

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

L.B. BALTRIP, *Applicant*

vs.

**AC TRANSIT DISTRICT, Permissibly Self-Insured;
Adjusted by ATHENS ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ8635472
Oakland District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.¹

In the Findings and Award of June 17, 2021, the Workers' Compensation Administrative Law Judge ("WCJ") found that during a period of cumulative trauma ending August 7, 2012, applicant, while employed as a bus driver by AC Transit, permissibly self-insured, sustained industrial injury to his bilateral upper extremities, causing permanent and total disability.

Defendant filed a timely petition for reconsideration of the WCJ's decision. Defendant contends that the WCJ issued erroneous rating instructions, which improperly led the Disability Evaluator to recommend an excessive rating of 97% permanent disability. Defendant further contends that the vocational opinion of applicant's expert, Mr. Frank Diaz, does not justify a finding of permanent and total disability pursuant to Labor Code section 4662(b) and *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587], that applicant's impairments should not be added but should be combined under the Combined Values Chart ("CVC"), and that *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 (writ den.) has been overruled by *Department of Corrections &*

¹ Commissioners Marguerite Sweeney and Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated August 30, 2021. Commissioners Sweeney and Lowe are no longer members of the Appeals Board. New panel members have been substituted in their place.

Rehabilitation v. Workers' Comp. Appeals Bd. (Fitzpatrick) (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680].

Applicant filed an answer, which has been considered.

The WCJ submitted a Report and Recommendation ("Report").

We have considered the allegations of defendant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated below and in the WCJ's Report, which we adopt and incorporate to the extent indicated in the attachment to this opinion, we will affirm the Findings and Award of June 17, 2021.²

In affirming the WCJ's decision, we have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the trial witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id.*)

In addition, it is necessary to address in some detail defendant's allegation that the WCJ issued erroneous rating instructions, leading the Disability Evaluator to recommend an excessive rating of 97% permanent disability. Although the WCJ found that applicant sustained 100% permanent disability, not 97%, the WCJ concedes in her Report that she used "the [97%] rating as a guide...to understand the extent of applicant's disability."

Because the WCJ's rating instructions dated April 14, 2021 and the Disability Evaluator's recommended rating dated April 26, 2021 were based on the evaluation of permanent impairment by Dr. Conrad, the Agreed Medical Evaluator ("AME") in orthopedics, we begin our analysis by outlining the permanent impairment found by the doctor under the AMA Guides, as set forth in his report dated January 24, 2017 (pp. 11-12):

In the analysis of impairment, this person has undergone bilateral carpal tunnel and cubital tunnel releases with persistent symptomatology including positive Tinel's signs at the levels of the distal wrist creases. For the carpal tunnel syndrome alone, three scenarios are possible in the analysis of impairment (see page 495). This

² The WCJ is incorrect in stating in her Report that by waiting to object to the WCJ's rating instructions and the Disability Evaluator's recommended rating in its petition for reconsideration, defendant waived the right to raise those objections. There was no waiver because defendant raised the objections and the issue of permanent disability in its petition for reconsideration of the Findings and Award of June 17, 2021. (Lab. Code, § 5904; *Johnson v. Cal. Dept. Corrections and Rehab.* (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 343.)

individual has been diagnosed with CRPS in the past but this diagnosis has never been proven. Scenario two allows 5% upper extremity impairment for residual symptomatology and deficits following carpal tunnel release. This gentleman is entitled to the entire 5% upper extremity for both right and left hands.

There has been no resection arthroplasty of the thumbs but the indications for surgery are, in fact, present. There are limitations in hand and wrist motion which is bilateral. The reader is referred to the Range of Motion Charts for the upper extremities. For the right hand and wrist, you will note that motion deficits allow 9% upper extremity impairment. For the left hand and wrist, motion deficits allow 11% upper extremity impairment. There is an additional deficit in motion and that is adduction of the thumbs bilaterally which is -2 cm (see Table 16-8). A deficit of 2 cm allows 1% thumb impairment (Table 16-8B, page 459). Therefore, 1% thumb impairment is 0% hand impairment which translates to 0% upper extremity-impairment. Accordingly, the minor deficit in motion in the thumbs does not qualify for ratable impairment.

The impairment then for the right wrist is 9% upper extremity impairment on the basis of motion deficits and 5% upper extremity impairment on the basis of page 495 or persistent symptomatology following carpal tunnel release. Using the Combined Values Chart, the combination of 4% and 9% allows 13% upper extremity impairment for the right hand and wrist, and 13% upper extremity impairment converts to 8% whole person impairment. Using traditional methods, then the impairment for the right hand, wrist, elbow, and forearm is 8% WPI.

For the left upper extremity, the motion deficits allow 11% upper extremity impairment. This gentleman is also entitled for 5% upper extremity impairment on the basis of page 495 or persistent carpal tunnel symptoms following carpal tunnel release (there is no similar justification for cubital tunnel syndrome). Using the Combined Values Table, the combination of 11% and 5% allows 15% upper extremity impairment, and 15% upper extremity impairment converts to 9% whole person impairment. Using traditional methods, then, the impairment for the left hand and wrist is 9% WPI.

This gentleman completed an ADL Impact Form and noted difficulties with dressing, brushing his teeth, bathing, combing his hair, and on the right side, writing. He also reported difficulties with touch discrimination. At my interview, he experienced difficulties with opening and closing bottles and even fine manipulation with a tendency to drop objects. The difficulties with dressing and undressing were verified in the examination and difficulties with grasping were also identified as he adapted to compress the dynamometer by resting the device on the table. It is unfortunate that the 9% WPI which is afforded for the left upper extremity, which is non-dominant, and the 8% WPI which is afforded for the right upper extremity, which is dominant, is insufficient and does not reflect this gentleman's loss of function. Accordingly, it becomes necessary to invoke

*Almaraz/Guzman*³], which allows rating within the four corners of the AMA Guides. I have considered the possibility of an additional impairment rating on the basis of grip loss, but careful reading of the qualifications for use of the Strength Loss Index will indicate that this method cannot be used in the presence of pain and restrictions in motion (see page 508). Accordingly, the Strength Loss Index cannot be utilized.

The *Almaraz/Guzman* principles allow rating within the four corners of the AMA Guides. The reader is referred to Table 13-16, page 338. This gentleman qualifies for Class I and is provided the maximum which, for the right upper extremity, is 9% impairment, and for the left upper extremity, 4% whole person impairment. It is not my intention to substitute the *Almaraz/Guzman* rating for the traditional rating but to combine the *Almaraz/Guzman* rating with the regular rating. The combination of 9% WPI for the right upper extremity and 8% WPI for the right wrist allows 16% WPI. The final impairment then for the right dominant extremity is 16% WPI.

Table 13-14 allows 4% upper extremity impairment for the non-dominant extremity. The combination of 9% and 4% allows 13% WPI. The impairment then for the left non-dominant extremity is 13% WPI.

Finally, I am allowed the 3% pain add-on and I will apply the entire 3% pain add-on as follows: 2% to the left upper extremity which is more painful than the right and 1% to the right upper extremity (for justification of pain add-on, please refer to page 573).

In addition to the right and left upper extremity impairments listed above, Dr. Conrad recorded three measurements of applicant's grip strength at 12-11-10 kg right (dominant) and 7-6-7 kg left. Dr. Conrad commented: "Grip strength is diminished bilaterally. It should be mentioned that it was necessary for [applicant] to rest the dynamometer as he compressed [it] in order to avoid pain." (Conrad report dated January 24, 2017, p. 6.)

Based on the above impairments found by Dr. Conrad, the WCJ issued rating instructions and the Disability Evaluator issued a recommended rating as follows:

³ In *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 808, 824 [75 Cal.Comp.Cases 837] ("*Almaraz-Guzman*"), the Court of Appeal stated that application of the AMA Guides to rate impairment must take into account the instructions on their use, which prescribe the exercise of clinical judgment in the impairment evaluation even beyond the descriptions, tables, and percentages provided for each of the listed conditions. Thus, an evaluation of permanent impairment that relies upon a physician's clinical judgement, and that goes beyond a "strict rating" under the descriptions, tables, and percentages provided for each of the conditions expressly categorized in the AMA Guides, is known as an "*Almaraz-Guzman*" rating of permanent impairment.

RECOMMENDED RATING INSTRUCTIONS

[...]

INSTRUCTIONS:

Right upper extremity: 16 WPI add 1 WPI for pain

Left upper extremity: 13 WPI add 2WPI for pain

Add upper extremities

Rate grip if possible:

Right: 12, 11, 10

Left 7, 6, 7

Right hand dominant

[...]

Report of Permanent Disability Based on Instructions as found on page 1:

AS DESCRIBED BY THE WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE.

The recommended rating is 97% amounting to 865.25 weeks of disability payments at the rate of \$270.00 a week in the total sum of \$233,617.50, thereafter a life pension of \$286.04 a week.

FORMULA:

GRIP: 7-6-7 = 6.7 LEFT AND 12-11-10 = 11 RIGHT

LEFT GRIP LOSS: $(43.5 - 6.7) / 43.5 = 84$ SLI = 30 UE = 18 WP

RIGHT GRIP LOSS: $(45.0 - 11) / 45.0 = 76$ SLI = 30 UE = 18 WP

LEFT-ARM - GRIP/PINCH STRENGTH

16.01.04.00 - 18 - [4]22 - 250F - 22 - 29

LEFT-ARM - OTHER

16.01.05.00 - 15 - [5]19 - 250F - 19 - 25

2 WP ADD-ON INCLUDED FOR PAIN

COMBINE (C) - UPPER LEFT

29 C 25 = 47

RIGHT-ARM - GRIP/PINCH STRENGTH

16.01.04.00 - 18 - [4]22 - 250F - 22 - 29

RIGHT-ARM - OTHER
16.01.05.00 - 17 - [5]22 - 250F - 22 - 29
1 WP ADD-ON INCLUDED FOR PAIN

COMBINE (C) – UPPER RIGHT
29 C 29 = 50

50 + 47 = 97 FINAL PD

Returning to defendant's allegation that the above rating instructions and recommended rating of 97% permanent disability are erroneous, we note that the only part of the rating instructions and recommended rating contested by defendant is the inclusion of Dr. Conrad's grip loss measurements. This is because the ratings suggested by defendant on page ten of its petition for reconsideration are based on the same Whole Person Impairments found by Dr. Conrad, exclusive of grip loss, that were included in the WCJ's instructions to the Disability Evaluator: right upper extremity - 16 WPI add 1 WPI for pain; and left upper extremity - 13 WPI add 2 WPI for pain.⁴

However, defendant does take issue with the WCJ's instruction to the Disability Evaluator to incorporate the grip loss measurements within Dr. Conrad's January 24, 2017 report. The WCJ instructed: "Rate grip if possible: Right [dominant]: 12, 11, 10 [and] Left 7, 6, 7." According to the Disability Evaluator, the grip loss aspect of applicant's permanent impairment produced a recommended rating of 29% permanent disability in each upper extremity.

Defendant contends that under the circumstances of this case, the AMA Guides do not authorize the inclusion of permanent impairment based on grip loss.

We disagree. In relevant part, the AMA Guides state at page 508:

16.8a Principles [¶] In a rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the Guides, the loss of strength may be rated separately. An example of this situation would be loss of strength due to a severe muscle tear that healed leaving a palpable muscle defect. If the examiner judges that loss of strength

⁴ Defendant suggests rating formulas of 51% permanent disability if the right and left upper extremity disabilities are added or 45% permanent disability if they are combined on the Combined Values Chart. Although these suggested ratings are sourced in Dr. Conrad's evaluation of permanent impairment (exclusive of grip loss), defendant fails to explain why its suggested ratings without addition or combination – 27% permanent disability in the right upper extremity and 24% in the left – differ from the Disability Evaluator's corresponding ratings of 29% permanent disability in the right upper extremity and 25% in the left. Therefore, we reject defendant's suggested permanent disability ratings.

should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength could be combined with the other impairments, only if based on unrelated etiologic or pathomechanical causes. Otherwise, the impairment ratings based on objective anatomic findings take precedence. Decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (eg, thumb amputation) that prevent effective application of maximal force in the region being evaluated.

[...]

[...] Two methods are used to determine loss of strength in the upper extremity. Measurements of grip and pinch strength are used to evaluate power weaknesses relating to the structures in the hand, wrist, or forearm. [...]

16.8b Grip and Pinch Strength [¶] Tests repeated at intervals during an examination are considered to be reliable if there is less than 20% variation in the readings. If there is more than 20% variation in the readings, one may assume the individual is not exerting full effort. The test is usually repeated three times with each hand at different times during the examination, and the values are recorded and later compared.

In this case, Dr. Conrad's January 24, 2017 report shows that he considered the possibility of an additional impairment rating on the basis of grip loss, but the doctor believed he could not use the Strength Loss Index in the presence of pain and restrictions in motion, citing page 508 of the AMA Guides. As indicated above, the text relied upon by Dr. Conrad states as follows: "Decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (e.g., thumb amputation) that prevent effective application of maximal force in the region being evaluated." (AMA Guides, Chapter 16.8a, p. 508.)

However, we agree with the WCJ that Dr. Conrad was mistaken in believing the AMA Guides precluded the doctor from evaluating impairment in applicant's upper extremities based on the Strength Loss Index. This becomes apparent with careful consideration of Dr. Conrad's measurements and observations. There was minimal variation (less than 20%) in the series of three right and left grip loss measurements recorded by Dr. Conrad (January 24, 2017 report, p. 6), and the AMA Guides state that tests repeated at intervals during an examination are considered to be reliable if there is less than 20% variation in the readings. Though Dr. Conrad commented that applicant had to lay the dynamometer on the table while compressing it to avoid pain, the doctor did not state that pain and/or reduced range of motion gave him reason to believe that the grip loss measurements were inaccurate or invalid. Thus, to the extent applicant had pain or loss of range

of motion in his hands and fingers, this did not “prevent effective application of maximal force in the region being evaluated,” as cautioned by the AMA Guides. Rather, grip strength is an authorized method to assess WPI in “a rare case” (Chapter 16.8a, p. 508) where the medical examiner has determined that an impairing factor “has not been considered adequately” by other methods in the Guides. Such was the case here. According to Dr. Conrad, applicant noted difficulties with dressing, brushing his teeth, bathing, combing his hair, and on the right side, writing. Applicant also reported difficulties with touch discrimination, and when Dr. Conrad interviewed him, applicant stated he experienced difficulties with opening and closing bottles and fine manipulation, with a tendency to drop objects. Dr. Conrad also reported that applicant’s difficulties with dressing and undressing were verified by the doctor’s examination, and as noted before applicant’s difficulties with grasping were evident as he adapted to compress the dynamometer by resting the device on the table. Dr. Conrad then stated that the WPIs for applicant’s right and left upper extremities did not “reflect [applicant’s] loss of function.”

Based on the observations and medical analysis of Dr. Conrad as just described, we conclude that the WCJ did not err by including in her rating instructions the grip loss measurements recorded on page six of Dr. Conrad’s January 24, 2017 report, as well as the doctor’s reference to Tables 16-31, 16-33, and 16-34 in Chapter 16.8b of the AMA Guides, to evaluate applicant’s permanent impairments and to generate a recommended rating of 97% permanent disability. The WCJ’s rating instructions and the recommended rating are based on substantial evidence, and we reject defendant’s allegations to the contrary. (See *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 622 [Appeals Board en banc]: “Formal rating instructions are tentative findings of fact and must be based on substantial medical evidence. When a WCJ instructs a rater to utilize particular WPI ratings, the WCJ has concluded that all of those WPI ratings are based on substantial medical evidence.”)

Defendant next contends that in finding applicant permanently and totally disabled, the WCJ erred in relying on the vocational opinion of applicant’s expert, Mr. Diaz. We do not find merit in this contention. Defendant complains that in his final report of May 29, 2019 (exhibit 103), Dr. Conrad did not review or comment upon the vocational rehabilitation reports of Mr. Diaz and Ms. Stevenson (defendant’s expert), and consequently there is no medical opinion from Dr. Conrad as to whether or not applicant is able to compete in the open labor market. However, Dr. Conrad’s May 29, 2019 report shows that the reason he did not review any vocational rehabilitation

reports is that defense counsel would not agree to it. Under the doctrine of invited error, defendant cannot now complain of Dr. Conrad's failure to review vocational reports because defendant is the reason for that failure. (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1167 (66 Cal.Comp.Cases 1290) [Under said doctrine, a party is estopped from asserting prejudicial error where its own conduct caused or induced the commission of the wrong.].)

Otherwise, we note that Mr. Diaz opined in his report of November 17, 2017 that applicant's amenability to rehabilitation is akin to that of a person returning to work in a sheltered workshop environment, and that even if applicant were to successfully complete a vocational training program he would still be unable to work in any position in the open labor market. (Applicant's exhibit 2, Diaz report dated 11/17/17, p. 37.)⁵

Defendant alleges that Mr. Diaz "employed an invalid methodology that relied on non-industrial factors and disregarded applicant's education and skillset to determine that applicant is not amenable to rehabilitation [,]" that "Mr. Diaz attempted to count jobs available to applicant pre-injury and post-injury to identify a percentile [but] this methodology does not rebut the rating schedule's presumption as to loss of future earning capacity [and] it represents Mr. Diaz' own methodology as to how best to characterize applicant's loss of future earning capacity." (Petition for Reconsideration, p. 7.) However, defendant does not cite any evidence in support of these allegations, which apparently represent defense counsel's personal opinions and do not provide any basis for disturbing the WCJ's reliance upon Mr. Diaz to find applicant permanently and totally disabled. Further, although defendant also claims that Mr. Diaz "relied on applicant's subjective report of pain, which duplicates AME Conrad's medical-legal opinion as to applicant's permanent work restrictions," the fact that Mr. Diaz took Dr. Conrad's medical opinion into account only strengthens Mr. Diaz's opinion that applicant is unable to work in any position in the open labor market.

⁵ On pages 33-34 of his November 17, 2017 report, Mr. Diaz addresses the issue of vocational apportionment, which is legally invalid under the Appeals Board's en banc opinions in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 (2023 Cal. Wrk. Comp. LEXIS 30) [Appeals Board en banc] ("*Nunes I*") and *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 (23 Cal. Wrk. Comp. LEXIS 46) [Appeals Board en banc] ("*Nunes II*"). However, Mr. Diaz's inclusion of vocational apportionment in his report does not invalidate the rest of his vocational opinion because vocational apportionment is irrelevant anyway. This is because the only kind of valid apportionment -medical apportionment - is not an issue in this case.

Defendant also contends that the WCJ should have relied upon the vocational opinion of defendant's expert, Ms. Stevenson, who opined that applicant is employable and amenable to rehabilitation. (Defense exhibit A, Stevenson report dated 4/2/18, pp. 12-13.) However, we agree with the WCJ's reasons for following the opinion of Mr. Diaz rather than Ms. Stevenson, as stated in the WCJ's Report:

Mr. Diaz's report is substantial evidence. He takes an accurate history of injury, employment and disability from the applicant as well as from the medical record. That is not the case for defendant's vocational counsellor. Ms. Stevenson [suggested] clerical work for applicant despite the fact that applicant barely has use of his hands.

Here we observe that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].) By analogy to that principle, we find no error in the WCJ's reliance upon the vocational opinion of Mr. Diaz over that of Ms. Stevenson. (See *Wong v. County of Los Angeles Sheriff's Dept.* (2023) 2023 Cal. Wrk. Comp. P.D. LEXIS 354.)

Finally, defendant relies upon *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd. (Fitzpatrick)* (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680] to contend that the WCJ erred in finding permanent and total disability, and that applicant's disabilities should be combined rather than added to achieve a correct overall rating of permanent disability. In *Fitzpatrick*, the Court of Appeal held that Labor Code section 4662(b) does not provide an independent basis to find permanent and total disability "in accordance with the fact," where the medical record justifies a scheduled rating of less than 100% and the scheduled rating is not rebutted. Here, we find defendant's reliance upon *Fitzpatrick* to be misplaced. This is because here, unlike *Fitzpatrick*, applicant obtained admissible vocational evidence from Mr. Diaz to rebut the scheduled rating. (On page ten of its petition for reconsideration, defendant claims that the scheduled permanent disability rating is either 45 or 51 percent, but as noted before defendant does not explain how it arrived at this rating.)

As for defendant's contention that applicant's disabilities should be combined rather than added, we note that in the recent en banc case *Vigil (Sammy) v. County of Kern* (2024) 89 Cal.Comp.Cases 686, the Appeals Board held that the Combined Values Chart ("CVC") in the Permanent Disability Ratings Schedule ("PDRS") may be rebutted, and impairments may be

added, where the applicant establishes the impact of each impairment on the activities of daily living (ADLs) and either (a) there is no overlap between the effects on ADLs as between the body parts rated, or (b) there is overlap but the overlap increases or amplifies the impact on the overlapping ADLs.

In this case, we already discussed above that the impact of applicant's bilateral upper extremity impairment on his activities of daily living is established by Dr. Conrad's reporting. Further, the Disability Evaluator's recommended rating formulae indicate that she combined and did not add the disabilities within each of applicant's upper extremities. Further, if there is any overlap between the effects on applicant's activities of daily living as between the right and left upper extremities, it increases or amplifies the impact on the overlapping ADLs. Moreover, the issue of whether the formal rating of applicant's permanent disability at 97% resulted from inappropriate addition of disabilities does not change the result here, because the WCJ did not adopt the 97% rating but used it as guide to rely upon Mr. Diaz's opinion to rebut the scheduled rating and to conclude that applicant is permanently and totally disabled.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of June 17, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 4, 2024

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**L.B. BALTRIP
LAW OFFICE OF ARJUNA FARNSWORTH
LAUGHLIN, FALBO, LEVY & MORESI**

JTL/ara

I certify that I affixed the official seal of
the Workers' Compensation Appeals
Board to this original decision on this date.
CS

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Applicant was a long term employee of AC transit. He began his employment as a bus driver in 2001 with the intent to work 20 years. Applicant was forced to take early retirement in 2014 because of injury to his bilateral upper extremities.

The parties agreed to utilize the services of Dr. Conrad as an agreed medical examiner. Dr. Conrad issued several reports addressing applicant's disability level.

Dr. Conrad completed a residual functional capacity form in which he noted the following. In an 8 hour work day applicant can write 1 hour for no more than 21-30 minutes [at a time], can keyboard for 2 hours for no more than 21-30 minutes [at a time], can mouse 2 hours for no more than 21-30 minutes [at a time] and can drive up to an hour. In addition to these restrictions, Dr. Conrad had essentially restricted applicant to no lifting, pushing or pulling more than 10 pounds.

In his permanent and stationary report Dr. Conrad noted the following difficulties with activities of daily living: dressing, brushing teeth, bathing, combing hair, opening and closing bottles. Dr. Conrad stated that applicant had difficulty with touch discrimination, fine manipulation and had a tendency to drop items.

Dr. Conrad stated that the straight AMA guide rating does not correctly addresses applicant's disabilities and notes that he considered rating applicant using a grip loss rating but his understanding was that grip loss ratings would be impermissible.

Although Dr. Conrad stated that in his opinion under the AMA guides he was unable to issue ratings using applicant's grip loss, his report included ratable factors of disability for grip loss which was rated by the disability evaluation unit to 97% permanent disability.

In this case I decided to obtain the rating using the grip loss because of the description provided by Dr. Conrad regarding the impact this injury had on applicant's activities of daily living. There appears to be no aspect of daily living activities that is not impacted by applicant's upper extremity disability. Applicant's testimony at trial that he had to use his teeth to open bottles emphasized further applicant's limitations in simply living.

I requested a formal rating from the disability evaluation unit. The matter was taken out of submission on April 14, 2021 in order to obtain the formal rating.

Formal rating instructions were requested on April 14, 2021 and the formal rating issued on April 26, 2021.

The rating instructions along with the formal rating were served on the parties on May 14, 2021, indicating that the matter would be submitted for decision 12 days after service of the formal rating unless either party objected to the rating.

Since no objections were filed, matter was resubmitted for decision on May 26.

My Findings and Award issued on June 17, 2021, 22 days after the matter was submitted.

Putting together applicant's testimony with Dr. Conrad's medical assessment and Mr. Diaz's finding of non-feasibility, it was my determination that applicant is permanently totally disabled.

Defendant has filed a timely petition for reconsideration from my Findings and Award.

TIMELINESS OF DECISION:

Defendant in its petition for reconsideration implies that my decision was not timely.

This matter proceeded to trial on March 2, 2021. On April 14, 2021, 43 days after the matter was submitted, the matter was taken out of submission so that a formal rating could be obtained.

On April 14, 2021, rating instructions were issued. The formal rating issued on April 26, 2021 and the rating along with my instructions were served on May 14, 2021.

The matter was resubmitted for decision on May 26, 2021 with the final decision issuing within 22 days after resubmission.

My decision was timely issued.

[...]

IS APPLICANT PERMANENTLY AND TOTALLY DISABLED?

Putting together applicant's testimony with Dr. Conrad's medical assessment and Mr. Diaz's finding of non-feasibility, it was my determination that applicant is permanently totally disabled.

Although the agreed medical examiner believed it was not appropriate to issue a final report utilizing the grip loss rating of the applicant, the agreed medical examiner still took grip loss measurements which were ratable factors by the disability evaluation unit.

I did not follow the rating issued by the disability evaluation unit. Had I done this, I would have issued a finding of 97% permanent disability. Rather I used the rating as a guide for me to understand the extent of applicant's disability.

Mr. Diaz in his vocational report mentions that applicant has chosen not to return to the labor market because of his grip loss. Mr. Diaz's report describes in detail the difficulties applicant experienced with his hands while participating in simple [test-taking].

In light of the grip loss rating I [was not persuaded that applicant could return] to the occupations defendant's vocational counsellor, Ms. Stevenson recommends. The occupations Ms. Stevenson discusses in her reports, clerical, office work, customer service work all involve hand usage.

[...]

Applicant was not ready to retire as suggested by defendant's vocational counsellor. Applicant [was] barely able to complete simple testing at Mr. Diaz's office. I [was not persuaded that] applicant could attend vocational retraining classes [given that] he can barely sustain a few hours of test taking on one day.

Mr. Diaz's report is substantial evidence. He takes an accurate history of injury, employment and disability from the applicant as well as from the medical record. That is not the case for defendant's vocational counsellor. Ms. Stevenson [suggested] clerical work for applicant despite the fact that applicant barely has use of his hands.

RECOMMENDATION

I recommend the Petition for Reconsideration filed by defendant be ***DENIED***.

DATE: 08/06/2021

Lilla J Szelenyi
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE