

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

LORENA RAMIREZ, *Applicant*

vs.

FAIRFAX SCHOOL DISTRICT, Permissibly Self-Insured, *Defendant*

**Adjudication Number: ADJ10193205
Bakersfield District Office**

**OPINION AND ORDER GRANTING
PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of August 25, 2023, wherein it was found that while employed on August 31, 2015 as a custodian, applicant sustained admitted industrial injury to the lumbar spine, but not to the leg, digestive system, nervous system or psyche. It was found that applicant's injury caused permanent disability of 33% and the need for further medical treatment. The WCJ's decision also contains a finding that "There is no *Almaraz/Guzman* adjustment of the permanent disability."

Defendant contends that the WCJ erred in finding permanent disability of 33%, arguing that 33% permanent disability is the rebuttal permanent disability per *Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] and since the WCJ's decision apparently found that the *Guzman* rating was not appropriate, that the WCJ should have utilized the scheduled impairment, which would have yielded 22% permanent disability.

We have not received an answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

We will affirm the substance of the WCJ's decision, but we will grant reconsideration and amend the decision to delete the finding that "There is no *Almaraz/Guzman* adjustment of the permanent disability."

Applicant was initially evaluated by panel qualified medical evaluator orthopedist Yuri Falkinstein, M.D. on July 15, 2016. Dr. Falkinstein recommended that applicant undergo surgical lumbar decompression and fusion. (July 15, 2016 report at p. 39.) Dr. Falkinstein opined that if applicant did not wish to undergo the surgical procedure, she was permanent and stationary with 13% whole person permanent impairment, but if she wished to undergo surgery, she had not yet reached maximal medical improvement. (July 15, 2016 report at pp. 41-42.)

At his June 13, 2017 deposition, upon being informed that defendant's utilization review denied the proposed surgery despite the recommendations of treating doctors and Dr. Falkinstein, Dr. Falkinstein opined that the most accurate measure of applicant's permanent impairment was 21% whole person impairment under DRE Category IV (AMA Guides, Table 15-3, p. 384) because applicant's condition required surgical intervention, whether or not it was provided. Dr. Falkinstein opined that the fairest, most accurate measure of applicant's impairment was 21% whole person impairment, which would be the rating if she had been provided surgery and had a good result from the surgery. (June 13, 2017 deposition transcript at pp. 24-25.) This was categorized as a rating under the "Almaraz-Guzman" principle at the deposition. (June 13, 2017 deposition transcript at pp. 24-25.)

In a report of August 30, 2019, Dr. Falkinstein wrote:

I previously rated her DRE III, 13%. However, in my deposition I discussed that since the surgery was not authorized and she wanted it, she would technically be rated as if she had the surgery — DRE IV, 21% whole person impairment, via **Almaraz Guzman II**. This is secondary to the fact that the surgery has been recommended by two board certified spine surgeons, including myself, however not provided. Therefore, she will be rated as if there was a successful surgery performed.

(August 30, 2019 report at p. 47.)

In *Almaraz v. Environmental Recovery Services* (2009) 74 Cal.Comp.Cases 1127 (Appeals Bd. en banc) (commonly known as, and hereinafter referred to as *Almaraz II*), we held that a "scheduled permanent disability rating may be rebutted by successfully challenging the component element of that rating relating to the employee's WPI under the AMA Guides ... by establishing that another chapter, table, or method within the four corners of the Guides most accurately reflects the injured employee's impairment." (*Almaraz II*, 74 Cal.Comp.Cases at pp. 1095-1096.) In

Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] the Court of Appeal affirmed our decision in *Almaraz II*.

While it is unclear in this case whether Dr. Falkinstein's ultimate 21% whole person impairment rating was truly a rebuttal *Guzman* rating, given that it was characterized as such in his deposition testimony and in his reporting, we will delete Finding No. 8 ("There is no *Almaraz/Guzman* adjustment of the permanent disability.") in order to lift any confusion.

Dr. Falkinstein clearly explains in his deposition testimony and in his report why 21% whole person impairment derived from DRE Category IV most accurately reflects applicant's impairment. This whole person impairment adjusts to 33% permanent disability, after apportionment.

We therefore grant reconsideration and amend the WCJ's decision to delete the potentially confusing and superfluous finding regarding the *Guzman* rebuttal but affirm the finding of 33% permanent disability.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of August 25, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of August 25, 2023 is **AFFIRMED** except it is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant, Lorena Ramirez, 52 years old, while employed on August 31, 2015, as a custodian, Occupational Group 340, at Bakersfield, California, by the Fairfax School District, sustained injury arising out of and in the course of employment to the lumbar spine but did not sustain injury arising out of and occurring in the course of employment to a leg, the digestive system, nervous system, or psyche.
2. At the time of injury, Applicant's earnings were sufficient to warrant a permanent disability rate of \$290.00 per week.
3. During the period from April 7, 2015 to July 14, 2016, the employer has paid Applicant temporary disability at \$527.62 per week.
4. During the period from July 15, 2016, through March 20, 2017, Defendant paid Applicant permanent disability indemnity at \$290.00 a week.
5. The injury was permanent and stationary on August 30, 2019.
6. Permanent disability is apportioned ninety percent (90%) to this injury.
7. The injury caused permanent disability of thirty-three percent (33%) after adjustment for age, occupation and apportionment, equivalent to 152.00 weeks of indemnity at \$290.00 per week commencing on August 30, 2019, for a total of \$44,080.00.
8. Applicant is in need of further medical treatment to cure or relieve the effects of this injury.
9. The reasonable value of the service of Applicant's attorney is \$5,289.60.

AWARD

AWARD IS MADE in favor of Lorena Ramirez against Fairfax School District as follows:

- (a) Permanent disability indemnity per Finding Number 7, less Attorney fees per Finding Number 9, and then allowed credit for prior payments per Finding Number 4.
- (b) Further medical treatment per Finding Number 8.
- (c) Attorney fees per Finding Number 9, to be commuted from the far end of the Award, if needed, to pay as a lump sum to Law Offices of Alex Berlin.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 13, 2023

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

**LORENA RAMIREZ
ALEX BERLIN
THE WHEATLEY FIRM**

DW/oo

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