

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

MICHAEL CARDOZA, *Applicant*

vs.

**COUNTY OF ALAMEDA SHERIFF'S DEPARTMENT; Permissibly Self-Insured;
administered by YORK RISK SERVICES GROUP, INC., a Sedgwick Company,
*Defendants***

Adjudication Numbers: ADJ15807564, ADJ15807527

Oakland District Office

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on September 16, 2022, wherein the WCJ found in pertinent part that applicant's injury caused 31% permanent partial disability.

Defendant contends that the report from Physical Medicine & Rehabilitation agreed medical examiner (AME) James B. Stark, M.D., is not substantial evidence to rebut the permanent disability rating schedule (PDRS) and that a strict application of the American Medical Association Guides to the Evaluation of Permanent Impairment, (AMA Guides) indicates applicant's injury caused 18% permanent disability.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant claimed injury to his low back while employed by defendant as a deputy sheriff on January 16, 2022.

AME Dr. Stark evaluated applicant on March 24, 2022. Dr. Stark examined applicant, took a history and reviewed the medical record. He diagnosed applicant as having a lumbar strain that was aggravating multilevel disc bulges, and low back pain. (Joint Exh. 100, Dr. Stark, March 26, 2022, p. 4.) He then stated:

I do not know of treatment that would restore Mr. Cardoza's bending and lifting capacity. His job requires bending and lifting. ¶ By this I mean, I do not anticipate measurable improvement in the foreseeable future. Alternatives are to continue with modified duty, meaning no lifting or repetitive bending, versus proceeding with industrial disability retirement. (Joint Exh. 100, p. 4.)

Regarding applicant's disability, Dr. Stark indicated that by making a strict application of the AMA Guides, "DRE lumbar category II applies with maximally 8% whole person impairment." (Joint Exh. 100, p. 4.) He then stated:

In my judgment, that 8% does not accurately reflect the level of disability associated with Mr. Cardoza's spine. His disability is that which prevents certain lifting activities. This means that rebuttal of The Guidelines is necessary, as per the Almaraz/Guzman decisions, in order to obtain the most accurate measure of impairment. ¶ For rebuttal, I will rely up on table 6-9 on page 136. This is the table for rating abdominal hernias. It is the only chart or table within the 4 corners of The Guidelines that even mentions the word "lifting." ¶ The range is from 10-19%. I recognize 15% whole person impairment as the most accurate measure of impairment. (Joint Exh. 100, pp. 4 - 5.)

The parties proceeded to trial on August 23, 2022. The issues submitted for decision included the level of permanent disability caused by the January 16, 2022 injury. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 23, 2022, p. 2.)¹

¹ We note that although the caption in the Petition includes case number ADJ15807527, that injury claim was not at issue in the August 23, 2022 trial and will not be addressed herein.

DISCUSSION

We first note that based on our review of the record, including the Electronic Adjudication Management System (EAMS) ADJ file, by “Correspondence Other” WCJ Russel stated that,

Attached are the MOH (Minutes of Hearing) with OTOC [Order Taking Off Calendar] of the Applicant’s Covid claim in ADJ15807527 per your joint request, and the completed PTCS [pre-trial conference statement] setting the back claim [ADJ15807564] for half day trial on 8/23 before Judge Tammy Homen, as previously agreed. (July 20, 2022, email to counsel.)

The PTCS, referred by WCJ Russell, indicates the parties had agreed to close discovery and try the matter “on current record.” (July 20, 2022 PTCS, p. 4.) The only evidence submitted at the August 23, 2022; trial was the report from AME Dr. Stark. (MOH/SOE, August 23, 2022, p. 2.)²

It is well settled that the Appeals Board may rely on the medical opinion of a single physician unless it is “based on surmise, speculation, conjecture, or guess.” (*Place v. Workmen’s Comp. App. Bd.* (1970) 3 Cal.3d 372, 378. [35 Cal.Comp.Cases 525].) To be substantial evidence a medical opinion must be based on pertinent facts, on an adequate examination and accurate history, and it must set forth the basis, and the reasoning, in support of the conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) “[W]orkers’ compensation law favors agreed medical examiners in resolving medical disputes fairly and expeditiously.” (*Green v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1444 [70 Cal.Comp.Cases 294].) As noted by the WCJ, Dr. Stark was presumably chosen by the parties to examine applicant in the capacity of an AME because of his expertise and neutrality, so his opinions should be followed unless there is good reason to set them aside. (see Report p. 2; *Power v. Workers’ Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

Here, Dr. Stark indicated that applicant could “continue with modified duty, meaning no lifting or repetitive bending” and that applicant’s disability “prevented certain lifting activities.” (Joint Exh. 100, p. 4.) The categories of the diagnosis related estimate (DRE) impairment for the lumbar spine are “summarized in table 15-3” of the AMA Guides (See AMA Guides p. 634.) Dr. Stark stated that the lumbar spine impairment rating based on the DRE table 15-3 did not accurately

² Although identified as exhibits, the parties’ trial briefs are their respective arguments, and are not evidence.

identify applicant's disability. He then explained that the reason for using the Table 6-9 (Impairment Due to Herniation) was because it addresses the impairment caused by applicant's inability to do heavy lifting. (Joint Exh. 100, pp. 4 - 5.) Dr. Stark referred to the "Almaraz/Guzman decisions" wherein the Appeals Board, and subsequently the Sixth District Court of Appeal, explained that the AMA Guides provide guidelines for the exercise of professional skill and judgment which, in a given case, may result in ratings that depart from those based on the strict application of the AMA Guides. (*Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) (*Almaraz/Guzman II*) affirmed by *Milpitas Unified School Dist. v. Workers' Compensation Appeals Board* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] (modified on other grounds on September 1, 2010).) Dr. Stark's explanation of why he rated applicant's lumbar spine impairment by "analogy" to the AMA Guides hernia impairment is consistent with the reporting doctor's responsibility to correctly identify the injured worker's disability as explained in the "Almaraz/Guzman decisions" discussed above.

Finally, as we stated earlier (see footnote 2), a party's arguments are not evidence. In this matter, applicant's low back injury claim was accepted, and the "primary issue" litigated by the parties was the permanent disability caused by applicant's injury. (See Report, p. 1; MOH/SOE, p. 2.) As noted above, Dr. Stark's report was admitted into the trial record as a Joint Exhibit and there was no other medical evidence submitted by either party. Defendant's disagreement with AME Dr. Stark's conclusions is not evidence that the doctor's opinions are incorrect. Again, having reviewed the entire record, we see no factual and/or legal basis for disturbing the WCJ's F&A.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued by the WCJ on September 16, 2022, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 18, 2022

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

**MICHAEL CARDOZA
RAYMOND E. FROST & ASSOCIATES
MICHAEL SULLIVAN & ASSOCIATES LLP**

TLH/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

- | | | |
|----|----------------------------|--|
| 1. | Applicant's Occupation: | Deputy Sheriff |
| | Dates of Injury: | January 16, 2022 (ADJ15807564);
Mistakenly Filed (ADJ15807527) |
| 2. | Parts of Body Inured: | Low Back |
| | Identity of Petitioner: | Defendant |
| | Timeliness: | Yes |
| | Verification: | Yes |
| 3. | Date of Findings and Award | September 15, 2022 |
| 4. | Defendants' Contentions: | The determination that permanent disability based on AME Dr. Stark's analysis of Almaraz/Guzman is not substantial evidence. |

II.

STATEMENT OF THE CASE AND FACTS

Applicant sustained an admitted injury to his low back on January 16, 2022. The Applicant was employed as a deputy sheriff.

The matter proceeded to trial on August 23, 2022, on the primary issue of permanent disability.

On September 15, 2022, I issued a Findings and Award based on the AME report of Dr. Stark based on his analysis of permanent disability under Almaraz/Guzman. Defendant filed a Petition for Reconsideration utilizing two Case Numbers. It should be noted that the Defendant erred including Case No. ADJ15807527 as that case was not before the WCJ. This mistake although inadvertent caused a delay in forwarding to the court WCJ. Although the Petition for Reconsideration was filed timely on October 5, 2022, it was not received by the correct WCJ until October 10, 2022. The Board should not take this mistake lightly as there could have been dire consequences.

III.

DISCUSSION

The Board has long held that the strict ratings maybe rebutted within the four corners of the AMA Guides. (*Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 CCC 1084.) (*Levy v. State of California, Department of Motor Vehicles*, 2009 Cal. Wrk. Comp. P.D. LEXIS 591.¹)

Here, defendant argues that Dr. Stark's medical report is not substantial evidence. It is presumed that Dr. Stark was utilized as an agreed medical examiner based on his experience and neutrality, and accordingly, Dr. Stark's opinions are entitled to great weight unless there is good cause to set them aside. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782.) The defendant did not cross-examine the AME Dr. Stark. The only evidence offered by the parties was Joint Exhibit 100 AME report of Dr. James Stark, dated March 26, 2022. The defendant cannot have his cake and eat it to[o].

Dr. Stark based his analysis on his personal physical examination of the Applicant. The applicant was employed as a deputy sheriff since 2007. He took a complete history. Reviewed the medical reports of Concentra and the MRI report dated February 13, 2022. The Applicant was diagnosed with lumbar strain aggravating multilevel disk bulges. (*Granado v. Workmen's Comp. App. Bd.*, 33 Cal. Comp. Cases 647.) The WCJ found Dr. Stark's medical report to be substantial evidence.

Dr. Stark was of the opinion that the AMA Guides did not accurately reflect the applicant's level of disability. The Applicant's disability prevented certain lifting activities. Dr. Stark referred to table 6-9, page 136, as it was the only table within the four corners that mentioned the word "lifting". The rating under table 6-9 was 10-19%. Dr. Stark provided a 15% whole person impairment. Dr. Stark's opinion was within the four corners of the AMA guides utilizing Table 13-15 Station and Gait Disorders. Dr. Stark rebutted the scheduled rating because he explained why it most accurately reflected the impairment.

¹ Although WCAB panel decisions are not binding, they may be considered the extent that their reasoning is persuasive (see *Guitron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion).)

Based upon the above, I recommend that defendant's Petition for Reconsideration be denied.

Date: October 10, 2022

Tammy Homen
Workers' Compensation Judge

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