

PMM

1 WORKERS' COMPENSATION APPEALS BOARD  
2 STATE OF CALIFORNIA  
3

4 LEIA PORTER,

Case No. ADJ9288622  
(Stockton District Office)

*Applicant,*

OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION

vs.

5  
6 RIDI HOME CARE, INC.; NOVA CASUALTY  
INSURANCE COMPANY,  
7  
8

*Defendants.*

9  
10  
11 Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ)  
12 Findings and Award and Order of August 30, 2017, wherein it was found that, while employed on  
13 October 13, 2013 as a caregiver, applicant sustained industrial injury to her lumbar spine, causing  
14 permanent disability of 19% and the need for further medical treatment. In finding permanent disability  
15 of 19%, the WCJ rated the applicant's permanent disability utilizing the scheduled 8% whole person  
16 impairment using the diagnosis-related estimate method, as well as a 3% add-on for pain, for a total 11%  
17 WPI. In making her findings regarding the level of cervical impairment, the WCJ followed the strict  
18 interpretation of the AMA Guides impairments offered by panel qualified medical evaluator pain  
19 specialist James B. Shaw, M.D. However, the WCJ declined to adopt Dr. Shaw's alternative impairment  
20 analysis pursuant to *Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman)* (2010)  
21 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].

22 Applicant contends that the WCJ erred in finding permanent disability of only 19% arguing that  
23 the WCJ erred in not adopting Dr. Shaw's alternative *Guzman* analysis. We have received an answer.  
24 We do not have the benefit of the report contemplated by Appeals Board Rule 10860 because the WCJ  
25 who issued the decision has retired. Nevertheless, because the requirement of a report is "directory  
26 rather than mandatory," the lack of a report is no impediment to the issuance of our decision. (*California  
27 Highway Patrol v. Workers' Comp. Appeals Bd. (Clark)* (1986) 178 Cal.App.3d 1016, 1019-1021 [51

1 Cal.Comp.Cases 123]; *United Merchandising Corp. v. Workers' Comp. Appeals Bd. (Katz)* (1987) 52  
2 Cal.Comp.Cases 353 [writ den.],<sup>1</sup>

3 The WCJ correctly rejected Dr. Shaw's *Guzman* analysis. In his April 29, 2015 report, Dr. Shaw  
4 wrote:

5 This case is felt to be complex and extraordinary because the  
6 patient's pain and symptomatology are greater than what one would find  
7 related to a simple and straightforward diagnosis.

8 It is my opinion that strict whole person impairment (WPI) rating  
9 would not be an accurate measurement of this patient's permanent  
10 disability based on my clinical experience and in consideration of the  
11 effects of the residuals of the work injury on the patient's activities of  
12 daily living.

13 In this case, the patient would fall into a cohort of patients whose  
14 level of whole person impairment (WPI) is greater than that obtained  
15 using a strict interpretation of the American Medical Association (AMA)  
16 Guides for the Evaluation of Disability, Fifth Edition.

17 It should be acknowledged that the lumbar spine has two different  
18 primary functions. The first is a "levering" function in which the back is  
19 utilized to lift, stoop, bend, and carry object placed outside the center of  
20 gravity of the body. The lumbar spine function is that of "support", in  
21 which the upper body, head, and upper extremities are supported while  
22 the individual is a weight bearing position such as standing and walking.

23 In considering these functions in combination, it is my reasonable  
24 medical opinion, to a degree of medical probability, that the patient  
25 exhibits a 20-percent loss of function of the lumbar spine. Pursuant  
26 to Figure 15-19 on page 427, the maximum whole person impairment  
27 represented by a total impairment (WPI) 0.9 multiplied by 20%  
corresponds to afn] 18% whole person impairment referable to the  
lumbar spine pursuant to [*Guzman*] before apportionment.

28 The functional loss of support, and levering within the  
29 biomechanical envelope has lead [sic] to a persistent lumbar myofascial  
30 pain syndrome impact a wide range of functioning as determined by our  
31 history, examination, self reporting, and my experience of managing, and  
32 evaluating similar to same cases.

(April 29, 2015 report at p. 19.)

33 At his January 28, 2016 deposition, Dr. Shaw explained his *Guzman* opinion, in part, stating,  
34 "And you're talking about somebody being dislocated from her job and you're going to give her an eight  
35 percent. It doesn't add up. And then her clinical presentation does not either. And I'm not allowed to,  
36  
37

<sup>1</sup> A WCJ who did not issue the underlying decision filed a Report and Recommendation on Petition for Reconsideration referring us to the original WCJ's Opinion on Decision.

1 because of the AMA guides, to give her three percent for pain. It's disallowed. So I can't mix that with  
2 the eight percent." (January 28, 2016 deposition transcript at p. 25.) At a subsequent August 1, 2017  
3 deposition, Dr. Shaw was asked, "Why is it that Ms. Porter for her lumbar spine could not fit into the  
4 DRE for her lumbar spine?" Dr. Shaw responded, "Well, from a strict standpoint she can, but from a  
5 [Guzman] standpoint where you're actually evaluating someone for their functional loss, it doesn't match  
6 up." (August 1, 2017 deposition transcript at p. 14.)

7 In *Almaraz v. Environmental Recovery Services* (2009) 74 Cal.Comp.Cases 1127 (Appeals Board  
8 en banc) (commonly known as, and hereinafter referred to as *Almaraz II*), we held that a "scheduled  
9 permanent disability rating may be rebutted by successfully challenging the component element of that  
10 rating relating to the employee's WPI under the AMA Guides ... by establishing that another chapter,  
11 table, or method within the four corners of the Guides most accurately reflects the injured employee's  
12 impairment." (*Almaraz II*, 74 Cal.Comp.Cases at pp. 1095-1096.) However, although a physician is not  
13 locked in to any particular evaluation method found in the AMA Guides, his or her rating must still be  
14 based on and consistent with the AMA Guides, as read as a whole. As we explained, "A physician's  
15 WPI opinion that is not based on the AMA Guides does not constitute substantial evidence because it is  
16 inconsistent with the mandate of section 4660(b)(1)." (*Almaraz II*, 74 Cal.Comp.Cases at p. 1104.)

17 In *Guzman, supra*, the court of Appeal affirmed our decision in *Almaraz II*. In affirming our  
18 decision, the Court of Appeal, Sixth Appellate District expressly recited and adopted our emphasis on the  
19 fact that our "decision does not allow a physician to conduct a fishing expedition through the Guides  
20 'simply to achieve a desired result'; the physician's medical opinion 'must constitute substantial  
21 evidence' of WPI and 'therefore ... must set forth the facts and reasoning [that] justify it.'" (*Guzman*,  
22 *supra*, 187 Cal.App.4th at p. 825.)

23 The Court of Appeal explained that, "In order to constitute substantial evidence, a medical  
24 opinion must be predicated on reasonable medical probability. [Citation.] Also, a medical opinion is not  
25 substantial evidence if it is based on facts no longer germane, on inadequate medical histories or  
26 examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. [Citation.]  
27 Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the

1 physician's opinion, not merely his or her conclusions. [Citation.]” (*Id.*)

2           The *Guzman* court held that “Simply presenting a view contrary to an established rating in the  
3 Guides ... would not be sufficient to rebut the PDRS rating. [A]n impairment rating that is inadequately  
4 supported by evidence and reasoning—and unquestionably, a rebuttal position arrived at by hunting  
5 through the Guides for a more favorable rating—will result in an opinion the [WCAB] will necessarily  
6 reject as insufficient evidence.” (*Id.* at p. 828.)

7           As explained by the WCJ in her Opinion on Decision, Dr. Shaw’s is not a proper rebuttal of the  
8 scheduled rating in the Guides. The Court of Appeal explained in *Guzman* that, “[i]n order to support the  
9 case for rebuttal, the physician must ... explain why departure from the impairment percentages is  
10 necessary and how he or she arrived at a different rating.” (*Id.* at p. 828.) As the WCJ correctly states in  
11 her Opinion on Decision, Dr. Shaw does not adequately explain his conclusion that strict application of  
12 the AMA Guides does not accurately reflect the applicant’s impairment, or why strict application of the  
13 Guides is not warranted because of the peculiarities of this particular case. Additionally, as also noted by  
14 the WCJ, it appears that Dr. Shaw’s alternate analysis was based upon the incorrect assumption that a  
15 pain add-on is not allowed with the DRE method. Finally, Figure 15-19 of the AMA Guides is not a  
16 “table or method.” Figure 15-19 provides information on how to convert a whole person impairment to a  
17 regional estimate of spinal impairment. (AMA Guides, § 15.13, p. 427.) The figure is not intended to be  
18 used as a rating mechanism and neither applicant nor Dr. Shaw specify where the rating method utilized  
19 (multiplying Dr. Shaw’s assessment of the percentage of loss of function in the body part by the body  
20 part’s maximum impairment) is outlined in the AMA Guides.

21           Accordingly, we will deny the applicant’s Petition for Reconsideration.

22     / / /  
23     / / /  
24     / / /  
25     / / /  
26     / / /  
27     / / /