WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ANA R. SANCHEZ, *Applicant*

vs.

FOREVER 21, INC.;
ACE AMERICAN INSURANCE COMPANY C/O BROADSPIRE, *Defendants*

Adjudication Number: ADJ11573028
Marina del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by defendants Forever 21, Inc. and ACE American Insurance Company c/o Broadspire. This is our Opinion and Decision After Reconsideration.

Defendants seek reconsideration of the August 17, 2021 Order, wherein the workers' compensation administrative law judge (WCJ) ordered defendants (1) to provide applicant with a Supplemental Job Displacement Benefit Voucher (SJDB); and (2) to pay reasonable attorney's fees; and deferred the issue of penalties and sanctions.

Defendants contend that Victor Navarro, M.D., applicant's primary treating physician, was not predesignated pursuant to Labor Code,[1] section 4600; Dr. Navarro's report was not substantial medical evidence; Dr. Navarro did not include a Physician's Return to Work & Voucher Report (Form DWC-AD 10133.36) and defendants are not obligated to issue a SJDV until this report is submitted; defendants made an offer to return to regular work per the report of Eleby Washington, M.D., orthopedic panel qualified medical evaluator, that was rejected; and an award of attorney's fees is not supported by the evidence.

We received an answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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[1] All future statutory references are to the Labor Code unless otherwise indicated.

We have considered the Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we rescind the August 17, 2021 Order and return this matter to the trial level for further proceedings.

FACTS

As the WCJ stated,

> The Defendant Employer provided the Applicant with some medical treatment for her injuries claimed herein. The Applicant's Primary Treating Physician, Victor Navarro, D.C., dated August 20, 2019 (Applicant's Exhibit A), noted Applicant's job duties included repetitive hand motion, lifting boxes up to 60 pounds, unloading boxes, pulling racks full of boxes, bending, squatting, reaching, twisting, turning and in constant motion for 8-12 hours each day she worked. The Applicant's Primary Treating Physician reported the Applicant was precluded from performing heavy work.
>
> The medical evidence presented by the Defendant, Dr. Eleby R. Washington III, allowed the Applicant to return to her usual and customary job duties (Defendant's Exhibits 1 and 2).
>
> Although the Defendant argued that an offer of regular or modified work was offered to the Applicant, its timeliness was argued as well as whether the appropriate forms were signed acknowledging receipt of an offer to return to work. Applicant further argued that Defendant was on notice that Applicant remained treating with her doctor.
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> There were no witness presented. (Report, p. 2.)

DISCUSSION

Section 5313 requires the WCJ to,

> . . . make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made. (§ 5313.)

Section 5313 requires the WCJ to state the "reasons or grounds upon which the [court's] determination was made." (See also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-22 [2010 Cal. Wrk. Comp. LEXIA 74].) The WCJ's opinion on decision "enables the

parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton,* at p. 478), and must be supported by substantial evidence. (§§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd*. (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.)

Furthermore, the WCJ is charged with preparing the minutes of hearing and a summary of evidence at the conclusion of each hearing. (Cal. Code Regs., tit. 8, § 10566; *Hamilton, supra,* at p. 476.) The minutes of hearing and summary of evidence must include all interlocutory orders, admissions and stipulations, the issues and matters in controversy, a descriptive listing of all exhibits received for identification or in evidence, the disposition of the matter, and a fair and unbiased summary of the testimony given by each witness. (Cal. Code Regs., tit. 8, § 10566; *Hamilton, supra,* at p. 476.)

Here, we are unable to ascertain the basis for the WCJ's decision as her Opinion on Decision and Report are devoid of analysis. As such, we rescind the August 17, 2021 Order and return this matter to the trial level for further proceedings.

Nevertheless, in light of the parties' arguments, we provide the following guidance with respect to applicant's claim for a SJDB voucher. Applicant is entitled to a SJDB voucher upon showing that she sustained permanent partial disability and the employer failed to show that it offered regular, modified, or alternative work, regardless of whether the record contains a Physician's Return to Work & Voucher Report. (§§ 4658.7(b), 5705.) In *Opus One Labs v. Workers' Comp. Appeals Bd. (Fndkyan)* (2019) 84 Cal. Comp. Cases 634, 636 [2019 Cal. Wrk. Comp. LEXIS 51] (writ denied), a different Appeals Board panel concluded that:

> We are persuaded by applicant's contention here that, in this instance, defendant had the burden to obtain a Physician's RTW form when defendant was apprised of applicant's permanent disability status and work preclusions in the QME report. The purpose of a Physician's RTW form is to inform defendant that

> applicant has become permanent and stationary, the industrial injury caused permanent partial disability, and of applicant's work capacities and restrictions. (Lab. Code, § 4658.7(b)(1), (h)(2); Cal. Code of Regs., tit. 8, § 10133.31(b).) The QME report here provided this information. To conclude otherwise would place form over substance. (*County of Kern v. T.C.E.F, Inc.* (2016) 246 Cal. App. 4th 301, 321, 200 Cal. Rptr. 3d 714 ["A general principle of statutory construction is that courts do not place form over substance where doing so defeats the objective of a statute, especially a statute designed to protect a public interest. (citations omitted.) It is an 'established principle of the law that the substance and not the mere form of transactions constitutes the proper test for determining their real character. If this were not true it would be comparatively simple to circumvent by sham the provisions of statutes framed for the protection of the public. This the law does not permit.' (citations omitted)."]; *Pulaski v. American Trucking Associations, Inc.* (1999) 75 Cal. App. 4th 1315, 1328 [64 Cal. Comp. Cases 1231, 1236] ["Substantial compliance, as the phrase is used in the decisions, means actual compliance in respect to the substance essential to every reasonable objective of the statute . . . . Where there is compliance as to all matters of substance technical deviations are not to be given the statute of noncompliance. . . . Substance prevails over form. (citations omitted.)" (internal quotations omitted [by WCAB]; emphasis in original.)].) [Citations to record omitted]

We agree. The burden of proof remains with defendant to show that it offered regular, modified or alternative work, irrespective of whether defendant received a Physician's Return to Work & Voucher Report.

Moreover, the offer of regular, modified or alternative work must be bona fide. In *Dennis v. State of* California (April 30, 2020) 85 Cal.Comp.Cases 389 [2020 Cal. Wrk. Comp. LEXIS 19] (Appeals Board en banc), we held that,

> Our review of statutes and case law, however, leads us to conclude that an employer's inability to offer regular, modified, or alternative work does not release an employer from the statutory obligation to provide a SJDB voucher. (§ 4658.7(b).) "Labor Code section 3202 requires the courts to view the Workers' Compensation Act from the standpoint of the injured worker, with the objective of securing the maximum benefits to which he or she is entitled." (*Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901, 910 [269 Cal.Rptr. 656, 55 Cal.Comp.Cases 196].) Thus, absent a bona fide offer of regular, modified, or alternative work, regardless of an employer's ability to make such an offer, and regardless of an employee's ability to accept such an offer, an employee is entitled to a SJDB voucher. (*Dennis*, *supra*, 85 Cal. Comp. Cases at 406.)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that defendants Forever 21, Inc. and ACE American Insurance Company c/o Broadspire's Petition for Reconsideration of the August 17, 2021 Order is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 5, 2022

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

ANA R. SANCHEZ
HINDEN & BRESLAVSKY
WAI & CONNOR, LLP

LSM/*pc*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARTIN SCHMIDT, *Applicant*

vs.

FREMONT SWIM SCHOOL, SECURITY NATIONAL INSURANCE COMPANY, administered by AMTRUST N.A., *Defendants*

Adjudication Number: ADJ12311590
Sacramento District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by applicant Martin Schmidt. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the August 24, 2021, Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) found that applicant is not entitled to the Supplemental Job Displacement Benefit (SJDB) voucher because there is no substantial medical evidence of permanent partial disability.

Applicant contends that there is substantial evidence that applicant was an employee of defendant and sustained an industrial injury. Applicant further contends that his employment resignation has no bearing on his entitlement to a voucher. Lastly, applicant contends that defendant has the burden to obtain the Physician's Return to Work & Voucher Report (Form DWC-AD 10133.36).

We have not received an answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied. The WCJ noted that there are no findings with respect to applicant's resignation or with respect to the Physician's Return to Work & Voucher Report and asks that should we find that there is permanent partial disability, that the matter be remanded to the trial level to determine these issues.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we rescind the August 24, 2021 Findings of Fact and return this matter to the trial level for further proceedings consistent with this Opinion.

FACTS

The WCJ stated the following facts:

> Applicant sustained an industrial injury on September 15, 2015. Applicant had industrially related hernia surgery on October 23, 2015. After the surgery applicant returned to work, working modified duties. Applicant was having difficulty performing his job and thus voluntarily resigned in June 2018.
>
> The parties utilized Dr. Davidson as the PQME. Dr. Davidson issued a report dated December 3, 2019 in which he found that applicant sustained 0% permanent disability on a strict AMA Guides analysis and further provided an *Almarez/Guzman* [*sic*] analysis opining that applicant sustained 10% impairment. Dr. Davidson did not provide a Physicians Return to Work form and defendant did not provide an offer of alternative or modified work. The parties ultimately settled the case in chief via Compromise & Release on September 9, 2020.
>
> The parties disputed if applicant was eligible for supplemental job displacement benefits. Defendant argued that Dr. Davidson's *Almarez/Guzman* [*sic*] analysis was flawed and thus applicant's level of permanent disability was zero, applicant disagreed. Applicant also argued that because he was not offered alternative or modified work, he was entitled to the voucher. The matter was therefore set for trial on these issues. The Court ruled that there was no substantial evidence that applicant sustained permanent partial disability and thus applicant was not entitled to the benefits. Applicant appeals this ruling. (Report, pp. 1-2.)

DISCUSSION

The WCJ provided the following reasons to support the finding that applicant did not sustain permanent partial disability.

> Defendant argues that applicant is not eligible for the benefits because there is no substantial evidence that applicant sustained any permanent disability. Dr. Davidson found that on a strict analysis of the AMA Guides applicant sustained 0% WPI under Table 6-9. However he noted that applicant has surgical scarring and constant persistent pain. He did not

> believe that applicant's strict rating was an accurate assessment of his level of permanent disability and therefore found impairment under *Almarez/Guzman* [*sic*]. However, Dr. Davidson's analogy is also under Table 6-9. Dr. Davidson opined that applicant's impairment involved the second criteria under Class 2 which is "frequent discomfort, precluding heavy lifting but not hampering some activities of daily living." Essentially, Dr. Davidson eliminated the first requirement of Class 2 impairment under Table 6-9 (requiring palpable defect in supporting structures of abdominal wall). *Almarez/Guzman* [*sic*] allows a physician to analogize applicant's impairment to any table in the AMA Guides. Dr. Davidson first states that applicant has no disability utilizing Table 6-9 and then tries to "analogize" applicant's disability to the exact same table; this is not what *Almarez/Guzman* [*sic*] envisioned. Dr. Davidson's analysis is therefore not substantial medical evidence. (Opinion on Decision.)

In *Almaraz v. Environmental Recovery Servs.* (*Almaraz/Guzman II*) (2019) 74 Cal.Comp.Cases 1084, 1086-1087 [2009 Cal. Wrk. Comp. LEXIS 219] (Appeals Board en banc), we held that:

> (1) the language of Labor Code[1] section 4660(c), which provides that "the schedule . . . shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule," unambiguously means that a permanent disability rating established by the Schedule is rebuttable; (2) the burden of rebutting a scheduled permanent disability rating rests with the party disputing that rating; (3) one method of rebutting a scheduled permanent disability rating is to successfully challenge one of the component elements of that rating, such as the injured employee's whole person impairment (WPI) under the AMA Guides; and (4) when determining an injured employee's WPI, it is not permissible to go outside the four corners of the AMA Guides; however, a physician may utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee's impairment. (Footnote not in original.)

We then explained that while the AMA Guides provide the analytical framework for assessing WPI, the Guides do not restrict a physician to mechanically and uncritically assign a WPI; that, instead, the AMA Guides contemplates that a physician use his or her judgment, experience, training, and skill in assessing WPI. (*Almaraz/Guzman II, supra,* at pp. 1103-1104.)

> Therefore, based upon the physician's judgment, experience, training, and skill each reporting physician (treater or medical-legal evaluator) should

[1] All future statutory references are to the Labor Code unless otherwise indicated.

> give an expert opinion on the injured employee's WPI using the chapter, table, or method of assessing impairment of the AMA Guides that most accurately reflects the injured employee's impairment. (See *Glass, supra,* 105 Cal.App.3d at p. 307 [45 Cal.Comp.Cases at p. 449] ("The Board may not rely upon alleged limitations in the Rating Schedule to deny the injured worker a permanent disability award which accurately reflects his true disability.").) This does not mean, of course, that a physician may arbitrarily assess an injured employee's impairment. As stated by the AMA Guides, "[a] clear, accurate, and complete report is essential to support a rating of permanent impairment" and the report should "explain" its impairment conclusions. (AMA Guides, § 2.6, at pp. 21–22.) 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. (*See Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620–621 (Appeals Board en banc).) (*Almaraz/Guzman II, supra,* 74 Cal. Comp. Cases at p. 1104.)

Here, Dr. Davidson explained that a strict application of the AMA Guides results in applicant having a 0% WPI because applicant no longer has a palpable defect or hernia due to surgical treatment. (Applicant Exhibit 1, Dr. Davidson report dated December 3, 2019, p. 8.) However, applicant does have surgical scarring and constant persistent pain. (*Id.* at p. 9.) Dr. Davidson did not believe that a strict application of the AMA Guides is an accurate depiction of applicant's permanent impairment. (*Ibid*.) Dr. Davidson identified Class 2 from Table 6-9 as the most accurate description of applicant's permanent impairment, resulting in a rating of 10% WPI. (*Ibid.*) In other words, Dr. Davidson provided an explanation as to why he deviated from the Permanent Disability Schedule, stayed within the AMA Guides framework, and used his judgment, experience, training and skill to determine a more accurate WPI for applicant. This is exactly what *Almaraz/Guzman II* required him to do. Therefore, we find his reasoning and conclusions to be substantial medical evidence.

Lastly, considering the arguments in the Petition, we provide the following guidance with respect to applicant's claim for a SJDB voucher. Applicant is entitled to a SJDB voucher upon showing that he sustained permanent partial disability and the employer failed to show that it offered regular, modified, or alternative work, regardless of whether the record contains a Physician's Return to Work & Voucher Report. (§§ 4658.7(b), 5705; *Opus One Labs v. Workers' Comp. Appeals Bd. (Fndkyan)* (2019) 84 Cal. Comp. Cases 634, 636 [2019 Cal. Wrk. Comp. LEXIS 51] (writ denied) [the burden of proof remains with defendant to show that it offered regular, modified or alternative work, irrespective of whether defendant received a Physician's

Return to Work & Voucher Report so long as defendant was apprised of applicant's permanent disability status and work preclusions].)

Moreover, applicant's resignation has no bearing on his entitlement to a voucher. (*Dennis v. State of* California (April 30, 2020) 85 Cal.Comp.Cases 389, 406 [2020 Cal. Wrk. Comp. LEXIS 19] (Appeals Board en banc) ["Thus, absent a bona fide offer of regular, modified, or alternative work, regardless of an employer's ability to make such an offer, and regardless of an employee's ability to accept such an offer, an employee is entitled to a SJDB voucher."])

Accordingly, we rescind the August 24, 2021 Findings of Fact and return this matter to the trial level for further proceedings consistent with this Opinion.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that applicant Martin Schmidt's Petition for Reconsideration of the August 24, 2021 Findings of Fact is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 7, 2022

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

MARTIN SCHMIDT
LAW OFFICE OF WILLIAM R. ORR
HANNA BROPHY SACRAMENTO

LSM/*pc*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *mc*