

NOV 04 2016

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3  
4 **MEGAN PRELL,**

5 *Applicant,*

6 vs.

7  
8 **CEDAR FAIR, L.P. dba as KNOTT'S BERRY  
9 FARM; ACE AMERICAN INSURANCE  
10 COMPANY, administered by SEDGWICK  
11 MANAGEMENT SERVICES, INC.,**

12 *Defendants.*

Case No. **ADJ9183350**  
(Anaheim District Office)

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

13 Applicant seeks reconsideration of the Findings and Award of August 15, 2016, in which the  
14 workers' compensation judge (WCJ) found that applicant, while employed as a "performer/greeter/park  
15 character" by Knott's Berry Farm on September 17, 2013, sustained industrial injury to her left shoulder,  
16 causing permanent disability of 2%.

17 Applicant contends, in substance, that the WCJ erred in finding of permanent disability of 2%,  
18 and that the WCJ should have determined permanent disability based on 15% Whole Person Impairment  
19 (WPI) as found by Dr. Mann, the Panel Qualified Medical Evaluator (PQME), because it is "within the  
20 four corners of the AMA Guides."

21 Defendant did not file an answer.

22 The WCJ submitted a Report and Recommendation.

23 Based on our review of the record and applicable law, we will grant reconsideration and amend  
24 the WCJ's decision to find permanent disability in accordance with Dr. Mann's finding of 15% WPI  
25 under "*Almaraz Guzman*." (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Almaraz-*  
26 *Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].)  
27

1 **BACKGROUND**

2 We adopt and incorporate the "Statement of Facts" from the WCJ's Report. We do not adopt or  
3 incorporate the remainder of the Report. Briefly, Dr. Mann served as the PQME in this case. Dr. Mann  
4 is a specialist in orthopedic surgery. In his report dated December 16, 2014, Dr. Mann provided his  
5 assessment of applicant's impairment under the AMA Guides, as follows:

6 **IMPAIRMENT RATING:**

7 **A. IMPAIRMENT RATING PER STANDARD RATING:**

8 As far as the left shoulder is concerned taking into consideration,  
9 shoulder motion impairment section 16.4i, pages 474 to 479 and using  
10 the figures 16-37, 16-40 and 16-43, she has limited range of motion in  
11 the right shoulder and she has a total of 3% upper extremity  
12 impairment rating which when taking into consideration page 439, table  
13 16-38 equals to 2% of whole percent impairment per standard rating.

14 **B. WPI RATING IN CONSIDERATION OF ALMARAZ-GUZMAN**  
15 **II IN THIS CASE:**

16 When determining an injured employee's WPI, it is not permissible to go  
17 outside the four corners of the AMA Guides. However, a physician may  
18 utilize any chapter, table or method in the AMA Guides that most  
19 accurately reflects the injured employee's impairment for work activities  
20 along with Activities of daily living. This patient has extensive  
21 conservative treatment with medications, acupuncture, Physical therapy  
22 and finally surgery on left shoulder and still remains symptomatic. She  
23 is [a] young female of 26 years and long life to go. Objective MRI  
24 evidence still shows shows: Disruption of the middle glenohumeral  
25 ligament, Partial tears of the superior and inferior glenohumeral  
26 ligaments, Irregular tear of the superior glenoid labrum., Blunting of the  
27 anterior glenoid labrum, possibly congenital in nature and Mild  
notching of the postelior glenoid labnun without avulsion. Still remains  
symptomatic and in future will need probable repeat surgical  
intervention as outlined above. Therefore, taking into consideration the  
Almaraz-Guzman II Based upon reasonable medical probability as in  
my opinion he [sic] has a more disability than the activities of daily  
living as noted in the AMA guide therefore I will try to give her  
Almaraz and Guzman impairment rating. [Sic.] In Almaraz/Guzman II,  
decision an evaluating physician is no longer bound to strict application  
of the AMA guides in reaching an impairment rating. The legislature  
recognized that not every injury can be accurately described by the  
classification designated for the particular body part involved. Instead,  
the evaluating physician may draw [upon] his or her judgment, training

1 and experience, in order to provide a broader basis for establishing and  
2 [sic] appropriate rating. However, there must be some point of  
3 reference within the four corners of the AMA guides. The evaluating  
4 physician is free to reference any material from any table or portion of  
5 the guides in arriving at an impairment rating. The evaluating physician  
6 must use the entire range of clinical skill and judgment when assessing  
7 whether or not the measurement or test results are possible and  
8 consistent with the impairment being evaluated. If, in spite of an  
9 observation or test result, the medical evidence appears insufficient to  
10 verify an impairment of a certain magnitude exist[s], the physician may  
11 modify the impairment accordingly and then describe and explain the  
12 reason for the modification in writing. Therefore, taking into  
13 consideration the nature of surgery she had and residual findings as  
14 noted in MRI Scan. [Sic.] Based on [reasonable] medical probability  
15 she has more disability than as compared to the standard rating. Per  
16 table 16-4 page 440 for the upper extremity, loss of function, which  
17 equals to almost 60% of whole person impairment. [Sic.] In my  
18 opinion, based upon reasonable medical probability; she has lost  
19 25% function of his [sic] left upper extremity. Therefore, in my  
20 opinion; she has left upper extremity impairment equal to 15 %  
21 whole person impairment in performing the work-related activities  
22 and activities of daily living. Therefore, I will give him [sic] a total  
23 of 15% impairment in consideration of Almaraz and Guzman.

24 (Applicant's trial exhibit 1, emphasis in original.)

## 25 DISCUSSION

26 In *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Almaraz-Guzman)* (2010) 187  
27 Cal.App.4th 808 [75 Cal.Comp.Cases 837], the Court of Appeal concluded that the language of Labor  
Code section 4660 permits reliance on the entire AMA Guides, including the instructions on the use of  
clinical judgment, in deriving an impairment rating in a particular case. The Court stated that "the  
physician must be permitted to explain why departure from the impairment percentages is necessary and  
how he or she arrived at a different rating. That explanation necessarily takes into account the physician's  
skill, knowledge, and experience, as well as other considerations unique to the injury at issue." (75  
Cal.Comp.Cases at 854.)

Similarly, in *City of Sacramento v. Workers' Comp. Appeals Bd. (Cannon)* (2013) 222  
Cal.App.4th 1360 [79 Cal.Comp.Cases 1], the Court of Appeal concluded that a police officer's plantar  
fasciitis, manifested only by his subjective experience of pain, fell into the *Almaraz-Guzman* category of

1 cases. In such cases, the AMA Guides call for the physician's exercise of clinical judgment to assess the  
2 impairment most accurately. In *Cannon*, the Court found no fault with the AME's conclusion that the  
3 police officer's plantar fasciitis was equivalent to a limp with arthritis, resulting in a 7 percent WPI  
4 impairment for purposes of determining permanent disability.

5 As in *Almaraz-Guzman* and *Cannon*, we are persuaded that the instant case falls within the  
6 category of cases in which the AMA Guides call for the physician's exercise of clinical judgment to  
7 assess the applicant's impairment most accurately. Dr. Mann, the PQME in orthopedic surgery,  
8 thoroughly explained why a "strict" rating under the AMA Guides is inaccurate. The doctor noted that  
9 applicant had surgery on her left shoulder but remains symptomatic. She is relatively young and her  
10 MRI shows objective evidence of remaining problems in her left shoulder. Dr. Mann also stated that it is  
11 "probable" that applicant will need "repeat surgical intervention." Due to the foregoing factors, and  
12 based on table 16-4 of the AMA Guides, Dr. Mann estimated that applicant has impairment  
13 equivalent to 25% of the total loss of function for the upper extremity under that table. Since a  
14 total loss of function would produce a WPI rating of 60%, Dr. Mann concluded with reasonable  
15 medical probability that an accurate assessment of applicant's impairment would be one-quarter of  
16 that, equating to a WPI of 15%.

17 We note that the only other medical evidence in the record consists of the reports of Dr. Fischer,  
18 the surgeon who performed surgery on applicant's left shoulder. In his last report dated October 30,  
19 2014, Dr. Fischer stated that he deferred to Dr. Einbund, the primary treating physician, for the final  
20 determination of impairment. (See defense exhibit A.) However, no report from Dr. Einbund was  
21 introduced into evidence.

22 We conclude that Dr. Mann's finding that applicant has 15% WPI due to her left shoulder injury  
23 is substantial medical evidence<sup>1</sup> and is within the four corners of the AMA Guides. As such, Dr. Mann's  
24 opinion on impairment justifies rejection of the strict rating and application of the alternative 15% rating  
25 under *Almaraz-Guzman*. Accordingly, we will grant reconsideration and amend the WCJ's decision to  
26

27 <sup>1</sup> See *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525, 529-530].

1 reflect a permanent disability award based on WPI of 15%, as formulated by Dr. Mann.<sup>2</sup>

2 The adjusted permanent disability rating is as follows:

3 16.02.02.00 - 15% - [1.4]21% - 311G - 23% - 19%

4 For the foregoing reasons,

5 **IT IS ORDERED**, that reconsideration of the Findings and Award of August 15, 2016 is  
6 **GRANTED**, and that as the Decision After Reconsideration of the Workers' Compensation Appeals  
7 Board, said decision is **AFFIRMED**, except that it is **AMENDED** in the following particulars:

8 **FINDINGS OF FACT**

9 2. Applicant's actual earnings at the time of injury were \$303.26 per week.

10 4. Applicant is entitled to a permanent disability award of 19%, equivalent to 70.50 weeks of  
11 indemnity payable at the rate of \$201.97 per week, in the total sum of \$14,238.88, payable forthwith less  
12 credit for permanent disability paid.

13 7. A reasonable attorney's fee is found to be 15% of the permanent disability award.

14 **AWARD**

15 [A] Permanent disability award of 19%, equivalent to 70.50 weeks of indemnity payable at the  
16 rate of \$201.97 per week, in the total sum of \$14,238.88, payable forthwith less credit for permanent  
17 disability paid.

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25  
26 <sup>2</sup> In addition, we will amend Finding 2, wherein the WCJ found "applicant's actual earnings at the time  
27 of injury were \$201.97 per week," to correctly reflect the parties' trial stipulation that applicant's  
earnings were \$303.26 per week.

1 [C] The reasonable value of the services and disbursements of applicant's attorney is 15% of the  
2 permanent disability award.

3  
4 **WORKERS' COMPENSATION APPEALS BOARD**

5  
6  
7 **MARGUERITE SWEENEY**

8  
9  
10 **I CONCUR,**

11  
12   
13 **KATHERINE ZALEWSK**

14 **PARTICIPATING, BUT NOT SIGNING**

15  
16 **DEIDRA E. LOWE**

17  
18 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

19 **NOV 0 2 2016**

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

22 **EDWARD SINGER**  
23 **MEGAN PRELL**  
24 **PRINDLE GOETZ**

25  
26  
27 **JTL/bea**