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Anthony Ferras, Applicant v. United Airlines, Gallagher Bassett, Defendants

W.C.A.B. No. ADJ 3434046 (SFO 0489095)--WCJ Richard Newman (SFO); WCAB Panel: Commissioners Cuneo, Aghazarian, Caplane (concurring, but not signing)

Workers' Compensation Appeals Board (Panel Decision)

2009 Cal. Wrk. Comp. P.D. LEXIS 119

Opinion Filed March 2, 2009

PUB-STATUS: [*1]

Publication Status: **CAUTION:** This decision has not been designated a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffin v. WCAB* (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public [*2] interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

DISPOSITION: *Disposition:* The Petition for Reconsideration is *denied*.

HEADNOTE: Permanent Disability--Rating--AMA Guides--WCAB upheld WCJ's finding that applicant/aircraft mechanic's 1/10/2002 right abductor tendon injury resulted in 24 percent permanent disability, as rated under Chapter 6 (hernia-related injuries) of AMA Guides, and that qualified medical evaluator's (QME) opinion was sufficient to rebut strict application of AMA Guides pursuant to *Alvarez v. Environmental Recovery Services* (2009) 74 Cal. Comp.

*Cases 201 (Appeals Board en banc opinion) and Guzman v. Milpitas Unified School District, PSI (2009) 74 Cal. Comp. Cases 201 (Appeals Board en banc opinion), when QME acknowledged [*3] that Chapter 17 of AMA Guides could be used to rate abductor tendon strain and, in fact, had utilized Chapter 17 in prior report to rate applicant's impairment, but subsequently opined that zero impairment rating compelled by use of Chapter 17 would not be a fair or accurate measure of applicant's actual permanent disability, and that impairment and disability was more accurately reflected by analogy under Chapter 6 based upon applicant's specific work restrictions. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[4][a], 32.03A8.02[3]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 2-6.]*

COUNSEL: *Counsel:* For applicant--Durard, McKenna & Borg
For defendants--Mullen & Filippi

OPINIONBY: *Opinion By:* Commissioner James C. Cuneo

OPINION: ORDER DENYING RECONSIDERATION

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

For the foregoing reasons,

IT IS [*4] **ORDERED** that said Petition for Reconsideration be, and it hereby is, **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD
Commissioner James C. Cuneo

I concur,

CONCURBY: Commissioner Gregory G. Aghazarian
Commissioner Ronnie G. Caplane (concurring, but not signing)

* * * * *

REPORT AND RECOMMENDATION ON RECONSIDERATION

On January 26, 2009, defendant United Airlines filed a timely petition for reconsideration from my Findings and Award that was served on December 30, 2008. Defendant appeals my finding of permanent disability and specifically contends that the opinion of the panel qualified medical examiner (QME), Dr. David Kneapler, as expressed in his March 28, 2008 report, improperly based applicant's impairment on Chapter 6, Section 6.6, of the AMA Guides, which section addresses injuries to the abdominal wall. Defendant contends that I should have followed the QME's February 20, 2007 report that bases impairment on Chapter 17, dealing with lower extremities. In a more general

sense, the defendant's petition raises the question as to whether the AMA Guides may be rebutted when a physician uses clinical judgment to base impairment on a chapter other than the one typically [*5] associated with the injured body part.

Procedural History

At the trial on December 17, 2008 the parties stipulated that applicant, born May 4, 1961, while employed on January 10, 2002, as an aircraft mechanic (occupational group number 380) in San Francisco, California, by United Airlines, permissibly self-insured, sustained an injury to his right adductor tendon, arising out of and in the course of employment. The parties further stipulated that the applicant is permanent and stationary, the QME's February 20, 2007 report rates 0 % permanent disability, and the QME's March 28, 2008 report rates 24% permanent disability. The issue of permanent disability was submitted based on the record, including applicant's offer of proof. The offer of proof indicated that applicant has frequent discomfort and pain and that his daily living activities are affected, primarily lifting.

I found the opinion of the QME as set forth in his March 28, 2008 report to be the most persuasive of record. In this report, and in his deposition testimony, the QME opines that, although applicant's injury can be evaluated under Chapter 17 of the AMA Guides, Section 6.6 of the Guides, which deals primarily [*6] with hernias, provides a more accurate way to rate applicant's impairment based on specific work restrictions.

Based on this finding and the parties' stipulations, I adopted the following permanent disability rating: 06.05.00.99-[6]19-380H-24-24%. My award of permanent disability and award of attorney's fee were based on this rating. The other findings I made were not disputed. [See Opinion on Decision, contained in the minutes of December 17, 2008.]

Discussion

Defendant contends that I improperly followed the opinion of the QME, which opinion was based on [what the QME considered to be] an analogous impairment. Although the injury was to the applicant's adductor tendon, which normally falls under Chapter 17 of the AMA Guides, the QME utilized Chapter 6 of the Guides, concerning hernia-related impairments.

As noted from the QME's March 28, 2008 report, the doctor believed that a surgery that was performed on applicant to repair his adductor tendon resulted in impairment, a restriction to lifting to 30 pounds. The QME commented that [he] "consider[ed] this an important point, as his [initial] disability rating by the AMA Guides, which rated zero percent, according to [his] best [*7] understanding at the time, did not comport with the substantial restriction of work activities [he] found." (App Exh 1, p. 2.)

The QME further explained that he found that utilizing the abdominal wall was reasonable "given that the disability affects the abdominal wall and the pain limits his lifting." (App. Exh. 1, p.3.) The QME also notes that "clinical judgment should control in determining the actual impairment rating." (App. Exh. 1, p. 3.) Utilizing this judgment, the QME determined that applicant's impairment is best described under class two of this type of impairment. (App. Exh. 1, p. 3.)

Defendant contends that rating by analogy is improper in this case since, as the QME conceded, Chapter 17 can be used to rate an adductor tendon strain, and in fact the QME used this chapter in initially rating the impairment in his February 20, 2007 report (Def. Exh. A.) Defendant also contends that, while using the hernia section may have been appropriate with respect to impairment of function concerning performance of the activities of daily living, the QME's rating by analogy fails "because he did not compare any 'measurable impairment'."

These contentions might be true if one [*8] reads the Guides as inflexible and devoid of clinical judgment. In this case, the QME opined that in his clinical judgment, a zero impairment rating (which is the rating of his 2/20/07 report, using Chapter 17) did not adequately describe applicant's "substantial restriction of work activities". As noted below, the basis for the QME's opinion has recently been confirmed by the appeals board as one way to rebut the permanent disability rating schedule.

Defendant's petition was filed before the board's en banc decision issued in two consolidated cases, *Almaraz v. Environmental Recovery Services and SCIF* (2009) ADJ1078163 (BAK 0145426) and *Guzman v. Milpitas Unified School District* (2009) ADJ3341185 (SJO 0254688). In its consolidated decision, the board held that: "(1) the AMA Guides portion of the 2005 Schedule is rebuttable; (2) the AMA Guides portion of the 2005 Schedule is rebutted by showing that an impairment rating based on the AMA Guides would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability; and (3) when an impairment rating based on the AMA Guides has been [*9] rebutted, the WCAB may make an impairment determination that Considers medical opinions that are not based or are only partially based on the AMA Guides." (*Id.* at p. 2.)

The board in *Almaraz/Guzman* noted that several sections of the QME Guides allow for clinical judgment to in determining impairment, and ultimately disability resulting from a particular injury. Specifically, the following language from page 11 of the Guides, which the QME cites in his March 28, 2008 report (App Exh 1, p. 3.), is also cited by the board:

"In situations where impairment ratings are not provided, the *Guides* suggests that physicians use clinical judgment, comparing measurable impairment resulting from the unlisted condition to measureable impairment resulting from similar conditions with similar impairment of function in performing activities of daily living. [P] The physician's judgment, based upon experience, training, skill, thoroughness in clinical evaluation, and ability to apply the *Guides* criteria as intended, will enable an appropriate and reproducible assessment to be made of clinical impairment." [cites.] (*Id.* at p. 19.)

The board also cited the following language [*10] from page 18 of the AMA Guides as supportive of a physician's use of clinical judgment:

"The physician's role in performing an impairment evaluation is to provide an independent, unbiased assessment of the individual's medical condition, including its effect on function, and identify abilities and limitations to performing activities of daily living Performing an impairment evaluation requires considerable medical expertise and judgment." [cites.] (*Id.* at p. 18.)

The board concluded that "an impairment rating strictly based on the AMA Guides is rebutted by showing that such an impairment rating would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability. This conclusion finds support both in California cases addressing injuries under the former Schedule and in out-of-state cases addressing circumstances under which the AMA Guides need not be strictly followed." (*Id.* at p. 38.)

In this case, the QME concluded that a zero impairment rating compelled by the use of Chapter 17 would not be a fair and accurate measure of the employee's permanent disability. [*11] I found the QME's explanation to be persuasive and substantial evidence on this issue. Thus, the AMA Guides portion of the schedule has been rebutted by this opinion.

With respect to the appropriate rating following rebuttal of a specific section of the Guides, the board in *Almaraz/Guzman* concluded that "... a physician may depart from the specific recommendations of the AMA Guides and *draw analogies to the Guides' other chapters, tables, or methods of assessing impairment*. This is consistent with the long-established principle in California that non-scheduled ratings may be arrived at by making comparisons and drawing analogies to scheduled ratings. (cites.) (*Id.* at pp. 46-47; emphasis added.) This is precisely the method that the QME used in the present case, drawing an analogy to the impairment of applicant's lifting restriction, as measured under a different chapter of the Guides.

Based on *Almaraz/Guzman*, it is the physician who determines in a clinical context whether the chapter of the Guides normally associated with an injured body part can be fairly used to assess the level of permanent disability, or whether, as was found here, the impairment level [*12] should be based on a different chapter of the Guides.

Conclusion

Based on the foregoing, it is respectfully recommended that defendant's petition for reconsideration be denied.

Richard Newman
Workers' Compensation Administrative Law Judge
Filed and served: February 9, 2009

Legal Topics:

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