

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

MICHAEL CHOICE, *Applicant*

vs.

UNITED AIRLINES, *Permissibly Self-Insured, Defendant*

**Adjudication Number: ADJ15715549
(Oakland District Office)**

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

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of May 20, 2024, wherein it was found that while employed on December 15, 2021, as a ramp service employee, applicant sustained industrial injury to the left heel, left ankle, and in the form of a scar causing permanent disability of 59%.

Defendant contends that the WCJ erred in finding permanent disability of 59%, arguing that the permanent disability rating impermissibly combined muscle strength impairment and a range of motion impairment that are considered duplicative under the AMA Guides. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

As explained below, we will grant reconsideration and amend the WCJ's decision to defer the issue of permanent disability pending further development of the medical record and analysis and decision from the WCJ.

Preliminarily, we note that defendant has attached a medical report to its Petition that had already been entered into the evidentiary record, in violation of Appeals Board Rule 10945(c)(1). (Cal. Code Regs., tit. 8, § 10945, subd. (c)(1).) Additionally, defendant has attached a consultive rating determination from the Disability Evaluation Unit, despite the fact that such determinations are not admissible in judicial proceedings. (Administrative Rule 10166(b), Cal. Code Regs., tit. 8, § 10166, subd. (b).) We have not considered this document. Defense counsel is strongly cautioned to adhere to WCAB and Appeals Board rules in future proceedings.

Although we sympathize with the WCJ's statement in her Report that defendant should have raised its specific arguments regarding the permanent disability rating before the WCJ's decision, since it is applicant's burden to provide substantial medical evidence supporting a permanent disability rating (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 [Appeals Bd. en banc]), defendant did not waive the contention that the decision is not based on substantial medical evidence.

In her January 25, 2024 report, qualified medical evaluator chiropractor Kirsten Schick, D.C. opined that applicant's injury caused 16% whole person impairment (WPI) for loss of muscle strength in the ankle, 6% WPI for loss of range of motion in the ankle, and 3% for peripheral nerve injury (sensory loss) in the ankle. (January 25, 2024 report at p. 13.)¹ Dr. Schick proposed a combined rating for these three impairments, which was adopted by the WCJ. However, these ratings cannot be combined under a "strict" AMA Guides rating. (AMA Guides, Table 17-2, p. 526.) Dr. Schick apparently believes that the muscle strength and range of motion impairments may be combined because Table 17-2 lists "ROM Ankylosis" rather than having separate entries for ROM and Ankylosis. Dr. Schick interprets this as meaning that range of motion can be combined with other methods so long as ankylosis is not present. However, it is clear that the table refers to loss of range of motion regardless of whether ankylosis is present. First, because Table 17-2 otherwise contains every rating method contained in Chapter 17, it would be unreasonable to read Table 17-2 as excluding range of motion without ankylosis. Secondly, Example 17-7 (AMA Guides, p. 538) makes clear that the cross-usage chart applies to range of motion impairments regardless of whether ankylosis is present. In Example 17-7, the hypothetical patient had range of motion impairments without ankylosis, and the instructions state that the range of motion impairments cannot be combined with muscle atrophy ratings.

All findings of the WCAB must be based on substantial evidence. (*Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620 [Appeals Bd. en banc].) "[T]o constitute substantial evidence regarding a WPI, a physician's opinion must comport with the AMA Guides, including as applied and interpreted in published appellate opinions and en banc decisions of the

¹ Dr. Schick also determined that applicant had 9% WPI related to scarring. Defendant does not dispute the scarring impairment rating.

Appeals Board.” (*Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 620 [Appeals Bd. en banc].)

In *Almaraz v. Environmental Recovery Services* (2009) 74 Cal.Comp.Cases 1127 (Appeals Board en banc) (commonly known as, and hereinafter referred to as *Almaraz II*), we held that a “scheduled permanent disability rating may be rebutted by successfully challenging the component element of that rating relating to the employee’s WPI under the AMA Guides ... by establishing that another chapter, table, or method within the four corners of the Guides most accurately reflects the injured employee’s impairment.” (*Almaraz II*, 74 Cal.Comp.Cases at pp. 1095-1096.) However, although a physician is not locked into any particular evaluation method found in the AMA Guides, his or her rating must still be based on and consistent with the AMA Guides, as read as a whole.” (*Almaraz II*, 74 Cal.Comp.Cases at p. 1104.) Our decision in *Almaraz II* was affirmed by the Court of Appeal in *Milpitas Unified School District v. Workers’ Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].

Although the current record does not constitute substantial medical evidence sufficient to support the finding of permanent disability found by the WCJ, a combination of ratings may be permissible despite Table 17-2 if it can be shown that a combined rating (or some other alternative rating) better reflects applicant’s impairment in his activities of daily living. However, the applicant bears the burden of presenting substantial medical evidence on this issue.

The WCAB has a duty to further develop the record when there is a complete absence of (*Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) medical evidence on an issue. The WCAB has a constitutional mandate to ensure “substantial justice in all cases.” (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) In accordance with that mandate, we will grant reconsideration and amend the WCJ’s decision to defer the issue of permanent disability so that the record may be further developed, and the issue reanalyzed. We express no opinion on the ultimate resolution of this issue.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of May 20, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of May 20, 2024 is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant, Michael Choice, age 65 on the date of injury, while employed on December 15, 2021 as a ramp service employee, occupational group number 460, by defendant sustained an injury arising out of and in the course of his employment to his left heel/Achilles, left ankle, and in the form of a scar.
2. At the time of injury, applicant's earnings were \$845.67 per week, warranting weekly indemnity rates of \$563.78 for temporary disability and \$290.00 for permanent disability.
3. The injury caused temporary disability for the periods December 16, 2021 through March 27, 2022 and from August 1, 2022 through May 31, 2023.
4. The injury caused need for further medical treatment.
5. The issues of permanent disability and attorneys' fees are deferred, with jurisdiction reserved.

AWARD

AWARD IS MADE in favor of MICHAEL CHOICE against UNITED AIRLINES as follows:

- a. Medical treatment to cure or relieve the effects of the injury.
- b. Temporary disability indemnity at the weekly rate of \$563.78 for the periods December 16, 2021 to March 27, 2022 and from August 1, 2022 to May 31, 2023 less credit for previously paid amounts.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 5, 2024

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

**MICHAEL CHOICE
CHAVEZ & BREAU
BRITTANY HUYNH**

DW/oo

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