

Almaraz / Guzman

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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

Case No. ADJ7603192
(Salinas District Office)

DEBERA SINEATH,
Applicant,

vs.

WELLS FARGO BANK, Permissibly Self-
Insured, Administered by SPECIALTY RISK
SERVICES,

Defendants.

OPINION AND ORDER
DENYING PETITION FOR
REMOVAL

Defendant has filed a timely, verified Petition for Removal, requesting that the Appeals Board rescind the Findings and Order dated August 13, 2014, wherein the presiding workers' compensation administrative law judge (PWCJ) found that there is good cause to remove John W. Batcheller, M.D., as the panel qualified medical examiner (QME) in this case and ordered the Medical Unit to issue a new QME panel in orthopedic surgery. Defendant contends that there is no legal basis for replacing Dr. Batcheller because he has not violated the requirements of Administrative Director Rules 31.5 and 41 (Cal. Code Regs., tit. 8, §§31.5 and 41) and because a QME is permitted but not required to provide alternative rating of permanent disability pursuant to *Almaraz v. Environmental Recovery Services/ Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) (*Almaraz/Guzman*); and that the proper procedure for fixing the report of Dr. Batcheller is further discovery, not replacement of the QME. Applicant has filed an Answer.

Applicant, while employed as a project manager from December 30, 2009, through December 29, 2010, sustained an industrial injury to her bilateral upper extremities and claims to have sustained injury to her psyche. She was evaluated by Dr. Batcheller as a panel QME pursuant to Labor Code section 4062.2. In his report dated March 28, 2014, Dr. Batcheller stated: "In regard to the question of Almaraz/Guzman, I am of a mind with Dr. Demore in that Almaraz/Guzman is basically a legalistic ploy

1 that attempts to insinuate subjective complaints as a factor in impairment rating. Like Dr. Demore, I use
2 the AMA Guides and do not, and never will, use Almaraz/Guzman" (page 10).

3 In *Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187
4 Cal.App.4th 808 [75 Cal.Comp.Cases 837], the Court of Appeal held: "To accommodate those complex
5 or extraordinary cases, [the *AMA Guides*] calls for the physician's exercise of clinical judgment to
6 evaluate the impairment most accurately, even if that is possible only by resorting to comparable
7 conditions described in the *Guides*" (75 Cal.Comp.Cases at 855). Despite this holding, Dr. Batcheller
8 states categorically that he will never use this procedure, even though it is sanctioned by the court. "A
9 medical report predicated upon an incorrect legal theory . . . cannot rise to a higher level than its own
10 inadequate premises. Such reports do not constitute evidence to support a denial of full compensation for
11 an industrially caused disability." (*Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33
12 Cal.Comp.Cases 358, 363].) Thus, while *Guzman, supra*, does not require an evaluator to apply
13 alternative procedures, Dr. Batcheller states that he will not apply the procedures even if appropriate.

14 For this reason, Dr. Batcheller's evaluation of applicant's permanent disability cannot constitute
15 substantial evidence. He cannot provide a "complete medical evaluation" as required by Rule
16 31.5(a)(15)(A). Therefore, the Medical Director is required to provide a replacement panel.

17 Furthermore, defendant has not demonstrated that it will sustain substantial prejudice and/or
18 irreparable harm, as required by W/CAB Rule 10843, if a new QME panel issues. It is possible that a
19 new QME who understands his or her obligations under *Guzman, supra*, will nonetheless decide that the
20 alternative procedure is not required in this case.

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