

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

<p><i>Applicant,</i></p> <p>vs.</p> <p>TRANSPORTATION</p> <p><i>Defendant.</i></p>

Case Nos.

JOINT FINDINGS AND AWARD

The above-entitled matter having been heard and regularly submitted, the Honorable Eugene Gogerman, Workers' Compensation Judge, now decides as follows:

STIPULATED FACTS

1. Applicant _____ 1954, while employed as a bus driver (Occupational Group 250) in San Rafael, California, by defendant _____ **TRANSPORTATION** _____ sustained injury, arising out of and occurring in the course of his employment, to his shoulders on June 28, 2015 _____ and to his feet during the period ending December 31, 2014 _____
2. At all relevant times, defendant _____ **TRANSPORTATION** _____ compensation liability.
3. Applicant has been adequately compensated for all periods of temporary disability in connection with the injuries identified in Stipulated Fact No. 1.
4. At the time of the injuries identified in Stipulated Fact No. 1, applicant's average weekly earnings were _____
5. Both injuries identified in Stipulated Fact No. 1 reached maximum medical improvement on June 15, 2016.

6. Applicant is entitled to reasonable and necessary further medical treatment to cure or relieve from the effects of the injuries identified in Stipulated Fact No. 1.

FINDINGS OF FACT

1. The injury in WCAB _____ has resulted in 9% permanent partial disability.
2. The injury in WCAB _____ has resulted in 10% permanent partial disability.
3. Applicant's attorney is entitled to a fee consisting of 15% of the indemnity awarded herein.

AWARD

In WCAB _____ **AWARD IS MADE** in favor of
against _____ **TRANSPORTATION**
permanent partial disability of 9%, entitling applicant to 27 weeks of disability indemnity, starting June 15, 2016, at the rate of \$290.00 per week, in the total sum of \$7,830.00, less credit to defendant for all sums heretofore paid on account thereof, and less \$1,174.50 payable to LAW OFFICE OF _____ as attorney fees to be commuted from the far end of the award if necessary.

In WCAB _____ **AWARD IS MADE**
_____ **TRANSPORTATION**
permanent partial disability of 10%, entitling applicant to 30.25 weeks of disability indemnity, starting June 15, 2016, at the rate of \$290.00 per week, in the total sum of \$8,772.50, less credit to defendant for all sums heretofore paid on account thereof, and less \$1,315.88 payable

to LAW OFFICE OF
of the award if necessary.

as attorney fees to be commuted from the far end

DATE: March 2, 2018



Eugene Gogerman
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Served by mail on all parties listed on the
Official Address record:
ON: March 5, 2018
BY: A. Paraiso

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBERS:

-vs.-

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: Eugene Gogerman

OPINION ON DECISION

Introduction and Procedural History

The parties to these consolidated cases agreed on all issues except the extent of applicant's permanent disability. In the course of his work as a bus driver for defendant, applicant suffered an admitted specific injury to his shoulders (ADJ) as well as admitted cumulative trauma to his feet (ADJ). As a secondary issue, applicant's attorney seeks a fee from his recovery. At trial, the parties offered three exhibits and the injured worker testified. The matter was subsequently referred to the Disability Evaluation Unit, whose formal rating analyses relative to the two cases were served on the parties with no resulting objection.

Documentary Evidence

There were two joint exhibits and a single defense exhibit; all were admitted without objection.

1. Joint exhibits.

Both joint exhibits contain the findings and opinions of the parties' Agreed Medical Evaluator ("AME"), Dr. Peter Mandell. Exhibit 1 consists of Dr. Mandell's report dated November 9, 2016. Of note, although the caption of the report lists only Case No. _____ (corresponding to the cumulative trauma to the feet), the AME actually discusses both pending claims. He relates applicant's history of developing pain in both feet in late 2014. _____ told Dr. Mandell that, on June 28, 2015, he injured his shoulders while helping a wheelchair-bound passenger onto his bus. As of the time of this examination, applicant described periodic pain in both shoulders and both feet, with minimal or no impact on activities of daily living. He told the AME that he began driving for defendant in 2001 and worked an average of 60 hours per week. The report reflects a thorough physical examination, following which Dr. Mandell finds it medically probable that applicant sustained bilateral metatarsalgia and bilateral shoulder tendinitis as a result of his work. Impairment is first calculated for the shoulders based on loss of motion, yielding 2% whole person impairment ("WPI") for the right shoulder and 3% for the left. The AME then opines that such ratings "are inaccurate, because ... they do not account for strength loss." On this basis, he invokes *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808. Referencing Table 16-32 of the AMA Guides, Dr. Mandell uses applicant's grip strength readings to arrive at WPI values of 12% for each shoulder. He rules out apportionment and determines that both injuries became permanent and stationary on June 15, 2016. He does not find any ratable impairment as to the feet, according to this report.

Joint exhibit 2 is the transcript of Dr. Mandell's deposition, taken on May 12, 2017. Of import to this trial, upon questioning by applicant's counsel, the AME confirmed that applicant suffered Morton's neuromas in addition to the metatarsalgia he diagnosed in the report. Then, addressing impairment for the feet, Dr. Mandell again cited *Guzman, supra*, and turned to Table 17-

33 in the AMA Guides, relating to metatarsal fractures and metatarsalgia. Based on that table, he testified that applicant should be given 3% WPI for each foot.

2. Defendant's exhibit.

Defense exhibit A is a PR-4 report dated June 15, 2016, issued by Vincent Marino, DPM, who most recently treated applicant's foot injury, according to Dr. Mandell. In the PR-4, Dr. Marino attributes applicant's symptoms to repetitive use of pedals at work. The examination findings are all normal. The report reflects a diagnosis of bilateral neuromas and it appears that Dr. Marino did not find any impairment to be warranted. The report is rather short on detail, in that it appears that Dr. Marino simply filled in the PR-4 blanks without much elaboration.

Applicant's Testimony

He injured his shoulders on June 28, 2015, while trying to make space for a wheelchair. He does not recall when he was off work due to this injury. He saw Dr. Mandell, who examined his shoulders. He provided Dr. Mandell with an honest account of his symptoms and the injury. Dr. Mandell used a tool to measure his grip strength in both upper extremities. He gave his best effort while doing this measurement.

Currently, he has difficulty with gripping: both arms sometimes hurt when he has to grip something firmly, left worse than right. He also has shoulder pain when picking things up or pulling at certain angles. Having to lie on one side more than the other has affected his sleep. He does not garden or play guitar as much as before. In his feet, he has had pain between the big toe and the second toe on both sides, off and on, for about two-and-a-half years. He has not seen any doctors for his feet since he last saw Dr. Marino in June 2016.

He is currently working and feels physically capable of doing his job. He does not need restrictions at this time. He is 5'6" tall. Asked whether he is able to select which routes he drives for

defendant, applicant said, "Not entirely. No one does, unless you're number one." Currently, he drives a commuter route between Santa Rosa and San Francisco. The bulk of his driving is on the freeway. Turning the steering wheel on a 900-Series bus like the one he drives requires more force than a passenger car, particularly in an urban environment. Keeping out of harm's way is more difficult in a bus than in a car. He still sometimes has to make room for a wheelchair on the bus, but he does it carefully.

Analysis

1. What is the extent of applicant's permanent disability as to the shoulders?

Having carefully considered Dr. Mandell's report and deposition testimony, along with the rest of the record and applicable legal authority, I am not persuaded that the "strict" AMA Guides-based ratings have been rebutted in favor of the AME's *Guzman* analysis. Put another way, I do not find Dr. Mandell's *Guzman*-based ratings to be substantial medical evidence. Thus, I will adopt the Disability Evaluation Unit's rating based on the loss-of-motion impairment analysis in Dr. Mandell's report.

I have several specific concerns with the proposed *Guzman* ratings. First, I find that the need for rebuttal of the "strict" rating has not been established. Such rebuttal is appropriate in cases that are "complex or extraordinary" (*Guzman, supra*, 187 Cal.App.4th 808, 830). Other than his statement that the "strict" ratings are "inaccurate," Dr. Mandell does not explain whether and why this case falls outside the range of upper extremity disabilities contemplated by Chapter 16 of the AMA Guides, so as to necessitate a departure from the prescribed protocol. In fact, his reliance on grip loss is in direct contradiction with § 16.8a of the AMA Guides and neither his report nor his deposition testimony provides an explanation for this deviation. Also, it is not clear to me why applicant's shoulder injury should be evaluated by looking at his hand grip strength.

Most importantly, I note that Dr. Mandell's calculation of the alleged loss of grip strength is not within the four corners of the AMA Guides because of applicant's age. According to the AME report, he referenced Tables 16-32 and 16-34 to arrive at 12% WPI for each side because applicant's dynamometer readings were over 30% below the expected strength. Indeed, a loss of 31-60% of one's expected grip strength is assigned 20% WPI in Table 16-34. However, those expected strength figures Dr. Mandell is relying on—45.9 kg for the major hand and 43.5 kg for the minor—are appropriate for individuals between 50 and 59 years of age, according to Table 16-32. was born on 1954. Thus, when he saw Dr. Mandell in November 2016, he was 62 years old. There are no average grip strength values provided for individuals over 60. Gauging by the entirety of Table 16-32, it is apparent (and logical) that the authors of the AMA Guides anticipate one's grip strength to diminish with age after age 40. It makes little sense to assume that the strength levels given for individuals in their 50s will simply remain static for the remainder of their lives. In other words, I cannot accept Dr. Mandell's calculation of a 34% loss of grip strength on the right and 31% on the left. I am compelled to reject the resulting *Guzman*-based ratings of 12% WPI for each side.

Moreover, I note that there is no atrophy documented by the AME and the supposed loss of over 30% of expected grip strength seems disproportionate in relation to the rest of applicant's objective examination findings. Also, applicant testified that he has more difficulty gripping with his left hand, yet Dr. Mandell calculated a greater proportional loss of grip strength on the right. Finally, I find it implausible that applicant would have been able to continue driving a bus—which, according to his testimony, requires greater effort to steer than a passenger car—up to 60 hours per week for nearly two years as of the date of this trial in the presence of such substantial loss of strength.

2. What is the extent of applicant's permanent disability as to the feet?

Based on a thorough analysis of the evidence, I find Dr. Mandell's deposition testimony, arriving at a rating of 3% WPI for each foot, to be substantial medical evidence. Therefore, I will adopt the Disability Evaluator's final rating of those factors as well.

In the deposition, applicant's counsel effectively demonstrated that Dr. Mandell omitted the diagnosis of Morton's neuromas from his report, wherein he did not find any ratable impairment for the feet. With the neuromas in mind, I find it reasonable and persuasive that the AME reconsidered applicant's condition and, applying the appropriate table in the Lower Extremities chapter of the AMA Guides, arrived at a ratable impairment value for each foot. Unlike his *Guzman* analysis regarding the shoulders, I am able to follow Dr. Mandell's rationale concerning the foot impairment.

I reject Dr. Marino's finding of no ratable impairment because I find the AME's report and testimony to be much more thorough and better reasoned.

3. Is applicant's attorney entitled to a fee?

In light of the competent and diligent representation provided to the injured worker in connection with this dispute, I find that applicant's counsel is entitled to a fee consisting of 15% of the indemnity being awarded herein.

DATE: March 2, 2018



Eugene Gogerman
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

DIETZ GILMOR SAN FRANCISCO, US Mail
TRANSPORTATION