

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

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5 **HORACE GRANT,**

6 *Applicant,*

7 **vs.**

8 **LOS ANGELES LAKERS; FEDERAL
INSURANCE COMPANY,**

9 *Defendants.*

Case Nos. ADJ7585014
(Santa Ana District Office)

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

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12 Defendant seeks reconsideration of the December 5, 2012 Amended Findings And Award of the
13 workers' compensation administrative law judge (WCJ) who found that applicant, while employed by
14 defendant as a professional basketball player from March 12, 2003 to March 14, 2004, incurred industrial
15 injury to his neck, lumbar spine, both shoulders, both arms, both knees, both ankles, right hip, both
16 wrists, posttraumatic headaches, posttraumatic head syndrome, and a sleep disorder causing 90%
17 permanent disability without apportionment, and a need for medical treatment.

18 Defendant contends that the WCJ's decision is not based upon substantial medical evidence and
19 is contrary to the weight of the evidence.

20 An answer was received from applicant. The WCJ was not available to provide a Report and
21 Recommendation on Petition for Reconsideration.

22 Reconsideration is granted and the WCJ's December 5, 2012 decision is rescinded as our
23 Decision After Reconsideration. The case is returned to the trial level for development of the record,
24 further proceedings and a new decision by a WCJ in accordance with this decision. The medical
25 reporting relied upon by the WCJ does not include a proper analysis of applicant's condition pursuant to
26 the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides), and is not
27 substantial medical evidence.

1 **BACKGROUND**

2 Applicant played professional basketball from 1987 through March 12, 2004, when he injured his
3 hip and was unable to continue in that line of work. His last year of employment as a professional athlete
4 was with the defendant Los Angeles Lakers (Lakers). In 2011, applicant filed a claim of cumulative
5 trauma industrial injury against the Lakers.

6 Medical reporting was provided by applicant's Qualified Medical Examiner (QME) James
7 Styner, M.D., and by his QME in neurology Kenneth Nudleman, M.D. Defendant obtained the reporting
8 of QME Lawrence Feiwell, M.D. In addition to the reporting of those medical examiners, the WCJ also
9 received applicant's testimony into evidence during the trial of the issues on August 23, 2012. Following
10 the trial, the WCJ issued his December 5, 2012 decision as described above.

11 In his Opinion on Decision (Opinion), the WCJ accurately summarizes the medical evidence
12 provided by the examining physicians as follows:

13 "The applicant was seen by Dr. Kenneth Nudleman on August 1, 2011 in
14 his field on Neurology (applicant's exhibit #4).

15 "Dr. Nudleman diagnosed the applicant with posttraumatic headaches with
16 a migraine component, posttraumatic head syndrome, a sleep disorder, and
17 lumbar sciatica (page 3 of his report).

18 Dr. Nudleman stated that the applicant became permanent and stationary
19 one year after completing his professional career as a basketball player
20 (page 3 of his report).

21 Using the old schedule, Dr. Nudleman characterized the applicant's
22 neurological complaints as follows: headaches, rare to occasional moderate
23 headaches (less than occasional slight tension headaches), intermittent
24 slight sleep disorder, and a minimal to slight intermittent head syndrome
25 (page 3 of his report).

26 Dr. Nudleman did not apportion any of his disability to non-industrial
27 factors (page 3 of his report).

Dr. Nudleman, using the new schedule, stated on the headaches would be a
1% Whole Person Impairment, a 5% WPI for the posttraumatic head
syndrome, a &5 WPI for the sleep disorder, which, on the combined values
chart, would equal a 12% neurological WPI (page 3 of his report).

"The applicant was examined by James Styner, MD on August 2, 2011
(applicant's exhibit #1).

1 "Dr. Styner took a history that the applicant had injuries playing basketball
2 to his neck, low back, both shoulders, both arms, both knees and ankles, his
3 right hip and both wrists.

4 "His history included that the applicant had left knee surgery in September
5 2003.

6 "The applicant testified that he had to give up his career in March 2004
7 when he injured his right hip. The applicant did not work between 2004 to
8 2011, when he became an Ambassador for the National Basketball
9 Association where he travels every other month to foreign countries to
10 teach coaches and potential players the elements of basketball.

11 "Dr. Styner diagnosed that the applicant had a cervical strain, imflamed
12 [*sic*] bilateral shoulders, lateral epicondylitis of both elbows, an inflamed
13 [*sic*] right wrist, left small finger fracture, lumbar strain with disc
14 herniation @ L5-S1, pulled bilateral hamstrings, inflamed bilateral knees,
15 and bilateral ankle degenerative disc disease (page 10 of his report).

16 "Dr. Styner concluded that these injuries were due to his time playing
17 professional basketball.

18 "Dr. Styner felt that the applicant would not benefit from conservative
19 treatment (page 10 of his report), which contradicted his statement that the
20 applicant would need conservative care for exacerbations (page 13 of his
21 report).

22 "In regards to work restrictions, Dr. Styner stated that the applicant was
23 limited to light work with no work at or above shoulder level and had to sit
24 or stand at will. In addition, he was precluded from repetitive squatting,
25 kneeling, bending, stooping, or climbing, as well as prolonged or repetitive
26 fine manipulative tasks (page 11 of his report).

27 "In regards to his impairments under the AMA Guides, Dr. Styner found
that the applicant had a 18% Whole Person Impairment for his cervical
spine, a 13% Whole Person Impairment for his lumbar spine, a 39% Whole
Person Impairment for both of his arms, 19% for both of his legs, which
Dr. Styner stated combined for a 65% Whole Person Impairment (pages
12-13 of his report).

"Dr. Styner found that there was not any apportionment to non-industrial
factors (page 14 of his report).

"Dr. Nudleman wrote a supplemental report on August 19, 2011
(applicant's exhibit #5). Dr. Nudleman reviewed extensive medical
records and stated that even though the applicant was involved in two
motor vehicle accidents, these records did not change his opinion (page 3
of his report).

"Dr. Nudleman wrote a second supplemental report on October 21, 2011
(applicant's exhibit #6) where he reviewed the applicant's deposition taken
on August 1, 2011. This review did not change his prior opinions.

1 "The applicant was seen by an Orthopedist, Dr. Lawrence Feiwell, on
2 October 25, 2011 (Defense exhibit #B).

3 "Dr. Feiwell took a history that the applicant played professional basketball
4 from 1987 to 2004. The applicant injured his ankle in 1988, while playing
5 for the Chicago Bulls. The applicant tore the ligament in his right wrist
6 when he played with Orlando in the late 1990's. The applicant had an
7 injury to his neck sometime between 2001 to 2003 when he played for
8 Orlando. The applicant had left knee surgery in 2002 while he played for
9 the Los Angeles Lakers. In 2004, the applicant injured his right hip
10 playing for the Lakers. The applicant sustained an automobile accident in
11 2009, without any residual complaints. He currently has seven children.

12 "Dr. Feiwell concluded that the applicant had a 5% Whole Person
13 Impairment for his neck and an additional 5% WPI for his low back. He
14 would give an additional 2% for the chondromalacia in his left knee. (page
15 24 of his report).

16 "Dr. Feiwell apportioned 50% of his disability to his working out, taking
17 care of his children and household activities, and 50% to his professional
18 career (page 25 of his report).

19 "Dr. Feiwell stated that the applicant did not need any future treatment.

20 "Dr. Styner reviewed Dr. Lawrence Feiwell's report dated October 25,
21 2011 in his report dated January 31, 2012. (applicant's exhibit #3). *Dr.*
22 *Styner stated that the utilization of the AMA charts should not apply to the*
23 *applicant as he was not physically an average worker.* He also disagreed
24 with Dr. Feiwell that there should be any apportionment to non-industrial
25 factors. He also disagreed with Dr. Feiwell's work restrictions and his
26 interpretation of the subrosa video.

27 "Dr. Styner reviewed some subrosa video of the applicant in his report
dated January 24, 2012 (applicant's exhibit #2). This video did not change
his former opinions.

"Dr. Styner wrote another supplemental report on January 31, 2012
(applicant's exhibit #3). He reviewed Dr. Feiwell's October 25, 2011
report and stated that Dr. Feiwell conducted an essentially normal
examination, found that the applicant had 12% Whole Person Impairment
and had work restrictions for his left knee of no prolonged standing or
walking. Dr. Feiwell had apportioned 50% to normal living activities and
stated that no future treatment was required.

"*Dr. Styner concluded that Dr. Feiwell should not have utilized the AMA
charts as he was not a 'normal physical person' that is the basis for these
charts, but is a professional athlete, and Almaraz/Guzman allows for a
higher rating.* He also disagreed with Dr. Feiwell's opinion on
apportionment. He also disagreed with Dr. Feiwell's opinion on the need
for future treatment.

1 "Dr. Nudleman wrote a third supplemental report on February 6, 2012
2 (applicant's exhibit #7). He reviewed Dr. Feiwell's October 25, 2011
3 report. He also reviewed a subrosa video of the applicant. Dr. Nudleman
4 did not change his prior opinions.

5 "Dr. Feiwell wrote a supplemental report on February 10, 2012 (Defense
6 Exhibit #A) where he reviewed some subrosa video. The video lasted 124
7 minutes. He did not indictate [sic] this changed his opinion (and since it
8 was not introduced into evidence, it is not considered by the Court).

9 "Dr. Feiwell also reviewed two MRIs, both conducted on October 25,
10 2011. One was of the applicant's lumbar spine, which revealed minor disc
11 protrusions at two levels which were minor disc protrusions and one of the
12 applicant's hips, which were consistent with arthritis." (Emphasis added.)

13 The WCJ further explained the reasons for his decision in his Opinion in pertinent part as follows:

14 "The Court utilized the orthopedic factors contained in the medical report
15 of James Styner dated August 2, 2011 (applicant's exhibit #1) and the
16 neurologic factors of Dr. Nudleman dated August 1, 2011 (applicant's
17 exhibit #4).

18 "The Court finds that the new rating schedule applies, and that the
19 exceptions in *Labor Code section 4660(d)* do not apply, since there is no
20 permanent and stationary report prior to January 1, 2005, there is no report
21 prior to that date indicating the existence of permanent disability, and since
22 the cumulative trauma is found to end on the date of the Minnesota game,
23 March 12, 2004, the applicant did not miss any time from playing for
24 which he should have received a Notice of benefits.

25 "Based upon the Formal Rating of the Disability Evaluation Unit, the
26 applicant is entitled to permanent disability of ninety percent (90%), which
27 is the dollar amount of \$156,562.50, payable beginning on August 2, 2011,
and thereafter a life pension of \$115.96 per week...

"Dr. Feiwell in his report dated October 25, 2011 (defense exhibit #B)
apportioned 50% of the applicant's factors of disability to the applicant's
activities subsequent to 2004, which include working-out, taking care of
his children and household activities (page 25 of his report).

"The Court finds that this apportionment is not based upon scientific
medical evidence and cannot be utilized to decide this issue.

"The medical opinions of Dr. James Styner dated August 2, 2011
(applicant's exhibit #1) and the medical opinion of Dr. Kenneth Nudleman
dated August 1 2001 (applicant's exhibit #4) both concluded that based
upon the diagnostic tests, that the applicant did not have any apportionment
to non-industrial factors, and the Court relies upon these two opinions for
its decision that there is not any apportionment to non-industrial factors."

1 **DISCUSSION**

2 As can be seen from the WCJ's Opinion, he relied upon the reporting of applicant's two QMEs to
3 find that applicant is currently 90% permanently disabled without apportionment to any non-industrial
4 factors. In discussing Dr. Styner's reporting in his Opinion, the WCJ implicitly accepted that physician's
5 view that the AMA Guides do not straightforwardly apply to the applicant because he is a professional
6 athlete and not a "normal person," and that the holding in the consolidated *Almaraz/Guzman* cases
7 authorized the physician to construe the AMA Guides in a way that "allows for a higher rating."
8 (*Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal.
9 Comp. Cases 1084 (Appeals Board en banc) (*Almaraz/Guzman*); *Milpitas Unified School Dist. v.*
10 *Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].)

11 Dr. Styner's application of the AMA Guides and understanding of the *Almaraz/Guzman* holding
12 are incorrect, and his reporting is not substantial evidence in support of the WCJ's decision.

13 Dr. Styner first addressed the use of the AMA Guides in his August 2, 2011 report, where he
14 summarily wrote on pages 12-13 as follows:

15 "[I]t is felt that the tables used to rate his bilateral upper extremity
16 impairment [in the AMA Guides] would not accurately reflect his actual
17 physical condition and impairment...

18 "It is my opinion that the patient's bilateral upper extremity impairment
19 should be determined using the criteria for rating impairments of two upper
20 extremities, as outlined in Table 13-17, page 340 of the AMA Guides, as
21 this most accurately reflects the patient's bilateral upper extremity
22 impairment.

23 "The patient is able to use both upper extremities for self care and he can
24 grasp and hold objects with some difficulty, but he does not have any
25 digital dexterity. These criteria places him into a Class 2 impairment with
26 a corresponding 39% whole person impairment."

27 Similarly, with regard to applicant's lower extremities, Dr. Styner wrote on page 13 of his
28 August 2, 2011 report as follows:

29 "In the case of Mr. Grant, it is felt that the tables used to rate his bilateral
30 lower extremity impairment would not accurately reflect his actual physical
31 condition and impairment.

32 "The patient has sustained and repetitive injuries to his bilateral lower
33 extremities as a result of the constant driving off the line, grappling with
34 opponents, tackling, running, jumping, and having others landing on his
35 lower extremities during the course of the game and practices.

1 "It is my opinion that the patient's bilateral lower extremity impairment
2 should be determined using the criteria for rating gait and station disorders,
3 as this most accurately reflects the patient's bilateral lower extremity
4 impairment.

5 "The patient's bilateral lower extremity condition has resulted in great
6 difficulty with ambulation. He has difficulty walking more than a block
7 without pain. He is also limited to walking on straight surfaces, as climbing
8 stairs does result in severe pain.

9 "Based on the above criteria, the patient falls into a Class 2 impairment due
10 to station and gait disorders as outlined in Table 13-15, page 336 of the
11 AMA Guides. The patient is assigned a whole person impairment of 19%
12 for his station and gait disorder.

13 "Utilizing the Combined Values Chart on page 604 of the AMA Guides,
14 the patient has a total of 65% whole person impairment."

15 In his report dated January 31, 2012, Dr. Styner responds to Dr. Feiwell's reporting and
16 application of the AMA Guides as follows:

17 "I have reviewed Dr. Feiwell's report and I must respectfully disagree with
18 him on several issues. Firstly, *Dr. Feiwell uses the typical charts in the
19 AMA Guides to rate Mr. Grants's [sic] upper and lower extremity
20 impairment.*

21 "Mr. Grant was a professional basketball player for a long period of time,
22 Professional basketball is a profession that is very exclusive and requires
23 the participants to be in superb condition. Professional basketball players
24 are also required to deal with daily severe pain and to be able to perform
25 with severe pain. Furthermore, as part of the conditioning process, the
26 basketball player must stay in tip top shape in order to be able to keep his
27 job. This involves repetitive lifting, running, jumping, squatting, etc while
lifting weights far in excess of what the average person can lift.

28 "*Based on the unique qualifications required to be a professional
29 basketball player, it is simply unreasonable to use the usual charts in the
30 AMA Guides to rate this patient.* These charts were designed to measure
31 impairment in the average worker, not a top tier professional athlete such
32 as Mr. Grant.

33 "Fortunately for the patient, *the recent Almaraz/Guzman ruling has
34 allowed the physician to rate the patient using the any [sic] chart within
35 the AMA Guides that he feels is appropriate and that is what I did in my
36 report of 8/2/11.* I continue to stand by my rating of this patient."
37 (Emphasis added.)

38 As shown by his reporting, Dr. Styner opined that it is proper to assess applicant's permanent
39 disability using other than the "usual" and "typical" charts and tables in the AMA Guides because
40 applicant was a professional athlete and the use of other charts and tables leads to a higher whole person

1 impairment. Dr. Styner is correct in noting that there is a relationship between an injured worker's
2 occupation and the level of permanent disability that results from certain injuries. However, that
3 occupational factor is already accounted for in the rating string. In this case, the DEU rater applied the
4 occupational variant of 590J, which represents the most physically strenuous occupations. Thus,
5 reference to applicant's occupation as a professional athlete as reason to use other than the usual charts
6 and tables in the AMA Guides to rate whole person impairment is unjustified.

7 Moreover, Dr. Styner's deviation from the usual method of measuring impairment under the
8 AMA Guides just to obtain higher whole person impairment is contrary to the holding in
9 *Almaraz/Guzman*. As the Appeals Board wrote in *Almaraz/Guzman*:

10 "[E]ach reporting physician (treater or medical-legal evaluator) should give
11 an expert opinion on the injured employees' WPI using the chapter, table,
12 or method of assessing impairment. *This does not mean, of course, that a*
13 *physician may arbitrarily assess an injured employee's impairment. As*
14 *stated by the AMA Guides, '(a) clear, accurate, and complete report is*
15 *essential to support a rating of permanent impairment' and the report*
should 'explain' its impairment conclusion. In other words, a physician's
WPI opinion must constitute substantial evidence upon which the WCAB
may properly rely, including setting forth the reasoning behind the
assessment. (Almaraz/Guzman, supra, 74 Cal. Comp. Cases at 1104,
citations omitted.)...

16 In *Guzman* the Court of Appeal affirmed the Appeals Board's holding that an examining
17 physician may utilize any chapter, table, or method in AMA Guides that most accurately reflects the
18 injured employee's impairment while staying within the four corners of the AMA Guides. But as the
19 Court wrote in *Guzman*, the physician must then explain:

20 "[W]hy departure from the impairment percentages is necessary and how
21 he or she arrived at a different rating. That explanation necessarily takes
22 into account the physician's skill, knowledge, and experience, as well as
23 other considerations *unique to the injury at issue*...If the explanation fails
24 to convince the WCJ or WCAB that departure from strict application of the
25 applicable tables and measurements in the Guides is warranted in the
26 current situation, the physician's opinion will properly be rejected.
27 *Without a complete presentation of the supporting evidence on which the*
physician has based his or her clinical judgment, the trier of fact may not
be able to determine whether a party has successfully rebutted the
scheduled rating or, instead, has manipulated the Guides to achieve a more
favorable impairment assessment." (187 Cal.App.4th at 829, emphasis
added.)

1 Dr. Styner's use of other than the usual tables in the AMA Guides is not supported by the medical
2 record. With regard to applicant's upper extremities, the physician in his August 2, 2011 report utilized
3 Table 13-17, page 340 of the AMA Guides, which pertains to impairments caused by spinal cord
4 disorders. However, he provided no discussion of any supporting evidence or considerations unique to
5 the injury to justify his departure from the usual table. In fact, there is no evidence in the record of a
6 spinal cord disorder and there is no neurological finding that indicates any such impairment to the upper
7 extremities. Dr. Styner's failure to describe any supporting evidence or discussion of considerations
8 unique to the injury invalidates his deviance from the use of the usual tables in the AMA Guides to
9 evaluate applicant's upper extremities, and renders his opinion is insubstantial. (*Almaraz/Guzman*,
10 *supra.*) A decision of the WCJ that is not supported by substantial evidence will be set aside. (*Bracken*
11 *v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [54 Cal.Comp.Cases 349]; *LeVesque v.*
12 *Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].)

13 Similarly with regard to his evaluation of applicant's lower extremities, Dr. Styner does not
14 provide a rating from the usual table in the AMA Guides. Instead he relies on Table 13-15, which
15 concerns "gait disorders," which are described in chapter 13.5 of the AMA Guides as "Problems
16 maintaining balance and a stable gait" that develop from central nervous system or peripheral neurologic
17 impairment. However, applicant has no such neurologic impairment. Moreover, there is no evidence
18 that applicant has any kind of gait abnormality or difficulty ambulating, and the August 23, 2012 Minutes
19 of Hearing summarize his testimony at trial that he regularly runs on an "elliptical or nordic machine" as
20 part of his routine work outs. (8:10-11.)

21 Dr. Styner provided no rationale for utilizing Table 13-15, other than noting that applicant was a
22 professional athlete and that use of the chart yields a higher whole person impairment. As discussed
23 above, applicant's former occupation does not alone justify use of other than the usual charts in the AMA
24 Guides in order to calculate higher whole person impairment. Like his opinion regarding applicant's
25 upper extremities, Dr. Styner's opinion regarding the whole person impairment caused by injury to
26 applicant's lower extremities is not substantial medical evidence, and does not support the WCJ's
27 decision.

1 In addition, Dr. Styner's evaluation of applicant's spine is not supported by the medical record.
2 No finding of radiculopathy is included in his August 2, 2011 report of examination, and neither
3 Dr. Feiwell nor Dr. Nudleman reported radiculopathy in connection with their examinations.
4 Nevertheless, Dr. Styner utilized the cervical and lumbar spine categories in the AMA Guides that
5 specifically describe the existence of radiculopathy as reason for their use. An opinion that is based upon
6 an incorrect medical history is not substantial medical evidence. (*Heggin v. Workmen's Comp. Appeals*
7 *Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3
8 Cal.3d 372 [35 Cal.Comp.Cases 525].)

9 Because the WCJ's relied upon medical reporting that is not substantial medical evidence, the
10 December 5, 2012 decision is rescinded and the case is returned to the trial level for development of the
11 record and a new decision by a WCJ that addresses all issues in dispute. When the medical record
12 requires further development, the preferred procedure is first to seek supplemental opinions from the
13 physicians who have already reported in the case. If the supplemental reports or depositions of the
14 previously reporting physicians cannot or do not sufficiently develop the record, an agreed medical
15 evaluator (AME) may be considered. Finally, if none of these options succeeds or is possible, the WCJ
16 or the Board may then appoint a medical examiner. (*McDuffie v. Los Angeles County Metropolitan*
17 *Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

18 For the foregoing reasons,

19 **IT IS ORDERED** that defendant's petition for reconsideration of the December 5, 2012
20 Amended Findings And Award of the workers' compensation administrative law judge is **GRANTED**.

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1 **IT IS FURTHER ORDERED** as the decision after reconsideration of the Appeals Board that the
2 December 5, 2012 Amended Findings And Award of the workers' compensation administrative law is
3 **RESCINDED** and the case is **RETURNED** to the trial level for further proceedings and a new decision
4 by a workers' compensation administrative law judge in accordance with this decision.

5
6 **WORKERS' COMPENSATION APPEALS BOARD**

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8 
9 _____
10 **RONNIE G. CAPLANE**

11 **I CONCUR,**

12 
13 _____
14 **ALFONSO J. MORESI**



15 
16 _____
17 **FRANK M. BRASS**

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

19
20 **FEB 04 2013**

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

23 **HORACE GRANT**
24 **RONALD MIX**
25 **DEAN STRINGFELLOW**

26 **JFS/abs**

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