

Estrada Ramirez, Adrian

EXPERT TESTIMONY

Admissibility of opinions

Psychologists may testify about the degree of impairment caused by a mental health condition if their opinion is admissible under ER 702 using the analysis from *Frausto v. Yakima HMA*, 188 Wn.2d 227 (2017). ...*In re Adrian Estrada Ramirez*, BIIA Dec., **1916654 (2020)** [*Editor's Note*: The Board's decision was appealed to superior court under Clark County Cause No. 20-2-01788-06.]

Scroll down for order.

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

IN RE: ADRIAN ESTRADA RAMIREZ) DOCKET NOS. 19 16654 & 19 16655
CLAIM NO. AP-49203) DECISION AND ORDER

Adrian Estrada Ramirez hurt his back during the course of his employment with Timber Technologies, LLC. The Department accepted his claim and provided benefits but denied responsibility for several mental health conditions. The Department ended time-loss compensation benefits and closed the claim with a permanent partial disability award consistent with Category 2 of the categories of dorso-lumbar and lumbosacral Impairment. Mr. Estrada Ramirez contends mental health conditions were proximately caused by the industrial injury. He also contends entitlement to time-loss compensation benefits, an increased award for permanent partial disability, a mental health related award for permanent partial disability and, alternatively, a pension. Our industrial appeals judge affirmed the Department order ending time-loss but reversed the closing order and remanded to the Department to accept responsibility for the following mental health conditions: major depressive disorder, generalized anxiety disorder, and somatic symptom disorder, and closing the claim effective April 1, 2019, with an award for permanent partial disability equal to Category 4 of the categories of dorso-lumbar and/or lumbosacral impairment. We grant review to dismiss the claimant's appeal in Docket No. 19 16654 because he failed to present prima facie evidence of entitlement to total temporary disability relief and to make appropriate findings and conclusions. We also grant review to find that the claimant is entitled to an award for permanent partial disability equal to Category 4 for his mental health conditions.

DISCUSSION

Adrian Estrada Ramirez is 39 years old and has a ninth grade education. On October 4, 2011, he was working for Timber Technologies, LLC lifting up trusses to build a roof when his foot slipped. Mr. Estrada Ramirez hit his back on one of the trusses. Although he resumed his work, Mr. Estrada Ramirez slipped a second time and hit his back again. As a result of the industrial injury, Mr. Estrada Ramirez sought chiropractic treatment and later underwent two back surgeries. Since the surgeries, he has increased back pain with daily activities like showering and bending over.

Mr. Estrada Ramirez indicated he suffers from back injuries and mental health conditions. He contends that he was unable to work from February 26, 2019, through April 1, 2019, as a result of the mental health conditions. He also argued entitlement to treatment for those conditions and

1 permanent partial disability or a pension. To prove this contention he offered testimony from his
2 attending physician, Richard Heitsch, M.D., and Silverio Arenas Jr, PH.D, a psychologist.

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4 Dr. Heitsch diagnosed major depressive disorder, generalized anxiety somatic symptom
5 disorder, and PTSD. Dr. Arenas agreed with all of the conditions except PTSD. Both agreed that
6 these mental health conditions were proximately caused by the industrial injury. Dr. Heitsch testified
7 that there was still an open question about whether Mr. Estrada Ramirez required further treatment.
8 But Dr. Arenas disagreed. He offered the opinion that Mr. Estrada Ramirez suffered from all of the
9 before mentioned mental health conditions. Dr. Arenas further testified these conditions resulted in
10 Category 4 impairment.

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12 The Department argued that its two orders were correct because they ended time-loss
13 compensation and awarded permanent partial disability for Category 2 lumbar/lumbosacral
14 impairments but denied all of the mental health conditions. To prove its contention, the Department
15 offered testimony from Mario Porras, M.D., an orthopedic surgeon, and Raghuram Bhat, Ph.D., a
16 psychiatrist.

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18 Dr. Porras diagnosed lumbar sprain/strain, thoracic sprain /strain at L4-5, and disc protrusion
19 with left L5 radiculopathy as proximately caused by the industrial injury. He concluded that
20 Mr. Estrada Ramirez required no treatment and had no work restrictions. Similarly, Dr. Bhat found
21 no clear evidence of psychiatric diagnoses but didn't entirely disagree with the somatic symptom
22 disorder diagnosis. He offered no opinion about Mr. Estrada Ramirez's need for treatment, any
23 temporary total disability, or impairment rating.

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25 Based on the total record, our industrial appeals judge accepted three mental health
26 conditions: major depressive disorder, generalized anxiety, and somatic symptom disorder but found
27 the claimant was not a temporarily totally disabled worker as a result of these conditions. Our judge
28 also held that Mr. Estrada Ramirez was not permanently totally disabled but did have a Category 4
29 dorso-lumbar and/or lumbosacral Impairment. He didn't find any permanent partial disability for the
30 mental health conditions.

31 Mental Health Conditions

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33 The first question before us is whether Mr. Estrada Ramirez's mental health conditions were
34 proximately caused by the industrial injury. A worker is entitled to benefits under the Industrial
35 Insurance Act if the industrial injury is a proximate cause of the alleged condition for which benefits
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1 are sought.¹ The proximate cause between the claimant's condition and the industrial injury must be
2 established by competent medical testimony that there is a probable, not merely possible, causal
3 relationship.² Further, in *In re Martha E. Perez*³ we clarified our application of *In re Sabir Velicanin*.⁴ We
4 held that WAC 296-14-300(3) does not preclude the Department from allowing somatic symptom disorder
5 as a matter of law because WAC 296-14-300(3) does not apply to cases involving industrial injuries.⁵
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8 In these appeals, Drs. Heitsch and Porras diagnosed Mr. Estrada Ramirez with major
9 depressive disorder, generalized anxiety, and somatic symptom disorder that they believed were
10 proximately caused by the industrial injury. Moreover, Dr. Bhat did not disagree with the somatic
11 symptom disorder condition. We find Mr. Estrada Ramirez's major depressive disorder, generalized
12 anxiety, and somatic symptom disorder were proximately caused by the industrial injury. We also
13 agree that Mr. Estrada Ramirez was not entitled to further treatment for those conditions. Dr. Arenas'
14 evaluation makes it clear that further treatment for those mental health conditions wouldn't help
15 Mr. Estrada Ramirez. Moreover, Dr. Heitsch couldn't decide whether treatment was necessary
16 without further evaluation. Based on a preponderance of the evidence, all of Mr. Estrada Ramirez's
17 conditions caused by the industrial injury are fixed and stable.
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20 Total Disability

21 The second question before us is whether Mr. Estrada Ramirez was a temporarily totally
22 disabled worker. The test for total disability is the same whether it is temporary or permanent in
23 nature.⁶ Total disability is an impairment of mind or body, proximately caused by an industrial injury
24 or occupational disease or its residuals, that renders a worker unable to perform or obtain reasonably
25 continuous gainful employment.⁷ In an appeal before the Board, the appellant has the burden of
26 proceeding with evidence to establish a prima facie case for the relief sought.⁸ The claimant did not
27 meet this burden.
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30 The claimant contended that he was unable to work from February 26, 2019, through April 1,
31 2019. Mr. Estrada Ramirez argued that the Department had a burden to show that he was able to
32 work by introducing vocational or other testimony. But that argument simply ignores his burden as
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¹ *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674 (1977).

² *Sacred Heart Medical Ctr. v. Carrado*, 92 Wn.2d 631 (1979); *Sayler v. Dep't of Labor & Indus.*, 69 Wn.2d 893 (1966).

³ *In re Martha E. Perez*, BIIA Dec., 18 10694 (2019).

⁴ *In re Sabir Velicanin*, Dckt. No. 15 22887 (May 15, 2017).

⁵ *Perez*.

⁶ *Bonko v. Dept of Labor & Indus.*, 2 Wn. App. 22 (1970).

⁷ RCW 51.32.090; *Bonko* at 25.

⁸ RCW 51.52.050(2)(a).

1 appellant in this appeal. Mr. Estrada Ramirez could have introduced testimony from a vocational
2 expert but did not. In addition, Dr. Heitsch offered no opinion about whether the claimant could work.
3 Thus, the only witness who provided an opinion about the claimant's ability to work was Dr. Porras.
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5 Dr. Porras testified that the claimant could work without restriction. Based on the record, we
6 find that the claimant has failed to present prima facie evidence that he was temporarily totally
7 disabled worker. The claimant's appeal in Docket No. 19 16654 is dismissed.
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10 Permanent Partial Disability

11 The next issue is whether Mr. Estrada Ramirez was entitled to an increased permanent partial
12 disability award for dorso-lumbar and/or lumbosacral impairments or any permanent partial disability
13 award for the mental health conditions. We agree with our judge that Mr. Estrada Ramirez was
14 entitled to an increased permanent partial disability award for his dorso-lumbar and/or lumbosacral
15 impairment.
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18 Dr. Heitsch offered the opinion that Mr. Estrada Ramirez's back impairment was best
19 described as a Category 4 impairment. He reviewed the Department's worksheet for impairment and
20 assigned four points to Column A (for mild but significant muscle weakness and atrophy). Dr. Heitsch
21 assigned one point for Column B (to reflect no reflex loss) and four points in Column C (to show mild
22 but significant changes to Mr. Estrada Ramirez's spine). Next, he allotted five points to Column D (to
23 reflect Mr. Estrada Ramirez's moderate continuous pain).
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28 Dr. Porras agreed with Dr. Heitsch on Columns B and C, but assessed the claimant differently
29 for Columns A and D. For example, Dr. Porras didn't see that Mr. Estrada Ramirez had any muscle
30 weakness or atrophy. He also didn't notice any abnormalities related to Column D. As a result, these
31 points were low. Further, his opinion wasn't entirely clear with regard to his Column D assessment.
32 As our judge mentioned, Dr. Porras didn't explain why there were no points in column D for the "other
33 things" considered in that column.
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37 Based on the entire record, we conclude that Dr. Heitsch, as attending physician, was in a
38 better position to evaluate Mr. Estrada Ramirez's lumbar impairment. We find that a preponderance
39 of the evidence shows that Mr. Estrada Ramirez's dorso-lumbar and/or lumbosacral impairment was
40 equal to Category 4.
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43 We also find that Mr. Estrada Ramirez is a permanently partially disabled person as a result
44 of his mental health conditions. Permanent partial disability ratings must be based on medical
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1 testimony, supported at least in part by objective findings.⁹ The only testimony of permanent partial
2 disability ratings in this record was provided by Drs. Arenas and Heitsch. Although Dr. Arenas is a
3 psychologist rather than a doctor of medicine, his opinion about ratings need not automatically be
4 disregarded.
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7 In *Frausto v. Yakima HMA, LLC*, the Washington State Supreme Court allowed a registered
8 nurse to testify about causation.¹⁰ The court held that the determination about whether a witness
9 meets the qualification to testify under ER 702 is within the trial court's discretion.¹¹ In *In re Dean L.*
10 *Babbitt*, we followed the Supreme Court's reasoning when we abandoned the strict rules that
11 precluded some witnesses from testifying about causation merely because of a professional title.¹²
12 We also explained that ER 702 also permits an expert to testify when his expertise derives from
13 knowledge, skill, experience, training, or education.¹³ The same reasoning that applies to opinions
14 on causation is applicable to opinions on impairment, as is the circumstance here.
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19 Dr. Arenas testified he was familiar with the Washington State criteria for determining
20 impairment. Against that backdrop, he offered the opinion that Mr. Estrada Ramirez has a Category
21 4 mental health impairment as defined by the Washington Administrative Code. Based on the
22 testimony, we believe Dr. Arenas had the skill, experience, training, or education to testify about
23 impairment ratings under ER 702 and his testimony should have been considered. Dr. Heitsch
24 agreed with Dr. Arenas and there is no authority requiring him to articulate independent findings to
25 support the concurrence. The combined testimony is more persuasive than that of Dr. Bhat who
26 didn't render any diagnosis for mental health conditions or contradict the testimony about the mental
27 health impairment rating. Based on the entire record, we agree that the claimant showed by a
28 preponderance that he was entitled to an award for permanent partial disability for the mental health
29 conditions consistent with Category 4.
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35 Pension

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37 The final issue before us is pension. We find that Mr. Estrada Ramirez did not provide any
38 testimony about his inability to work on a permanent basis as a result of total disability.
39 Mr. Estrada Ramirez has limited education in addition to his work related conditions. As we have
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43 ⁹ *Hyde v. Dept of Labor & Indus.*, 46 Wn.2d 31 (1955).

44 ¹⁰ *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227 (2017).

45 ¹¹ *Frausto*.

46 ¹² Dckt. No. 18 20492 (January 17, 2020).

47 ¹³ *Babbitt* at 3.

1 previously mentioned, the claimant failed to present testimony about whether or not he could work
2 on a temporary basis. Based on our review, he also chose not to present any testimony that he was
3 unable to perform any work at all. As a result, we find that a preponderance of the evidence shows
4 Mr. Estrada Ramirez wasn't entitled to a pension.
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7 **DECISION**

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9 1. In Docket No. 19 16654, the claimant, Adrian Estrada Ramirez, filed an appeal with the Board of
10 Industrial Insurance Appeals on May 20, 2019, from an order of the Department of Labor and
11 Industries dated March 29, 2019. In this order the Department affirmed its February 27, 2019
12 order ending time-loss compensation as of February 26, 2019. This appeal is dismissed.
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15 2. In Docket No. 19 16655, the claimant, Adrian Estrada Ramirez, filed an appeal with the Board of
16 Industrial Insurance Appeals on May 20, 2019, from an order of the Department of Labor and
17 Industries dated April 1, 2019. In this order the Department affirmed its February 28, 2019 order
18 closing the claim with a Category 2 permanent partial impairment. This order is incorrect and is
19 reversed and remanded to the Department to (1) accept responsibility for the conditions
20 diagnosed as major depressive disorder, generalized anxiety disorder, and somatic symptom
21 disorder, (2) pay an award for permanent partial disability for mental health conditions equal to
22 Category 4 impairment; and (3) close the claim effective April 1, 2019, with an award for
23 permanent partial disability equal to a Category 4 dorso-lumbar and/or lumbosacral impairment,
24 less amounts previously paid.
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30 **FINDINGS OF FACT**

- 31 1. On August 19, 2019, an industrial appeals judge certified that the parties
32 agreed to include the Jurisdictional History in the Board record solely for
33 jurisdictional purposes.
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- 35 2. Adrian Estrada Ramirez sustained an industrial injury on October 4, 2011,
36 when he fell and injured his back and sustained lumbar and thoracic
37 sprains or strains, and a L4-5 disc protrusion with left L5 radiculopathy.
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- 39 3. Adrian Estrada Ramirez's major depressive disorder, generalized anxiety
40 disorder, and somatic symptom disorder were proximately caused by his
41 industrial injury.
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- 43 4. Adrian Estrada Ramirez is 39 years old with a ninth grade education. He
44 has worked as a roofer and a bartender, and has some accounting
45 experience.
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- 47 5. Adrian Estrada Ramirez's spinal range of motion is limited to flexion of 25
degrees, extension of 10 degrees, and right and left lateral bending of 15
degrees.

- 1 6. There was insufficient evidence presented to determine that
2 Mr. Estrada Ramirez was unable to perform or obtain reasonable
3 continuous gainful employment from February 26, 2019, through
4 March 31, 2019, and as of April 1, 2019.
- 5 7. As of April 1, 2019, Adrian Estrada Ramirez's conditions proximately
6 caused by the industrial injury were fixed and stable and did not need
7 further proper and necessary treatment.
- 8 8. As of April 1, 2019, Adrian Estrada Ramirez had mild but significant
9 muscle weakness and atrophy, no reflex loss, mild but significant changes
10 in his lumbar spine as shown by x-ray and MRI images, moderate,
11 continuous pain, muscle spasm, tenderness, reduced range of motion,
12 and a positive straight leg raising test on his left side.
- 13 9. On April 1, 2019, Adrian Estrada Ramirez had a permanent partial
14 disability proximately caused by the industrial injury equal to a Category 4
15 dorso-lumbar and/or lumbosacral impairment pursuant to
16 WAC 296-20-280.
- 17 10. On April 1, 2019, Adrian Estrada Ramirez had a permanent partial
18 disability proximately caused by the industrial injury equal to a Category 4
19 mental health impairment pursuant to WAC 296-20-340.

22 **CONCLUSIONS OF LAW**

- 23 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
24 and subject matter in these appeals.
- 25 2. Adrian Estrada Ramirez failed to establish a prima facie case.
- 26 3. Adrian Estrada Ramirez's appeal from the Department order dated
27 March 29, 2019, is dismissed for failure to present a prima facie case for
28 the relief being sought as required by RCW 51.52.050.
- 29 4. Adrian Estrada Ramirez's conditions proximately caused by the industrial
30 injury were fixed and stable as of April 1, 2019, and he is not entitled to
31 further treatment. RCW 51.36.010.
- 32 5. Adrian Estrada Ramirez was not a permanently totally disabled worker
33 within the meaning of RCW 51.08.160, as of April 1, 2019.
- 34 6. On April 1, 2019, Adrian Estrada Ramirez had a permanent partial
35 disability within the meaning of RCW 51.32.080, proximately caused by
36 the industrial injury.
- 37 7. The Department order dated April 1, 2019, is incorrect and is reversed.
38 This matter is remanded to the Department to accept responsibility for
39 the conditions diagnosed as major depressive disorder, generalized
40 anxiety disorder, and somatic symptom disorder; to pay a partial disability
41 award equal to Category 4 for mental health impairment; and to pay a
42 partial disability award equal to a Category 4 dorso-lumbar and/or
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1 lumbo-sacral impairment, less prior awards, if any, and to close the claim
2 as of April 1, 2019.

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4 Dated: August 17, 2020.

5 BOARD OF INDUSTRIAL INSURANCE APPEALS

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8 LINDA L. WILLIAMS, Chairperson

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11 ISABEL A. M. COLE, Member
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**Addendum to Decision and Order
In re Adrian Estrada Ramirez
Docket Nos. 19 16654 & 19 16655
Claim No. AP-49203**

Appearances

Claimant, Adrian Estrada Ramirez, by Crandall O'Neill Imboden & Styve, P.S., per Tom O'Neill
Employer, Timber Technologies, LLC (did not appear)
Department of Labor and Industries, by Office of the Attorney General, per Steve Vinyard

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on April 1, 2020, in which the industrial appeals judge affirmed the Department order dated March 29, 2019, and reversed and remanded the Department order dated April 1, 2019.

Evidentiary Rulings

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.