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## STATE OF CALIFORNIA

**ROSA ALVAREZ**  
**(ROSA ALVAREZ-GARAY),**

***Applicant,***

**VS.**

**WATERWAY PLASTICS; US FIRE  
INSURANCE COMPANY, administered by  
MATRIX ABSENCE MANAGEMENT, INC.,**

***Defendant(s).***

**Case No. ADJ4016007 (OXN 0139975)**

## OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's petition for reconsideration to further study the factual and legal issues in this case.<sup>1</sup> This is our Opinion and Decision After Reconsideration. Defendant sought reconsideration of the July 7, 2009 Amended Findings and Award and Order Vacating Findings and Award Dated 6/22/09, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a machine operator during the period January 28, 2004, through January 28, 2005, sustained industrial injury to her right wrist; that the employer's workers' compensation carrier was Plastics Manufacturers Self-Insured Program, administered by Matrix Absence Management; and that applicant's injury caused 21 percent permanent disability, entitling her to 80.50 weeks of disability indemnity at the rate of \$220.00 per week, plus augmentation per Labor Code section 4658(d). The WCJ ordered the June 22, 2009 Findings and Award vacated.

Defendant contended that the WCJ improperly determined applicant's percentage of permanent disability, which is to be calculated according to the American Medical Association's

<sup>1</sup> Commissioner Aghazarian, who was on the panel that granted reconsideration, no longer serves on the Appeals Board. Another panel member has been assigned to take his place.

1 *Guides to the Evaluation of Permanent Impairment* (5th Edition) (AMA Guides), and that he  
2 improperly awarded augmentation of the permanent disability award per Labor Code section  
3 4658(d) sua sponte, in violation of defendant's due process right to adjudicate the issue. Defendant  
4 further points out that the WCJ failed to indicate the employer's correct insurer, an error he  
5 acknowledged in the March 26, 2008 Minutes of Hearing.

6 We have considered the Petition for Reconsideration and applicant's Answer, and we have  
7 reviewed the record in this matter. The WCJ has retired, so we have not received a Report and  
8 Recommendation on Petition for Reconsideration.

9 For the reasons discussed below, we will amend the WCJ's decision to reflect the proper  
10 insurer and to defer the Labor Code section 4658(d) issue, and we will otherwise affirm.

#### 11 **BACKGROUND**

12 Applicant sustained an admitted injury to her right wrist. The parties agreed to use Dr.  
13 Alan Sanders as an agreed medical evaluator (AME). In his January 30, 2007 report, at pages 6-7,  
14 Dr. Sanders stated the following regarding permanent impairment:

15 "The patient would be evaluated per AMA Guidelines. In order to  
16 do that, we start on page 493 with the diagnosis and then go to  
17 page 492, where we have to sign the nerve value table for the  
18 median nerve. We would indicate that this carries a full sensory  
percentage of 39 percent. We then have to pick a grade.

19 We go to page 482, Table 16:10. We look at the grades and we  
20 would then have to consider, based upon her complaints,  
21 symptoms, and physical examination, that she would have what  
would be considered a Grade III. I believe I would give her the full  
22 grade to include 60 percent.

23 Therefore, we take 60 percent and multiply it by 39, which gives us  
24 a 23.4 percent impairment to the upper extremity. We then have to  
25 convert this to whole person impairment. 23 percent converts to  
14 percent whole person impairment and that would be the value  
with regard to her impairment for the upper extremity.

26 I would suspect that the patient has a reasonable grip strength loss  
27 between 10 and 30 percent strength index loss. Unfortunately, she  
does not give her full effort. I therefore believe that her evaluation

1 regarding grip strength loss should also be noted.

2 I would indicate that based upon the percent strength loss index  
3 between 10 and 30, which is the minimal amount, this would be  
4 evaluated per Table 16:34. We would then note that this represents  
5 a 10 percent upper extremity impairment which then converts on  
6 page 439, Table 16:3 to a 6 percent whole person impairment.

7 We then would combine 14 percent with 6 on page 604. This  
8 would then give us a final value of 19 percent whole person  
9 impairment for this injury."

10 Dr. Sanders was deposed on July 16, 2007. Defense counsel asked him about the three  
11 scenarios at page 495 of the AMA Guides for evaluating carpal tunnel syndrome.

12 "A That's correct. That's one way to evaluate carpal tunnel  
13 syndrome. There's no argument there. There are other ways to  
14 evaluate it as well.

15 Q Did you choose other way?

16 A Yes, which is to evaluate the neurological chapter which  
17 evaluates it with regards to peripheral nerve entrapment which the  
18 DEU has accepted." (July 16, 2007 Deposition of Alan Sanders,  
19 M.D., p. 5.)

20 Dr. Sanders explained, at page 9, that he felt he had the option to choose to evaluate applicant  
21 neurologically rather than by the three scenarios, because it was more appropriate in relationship to  
22 her impairment. He said, at pages 11-12, that the Guides give a variety of ways of evaluating  
23 carpal tunnel syndrome. "So I followed through with the Guides, used my interpretation and gave  
24 you the references and step-by-step how I performed my exam." (*Id.*, at p. 12.) In his deposition,  
25 Dr. Sanders explained in detail how he evaluated applicant under the Guides, including how he  
26 addressed applicant's questionable credibility regarding grip strength and pain.

27 After rescinding an initial Findings and Award, the WCJ prepared formal rating  
instructions, based on Dr. Sanders January 30, 2007 report and his deposition. Defendant cross-  
examined the rater, Chris Clark, on March 3, 2009. Mr. Clark testified as follows:

"He did not deviate from the AMA guides. He chose the  
impairment rating from the guides.

1 When asked about the number 19 in the rating string, he deviated  
2 from the normal Grade 3 sensory impairment to combine it with  
3 the upper-extremity grip loss and did so because he believes that  
4 page 11 of the guides allows the doctor to clarify and to deviate  
from the guides based upon his skill, training, and experience and  
his clinical judgment.

5 He arrived at the combination of the grip loss because he read the  
6 deposition of Dr. Sanders, who explained his rationale.” (March 3,  
2009 Minutes of Hearing and Summary of Evidence, p. 2.)

7 He explained, “It is not mandatory that the rater rely upon the objective evidence of impairment  
8 only. The rater believes that the doctor can rely upon complaints of pain to form the basis of the  
9 rating and not just the objective evidence.” (*Id.*, at p. 3.)

10 The WCJ issued his amended decision on July 7, 2009, finding 21 percent permanent  
11 disability. Defendant filed a petition for reconsideration.

## 12 DISCUSSION

13 Labor Code section 4660 provides, in pertinent part,

14 “(a) In determining the percentages of permanent disability,  
15 account shall be taken of the nature of the physical injury or  
16 disfigurement, the occupation of the injured employee, and his or  
her age at the time of the injury, consideration being given to an  
employee's diminished future earning capacity.

17  
18 (b)(1) For purposes of this section, the ‘nature of the physical  
19 injury or disfigurement’ shall incorporate the descriptions and  
20 measurements of physical impairments and the corresponding  
percentages of impairments published in the American Medical  
Association (AMA) Guides to the Evaluation of Permanent  
21 Impairment (5th Edition).”

22 In *Almaraz v. Environmental Recovery Services* and *Guzman v. Milpitas Unified School*  
23 *District* (2009) 74 Cal. Comp. Cases 1084 (Appeals Board en banc) (*Almaraz/Guzman II*), we  
24 clarified and modified our prior decision in these cases (*Almaraz v. Environmental Recovery*  
25 *Services* and *Guzman v. Milpitas Unified School District* (2009) 74 Cal. Comp. Cases 201  
26 (Appeals Board en banc). (*Almaraz/Guzman I*). We held, in *Almaraz/Guzman II*,

1 “(1) the language of Labor Code section 4660(c), which provides  
2 that ‘the schedule ... shall be prima facie evidence of the  
3 percentage of permanent disability to be attributed to each injury  
4 covered by the schedule,’ unambiguously means that a permanent  
5 disability rating established by the Schedule is rebuttable; (2) the  
6 burden of rebutting a scheduled permanent disability rating rests  
7 with the party disputing that rating; (3) one method of rebutting a  
8 scheduled permanent disability rating is to successfully challenge  
9 one of the component elements of that rating, such as the injured  
10 employee’s whole person impairment (WPI) under the AMA  
11 Guides; and (4) when determining an injured employee’s WPI, it is  
12 not permissible to go outside the four corners of the AMA Guides;  
13 however, a physician may utilize any chapter, table, or method  
14 in the AMA Guides that most accurately reflects the injured  
15 employee’s impairment.” (74 Cal.Comp.Cases at p. 1086-1087.)  
16 (Footnote omitted.) (Emphasis added.)

17 We expressly rejected the defendant’s argument in that case that “section 4660(b)(1) permits a  
18 physician to consider only the Guide’s impairment percentage measurement system and does not  
19 allow a physician to consider any other portion of the Guides.” (74 Cal.Comp. Cases at p. 1105.)

20 We explained,

21 “Section 4660 vested the AD with the authority to create the 2005  
22 Schedule (Lab. Code, § 4660(e); see also § 4660(c)) and, in  
23 creating it, the AD ‘adopt[ed] and incorporate[ed]’ the whole  
24 AMA Guides without limitation. (Cal. Code Regs., tit. 8, § 9805.)  
25 Therefore, the entire AMA Guides is part of the Schedule.

26 Moreover, there is no separate portion of the AMA Guides which  
27 sets forth ‘the descriptions and measurements of physical  
impairments and the corresponding percentages of impairments’  
that stands alone from and may be dissociated from the balance of  
the Guides, particularly Chapters 1 and 2. The AMA Guides  
consists of 18 chapters. Chapter 1 discusses the philosophy,  
purpose, and appropriate use of the Guides. Chapter 2 explains  
how an impairment evaluation should be performed and reported.  
Chapters 3 through 17 each address different organs/body systems  
and Chapter 18 addresses pain. Yet, Chapters 3 through 18 all  
explicitly or implicitly refer back to Chapters 1 and 2. Thus, the  
AMA Guides is an integrated document and its statements in  
Chapters 1 and 2 regarding physicians using their clinical  
judgment, training, experience and skill cannot be divorced from  
the balance of the Guides.” (*Id.*, at pp. 1105-1106.) (Footnotes

omitted.)

In the present case, defendant argues that the permanent disability rating is not based on a proper calculation under the AMA Guides, and that the correct rating should be no more than four percent. The evidence shows, however, that the AME and the rater operated entirely within the four corners of the AMA Guides. The WCJ's finding on permanent disability, therefore, meets the standards set forth in *Almaraz/Guzman II*. That another method not considered best by this AME may also be valid does not render the method used by this AME invalid. Accordingly, we will affirm the WCJ's finding on permanent disability.

As to the issue of augmentation pursuant to Labor Code section 4658(d),<sup>2</sup> defendant is correct that this specific issue was not raised at trial, and that no evidence was introduced on the issue. In *Bontempo v. Workers' Comp. Appeals Bd.* (2009) 173 Cal. App. 4th 689 [74 Cal.Comp.Cases 419], the Court held that, by checking the boxes on the pre-trial conference statement labeled "permanent disability" and "apportionment," the parties conveyed their intention that the WCJ calculate the permanent disability award under the applicable formula, including section 4658(d)(2). It was not required that section 4658(d) be separately listed as an issue.

In the present case, permanent disability and apportionment were listed as issues at the mandatory settlement conference and at trial. Pursuant to *Bontempo*, that is sufficient to raise the issue of section 4658(d). Nevertheless, it was improper for the WCJ to make a decision on this issue, because no evidence had been admitted on the factual questions that must be resolved prior to a decision on application of section 4658(d). For this reason, we will amend Finding of Fact No. 3 and the Award and add Finding of Fact No. 5 to defer the issue of Labor Code section 4658(d).

We will also amend Finding of Fact No. 2 and the Award to reflect the proper identity of the insurer.

Applicant's request for costs and sanctions pursuant to Labor Code section 5813 is denied.

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<sup>2</sup> Labor Code section 4658(d)(2) provides for a 15 percent increase in permanent disability payments, if an employer who employs 50 or more employees fails to offer an injured employee regular work, modified work, or alternative work within 60 days of a disability becoming permanent and stationary. Subdivision (d)(3) provides for a decrease by 15 percent if the employer offers regular work, modified work, or alternative work within 60 days.

1 For the foregoing reasons,

2 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation  
3 Appeals Board, that the July 7, 2009 Amended Findings and Award and Order Vacating Findings  
4 and Award Dated 6/22/09 is **AFFIRMED, EXCEPT** that it is **AMENDED** as set forth below:

5 Findings of Fact Nos. 2 and 3 are **AMENDED** and Finding of Fact No. 5 is **ADDED**, as  
6 follows:

7 **FINDINGS OF FACT**

- 8
- 9 2. At the time of the injury, the employer's workers' compensation  
10 carrier was U. S. Fire Insurance Company, administered by Matrix  
Absence Management.
- 11 3. Applicant's injury caused permanent disability of 21 percent,  
12 entitling applicant to 80.50 weeks of disability indemnity at the  
13 rate of \$220.00 per week, in the total sum of \$17,710, less credit to  
14 defendant for all sums heretofore paid on account hereof, if any,  
and less attorney's fees.
- 15 5. The issue of adjustment pursuant to Labor Code section 4658(d) is  
deferred.

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1 The Award is amended as follows:

2 **AWARD**

3 **AWARD IS MADE** in favor of ROSA ALVAREZ-GARAY against U. S. FIRE  
4 INSURANCE COMPANY, administered by MATRIX ABSENCE MANAGEMENT, payable as  
5 follows:

6 Permanent disability indemnity for 80.50 weeks at the rate of \$220.00 per  
7 week, in the total of \$17,710, less credit to defendant for all sums  
8 heretofore paid on account thereof, if any, less 15 percent payable to Paul  
9 Kinsler as attorney's fees, to be commuted from the far end of the award.

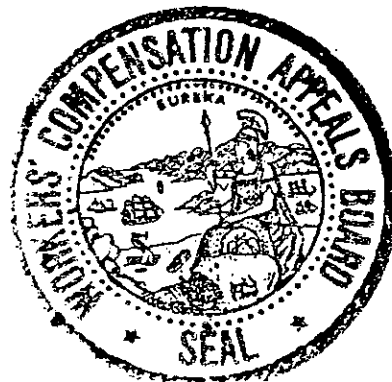
10 **WORKERS' COMPENSATION APPEALS BOARD**

11  
12 Frank M. Brass  
13 **FRANK M. BRASS**

14 **I CONCUR.**

15  
16 Ronnie G. Caplane  
17 **RONNIE G. CAPLANE**

18 Susan V. Hamilton **DEPUTY**  
19 **SUSAN V. HAMILTON**



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

22 **FEB 25 2010**

23 **SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT**  
24 **THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:**

25 **PAUL F. KINSLER**  
26 **TOBIN & LUCKS**  
27 **MATRIX**  
**ROSA ALVAREZ**  
**CB/bea**

**ALVAREZ, Rosa**



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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROSA ALVAREZ  
(ROSA ALVAREZ-GARAY),

*Applicant,*

vs.

WATERWAY PLASTICS; US FIRE  
INSURANCE COMPANY, administered by  
MATRIX ABSENCE MANAGEMENT, INC.,

*Defendant(s).*

Case No. ADJ4016007 (OXN 0139975)

OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION

Reconsideration has been sought by defendant with regard to a decision filed on July 15, 2009.

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted in order to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration will be granted for this purpose and for such further proceedings as we may hereinafter determine to be appropriate.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration be, and it hereby is, **GRANTED**.

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1 IT IS FURTHER ORDERED that pending the issuance of a Decision After  
2 Reconsideration in the above case, all further correspondence, objections, motions, requests and  
3 communications shall be filed with the Workers' Compensation Appeals Board, P. O. Box  
4 429459, San Francisco, California 94142-9459, ATTENTION: Office of the Commissioners,  
5 and not with any local office.

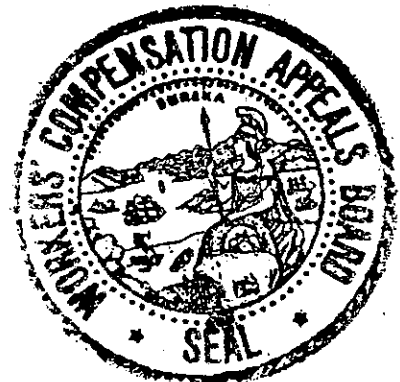
6 WORKERS' COMPENSATION APPEALS BOARD

7  
8   
9 FRANK M. BRASS

10 I CONCUR,

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12   
13 RONNIE G. CAPLANE

14  
15   
16 GREGORY G. AGHAZARIAN



17 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

18 OCT 05 2009

19 SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT  
20 THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

21 PAUL F. KINSLER  
22 TOBIN & LUCKS  
23 ROSA ALVAREZ

24 

25  
26 rrm

27 AT VAREZ, ROSA

No Report & Recommendation from the Judge

JUDGE Blitzstein