

DIRECT ESTIMATE METHOD FOR LUMBAR SPINE
IMPHINMENT UPLEAD UNDER NUMBER 6270004 -
THIS CONTAINS WITH OTHER CASES IN WHICH WCF FEEL
THIS METHOD NOT SUGGESTATIVE MEDICAL EVIDENCE
WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SAMUEL ESPINOZA,

Case No. ADJ6760596
(Santa Ana District Office)

Applicant,

vs.

EXCEL STAFFING SERVICES and ACE
AMERICAN INSURANCE, administered by
SEDGWICK CLAIMS MANAGEMENT
SERVICES, INC.,

OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION

Defendants.

Applicant seeks reconsideration of the First Amended Findings and Award and Order (F&A) issued by the workers' compensation administrative law judge (WCJ) on March 7, 2018, wherein the WCJ found in pertinent part that applicant sustained injury to his low back, right leg, right lower extremity, and internal system, and in the form of "urological issues" and sexual dysfunction, and that applicant did not sustain a psychiatric injury or injury in the form of a sleep disorder. The WCJ also found that the proper whole person impairment (WPI) for applicant's lumbar spine was 29%; that the injury caused 43% permanent disability; and that applicant did not provide any documentation to substantiate any self-procured medical treatment so applicant was given 30 days to produce such documentation.

Applicant contends that the WPI for his lumbar spine should be based on the alternate rating which Dr. Silbart, the orthopedic agreed medical examiner (AME), described in his January 10, 2012 report, and that liability for self-procured medical treatment was not an issue submitted for decision.

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

We have considered the allegations in the Petition and the Answer and the contents of the Report. Based upon our review of the record and for the reasons set forth below, we will grant reconsideration

1 and affirm the F&A except that we will amend it to find that applicant has 45% WPI for the lumbar spine
2 (Finding 9, Award f), and 57% permanent disability, with attorney's fees based thereon (Findings 8 and
3 15, Awards e and k), and to defer the issue of mileage reimbursement (Finding 14).

4 BACKGROUND

5 Applicant claimed injury to his low back, right leg, right lower extremity, psyche, and internal
6 system, and in the form of sexual dysfunction, sleep disorder and "urological issues" while employed by
7 defendant as a shipper on November 26, 2008.

8 On October 20, 2009, applicant was evaluated by Steven B. Silbart, M.D. The doctor examined
9 applicant, took a history and reviewed the medical record. (Joint Exh. 10, Steven B. Silbart, M.D.,
10 October 20, 2009.) He recommended that applicant have further medical treatment and stated that he
11 would re-evaluate applicant when the treatment had been completed. (Joint Exh. 10, p. 12.) On May 26,
12 2010, Applicant underwent a two-level lumbar spinal fusion surgery and Dr. Silbart re-examined
13 applicant on December 20, 2010. (Joint Exh. 9, Steven B. Silbart, M.D., December 20, 2010.) The doctor
14 indicated that he needed to review the operative report and subsequent treatment notes before he could
15 address the issue of applicant's permanent disability. (Joint Exh. 9, p. 7.)

16 After reviewing the interim medical record, Dr. Silbart re-examined applicant on January 10,
17 2012, and he concluded that applicant's condition had become permanent and stationary/reached
18 maximum medical improvement as of August 17, 2011. (Joint Exh. 7, Steven B. Silbart, M.D., January
19 10, 2012, p. 10.) By using the range of motion method for determining applicant's WPI regarding his
20 lumbar spine, the doctor concluded that applicant had 29% WPI. (Joint Exh. 7, pp. 10 - 11.) However, he
21 then stated: —

22 "Mr. Espinoza's lumbar impairment, in my opinion, is under-represented
23 by a strict use of the AMA Guides. An alternative manner of arriving at his
24 impairment, still within the four corners of The Guides, by analogy, would
25 be to consider the spine as a whole, and to calculate Whole Person
26 Impairment as an appropriate fraction of the whole. Taking all things into
27 consideration, including the patient's history, clinical presentation, the
medical records, his overall decrease in level of function and his midrange
Questionnaire, the AMA Guides 5th Edition Visual Analogue Pain
work activities of daily living, it is my opinion that Mr. Espinoza's

1 impairment is more accurately described as 50% decrease in his overall
2 lumbar function. Understanding that the authors of The Guides have
3 affixed a maximum derived value for the lumbar spine as 90% Whole
4 Person, Mr. Espinoza's impairment is most 'accurately' described as 50% of
5 (Joint Exh. 7, p. 11.)

6 On August 5, 2014, Dr. Silbart's deposition was taken. (Def. Exh. H, Steven B. Silbart, M.D.
7 deposition transcript, August 5, 2014.) He explained that his opinion that applicant had a fifty percent
8 decrease in his lumbar function was based on applicant's

9 "... performance on physical examination as well as the level of discomfort
10 he has. The described impact that his injury and his level of pain has on his
11 activities of daily living, I took that as a whole."
12 (Def. Exh. H, p. 20.)

13 When asked about how he reached his conclusion that applicant had 45% WPI regarding his
14 lumbar spine, the doctor testified that:

15 "... [T]he authors of the Guides have affixed a maximum derived value of
16 impairment for the lumbar spine as being 90 percent and my making a
17 reasonable and well-founded estimate of the patient's overall loss of
18 function as being 50 percent, to then take 50 percent of the 90 percent as
19 being 45 percent...." (Def. Exh. H, pp. 21 – 22.)

20 The parties proceeded to trial on May 3, 2017. The issues submitted for decision included parts of
21 body injured, permanent disability and apportionment, and "Liability for self-procured medical
22 treatment." (Minutes of Hearing (MOH), May 3, 2017, pp. 2 – 3; Partial Transcript of Proceedings, pp. 3-
23 4.) At the applicant's request, the WCI stated, "Take mileage off. That will not be at issue in the trial."
24 (Partial Transcript of Proceedings, p. 5.)¹

25 DISCUSSION

26 Applicant asserts that the WPI rating based upon the range of motion method does not accurately
27 describe the disability caused by his injury and that the AME's alternative rating is an accurate

¹ We note that the WCI and applicant's counsel discussed the issue of mileage and it was deferred. (Partial
Transcript of Proceedings, pp. 4 – 5.) Thus, we will amend the Findings to defer that issue.

1 description of his disability.

2 The Sixth District Court of Appeal has explained that the American Medical Association's
3 Guides to the Evaluation of Permanent Impairment (Guides) provide guidelines for the exercise of
4 professional skill and judgment which may result, in a given case, in ratings that depart from those found
5 in the Guides. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187
6 Cal.App.4th 808 [75 Cal.Comp.Cases 837].) The Court explained that application of the Guides must
7 take into account the instructions on its use, which clearly prescribe the exercise of clinical judgment in
8 the impairment evaluation, even beyond the descriptions, tables, and percentages provided for each of the
9 listed conditions. (*Id.* at 824.) The Court quoted the Guides' statement that:

10 "The physician's judgment, based upon experience, training, skill,
11 thoroughness in clinical evaluation, and ability to apply the Guides criteria
12 as intended, will enable an appropriate and reproducible assessment to be
13 made of clinical impairment. Clinical judgment, combining both the 'art'
14 and 'science' of medicine, constitutes the essence of medical practice."
15 (Guides §1.5, p. 11.)" (*Id.* at 823.)

16 Here, Dr. Silbart examined applicant on three occasions, reviewed his extensive medical record,
17 and assigned a WPI using a strict application of the guides. He then exercised his clinical judgement and
18 reached his conclusion that the strict application of the Guides did not accurately describe applicant's
19 disability. As noted above, in his report and deposition testimony the doctor explained why his use of the
20 regional spine impairment was a more accurate description of applicant's impairment. Also, as the AME,
21 Dr. Silbart was presumably chosen by the parties because of his expertise and neutrality. Therefore, his
22 opinion should ordinarily be followed unless there was a good reason to find that opinion unpersuasive.
23 (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775 [51 Cal.Comp.Cases 114, 117].) The
24 record contains no evidence that warrants a finding that Dr. Silbart's opinions are unpersuasive. Thus, his
25 opinion that applicant had 45% WPI regarding his lumbar spine constitutes substantial evidence and
26 based thereon applicant's disability is rated as follows:
27

UPPER DIGESTIVE
70% (06.01.00.00 - 5 - [6] 7-360F - 7 - 7) 5 PD
COLON, RECTUM, ANUS
70% (06.02.00.00- 2 - [6] 3 - 360F - 3 - 3) 2 PD
SEXUAL DYSFUNCTION

ESPINOZA, Samuel

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NO HE DISMIT!

07.05.00.00-6- [2] 7 - 360F - 7 - 7 PD
LUMBAR
85% (15.03. 01.00 - 45- [5] 57-360G - 60 - 60) 51 PD
51 C 7 C 5 C 2 = 57 FINAL PD

Applicant also contends that liability for self-procured medical treatment was not identified as an issue in the Pre-trial Conference Statement and that it was not raised as an issue at trial. Our review of the record indicates that liability for self-procured medical treatment was raised as an issue at trial. (Minutes of Hearing, May 3, 2017, p. 3. issue 7; Partial Transcript of Proceedings, p. 4) Additionally, applicant was given 30 days after service of the F&A to provide defendant documentation pertaining to self-procured treatment. (F&A, Finding 14.) Thus, the WCJ's finding does not constitute a denial of applicant's due process rights. However, we amend the Findings to conform to the transcript with respect to the issue of mileage reimbursement.

The Petition does not include references to the record to support applicant's contentions. Applicant's counsel is reminded that failure to comply with the requirements of WCAB Rules 10842 and 10846 may be grounds for dismissal and subject the offending party to sanctions. (Lab. Code §§5902, 5813; Cal. Code Regs., tit. 8, §§10842, 10846, 10561.).

Accordingly, we grant reconsideration and affirm the F&A except that we amend it find applicant has 57% permanent disability, that the issue of mileage reimbursement is deferred, and that applicant's attorney is awarded fees in the amount of \$6,968.46.

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1 For the foregoing reasons,

2 **IT IS ORDERED** that applicant's Petition for Reconsideration of the First Amended Findings
3 and Award and Order issued by the WCI on March 7, 2018, is **GRANTED**.

4 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'
5 Compensation Appeals Board, that the First Amended Findings and Award and Order of March 7, 2018,
6 is **AFFIRMED**, except that it is **AMENDED** as follows:

7 **FINDINGS OF FACT**

- 8 8. This Court will award applicant permanent partial disability indemnity
9 in the amount of 57%, commencing on August 17, 2011 as the stipulated
10 permanent and stationary date. The parties shall administer the benefits
11 accordingly.
- 12 9. This Court has determined that the proper WPI to assign to the
13 Applicant is 45% for his lumbar spine.
- 14 14. Applicant has not provided any documentation to substantiate any self-
15 procured medical treatment. If Applicant has any outstanding costs
16 associated with this industrial injury, he shall have 30 days from the date of
17 service of this Findings and Award to produce such documentation to the
18 Defendant for reimbursement with this Court maintaining jurisdiction over
19 any disputes. The issue of mileage reimbursement is deferred.
- 20 15. The reasonable value of services of the Applicant's Attorney is 15% of
21 the permanent disability indemnity, which equates to \$6,968.46. The Court
22 to maintain jurisdiction over any disputes arising out of the amount of
23 attorney's fees to be awarded.

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AWARD

e. Permanent partial disability indemnity in the amount of 57% [for a total of \$46,456.41] commencing on August 17, 2011 as the stipulated permanent and stationary date. The parties shall administer the benefits accordingly, with Defendant receiving credit as permanent disability for any benefits previously paid beyond August 17, 2011.

f. The proper WPI to assign to the Applicant is 45% for his lumbar spine.

k. The reasonable value of services of the Applicant's Attorney is 15% of the permanent disability indemnity, which equates to \$6,968.46. The Court to maintain jurisdiction over any disputes arising out of the amount of attorney's fees to be awarded.

WORKERS' COMPENSATION APPEALS BOARD



KATHERINE ZALEWSKI CHAIR

I CONCUR,



ANNE SCHMITZ DEPUTY

CONCURRING, BUT NOT SIGNING

MARGUERITE SWENEY



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 23 2018

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

**CALIFORNIA LAW ASSOCIATES
SAMUEL ESPINOZA
PEARLMAN, BROWN & WAX**



TLH/pc
ESPINOZA, Samuel 7