

IV. MR. WALKER WILL TESTIFY THAT THE REPORTS OF DR. UNSPECIFIED ARE NOT SUBSTANTIAL MEDICAL EVIDENCE PER ESCOBEDO AND BLACKLEDGE.

A. APPEALS BOARD *EN BANC* DECISIONS ARE BINDING PRECEDENT ON WORKERS' COMPENSATION JUDGES.

The Appeals Board's *en banc* decisions are binding precedent on all Appeals Board panels and Workers' Compensation Judges. (Cal. Code Regs., Tit. 8, Sec. 10341; *City of Long Beach v. WCAB (Garcia)* (2005) 126 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236]; *see also* Govt. Code, Section 11425.60(b).)

In construing a statute, the Appeals Board's fundamental purpose is to determine and effectuate the Legislature's intent. (*DuBois v. WCAB* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286]; *Nickelsberg v. WCAB* (1991) 54 Cal.3d 288, 294 [56 Cal.Comp.Cases 476] *Moyer v. WCAB* (1973) 10 Cal.3d 222, 230 [23 Cal.Comp.Cases 652].)

The best indicator of the Legislature's intent is the clear, unambiguous, and plain meaning of the statutory language. (*Dubois v. WCAB, supra*, 5 Cal.4th at 387-88; *Gaytan v. WCAB* (2003) 109 Cal.App.4th 200, 214 [68 Cal.Comp.Cases 693] ; *Boehm & Associates v. WCAB (Lopez)* (1999) 76 Cal.App.4th 513, 516 [64 Cal.Comp.Cases 1350].) When the statutory language is clear and unambiguous, there is no room for interpretation. The WCAB must simply enforce the statute according to its plain terms. (*DuBois v. WCAB, supra*, 5 Cal.4th at 387; *Atlantic Richfield Co. v. WCAB (Arvizu)* (1982) 31 Cal.3d 715, 726 [47 Cal.Comp.Cases 500] ; *Cal. Ins. Guar. Ass'n. v. WCAB (Karaiskos)* (2004) 116 Cal.App.4th 350, 355 [699 Cal.Comp.Cases 183].) (*Escobedo,*

supra, at 7.)

The Workers' Compensation Appeals Board issued an *en banc* decision in *Escobedo v. WCAB (Marshalls and CNA Insurance Co.)*, GRO 0029816, GRO 0029817 (WCAB, 2005). Therefore, *Escobedo* is binding precedent upon all Workers' Compensation Judges.

B. *ESCOBEDO* ESTABLISHES THAT ANY DECISION OF THE WCAB MUST BE SUPPORTED BY SUBSTANTIAL EVIDENCE.

In *Escobedo, supra*, the WCAB stated: "...it is well established that any decision of the WCAB must be supported by substantial evidence. (Lab. Code, Sec 5952(d); *Lamb v. WCAB* (1974) 11 Cal.3d 274, 281 [30 Cal.Comp.Cases 310] ; *Garza v. WCAB* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500] ; *LeVesque v. WCAB* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16.]) (*Escobedo, supra*, at 19.)

Escobedo lays out the criteria for a medical report to satisfy the requirements to be "substantial medical evidence":

1. Predicated on reasonable medical probability. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968), 69 Cal.2d 408, 413, 416-419 [33 Cal.Comp.Cases 660]; *Travelers Ins. Co. v. IAC (Odello)*(1949) 33 Cal.2d 685, 687-88 [14 Cal.Comp.Cases 54]; *Rosas v. WCAB* (1993) 16 Cal.App.4th 1692, 1700-02, 1705 [58 Cal.Comp.Cases 313.]
2. Must be based on facts which are germane;
3. Must be based on adequate medical histories and examinations;
4. Must be based on correct legal theories;
5. Must not be based on surmise, speculation, conjecture, or guess;
6. Must set forth the reasoning behind the physician's opinion, not merely his or her conclusions.

and

(*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525]; *Zemke v. Workmen's Comp. Appeals Bd.*, *supra*, 68 Cal.2d at p. 798; *Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal. 2d 399, 407 (a mere legal conclusion does not furnish a basis for a finding); *Zemke v. Workmen's Comp. Appeals Bd.*, 68 Cal.2d at pp. 799, 800-801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence); *see also People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 (the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based).

Escobedo at 20.

C. *BLACKLEDGE* ESTABLISHES THAT A MEDICAL REPORT MUST COMPORT WITH THE *AMA GUIDES* TO BE SUBSTANTIAL EVIDENCE ON ASSESSING AN EMPLOYEE'S WHOLE PERSON IMPAIRMENT PERCENTAGE.

In a second *en banc* decision, *Blackledge v. Bank of America and Ace Ins. Co.*,

ADJ1735018 (LBO 0375311) (WCAB, 2010), the Workers' Compensation Appeals Board noted that the role of the physician in evaluating permanent impairment under the *AMA Guides to the Evaluation of Permanent Impairment [Fifth Edition]*, is to: "...assess the injured employee's whole person impairment percentage(s) by a report that sets forth facts and reasoning to support its conclusions and that comports with the *AMA Guides* and case law. *Id.* at 1-2. As noted by the WCAB in *Blackledge, supra*, "...the physician compares the medical findings for each condition with the impairment criteria listed within the *Guides* and then calculates the appropriate impairment rating(s) for the

conditions(s). (*The AMA Guides to the Evaluation of Permanent Impairment [Fifth Edition]*, Section 2.6b at 22; see also Sections 2.5, 2.6c.1, 2.6c.2 at 19-22.) *Blackledge* at 8.

In order for a physician's opinion on Whole Person Impairment to constitute substantial evidence, it must comport with *The AMA Guides [Fifth Edition.] Blackledge* at 8. When a physician evaluates an injured employee's Whole Person Impairment(s), the physician must explain how he or she arrived at the Whole Person Impairment(s) so that the parties and the WCAB can determine whether the Whole Person Impairment(s) are consistent with *The AMA Guides. Id.* at 9. If errors are identified in the physician's report, as noted in *Blackledge*, the parties normally seek "... a clarifying supplemental report or depose the physician. (Lab. Code Sec. 5502.5; Cal. Code Regs, tit. 8, Sections 10243, 10353(b).)" *Blackledge* at 15.

D. BLACKLEDGE ESTABLISHES THAT THE PHYSICIAN MUST COMPARE THE SPECIFIED FINDINGS FOR AN AMA RATING TO DETERMINE IF ALL ARE PRESENT AND "SATISFIED" BY THE PATIENT FOR A PERMANENT IMPAIRMENT RATING TO BE GIVEN. BLACKLEDGE NOTED THAT IT IS THE WORKERS' COMPENSATION JUDGE'S DUTY TO DETERMINE WHETHER OR NOT ALL OF THE AMA GUIDES' STANDARDS FOR AN IMPAIRMENT RATING ARE PRESENT.

In *Blackledge*, the WCAB specifically discussed the criteria for an AMA rating, referring to the pages and Tables in *The AMA Guides* listing the necessary findings for a DRE II rating of the spine, listing the findings needed to be present and "satisfied" for a permanent impairment rating to be given, and concluding that the medical reports contained "ambiguities" regarding whether or not the specified findings were present . The Workers' Compensation Appeals Board then remanded the matter to the Workers'

Compensation Judge to resolve the apparent ambiguities. *Id.* at 20. The WCAB noted that it was a workers' compensation judge's job to determine whether or not all of the AMA Guides standards for a rating are present. *Id.* at 21.

In *Zemke v. WCAB*, 68 Cal.2d 794 (1968), the Workers' Compensation Appeals Board noted that, if a determination by the Workers' Compensation judge was not supported by substantial evidence and was based upon an error of law, the WCAB must annul the order. *Id.* at 794. The Board must rely on expert medical opinion but, if an expert's opinion does not rest upon relevant facts or assumes an incorrect legal theory, then it cannot constitute substantial evidence upon which the Board may base a finding. *Owings v. IAC* (1948) 31 Cal. 2d 689, 692-93 (192 P.2d 1]; *West v. IAC* (1947) 79 Cal.Ap.2d 711, 716-20 [1890 P.2d 972). *Zemke* at 797.

As the WCAB stated in *Zemke*:

We have also said that the W.C.A.B. is not entitled to rely on medical reports which it knows to be erroneous. (*McCoy v. Industrial Accident Com.* (1966) 64 Cal.2d 82, 92 [48 Cal.Rptr. 858, 410 P.2d 362])...A medical report predicated upon an incorrect legal theory and devoid of relevant factual basis, as well as a medical opinion extended beyond the range of the physician's expertise, cannot rise to a higher level than its own inadequate premises.

Zemke at 801.

1. ***The AMA Guides, Fifth Edition*, at p. 496, establish that 8 or more signs must be present for a finding of CRPS. Dr. Unspecified specifically noted this at p. 11 of his report of 8/22/11. Therefore, he noted the specific findings required for the AMA rating. However, he failed to note that 8 of such findings were required by p. 496 for a diagnosis of CRPS and resulting impairment rating.**

Mr. Walker will testify that Dr. Unspecified failed to identify the correct findings necessary for a diagnosis of CRPS and subsequent impairment rating as required of him by *Blackledge*.

2. Mr. Walker will testify that Dr. Unspecified did not report that 8 or more of the specified signs were present in this patient.

- a) In his discussion, he contended that 6 signs were present. (*See* rpt. of 8/22/11 at 11.)
- b) In his physical examination, he only reported 4 signs present. (*See id.* at 4.)
- c) Under either the discussion or physical examination, he failed to report that 8 or more signs were present as required by p. 496 of *The Guides* and as required by *Blackledge*. Therefore, his report does not constitute substantial evidence per *Escobedo* and *Blackledge*.

3. Mr. Walker will testify that Dr. Unspecified did not meet the criteria for an AMA rating under *Williams, supra*.

As this Court will see from review of Dr. Witzcak's report of September 1, 2012, at page 2, Dr. Unspecified provides no evaluation of the Applicant's impairment of function

in performing activities of daily living as required by *Williams*. He states, in total:

The patient is observed performing very limited activities with her dominant right upper extremity. She holds her arm at her side and is seen using it for minor assistive activities. According to Table 13-22, this would place her in Class three, giving her a whole person impairment of 39%.

(Rpt. of Dr. Unspecified of 9/1/12 at 2.)

Mr. Walker will testify that *The AMA Guides, Fifth Edition*, list relevant Activities of Daily Living for an impairment rating at page 4, as follows:

Table 1-2 Activities of Daily Living Commonly Measured in Activities of Daily Living (ADL) and Instrumental Activities of Daily Living (IADL) Scales.

| Activity | Example |
|-----------------|----------------|
|-----------------|----------------|

| | |
|--------------------------------|--|
| Self-care, personal hygiene | Urinating, defecating, brushing teeth, combing hair, bathing, dressing oneself, eating |
| Communication | Writing, typing, seeing, hearing, speaking |
| Physical activity | Standing, sitting, reclining, walking, climbing stairs |
| Sensory function | Hearing, seeing, tactile feeling, tasting, smelling |
| Nonspecialized hand activities | Grasping, lifting, tactile discrimination |
| Travel | Riding, driving, flying |
| Sexual function | Orgasm, ejaculation, lubrication, erection |
| Sleep | Restful, nocturnal sleep pattern |

The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Mr. Walker will testify:

1. Dr. Unspecified provides no comments on ability to perform ADL's of self-care, personal hygiene; communication; physical activity; sensory function; travel, sexual function, or sleep.

2. The relevant inquiries for nonspecialized hand activities are grasping, lifting, and tactile discrimination. Dr. Unspecified provides no comments regarding grasping, lifting, or tactile discrimination.

3. Under Table 13-22, the criteria for the dominant upper extremity is: "Individual can use the involved extremity but has difficulty with self-care activities." *Id.* at p. 343, Table 13-22. Dr. Unspecified fails to provide any information that the Applicant has difficulty with self-care activities. Therefore, Dr. Unspecified's rating does not meet the criteria detailed on page 343 of *The AMA Guides, Fifth Edition*, Table

13-22. Mr. Walker will testify that, therefore, Dr. Unspecified's report does not meet the criteria of *Williams*, noted above, or Table 13-22 of *The AMA Guides, Fifth Edition*.

In *Asim v. East Bay Municipal Utilities District*, Case no> ADJ6713393, ADJ7568222, decided February 11, 2013, a Panel of Commissioners Sweeney, Lowe, and Caplane, disallowed a QME's impairment rating because she did not discuss applicant's impairment in relation to her activities of daily living. *Id.* at 4.

**with
within** 4. **Further, in his AMA rating, Dr. Unspecified failed to comply pages 4 and 5 of the Guides in order to place the patient a class for impairment rating. As such, his report failed to apply the correct legal standard and is not substantial medical evidence.**

Dr. Unspecified placed the Applicant in Class 3, 39% WPI [Table 13-22], per p. 2 of his report of 9/1/12. (Rpt. of 9/1/12 at 2.)

Table 13-22 of the *Guides* provides impairment from 25% WPI to 39% WPI for the dominant extremity. (See *AMA Guides [Fifth Edition]* at p. 343.)

Page 5 of the *Guides* indicates: "Using the impairment criteria within a class and knowing the activities the individual can perform, the physician can estimate where the individual stands within that class." (*Id.* at 5.) Page 5 also notes that Table 1-2 [Activities of Daily Living] can help to determine how significantly the impairment impacts these activities.

Table 1-2, p. 4 of the *Guides*, lists 8 areas of Activities of Daily Living to be considered per page 5 in placing an Applicant within an impairment class. Those 8 Areas of Activities of Daily Living are:

1. Self-care, personal hygiene

2. Communication
3. Physical activity
4. Sensory function
5. Nonspecialized hand activities
6. Travel
7. Sexual function
8. Sleep.

Dr. Unspecified's report of 9/1/12 contains NO information on which
of
the Activities of Daily Living are affected by the alleged CRPS. Therefore, he fails to comply with page 5 of the *Guides* which indicates that placement within a class is based upon the impact on the 8 areas of Activities of Daily Living listed in Table 1-2 of the *Guides*.

As such, Dr. Unspecified's report of 9/1/12 fails to correctly apply the legal standard of the *AMA Guides, Fifth Edition*, at pages 4 and 5 and, as a result, applies an incorrect legal theory and is, therefore, not substantial medical evidence under *Escobedo*.