STATE OF CALIFORNIA

WORKERS' COMPENSATION APPEALS BOARD

Applicant, v. **TRANSPORTATION** *Defendant.*	Case Nos. **Report and Recommendation on Petition for Reconsideration**

INTRODUCTION

Applicant seeks reconsideration of my Joint Findings and Award, issued on March 2, 2018. Therein, I found that his admitted bilateral shoulder injury in WCAB Case No. resulted in 9% permanent partial disability, while his admitted bilateral foot injury in resulted in 10% permanent partial disability. I awarded indemnity accordingly, including attorney fees. In the petition for reconsideration, applicant does not raise any contentions relating to As to he asserts that, in arriving at 9% permanent partial disability, I acted without or in excess of the Appeals Board's powers, that the evidence does not justify the finding of 9% permanent partial disability, and that the findings of fact do not support the award of 9% permanent partial disability.

Applicant's petition is timely and verified. Defendant has filed an answer.

FACTS

1. *Procedural background.*

As noted above, this matter is comprised of two consolidated cases, each arising from an admitted industrial injury caused by applicant's employment as a bus driver for defendant. The specific injury in (master file) was to applicant's shoulders, while the cumulative trauma in was to his feet. By the time of trial, the parties' only dispute had to do with the level of permanent disability caused by the two injuries.

2. *Trial and decision.*

At trial, applicant contended that Agreed Medical Evaluator ("AME") Peter Mandell, M.D., effectively rebutted the "strict" AMA Guides-based impairment ratings within the meaning of *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (Guzman) (2010) 187 Cal.App.4th 808. Defendant disputed the sufficiency of the higher *Guzman*-based rating for the shoulders and, as to the feet, argued that applicant has no ratable impairment, in accordance with the primary treating physician's report and the AME's original findings. The record at trial was limited to three exhibits and the testimony of the injured worker. The exhibits, consisting of one AME report, the transcript of the AME's deposition, and a PR-4 from applicant's treating podiatrist in were summarized at pp. 2-3 of my March 5, 2018, Opinion on Decision (EAMS Document ID No. 66374142). Relevant to this Report, I noted that, in the initial report, Dr. Mandell arrived at shoulder impairment ratings of 2% on the right and 3% on the left under a strict application of the AMA Guides. However, he went on to provide a 12% rating for each shoulder under *Guzman, supra*. As to the feet, he did not find any ratable

impairment in the report, but when questioned by applicant's counsel in deposition, he agreed that a 3% rating was warranted on each side, pursuant to *Guzman*. The treating podiatrist, for his part, completed a form PR-4 finding industrial injury but no impairment. Applicant's trial testimony was relatively succinct and is summarized on pp. 3-4 of my Opinion on Decision. There were no other witnesses.

After the record was closed, I referred the matter to the Disability Evaluation Unit for formal rating analyses (EAMS Document ID No. 65613584), which did not give rise to any objections from the parties.

Having thoroughly reviewed the evidence, I concluded that Dr. Mandell's *Guzman*-based impairment opinion regarding the shoulders did not rise to the level of substantial medical evidence. Consequently, I found permanent partial disability in accordance with his "strict" impairment findings. As to the feet, however, I was persuaded by the AME's deposition testimony. Therefore, I rejected the treating physician's findings, as well as the AME's earlier report, and found disability based on the impairment outlined in Dr. Mandell's deposition transcript. Finally, I awarded applicant's attorney a fee of 15% of her client's indemnity.

3. *Contentions on reconsideration.*

As noted above, petitioner's contentions are limited to Specifically, he argues that (1) I relied on an incorrect legal standard to reject Dr. Mandell's *Guzman* ratings, and (2) the AME's *Guzman* ratings should have been adopted as the most accurate.

DISCUSSION

1. *Rebuttal of the "strict" ratings was not justified under either the "complex and extraordinary" standard in* Guzman, supra, *or the four-prong test espoused by petitioner.*

As his first argument, applicant asserts that I erred in rejecting the *Guzman* ratings for lack of evidence that this case is "complex and extraordinary," the phrase used by the Sixth District Court of Appeal in *Guzman, supra*, 187 Cal.App.4th 808. In support of this position, applicant cites *City of Sacramento v. Workers' Comp. Appeals Bd.* (Cannon) (2013) 79 Cal.Comp.Cases 1, as well as the four-prong test set forth in *Cramer v. County of Sonoma* (2016) 2016 Cal.Wrk.Comp.P.D.LEXIS 87. This argument fails for two reasons. First, the Third District Court of Appeal in *Cannon* did not overrule *Guzman*, but rather offered its interpretation of the "complex and extraordinary" language. The latter opinion still includes this limitation on cases where the medical evaluator may "resort[] to comparable conditions described in the Guides" to arrive at the most accurate rating. *Guzman, supra*, 187 Cal.App.4th at 830.

More importantly, even when the broader four-prong test set forth by the Appeals Board in *Cramer, supra*, is applied to the medical evidence in this case, rebuttal of the Guides-based rating still cannot be found.

> 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.

Cramer, supra, 2016 Cal.Wrk.Comp.P.D.LEXIS 87, *8. Here, for the reasons discussed in detail below, I found that the third element has not been shown. However, to applicant's first point, the

AME also did not explain why the AMA Guides-based ratings are inaccurate or why the alternative ratings are accurate. The AME report contains the following justification for Dr. Mandell's decision to depart from the Guides-based ratings: "Under *Guzman* ... the above-noted impairment ratings are inaccurate, because, while they take into account range of motion, they do not account for strength loss" (joint exhibit 1 at p. 8). This statement is conclusory and does not constitute an explanation as to why grip strength loss is a more accurate measure of shoulder impairment than loss of shoulder motion.

2. *The AME's* Guzman *impairment analysis is not within the four corners of the Guides.*

As mentioned above, regardless of whether rebuttal of the "strict" ratings is deemed appropriate, the substance of Dr. Mandell's *Guzman* analysis is not within the four corners of the AMA Guides and, as a result, his *Guzman*-based ratings are not substantial medical evidence. First, although petitioner contends that I improperly substituted my own lay opinion when I questioned the appropriateness of using grip strength to evaluate shoulder impairment, that was no mere conjecture on my part. The AMA Guides make it expressly clear that shoulder strength should not be evaluated through grip measurements. "Measurements of grip and pinch strength are used to evaluate power weaknesses relating to the structures in the hand, wrist, or forearm. Manual muscle testing of major groups is used for testing strength about the elbow and shoulder." AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, at § 16a (see also AMA Guides, Table 16-35). Here, Dr. Mandell diagnosed applicant with bilateral shoulder tendinitis and did not identify any injury to the hands, wrists, or forearms (joint exhibit 1 at p.6). However, the only strength measurements he obtained were dynamometer readings of grip

strength (see joint exhibit 1 at pp. 3-4). The AME's decision to use grip strength readings for a purpose that is expressly proscribed in the AMA Guides cannot be said to fall within the four corners thereof.

Furthermore, as pointed out in my Opinion on Decision, Dr. Mandell calculated applicant's purported loss of grip strength based on incorrect expected values.

> 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.
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> 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.

Opinion on Decision at p. 5. Applicant's portrayal of my analysis as my "own version of how to read the AMA Guides" is without basis. It is plain that the expected grip strength table does not provide data for individuals over 59 years old. Dr. Mandell gives no explanation for his decision to use the expected values for 50-59-year-olds to gauge a 62-year-old individual's grip strength. Considering the percentages of strength loss he computed (34% and 31%), as well as the fact that an individual with less than 30% strength loss would no longer qualify for a 12% whole person impairment, the AME's analysis is not persuasive.

3. *Other evidence showed that the* Guzman*-based grip strength ratings are unreliable.*

In addition to my concerns with Dr. Mandell's use of the grip strength measurements to evaluate applicant's shoulder impairment, I discussed in the Opinion on Decision other aspects of the record that caused me to reject the AME's proposed alternative ratings.

> 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.

Opinion on Decision at p. 5. Applicant has not offered any facts to rebut these findings.

RECOMMENDATION

For the foregoing reasons, I recommend that applicant's Petition for Reconsideration, filed herein on March 20, 2018, be denied.

DATED: April 4, 2018

Eugene Gogerman
Workers' Compensation Judge
Workers' Compensation Appeals Board

The Report and Recommendation on Petition for Reconsideration was filed and served on all parties listed in the Official Address Record.

Date: April 4, 2018
By: Amy Tang