

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

DANIEL LINSTAD, *Applicant*

vs.

CITY OF RICHMOND, PERMISSIBLY SELF-INSURED, *Defendant*

**Adjudication Number: ADJ20141060
Santa Rosa District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant City of Richmond (defendant) seeks reconsideration of the October 11, 2024 Findings of Fact and Award (F&A), wherein the workers' compensation arbitrator (WCA) found that applicant, while employed as a firefighter on December 3, 2017, sustained industrial injury to his lumbar spine. The WCA found in pertinent part that applicant sustained 33 percent permanent disability.

Defendant contends that the Independent Medical Evaluator (IME) improperly relied on applicant's loss of lifting capacity as a basis for assessing applicant's whole person impairment by analogy.

We have received an Answer from applicant. The WCA prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied, or in the alternative, granted for the purpose of development of the record with the IME.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny reconsideration.

FACTS

Applicant sustained injury to his lumbar spine while employed as a firefighter by defendant City of Richmond on December 3, 2017. Defendant admits injury arising out of and in the course of employment but disputes the nature and extent of the injury.

Pursuant to Labor Code¹ section 3201.7, the parties are subject to an Alternative Dispute Prevention and Resolution (ADR) Program, which allows each party to obtain an Independent Medical Evaluator (IME) and further provides for resolution of disputes through arbitration. Applicant has selected IME James Stark, M.D., while defendant has selected IME Daniel D'Amico, M.D.

On September 12, 2024, the parties proceeded to arbitration, and framed issues of, in relevant part, permanent disability and apportionment. (Transcript of Arbitration Proceedings, dated September 12, 2024, at p. 8:13.) The WCA heard testimony from applicant, and the parties submitted the matter for decision the same day.

On October 11, 2024, the WCA issued his F&A, determining in relevant part that applicant's injury resulted in 33 percent permanent disability. The WCA's Opinion on Decision reviewed the reporting of both IME Dr. Stark as well as Dr. D'Amico but found the reporting of Dr. Stark to be the more persuasive. (Opinion on Decision, at pp. 6-8.) Dr. Stark determined that applicant's "strict" rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (AMA Guides), was eight percent impairment using a Diagnosis Related Estimate (DRE) approach. However, Dr. Stark further opined that the impairment derived from the DRE approach did not accurately represent applicant's functional loss, including applicant's losses in capacity for lifting. (*Id.* at p. 6.) Thus, Dr. Stark rated applicant's disability by analogy to hernia using AMA Guides Table 6-9 and assessed 15 percent impairment. (*Ibid.*) When adjusted by the Permanent Disability Rating Schedule, applicant's impairment rated to 33 percent permanent disability. (Finding of Fact No. 5; Award No. "a".)

Defendant's Petition avers the WCA's decision erred in accepting Dr. Stark's reasoning that departure from a "strict" AMA Guides rating was appropriate because of applicant's compromised lifting capacity. Defendant asserts that because the AMA Guides specifically contemplates functional limitations in assessing percentages of impairment, it was error for

¹ All further references are to the Labor Code unless otherwise noted.

Dr. Stark to rely on applicant's diminished lifting capacity as a basis for departing from a strict rating. (Petition, at p. 5:15.)

Applicant's Answer responds that ratings derived from a strict application of the AMA Guides are rebuttable, and that in the instant matter, applicant's functional limitations are significant and well-documented in the medical record. (Answer, at p. 6:7.)

The WCA's Report observes that Dr. Stark's analysis of impairment appropriately describes a strict rating under the AMA Guides but also sets forth a rationale for why the strict rating does not accurately reflect applicant's disability and offers an alternative rating from within the four corners of the AMA Guides that provides a more accurate assessment of impairment. (Report, at p. 6.) Accordingly, the WCA recommends we deny defendant's petition, or in the alternative, return the matter to the trial level for supplemental reporting from Dr. Stark. (*Id.* at p. 7.)

DISCUSSION

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b)
 - (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
 - (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on November 22, 2024, and 60 days from the date of transmission is January 21, 2025. This decision is issued by or on January 21, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on November 19, 2024, and the case was transmitted to the Appeals Board on November 22, 2024. Service of the Report and transmission of the case to the Appeals Board did not occur on the same day. Thus, we conclude that service of the Report did not provide accurate notice of transmission under Labor Code section 5909(b)(2) because service of the Report did not provide actual notice to the parties as to the commencement of the 60-day period on November 22, 2024.

No other notice to the parties of the transmission of the case to the Appeals Board was provided by the district office. Thus, we conclude that the parties were not provided with accurate notice of transmission as required by section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on November 22, 2024.

II.

The WCA has relied on the opinions of Dr. Stark in reaching the award of 33 percent permanent disability. Dr. Stark, in turn, has offered a strict AMA Guides rating at 8 percent impairment using a DRE approach, but has further opined that this rating does not accurately reflect applicant's overall impairment, noting significant compromise in applicant's lifting capacity. Thus, Dr. Stark has rated applicant's impairment by analogy to a hernia injury, and assessed 15 percent impairment, which in turn yields 33 percent permanent disability after adjustment. (Finding of Fact No. 5; Opinion on Decision at p. 8.)

The overarching goal of rating permanent impairment is to achieve accuracy. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Guzman III)* (2010) 187 Cal.App.4th 808, 822 [75 Cal.Comp.Cases 837].) As the Court of Appeal stated in *Guzman III*:

Section 4660, subdivision (b)(1), recognizes the variety and unpredictability of medical situations by requiring incorporation of the descriptions, measurements, and corresponding percentages in the Guides for each impairment, not their mechanical application without regard to how accurately and completely they reflect the actual impairment sustained by the patient.

...

If the physician expresses the opinion that the chapter applicable to a particular kind of injury does not describe the employee's injury, but all other chapters address completely different biological systems or body parts, it would likely be difficult to demonstrate that that alternative chapter supplies substantial, relevant evidence of an alternative WPI rating. In order to support the case for rebuttal, the physician must be permitted to explain why departure from the impairment percentages is necessary and how he or she arrived at a different rating. That explanation necessarily takes into account the physician's skill, knowledge, and experience, as well as other considerations unique to the injury at issue. In our view, a physician's explanation of the basis for deviating from the percentages provided in the applicable Guides chapter should not a priori be deemed insufficient merely because his or her opinion is derived from, or at least supported by, extrinsic resources. The physician should be free to acknowledge his or her reliance on standard texts or recent research data as a basis for his or her medical conclusions, and the WCJ should be permitted to hear that evidence. If the explanation fails to convince the WCJ or WCAB that departure from strict application of the applicable tables and measurements in the Guides is warranted in the current situation, the physician's opinion will properly be rejected. Without a complete presentation of the supporting evidence on which the physician has based his or her clinical judgment, the trier of fact may not be able to determine whether a party has successfully rebutted the scheduled rating or, instead, has manipulated the Guides to achieve a more favorable impairment assessment.

(*Guzman III, supra*, 187 Cal.App.4th at pp. 822, 828–829.)

Thus, in order to rebut a strict application of the AMA Guides, the doctor is expected to (1) provide a strict rating per the AMA Guides; (2) explain why the strict rating does not accurately reflect the applicant's disability; (3) provide an alternative rating using the four comers of the AMA Guides; and (4) explain why that alternative rating most accurately reflects applicant's level of disability. (*Id.* at pp. 828–829.)

Defendant's Petition contends Dr. Stark's rebuttal of the strict AMA Guides rating and his rating by analogy to hernia injury was unnecessary and unsupported in the record. Defendant notes that Chapter 1 of the AMA Guides states that the "[i]mpairment ratings were designed to reflect functional limitations, not disability," and that the impairment listed in the Guides are "an estimate of the impact on an applicant's ability to perform activities of daily living (excluding work)." (Petition, at p. 7:15.) Defendant contends that "it is nearly impossible to contemplate that the Guides' authors did not consider lifting as one of the activities of daily living impacted by a lumbar spine injury...." (*Id.* at p. 8:8.) Accordingly, defendant concludes the eight percent strict rating adequately contemplates functional loss, including loss of lifting capacity, obviating the need for an alternative rating.

The WCA's Report acknowledges that the AMA Guides introductory chapter does address functional limitations in activities of daily living. However, the WCA distinguishes between generalized goals identified by the authors of the AMA Guides in attempting to quantify impairment and the overarching goal of accurately reflecting disability as described in *Guzman III, supra*, as follows:

James Stark, M.D. evaluated applicant on July 12, 2021 and he diagnosed applicant with "multilevel degenerative disc and joint disease with likely right LS radiculopathy based upon weakness, sensory loss and atrophy." Dr. Stark did find applicant to be at Maximum Medical Improvement (MMI) status but deferred his opinion relative to permanent disability until he had the opportunity to review the 2020 MR1 findings as well as a recommended EMG of the right lower extremity. The EMG was ordered to determine applicant had LS radiculopathy.

Upon review of the MRI and EMG (which was interpreted as normal), Dr. Stark determined that a "strict" rating of permanent impairment would be consistent with a DRE Category II at 8% WPI. However, Dr. Stark determined that the 8% WPI was not the most accurate level of impairment because it did not take into consideration applicant's functional loss of lifting capacity.

Based upon an Almaraz Guzman analysis, Dr. Stark applied Table 6-9 from the AMA Guides (hernia). His basis for this utilization was that this was the only table within the guides that "even mentions lifting". After reviewing the various descriptions of restrictions on this table, Dr. Stark opined that a Class II description best described applicant's lower back symptoms. He determined that a 15 % WPI was the most accurate measurement of disability. Dr. Stark found no element of apportionment to non-industrial factors.

...

Dr. Stark did provide an alternative rating within the “four corners” of the AMA Guides and he explained why the alternative rating more accurately reflected applicant’s disability.

In describing his rationale why the alternative rating was better reflective of applicant’s impairment, he noted the limitations in rating lumbar spine disabilities using the “DRE” method. This method did not contemplate any described loss of lifting.

Based upon this analysis, I confirm that Dr. Stark’s opinion is compliant within the case law and should be considered substantial medical evidence. Defendant’s contention that Dr. Stark’s opinion is not substantial medical evidence is a misapplication of whether “lifting” is contemplated in the table 15-3. Defendants rely upon commentary noted in Chapter 1 of the AMA Guides that activities of daily living are to be contemplated in assigning Whole Person Impairments. This would cover lifting.

The error in defendant’s analysis is that this chapter does not quantify the specific loss of lifting ability. In the present case, applicant is limited to lifting up 40 pounds. This would contemplate at least a 50-70% loss of lifting capacity.

Defendant’s analysis would treat all lifting restrictions the same and not make any distinction between what percentage of loss exists. This is clearly not contemplated by the AMA Guides or assigning permanent disability.

Dr. Stark’s opinion utilized Table 6-9 from the AMA Guides. This Table is contained in Chapter 6 “the Digestive System”. Dr. Stark believed that this was the best Table to assess permanent disability because it does contemplate a specific restriction as to loss of lifting. I find no error in this assessment as the primary impairment to applicant’s low back affects his ability to lift.

(Report, at pp. 6-7.)

Here, Dr. Stark has specifically provided a strict rating under the AMA Guides but has opined that in his experience and medical judgment the impairment percentage described by a diagnosis-related estimate is less accurate than a rating by analogy to hernia injury, which contemplates diminished lifting capacity as a factor in quantifying permanent impairment. (AMA Guides, § 6.6, p. 136.)

Defendant directs our attention to a recent panel² decision in *Cardoza v. Alameda Sheriff's Department* (November 18, 2022, ADJ15807564, ADJ15807527), wherein we affirmed the WCJ's decision relying on a report authored by Dr. Stark acting in the capacity of Agreed Medical Evaluator (AME). Therein, Dr. Stark similarly opined to a rating for low back injury by analogy to a hernia injury with a concomitant loss of lifting capacity. Defendant argues that our decision therein was based solely on deference to Dr. Stark's status as an AME, and "indirectly suggests a different result may have been reached had Dr. Stark not been acting as an AME." (Petition, at p. 9:10.) We find this argument unpersuasive, however, because our opinion in *Cardoza* specifically noted Dr. Stark's conclusion that the diagnosis-related estimate did not accurately quantify applicant's disability. (*Id.* at p. 4.) Because Dr. Stark appropriately explained the reasons why an alternative rating under the hernia chapter provided a more accurate assessment of residual impairment, we affirmed the WCJ's reliance on the alternative rating. (*Ibid.*)

Moreover, as the WCA in the instant matter correctly points out, "regardless of whether Dr. Stark is an AME or an IME, his opinion must still meet the requirement of substantial medical evidence." (Report, at p. 6.) And while the WCA determined the reporting of Dr. Stark to be the more well-reasoned and persuasive, the WCA also observed that both reporting IMEs in this matter reached the conclusion that an alternative to the strict AMA Guides rating was warranted and appropriate. (Opinion on Decision, at p. 6.)

Following our independent review of the record, we conclude that Dr. Stark has appropriately assessed applicant's impairment using a strict rating per the AMA Guides, explained why the strict rating does not accurately reflect the applicant's disability, provided an alternative rating within the four corners of the AMA Guides, and explained why that alternative rating most accurately reflects applicant's level of disability. (*Guzman III, supra*, at p. 828.) We also observe that Dr. Stark's medical opinion "takes into account the physician's skill, knowledge, and experience, as well as other considerations unique to the injury at issue." (*Id.* at p. 829.)

We will affirm the WCA's decision, accordingly.

² Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered a similar issue.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 21, 2025

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

**DANIEL LINSTAD
RAINS, LUCIA, STERN, ST. PHALLE & SILVER
RTGR LAW
JEFFREY FRIEDMAN, ARBITRATOR**

SAR/abs

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