**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**MARIA ESTRELLA, *Applicant***

**vs.**

**STATE OF CALIFORNIA, Legally Uninsured, Administered By STATE COMPENSATION INSURANCE FUND, *Defendant***

**Adjudication Number: ADJ11211751**
**Salinas District Office**

# OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of September 16, 2021, wherein it was found that, while employed during a cumulative period ending on May 17, 2017 as a correctional officer, applicant sustained industrial injury to her right shoulder, lumbar spine, thoracic spine, and cervical spine, causing permanent disability of 58% and the need for further medical treatment. In making his findings regarding the level of permanent impairment, the WCJ followed the strict interpretation of the AMA Guides impairments offered by panel qualified medical evaluator chiropractor Naeem M. Patel, D.C. However, the WCJ declined to adopt Dr. Patel's alternative impairment analysis pursuant to *Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].

Applicant contends that the WCJ erred in finding permanent disability of only 58% arguing that the WCJ erred in not adopting Dr. Patel's alternative *Guzman* analysis. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, the WCJ correctly rejected Dr. Patel's *Guzman* analysis. We therefore deny the applicant's Petition.

Dr. Patel's first permanent impairment analysis is contained in his January 9, 2020 report, in which Dr. Patel found that applicant's condition producing pain in the low back and right shoulder was permanent and stationary. Dr. Patel opined that applicant's low back permanent impairment was a Category III impairment under the Lumbar Diagnosis Related Estimates (DRE)

Method (AMA Guides, pp. 381-388). Category III allows the medical evaluator to select a range of impairment between 10% and 13%, and Dr. Patel found that applicant's lumbar impairment was 13% due to "loss of relevant reflex(es), or loss of muscle strength…." (January 9, 2020 report at p. 21.) Dr. Patel also found right shoulder impairment utilizing the Shoulder Motion Impairment Method (AMA Guides, p. 474-479), adding impairments for loss of right shoulder flexion, extension, abduction, adduction, and internal rotation. (January 9, 2020 report at p. 22.) Dr. Patel also added a 3% add-on to the lumbar spine impairment due to pain. (January 9, 2020 report at p. 22.)

However, Dr. Patel further wrote:

> In light of Almarez-Guzman II [sic], I do not feel that the total WPI listed above accurately reflects Mrs. Estrella's overall functional impairment. I would like to use Table 6-9, (p. 136), and would analogize the loss of lifting capacity as Mrs. Estrella who has discomfort, precluding heavy lifting but not hampering some activities of daily living and feel Ms. Ortiz [sic] would fall into a class 2 impairment 10%-19%.
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> Based on loss of applicant's work capacity combined with decreased range of motion, and loss of significant functional loss [sic] and difficulty doing her ADL and chronic pain, Mrs. Estrella should have an add on of an additional WPI for loss of lifting capacity and very heavy work.

(January 9, 2020 report at p. 22.)

In an August 20, 2020 report, Dr. Patel opined that, in addition to the impairment previously outlined, applicant had two separate 6% impairments in the cervical and thoracic spine. (August 20, 2020 report at p. 21.) Additionally, in response to a letter from applicant's counsel, Dr. Patel clarified that "the 15% loss of lifting capacity [add-on from Table 6-9] should be divided up equally, 7.5% WPI to the lumbar spine and 7.5% WPI for the right shoulder." (August 20, 2020 report at p. 19.)

In a January 9, 2021 supplemental report, Dr. Patel reiterated that the scheduled rating for the lumbar spine was 13% utilizing the DRE method and the scheduled rating for the right shoulder was 5% utilizing the motion impairment (ROM) method, but that the additional 15%:

> [I]s based on functional limitation and in the inability to perform activities of daily living [(ADLs)], such as walking, moving light furniture, scrubbing, bending to clean and wash the floor, showering, doing yard work such as pulling the weeds. Therefore, her loss of lifting capacity hampers her hand activities, as the ADLs mentioned above.

> Therefore, the additional 15% WPI is given to her for her discomfort, unable to do heavy lifting and some activities of daily living.

(January 9, 2021 report at p. 2.)

In his final, April 8, 2021 report, Dr. Patel wrote:

> The ADLs that effect [sic] the low back are bathing, typing, standing, sitting, reclining, walking and climbing stairs, lifting and sleeping. The ADLs that effect [sic] the right shoulder are brushing teeth, combing hair, bathing, typing, sleeping, grasping and lifting.
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> And it is because of the ADL impacts mentioned above and loss of function that strict ratings for the lumbar spine and right shoulder are the most accurate reflection of overall impairment, and that is the reason why the addition of 15% impairment using Table 16-9 [sic], Class 2 and how I split the 15% as described in my previous report. I feel that the 15% loss of lifting capacity should be divided up equally, 7.5% WPI to the lumbar spine and 7.5% WPI for the right shoulder.
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> So when giving 7.5% to each body part the lumbar spine impairment is 13% WPI + 3% WPI pain add on plus 7.5% WPI for loss of lifting capacity for a total of 23.5%. Likewise the right shoulder will be 5% WPI plus 7.5% for a total of 12.5%.

(April 8, 2021 report at p. 2.)

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.) However, although a physician is not locked into any particular evaluation method found in the AMA Guides, his or her rating must still be based on and consistent with the AMA Guides, as read as a whole. As we explained, "A physician's WPI opinion that is not based on the AMA Guides does not constitute substantial evidence because it is inconsistent with the mandate of section 4660(b)(1)." (*Almaraz II*, 74 Cal.Comp.Cases at p. 1104.)

In *Guzman, supra*, the Court of Appeal affirmed our decision in *Almaraz II*. In affirming our decision, the Court of Appeal expressly recited and adopted our emphasis on the fact that our

"decision does not allow a physician to conduct a fishing expedition through the Guides 'simply to achieve a desired result'; the physician's medical opinion 'must constitute substantial evidence' of WPI and 'therefore … must set forth the facts and reasoning [that] justify it.'" (*Guzman*, *supra*, 187 Cal.App.4th at p. 825.)

The Court of Appeal explained, "'In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. [Citation.] Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. [Citation.] Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citation.]'" (*Id.*)

The *Guzman* court held that "Simply presenting a view contrary to an established rating in the Guides … would not be sufficient to rebut the PDRS rating. [A]n impairment rating that is inadequately supported by evidence and reasoning—and unquestionably, a rebuttal position arrived at by hunting through the Guides for a more favorable rating—will result in an opinion the [WCAB] will necessarily reject as insufficient evidence." (*Id.* at p. 828.)

To the extent that an evaluating physician gives impairment ratings that depart from the strict interpretation of the AMA Guides, he or she must explain why the standard method outlined in the Guides does not accurately reflect applicant's impairment, and why any alternative method better describes the impairment. (*Id*. at pp. 828-829.)

In this matter, Dr. Patel never adequately described how the standard ratings in the Guides did not reflect applicant's impairment. While Dr. Patel listed activities that applicant had difficulty with, he did not discuss how applicant had more difficulties with these activities compared to other people with DRE Category III lumbar disabilities and others suffering with multiple shoulder motion deficiencies, especially considering that Dr. Patel had already exercised discretion in placing applicant at the very top of the Lumbar DRE Category III range and in giving a 3% WPI add-on for pain. While Dr. Patel gives an added rating based on loss of strength, Lumbar DRE Category III already includes "loss of muscle strength." (AMA Guides, Table 15-3, p. 384; *Johnson v. State of California* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 428 [Appeals Bd. panel].)

Similarly, the Upper Extremities chapter of the Guides (Chapter 19) contains its own section on evaluating loss of shoulder strength (See AMA Guides, § 16.8, Strength Evaluation, pp.

507-511.) Dr. Patel never explains why he analogizes to a chapter dealing with hernias rather than utilizing the strength method specifically outlined for the shoulder. In any case, the Guides make clear that muscle strength and range of motion ratings cannot be combined for the same injury, stating, "If the examiner judges that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength *could be combined* with the other impairments *only* if based on unrelated etiologic or pathomechanical causes. Otherwise, the impairment ratings based on objective anatomic findings take precedence. Decreased strength *cannot* be rated in the presence of decreased motion ...." (AMA Guides, § 16.8a Principles, p. 508 [italics in original].) As noted previously, an alternative rating must be consistent with the Guides.

While we do not endorse the WCJ's apparent holding that an alternative rating may never be added to a scheduled rating, a reporting physician is required to present substantial medical evidence of how the scheduled rating fails to reflect an injured worker's true impairment, and any alternative rating must be consistent with the Guides. Since Dr. Patel's *Guzman* analysis fell short of these requirements, the WCJ correctly disregarded the 15% WPI add-on recommended by Dr. Patel. Accordingly, we deny the applicants' Petition for Reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that Applicant's Petition for Reconsideration of the Findings and Award of September 16, 2021 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**I CONCUR,**

**/s/ DEIDRA LOWE, COMMISSIONER**

**I DISSENT,**

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

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

**November 15, 2021**

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

**MARIA ESTRELLA**
**GEORGARIOU & DILLES, LLP**
**STATE COMPENSATION INSURANCE FUND**

**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*

**DISSENTING OPINION OF CHAIR KATHERINE A. ZALEWSKI**

I respectfully dissent. While I agree with my colleagues that an add-on to applicant's lumbar spine impairment is not warranted, I would have granted reconsideration and amended the WCJ's decision to incorporate an 8% WPI add-on (7.5% rounded up) to applicant's right shoulder impairment.

As noted by my colleagues in the majority, in *Almaraz v. Environmental Recovery Services* (2009) 74 Cal.Comp.Cases 1127 (Appeals Bd. en banc) (*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, 823-824 [75 Cal.Comp.Cases 837], the Court of Appeal affirmed our decision in *Almaraz II*, stating:

> 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. Indeed, throughout the Guides the authors emphasize the necessity of "considerable medical expertise and judgment," as well as an understanding of the physical demands placed on the particular patient. (Guides, p. 18.) "The physician must use the entire range of clinical skill and judgment when assessing whether or not the measurements or tests results are plausible and consistent with the impairment being evaluated. If, in spite of an observation or test result, the medical evidence appears insufficient to verify that an impairment of a certain magnitude exists, the physician may modify the impairment rating accordingly and then describe and explain the reason for the modification in writing." (Guides, p. 19.) The PDRS itself instructs physicians that if a particular impairment is not addressed by the AMA Guides, they "should use

> clinical judgment, comparing measurable impairment resulting from the unlisted objective medical condition to measurable impairment resulting from similar objective medical conditions with similar impairment of function in performing activities of daily living." (PDRS, p. 1-4.)
>
> Accordingly, while … the Guides should be applied "as intended" by its authors, such application must take into account the instructions on its use, which clearly prescribe the exercise of clinical judgment in the impairment evaluation, even beyond the descriptions, tables, and percentages provided for each of the listed conditions. The Board aptly observed that the descriptions, measurements, and percentages cannot be dissociated from the balance of the Guides, particularly chapters 1 and 2, which contain the instructions on the appropriate use of the ensuing chapters to perform an accurate and reliable impairment evaluation. "Thus, the AMA Guides is an integrated document and its statements in Chapters 1 and 2 regarding physicians using their clinical judgment, training, experience and skill cannot be divorced from the balance of the Guides."

Here, as allowed by the *Guzman* decision, Dr. Patel chose impairment ratings that gave a more accurate measure of applicant's difficulty in performing activities of daily living. Dr. Patel tied his loss of strength add-on to applicant's "difficulty doing her ADL." (January 9, 2020 report at p. 22). Dr. Patel further explained in his January 9, 2021 report, applicant's additional impairment was warranted by difficulty performing activities "such as walking, moving light furniture, scrubbing, bending to clean and wash the floor, showering, doing yard work such as pulling the weeds. Therefore, her loss of lifting capacity hampers her hand activities, as the ADLs mentioned above." (January 9, 2021 report at p. 2.) In his final April 8, 2021 report, Dr. Patel specified that the impaired activities of daily living attributable to the right shoulder injury, were "brushing teeth, combing hair, bathing, typing, sleeping, grasping and lifting." (April 8, 2021 report at p. 2.)

Unlike the DRE Lumbar method which takes loss of strength into account, range of motion and loss of strength are separate deficiencies. While the AMA Guides state that upper extremity range of motion and loss of strength are generally not to be combined, *Guzman* allows departure from this general guideline when the reporting physician makes clear that an impairment is not accurately measured by only one rating. (*Lux v. County of Santa Barbara* (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 224 [Appeals Bd. panel].)

Accordingly, I respectfully dissent.

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

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

**November 15, 2021**

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