

1 Law Office of

2  
3 San Francisco, CA 94102

4  
5 BEFORE THE WORKERS' COMPENSATION APPEALS BOARD  
6 OF THE STATE OF CALIFORNIA

7  
8 *Applicant,*

9  
10 *Defendant(s).*

EAMS No:

**PETITION FOR RECONSIDERATION**

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13 Applicant, herein, through his attorney of record, petitions the Workers'  
14 Compensation Appeals Board pursuant to Labor Code section 5900 et seq. for an order granting  
15 reconsideration of the Joint Findings and Award issued on March 2, 2018 in the above entitled case  
16 on the grounds that:

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- 18 1. By the order, decision, or award made and filed by the Honorable Eugene Gogerman,  
19 Workers' Compensation Administrative Law Judge, the appeals board acted without or in  
20 excess of its powers,  
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  - 22 2. That the evidence does not justify the findings of facts, and
  - 23 3. That the findings of fact do not support the order, decision, or award.

24 For the reasons fully explained below, the trial court erred in its Findings of Fact number one,  
25 where the court found that injury in WCAB Case No. resulted in a 9% permanent  
26 partial disability. Applicant agrees with and does not Petition for Reconsideration on Findings of  
27 Fact number two and number three.  
28

1 **BACKGROUND**

2 Applicant, has worked for Transportation as a  
3 bus driver since 2001. In approximately January of 2015, filed a claim alleging the  
4 repetitive application of the gas and break pedals caused a cumulative trauma to both feet. On June  
5 28, 2015, filed a claim alleging a specific injury to his bilateral shoulders when he was  
6 pushing a wheelchair and felt sudden symptoms in his bilateral shoulders.  
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8 Applicant and Defendant agreed to utilize Dr. Peter Mandell as the Agreed Medical Examiner  
9 (AME) for all conditions arising out of the employment with  
10 Transportation.  
11

12 Dr. Mandell issued a report dated November 9, 2016 stating suffered two injuries, a  
13 cumulative trauma to his feet, and a specific injury to his shoulders. Dr. Mandell provided a  
14 combined 5% WPI to both shoulders under the strict reading of the AMA Guides. Dr. Mandell stated  
15 the rating of 5% WPI for the shoulders was inaccurate and therefore, an accurate rating under a  
16 theory of Almaraz/Guzman would be 12% WPI for each upper extremity. Dr. Mandell stated that the  
17 diagnosis for Applicant's foot symptoms was bilateral metatarsalgia which did not qualify for an  
18 impairment rating under the strict AMA Guides criteria. Dr. Mandell found all injuries to be 100%  
19 industrial.  
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21 In deposition, held at Dr. Mandell's office on May 12, 2017, Dr. Mandell corrected his  
22 diagnosis of the bilateral foot pain to Morton's Neuroma. Dr. Mandell stated Morton's Neuroma was  
23 not specifically listed in the AMA Guides and the 0% strict AMA guides rating was not accurate. He  
24 felt that Applicant would be accurately described within Table 17-33, Page 547 of the AMA Guides.  
25 Dr. Mandell stated that in his medically probable opinion, 3% whole person impairment for each foot  
26 was more accurate than 0% for each foot.  
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1 Trial was held before Honorable Workers' Compensation Judge (WCJ), Judge Eugene  
2 Gogerman, on October 16, 2017. At trial, applicant's testimony was taken and medical evidence was  
3 submitted.

4 Judge Gogerman issued a Joint Finding and Award on March 2, 2018. The WCJ agreed that  
5 Applicant sustained two distinct injuries, a specific injury to his bilateral shoulders and a cumulative  
6 trauma to his bilateral feet. However, the WCJ stated, "I am not persuaded that the 'strict' AMA  
7 Guides-based ratings have been rebutted in favor of the AME's Guzman analysis. Put another way I  
8 do not find Dr. Mandell's Guzman-based ratings to be substantial medical evidence. Thus, I will  
9 adopt the Disability Evaluation Unit's rating based on the loss-of-motion impairment analysis in Dr.  
10 Mandell's report."  
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12 The WCJ stated, "I have several specific concerns with the proposed Guzman ratings." Based  
13 on this opinion, Judge Gogerman issued a Joint Finding and Award rejecting the AME's  
14 Almaraz/Guzman analysis, finding the injured worker was only entitled to the strict AMA Guides  
15 rating based on loss of motion, and thus providing only 9% permanent disability to applicant's  
16 bilateral shoulders.  
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18 Applicant Petitions for Reconsideration from the Joint Findings and Award as it is in error.  
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## 20 ISSUES

- 21 1. Whether the WCJ failed to apply the correct legal standard.
- 22 2. Whether the WCJ erred in failing to find applicant had suffered 12% whole person  
23 impairment to each shoulder, and erred in substituting the DEU's rating in the place of  
24 that of the AME, Dr. Mandell, who is a medical expert trained to determine the most  
25 accurate rating.  
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## ARGUMENTS

1. *The judge failed to apply the correct legal standard when considering whether Dr. Mandell's report is substantial medical evidence, and whether the Almaraz/Guzman rating was appropriate.*

The WCJ stated, "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 and extraordinary.' "

The WCJ's analysis provides that a rating by analogy under Almaraz/Guzman is permissible only in complex or extraordinary cases. According to *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal. Comp. Cases 1084 (*Appeals Board en banc opinion*) and *City of Sacramento v. WCAB (Cannon)* (2013) 79 Cal. Comp. Cases 1, this is strictly contradiction of the Sixth District's decision. In fact, the court of appeal states plainly, a case does not have to be "complex" or "extraordinary" for Almaraz-Guzman III to apply: the physician must find the most accurate WPI rating based on his or her clinical judgment, expertise, knowledge, skill and education (*Cannon*). It is well established that Almaraz/Guzman can be applied in any case where the strict AMA Guides rating is inaccurate so long as the evaluator's discussion meets the four prong test.

The test for applying Almaraz/Guzman can be found in *Cramer* wherein the WCAB cited *Guzman III*, "To properly rate using Almaraz/Guzman the doctor is expected to 1) provide a strict rating per the AMA Guides, 2) explain why the strict rating does not accurately reflect the applicant's disability, 3) provide an alternative rating using the four corners of the AMA Guides, and 4) explain why that alternative rating most accurately reflects applicant's level of disability."

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1           Therefore, the WCJ made an error of law and his Findings and Award should be rescinded and  
2 the matter remanded to award applicant the permanent disability based on the accurate rating  
3 provided by the AME, of 12% whole person impairment for each shoulder.  
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6           2. *The record supports use of Dr. Mandell's Almaraz/Guzman rating for the shoulder as a*  
7           *rebuttal to the AMA Guides rating. Dr. Mandell's opinion is substantial medical evidence,*  
8           *and 12% for each shoulder is the most accurate rating for Applicant's admitted, industrial*  
9           *injury.*

10           The medical-legal examiner is required to perform an evaluation of the injured worker and  
11 comment on the issues in dispute. Significant case law exists interpreting of Almaraz/Guzman and  
12 when it can be applied. The doctor is tasked with finding the most accurate rating for an injured  
13 worker. Here, the AME performed an examination and listed his objective and subjective findings of  
14 the applicant's condition. In his upper extremity examination, Dr. Mandell reviewed the range of  
15 motion for both shoulders, elbows, and thumbs. He used a dynamometer to obtain grip testing on  
16 both the left and right extremity. He documented four attempts on each upper extremity and reported  
17 the results in his November 9, 2017 report.  
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20           Dr. Mandell provided a strict AMA Guides rating and explained that applicant would have a 5%  
21 WPI to both shoulders. However, he stated, "Under Guzman, for his shoulders the above-noted  
22 impairment ratings are inaccurate, because while they take into account range of motion, they do not  
23 account for strength loss." Applicant has met his burden because Dr. Mandell provided a strict  
24 analysis rating, stated why it is not accurate, and provided the parties with the accurate rating within  
25 the four corners of the AMA Guides.  
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1           “A medical report must be based upon reasonable medical probability.” *McAllister vs. WCAB*  
2 (1968) 69 Cal.2d 408, 33 Cal. Comp. Cases 660. Substantial evidence means evidence that, if true,  
3 has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence  
4 as a reasonable mind might accept as adequate to support a conclusion. It must be reasonable in  
5 nature, credible, and of solid value. Here, Dr. Mandell’s opinion is more than a speck of evidence.  
6 Dr. Mandell is a board certified orthopedic surgeon. Dr. Mandell is certified to perform QME  
7 evaluations. He performed an evaluation in person, reviewed the medical file, and issued a  
8 comprehensive report. His opinion is based on reasonable medical probability (Exhibit 1, page 8).  
9 Dr. Mandell had an accurate history, was provided a complete medical record, and was the agreed  
10 examiner for the parties. Therefore, Dr. Mandell’s opinion is substantial medical evidence.  
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12           The parties agreed to use Dr. Mandell as the Agreed Medical Examiner to evaluate the  
13 Applicant’s injuries including, but not limited to, permanent impairment, causation, and periods of  
14 temporary disability. An AME may hold more weight than a QME, since the AME is considered to  
15 be the “opinion of each party’s physician.” See *Green v. WCAB*, (2005) 70 Cal. Comp. Cases 294  
16 (2nd DCA) and *Berry v. WCAB*, (1969) 34 Cal. Comp. Cases 507.). Both parties voluntarily entered  
17 into the agreement to use Dr. Mandell as an AME because of his expertise, skill, and training. In  
18 addition, Dr. Mandell is a well-known physician throughout the community whose opinion is relied  
19 on by both attorneys and judges, and has been relied upon for many years. Without defendant  
20 showing clear error on the part of the doctor or contradictory medical evidence, the defendant is  
21 bound to the doctor’s opinion. The WCJ should always follow an AME unless there is a significant  
22 failure of the report. Moreover, the judge should follow the doctor’s opinion based on Labor Code  
23 3202 for the mandate of liberal construction.  
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1 Of note, the defendant made no objection to the doctor's Almaraz/Guzman rating until the date of  
2 the MSC. He did not previously raise any objections or issues with the applicant's rating, age, or any  
3 other issues regarding the shoulders. Dr. Mandell was deposed and defendant raised no objections  
4 and in fact, asked no questions at the deposition.  
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7 *3. The WCJ erred in providing his own medical opinion in place of a physician.*

8 Per the en banc decision in *Blackledge v. Bank of America (2010)*, 75 Cal. Comp. Cases 613, the  
9 physician's role is, "to assess whole person impairment by a report that sets forth facts and reasoning  
10 to support its conclusions." In any case before the Appeals Board, the doctor should decide whether  
11 a rating is more accurate. The doctor's indication about his preference for a higher rating would  
12 seem sufficient to justify awarding the higher rating as long as it's based on substantial medical  
13 evidence.  
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15 Here, the WCJ stated, "it is not clear to me why applicant's shoulder injury should be evaluated  
16 by looking at his hand grip strength." The AME in the case is a physician and is in a position to  
17 decide how an injury impacts an injured worker's functional ability. If the orthopedic surgeon  
18 believes that the injured worker's impairment can be seen in his loss of grip strength, the judge is not  
19 in a position to substitute his own thoughts in place of that medical opinion.  
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21 WCJ Gogerman states, "In fact, his reliance on grip loss is in direct contradiction with Section  
22 16.8 of the AMA Guides and neither his report nor his deposition testimony provides an explanation  
23 for this deviation." The WCJ does not explain further. However, reviewing Section 16.8 we can find  
24 several statements.  
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26 Under Section 16.8a, Titled "Principles" the AMA Guides state, "When evaluating strength, the  
27 examiner must have good reason to believe the individual has reached maximal medical improvement  
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1 and that the condition is a 'permanent' one as defined in Chapter 1 and the Glossary. Maximum  
2 strength is usually not regained for at least a year after an injury or surgical procedure.... Strength  
3 can only be applied as a measure when a year or more has passed." was injured on June 28,  
4 2015 and Dr. Mandell evaluated him on November 2016, therefore more than a year passed from his  
5 date of injury to the evaluation. The examiner had good reason to believe had reached  
6 maximum medical improvement. Dr. Mandell's Almaraz/Guzman rating is not in contradiction with  
7 this section.  
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9 Further, 16.8 states, "Two methods are used to determine loss of strength in the upper extremity.  
10 Measurements of grip and pinch strength are used to evaluate power weaknesses relating to the  
11 structures in the hand, wrist, or forearm. Manual muscle testing of major groups is used for testing  
12 strength about the elbow and shoulder." If Dr. Mandell had opted to provide a strict AMA Guides  
13 rating, he would likely have had to use manual muscle testing to assess the individual's ability to hold  
14 the joint against resistance. If the rating provided by Dr. Mandell were a strict AMA Guides rating, it  
15 might contradict this section. However, the *Cannon* court quoted and reiterated the Sixth DCA in  
16 Almaraz-Guzman III that Labor Code Section 4660 does not require strict compliance with or  
17 mechanical application of the AMA Guides, and the key in every case is for a treating or evaluating  
18 physician to find the most accurate WPI rating within the four corners of the AMA Guides 5th  
19 Edition (*Cannon, supra*). The purpose of invoking Almaraz/Guzman is for the doctor to find the  
20 accurate rating. The WCJ misinterprets the law to require the injured worker to strictly comply with  
21 the section in the AMA Guides in order to be an accurate rating. As a result, Dr. Mandell's selection  
22 of a similar table, with symptoms the injured worker is suffering from, is a valid use of the chapter  
23 and section under Almaraz/Guzman. Dr. Mandell's opinion on impairment should be the controlling  
24 opinion. The WCJ should not be permitted to substitute his own opinion of medicine in the place of a  
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1 physician or require strict compliance with the AMA Guides even when the doctor uses  
2 Almaraz/Guzman to provide the most accurate rating.

3 WCJ Gogerman instructed the DEU to find a rating based on the strict application of the guides  
4 instead of the AME's opinion. Therefore, the judge erred in providing his own medical opinion and  
5 instructing the DEU to issue a rating based on the inaccurate rating provided by the AME.  
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8 4. *The WCJ erred in his analysis of the grip loss table.*

9 The WCJ wrote that : was 62 years old and that the grip strength values are only provided  
10 for individuals between 50 and 59 years of age. The WCJ states that it is, "apparent (and logical) that  
11 the authors of the AMA Guides anticipate one's grip strength to diminish with age after age 40. It  
12 makes little sense to assume that the strength levels given for individuals in their 50s will simply  
13 remain static for the remainder of their lives." The AME is permitted to use Almaraz/Guzman so  
14 long as he stays within the four corners of the AMA guides. Again, neither the Labor Code nor case  
15 law requires strict compliance with or mechanical application of the AMA Guides. If we do not  
16 permit the AME to find grip strength loss for an individual because they do not fit strictly within the  
17 table, that would negate the ability of the doctor to use tables by analogy. Judge Gogerman's opinion  
18 is even more troublesome because his opinion would effectively mean that no injured worker over  
19 age 59 can suffer ratable grip strength loss, ever.  
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22 Judge Gogerman's statement that it is "apparent (and logical)" is his own version of how to read  
23 the AMA Guides. His opinion is not supported by case law or the Guides and would, in fact, be a re-  
24 writing of what the Guides say. If we review the permanent disability rating schedule, we find that  
25 injured workers who are of advanced age are given higher ratings because the impact on their ability  
26 to work is worse, not better. Therefore, it is not logical or apparent to exclude all workers over age 59  
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1 from having ratable grip strength loss. In *Milpitas* after granting reconsideration of its prior decision  
2 in this matter the Appeals Board clarified and modified the decision to hold in part, when determining  
3 an injured employee's WPI... a physician may utilize any chapter, table, or method in the AMA  
4 Guides that most accurately reflects the injured employee's impairment. Therefore, the courts have  
5 well established their intention for a doctor to be able to use any chapter by analogy without strict  
6 compliance.  
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8 WCJ Gogerman also apparently requires atrophy before finding grip strength loss to be  
9 appropriate. Again, this is not a requirement from the AMA Guides, but the WCJ's own, non-  
10 medical, opinion substituted in the place of a physician and the AMA Guides. Therefore, WCJ  
11 Gogerman's Joint Finding and Award must be rescinded.  
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14 5. *The WCJ erred in discussing applicant's ability to work as a basis to deny permanent*  
15 *impairment.*

16 The WCJ wrote, "I find it implausible that applicant would have been able to continue driving a  
17 bus—which according to his testimony, requires greater effort to steer than a passenger car—up to 60  
18 hours per week for nearly two years as of the date of this trial in the presence of such substantial loss  
19 of strength." We do not agree that it is implausible. The injured worker testified at trial that his  
20 doctor told him the only solution at work would be a "custom bus" and he should "try to cope and  
21 tolerate the pain as best he can if he wants to continue working." Therefore, the injured worker does  
22 have difficulty driving the bus. The statement that the worker can still steer a bus is not indicative of  
23 whether he has grip loss. There is no medical evidence to support the WCJ's conclusion that an  
24 injured worker who can steer a bus does not have grip strength loss. Further, Dr. Mandell, who  
25 evaluated the applicant did not provide permanent work restrictions even though he reported the  
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1 significant loss of grip strength. Again, Dr. Mandell was in the best position to decide whether the  
2 applicant's grip loss meant he could not steer a bus. Dr. Mandell did not feel any work restrictions  
3 were appropriate. As a result, it is inappropriate for the WCJ to state that if applicant can continue  
4 driving a bus, his loss of strength is non-existent.

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7 6. *The WCJ's finding that, "The injury in WCAB Case No. \_\_\_\_\_ has resulted in 10%*  
8 *permanent partial disability" is accurate.*

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10 7. *The WCJ's finding that Applicant's attorney is entitled to a 15% fee is accurate.*  
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13 Wherefore, and based on the above, Applicant is entitled to the accurate rating described in Dr.  
14 Mandell's report and his deposition. This Petition for Reconsideration should be granted and the  
15 WCJ's Findings and Award should be rescinded and the matter remanded back to the WCJ with  
16 instructions to find that applicant is entitled to a permanent disability rating based on 12% whole  
17 person impairment for each shoulder as provided by the AME, Dr. Mandell, and for whatever other  
18 relief is deemed proper to this petitioning party.  
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21 Dated: March 19, 2018.

Respectfully Submitted:

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24 Attorney at Law  
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1 I, \_\_\_\_\_ say that I am the attorney for applicant, \_\_\_\_\_ in the above-entitled action. I  
2 have read the foregoing Petition for Reconsideration and know the contents thereof, and that the same  
3 is true of my own knowledge, except as to the matters which are therein stated upon my information  
4 or belief, and as to those matters that I believe it to be true.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true  
and correct.

5 Executed on March 19, 2018 at San Francisco, California.  
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9 Attorney at Law

10 DWC/WCAB FORM 45 (Page 2) (REV. 3-76)  
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