

1 WORKERS' COMPENSATION APPEALS BOARD
2 STATE OF CALIFORNIA
3

4 Case No. AD19729782
5 (Van Nuys District Office)

6 *Applicant,*
7
8 *vs.*
9
10 ACE AMERICAN
11 INSURANCE, administered by BARRETT
12 BUSINESS SERVICES, INC.,
13
14 *Defendants.*

15 OPINION AND ORDER GRANTING
16 PETITION FOR RECONSIDERATION
17 AND DECISION AFTER
18 RECONSIDERATION

19 Defendant seeks reconsideration of the February 23, 2016 Findings, Award and Order wherein
20 the workers' compensation administrative law judge (WCJ) found that the applicant sustained injury
21 arising out of and in the course of employment to his left middle and ring fingers on November 11, 2014
22 that caused 31% permanent disability.

23 Defendant contends that the WCJ erred in finding that applicant sustained 31% permanent
24 disability, arguing that decision is not based on substantial medical evidence because the panel qualified
25 medical evaluator (POME) Robert Wilson did not provide a rationale for deviating from a "strict" AMA
26 Guides rating. Defendant also notes that the correct identity of the third party administrator is Barrett
27 Business Services.

28 The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report)
29 recommending that defendant's petition be amended solely to substitute the correct name of the third
30 party administrator. For the reasons discussed below, we will grant reconsideration, rescind the Findings
31 and Award, and return this matter to the trial level for further proceedings and a new decision.

32 We will briefly review the relevant facts. Applicant sustained a crush injury to his left middle
33 and ring fingers on November 11, 2014. The parties selected Robert an orthopedic surgeon,
34 as a POME. Dr. initially evaluated the applicant on July 28, 2015. He opined that applicant had
35 4% whole person impairment and stated with reference to *Almaraz-Guzman* that "No other chapter or
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1 section would be more appropriate.” (Exh. F, Dr. V , July 28, 2015 report, p. 15.” On September 16,
2 2015, Dr. issued a supplemental report. Dr. Wilson explained:

3 I have now received a request for a supplement report. I am being asked to
4 reconsider his impairment based also on the sensory loss, grip strength, as
5 well as “peripheral nerve or vascular impairment.”

6 It is true the patient has significant injuries to his left third and fourth
7 fingers and has difficulty using them in any type of normal fashion. Page
8 499, Table 16-18 does note maximum impairment values.

9 The maximum impairment value for a third or middle finger, the entire
10 finger would be 11% whole person. The maximum value for an entire ring
11 finger would be 5% whole person impairment. If this maximum
12 impairment value is used, then there would be no further impairment for
13 sensory loss, grip and pinch strength, weakness or peripheral nerve or
14 vascular impairment. Given the significant injury Mr. Cory Allred
15 suffered, it is felt that in considering *Almaraz-Guzman* that this would be
16 an appropriate rating impairment.

17 The previously given impairment that I provided would be considered the
18 strict interpretation of the Guides. I would now modify my report, and
19 considering *Almaraz-Guzman*, that the 11% whole person impairment for
20 the middle finger and 5% whole person impairment for the ring finger be
21 combined for a 16% whole person impairment. The previously given 3%
22 for pain would remain unchanged as previously noted. (Exh. D,
23 Dr. Wilson, September 16, 2015, p. 2.)

24 Not all expert medical opinion constitutes substantial evidence. (*Heggin v. Workmen's Comp.*
25 *Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93, 97]; *Place v. Workmen's Comp. Appeals Bd.*
26 (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].) To constitute substantial evidence, a medical
27 opinion must be predicated on reasonable medical probability. (*Escobedo v. Marshalls* (2005) 70
Cal.Comp.Cases 604 (en banc); *McAllister v. Workmen's Comp. Appeals Bd.*, *supra*, 69 Cal.2d 408, 413,
416-417; *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700-1702, 1705 [38
Cal.Comp.Cases 313].) “A medical report predicated upon an incorrect legal theory and devoid of
relevant factual basis, as well as a medical opinion extended beyond the range of the physician's
expertise, cannot rise to a higher level than its own inadequate premises.” (*Zemke v. Workmen's Comp.*
Appeals Bd. (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358, 363].) “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

1 opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture, or
2 guess." (*Heggin v. Workers' Comp. Appeals Bd.*, *supra*, 36 Cal.Comp.Cases at p. 97.) Whether a
3 physician's opinion constitutes substantial evidence "must be determined by the material facts upon
4 which his opinion was based and by the reasons given for his opinion." (*Ibid.*)

5 Pursuant to Labor Code section 4660, when discussing the applicant's injury, the physician
6 should "incorporate the descriptions and measurements of physical impairments and the corresponding
7 percentages of impairments published in the [AMA Guides]." In 2005, the Administrative Director
8 adopted the Permanent Disability Rating Schedule (PDRS) incorporating the AMA Guides (Lab. Code,
9 § 4660(b)(2)), and the PDRS is "prima facie evidence of the percentage of permanent disability to be
10 attributed to each injury covered by the schedule." (Lab. Code, § 4660, subd. (c).) We addressed the
11 requirements for rebutting the application of the 2005 PDRS in our September 3, 2009 en banc decision
12 in *Almaraz v. Environmental Recovery Services / Guzman v. Milpitas Unified School Dist.* (2009) 74
13 Cal.Comp. Cases 1084 (Appeals Board en banc) (*Almaraz/Guzman II*). Subsequently, the Sixth Court of
14 Appeals affirmed our decision in *Almaraz/Guzman II* on August 19, 2010. (*Milpitas Unified School Dist.*
15 *v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] (modified on
16 other grounds on September 1, 2010).)

17 In affirming *Almaraz/Guzman II*, the Court of Appeal stated that departure from a strict
18 application of the Guides is appropriate "for cases that do not fit neatly into the diagnostic criteria and
19 descriptions" and that the AMA Guides call for a physician to use clinical judgment to evaluate the
20 impairment most accurately, even if that is possible only by resorting to comparable conditions described
21 in the AMA Guides. (*Milpitas Unified School District v. Workers' Comp. Appeals Bd.* (2010) 75 Cal.
22 Comp. Cases 837, 839.) Both *Almaraz/Guzman II* and the Court of Appeal decision emphasized that a
23 physician's ability to depart from a strict application of the Guides is not without limit and that the
24 physician's opinion must constitute substantial evidence. (See *Escobedo v. Marshalls* (2005) 70 Cal.
25 Comp. Cases 604, 621 (en banc)).

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1 *Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc).

2 In this case, the parties will need to solicit supplemental reporting from or depose the POME, Dr. Wilson.
3 For the foregoing reasons,

4 **IT IS ORDERED** that defendant's Petition for Reconsideration of the February 23, 2016
5 Findings, Award and Order is **GRANTED**.

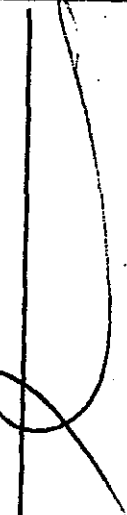
6 **IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers'
7 Compensation Appeals Board, that the February 23, 2016 Findings, Award and Order is **RESCINDED**,
8 and the matter **RETURNED** for further proceedings and a new decision by the WCJ consistent with this
9 opinion.

10 **WORKERS' COMPENSATION APPEALS BOARD**

11 **I CONCUR,**

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14 **DEIDRA E. LOWE**

15 
16 **KATHERINE ZALEWSKI**

17 
18
19 **MARGUERITE SWEENEY**

20 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**



MAY 09 2016

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

**CORY ALLRED
KEGEL, TOBIN & TRUCE
LAW OFFICES OF RONALD NOLAN**

MWH/ebc

