

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

HARLEY MOORE, *Applicant*

vs.

**FREEDOM ROADS, LLC AKA STIER'S RV CENTERS LLC
DBA CAMPING WORLD RV SALES;
ACE AMERICAN INSURANCE COMPANY, ADJUSTED BY
GALLAGHER BASSETT SERVICES, *Defendants***

**Adjudication Number: ADJ14892408
Sacramento District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

The WCJ properly relied upon the opinion of the agreed medical evaluator (AME), who the parties presumably chose because of the AME's expertise and neutrality. The WCJ was presented with no good reason to find the AME's opinion unpersuasive, and we also find none. (See *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 24, 2023

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

**HARLEY MOORE
PACIFIC WORKERS
LAUGHLIN, FALBO, LEVY & MORESI**

AS/mc

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I

<u>Date of Injury:</u>	January 4, 2021
<u>Age on DOI:</u>	39 years old
<u>Occupation:</u>	Support Specialist
<u>Parts of Body Injured:</u>	Low back and bilateral feet
<u>Identity of Petitioners:</u>	Defendant
<u>Timeliness:</u>	Petition was filed timely
<u>Verification:</u>	Petition was verified
<u>Date of Order:</u>	May 30, 2023
<u>Petitioners Contentions:</u>	Defendant contends the WCJ acted without or in excess of their powers by the Order, Decision, or Award, and that the evidence does not justify the Findings of Fact, and that the Findings of Fact do not support the Order, Decision, or Award. Defendant contends the reports of the AME Dr. Peter Mandell are not substantial medical evidence because he did not review later medical records. In addition, Defendant disagrees with Dr. Mandell's findings of permanent disability under <i>Almaraz/Guzman</i> , contending the findings conflict with the AMA Guides, despite specific cites the AMA Guides, and fly in the face of common sense and human anatomy.

II

FACTS

Applicant fell on January 4, 2021, sustaining an accepted injury to the low back and bilateral feet. Eventually, the matter went to trial, and it was found that the occupational group number is 351 for forklift operator, the permanent and stationary date is December 17, 2021, and Defendant is entitled to a credit for temporary disability overpayment of \$2,344.95. Additionally, it was found that Applicant is entitled to a permanent disability award of 96% without apportionment less an attorney fee is 15% of the permanent disability and life pension. Finally, it was found that Defendant is not entitled to an additional QME panel in podiatry. Defendant filed a Petition for Reconsideration.

In the Petition for Reconsideration, Defendant does not discuss or otherwise dispute the findings regarding occupational group number, credit for temporary disability overpayment, and no good cause for an additional QME panel in podiatry. Therefore, these findings are not addressed below in this Report and Recommendation but are part of the Findings and Opinion on Decision.

III

DISCUSSION

Events After Trial

The trial was on May 3, 2023. In the Petition for Reconsideration, Defendant references events occurring after trial. Defendant indicates Applicant saw Dr. Woodcox on June 6, 2023, for a second surgical consultation and appears to be scheduled for a follow up visit. Defendant indicates the report from June 6, 2023, is still pending. These events are not part of the record and should not be considered.

Furthermore, it is unclear if Dr. Woodcox recommends surgery, if Applicant would go forward with surgery, if Defendant would approve surgery, or if surgery would improve the medical condition. In addition, AME Dr. Mandell already considered surgery. The most recent findings by Dr. Mandell are in his report dated November 22, 2022. In that report, Dr. Mandell indicated Applicant might need surgery and recommended a provision be made for surgery as future medical care (Joint Exhibit DD).

Continued Medical Care

In the Petition for Reconsideration, Defendant contends AME Dr. Mandell did not consider subsequent opinions by treating podiatrist Dr. Marino including a surgery recommendation and a normal EMG/NCV study of the feet. A normal study and continued treatment do not refute permanent and stationary status. Furthermore, Dr. Mandell reviewed other studies including negative x-rays of the ankles, a normal MRI of the right ankle, an MRI of the left ankle, and an MRI of the lumbar spine. (Joint Exhibit CC) In addition, Dr. Mandell considered surgery, as discussed above.

Defendant cites portions of the deposition transcript where Dr. Marino addresses permanent and stationary status and diagnoses and disagrees with Dr. Mandell. Of note, Dr. Marino later changes his mind regarding permanent and stationary status. In addition, the fact that Dr. Marino disagrees with Dr. Mandell does not invalidate Dr. Mandell's findings. Furthermore, during his deposition testimony, Dr. Marino also testified that he had only seen Applicant once at that point and mentioned questions he would have for Applicant in a re-evaluation. (Joint Exhibit HH)

PERMANENT AND STATIONARY DATE

Applicant claims a permanent and stationary date of December 17, 2021, based on the finding of AME Dr. Mandell. Defendant claims Applicant is not permanent and stationary based on a finding of treating podiatrist Dr. Marino.

On December 17, 2021, Dr. Mandell performed an AME evaluation and found Applicant to be permanent and stationary. (Joint Exhibit CC) Later, at the re-evaluation on November 11, 2022, Dr. Mandell confirmed the permanent and stationary date of December 17, 2021. (Joint Exhibit DD) On February 22, 2023, Dr. Marino testified during his deposition that Applicant was not permanent and stationary and should receive more treatment first. (Joint Exhibit HH) Subsequently, Dr. Marino saw Applicant for a re-evaluation where he performed a physical exam and reviewed negative nerve studies. At that time, Dr. Marino agreed with Dr. Mandell that Applicant is permanent and stationary. (Joint Exhibit BB)

The record supports a finding that Applicant is permanent and stationary as of December 17, 2021.

PERMANENT DISABILITY AND APPORTIONMENT

Applicant saw Dr. Parkin on March 26, 2021, for bilateral heel pain that began after a fall on January 4, 2021. Applicant complained of pain and numbness with tingling in both heels. Upon exam, Applicant had generalized swelling over the heels with tenderness. He had tenderness over the Achilles tendons bilaterally and pain with flexion and extension of the feet but good range of motion. X-rays of the ankles showed no fracture, no significant degenerative joint disease, and no bony abnormality. Dr. Parkin provided gel heel cushions, recommended sedentary work only, ordered MRIs of the bilateral feet, discouraged long periods of walking, prescribed a wheelchair to minimize time on the feet, and provided Applicant with a handicap sticker for parking. (Applicant Exhibit 1)

Applicant saw Dr. Poon on July 9, 2021, for low back pain with bilateral heel pain. Upon exam, Applicant had tenderness over the lumbosacral spine and paraspinal muscles, reduced lumbar range of motion, and mild lumbar muscle atrophy. Dr. Poon also found decreased sensation to bilateral feet corresponding with L5-S1 dermatome, tenderness of the bilateral heels, decreased right ankle range of motion, bilateral ankle tenderness, a right heel spur, positive bilateral Achilles squeeze mechanism, and numbness at the sole of both feet. Dr. Poon diagnosed Applicant with a low back strain involving the muscle, fascia, and tendons as well as contusions of the lower back and pelvis, and plantar fascial fibromatosis. Dr. Poon dispensed crutches to Applicant for better gait and stability. Dr. Poon gave work restrictions of no walking more than 15 minutes or 100 feet, no climbing, no commercial driving, and a 15-minute rest break every two hours for stretches. (Defendant Exhibit D)

In his initial AME report dated December 17, 2021, Dr. Mandell found impairment of 8% WPI for the lumbar spine based on DRE Lumbar Category II considering non-verifiable radicular complaints and restrictions on activities of daily living. For the right foot and ankle, Dr. Mandell found 12% WPI based on range of motion for the strict rating, and the same for the left foot and ankle. Dr. Mandell indicated that the strict rating is not accurate for the bilateral feet because it does not account for the very significant and constant limp from both lower limbs. To correct the inaccuracy, Dr. Mandell stated "I turn to Table 17-5 on page 529" and explained that Applicant is equivalent to someone who requires routine use of a cane and found 20% WPI for each foot. (Joint Exhibit CC) In the Petition for Reconsideration, Defendant contends the findings of permanent disability under Almaraz/Guzman conflict with the AMA Guides and go outside the four corners however Dr. Mandell cites a specific section of the AMA Guides regarding lower limb impairment due to gait derangement. (Joint Exhibit CC)

Dr. Mandell testified during his deposition on July 7, 2022, in pertinent part as follows: Applicant sustained a crushing injury to the soft tissues on the bottom of his feet. He double checked that Applicant limps all the time. The impairment of 12% WPI for each foot was not accurate. Applicant also has impairment of 20% WPI based on gait considering the very significant limp in both lower limbs. Applicant has an equivalent amount of impairment as someone using a cane routinely. Applicant would probably benefit from using a cane. There is no overlap between gait impairment and range of motion because Applicant had such a significant limp. Just because Applicant does not use a cane does not mean the pain is not real and does not mean Applicant is not limping terribly. The limp is so significant that the limp impairment and range of motion impairment need to be added rather than combined to gain accuracy. Applicant is more impaired than what the range of motion suggests. Applicant's impairment is analogous to someone with tremendous amount of limping. Dr. Mandell considers the fact that both legs are involved. The fact that an amputation below the knee is between 28% and 32% WPI is probably a mistake in the AMA Guides. It is more accurate to combine the impairment of range of motion and gait derangement under Almaraz/Guzman. A person can have impairment from more than one cause like problems in each lower limb which is worse than having problems in just one lower limb. A person only has one gait, but the value of the gait derangement can change depending on how many causes there are. To obtain an accurate impairment, he considered the fact that Applicant has similar problems on both sides. The gait derangement in the AMA Guides is a failing that led to the use of Almaraz/Guzman. His impairment finding is based on training, experience, judgement, and skill, as well as observing Applicant limping around and how much the limp affects his activities of daily living. He takes the whole picture into account. An orthopedist would be the person to take care of Applicant but if Applicant gets more benefit from a podiatrist, then that is fine. (Joint Exhibit EE)

Applicant had an AME re-evaluation with Dr. Mandell on November 11, 2022. Applicant complained of lower back pain that radiates to both sides and sometimes radiates down both lower limbs to the heels and feet. Applicant complained of bilateral lower limb pain with occasional numbness, weakness, and tingling in the legs. Applicant reported that he limps all the time, cannot stand, and has difficulty sitting and walking. Applicant did not understand why Dr. Tarasenko's report indicates Applicant does not limp. Upon exam of the lumbar spine, Applicant had reduced lumbar range of motion and positive tests for percussion and jarring. During the neurological exam, Applicant had fluttering-type sensory weakness in both lower extremities with normal reflexes, no atrophy, and no motor weakness. Dr. Mandell indicated Applicant walks with a

marked limp without a cane, crutches, or braces. Applicant performed heel and toe walking well. Applicant had no deformities or tenderness of the hips. Applicant had normal range of motion of the lower extremities. Applicant's knees were normal upon exam. Applicant had tenderness of the bilateral ankles and reduced range of motion. Dr. Mandell diagnosed Applicant with symptomatic lumbar disc disease with lower extremity radiculopathy, bilateral plantar fasciitis, and tendinosis. Dr. Mandell found impairment of 8% WPI based on Lumbar DRE Category II for non-verifiable radicular complaints. For the right foot and ankle, he found 12% WPI based on range of motion. For the left foot and ankle, he found 12% WPI based on range of motion. Dr. Mandell indicated that Almaraz/Guzman applies if Applicant limps all the time as reported by Applicant. Dr. Mandell observed Applicant walking with a marked limp. In addition, Dr. Mandell referenced Dr. Marino's finding of a severe antalgic gait. Using Almaraz/Guzman, Dr. Mandell found 32% WPI for the right foot and 32% WPI for the left foot. (Joint Exhibit DD)

Applicant saw Dr. Tarasenko on February 22, 2023, during which Applicant complained of low back pain radiating to the buttocks, bilateral hip pain, bilateral ankle pain, and bilateral buttock pain. Dr. Tarasenko indicated that Applicant walks with a normal gait. Upon exam of the lumbar spine, Applicant had reduced extension, normal heel and toe walk, tenderness and trigger points, significant tenderness over facet joints at L4 through S 1 with positive facet loading. Upon exam of the hips, Applicant had significant tenderness over the SI joints, positive tests regarding pelvic compression, Faber test, and Gaenslen's Maneuver, with significant tenderness over both greater trochanters, and trigger points over both ilia-tibial bands. Regarding fibromyalgia, Applicant had 14 positives out of 18 tender points. Dr. Tarasenko diagnosed Applicant with bilateral trochanteric bursitis, lumbar facet arthropathy, myofascial pain syndrome, fibromyalgia, occipital neuralgia, and sacroiliac joint syndrome. (Defendant Exhibit B)

Applicant saw Dr. Marino on May 16, 2023, for a re-evaluation of both feet. The nerve studies were done and had negative results. Applicant still had bilateral heel pain in the plantar and posterior aspects. Applicant still walked with an antalgic gait. Applicant reported that he had crutches in the car that he uses sometimes to take the pressure off his feet. Dr. Marino performed a physical exam finding slight Tinel's sign of the tarsal canal bilaterally and slight Tinel's/paresthesia of the infra-calcaneal nerve bilaterally. Applicant had severe pain upon palpation to the plantar aspect of the bilateral heels and fascial attachment point. Applicant had pain to the posterior aspect of the medial/lateral calcaneus. Applicant had an antalgic gait. There was decreased dorsiflexion of the bilateral ankles. Dr. Marino diagnosed Applicant with bilateral feet contusion, bilateral plantar fasciitis, and bilateral tarsal tunnel syndrome. Dr. Marino explained that the negative nerve conduction velocity and EMG studies indicate that surgery for the tarsal tunnel is not necessary currently. Dr. Marino found the only treatment left is a partial plantar fasciotomy. (Joint Exhibit BB)

The findings of Dr. Mandell rate as follows:

Right foot/ankle	17.01.08.00- 32 [1.4] 45 - 351G - 48 - 48
Left foot/ankle	17.01.08.00 - 32 [1.4] 45 - 351G - 48 - 48
Addition method	48 + 48 = 96%

In *Kite*, the QME found a synergistic effect of the injury to the same body parts bilaterally and found that adding the impairments produced the most accurate reflection of disability. *Athens Administrators v. WCAB (Kite)* (2013) 78 Cal. Comp. Cases 213 (writ denied). This is consistent with Dr. Mandell's findings. During his deposition, Dr. Mandell testified that each side should be added, there was no overlap because both legs are involved, and this accurately obtains his impairment. (Joint Exhibit EE)

The factors of permanent disability are based upon the findings of AME Dr. Mandell which support a finding that Applicant is entitled to a permanent disability award of 96%, equivalent to 849.25 weeks of indemnity payable at the rate of \$290 per week beginning December 17, 2021, in the total sum of \$246,282.50, less permanent disability advances, a temporary disability overpayment, and attorney fees.

ATTORNEY FEES

Based on the California Code of Regulations section 10844 and the guidelines for awarding attorney fees as provided in the Policy and Procedural Manual Index, it is found that a reasonable attorney fee is 15% of the permanent disability and life pension.

IV

RECOMMENDATION

For the reasons stated above, it is respectfully recommended that Defendant's Petition for Reconsideration be denied.

DATE: June 30, 2023

S ARIEL ALDRICH

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE