

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

MARIA ALCANTAR ACEVES, *Applicant*

vs.

**STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION, legally uninsured, administered by STATE COMPENSATION
INSURANCE FUND, *Defendants***

**Adjudication Numbers: ADJ13007518, ADJ13007517
Salinas District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the 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 for the reasons stated below, we will deny reconsideration.

In his April 14, 2021 report, panel qualified medical examiner (PQME) Michel Gagnon, D.C., stated:

Almaraz/Guzman analysis:

In my report of January 22, 2021, I specifically note as part of my examination findings that the right shoulder ranges of motion are normal but there exists a significant strength deficit resulting from the patient's SLAP tear. The MRI also noted mild supraspinatus and infraspinatus strain and tendinitis with perhaps minimal partial-thickness undersurface tear near their conjoined insertion but no gross defect or retraction of the rotator cuff tendons. I provided an impairment rating of 0% as ranges of motion are normal. No ligamentous laxity was present. I finalized a rating based on weakness with 2% WPI using table 16-3 on page 439.

For the right shoulder permanent work restrictions, I provided no lifting above the shoulder of 15 pounds and to minimize motions requiring internal or external ranges of motion. ASLAP tear or labrum tear causes significant loss of function of the involved upper extremity. The labrum acts to stabilize the shoulder and prevents subluxations or dislocations. When the labrum integrity

is damaged, loss of motion and strength usually ensue. The muscular strength and endurance of the rotator cuff also decreases. The outcome of all this is usually pain, some instability, loss of function, loss of motion and muscle strength.

In her situation, the limitation of no lifting greater than 15 pounds above the shoulder is reasonable. The bicep tendon does not appear to be involved.

As I re-analyze her loss of function, I estimate that she has lost approximately 25% of her shoulder strength. Therefore, with this great loss of function, it is my opinion that a more accurate impairment of her condition can be provided. I am therefore updating my impairment analysis by using the following analogy: Looking at page 499, Table 16-18, the glenohumeral joint has a maximum impairment value of 36% WPI. Therefore, 25% of 36% or one quarter of 36% is a total of 9% WPI. This updated impairment reflects her total loss of function in the right shoulder and is an accurate impairment. This takes into account the loss of strength noted in my examination findings.

(Dr. Gagnon's 4/14/21 report, at p. 2, applicant's Exhibit A-1.)

For the reasons stated in the WCJ's report, we agree that the Dr. Gagnon's opinion is substantial medical evidence upon which the WCJ properly relied. To be considered substantial evidence, a medical opinion "must be predicated on reasonable medical probability." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-17, 419 [33 Cal.Comp.Cases 660].) A physician's report must also be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc), 70 Cal.Comp.Cases 1506 (writ den.); see also *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Almaraz-Guzman III)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] [an evaluating physician may deviate from a "strict" application of the AMA Guides in order to provide a rating within the four corners of the Guides that more accurately reflects the employee's impairment based on the physician's judgment, training and experience].)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 8, 2021

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

**MARIA ALCANTAR ACEVES
SPRENKLE, GEORGARIOU & DILLES, LLP
STATE COMPENSATION INSURANCE FUND**

PAG/ara

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

Defendant has filed a timely, verified Petition for Reconsideration from the Findings & Award of 7/27/2021, stating the usual statutory grounds. Defendant argues that the Workers' Compensation Judge (WCJ) erroneously relied on the opinions of QME Michel Gagnon, to determine the "date of injury" in ADJ13007518 and to determine the amount of permanent disability in ADJ13007517. The Petition is without merit and should be denied.

II STATEMENT OF MATERIAL FACTS

Applicant was employed by the State of California as a correctional officer on 9/25/2019 when she sustained an admitted injury to her right shoulder (ADJ13007518); and during a period of cumulative trauma through 9/26/2019, when she sustained admitted injuries to her cervical spine, bilateral upper extremities, including her bilateral forearms, bilateral epicondylitis, and bilateral carpal tunnel syndrome (ADJ13007517). At the trial, the parties stipulated that Applicant's proposed permanent disability ratings with respect to whole person impairment, as set forth on page 3 of the Pre-trial Conference Statement, are accurate if the WCJ applied the *Almaraz/Guzman* analysis and evaluation by Dr. Gagnon. (MOH/SOE 6/16/2021, p. 2).

The medical evidence consists solely of a series of reports from QME Michel Gagnon, DC. When he initially saw Applicant on 1/23/2020, he reported that Applicant complained of symptoms in her neck, right shoulder and upper extremities (Gagnon report, 1/23/2020, Ex. A-6, p. 4). She told Dr. Gagnon that her injury "...has been ongoing due to the repetitive movements that my job requires me to do." She was still employed in the same job, full-time, without restrictions, except for the self-imposed restriction from heavy lifting and taking breaks as needed (Id, p. 5). She said she was 80% recovered but not permanent and stationary, had not lost any time from work and was expected to make a full recovery with recommended treatment (Id, pp. 8-9).

On re-evaluating Applicant on 8/21/2020, Dr. Gagnon once again reported that Applicant was continuing to work full-time, with no new periods of temporary disability and no specific work restrictions (Gagnon report, 8/21/2020, p. 2, Ex. A-4). She was not yet permanent and stationary, and discussion of possible permanent disability was deferred (Id, p. 4).

Dr. Gagnon again re-evaluated Applicant on 1/22/2021. He reported that Applicant was continuing to work full-time with self-imposed restriction and breaks. He described the impact of Applicant's injuries on her activities of daily living. (Gagnon report, 1/22/2021, p. 2) He found Applicant had now achieved permanent and stationary status. For the cervical spine, he found 8% WPI, and based on loss of strength in the right shoulder on internal and external rotation, he assigned an AMA Guides "strict" rating of 2% WPI (Id, p. 5).

In his final report, dated 4/14/2021 (Exhibit A-1, p. 2), under the heading, “Almaraz/Guzman Analysis,” Dr. Gagnon concluded that several factors warranted identifying a more accurate rating for the shoulder impairment, including the SLAP or labrum tear, the 25% loss of strength, the above-shoulder lifting restriction of 15 lbs., and significant loss of function. By analogy to a glenohumeral joint impairment, he applied the 25% loss of strength to the maximum value of 36% impairment, to arrive at a rating of 9% WPI.

Applicant’s proposed permanent disability ratings on page 3 of the Pre-trial Conference Statement were:

ADJ13007518: 100% - (16.02.02.00 - 9 - [1.4] 13 - 490I - 18 - 19%) 19%
ADJ13007517: 100% - (15.01.01.00 - 8 - [1.4] 11 - 490I - 16 - 18%) 18%

In the contested Findings & Award, I found in favor of Applicant on the *Almaraz/Guzman* issue and awarded permanent disability as proposed by Applicant. I also found the date of injury in ADJ13007517 to be 1/22/21.

III DISCUSSION

A. Date of Injury in ADJ13007517

The type of injury in this case is cumulative trauma. Labor Code Sec. 5412 specifies that the date of injury in cumulative trauma cases is the date when knowledge of industrial causation concurs with the date when the employee first suffers disability. The requisite “knowledge” is generally gained from the advice of a physician, absent evidence (not present in this case) that the injured worker has sufficient experience or training to know that the injury was caused by work. *City of Fresno v. WCAB (Johnson)* (1985) 50 CCC 53. The record does not show if, and when, she learned of Dr. Gagnon’s findings, as reported by him on 1/23/2020, but her attorney formally entered the case and filed the Application alleging cumulative trauma on 2/20/2020. However, when Applicant was first examined by Dr. Gagnon in January of 2020, she told him she believed that her cumulative injury was caused by her work. Her “belief” is not the same as “knowledge” derived from a physician’s expertise. Considering the evidence as a whole, I conclude that Applicant first gained the required knowledge of industrial causation in either January or February of 2020.

The equally critical issue raised by Petitioner is when Applicant first suffered disability from the cumulative injury. Petitioner argues that Applicant first suffered disability when she self-imposed a restriction from heavy lifting. The record does not show when she first did so, but it does not matter: for purposes of satisfying the second prong of 5412, there must be evidence of either temporary or permanent disability. [*Chavira v. WCAB* (1991) 56 CCC 631] It is undisputed that Applicant was never taken off work by a physician for a temporary disability caused by this injury. Permanent disability was not found until Dr. Gagnon’s evaluation on 1/22/2021. It was only then that there was concurrence of knowledge and disability, thus establishing the 1/22/2021 date of injury under Labor Sec. 5412.

B. Almaraz/Guzman and Permanent Disability

Petitioner contends that Dr. Gagnon arbitrarily changed his 2% impairment rating for the shoulder to a 9% rating, when he wrote his report in April of 2021 (Exhibit A-1). The 2% rating in his earlier report in January of 2021 (Exhibit A-3), was a strict rating under the AMA Guides. There was no indication that the doctor considered the possibility of a more accurate rating for the shoulder impairment, when he wrote his 1/22/21 report, but he was asked to do so subsequently, and the April report resulted.

In the April report, the doctor provided considerable discussion of his reasons for finding a more accurate basis for rating the impairment, as summarized above. Petitioner asserts that the doctor locked himself in to the strict rating and should not be allowed to depart from it under any circumstances. This is precisely the type of rigid position rejected by the Court in *Milpitas Unified School District v. WCAB (Guzman)* (2010) 75 CCC 837, where the Court said that the Guides should not be applied mechanically, "...without regard to how accurately and completely they reflect the actual impairment sustained by the patient." Instead, said the Court, doctors should use their "clinical judgment" in evaluating the impairment. I conclude that Dr. Gagnon neglected to consider these principles, when he prepared his January report and that the April report was appropriately intended to correct this omission. Consequently, the April report is substantial evidence in support of my finding of permanent disability in the cumulative trauma case.

**IV
RECOMMENDATION**

I recommend that the Petition for Reconsideration be Denied.

Respectfully submitted,

**MICHAEL H. YOUNG
Workers' Compensation
Administrative Law Judge**