

# Ramirez, Bertha

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## EVIDENCE

### Judicial notice of AMA guides

The Board can take judicial notice of the AMA guides when making a determination regarding permanent partial disability. ....*In re Bertha Ramirez, BIIA Dec., 03 14933 (2004)* [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County by Department Cause No.04-2-25966-5SEA, employer Cause No. 04-2-24884-1Sea, Consolidated under Cause No. 04-2-25966-5SEA.]

## EXPERT TESTIMONY

### Scope of expertise

## PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

### Rating by Board

The Board can rate a permanent partial disability based on findings of a non-physician expert qualified to make disability-related findings when the record also contains medical evidence establishing the existence of a permanent partial disability. ....*In re Bertha Ramirez, BIIA Dec., 03 14933 (2004)* [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No.04-2-25966-S SEA.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON**

1 **IN RE:     BERTHA RAMIREZ                             )     DOCKET NO. 03 14933**  
2   )  
3 **CLAIM NO. X-712315                                     )     DECISION AND ORDER**  
4 \_\_\_\_\_)

5 **APPEARANCES:**

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7         Claimant, Bertha Ramirez, by  
8         Le & Associates, P.S., per  
9         Edward K. Le

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11         Employer, Kenney Presbyterian Home, by  
12         Comprehensive Risk Management, Inc., per  
13         Terry Peterson

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15         Department of Labor and Industries, by  
16         The Office of the Attorney General, per  
17         Beverly Norwood-Goetz, Assistant

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19         The claimant, Bertha Ramirez, filed an appeal with the Board of Industrial Insurance Appeals  
20 on May 13, 2003, from an order of the Department of Labor and Industries dated May 8, 2003. In  
21 this order, the Department affirmed as correct its order dated February 24, 2003, in which the  
22 Department closed the claim with a permanent partial disability award equivalent to 2 percent of the  
23 amputation value of the left leg above the knee joint. Deduction was taken for an overpayment of  
24 time loss compensation in the amount of \$2,334.78, and no warrant was issued. The Department  
25 order is **REVERSED AND REMANDED**.  
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**PRELIMINARY MATTERS**

31 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
32 and decision on timely Petitions for Review filed by the Department, the employer, and the  
33 claimant, to a Proposed Decision and Order issued on February 27, 2004, in which the industrial  
34 appeals judge reversed and remanded the order of the Department dated May 8, 2003.

37 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that  
38 no prejudicial error was committed. The rulings are affirmed. The claimant takes issue with  
39 evidentiary rulings made in response to certain objections in the deposition of Stan R. Schiff, M.D.,  
40 Ph.D., a neurologist, concerning his opinions about, or concurrences with, the findings of Theodore  
41 J. Becker, Ph.D. The most important of these had to do with whether the doctor agreed with a  
42 disability rating made by Dr. Becker. This and other related objections were sustained, disallowing  
43 the doctor's responses. Unfortunately, the claimant failed to lay the proper foundation for testimony  
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1 about what Dr. Becker found as required by Evidence Rule 703, nor were any questions in the form  
2 of a hypothetical question, incorporating testimony to be given by Dr. Becker.  
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4 **DECISION**

5 The Department of Labor and Industries, the employer, and the claimant petitioned from the  
6 Proposed Decision and Order issued on February 27, 2004, in which the industrial appeals judge  
7 denied the Department's responsibility for a low back condition as precluded by res judicata; denied  
8 the Department's responsibility for a mental health condition; but increased an award for permanent  
9 the Department's responsibility for a mental health condition; but increased an award for permanent  
10 partial disability for a left knee condition from 2 percent to 10 percent, based on the industrial  
11 appeals judge's application of the American Medical Association, *Guides to the Evaluation of*  
12 *Permanent Impairment* (hereafter *AMA Guides*) to findings of loss of range of motion of the knee  
13 that were part of a performance-based physical capacities evaluation and part of the record. The  
14 findings were made by Theodore J. Becker, Ph.D., RPT, (among a number of other designations),  
15 on referral from a treating physician. The main thrust of the Department's arguments are that:  
16 (1) The claimant failed to make a prima facie case for an increased award for permanent partial  
17 disability because she offered no legally competent opinion on the extent of permanent partial  
18 disability; (2) By applying the *AMA Guides* and determining a permanent partial disability rating, the  
19 industrial appeals judge impermissibly took judicial notice of the *AMA Guides*, since they were not  
20 in the record; and, (3) The industrial appeals judge failed to give special consideration to the  
21 opinion of the treating physician—the attending surgeon concurred with the Independent Medical  
22 Examiners. The employer essentially agreed with the Department's position. Ms. Ramirez takes  
23 issue with certain evidentiary rulings, discussed above. Ms. Ramirez also requests a higher award  
24 for permanent partial disability. The claimant did not petition from the determination that the back  
25 issue was precluded on res judicata grounds, and we agree with the disposition of that issue and on  
26 the issue of whether or not the claimant suffered from a mental health condition. We have granted  
27 review to deal with the issue of permanent partial disability of Ms. Ramirez's left knee and the  
28 evidentiary matters related to it.  
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40 On July 28, 2001, Bertha Ramirez, a Spanish-speaking kitchen worker, slipped while  
41 descending stairs in the course of her employment and injured her left knee. She came under the  
42 care of John E. McDermott, M.D., an orthopedic surgeon, who, in addition to his private practice,  
43 consults and examines for the Department. He eventually performed arthroscopic surgery on  
44 March 27, 2002, excising a torn lateral meniscus, and found medial plica (roughening) on the  
45 patella, which he debrided. Ms. Ramirez underwent physical therapy. At some point, in a  
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1 vocational questionnaire, Dr. McDermott recommended that she have a performance-based  
2 physical capacities examination (Exhibit No. 18), and also completed an estimate of capacities  
3 indicating that Ms. Ramirez should be temporarily restricted in her standing and walking, that she  
4 should bend only occasionally, and never squat, kneel, crawl, and, for some reason, never use her  
5 arms repetitively. He saw Ms. Ramirez shortly after surgery, but she did not come in again until  
6 October 2002, complaining of knee tenderness. He suggested that a rating exam be done.  
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10 Ms. Ramirez maintains that as a result of her knee injury, her gait altered and her back  
11 became symptomatic. On February 21, 2003, however, the Department issued an order  
12 segregating the back condition, and that order was not appealed. As stated above, we agree with  
13 our industrial appeals judge that this order became res judicata as to the claimant's alleged back  
14 condition, and she is precluded from having it allowed. As far as the mental health condition is  
15 concerned, the claimant did not present evidence that she suffered from an industrially caused  
16 condition, and she simply failed to make a prima facie case. In fact, a psychiatrist who examined  
17 her at her attorney's request, G. Christian Harris, M.D., declined to actually make a psychiatric  
18 diagnosis; furthermore, whatever problems he thought Ms. Ramirez had, he did not relate to her  
19 work injury. As stated above, we agree with our industrial appeals judge's disposition of these  
20 issues.  
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26 Bruce E. Bradley, Jr., M.D., an orthopedic surgeon, conducted two Independent Medical  
27 Exams four months apart, January 2003 and April 2003, the latter primarily having to do with  
28 whether the low back condition was related to the knee injury and its consequences. Dr. Bradley  
29 examined range of motion of the knee on both occasions, stating that it was essentially normal. He  
30 rated the left lower extremity at 2 percent according the **diagnosis** of meniscectomy, one of the  
31 three bases for rating set forth in the *AMA Guides*. Dr. McDermott agreed with the rating.  
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35 Theodore J. Becker, Ph.D., has a doctorate in Human Performance and is a Registered  
36 Physical Therapist, (as well as CET, CEAS, CDE, CDA, designations which were not explained in  
37 the record). He also received a masters degree in sports science and sports medicine. His  
38 Curriculum Vitae is Exhibit No. 15 and covers 12 pages. Many pages are taken up in his deposition  
39 outlining his achievements, including teaching an annual course for the Association of Disability  
40 Evaluating Physicians on impairment ratings. He testified that the Department has asked him to do  
41 impairment ratings in the past, and that in certain state and federal cases he has been asked to do  
42 so as well. He conducted Ms. Ramirez's performance-based Physical Capacities Evaluation on  
43 September 3, 2003, at the request of one of the treating physicians. The examination results are  
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1 set forth in Exhibit No. 13. In the examination, among other things, he found a restricted range of  
2 motion of the left knee, specifically flexion, of 27 percent less than expected.  
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4 We agree with the Department and the employer, as well as our industrial appeals judge,  
5 that Dr. Becker could not rate under the Washington Administrative Code (WACs), statutes, and  
6 case law. We feel it is appropriate, however, to rely on the restriction in flexion Dr. Becker found in  
7 establishing permanent partial disability, and apply the *AMA Guides* accordingly.  
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10 The case law and the Board have recognized that valid expert opinion is not limited to  
11 certain degrees or titles, but on training and experience; e.g. *Judd v. Department of Labor and*  
12 *Indus.*, 63 Wn. App. (1991); *Goodman v. Boeing Co.* 75, Wn. App. 60 (1994); *Harris v. Robert C.*  
13 *Groth, M.D., Inc.*, P.S. 99 Wn.2d, 438 (1983). As stated in *Judd*:  
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16 Whether an expert witness is a licensed physician is an important  
17 factor to be taken into consideration, but is not dispositive here for the  
18 same reasons it is not dispositive in deciding whether an expert witness  
19 who is not a physician may testify in medical negligence cases. *Harris*  
20 *v. Groth*, 99 Wn.2d 438, 439, 663 P.2d 113 (1983) discussed the use of  
21 expert testimony in medical negligence cases as it relates to both the  
22 standard of care and causation, and held, "nonphysicians, if otherwise  
23 qualified, may give expert testimony in a medical malpractice case." It is  
24 a matter within the trial court's discretion. Per se limitations on the  
25 testimony of otherwise qualified nonphysicians are not in accord with the  
26 general trend in the law of evidence, which is away from reliance on  
27 formal titles or degrees. *Harris*, at 449. This trend is noted in 5A K.  
28 Tegland, Wash. Prac., *Evidence* § 289, at 382-83 (3d ed. 1989):  
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30 The witness need not possess the academic credentials of an  
31 expert; practical experience may suffice. Training in a related field or  
32 academic background alone may also be sufficient. [ER] 702 states very  
33 broadly that the witness may qualify as an expert by virtue of  
34 knowledge, skill, experience, training, or education.  
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36 Accordingly, we accept Dr. Becker's findings, which are certainly within his area of expertise, as  
37 expert testimony to be properly considered.  
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39 We note that there is a Board decision, *In re Michael McGoff*, BIIA Dec., 90 1897 (1991), in  
40 which the Board declined to rate a permanent partial disability based on chiropractic findings, but  
41 there was also a question of whether the permanent partial disability issue had been preserved at  
42 all—the case was tried as a treatment case; the Petition for Review never really asked for it. There  
43 is no mention at all of what the chiropractic findings were, simply that the Board could not accept a  
44 chiropractor's opinion of permanent partial disability. To the extent that the *McGoff* decision may  
45 conflict with our decision here, it is overruled.  
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1 The Department argues that the industrial appeals judge went outside the record, or  
2 impermissibly "noticed" the *AMA Guides* as adjudicative facts. RCW 51.32.080 and the WACs talk  
3 about use of a nationally recognized rating method. The WACs make reference to the *AMA Guides*  
4 in many places. It can, therefore, be argued that the *AMA Guides* are incorporated into the Act or  
5 WACs. It is clear from prior cases that Department policies are replete with references to the  
6 *AMA Guides*. Also the recent WAC 296-20-030 that would discount Pain Table No. 18 in the most  
7 recent version of the *AMA Guides*, the 5th Edition, implicitly recognizes their use; more telling is  
8 WAC 296-20-2015. WAC 296-20-2015 implements a number of things with reference to  
9 Independent Medical Exam procedures and ratings, not the least of which is the overview for rating  
10 impairment. This describes the basis for different kinds of ratings. For example, specified  
11 disabilities are to be rated according to RCW 51.32.080, and ratings for extremities are to be done  
12 according to the *AMA Guides*. This simply recognizes what is well-established: at the very least,  
13 the *AMA Guides* are regularly used; at most, they are incorporated by reference into the applicable  
14 law. We believe the industrial appeals judge properly took judicial notice of them.

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16 The Board has rated permanent partial disability differently from what was specifically  
17 testified to, based on the record as a whole, including according to *AMA Guides*; e.g., *In re Donald*  
18 *Woody*, BIIA Dec., 85 1995 (1987); *In re Nanci A. Presley-Holley*, Dckt. No. 02 10829 (December 3,  
19 2003) (in which Table 17 was applied); *In re Tammy A. Cole*, Dckt. No. 00 23978 (February 2002);  
20 *In re Stengel Bishop*, Dckt. No. 87 3967 (October 24, 1989).<sup>1</sup> The only difference here is that we  
21 rely on findings (not conclusions) of a nonphysician expert, which we believe to be appropriate in  
22 this case for the reasons stated above.

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24 Section 17.2 of the *AMA Guides* provides for three methods of assessment: (1) Anatomic  
25 (Nine specific elements including muscle atrophy), (2) Functional (Three specific elements including  
26 range of motion, gait derangement, and muscle strength), and (3) Diagnosis based (Including all  
27 previous elements and adding others to include meniscectomies). The text specifically states that  
28 "In certain situations, diagnosis-based estimates are combined with other methods of assessment."  
29 The guidelines further provide that the "evaluator" should first establish a diagnosis and determine  
30 whether or not the claimant has reached maximum medical improvement. According to Table 17-2,  
31 diagnosis-based impairment ratings cannot be combined with gait derangement, muscle atrophy,  
32 muscle strength, or range of motion. Gait derangement ratings require the person to be dependent

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<sup>1</sup> It should be noted, with reference to the discussion about judicial notice of the *AMA Guides*, that it is not clear in the Board cases that have applied them whether the different *AMA Guides* provisions applied were in fact part of the record in some way.

1 upon "assistive devices." The use of functional impairment rating requires documentation such as  
2 the measurements used by Dr. Becker. Whether the rating pursuant to the *AMA Guides* should  
3 always be applied according to functional loss, not according to the diagnostic or anatomic basis, is  
4 not something we decide here; it appears that this is something within the discretion of the expert.  
5 On the other hand, we note that the applicable statutes and WACs refer to permanent partial  
6 disability as a loss of **function**; e.g., WAC 296-20-210; WAC 296-20-19020, and Board cases also  
7 support it; e.g., *Wayne W. Ackerlund*, Dckt. No. 85 4052 (September 8, 1987).

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11 A straightforward application of Table 17-10 for Knee Impairment of the *AMA Guides* and the  
12 decrease in range of motion found by Dr. Becker yields 10 percent of the amputation value of the  
13 left leg at or above the knee joint with short thigh stump as the permanent partial disability. We  
14 arrive at that determination in considering there is the range of expert opinion to choose from in this  
15 case. Dr. Bradley, the examiner, measured flexion and extension, but his overall assessment was  
16 less detailed than the Physical Capacities Evaluation performed by Dr. Becker. He did find a  
17 decreased range of motion of the left knee flexion as compared to the right. He also noted that  
18 Ms. Ramirez favored her left knee when performing knee bends. Dr. Bradley did not explain why a  
19 diagnosis-based impairment rating was better suited to the claimant's knee condition than the loss  
20 of function method. We recognize that both Dr. McDermott and Dr. Bradley found minimal  
21 restriction of flexion motion, but these findings were made in a brief office visit in contrast to the  
22 hours spent by Dr. Becker in evaluating Ms. Ramirez's functional capacity. Dr. McDermott did not  
23 record any measurements at all. Dr. Becker's findings are more consistent with the claimant's  
24 testimony about difficulties that she has encountered in using her left lower extremity, which has  
25 been confirmed to some extent by her lay witnesses. The evidence supports an increased  
26 permanent partial disability award and is consistent with the *AMA Impairment Rating Guidelines*.  
27 Since the diagnosis-based impairment is not to be combined with the functional method, the  
28 10 percent rating includes the previous 2 percent meniscectomy rating.

### 29 30 31 32 33 34 35 36 37 38 **FINDINGS OF FACT**

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40 1. On August 23, 2001, Bertha Ramirez filed an application for benefits  
41 with the Department of Labor and Industries, alleging that on  
42 July 28, 2001, she injured her left knee during the course of her  
43 employment with Kenny Presbyterian Home, when she slipped on some  
44 stairs. On September 24, 2001, the Department issued an order in  
45 which it allowed the claim.  
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1 Between September 24, 2001 and January 29, 2002, the Department  
2 issued various time loss compensation orders. On February 8, 2002,  
3 the Department issued an order in which it assessed an over-payment  
4 of time loss compensation in the amount of \$2,205.07, on the basis that  
5 the claimant had returned to work on September 29, 2001.  
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7 On February 21, 2003, the Department issued an order in which it  
8 segregated a lumbosacral sprain as unrelated and not the responsibility  
9 of the Department. On February 24, 2003, the Department issued an  
10 order in which it closed the claim with a permanent partial disability  
11 award equivalent to 2 percent of the left leg above the knee joint with  
12 short thigh stump and made a deduction for the assessed overpayment.  
13 No warrant was issued.  
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15 On March 3, 2003, the claimant filed a Notice of Appeal with the Board  
16 of Industrial Insurance Appeals to the February 24, 2003 order, but not  
17 to the February 21, 2003 order. On March 28, 2003, the Department  
18 held the February 24, 2003 order in abeyance, and the Board returned  
19 the case to the Department on April 2, 2003. On May 8, 2003, the  
20 Department issued an order in which it affirmed its February 24, 2003  
21 order. On May 13, 2004, the claimant filed a Notice of Appeal with the  
22 Board, and on June 4, 2003, the Board granted the appeal.  
23

- 24 2. On July 28, 2001, Bertha Ramirez sustained an industrial injury to her  
25 left knee when she slipped on some stairs during the course of her  
26 employment with Kenney Presbyterian Home. Her knee condition  
27 required medical treatment to include meniscectomy surgery.  
28
- 29 3. As of May 8, 2003, Bertha Ramirez's left knee condition, proximately  
30 caused by the industrial injury of July 28, 2001, had reached maximum  
31 medical improvement and was considered fixed and stable. No further  
32 medical treatment was necessary.  
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- 34 4. As of May 8, 2003, Bertha Ramirez had sustained a permanent partial  
35 disability impairment to her left knee equivalent to 10 percent of the  
36 amputation value of the left leg above the knee joint with short thigh  
37 stump, proximately caused by the industrial injury of July 28, 2001. Her  
38 impairment rating was based upon a loss of flexion to only 110 degrees,  
39 difficulty with the physical function of her knee, and the meniscectomy  
40 surgery.  
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- 42 5. As of May 8, 2003, Bertha Ramirez did not have a mental health  
43 condition proximately caused or aggravated by her July 28, 2001  
44 industrial injury.  
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- 1 6. Bertha Ramirez did not protest or appeal the Department order dated  
2 February 21, 2003, within 60 days of its communication, that denied  
3 responsibility for a low back condition.  
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- 5 7. Bertha Ramirez did not protest or appeal the Department order dated  
6 February 8, 2002, within 60 days of its communication, in which the  
7 Department assessed an overpayment of time loss compensation  
8 benefits in the amount of \$2,205.07.  
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### CONCLUSIONS OF LAW

- 10 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
11 parties to and the subject matter of this appeal.  
12
- 13 2. As of May 8, 2003, Bertha Ramirez's left knee condition, proximately  
14 cause by her July 28, 2001 industrial injury, was not in need of further  
15 proper and necessary treatment within the meaning of RCW 51.36.010.  
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- 17 3. As of May 8, 2003, Bertha Ramirez had sustained a permanent partial  
18 disability equivalent to 10 percent of the amputation value of the left leg  
19 above the knee joint with short thigh stump, proximately caused by her  
20 July 28, 2001 industrial injury, within the meaning of RCW 51.32.080(1).  
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- 22 4. The Department orders dated February 8, 2002 and February 21, 2003,  
23 are final and binding determinations that the Department correctly  
24 assessed an overpayment of time loss compensation benefits in the  
25 amount of \$2,205.07, and that the Department is not responsible for a  
26 lumbosacral strain of the claimant's low back. The doctrine of  
27 res judicata precludes the claimant from challenging the overpayment  
28 assessment or establishing responsibility for the low back condition in  
29 this appeal.  
30
- 31 5. The Department order dated May 8, 2003, is incorrect and is reversed.  
32 The claim is remanded to the Department with direction to issue an  
33 order paying the claimant a permanent partial disability award equivalent  
34 to 10 percent of the amputation value of the claimant's left leg above the  
35 knee joint with short thigh stump, less previous award and less any  
36 balance on the overpayment assessment, segregating any mental  
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1 health condition of the claimant as not related or aggravated by the  
2 industrial injury of July 28, 2001, and not the responsibility of the  
3 Department, and to thereafter close the claim.  
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5 It is so **ORDERED**.

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7 Dated this 1st day of September, 2004.  
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10 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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14 /s/ \_\_\_\_\_  
15 THOMAS E. EGAN Chairperson  
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19 /s/ \_\_\_\_\_  
20 FRANK E. FENNERTY, JR. Member  
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23 **DISSENT**

24 I find the Department's Petition for Review persuasive, and respectfully dissent from the  
25 decision of the majority. The Department's rating was based on the opinion of Dr. Bradley, an  
26 experienced examiner who saw the claimant twice, supported by the opinion of the attending  
27 physician who performed a meniscectomy and noted that the claimant had only a tiny meniscal  
28 tear. While I respect the ability of Dr. Becker, it is clear that Dr. Bradley observed evidence of  
29 non-organic responses, including Waddell's signs, and, as a physician, was in the best position to  
30 apply the *AMA Guides* to this case.  
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35 The *AMA Guides* give a choice of three alternative methods to use in rating a knee  
36 impairment, such as involved here. Choice of the method to be used is clearly a medical decision.  
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38 The *AMA Guides*, indeed, specify that the examining physician shall choose the method "that gives  
39 the most clinically accurate impairment rating." Involving, as it does, multiple considerations, this  
40 relegation of the choice to a physician making a clinical evaluation is wholly appropriate. While an  
41 industrial appeals judge may select a rating that is between two ratings given by physicians, I do  
42 not believe it is proper for the judge or the Board to make the judgment here. Neither the rating  
43 given by the Board **nor** the choice by the Board of rating method from the *AMA Guides* was  
44 supported by any physician, and was contrary to the decision of the examining physician, a  
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decision supported by the attending physician. The majority concedes that choice among rating methods is "within the discretion of the expert," yet ignores the opinion of that expert, Dr. Bradley.

Because I do not believe the Board has the power to make the rating decision made based on the circumstances in this case, I would sustain the Department's decision.

Dated this 1st day of September, 2004.

BOARD OF INDUSTRIAL INSURANCE APPEALS

*/s/* \_\_\_\_\_  
CALHOUN DICKINSON Member