WCJ

1 intended the rater to give a 3% add-on for pain, the WCJ's instructions should have expressly so
2 stated. Otherwise, he should have utilized the alternative procedure just discussed in the paragraph
3 above.

4 Given that the WCJ rejected the rater's recommended rating, it seems the WCJ intended to
5 instruct the rater to actually utilize Dr. Pechman's 8% WPI based on a DRE II and 2% WPI based
6 on patellofemoral pain syndrome; however, it further seems the WCJ also was asking the rater to
7 offer an expert opinion on whether a 3% WPI add-on for pain would be appropriate under the
8 Guides. Assuming the WCJ was directing the rater to actually utilize the 8% and 2% WPI ratings,
9 then it was inappropriate for the rater to disregard those two WPI ratings. As emphasized above, a
10 rater is *not* a trier of fact and *not* a medical expert. Although a rater is an expert in applying the
11 Schedule, the rater must follow the formal rating instructions of any WCJ and the rater must
12 consider no more and no less than the instructions.

13 Nevertheless, because the WCJ ultimately rated the permanent disability himself, the
14 ambiguities in the rating instructions and the rater's failure to follow their apparent intent are now
15 immaterial.

16 **B. The WCJ Needs to Reassess Whether a 10% WPI Is Supported by Substantial Evidence**

17 The WCJ concluded that applicant's injury caused 10% WPI based on the 8% WPI for a
18 DRE II and the 2% WPI for patellofemoral pain syndrome set forth in Dr. Pechman's May 14,
19 2007 report and its attached Impairment Rating Report. We will remand to the WCJ to reassess in
20 the first instance whether Dr. Pechman's report constitutes substantial evidence to support these
21 WPIs.

22 In finding 8% WPI based on a DRE II, Dr. Pechman referred to pages 384 to 386 and Table
23 15-3 of the AMA Guides. Under Table 15-3 of the AMA Guides a DRE II can result in 5% to 8%
24 WPI. Table 15-3 allows a DRE II finding to be made where, among other things: "Clinical history
25 and examination findings are compatible with a specific injury; findings may include significant
26 muscle guarding or spasm observed at the time of the examination, asymmetric loss of range of
27 motion, or nonverifiable radicular complaints, defined as complaints of radicular pain without

1 objective findings; no alteration of the structural integrity and no significant radiculopathy.”

2 Here, it was admitted that applicant sustained a specific injury on October 26, 2005 and Dr.
3 Pechman’s report found a specific injury based on applicant’s history and physical examination.
4 Therefore, the “specific injury” provision for a DRE II appears to be satisfied.¹⁹ Yet, Dr.
5 Pechman’s report does not appear to support either “significant muscle guarding or spasm”²⁰ or
6 “asymmetric loss of range of motion.”²¹ Moreover, it is somewhat questionable whether Dr.
7 Pechman’s report establishes “nonverifiable radicular complaints.” On the one hand, Dr. Pechman
8 said that while applicant complained of low back pain, she reported that “[t]here is no radiating
9 pain, no numbness or tingling” (May 14, 2007 report, at p. 2) and declared that applicant’s straight
10 leg raising tests in both the sitting and supine positions were negative bilaterally for back pain
11 down the legs (May 14, 2007 report, at pp. 8-9). On the other hand, Dr. Pechman noted that
12 “[t]here is radiating pain to the anterior aspect of the right thigh” (May 14, 2007 report, at p. 2) and
13 observed that the January 16, 2006 report of applicant’s primary treating physician, Philip Sobol,
14 M.D., recited that applicant “complain[s] of low back pain radiating to her right leg,” which Dr.
15 Sobol diagnosed as “[l]umbar sprain/strain, with the right lower extremity radiculitis” (May 14,
16 2007 report, at p. 14).

17 The WCJ should resolve these apparent ambiguities. In doing so, the WCJ may order
18 further development of the record.

19 Dr. Pechman’s Impairment Rating Report indicates that the 2% WPI for the right knee “is
20 based on patellofemoral pain syndrome,” citing to pages 544-545 and Table 17-31 of the AMA
21 Guides. A note to Table 17-31 allows a 2% WPI for “an individual with a history of direct trauma,
22 a complaint of patellofemoral pain, crepitation on physical examination, but without joint space

23 _____
24 ¹⁹ It is conceivable, though, that a DRE II could be used in a cumulative trauma case based on the
principles of *Almaraz/Guzman II*. This is a question for another day, however.

25 ²⁰ Dr. Pechman merely reported that “[t]here was palpable *tenderness* in the right posterior superior
26 iliac spine.” (Emphasis added.) Furthermore, he stated “[t]here was no evidence of any paravertebral
muscle rigidity or spasm.” (May 14, 2007 report, at p. 9.)

27 ²¹ Not only was applicant’s lumbosacral range of motion symmetric bilaterally, it appears her range of
motion was entirely normal. (May 14, 2007 report, at p. 9.)

1 narrowing on x-rays.”²²

2 Preliminarily, the AMA Guides does not appear to define “direct trauma.” Therefore, the
3 question of whether Blackledge’s knee injury resulted from “direct trauma” should be resolved by
4 the WCJ on remand if he finds that the other requisite elements for a WPI rating based on
5 patellofemoral pain are present. Nevertheless, the rater exceeded his role in testifying that “[he]
6 did not see a direct trauma” in reviewing Dr. Pechman’s report. To the extent the definition of
7 “direct trauma” is a medical question, the rater impermissibly substituted his lay opinion for that of
8 Dr. Pechman. To the extent it is a legal question, the rater impermissibly took on the role of the
9 judge.²³

10 In any event, the “patellofemoral pain” component appears to be present because Dr.
11 Pechman’s report said that applicant complained of “off and on” pain in the anterior aspect of the
12 right knee. (May 14, 2007 report, at p. 2.)

13 Nevertheless, it appears that the element of “crepitation on physical examination” may be
14 missing. That is, Dr. Pechman stated that, on physical examination, “[t]here was no palpable or
15 audible crepitus noted about the patella.” (May 14, 2007 report, at p. 11.) On the other hand, as
16 just discussed, Dr. Pechman’s report does find the “direct trauma” component of patellofemoral
17 syndrome. Moreover, the rater testified that “[i]f direct, were found, then the rating indicated by
18 Pechman would be appropriate.”

19 Accordingly, it may or may not be that all of the AMA Guides standards for patellofemoral
20 pain syndrome are present. On remand, the WCJ should determine this issue in the first instance
21 but, in his discretion, he may direct further development of the record.

22 Finally, the WCJ directed the rater to “consider” a 3% WPI add-on for pain. However,

23 _____
24 ²² Applicant’s knee x-rays revealed “the joint compartments to be well maintained.” (May 14, 2007
25 report, at p. 13.) Also, Dr. Pechman’s Impairment Rating Report recites that “[t]he [right] knee cartilage
interval is normal (4 mm)” and that “[t]he [right] patellofemoral cartilage interval is normal.”

26 ²³ We do note, though, that Dr. Pechman’s Impairment Rating Report states that “the patient has a
27 history of direct trauma.” This comment appears to flow from the history Dr. Pechman obtained that
applicant’s right knee injury occurred when “she took a wrong step while descending a flight of stairs ...
and her body ‘twisted toward the right side.’ ” (May 14, 2007 report, at p. 3.)

1 when the WCJ rated the case himself, he did not include a 3% WPI add-on.

2 On this point, the AMA Guides calls for an evaluating physician to calculate the WPI for a
3 particular body part or system; then, if the individual has “pain-related impairment that has
4 increased the burden of his or her condition *slightly*,” the physician “may increase the [previously-
5 calculated WPI] by up to 3%” without undertaking a formal pain-related impairment assessment.
6 (See AMA Guides, Chapter 18, § 18.3d, at p. 573 (emphasis in original); see also p. 574, Figure
7 18-1.) Because this pain add-on can be assessed only to “increase” other ratable impairment (*id.*),
8 there can be no pain add-on if there is no underlying WPI for a particular body part or system.

9 Here, it does not appear that Dr. Pechman was giving a 3% WPI add-on for pain over and
10 above either the 8% WPI for the low back or the 2% WPI for the right knee.

11 In finding 8% WPI for the low back, Dr. Pechman said he was giving greater than the 5%
12 minimum rating for DRE II because “some ADL changes are noted.” ADL deficits secondary to
13 pain can be the basis for a 3% WPI add-on. (AMA Guides, § 18.3d, at p. 573.) Therefore, it
14 appears Dr. Pechman might have been adding 3% to the 5% minimum on that basis, leading to the
15 overall 8% WPI for DRE II. Yet, there is no indication that Dr. Pechman intended to increase the
16 overall 8% WPI by an *additional* 3%. In any event, Dr. Pechman’s use of a DRE II may not be
17 supported by substantial evidence, as discussed above.

18 Moreover, Dr. Pechman’s 2% WPI for the right knee was already based in part on
19 patellofemoral pain and Dr. Pechman does not state an intent to increase that 2% WPI by an
20 additional 3%. Moreover, if the WCJ concludes that the 2% WPI for patellofemoral pain
21 syndrome is not supported by substantial evidence, then there would be no underlying WPI for that
22 body part to “increase,” meaning there could be no 3% add-on due to knee pain.

23 Therefore, again, the WCJ may consider directing the parties to further develop the record
24 on the pain add-on issue.

25 ///

26 ///

27 ///

1 **C. Dr. Pechman Did Not Inappropriately Rely on a “Computerized Impairment Rating”**

2 Defendant asserts that Dr. Pechman inappropriately relied on a “computerized impairment
3 rating” that “does not reflect Dr. Pechman’s opinion at all but attempts to take the objective factors
4 of disability in Dr. Pechman’s report and apply these objective factors to the AMA Guides.” This
5 argument has absolutely no basis in fact. First, there is no support in the record for ACE’s
6 allegation that Dr. Pechman utilized a “computerized” WPI rating. Second, Dr. Pechman states, “I
7 declare under penalty of perjury that the information contained in this report and its attachments ...
8 is true and correct to the best of my knowledge and belief.” Therefore, Dr. Pechman has
9 essentially declared under penalty of perjury that his attached Impairment Rating Report reflects
10 his opinion. Third, if defendant had any serious question about whether the Impairment Rating
11 Report actually reflected Dr. Pechman’s opinion, it could have cross-examined him. (Cf.
12 *Lumberman’s Mutual Casualty Co. v. Industrial Acc. Com. (Cacozza)* (1946) 29 Cal.2d 492, 500
13 [11 Cal.Comp.Cases 289, 294]; *Foremost Dairies, Inc. v. Industrial Acc. Com. (McDannald)*
14 (1965) 237 Cal.App.2d 560, 572 [30 Cal.Comp.Cases 320, 329].) Fourth, Dr. Pechman’s
15 Impairment Rating Report is completely consistent with the “Sample Report for Permanent
16 Medical Impairment” contained in the AMA Guides. (AMA Guides, at pp. 23-24.)

17 **D. Neither the WCJ nor Dr. Pechman Applied the Principles of *Almaraz II***

18 Defendant also claims that the WCJ’s 10% WPI finding is not justified under
19 *Almaraz/Guzman II*. In light of our disposition, this issue is moot. Nevertheless, it does not
20 appear that either Dr. Pechman or the WCJ used an *Almaraz/Guzman II* approach.

21 **III. CONCLUSION**

22 For all the above reasons, we amend the WCJ’s November 19, 2009 decision to defer the
23 issues of permanent disability and attorney’s fees and remand the matter to the trial level for a new
24 decision on these issues consistent with this opinion. The WCJ shall have discretion to first
25 conduct further proceedings on these issues, possibly including further development of the record.

26 For the foregoing reasons,

27 **IT IS ORDERED**, as the Decision After Reconsideration of the Appeals Board (En Banc),

1 that the Findings and Award of November 19, 2009, is **AMENDED** to **STRIKE** Findings of Fact
2 Nos. 4 and 6 and the Award in its entirety and to **SUBSTITUTE** the following therefor:

3 **FINDINGS OF FACT**

4 ***

5 4. The issue of permanent disability is deferred.

6 ***

7 6. The issue of reasonable attorney's fees is deferred.

8 **AWARD**

9 **AWARD IS MADE** in favor of **CYNTHIA BLACKLEDGE** and against
10 **ACE AMERICAN INSURANCE CO.**, as follows:

11 (a) All further medical treatment reasonably required to cure or relieve
12 the effects of the injury.

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