

STATE OF CALIFORNIA
Division Of Workers' Compensation
Workers' Compensation Appeals Board

Case No(s). **ADJ9465055**

LINDA BALDERRAMA,

Applicant,

vs.

**CKE RESTAURANTS DBA CARL'S JR.
RESTAURANT; TRAVELERS PROPERTY
CASUALTY COMPANY OF AMERICA,**

Defendant(s).

**FINDINGS OF FACT
AND AWARD**

LAW OFFICES OF ROWEN, GURVEY & WIN

By: Brian Kramer, J.D.
Attorneys for Applicant

TRINIDAD & ASSOC.

By: Jason Don A. de Jesus
Attorneys for Defendant

The above entitled matter having been heard and regularly submitted, the Honorable Shiloh Rasmusson, Workers' Compensation Administrative Law Judge, now decides as follows:

FINDINGS OF FACT

1. Applicant Linda Balderrama, born February 11, 1957, while employed on December 14, 2013, as a cashier/cleaner, occupational group number in dispute, at Newhall, California by CKE Restaurants dba Carl's Jr. Restaurant insured by Travelers Property Casualty Company of America, sustained injury arising out of and in the course of employment to the lumbar spine, and claims to have sustained injury arising out of and in the course of employment in the form of hypertension, and to the upper and lower gastrointestinal systems.

2. Applicant has sustained her burden of proof to establish injury to the body parts of lumbar spine, hypertension, upper and lower gastrointestinal systems.
3. Applicant's earnings at the time of injury were \$147.03 per week, sufficient to produce a temporary disability indemnity rate of \$160.00 per week and a permanent disability indemnity of \$160.00 per week.
4. Applicant's injury caused temporary disability for which applicant has been adequately compensated.
5. Applicant's occupational code at the time of injury was 322.
6. Applicant's injury caused permanent disability of 75% equivalent to 513.25 weeks of indemnity payable at the rate of \$160.00 per week in the total sum of \$82,120.00. Thereafter, a life pension is due at the weekly rate of \$115.96 for the remainder of applicant's lifetime. Defendant is entitled to credit for permanent disability advances, if any, according to proof, with WCAB jurisdiction reserved in the event of a dispute.
7. There is legal basis for apportionment.
8. There is need for future medical treatment to cure or relieve from the effects of this injury.
9. The reasonable value of the services and disbursements of applicant's attorney is the sum of \$12,318.00 off the side of the permanent disability award, and \$10,520.10 off the side of the life pension award.

AWARD

AWARD IS MADE in favor of **LINDA BALDERRAMA** against **CKE RESTAURANTS DBA CARL'S JR. RESTAURANT, INSURED BY TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA**, payable as follows:

- a. Permanent disability of 75%, entitling applicant to 513.25 weeks of disability indemnity at the rate of \$160.00, in the total sum of \$82,120.00, less credit to defendant for all sums heretofore paid on account thereof, if any, and less \$12,318.00 payable as attorney fees to be commuted off the side of the permanent disability award.
- b. Thereafter, a life pension is due in at the initial weekly rate of \$115.96, less attorney fees.
- c. Future medical treatment reasonably required to cure or relieve from the effects of the injury herein.

ORDER OF COMMUTATION

- d. **IT IS ORDERED** that the sum of \$12,318.00 be commuted off the side of the weekly payments of permanent disability in order to pay attorney fees awarded herein.
- e. **IT IS FURTHER ORDERED** that the sum of \$10,520.10 be commuted off the side of the life pension in order to pay attorney fees awarded herein.


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f. IT IS FURTHER ORDERED that defendant hold the attorney fees in trust pending receipt of a written, signed fee split agreement.

Dated: January 23, 2019

Filed and Served by mail on above date on all parties/liens on the Official Address Record.

By: *Vergel Alberto*



SHILOH ANDREW RASMUSSON
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

STATE OF CALIFORNIA
Division Of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER ADJ9465055

LINDA BALDERRAMA,
APPLICANT

v. **CKE RESTAURANTS DBA CARL'S JR.**
RESTAURANT; TRAVELERS
PROPERTY CASUALTY COMPANY OF
AMERICA, DEFENDANT
DECEMBER 14, 2013

DATE OF INJURY:
WORKERS' COMPENSATION
JUDGE:
DECISION DATE:

SHILOH A. RASMUSSEN
JANUARY 24, 2019

OPINION ON DECISION

BACKGROUND

Applicant Linda Balderrama, born February 11, 1957, while employed on December 14, 2013, as a cashier/cleaner, occupational group number in dispute, at Newhall, California by CKE Restaurants dba Carl's Jr. Restaurant, insured by Travelers Property Casualty Company of America, sustained injury arising out of and in the course of employment to the lumbar spine, and claims injury in the form of hypertension, and to the upper and lower gastrointestinal systems.

The parties have selected Agreed Medical Examiner Steven Silbart, M.D., who has authored multiple reports, and have further selected internal medicine QME Masoud Azizad, M.D. The matter was heard at trial on December 20, 2018. The issues framed at that time were permanent disability, apportionment, occupational group number, the need for further medical treatment, the lien of applicant's former attorney(s), attorney fees, and whether the reporting of Dr. Silbart constitutes substantial medical evidence. The applicant testified under direct and cross examination, and the matter was submitted for decision the same day. This decision now follows.

INJURY: PARTS OF THE BODY

Defendant admits industrial injury to applicant's lumbar spine. Applicant also alleges injury to the upper and lower gastrointestinal systems, and in the form of hypertension. Based upon applicant's testimony and the medical reporting of Masoud Azizad, M.D., dated September 14, 2017, it is found that applicant also sustained injury in the form of hypertension, and to the upper and lower gastrointestinal systems, arising out of and occurring in the course of employment.

OCCUPATION

Based upon applicant's testimony which is set forth by reference in the permanent disability rating instructions, and the employer's detailed job description, and the opinion of the disability evaluation specialist, it is found that applicant was employed as a cashier/cleaner, occupational group number 322.

PERMANENT DISABILITY

The parties have selected Steven Silbart, M.D. as the Agreed Medical Examiner in orthopedics. The parties have further selected Masoud Azizad, M.D. as the Qualified Medical Examiner in internal medicine. The primary dispute advanced at the time of trial involved AME Dr. Silbart's usage of Figure 15-19 of the AMA Guides to rate applicant's low back disability.

Dr. Silbart has opined in his report of February 13, 2017, that the applicant's disability using the range of motion method would yield 24% whole person. However, Dr. Silbart opines that:

[O]n the basis of the patient's history, clinical presentation, the medical records, her overall decrease in level of function and her responses to the AMA Guides 5th Edition Visual Analogue Pain Questionnaire, an inventory which does cover some 16 categories of non-work activities of daily living,

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it is my opinion that Ms. Balderrama's lumbar spine impairment is underrepresented by a strict use of the AMA Guides."¹

Accordingly, Dr. Silbart rated by analogy to Figure 15-19 (which describes potential overall loss of spinal function at 90% WPI), and offers an assessment of 45% impairment. Defendant objects to the rating by analogy, and asserts that the reporting does not constitute substantial medical evidence as a result.

The injury at bar will be rated pursuant to the 2005 Permanent Disability Rating Schedule, which is presumptively correct, but may be rebutted.² Our Appeals Board has held that the language of Labor Code 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.³ "Section 4660(b)(1) does not mandate that the impairment for any particular condition must be assessed in any particular way under the Guides. Moreover, while the AMA Guides set forth an analytical framework and methods for a physician in assessing WPI, the Guides does not relegate a physician to the role of taking a few objective measurements and then mechanically and uncritically assigning a WPI that is based on a rigid and standardized protocol and that is devoid of any clinical judgment. Instead, the AMA Guides expressly contemplates that a physician will use his or her judgment, experience, training, and skill in assessing WPI."⁴ However, the Board has also cautioned that "[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

¹ Ex. 2, February 13, 2017 report of AME Steven Silbart, M.D. at p.2.

² *Almaraz v. Environment Recovery Services; Guzman v. Milpitas Unified School District* (2009) 74 Cal. Comp. Cases 1084, 1093.

³ *Id.* at 1084.

⁴ *Id.* at 1104.

WPI opinion must constitute substantial evidence upon which the WCAB may properly rely, including setting forth the reasoning behind the assessment.⁵

Here, AME Dr. Silbart has appropriately begun his analysis by offering a direct rating as set forth in the Range of Motion section of the AMA Guides (Tables 15-7 through 15-9). As is noted above, Dr. Silbart then explains why he feels that this rating does not accurately represent the applicant's residual disability.⁶ Dr. Silbart cites to the applicant's clinical presentation, her decrease in function, and her reported activities of daily living as factors he considered in determining that a departure from the strict application of the AMA Guides was warranted.

The rationale for departure from a strict rating assessment was further explained at deposition. Therein, Dr. Silbart reiterated his medical conclusions regarding why a strict application of the AMA Guides was inadequate:

Q: Regarding your use of the regional spine impairment chart, how did you arrive at 50 percent decrease in the applicant's overall lumbar function?

A: Well, as per my prior response, I think between her severely deranged physical examination with an arc of motion well below 50 percent of normal, with more than 50 percent of her lumbar disks involved in this case, and with her self-described decrease in function, I think that there is very reasonable substantiation of a loss of no less than 50 percent of her lumbar function.⁷

When challenged by defense counsel regarding various "normal" findings reflected in the AME's clinical examination, the AME countered with a multitude of clinically verified

⁵ *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Board en banc).

⁶ Ex. 2, February 13, 2017 report of AME Steven Silbart, M.D. at p.2.

⁷ Ex. 6, transcript of the December 18, 2017 deposition of AME Dr. Silbart at 9:16.

abnormal findings, including diminished squatting ability, abnormal straight leg testing, bilateral reflex testing that did not elicit a physiological response, multi-level disc abnormalities, right sided atrophy in the lower extremity, and positive EMG findings for radiculopathy. Moreover, these symptoms were superimposed on lumbar spine pathology that resulted in a significant loss of function:

A: I think between her severely deranged physical examination with an arc of motion well below 50 percent of normal, with more than 50 percent of her lumbar disks involved in this case, and with her self-described decrease in function, I think that there is very reasonable substantiation of a loss of no less than 50 percent of her lumbar function.⁸

In reviewing the issue presented herein, it is presumed that that the agreed medical evaluator has been chosen by the parties because of his expertise and neutrality. “[W]orkers’ compensation law favors agreed medical [evaluators] in resolving medical disputes fairly and expeditiously.”⁹ Therefore, an agreed medical evaluator’s opinion should ordinarily be followed unless there is good reason to find that opinion unpersuasive.¹⁰

Here, AME Dr. Silbart has rated the injury using a strict application of the AMA Guides. The original assessment of permanent disability was made pursuant to the Range of Motion methodology, and pursuant to defense counsel’s request at deposition, an assessment utilizing the DRE methodology. However, AME Silbart is clear in both his reporting and his deposition testimony that under either rubric, the applicant’s disability

⁸ Id. at 9:19.

⁹ *Green v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1444 (70 Cal. Comp. Cases 294).

¹⁰ *Power v. Workers Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 (51 Cal. Comp. Cases 114); *Los Angeles Unified School Dist. v. Workers’ Comp. Appeals Bd.* (Steele, (2000) 65 Cal. Comp. Cases 300, 301 (writ denied); *Siqueiros v. Workers’ Comp. Appeals Bd.* (1995) 60 Cal. Comp. Cases 150, 151 (writ denied).

is underrepresented and inaccurate. Dr. Silbart then clearly outlines the rationale for departure from the strict application of the Guides, including abnormal diagnostic testing in multiple areas confirmed by imaging studies and electro-diagnostic studies. He then quantifies the level of functional loss, and rates by analogy to the total spine impairment figure located in the AMA Guides at Figure 15-19.

This evaluative approach has been endorsed in multiple panel decisions of the WCAB, and operates under the larger aegis of the *en banc* decision in *Almaraz/Guzman*.¹¹ Accordingly, no good cause has been shown herein for the court not to follow the well-considered and well-documented opinions of the Agreed Medical Examiner.

The factors or permanent disability set forth in the rating instructions are based upon applicant's testimony with due consideration to her credibility and demeanor as a witness and the medical report(s) of Steven Silbart, M.D., dated February 13, 2017, and Masoud Azizad, M.D., dated September 14, 2017. There having been neither objection to the recommended rating nor a timely request for cross-examination of the disability evaluation specialist, and in accordance with the rater's recommendation, it is found that applicant is entitled to a permanent disability award of 75 percent, equivalent to 513.25 weeks of indemnity payable at the rate of \$160.00 per week, in the total sum of \$82,120.00, commencing August 11, 2016 per stipulations of the parties. Thereafter, a life pension is due at the initial weekly rate of \$115.96.

APPORTIONMENT

Based upon the medical report of Steven Silbart, M.D., dated February 13, 2017, and Masoud Azizad, M.D., dated September 14, 2017, based upon applicant's testimony, it is

¹¹ *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal. Comp. Cases 1084 (Appeals Board *en banc* opinion), *aff'd sub nom. Milpitas Unified School Dist. v. W.C.A.B. (Guzman)* (2010) 187 Cal. App. 4th 808, 115 Cal. Rptr. 3d 112, 75 Cal. Comp. Cases 837.

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found that there is legal basis for proper apportionment as set forth in the formal rating instructions.

NEED FOR FURTHER MEDICAL TREATMENT

Based upon the medical report of Steven Silbart, M.D., dated February 13, 2017, and Masoud Azizad, M.D., dated September 14, 2017, it is found that applicant is in need of further medical treatment to cure or relieve from the effects of the injury herein.

ATTORNEY FEES

Based upon the WCAB Rules of Practice and Procedure, section 10775, and the guidelines for awarding attorney fees found in the Policy and Procedure Manual Index §1.140, a reasonable attorney fee is found to be \$12,318.00 which shall be commuted from the final payment of the award to the extent necessary to pay as one lump sum.

Dated: January 23, 2019

Filed and Served by mail on above date on all parties/liens on the Official Address Record.

By: *Vergel Alberto*



SHILOH ANDREW RASMUSSON
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION**

01-24-2019

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FINDINGS OF FACT AND AWARD

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By: *Vergel Alberto*