

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

MANUEL NATIVIDAD COBOS, *Applicant*

vs.

**CARDENAS MARKETS, LLC; SAFETY NATIONAL CASUALTY, administered by
SEDGWICK, *Defendants***

**Adjudication Number: ADJ14079246
San Francisco District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration

Applicant seeks reconsideration of the Findings of Fact and Award (F&A) of April 10, 2023, wherein the worker compensation judge (WCJ) found in pertinent part that applicant, while employed by defendant on June 23, 2018 as a butcher, sustained injury arising out of and in the course of employment (AOE/COE) to his right shoulder and neck; and that applicant's injury caused 26% permanent disability.

Applicant contends that the WCJ erred when she found that he had 5% whole person impairment (WPI) of his right shoulder based on the scheduled rating; and that the WCJ should have found that applicant had 17% WPI based on the opinion of the Agreed Medical Evaluator (AME) Dr. Peter Mandell.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration and (Report), recommending that the Petition be denied.

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, as our

Decision After Reconsideration, we will rescind the F&A and return this matter to the trial level for further proceedings.

FACTS

Applicant sustained injury AOE/COE to his right shoulder and neck while working as a butcher for defendant on June 23, 2018. Applicant was in the cooler at work when some boxes fell and hit him on the neck and right shoulder. On July 19, 2019, primary treating physician (PTP) Dr. William Campbell, D.O. performed surgery on applicant's right shoulder. (Jt. Ex. 6, Surgical Report of William Campbell, D.O., dated 7/19/19, pp. 1-2.)

The AME Dr. Mandell submitted two reports. In his report of July 21, 2021, Dr. Mandell reported that applicant's surgery helped a little bit, that he did some physical therapy, and that he was off work for eight months. (Jt. Ex. 2, Report of Peter Mandell, M.D., dated 7/21/21, pp. 1-3.) He has since resumed work full-time. (Jt. Ex. 2, p. 7.) Dr. Mandell found applicant to be permanent and stationary. (Jt. Ex. 2, p. 7.) Dr. Mandell found that applicant had an 8% WPI for his neck. (Jt. Ex. 2, p. 7.) Dr. Mandell provided the following analysis for applicant's shoulder:

For his RIGHT shoulder, under the strict AMA Guides criteria, he has the following active ranges of motion:

- 140° of abduction for a 2% upper extremity impairment.
- 130° of forward flexion for a 3% upper extremity impairment.
- 45° of external rotation for a 1% upper extremity impairment.
- 45° of extension for a 1% upper extremity impairment.
- 35° of adduction for a 1% upper extremity impairment.

That adds to an 8% upper extremity impairment or a **5% whole person impairment**.

Approximately 100% of the causation of his shoulder impairment is a direct result of the injury in question.

He will need treatment in the form of injections, medications, and physical therapy. He may even require additional surgery, and provision should be made for that.

Under *Guzman*, the neck impairment is accurate. The shoulder impairment is not because, while it takes into account range of motion loss, it doesn't take into account grip strength loss. To correct for that, I turn to Table 16-31 on page 509 and note that an average male major grip strength is 47.6 kg. His best effort was 28.9 kg. Applying the strength loss index formula produces a 39% strength loss index, which from Table 16-34 is a 20% upper extremity impairment or 12% whole person impairment. I would add that to the above for a total of **17% whole person**

impairment. That's the accurate rating here based on my training, experience, judgment, and skill and offered with reasonable medical probability.

He can continue working full-time and full duty and is not in need of supplemental job displacement benefits.

(Jt. Ex. 2, pp. 7-8, emphasis in original.)

In his report of September 25, 2021, Dr. Mandell stated the following:

You ask whether or not there was a separate etiology for grip strength loss in Mr. Natividad Cobos' RIGHT upper limb except for the shoulder. The answer to that is not that I know of. I can tell the parties that for many years now I have evaluated hundreds if not thousands of individuals with shoulder problems and the vast majority of them had grip strength loss because of the interaction between the shoulder, elbow, wrist, forearm, and hand. Grip strength, in my medically probable opinion, does describe accurately what Mr. Natividad Cobos has to live and work with every day in the course of his activities and does represent an accurate assessment of his impairment.

You then go on to note that when adjusted for age and occupation, Mr. Natividad Cobos' disability turns out to be 41% whole person impairment. You then ask whether or not a 41% impairment accurately represents the disability Mr. Natividad Cobos has, even though he's back at full duty. I can only talk about the scientific and medical aspects of what I saw in Mr. Natividad Cobos' case. From a medical and scientific perspective, 17% whole person impairment is accurate. If there are other things at play here from a legal perspective, I would certainly defer to the lawyers and judges to hash that out.

(Jt. Ex. 1, Report of Peter Mandell, M.D., dated 9/25/21, pp. 1-2.)

The case proceeded to trial on March 9, 2023. The parties stipulated to a rating for applicant's neck resulting in 17% permanent disability. (Minutes of Hearing (MOH), p. 2, Stipulation 6.) As relevant here, the issue was:

1. What is the accurate permanent disability rating for the right shoulder?

Defense argues that the strict rating of 5% whole person impairment, rating out to 11% PD, using the range of motion method in the AMA Guides, is the most accurate reflection of applicant's permanent disability to his right shoulder.

Applicant argues that the whole person impairment of 17% as set forth in Dr. Mandell's Guzman rebuttal analysis is the more accurate whole person impairment. This would rate out to 37% permanent disability for the right shoulder.

(MOH, p. 2.)

The WCJ issued the F&A on April 10, 2023, finding in relevant part that applicant had sustained injury AOE/COE to his right shoulder and neck while employed by defendant on June 23, 2018; that applicant's level of permanent disability was 26%; and that there was a need for future medical treatment to cure or relieve the effects of the industrial injuries. The WCJ awarded applicant permanent disability of 26%, less attorney's fees; 15% of the permanent disability award as attorney's fees to applicant's attorney, the exact amount to be adjusted by the parties; future medical treatment; and deferred all other issues.

DISCUSSION

The workers' compensation system includes compensation for permanent disability. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320.) "[P]ermanent disability is understood as 'the irreversible residual of an injury.'" (*Id.* at p. 1320, quoting *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1111.) "Thus, permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity." (*Brodie, supra*, at p. 1320, citing Lab. Code, § 4660(a).)

When assessing an injured employee's permanent disability, the first step is a comprehensive medical-legal report prepared by a treating or evaluating physician. (*Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 619.) The physician uses the AMA Guides to determine the WPIs for the applicant's medical conditions. (*Id.* at pp. 619-620.) The physician must set forth their reasoning behind the WPI. (*Id.* at p. 621.) "The expert opinion of a single physician may establish an injured employee's WPI, provided that the opinion constitutes substantial evidence. (*Id.* at p. 620, citing *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525, 529-539].) Permanent disability payments are then calculated by converting that degree of permanent disability into an award based on a table. (*Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd. (Fitzpatrick)* (2018) 27 Cal.App.5th 607, 611 [83 Cal.Comp.Cases 1680], citing *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1270 [76 Cal.Comp.Cases 624].)

If a formal rating is requested, the WCJ's role is to frame instructions, based on substantial medical evidence, that specifically and fully describe the whole person impairment(s) to be rated, and the rater's role is to issue a recommended permanent disability rating based solely on the WCJ's formal rating instructions. (*Blackledge, supra*, 75 Cal.Comp.Cases at p. 615.) A WCJ is

not bound by a rater's recommended permanent disability rating, and instead the WCJ may choose to independently rate an applicant's permanent disability. (*Id.* at p. 616.) However, the WCJ's rating must be based on substantial evidence. (*Id.* at p. 616.)

Nevertheless, the scheduled rating under the PDRS (Permanent Disability Rating Schedule) can be rebutted. (*Fitzpatrick, supra*, 27 Cal.App.5th at p. 619.)

[A]n employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating.

(*Ogilvie, supra*, 197 Cal.App.4th at p. 1277.)

In *Almaraz v. Environmental Recovery Services* (2009) 74 Cal.Comp.Cases 1084 (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." (*Id.* at pp. 1095-1096.) In *Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837], the Court of Appeal affirmed our decision in *Almaraz II*.

In the instant case, AME Dr. Mandell concluded that "under the strict AMA Guides criteria," applicant has an 8% upper extremity impairment or a 5% WPI. (Jt. Ex. 2, pp. 7-8.) However, he concluded that applicant's shoulder impairment was not accurate, because

while it takes into account range of motion loss, it doesn't take into account grip strength loss. To correct for that, I turn to Table 16-31 on page 509 and note that an average male major grip strength is 47.6 kg. His best effort was 28.9 kg. Applying the strength loss index formula produces a 39% strength loss index, which from Table 16-34 is a 20% upper extremity impairment or 12% whole person impairment. I would add that to the above for a total of **17% whole person impairment**. That's the accurate rating here based on my training, experience, judgment, and skill and offered with reasonable medical probability.

(Jt. Ex. 2, p. 8.)

Dr. Mandell further explained his reasoning in his later report:

I can tell the parties that for many years now I have evaluated hundreds if not thousands of individuals with shoulder problems and the vast majority of them had grip strength loss because of the interaction between the shoulder, elbow, wrist, forearm, and hand. Grip strength, in my medically probable opinion, does describe accurately what Mr. Natividad Cobos has to live and work with every day in the course of his activities and does represent an accurate assessment of his impairment.

(Jt. Ex. 1, pp. 1-2.) Dr. Mandell confirmed his conclusion that using the AMA Guidelines strict criteria did not accurately reflect applicant's WPI and stated "From a medical and scientific perspective, 17% whole person impairment is accurate." (Jt. Ex. 1, p. 2.)

However, the WCJ did not follow Dr. Mandell's conclusions and determined that the WPI for the shoulder should be 5%, with a permanent disability rating of 11% and therefore applicant's permanent disability rating, including both the neck and right shoulder, was 26%. (Opinion on Decision (OOD), pp. 4-6; F&A, pp. 1-2.) The WCJ stated that Dr. Mandell's alternative rating might be viable under other circumstances. (OOD, pp. 4-6.) The WCJ explained that Dr. Mandell's use of grip strength was incorrect for an injury above the elbow and that the correct table for applicant's injury was 16-35 on page 510 of the AMA Guidelines. (OOD, pp. 4-6.)

Since the WCJ rejected the AME's grip strength analysis, the WCJ should have sought further clarification from Dr. Mandell. Dr. Mandell's explanation does not address the how and why a metric designed for the below the elbow upper extremity injuries (grip strength) was used instead of the standard interpretation in the AMA Guidelines for a shoulder injury. Dr. Mandell's reports are the only medical evidence on this issue. There is also a lack of substantial medical evidence to support the use of the table identified by the WCJ. (See *Blackledge, supra*, 75 Cal.Comp.Cases at p. 616.)

Decisions of the Appeals Board must be based on substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) A medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (*E.L. 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, 620-621 (Appeals

Bd. en banc.) “Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board’s findings if it is based on surmise, speculation, conjecture or guess.” (*Hegglin v. Workmen’s Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

On the other hand, there must be some solid basis in the medical report for the doctor’s ultimate opinion; the Appeals Board may not blindly accept a medical opinion which lacks a solid underlying basis and must carefully judge its weight and credibility. (*National Convenience Stores v. Workers’ Comp. Appeals Bd. (Kesser)* (1981) 121 Cal.App.3d 420, 426 [46 Cal.Comp.Cases 783].) In other words, the Appeals Board must look to the underlying facts of a medical opinion to determine whether or not that opinion constitutes substantial evidence, and accordingly, the expert’s opinion is no better than the facts on which it is based. (*Turner v. Workers’ Comp. Appeals Bd.* (1974) 42 Cal.App.3d 1036, 1044 [39 Cal.Comp.Cases 780].)

The issue we face on appeal is that we do not have the necessary medical evidence to support either Dr. Mandell’s or the WCJ’s conclusion regarding applicant’s WPI of his right shoulder. The WCJ and the Appeals Board both have a duty to develop the record further where there is an absence of or insufficient evidence to determine the issues raised for trial. (*Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal. App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see Lab. Code, §§ 5701 and 5906; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 139 (Appeals Bd. en banc).) Indeed, the Appeals Board has a constitutional mandate to “ensure substantial justice in all cases,” and is therefore “clearly permitted” to admit evidence even after the discovery cut-off under section 5502(d)(3). (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-405 [65 Cal.Comp.Cases 264].) “[A]llowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers’ compensation claims” and militates in favor of our presuming the continued vitality of sections 5701 and 5906, absent a clear legislative intention to the contrary.” (*Tyler, supra*, 56 Cal.App.4th at p. 394.) An adequately developed record affords all parties due process of law and further provides for meaningful review by the Appeals Board of a WCJ’s decision. (*Evans v. Workers’*

Comp. Appeals Bd. (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350]; *Hernandez v. Staff Leasing* (2011) [76 Cal.Comp.Cases 343, 346-347] (Appeals Bd. significant panel decision.)

Therefore, as there is a lack of substantial evidence to support either Dr. Mandell's or the WCJ's conclusions as to the WPI in applicant's right shoulder, as our Decision After Reconsideration, we rescind the F&A and return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the April 10, 2023 Findings of Fact and Award is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG L. SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 26, 2026

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

**MANUEL NATIVIDAD COBOS
WYMAN & HEGWER
FINNEGAN, MARKS, DESMOND & JONES**

JMR/pm

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