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9 WORKERS' COMPENSATION APPEALS BOARD
10 STATE OF CALIFORNIA

11	_____)	EAMS NO.:
12)	
13	Applicant,)	VENUE: SFO
14	vs.)	
15	TRANSPORTATION)	DEFENDANT'S ANSWER TO
16)	PETITION FOR RECONSIDERATION
17)	
18	Defendants.)	

19 TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

20 COMES NOW the Defendant, by and through its counsel of record, and Answers the Petition
21 for Reconsideration filed by applicant on the grounds that:

- 22 1. That by the Order, Decision or Award filed by the Hon. Eugene Gogerman, the Appeals
23 Board acted in keeping with its powers and duties,
- 24 2. That the evidence fully justifies the Findings of facts, and
- 25 3. The Findings of Fact support the Order, Decision or Award.

26 For the reasons fully explained below, the Trial court was fully justified in its finding of fact
27 number one, wherein it did not permit, or find justified, the rebuttal of the strict AMA Guides
28 permanent disability award of 9%.

1 I.

2 **FACTUAL BACKGROUND**

3 Doctor Mandell's report and deposition are the basis for the fight here. In his 11/9/16 report
4 (Joint Exhibit 1, at pages 3 to 4), Doctor Mandell set forth his shoulder evaluation.

5 There is no indication that Doctor Mandell did any manual muscle testing of the shoulders.

6 Doctor Mandell finds there **was** bilateral pain in shoulder movement. This is further confirmed
7 by Doctor Mandell at his deposition on 5/12/97 (Joint Exhibit 2, page 12: lines 24-25, page 13: lines 1-
8 18) where Doctor Mandell confirmed that the Applicant had pain in his bilateral shoulders.

9 Doctor Mandell found decreased range of motion in each shoulder. (Joint Exhibit 2 page 13:
10 lines 10 through 18.)

11 Doctor Mandell gives no explanation of the circumstances surrounding the administration of
12 the grip loss testing he did. (See joint Exhibit 1 at page 4.) He does, however, confirm that the
13 applicant is 5'6" tall. (Joint Exhibit 1 at page 3; confirmed by applicant's trial testimony (Amended
14 Minutes of Hearing and Summary of Evidence of trial 10/16/17 a.m. session, at page 5 line 8.)

15 II

16 **CONTENTIONS**

17 **The WCJ applied the correct legal standards in finding Doctor Mandell's**
18 **Almaraz/Guzman discussion unsupported due to his failure to properly defend,**
19 **which made the strict AMA guides rating appropriate to follow, as there was no**
proper rebuttal.

20 II ARUGMENT

21 **Doctor Mandell's report cannot be followed where it contradicts basic AME**
22 **assessment principles in striving to find support for improper Almaraz/Guzman**
23 **ratings on the shoulders.**

24 Basic rating concepts under the AMA guides prohibit rating strength in the presence of
25 decreased range of motion or painful conditions. (AMA guides section 16.8a) had both.
26 Doctor Mandell's effort to rate strength loss in such a situation is improper. The Court's rejection of
27 the attempt to go beyond what is permitted under the Guides is fully justified.

1 Doctor Mandell did no manual muscle testing. (Joint Exhibit 1 pages 3 to 4). Even assuming
2 that there was an absence of pain and motion loss here, Doctor Mandell could still not go to strength
3 under the AMA guides unless he did manual muscle testing. (AMA Guides section 16.8c.) Doctor
4 Mandell's effort to use grip strength is thus in direct contravention of the AMA Guides and Judge
5 Gogerman was right to prohibit it. Swarts v. Cadence Design 2012 Cal. Wrk. Comp P. D. Lexis 442
6 (rating must be based on and consistent with the AMA Guides).

7 There was no explanation of how the grip loss testing was done. The absence of such an
8 explanation requires that any findings regarding it be rejected as unsupported. Velasco v. County of
9 Santa Barbara Probation 2012 Cal. Wrk. Comp P. D. Lexis 161; Barajas v. Fresno USD 2012 Cal.
10 Wrk. Comp P. D. Lexis 7.

11 AMA Guides section 16.8b provide that the generally accepted position for measurements is
12 for the individual "to be seated with her back against the chair and feet flat on the floor with the arms
13 set just so." is only 5'6" tall. If he were sitting on an exam table, he would not have his feet
14 touch the floor, rendering any testing done improper and invalid.

15 Moreover, grip strength is not available to rate shoulder disability. AMA guides section 16.8b;
16 LLanez v. Diamond Holdings of California 2012 Cal. Wrk. Comp P. D. Lexis 474 (AME's use of
17 strength chart without adequate explanation rejected as strength may not be utilized in face of pain).

18 Despite all these deficiencies in his examination, Doctor Mandell simply makes the conclusion
19 that the range of motion assessment was not accurate as it did not include strength. There was
20 absolutely no explanation of the how and why for this conclusion. Neither was there any explanation
21 of how the doctor felt it was appropriate to dismiss the AMA Guides rating principles that strength
22 cannot be used in the presence of decreased motion and pain. Llanez, supra; Swarts, supra.

23 Doctor Mandell's utter failure to explain the how and why of why he seeks to invoke Almaraz /
24 Guzman falls flatly within the prohibitions of Gomez v. Castle and Cooke, Inc., et. al. (2012) 77 CCC
25 86, 891 – 92, quoting Blackledge v. the Bank of America (2010) 75 CCC 613 (en banc). There is no
26 substantial evidence here to support Doctor Mandell's Almaraz / Guzman's quest. Judge Gogerman
27 was absolutely proper to reject the effect.

1 Wherefore, Defendant seeks dismissal of the Petition for Reconsideration as it is unjustified on
2 the facts and law surrounding this matter.

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Dated: March 26, 2018

Respectfully submitted,
DIETZ, GILMOR & CHAZEN

By: _____
Carl Taber
Attorneys for Defendants

1 VERIFICATION

2 I, the undersigned, declare as follows:

3 I am the attorney of record for the Defendant, in the above-entitled action; I have read the
4 foregoing “**Defendant’s Answer to Petition for Reconsideration**” and know the contents
5 thereof. The same is true of my own knowledge, except as to the matters which are therein
6 stated upon information and belief, and as to those matters, I believe it to be true.
7

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

10 DATED: March 26, 2018

DIETZ, GILMOR & CHAZEN

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12 By _____
13 CAR TABER
14 Attorneys for Defendants
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