

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

**STEVEN WRUCK, *Applicant***

**vs.**

**TABLE BLUFF BREWERY; NATIONAL INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ16533639  
(Eureka 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 16, 2024, wherein it was found that while employed on October 28, 2020 as a warehouse manager/laborer, applicant sustained industrial injury to his right ankle, back, and hips causing permanent disability of 73% and the need for further medical treatment.

Defendant contends that the WCJ erred in finding permanent disability of 73%, arguing that the permanent impairment analysis of qualified medical evaluator chiropractor David E. Cox, D.C. did not constitute substantial medical evidence. We have received an Answer from the applicant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will grant reconsideration and return this matter for further development of the record for the QME to clarify and explain his permanent disability determination in greater detail.

Dr. Cox wrote as follows with regard to the right ankle and hips permanent impairment<sup>1</sup>:

**Right Ankle:**

My evaluation of Mr. Wruck indicates Permanent Impairment of the right leg orthopedic injury due to (1) loss of range of motion, (2) gait derangement, (3) loss of muscle strength in inversion (4) loss of lifting capacity.

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<sup>1</sup> Since there appears to be no disagreement with regard to the lumbar spine rating, we have omitted any discussion of the lumbar spine rating in quoting or summarizing Dr. Cox's reports and testimony.

According to Table 17-2 (page 526) of the AMA Guides, under the strict application of the AMA Guides, Gait derangement cannot be combined with these methods.

ROM METHOD:

Pursuant to Table 17-11 to 17-33 and 17-24 to 17-28 Ankle Motion Impairment Estimates the applicant has: 6% WPI due to plantar flexion of 10 degrees; 3% due to dorsiflexion of 8 degrees; 2% due to loss of inversion 8 degrees; 1 % due to loss of eversion of 6 degrees. Combined Loss of ROM equals **12% WPI**.

MUSCLE WEAKNESS:

According to Table 17-8 Impairment Due to Lower Extremity Muscle Weakness, 4/5 right ankle inversion weakness provides **5% WPI**.

GAIT DERANGEMENT:

Gait disturbance qualifies for 20% Whole Person Impairment due to "routine use of a walking stick." The cause of Mr. Wruck's gait disturbance is due to (1) pain in the right lower extremity due to implantation of surgical hardware. **20% WPI**

LOSS OF LIFTING CAPACITY:

Mr. Wruck qualifies for additional Impairment under Almaraz/Guzman. I considered Mr. Wruck's Loss of Lifting Capacity due to the persistent right ankle pain, analogizing this Loss of Lifting Capacity to Table 6-9 Criteria for Rating Permanent Impairment Due to Herniation Class 1 0% to 9% WPI. In my opinion, a more accurate Whole Person Impairment rating for Mr. Wruck's Impairment is consistent - by analogy - with injury to the "abdominal wall" as discussed in Chapter 6 (The Digestive System). According to Section 6.9 of the AMA Guides (page 136), Mr. Wruck's right ankle Impairment is consistent - by analogy - to Class 1 Impairment due to "Herniation" defect with increased abdominal pressure, readily reducible or occasional mild discomfort at site of defect but not precluding most activities of daily living."

This description of Class 2 Impairment due to Herniation closely describes Mr. Wruck's Impairment of his right ankle which is similar - by analogy - to injury to the abdominal wall that results in herniation. For example, Mr. Wruck does not present with "persistent protrusion at site of defect with increased abdominal pressure." However, he does present with persistent pain in the site of the right ankle injury, and this occurs with both touch (palpation) and with increased pressure on the ankle when lifting. Additionally, there is frequent discomfort, precluding heavy lifting but not hampering some activities of daily living.

And this persistent pain affects Mr. Wruck's activities of daily living (ADL's). He does present with frequent discomfort, precluding heavy lifting but not hampering some activities of daily living." By analogy to Table 6.9, this

qualifies for 10-19% Whole Person Impairment. Because Mr. Wruck has limitations on lifting greater than 25 lbs. and limitations on pushing more than 25 lbs., it is my opinion that these limitations adversely and severely impact his Future Earning Capacity and, for that reason, I provide for the higher - 19% - Whole Person Impairment. **19%WPI.**

In the case of Scotts Jack London Seafood vs. WCAB (Fitzsimmons) (2011)76 Cal. Comp. Cases 1348, the QME concluded that since the applicant had lost half of her lifting capacity and had difficulties with ambulation, she should be rated under both the gait derangement table and Table 6-9 by analogy. He then advocated for combining the rating under CVC to avoid any duplication or overstating the disability.

Considering the court's decision in Fitzsimmons, I found that in this case the most accurate way to describe Mr. Wruck's impairment, consistent with Almaraz/Guzman, was to use both the WPI based upon lifting (19%) and the WPI based upon gait (20%). Combining these 2 impairments under the CVC generated a final WPI of 32%. This was the most accurate way to address the functional loss using the AMA Guides.

Using the Combined Values Chart on page 604 to combine Impairments due to gait derangement (20%), loss of lifting capacity (19%) equals 32% for the orthopedic right leg injury. **32% WPI**

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### **Bilateral Hips:**

I the highest rating for gait impairment of 20%, it is my opinion that 20% gait impairments subsumes the bilateral hip trochanteric bursitis, within reasonable medical probability

(May 30, 2022 report at pp. 19-21.)

However, in an August 19, 2022 report, Dr. Cox appears to lower the gait derangement impairment after considering that applicant only occasionally uses an assistive device for walking rather than “routine” use of a walking stick as stated in the initial report. In the August 19, 2022 report, Dr. Cox wrote, “In addition to using the assistive device for weight bearing relief, he also uses the assistive device for balance support, as indicated in his ADLs. I concluded that he uses the ”walking stick” part time. According to Table 17-2 C Lower Extremities: Mild Impairment he qualifies for 15% WPI due to an antalgic limp with shortened stance phase and requires part time use of cane or crutch for walking but not usually at home or in the workplace.” (August 19, 2022 report at p. 11.)

At the conclusion of the August 19, 2022 report, Dr. Cox wrote:

In my opinion, the following impairments for this Applicant are accurate:

**Right Ankle:** According to Table 17-2 C Lower Extremities: Mild Impairment he qualifies for 15% WPI due to an antalgic limp with shortened stance phase and requires part time use of cane or crutch for walking but not usually at home or in the workplace. According to the Guide to the Appropriate Combination of Evaluation Methods, Page 526, it appears to be inappropriate to combine Gate Derangement with Range of motion. Assuming that you are correct about hernia rating by analogy, the 15% WPI appears reasonable. To assess the accuracy of this rating, I considered applying Table 17-3, page 527 of the Guides, Whole Person Impairment Values Calculated From Lower Extremity Impairment. I estimate that this Applicant has lost at least 50% of the primary functions of his right lower extremity to walk, lift, climb, etc. Considering the entirety of the medical evidence, one could calculate the loss of pre-injury function of the lower extremity. Applying table 17 - 3, page 527, of the Guides, the corresponding whole person impairment, considering that, as indicated, a 100% single lower extremity impairment was equivalent to a 40% whole person impairment. In this case, a 50% impairment of the right lower extremity corresponded to a whole person impairment of 20%. Absent the impairment for loss of lifting capacity, the total right ankle impairment is 20% WPI is more accurate than the 15% WPI from gait derangement, in all medical probability.

**Lumbar Spine:** 11% WPI by the Range of Motion Method.

**Right Hip:** 2% WPI for loss of motion.

**Left Hip:** 2% WPI for loss of motion.

(August 19, 2022 report at pp. 14-15.)

Thus, in the August 19, 2022 report, Dr. Cox appears to conclude that applicant had a “scheduled” gait derangement impairment of 15% WPI but an alternate rating of 20% WPI that more accurately described his impairment.

Dr. Cox was deposed on August 31, 2023, but for reasons that are unclear, he was asked about his ratings in his initial May 22, 2022 report, but not the updated ratings in the August 19, 2022 report. Dr. Cox again appears to testify that 15% WPI is the proper gait derangement rating, although the fact that he already came to this conclusion in the August 19, 2022 is not mentioned. (August 31, 2023 deposition at p. 11.) Dr. Cox also appeared to testify that he did not intend to rate both the gait derangement rating and the hernia loss of lifting capacity rating, but that the hernia loss of lifting capacity rating was meant to be alternative rather than additional:

Q. Now, underneath that you have a rating based on lifting capacity; is that right?

A. Yes.

Q. And I see that you used the word “additional” there.

So that was intended to be, not an alternative to the straight AMA Guides ratings, but you intended that to be additional; is that correct?

A. No. I really meant that to be an alternative.

Q. Okay. And your understanding of Almaraz-Guzman is that it’s meant to be an alternative because the straight AMA Guides ratings do not adequately describe the effect on activities of daily living; is that right?

A. Yes.

(August 31, 2023 deposition at pp. 8-9.)

However, at the conclusion of the deposition, upon being asked by applicant’s attorney “And then, as far as right ankle injury is concerned, based on the loss of lifting capacity, we’re still at 32 percent WPI, correct?,” Dr. Cox answered “yes.” The 32% WPI was the impairment rating given in the initial report combining 20% gait derangement and 19% hernia loss of lifting capacity, which appears to ignore the reduction of the gait derangement impairment in the August 19, 2022 report and earlier in the deposition and appears to ignore the suggestion in the supplemental report and earlier in the deposition that the rating was an alternative to the gait derangement rating.

Ultimately, the WCJ gave rating instructions to the Disability Evaluation Unit rater of “Gait derangement at 20% WPI,” “Loss of lifting capacity at 19% WPI (analogize to Table 6-9 Class 2)” and 2% WPI for each hip. The DEU rater adjusted the gait derangement and loss of lifting capacity impairments before combining them and gave the loss of lifting capacity impairment an impairment number corresponding to the digestive system rather than utilizing the 17.07 lower extremity ankle series. Despite using the impairment ratings from the initial May 30, 2022 report with regard to the right ankle, the WCJ also asked the rater to rate the hips impairment, despite Dr. Cox writing in the May 30, 2022 report that the hips impairment was subsumed within the right hip impairment.<sup>2</sup>

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<sup>2</sup> Dr. Cox did opine that separate hips impairment ratings was appropriate in the August 19, 2022 report, but in combination with different right ankle impairment 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].) As the Court of Appeal wrote in *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687], "In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. [Citation.] Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. [Citation.] Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citation.]"

In this case, Dr. Cox must clearly state his final conclusions regarding permanent impairment. It is not clear to us whether Dr. Cox believes the proper gait derangement rating is 15% or 20% WPI and it is not clear to us whether Dr. Cox ultimately opined that any alternate rating should be combined with the scheduled rating or should be used in alternative to the standard rating (or whether the hernia loss of lifting rating should be utilized at all, as Dr. Cox seemed to use an enhanced gait derangement rating as an alternative rating in his August 19, 2022 report.)

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].

To the extent that Dr. Cox does opine that a lifting capacity rating should be combined with a gait rating, Dr. Cox and the WCJ must determine whether such a combination is consistent with the AMA Guides. The parties should analyze the issue of whether the fact that a gait derangement impairment is not to be combined with a muscle strength impairment (AMA Guides, Table 17-2,

p. 526) supports the proposition that gait derangement impairment takes into account a loss of strength or lifting capacity. In determining an accurate alternative rating, the consideration should be on a rating that includes impairment of activities of daily living which are not adequately considered by the standard rating. While combination of ratings may be permissible despite Table 17-2, there needs to be a discussion regarding why the alternative rating better reflects applicant's impairment of activities of daily living. We also note, as Dr. Cox did at the conclusion of his August 19, 2022 report, that a 100% impairment of one lower extremity equates to 40% whole person impairment. The ultimate impairment rating should accurately reflect applicant's impairment consistent with the range of ratings contemplated by the AMA Guides.

Finally, to the extent that two ankle impairments are combined in the further proceedings, the DEU rater and the WCJ should consider the applicability of the statement in the 2005 Schedule for Rating Permanent Disabilities that "Multiple impairments such as those involving a single part of an extremity, e.g. two impairments involving a shoulder such as shoulder instability and limited range of motion, are combined at the upper extremity level, then converted to whole person impairment and adjusted before being combined with [other impairments]." (2005 Schedule at p. 1-11.) We note that even if a rating in a chapter other than the lower extremity chapter is utilized, a ankle impairment number (17.07) should be utilized for any ankle impairment.

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 on the issues discussed above. We express no opinion on the ultimate resolution of any of these issues.

For the foregoing reasons,

**IT IS ORDERED** that Defendant's Petition for Reconsideration of the Findings and Award of May 16, 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 16, 2024 is **AMENDED** as follows:

**FINDINGS OF FACT**

1. Steven Wruck, age 49 on the date of injury, while employed as a warehouse manager/laborer on October 28, 2020 by Table Bluff Brewing, Inc. dba Lost Coast Brewery insured for workers' compensation by WCF National Insurance Company sustained injury arising out of and in the course of employment to his right ankle, back and both hips.
2. At the time of injury applicant's earnings were \$829.30 per week yielding a temporary disability rate of \$552.87 and a permanent disability rate of \$290.00.
3. Applicant reached maximum medical improvement on May 14, 2022.
4. Applicant is in need of future medical treatment in accord with the opinion of Qualified Medical Examiner Dr. David Cox.
5. The issues of permanent disability and attorneys' fees are deferred, with jurisdiction reserved.



**AWARD**

**AWARD IS MADE** in favor of STEVEN WRUCK against WCF NATIONAL INSURANCE COMPANY of future medical treatment in accord with paragraph 4.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I DISSENT,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



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

**July 22, 2024**

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

**STEVEN WRUCK  
SWARTZ FOGY LAW GROUP  
COLEMAN, CHAVEZ & ASSOCIATES**

**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*

**DISSENTING OPINION OF COMMISSIONER CRAIG SNELLINGS**

I respectfully dissent. I would have denied the defendant’s Petition for the Reasons stated by the WCJ’s Report, which I quote below:

**I**  
**INTRODUCTION**

- a. Occupation: warehouse worker/laborer  
Date of Injury: October 28, 2020  
Parts of Body Injured: right ankle, back, both hips
- b. Identity of Petitioner: Defendant  
Timeliness: Yes  
Verification: Yes
- c. Date of Findings and Award: May 16, 2024
- d. Petitioner’s Contentions:

1. The judge did not consider whether the factors of permanent disability described by the QME were excluded by statutory or case law or were overlapping or duplicative.

2. The judge mixed up AMA Guides and Almaraz/Guzman rating instructions for the same body part.

3. There was an improper combination of duplicative ankle factors prohibited by Guzman III.

**II**  
**DISCUSSION**

October 28, 2020 was a very busy day at Table Bluff Brewing DbA Lost Coast Brewery. Mr. Wruck was in a hurry to comply with his boss’s instructions. He was told to tag all the pallets and was rushing to do so. Mr. Wruck needed to put a sticker on a pallet that was over his head, so he stood on a keg of beer and reached up. The keg slipped out from under him. He sustained compound fractures of the tibia and fibula. (Minutes of Hearing and Summary of Evidence July 12, 2023 at p. 4) (Hereafter MOH)

The emergency room records on the date of injury summarized by QME Dr. David E. Cox, D.C. in his initial report of May 14, 2022 noted initial diagnosis of “Significantly displaced, comminuted and angulated fracture through the distal shafts of fibula and tibia with intra-articular extension shattered

appearance.” (p. 13 Exhibit Z) Mr. Wruck was provided with an external fixation device. Surgery was delayed until December to allow swelling to go down.

Mr. Wruck had to lay in a hospital bed at home for about a year after the accident. His wife would come home on her lunch hour to take care of him. There was no discussion regarding home health care other than the care provided by his wife. His hips started hurting when he began to learn to walk again. (MOH p. 5 lines 17-22) In short, this was a traumatic injury with a long and difficult recovery.

Mr. Wruck was paid temporary total disability from October 29, 2020 through June 8, 2022. When he was released from medical treatment he obtained a position at Humboldt Beer Distributors as a delivery driver. He worked there for about two months but had to quit because the work was too hard for him. (MOH p. 5, lines 9-15)

QME Dr. Cox found the applicant MMI in May of 2022 and described permanent disability of 12% WPI for right ankle motion impairment, 5% WPI for muscle weakness, 20% WPI for gait derangement; loss of lifting capacity of 19% WPI. Dr. Cox combined the two to 32% WPI. He described 4% WPI for the lumbar spine. With regard to the hips, Dr. Cox felt the 20% gait impairment “...subsumes the bilateral hip trochanteric bursitis...” He found apportionment entirely to the specific industrial injury and described Mr. Wruck’s prognosis as poor. (Exhibit Z)

Rating instructions issued which included disability for the right ankle as gait derangement at 20% WPI and 19% loss of lifting capacity as follows:

Disability as described in reports of David E. Cox D.C.

Right ankle:

Gait derangement at 20 % WPI

Loss of lifting capacity at 19% WPI( analogizes to Table 6-9 Class 2)

as reflected in the May 30, 2022 report on pages 19-20: and page 4 of his October 22, 2023 report : p. 13 of the August 19, 2022 report.

Lumbar Spine pages 8 and 9 of the August 19, 2022 supplemental report 11% WPI and reaffirmed at deposition dated August 31, 2023 p. 15 based on ROM

Bilateral hips 2% right hip loss of motion

2% left hip loss of motion

APPORTIONMENT: all to the industrial injury

DEU rating issued at 73% permanent disability and was served on the parties on May 1, 2024. No objection was filed. The Findings and Award and Opinion on Decision was served on May 16, 2024.

Defendant has filed a well written and detailed Petition for Reconsideration primarily focusing on the combination of factors of disability -- gait derangement and heavy lifting. Defendant suggests the proper rating instructions should be 20% WPI for right lower extremity, 11% WPI for the lumbar spine and 2% WPI for the left hip.

Defendant's argument, while well written, is not persuasive. Defendant's proposed level of permanent disability does not accurately reflect Mr. Wruck's overall condition.

As noted in the Opinion:

Dr. Cox made several references to the case of *Scott's Jack London Seafood, Inc. v. Workers' Comp. Appeals Bd. (Fitzsimmons)*, 76 Cal. Comp. Cases 1348 (Cal. App. 1st Dist. November 22, 2011). Quoting from that case: "The overarching goal of rating permanent impairment is to achieve accuracy. (Almaraz-Guzman III, supra, at p. 822.) A "strict" application of the Guides may not accurately reflect an injured employee's permanent impairment."

Likewise, the Panel decision of *Greene v. Cent. Parking Sys.*, 2015 Cal. Wrk. Comp. P.D. LEXIS 283 (Cal. Workers' Comp. App. Bd. May 13, 2015) contained the following case note : "when majority WCAB panel, while noting that strict reading of AMA Guides (particularly Table 17-2 at p. 526) precludes combination of gait impairment with other impairment for lower extremities in determining overall impairment, concluded that Dr. Mouradian's combination of gait derangement with range of motion, ankle strength and sensory loss ratings on lower extremities most accurately reflected applicant's overall impairment within four corners of AMA Guides and was supported by reporting of panel qualified medical evaluator Barry Braiker, M.D., who also combined gait derangement with other lower extremity impairments, and with applicant's credible testimony..."

The deposition of Dr. Cox included questioning about Mr. Wruck's use of a walking stick intermittently, at pages 9 and 10 the doctor was asked about whether the use of cane/stick was different from when Mr. Wruck was examined in May of 2022 and whether that intermittent use would call for a lower rating. Dr. Cox responded on p. 11 there was an additional factor "...he's got implanted hardware, and that is always an additional burden."

On p. 14 of Exhibit C Dr. Cox pointed out that at the usual job where Mr. Wruck was injured he was lifting 160 pound kegs of beer. Dr. Cox pointed out even if

he were now capable of occasionally lifting 50 pounds that is equivalent to a 70 percent loss of lifting capacity.

The rating instructions included those factors of disability intended to most accurately reflect Mr. Wruck's disability based on the record provided by the parties. The instructions were appropriate and should be allowed to stand.

### **III** **RECOMMENDATION**

It is recommended that the Petition for Reconsideration be denied.

For the reasons stated in the WCJ's Report, I respectfully dissent.



**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

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

**July 22, 2024**

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

**STEVEN WRUCK  
SWARTZ FOGY LAW GROUP  
COLEMAN, CHAVEZ & ASSOCIATES**

**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*