

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

JORGE GERMAN BENAVIDES, *Applicant*

vs.

**WAGNER RYAN, individually; AGS TILE AND STONE
WESCO INSURANCE COMPANY,
administered by AMTRUST NORTH AMERICA, *Defendants***

**Adjudication Number: ADJ11187123
Sacramento 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, we will deny reconsideration.

We admonish defense attorney Matthew Seeley with the Law Offices of Hanna, Brophy, MacLean, McAleer & Jensen for attaching documents that are already part of the record in violation of WCAB Rule 10945. (Cal. Code Regs., tit. 8, § 10945(c)(1)-(2).) Failure to comply with the WCAB's rules in the future may result in the imposition of sanctions.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 9, 2022

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

**JORGE GERMAN BENAVIDES
METZINGER AND ASSOCIATES
HANNA BROPHY MACLEAN, MCALEER & JENSEN**

PAG/abs

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

Date of Injury:	October 18, 2017
Age on DOI:	40 years old
Occupation:	Tile setter
Parts of Body Injured:	Low back
Identity of Petitioners:	Applicant
Timeliness:	Petition was timely
Verification:	Petition was verified
Date of Order:	February 24, 2022
Petitioners Contentions:	Applicant contends the WCJ or WCAB 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. Specifically, Applicant disputes the finding of 38% permanent disability, contending he is 100% based on the vocational rehabilitation report by Frank Diaz.

II

FACTS

Applicant sustained an industrial injury to the low back on October 18, 2017 while working as a tile setter. The case went to trial on the issues of permanent and stationary date, permanent disability, the lien for vocational rehabilitation services, and attorney fees.

An award issued of permanent disability of 38% based on the findings of QME Dr. Nicole Chitnis, less permanent disability advances, and an attorney fee of 15% of the permanent disability. The award included future medical treatment to cure or relieve from the effects of the industrial injury as stipulated by the parties.

It was found that obtaining services of a vocational rehabilitation expert were reasonable and necessary, despite being unsuccessful, but the record requires further development to determine whether the exact amount of expenses incurred are reasonable and necessary. The parties were ordered to meet and confer to attempt to agree upon the cost of the vocational rehabilitation expert services and perform additional discovery if necessary.

Applicant filed a Petition for Reconsideration regarding permanent disability.

III DISCUSSION

The QME Dr. Chitnis found 13% WPI based on DRE Lumbar Category III for verifiable radiculopathy and based on the limitations of activities of daily living. Dr. Chitnis found an addition 2% WPI add on for pain. Then Dr. Chitnis opined that the case was complex and extraordinary because of Applicant's pain and symptoms. Dr. Chitnis found the strict rating was not an accurate measurement of Applicant's disability considering the impact upon the activities of daily living. Dr. Chitnis explained Applicant's condition is much more complex than a typical laminectomy because he developed scroma and epidural fibrosis at the surgical site and then significant degenerative joint disease resulting in foraminal stenosis. Dr. Chitnis found the level of impairment to be greater than the strict interpretation of the AMA Guides and used *Almaraz/Guzman* to account for the most accurate measure of Applicant's impairment. Dr. Chitnis analogized the condition to a one level fusion based on the significant pathology and found 23% WPI based on DRE Lumbar Category IV. Dr. Chitnis found this accurately described Applicant's impairment. (Joint Exhibit EE) Regarding her impairment finding, Dr. Chitnis explained that she considered everything about Applicant's condition including subjective complaints, objective findings, and all functional limitations. (Joint Exhibit GG)

The findings of Dr. Chitnis, based on the *Almaraz/Guzman* rating, rate as follows:

Lumbar spine 15.03.01.00 - 23 [1.4] 32 - 460H - 38 - 38%

Dr. Chitnis found work restrictions of excluding working at heights or lifting more than 25 pounds. Dr. Chitnis restricted the hours per day Applicant could walk, stand, bend, kneel, climb, squat, twist, and push/pull. Dr. Chitnis provided no limitations upon sitting, reaching above shoulder, keyboarding, writing, grasping, and fine manipulation. (Joint Exhibit EE)

Frank Diaz provided a vocational opinion. Mr. Diaz categorized Applicant's prior employment as very heavy work and presumed Applicant is limited to sedentary work but failed to provide his reasoning for these classifications. Regardless, Mr. Diaz found 1,127 positions that Applicant could perform. Furthermore, Mr. Diaz found Applicant unamenable to retraining despite graduating from high school in California in 1993. Mr. Diaz indicates Applicant does not know how to use a computer but also indicates Applicant has never tried to use a computer and is able to use a smartphone. Finally, Mr. Diaz does not address Applicant's lack of attempt or effort to reenter the workforce or obtain retraining. (Applicant Exhibit 1)

Dr. Chitnis reviewed the report by Mr. Diaz. In her supplemental report, Dr. Chitnis deferred to Mr. Diaz for vocational issues but opined "Medically speaking, I believe that the patient can do some sort of gainful employment." Dr. Chitnis questioned whether Mr. Diaz had the medical expertise to comment upon her conclusions and indicated Mr. Diaz has no basis to assess functional impairment. (Joint Exhibit HH)

The factors of permanent disability are based upon the *Almaraz/Guzman* ratings of QME Dr. Chitnis. The findings of Dr. Chitnis are the better reasoned and more persuasive than that of Mr. Diaz. The record supports a finding that Applicant is entitled to a permanent disability award of 38%, equivalent to 187 weeks of indemnity payable at the rate of \$290 per week, in the total sum of \$54,230, less permanent disability advances made and less a reasonable attorney fee.

IV

RECOMMENDATION

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

DATE: MARCH 15, 2022

ARIEL ALDRICH
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE