

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

**FRED BROYLES, *Applicant***

**vs.**

**ATLAS VAN LINES; ARCH INSURANCE,  
administered by GALLAGHER BASSETT SERVICES, *Defendants***

**Adjudication Number: ADJ12705097  
Sacramento District Office**

**OPINION AND ORDER  
DENYING PETITION  
FOR RECONSIDERATION**

We have considered the allegations of defendant's Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record and for the reasons stated in the WCJ's report, which we adopt and incorporate, and the additional reasons discussed below, we will deny defendant's Petition.

Pursuant to Labor Code section 4660.1(d), the scheduled rating is prima facie evidence of an employee's percentage of permanent disability. (Lab. Code, § 4660.1(d).) However, the scheduled rating is rebuttable. (See *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Almaraz-Guzman III)* (2010) 187 Cal.App.4th 808, 852-853 [75 Cal.Comp.Cases 837]; see also Lab. Code, § 4660.1(h) ["In enacting the act adding this section, it is not the intent of the Legislature to overrule the holding in *Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808."].) Specifically, the whole person impairment (WPI) portion of the scheduled rating may be rebutted by showing that "a different chapter, table, or method of assessing impairment of the AMA Guides more accurately reflects the injured employee's impairment than the chapter, table, or method used by the physician being challenged." (*Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School Dist. (Almaraz-Guzman II)* (2009) 74 Cal.Comp.Cases 1084, 1106 (Appeals Board en banc).) Physicians must still evaluate permanent impairment while staying within the "four corners of the Guides" pursuant to the Labor Code. (*Id.* at p. 1101.)

The overarching goal of rating permanent impairment is to achieve accuracy. (*Almaraz-Guzman III, supra*, at p. 822.) A “strict” application of the Guides may not accurately reflect an injured employee’s permanent impairment. The Court of Appeal in *Almaraz-Guzman III* acknowledged the Guides’ limitations and specifically held that

The *Guides* itself recognizes that it cannot anticipate and describe every impairment that may be experienced by injured employees. The authors repeatedly caution that notwithstanding its “framework for evaluating new or complex conditions,” the “range, evolution, and discovery of new medical conditions” preclude ratings for every possible impairment. (*Guides* § 1.5, p. 11.) The *Guides* ratings do provide a standardized basis for reporting the degree of impairment, but those are “consensus-derived estimates,” and some of the given percentages are supported by only limited research data. (*Guides*, pp. 4, 5.) The *Guides* also cannot rate syndromes that are “poorly understood and are manifested only by subjective symptoms.” (*Ibid.*)

To accommodate those complex or extraordinary cases, the *Guides* calls for the physician’s exercise of clinical judgment to assess the impairment most accurately.

(*Id.* at p. 823.)

The AMA *Guides* is thus not to be literally and mechanically applied. Instead, the evaluating physician may use his or her experience and expertise to interpret and apply *any portion* of the entire AMA *Guides*. A physician who departs from a strict application of the AMA *Guides* must explain why the departure is necessary and how the WPI rating was derived. (*Id.* at pp. 828-829.) Consequently, although the evaluating physician may utilize the chapter, table or method in the AMA *Guides* “that most accurately reflects the injured employee’s impairment,” the physician’s “opinion must constitute substantial evidence upon which the WCAB may properly rely, including setting forth the reasoning behind the assessment.” (*Almaraz-Guzman II, supra*, at p. 1104.)

Defendant contends that the qualified medical evaluator (QME) Dr. Joseph Sclafani improperly rated applicant’s impairment based on a lifting work restriction. This contention is unsupported by the record. Dr. Sclafani found that the strict rating of applicant’s impairment “is not commensurate with the applicant’s disability” and “does not accurately reflect the impact of this injury on applicant’s activities of daily living and work capacity.” (Joint Exhibit AA, QME Report by Dr. Joseph Sclafani, February 15, 2022, pp. 6-7.) He explained that “applicant’s

impairment is most accurately described pursuant to a rating analogy to a hernia condition.” (*Id.* at p. 7.) Dr. Sclafani opined that a class II impairment in Table 6-9 of the AMA Guides reflects the impairment applicant sustained “as a result of frequent discomfort precluding heavy lifting that interferes with some activities of daily living.” (*Id.*)

Dr. Sclafani explained why the strict rating did not accurately reflect applicant’s impairment and utilized his judgment, experience and training to provide an alternative rating from within the four corners of the Guides that more accurately reflects applicant’s impairment. He did not improperly use a work restriction to rate applicant’s impairment since he opined that the *Almaraz/Guzman* rating was warranted to account for the impact of lifting on his activities of daily living (ADLs). Although Dr. Sclafani referred to “work capacity,” which is not an ADL per the AMA Guides, he also explained that the rating is more accurate based on how this affects his ADLs. We therefore agree with the WCJ that Dr. Sclafani’s reporting regarding applicant’s impairment rating is substantial evidence to support an alternative rating per *Almaraz/Guzman*. (See e.g., *Scott’s Jack London Seafood, Inc. v. Workers’ Comp. Appeals Bd. (Fitzsimmons)* (2011) 76 Cal.Comp.Cases 1348 (writ den.) [QME’s ratings analogizing to herniation and gait derangement were substantial evidence even though applicant did not have a hernia or lower extremity injury].)

In conclusion, we will deny defendant’s Petition.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the Findings and Award issued by the WCJ on July 13, 2022 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

I CONCUR,

**/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**SEPTEMBER 21, 2022**

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

**FRED BROYLES  
EASON & TAMBORNINI  
LAW OFFICE OF SLADE NEIGHBORS**

*AI/pc*

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

REPORT AND RECOMMENDATION  
ON PETITION FOR RECONSIDERATION

Date of Injury:	October 9, 2019
Age on DOI:	57 years old
Occupation:	Driver
Parts of Body Injured:	Low back, right leg, right shoulder
Identity of Petitioners:	Defendant
Timeliness:	Petition was timely
Verification:	Petition was verified
Date of Order:	July 13, 2022 (served July 14, 2022)
Petitioners Contentions:	Defendant contends the basis for impairment should have been based on the strict rating rather than the <i>Almaraz/Guzman</i> rating. Defendant contends the WCAB / WCJ acted without or in excess of its powers by the order, decision, or award, the evidence does not justify the findings of fact, and the findings of fact do not support the order, decision, or award.

**II**  
**FACTS**

Applicant sustained an industrial injury to the low back and right leg while working as a driver on October 9, 2019. Applicant claimed an additional injury to the right shoulder. After trial, a Findings and Award issued. It was found that Applicant also sustained an injury to the right shoulder, Applicant is entitled to permanent disability of 29% without apportionment, and there is a need for future medical care for the low back and right leg. A reasonable attorney fee of 15% of the permanent disability was found. Defendant filed a Petition for Reconsideration.

**III**  
**DISCUSSION**

PERMANENT DISABILITY

At the reevaluation in July 2021, Dr. Sclafani performed an exam of the lumbosacral spine upon which Applicant had tenderness over the bilateral paraspinals, PSIS with guarding on range of motion, mild tenderness over the bilateral gluteal regions, and reduced range of motion on forward flexion, extension, and lateral flexion. Dr. Sclafani diagnosed Applicant with industrial myofascial pain and rigidity of the lumbar spine supporting musculature and industrially aggravated multilevel lumbar spondylosis with annular disruptions and resolved subjective radiculopathy. Applicant reported some difficulty getting dressed, reclining, lifting a child, and staying asleep due to lower back pain. Dr. Sclafani found 5% WPI based on Lumbar DRE Category II considering

verifiable pain and guarding with asymmetric range of motion deficits. (Joint Exhibit BB)

Subsequently, in his report dated February 15, 2022, Dr. Sclafani reviewed additional records including the Functional Capacity Evaluation report. Dr. Sclafani noted the occupational preclusions of no lifting, carrying, pushing, or pulling objects over 20 pounds, no stooping, kneeling, squatting, or bending at the waist, and no overhead work as well as the opportunity to take a 10-minute break every 120 minutes. Dr. Sclafani noted that Applicant demonstrated maximum effort and the restrictions accurately reflect his true abilities. Dr. Sclafani opined that Applicant has profound lifting restrictions due to the injury. Dr. Sclafani opined that the strict rating did not commensurate with Applicant's disability and used *Almaraz/Guzman* to apply an alternate rating method. Dr. Sclafani reasoned the strict rating does not accurately reflect the impact of the injury upon Applicant's activities of daily living and work capacity. Dr. Sclafani indicated, based on training, experience, and judgement, that Applicant's impairment is most accurately rated by analogy to a hernia condition. Dr. Sclafani considered frequent discomfort precluding heavy lifting that interferes with some activities of daily living. Dr. Sclafani found 15% WPI accurately described Applicant's impairment. (Joint Exhibit AA)

Dr. Sclafani provided a strict rating based on the DRE method, adequate support for why the strict rating did not accurately represent Applicant's disability, and reasoning why the analogy to a hernia condition was more appropriate.

The findings of Dr. Sclafani rate as follows:

Lumbar spine	06.05.00.00 - 15 [1.4] 21 - 350G - 23 - 29%
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The factors of permanent disability are based upon the reports of QME Dr. Sclafani. The record supports a finding that Applicant is entitled to a permanent disability award of 29%, equivalent to 124.75 weeks of indemnity payable at the rate of \$290 per week, in the total sum of \$36,177.50.

#### **IV** **RECOMMENDATION**

For the reasons stated above, it is respectfully recommended that Defendant's Petition for Reconsideration be denied.

DATE: August 15, 2022

Ariel Aldrich  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE