

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 Case No. ADJ3864345 (VNO 0557264)

4 **RON DAVIS,**

5 *Applicant,*

6 vs.

7 **WALT DISNEY COMPANY; LIBERTY
8 MUTUAL,**

9 *Defendants.*

**ORDER DENYING
PETITION FOR
RECONSIDERATION**

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11 We have considered the allegations of the Petition for Reconsideration and the contents of the
12 report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our
13 review of the record, and for the reasons stated in said report which we adopt and incorporate, we will
14 deny reconsideration.

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1 For the foregoing reasons,

2 **IT IS ORDERED** that said Petition for Reconsideration be, and it hereby is, **DENIED**.


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4 **WORKERS' COMPENSATION APPEALS BOARD**

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7 **RONNIE G. CAPLANE**

8 **I CONCUR,**

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11 **ALFONSO J. MOREST**

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14 **DEIDRA E. LOWE**



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

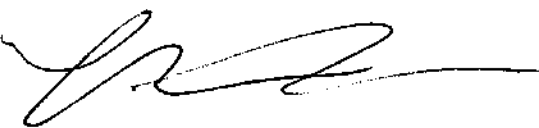
16 **FEB 11 2014**

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

19 **RON DAVIS**
20 **BRENNER STERNER**
21 **FRED TANENBAUM**

22 **ebc**

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26
27 **DAVIS, Ron**



CASE NO. ADJ3864345

RON K. DAVIS

v.

WALT DISNEY COMPANY;
LIBERTY MUTUAL

DATE OF INJURY:

JANUARY 3, 2008

WORKERS' COMPENSATION JUDGE:
DATE:

RALPH ZAMUDIO
DECEMBER 24, 2013

REPORT OF WORKERS' COMPENSATION JUDGE
ON PETITION FOR RECONSIDERATION

INTRODUCTION

The applicant, Ron K. Davis, , while employed on 1/3/2008 as a laborer, occupational group number 560, at Burbank, California by Walt Disney Company, whose workers' compensation insurer was Liberty Mutual, sustained injury arising out of and in the course of employment to the cervical spine, psyche, sleep and internal meaning GERD.

The applicant timely filed a verified petition for reconsideration of the Findings and Award served on 11/27/2013, awarding the applicant permanent disability of 62%, after apportionment.

The applicant recites as statutory grounds for seeking reconsideration that by the order, decision or award, the board acted without or in excess of its powers, and the evidence does not justify the findings of fact.

The applicant contends the undersigned WCJ erred in not an applying the *Almaraz/Guzman* approach utilized by the orthopedic AME to rebut the AMA Guides as

to the cervical spine wherein the AME relied upon Figure 15-19 to provide an alternate rating, one much higher than that produced using the DRE or ROM methods set forth in the Guides.

The defendant filed a detailed verified answer to the petition for reconsideration disputing applicant's contentions.

FACTS

The applicant suffered industrial injury while pulling a heavy file cabinet on 1/3/2008 to the cervical spine, with resulting psyche, sleep disorder, sexual dysfunction and GERD. He was provided industrial benefits and treatment. He underwent cervical spine surgery on 3/11/2008 and 5/19/2009. To resolve disputed medical issues the parties obtained AME orthopedic reports of Dr. Roger Sohn dated 6/7/2010 (WCAB Exhibit X-1) and 5/31/2013 (WCAB Exhibit X-8), deposition of Dr. Roger Sohn dated 12/1/2010 (WCAB Exhibit X-2), AME psychiatric reports of Dr. Perry Maloff dated 8/1/2011 (WCAB Exhibit X-3) and 1/9/2012 (WCAB Exhibit X-5), deposition of Dr. Perry Maloff dated 10/31/2011 (WCAB Exhibit X-4), PQME internal reports of Dr. Revels Cayton dated 12/3/2012 (WCAB Exhibit X-6) and 4/12/2013 (WCAB Exhibit X-7). Also placed in evidence at trial are treating physician reports of Dr. Sam Bakshian dated 7/28/2010 (Applicant's Exhibit 1) and 2/22/2010 (Applicant's Exhibit 3), and Dr. Dan Naim dated 3/17/2011 (Applicant's Exhibit 2).

The psychiatric AME, Dr. Maloff, found 8% whole person impairment for the applicant's psyche, with 90% apportionment to industrial causes. The internal PQME, Dr. Cayton, found that the applicant's sexual dysfunction was related to his psyche, with no independent ratable impairment. He found 9% whole person impairment for sleep maintenance insomnia, and 6% whole person impairment for GERD. (The

applicant on reconsideration does not dispute these findings and the undersigned WCJ ratings of those impairments.)

The orthopedic AME, Dr. Sohn, by his report dated 6/7/2010 found the applicant has a work restriction limiting him to light work only, precluding repetitive motions of the cervical spine and he should not do overhead work or keep his neck in a fixed position. Also at page 16 of said report, he found 23% whole person impairment using the ROM method of the AMA Guides because of the multi-level cervical disc involvement in this case. He also found under DRE Category IV he would have a 26% WPI, plus 3% for chronic pain producing a 28% WPI. At page 18 of his report, the AME explained why he felt this did not accurately reflect the applicant's impairment rating and attempted to apply an *Almaraz/Guzman* rebuttal rating as follows:

"However, I do not think this accurately rates the applicant's impairment rating. Under AMA guidelines, work activities are not taken into account. This accounts only for activities of daily living. I think to get an accurate rating in this person, work activities certainly must be taken into account in this workers' compensation setting. Not to do so would lead to an obvious inaccurate rating.

This is a gentleman who has virtually no extension of his cervical spine. He has 0% extension and only 40% of normal flexion. He has moderate spasm. He has significant diminution in his ability to lift, as well as his ability to move his neck. All-in-all, in my opinion, the applicant has lost 60% of his capacity for function of the cervical spine.

Taking into consideration of Figure 15-19, which provides for 80% whole person impairment for complete loss of cervical spine fusion, the applicant's whole person impairment is best rated, therefore, at 48% impairment whole person. Adding 3% for his chronic pain level, the applicant's whole person impairment is thus rated at 50% whole person. This in my opinion, is a more accurate rating under *Almaraz/Guzman*,

and is far more accurate than the above rating using traditional AMA guidelines."

The orthopedic AME was deposed on 12/1/2010. He confirmed the applicant has normal motor findings and no neurological deficit, but opined there was a 60% loss of function predicated on applicant's subjective complaints of pain in addition to his measurements. (WCAB Exhibit X2 at page 9:3-12.) He further testified on cross-examination, in pertinent part, as follows:

"Q. You didn't reference any particular tables that said measure 60 percent loss of function if this or that, or 40 percent if something else?

A. Right.

Q. After determining that there was a 60 percent loss of function, you multiplied that percentage times 80 percent for a complete loss of function and arrived at a 48 percent impairment rating standard; is that correct?

A. Yes.

Q. You did not follow that method based on any particular table, did you?

A. Yeah, Figure 15-19. That's exactly what it is.

Q. Well, Figure 15-19 says a complete loss of function cervical spine is worth 80%?

A. So I guess there is no table of simple algebra, or maybe this is simple mathematics, but $.6 \times .8 = .48$.

Q. We certainly understand the mathematics involved. My question is: There is no table that says if a person has lost 20 percent, versus 50%, versus 80 percent of their function in this area, it will rate this impairment level; is that correct?

A. That's just mathematics.

...

Q. What I'm saying is this Doctor -

A. There's nothing that says 6 times 8 is 48.

That's not in the Guides, but we can stipulate to that.

Q. No, that is.

But is there any table that documents or prescribes that methodology? And what crossed my mind is that sometimes you may have accelerated schedules or decelerated schedules.

In other words, sometimes, while the elimination of the use, let's say, of an extremity might have a certain value, loss of half that may not be equivalent to the loss of half. It may be greater, it may be less.

You used the arithmetic involved, but is it fair that there was no table indicated to you that if there's a 60 percent loss of function, that the method is to multiply that times the total loss, versus look to a table to find out what the impairment should be?

A. Yes, I guess I can concede that one."

(WCAB Exhibit X2 at pages 10:18-11:16; pp. 11:24-12:16.)

The AME further testified on cross-examination concerning his use of Figure 15-19, in pertinent part, as follows:

"Q. Looking at Figure 15-19, it says side view of the spinal column. And I'll quote the language, it says, quote, 'The whole spine divided into regions indicating the maximum whole person impairment represented by a total impairment of one region of the spine. Lumbar 90 percent, thoracic 30 percent, cervical 80 percent.' That's what you utilized, correct?

A. Yes.

Q. Once again, there is nothing in this figure or any other table that addresses anything other than the total loss of function in that area?

A. Right. You use that as a basis for my opinion, you're right. After that it's just mathematics."

(WCAB Exhibit X2 at pages 21:21-22:8.)

The parties were given opportunity to file post-trial briefs at conclusion of trial addressing whether the orthopedic AME opinion expressed by Dr. Sohn should be rated under the AMA Guides or under an *Almaraz/Guzman* alternate rating method utilizing Figure 15-19. After reviewing the entire record, and giving due consideration to the arguments and points & authorities set forth in the post-trial briefs filed by the parties the undersigned WCJ found convincing and persuasive the arguments set forth by defendant in its post-trial brief dated 8/29/2013 the opinion expressed by Dr. Sohn attempting to utilize an *Almaraz/Guzman* alternate rating for the applicant's cervical spine impairments fails to meet legal standards.

Based upon review of the entire record, and the above-noted medical reports of Dr. Roger Sohn, Dr. Perry Maloff, and Dr. Revels Cayton, it was found the injury caused permanent disability based upon the following rating formula:

15.01.01.00 - 29 - [5] 37 - 560J - 49 - 49 PD (A)

(26 WPI plus 3% add-on for pain = 29 WPI)

13.03.00.00 - 9 - [6] 12 - 560E - 11 - 11 PD (B)

06.01.00.00 - 6 - [6] 8 - 560F - 8 - 8 PD (C)

90% (14.01.00.00 - 8 - [8] 11 - 560D - 9 - 9) 8 PD (D)

(A) 49 C (B) 11 C (C) 8 C (D) 8 = 62% FINAL PD, after apportionment

It is from the Findings and Award of permanent disability not applying the attempted *Almaraz/Guzman* analysis by the orthopedic AME the applicant now seeks reconsideration.

DISCUSSION

The applicant contends the award of permanent disability is erroneous because the orthopedic component of the rating fails to reflect the *Almaraz/Guzman* approach utilized by the orthopedic AME to rebut the AMA Guides as to the cervical spine wherein the AME relied upon Figure 15-19 to provide an alternate rating, one much higher than that produced using the DRE or ROM methods set forth in the Guides.

After noting the applicant's work restrictions, include a limitation to light work [that under the old pre-SB899 PDRS would be assigned a 50% standard rating before adjustment for age and occupation], the orthopedic AME set forth at page 16 of his report dated 6/7/2010 applicant has a 23% whole person impairment using the ROM method of the AMA Guides because of the multi-level cervical disc involvement and

under DRE Category IV he would have a 26% WPI, plus 3% for chronic pain producing a 28% WPI.

In attempting to rebut the AMA Guides, and stay within the four corners of the Guides, the AME turned to Figure 15-19 to come up with an alternate rating under *Almaraz/Guzman* he felt is far more accurate than the above rating using traditional AMA guidelines. He opined the applicant has lost 60% of his capacity for function of the cervical spine and so using Figure 15-19 he applied a mathematical approach taking 60 percent loss of function, and multiplied that percentage times 80 percent for a complete loss of function and arrived at a 48 percent impairment rating standard, and adding 3% for chronic pain he arrived at a 50% WPI before adjustment [which interestingly is the same standard as under the old PDRS for a limitation to light work].

The Court of Appeal in *Almaraz/Guzman III* affirmed the board's en banc decision in *Almaraz/Guzman II* that a departure from a strict application of the Guides is appropriate "for cases that do not fit neatly into the diagnostic criteria and descriptions" and that the Guides call for a physician to use clinical judgment in evaluating the impairment most accurately, even that is possible only by resorting to comparable conditions described in the AMA Guides. The board made clear in *Almaraz/Guzman II* that a physician is not permitted to utilize any chapter, table or method in the AMA Guides to simply achieve a desired result, based directly or indirectly on the PDRS in effect prior to 2005. Stated the board,

"A physician's opinion regarding an injured employee's WPI under the Guides must constitute substantial evidence; therefore, the opinion must set forth the facts and reasoning which justify it. Moreover, a physician's WPI opinion that is not based on the AMA Guides does not

constitute substantial evidence." (*Almaraz/Guzman II, supra*, 74 Cal. Comp. Cases 1084, 1087.)

The Court of Appeal in *Almaraz/Guzman III* further explained as follows:

"[*Almaraz/Guzman II*] does not allow a physician to conduct a fishing expedition through the Guides 'simply to achieve a desired result'; the physician's medical opinion 'must constitute substantial evidence' of WPI and 'therefore . . . must set forth the facts and reasoning [that] justify it. 'In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. [Citation.] Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. [Citation.] Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions.'" (*Guzman III, supra*, 75 Cal. Comp. Cases 837, 851, citations omitted.)

The AME attempts to rebut the Guides by referring to Figure 15-19 of the Guides, attempting to stay within the four corners of the AMA Guides. However, the AME fails to provide sufficient explanation as to why rating applicant's WPI using Figure 15-19 is more appropriate than the ROM or DRE method for rating the WPI under the spinal chapter, other than to achieve a desired result because he views the AMA Guides as not considering work functions.

As explained by defendant in its well-written and persuasive trial brief and answer to the petition for reconsideration, the AME attempt to rebut the AMA Guides whole person impairment rating of the cervical spine factors of disability by reference to Figure 15-19 to produce a 48% WPI cervical spine disability is not substantial evidence.

As correctly argued by defendant:

"In the instant case, Dr. Sohn did not utilize any chapter, table, or method in the AMA Guides. Rather, he referenced FIGURE 15-19, in stating that,

'since the applicant has lost 60% of his capacity for function of the cervical spine...[taking into consideration Figure 15-19, which provides for 80% whole person impairment for complete loss of cervical spinal fusion, the applicant's whole person impairment is best rated, therefore, at 48% impairment whole person.' Dr. Sohn based his determination that the applicant lost 60% of his capacity for function of the cervical spine without any regard for objective findings and without any basis in the AMA Guides. He issued permanent disability findings under both the ROM and DRE methods, but arbitrarily dismissed these by nonchalantly concluding, with no explanation, that 'all-in all, in my opinion, the applicant has lost 60% of his capacity for function of the cervical spine.'

Figure 15-19 is a pictorial diagram of the side view of the spinal column. There is no rating methodology described therein. Figure 15-19 simply states, 'the whole spine divided into regions indicating the maximum whole person impairment represented by a total impairment of one region of the spine. Lumbar 90%, thoracic 40%, cervical 80%.' The figure is provided ONLY for a discussion of Chapter 15.13, which explains how to convert whole person impairment into regional spine impairment, NOT VICE-VERSA!

Chapter 15.13 describes dividing a whole person impairment under the ROM method by 0.80 for the cervical spine in order to establish a percentage of whole body impairment. There is absolutely no other utilization for this figure, which is a mere diagram of the spine.

A plain language interpretation of the findings of the Almaraz/Guzman II decision reveals that a figure is not a 'chapter, table, or method in the AMA Guides.' It is by definition, neither a chapter nor a table. As noted above, it is also not a method, as there is absolutely no methodology for describing a loss of use of the spine and applying a multiplier to it." [Trial Brief dated 8/29/13 at pages 4:23-5:17. See also, Answer to Petition for Reconsideration at pages 2:16-4:10; 6:6-7:10.]

It is not for the individual physician, even an AME, to second-guess the legislative mandate of workers' compensation reform under SB 899 requiring that the applicant's permanent disability for this 2008 injury be rated by applying the AMA Guides under

Labor Code sections 4658 and 4660. The AME above-noted reasoning for rejecting the AMA Guides methodology for determining WPI for a cervical spine injury because he views the Guides as lacking consideration of work functions and not intended to be used to consider and translate work disability, by itself, is not proper rebuttal of the AMA Guides. The statutory reform under SB 899 mandates and requires application of the 2005 PDRS utilizing the AMA Guides. (*Zenith v. Workers' Comp. Appeals Bd. (Cugini)* 159 Cal.App.4th 483 [73 Cal. Comp. Cases 81, 85-87]; *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal. Comp. Cases 783, 790-793 (board en banc); *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal. Comp. Cases 1822 (writ denied).)

The AME in attempting to rebut the AMA Guides seems to apply by analogy a work restriction methodology for arriving at a permanent disability rating for the cervical spine [as noted above work restrictions were previously utilized to rate spine injuries under the pre-2005 PDRS] by referring to Figure 15-19 taking a mathematical approach to calculate what he estimates is loss of 60% of applicant's capacity for function of the cervical spine coming up with a 48% number adding an additional 3% for chronic pain to arrive at a 50% WPI [achieving the same result -- a 50% standard rating for the cervical spine as was given under the pre-2005 PDRS for a limitation to light work, the same work restriction the AME finds applicable here] using Figure 15-19 out of context as argued by defendant. Such analysis is improper rebuttal as it is evident the AME is attempting to produce a permanent disability rating based indirectly on the PDRS in effect prior to 2005 to achieve a desired result.

The Court of Appeal in *Almaraz/Guzman III* affirmed the board's en banc decision in *Almaraz/Guzman II* that a departure from a strict application of the Guides is appropriate "for cases that do not fit neatly into the diagnostic criteria and descriptions"

and that the Guides call for a physician to use clinical judgment in evaluating the impairment most accurately, even that is possible only by resorting to comparable conditions described in the AMA Guides. The board made clear in *Almaraz/Guzman II* that a physician is not permitted to utilize any chapter, table or method in the AMA Guides to simply achieve a desired result, based directly or indirectly on the PDRS in effect prior to 2005. Stated the board,

"A physician's opinion regarding an injured employee's WPI under the Guides must constitute substantial evidence; therefore, the opinion must set forth the facts and reasoning which justify it. Moreover, a physician's WPI opinion that is not based on the AMA Guides does not constitute substantial evidence." (*Almaraz/Guzman II, supra*, 74 Cal. Comp. Cases 1084, 1087.)

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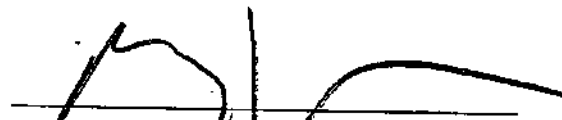
"[*Almaraz/Guzman II*] does not allow a physician to conduct a fishing expedition through the Guides 'simply to achieve a desired result'; the physician's medical opinion 'must constitute substantial evidence' of WPI and 'therefore' . . . must set forth the facts and reasoning [that] justify it. 'In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. [Citation.] Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. [Citation.] Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions." (*Guzman III, supra*, 75 Cal. Comp. Cases 837, 851, citations omitted.)

The opinion expressed by the orthopedic attempting to apply an *Almaraz/Guzman* alternative rating to the applicant's cervical spine disability is not substantial evidence.

RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the petition for reconsideration be DENIED.

Dated: 12/30/2013
Filed and Served by mail on
above date on all interested parties
on the Official Address Record.
By: Millie Rios
Millie Rios



RALPH ZAMUDIO
WORKERS' COMPENSATION JUDGE