Ramirez, Bertha

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

IN RE: BERTHA RAMIREZ	)	**DOCKET NO. 03 14933**
	)	
CLAIM NO. X-712315	)	**DECISION AND ORDER**

APPEARANCES:

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

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

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

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

PRELIMINARY MATTERS

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

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. The claimant takes issue with evidentiary rulings made in response to certain objections in the deposition of Stan R. Schiff, M.D., Ph.D., a neurologist, concerning his opinions about, or concurrences with, the findings of Theodore J. Becker, Ph.D. The most important of these had to do with whether the doctor agreed with a disability rating made by Dr. Becker. This and other related objections were sustained, disallowing the doctor's responses. Unfortunately, the claimant failed to lay the proper foundation for testimony

about what Dr. Becker found as required by Evidence Rule 703, nor were any questions in the form of a hypothetical question, incorporating testimony to be given by Dr. Becker.

DECISION

The Department of Labor and Industries, the employer, and the claimant petitioned from the Proposed Decision and Order issued on February 27, 2004, in which the industrial appeals judge denied the Department's responsibility for a low back condition as precluded by res judicata; denied the Department's responsibility for a mental health condition; but increased an award for permanent partial disability for a left knee condition from 2 percent to 10 percent, based on the industrial appeals judge's application of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereafter *AMA Guides*) to findings of loss of range of motion of the knee that were part of a performance-based physical capacities evaluation and part of the record. The findings were made by Theodore J. Becker, Ph.D., RPT, (among a number of other designations), on referral from a treating physician. The main thrust of the Department's arguments are that: (1) The claimant failed to make a prima facie case for an increased award for permanent partial disability because she offered no legally competent opinion on the extent of permanent partial disability; (2) By applying the *AMA Guides* and determining a permanent partial disability rating, the industrial appeals judge impermissibly took judicial notice of the *AMA Guides*, since they were not in the record; and, (3) The industrial appeals judge failed to give special consideration to the opinion of the treating physician—the attending surgeon concurred with the Independent Medical Examiners. The employer essentially agreed with the Department's position. Ms. Ramirez takes issue with certain evidentiary rulings, discussed above. Ms. Ramirez also requests a higher award for permanent partial disability. The claimant did not petition from the determination that the back issue was precluded on res judicata grounds, and we agree with the disposition of that issue and on the issue of whether or not the claimant suffered from a mental health condition. We have granted review to deal with the issue of permanent partial disability of Ms. Ramirez's left knee and the evidentiary matters related to it.

On July 28, 2001, Bertha Ramirez, a Spanish-speaking kitchen worker, slipped while descending stairs in the course of her employment and injured her left knee. She came under the care of John E. McDermott, M.D., an orthopedic surgeon, who, in addition to his private practice, consults and examines for the Department. He eventually performed arthroscopic surgery on March 27, 2002, excising a torn lateral meniscus, and found medial plica (roughening) on the patella, which he debrided. Ms. Ramirez underwent physical therapy. At some point, in a

vocational questionnaire, Dr. McDermott recommended that she have a performance-based physical capacities examination (Exhibit No. 18), and also completed an estimate of capacities indicating that Ms. Ramirez should be temporarily restricted in her standing and walking, that she should bend only occasionally, and never squat, kneel, crawl, and, for some reason, never use her arms repetitively. He saw Ms. Ramirez shortly after surgery, but she did not come in again until October 2002, complaining of knee tenderness. He suggested that a rating exam be done.

Ms. Ramirez maintains that as a result of her knee injury, her gait altered and her back became symptomatic. On February 21, 2003, however, the Department issued an order segregating the back condition, and that order was not appealed. As stated above, we agree with our industrial appeals judge that this order became res judicata as to the claimant's alleged back condition, and she is precluded from having it allowed. As far as the mental health condition is concerned, the claimant did not present evidence that she suffered from an industrially caused condition, and she simply failed to make a prima facie case. In fact, a psychiatrist who examined her at her attorney's request, G. Christian Harris, M.D., declined to actually make a psychiatric diagnosis; furthermore, whatever problems he thought Ms. Ramirez had, he did not relate to her work injury. As stated above, we agree with our industrial appeals judge's disposition of these issues.

Bruce E. Bradley, Jr., M.D., an orthopedic surgeon, conducted two Independent Medical Exams four months apart, January 2003 and April 2003, the latter primarily having to do with whether the low back condition was related to the knee injury and its consequences. Dr. Bradley examined range of motion of the knee on both occasions, stating that it was essentially normal. He rated the left lower extremity at 2 percent according the **diagnosis** of meniscectomy, one of the three bases for rating set forth in the *AMA Guides*. Dr. McDermott agreed with the rating.

Theodore J. Becker, Ph.D., has a doctorate in Human Performance and is a Registered Physical Therapist, (as well as CET, CEAS, CDE, CDA, designations which were not explained in the record). He also received a masters degree in sports science and sports medicine. His Curriculum Vitae is Exhibit No. 15 and covers 12 pages. Many pages are taken up in his deposition outlining his achievements, including teaching an annual course for the Association of Disability Evaluating Physicians on impairment ratings. He testified that the Department has asked him to do impairment ratings in the past, and that in certain state and federal cases he has been asked to do so as well. He conducted Ms. Ramirez's performance-based Physical Capacities Evaluation on September 3, 2003, at the request of one of the treating physicians. The examination results are

set forth in Exhibit No. 13. In the examination, among other things, he found a restricted range of motion of the left knee, specifically flexion, of 27 percent less than expected.

We agree with the Department and the employer, as well as our industrial appeals judge, that Dr. Becker could not rate under the Washington Administrative Code (WACs), statutes, and case law. We feel it is appropriate, however, to rely on the restriction in flexion Dr. Becker found in establishing permanent partial disability, and apply the *AMA Guides* accordingly.

The case law and the Board have recognized that valid expert opinion is not limited to certain degrees or titles, but on training and experience; *e.g. Judd v. Department of Labor and Indus*., 63 Wn. App. (1991); *Goodman v. Boeing Co*. 75, Wn. App. 60 (1994); *Harris v. Robert C. Groth*, M.D., Inc., P.S. 99 Wn.2d, 438 (1983). As stated in *Judd:*

> Whether an expert witness is a licensed physician is an important factor to be taken into consideration, but is not dispositive here for the same reasons it is not dispositive in deciding whether an expert witness who is not a physician may testify in medical negligence cases. *Harris v. Groth*, 99 Wn.2d 438, 439, 663 P.2d 113 (1983) discussed the use of expert testimony in medical negligence cases as it relates to both the standard of care and causation, and held, "nonphysicians, if otherwise qualified, may give expert testimony in a medical malpractice case." It is a matter within the trial court's discretion. Per se limitations on the testimony of otherwise qualified nonphysicians are not in accord with the general trend in the law of evidence, which is away from reliance on formal titles or degrees. *Harris*, at 449. This trend is noted in 5A K. Tegland, Wash. Prac., *Evidence* § 289, at 382-83 (3d ed. 1989):
>
> The witness need not possess the academic credentials of an expert; practical experience may suffice. Training in a related field or academic background alone may also be sufficient. [ER] 702 states very broadly that the witness may qualify as an expert by virtue of knowledge, skill, experience, training, *or* education.

Accordingly, we accept Dr. Becker's findings, which are certainly within his area of expertise, as expert testimony to be properly considered.

We note that there is a Board decision, *In re Michael McGoff*, BIIA Dec., 90 1897 (1991), in which the Board declined to rate a permanent partial disability based on chiropractic findings, but there was also a question of whether the permanent partial disability issue had been preserved at all—the case was tried as a treatment case; the Petition for Review never really asked for it. There is no mention at all of what the chiropractic findings were, simply that the Board could not accept a chiropractor's opinion of permanent partial disability. To the extent that the *McGoff* decision may conflict with our decision here, it is overruled.

The Department argues that the industrial appeals judge went outside the record, or impermissibly "noticed" the *AMA Guides* as adjudicative facts. RCW 51.32.080 and the WACs talk about use of a nationally recognized rating method. The WACs make reference to the *AMA Guides* in many places. It can, therefore, be argued that the *AMA Guides* are incorporated into the Act or WACs. It is clear from prior cases that Department policies are replete with references to the *AMA Guides*. Also the recent WAC 296-20-030 that would discount Pain Table No. 18 in the most recent version of the *AMA Guides*, the 5th Edition, implicitly recognizes their use; more telling is WAC 296-20-2015. WAC 296-20-2015 implements a number of things with reference to Independent Medical Exam procedures and ratings, not the least of which is the overview for rating impairment. This describes the basis for different kinds of ratings. For example, specified disabilities are to be rated according to RCW 51.32.080, and ratings for extremities are to be done according to the *AMA Guides*. This simply recognizes what is well-established: at the very least, the *AMA Guides* are regularly used; at most, they are incorporated by reference into the applicable law. We believe the industrial appeals judge properly took judicial notice of them.

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

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

[1] 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.

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

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

FINDINGS OF FACT

1. On August 23, 2001, Bertha Ramirez filed an application for benefits with the Department of Labor and Industries, alleging that on July 28, 2001, she injured her left knee during the course of her employment with Kenny Presbyterian Home, when she slipped on some stairs. On September 24, 2001, the Department issued an order in which it allowed the claim.

Between September 24, 2001 and January 29, 2002, the Department issued various time loss compensation orders. On February 8, 2002, the Department issued an order in which it assessed an over-payment of time loss compensation in the amount of $2,205.07, on the basis that the claimant had returned to work on September 29, 2001.

On February 21, 2003, the Department issued an order in which it segregated a lumbosacral sprain as unrelated and not the responsibility of the Department. On February 24, 2003, the Department issued an order in which it closed the claim with a permanent partial disability award equivalent to 2 percent of the left leg above the knee joint with short thigh stump and made a deduction for the assessed overpayment. No warrant was issued.

On March 3, 2003, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals to the February 24, 2003 order, but not to the February 21, 2003 order. On March 28, 2003, the Department held the February 24, 2003 order in abeyance, and the Board returned the case to the Department on April 2, 2003. On May 8, 2003, the Department issued an order in which it affirmed its February 24, 2003 order. On May 13, 2004, the claimant filed a Notice of Appeal with the Board, and on June 4, 2003, the Board granted the appeal.

2. On July 28, 2001, Bertha Ramirez sustained an industrial injury to her left knee when she slipped on some stairs during the course of her employment with Kenney Presbyterian Home. Her knee condition required medical treatment to include meniscectomy surgery.

3. As of May 8, 2003, Bertha Ramirez's left knee condition, proximately caused by the industrial injury of July 28, 2001, had reached maximum medical improvement and was considered fixed and stable. No further medical treatment was necessary.

4. As of May 8, 2003, Bertha Ramirez had sustained a permanent partial disability impairment to her left knee equivalent to 10 percent of the amputation value of the left leg above the knee joint with short thigh stump, proximately caused by the industrial injury of July 28, 2001. Her impairment rating was based upon a loss of flexion to only 110 degrees, difficulty with the physical function of her knee, and the meniscectomy surgery.

5. As of May 8, 2003, Bertha Ramirez did not have a mental health condition proximately caused or aggravated by her July 28, 2001 industrial injury.

6. Bertha Ramirez did not protest or appeal the Department order dated February 21, 2003, within 60 days of its communication, that denied responsibility for a low back condition.

7. Bertha Ramirez did not protest or appeal the Department order dated February 8, 2002, within 60 days of its communication, in which the Department assessed an overpayment of time loss compensation benefits in the amount of $2,205.07.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. As of May 8, 2003, Bertha Ramirez's left knee condition, proximately cause by her July 28, 2001 industrial injury, was not in need of further proper and necessary treatment within the meaning of RCW 51.36.010.

3. As of May 8, 2003, Bertha Ramirez had sustained a permanent partial disability equivalent to 10 percent of the amputation value of the left leg above the knee joint with short thigh stump, proximately caused by her July 28, 2001 industrial injury, within the meaning of RCW 51.32.080(1).

4. The Department orders dated February 8, 2002 and February 21, 2003, are final and binding determinations that the Department correctly assessed an overpayment of time loss compensation benefits in the amount of $2,205.07, and that the Department is not responsible for a lumbosacral strain of the claimant's low back. The doctrine of res judicata precludes the claimant from challenging the overpayment assessment or establishing responsibility for the low back condition in this appeal.

5. The Department order dated May 8, 2003, is incorrect and is reversed. The claim is remanded to the Department with direction to issue an order paying the claimant a permanent partial disability award equivalent to 10 percent of the amputation value of the claimant's left leg above the knee joint with short thigh stump, less previous award and less any balance on the overpayment assessment, segregating any mental

health condition of the claimant as not related or aggravated by the industrial injury of July 28, 2001, and not the responsibility of the Department, and to thereafter close the claim.

It is so **ORDERED.**

Dated this 1st day of September, 2004.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

DISSENT

I find the Department's Petition for Review persuasive, and respectfully dissent from the decision of the majority. The Department's rating was based on the opinion of Dr. Bradley, an experienced examiner who saw the claimant twice, supported by the opinion of the attending physician who performed a meniscectomy and noted that the claimant had only a tiny meniscal tear. While I respect the ability of Dr. Becker, it is clear that Dr. Bradley observed evidence of non-organic responses, including Waddell's signs, and, as a physician, was in the best position to apply the *AMA Guides* to this case.

The *AMA Guides* give a choice of three alternative methods to use in rating a knee impairment, such as involved here. Choice of the method to be used is clearly a medical decision. The *AMA Guides*, indeed, specify that the examining physician shall choose the method "that gives the most clinically accurate impairment rating." Involving, as it does, multiple considerations, this relegation of the choice to a physician making a clinical evaluation is wholly appropriate. While an industrial appeals judge may select a rating that is between two ratings given by physicians, I do not believe it is proper for the judge or the Board to make the judgment here. Neither the rating given by the Board **nor** the choice by the Board of rating method from the *AMA Guides* was supported by any physician, and was contrary to the decision of the examining physician, a

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