

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

Case No. ADJ591293

GENE FREITAS,

Applicant,

vs.

RALPH'S GROCERY COMPANY;
SEDGWICK CLAIMS MANAGEMENT
SERVICES,

Defendants.

FINDINGS AND AWARD

The above entitled matter having been heard and regularly submitted, the Honorable Lydia Mourenza, Workers' Compensation Administrative Law Judge, now decides as follows:

FINDINGS OF FACT

1. The applicant has failed to rebut the 31% rating.
2. Applicant is entitled to reimbursement of medical-legal costs payable by defendant in an exact amount to be adjusted by and between the parties with the WCAB retaining jurisdiction in the event of a dispute.

AWARD

AWARD IS MADE in favor of GENE FREITAS against RALPH'S GROCERY COMPANY of:

- a. Reimbursement of medical-legal costs in an amount to be adjusted by the parties.

DATE: Friday, November 2, 2012

Lydia Mourenza

Lydia Mourenza

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Served by mail on all parties listed on the
Official Address record on the above date.

BY: *H. Douglas*

BRADFORD BARTHEL VENTURA, Email
GENE FREITAS, US Mail
RALPH'S GROCERY COMPANY, US Mail
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WILLIAM HERRERAS GROVER BEACH, Email

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WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: Lydia Mourenza

DATE: November 2, 2012

OPINION ON DECISION

PERMANENT DISABILITY/OGILVIE REBUTTAL

Permanent disability was previously awarded based upon the medical reports of Dr. Montgomery (**Exhibits #5, #6**) and in accordance with the recommendation of the disability evaluation specialist at 31% permanent disability, *Ogilvie* reserved, January 29, 2010.

Applicant has presented Dr. Wallace as their DFEC expert, who has testified that the applicant is 100% disabled. Per her deposition of July 11, 2012 (**Exhibit #10**) in considering the applicant's right upper extremity only, there is no suitable employment and the applicant is unable to benefit from vocational rehabilitation. She has changed her opinion from that expressed in her testimony of July 31, 2006 (**Summary of Evidence, sic should be 2007**) and report of November 16, 2009 of 66% loss of earnings (**Exhibit #9**) to a total disability based upon the same information that she knew in 2009 (**Exhibit #10 p. 32**). While it is permissible to have a change in opinion, the lack of an identifiable basis for such a change is inherently suspect. This change in opinion additionally negates the prior opinion of a 66% DFEC. The opinion of Dr. Wallace is not deemed credible and fails to qualify as substantial evidence sufficient to overcome the presumption of correctness of the rating relied upon.

At trial, the applicant indicated he considers his inability to read and write, and to sit or stand for very long as why he is unable to work. (**Summary of Evidence, 9/25/2012, p.8**) None of those factors are related to the upper extremity injury at issue here. It is further noted that the applicant has indicated he considers himself retired, is receiving social security disability, and some benefits from his union.

The applicant's expert presented a *Le Boeuf* argument, and did not present a rebuttal to the correctness of the AMA based rating. This challenge should have been presented at the time of trial, and is not properly an *Ogilvie* rebuttal as was reserved. This is an additional basis for upholding the

31% award of January 29, 2010.

MEDICAL-LEGAL COSTS

Applicant incurred reasonable and necessary medical-legal expenses payable by defendant for DFEC evaluator Ann Wallace Ph.D. in an exact amount to be adjusted by and between the parties with the WCAB retaining jurisdiction in the event of a dispute.

DATE: November 2, 2012



Lydia Mourenza
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