

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

JASON WUEST, *Applicant*

vs.

**KERN COUNTY SUPERINTENDENT OF SCHOOLS, permissibly self-insured,
administered by SELF-INSURED SCHOOLS OF CALIFORNIA, *Defendants***

Adjudication Number: ADJ12059744

Bakersfield District Office

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Findings, Order and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on December 6, 2022, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his cervical spine, left shoulder, and elbow; and that the injury caused 28% permanent disability.

Defendant contends that the reports from orthopedic qualified medical examiner (QME) Peter M. Newton, M.D., are not substantial evidence; that the reports from primary treating physician (PTP) Richard E. Sall, M.D., are substantial evidence and the F&A should be based on those reports; and that applicant did not meet his burden of proof as to the compensable consequence neck injury claim.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We did not receive an Answer from applicant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant claimed injury to his cervical spine, left shoulder, and left elbow, while employed by defendant as teacher on September 22, 2017. On April 23, 2019, applicant underwent left shoulder surgery. (See Def. Exh. C, Dr. Newton, October 19, 2019, p. 9, record review.)

QME Dr. Newton evaluated applicant on September 30, 2019. Dr. Newton took a history and performed physical, neurological, and motor examinations. (App. Exh. 1, Dr. Newton, September 30, 2019, pp. 8 - 13.) He determined that applicant had chronic neck pain and possibly a herniated disc, that he had undergone a left shoulder arthroscopy with residual AC (acromioclavicular) joint separation, and that he had left elbow pain. (App. Exh. 1, p. 13.) Dr. Newton concluded that:

The mechanism of injury described by the applicant is consistent with an injury to the cervical spine, left shoulder, and elbow occurring on 09/22/17. (App. Exh. 1, p. 14.)

The doctor then stated:

I have taken into consideration the Guzman III decision requiring accurate impairment rating and allowing impairment rating based on the four corners of the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition [hereafter AMA Guides]. ¶ ... [T]he applicant has a total whole person impairment of 17% with respect to his cervical spine, left shoulder, and left elbow injuries.¹ (App. Exh. 1, p. 14.)

¹ The doctor's reference to "Guzman III" is in regard to our en banc decision which was affirmed by the Sixth District Court of Appeal, wherein the Court explained that the AMA Guides provide guidelines for the exercise of professional skill and judgment which, in a given case, may result in ratings that depart from those based on the strict application of the AMA Guides. (*Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084, 1086 (Appeals Board en banc) (*Almaraz/Guzman II*).) - (*Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman III)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].

Dr. Newton explained his analysis of applicant's factors of impairment as follows:

With respect to the cervical spine, this applicant has decreased range of motion, pain, but no verifiable radiculopathy. Per the strict interpretation of the AMA Guides ... this applicant's condition would be rated per the DRE category II with a 5% whole person impairment. Due the ongoing level of pain, DRE II is the most accurate choice for rating as there continues to be abnormal physical exam findings (noted in the report) and ongoing symptoms. Because of these abnormalities, a DRE I rating would not apply as this would indicate no loss of function, (0% WPI). A rating per DRE III also would not apply, as there is no evidence of verifiable radiculopathy. DRE II is thus the correct category for rating the current loss of function. ... ¶ This applicant has ongoing loss of motion and weakness of the shoulder. The loss of motion is the result of residual scar tissue/adhesions. The weakness is the result of disuse atrophy and abnormal mechanics of the rotator cuff musculature. ¶ Per the strict interpretation of the AMA Guides ... only one of these findings should be used for impairment rating purposes if there is an overlap in ADL [activities in daily living] limitations or both are caused by the same condition. ¶ If both weakness and loss of motion independently affect ADLs, both findings should be used for the impairment rating. An individual who has loss of motion will not be able to perform activities requiring full motion of the shoulder such as fully reaching overhead to a high shelf. An individual with weakness will not be able to perform activities requiring full strength including heavy lifting. Both weakness and loss of motion are objective findings that independently affect this applicant's ADLs and thus both will be used for an accurate reflection of this applicant's loss of function. ... ¶ With respect to the elbow, this applicant does have chronic lateral epicondylitis, which is a chronic tendonitis. It is important to note that chronic tendonitis is a micro-tearing condition of the outer elbow extensor tendons, which significantly affects the normal mechanics of gripping and grasping. On exam, there is atrophy of the forearm muscle and difficulty with gripping and grasping, as demonstrated by the loss of strength measured with the Jamar dynamometer. Grip loss is ratable impairment per the AMA Guides ... and, in this case should be used for rating purposes, as there is demonstrated decreased ability to forcefully grip and grasp versus the pre-injury capacity. This loss of function should be rated. ¶ The above impairment rating is an accurate reflection of this applicant's current loss of function as discussed in the activities of daily living section of my report, where it is noted that this applicant continues to have significant loss of function with activities of daily living. Per the requirements of the AMA Guides..., Chapters 1 and 2, accurate impairment rating is to be based on accurate reflection of an individual's loss of function.
(App. Exh. 1, pp. 15 – 16.)

After reviewing additional medical records, including the diagnostics studies he had requested, Dr. Newton submitted a supplemental report. Regarding the parts of body injured and the cause of applicant's injury, Dr. Newton stated:

This applicant sustained injury to his left shoulder and left elbow on 09/22/17 and, developed a compensable injury to the cervical spine. Although the cervical spine is not documented in the records it is not unusual for an individual with a chronic left upper extremity condition to overcompensate and develop a strain injury to the adjacent cervical spine. Many of the muscles that are injured with the shoulder injury connect/extend from the shoulder to the neck. ¶ ... This applicant's cervical spine, left shoulder, and elbow condition/disability/ impairment is caused by the 09/22/17 injury.
(Def. Exh. C, Dr. Newton, October 19, 2019, p. 13.)

Dr. Newton received a report from secondary treating physician, Dr. Shapiro, wherein Dr. Shapiro recommended that applicant undergo reconstruction of his left shoulder AC joint with an allograft (tissue transplant). Dr. Newton stated, "I do feel that surgery proposed by Dr. Shapiro is indicated if the applicant wishes to have further treatment. He has a significant separation of the shoulder acromioclavicular joint." (Def. Exh. D, Dr. Newton, December 18, 2019, p. 2.)

Applicant's PTP, Dr. Sall, issued a permanent and stationary (P&S) report on August 24, 2021. The diagnoses were left shoulder acromioclavicular separation, post-surgery, healed; and left elbow lateral epicondylitis, healed. (Def. Exh. A, Dr. Sall, August 24, 2021, p. 4.) The doctor assigned 2% whole person impairment (WPI) for applicant's left shoulder, and he said there was no WPI for applicant's left elbow. (Def. Exh. A, pp. 4 – 5.)

On December 27, 2021, Dr. Newton re-evaluated applicant. He took an interim history, examined applicant, and reviewed x-rays of applicant's cervical spine, right and left shoulders, left elbow, and right and left wrists. The x-rays were taken in his office at the time of the re-evaluation. (App. Exh. 2, Dr. Newton, December 27, 2021, p. 12.) He noted that applicant had undergone two left shoulder acromioclavicular joint surgeries since the prior examination and that his condition had reached maximum medical improvement. Dr. Newton determined that applicant's September 22, 2017, cervical spine, left shoulder, and left elbow injury caused 15% WPI. (App. Exh. 2, pp. 13 - 14.) The doctor again gave a detailed explanation of the WPI he had assigned, pursuant to the AMA Guides. (See App. Exh. 2, pp. 15 - 16.)

Dr. Newton was provided additional medical records to review, and in his January 25, 2022, report he stated:

My opinion regarding causation of injury, causation of disability/impairment, apportionment impairment, future medical care, and periods of TTD remains the same as documented in the 12/27/21 report. (App. Exh. 3, Dr. Newton, January 25, 2022, p. 12.)

In response to correspondence from defense counsel, Dr. Sall, issued a supplemental P&S report on March 12, 2022. Dr. Sall stated that he thought Dr. Newton's assessment of applicant's impairment did not "follow the requirements" of the AMA Guides and was incorrect. (Def. Exh. E, Dr. Sall, March 12, 2022, p. 4.)

The parties proceeded to trial on May 18, 2020. The issues submitted for decision included applicant's claim of injury to his neck (cervical spine), and permanent disability/apportionment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), May 18, 2020, p. 3.)

DISCUSSION

To be substantial evidence a medical opinion must not be speculative, and it must be based on pertinent facts, on an adequate examination and accurate history, and it must set forth the basis and the reasoning in support of the conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) Here, Dr. Newton examined applicant in September 2019, and December 2021. As noted above, in addition to performing physical, neurological, and motor examinations, he reviewed the extensive medical record, including various diagnostics and the x-rays performed at the December 2021 evaluation. He gave detailed explanations regarding his opinions as to the WPI caused by applicant's injury and he explained the basis for his opinion that applicant sustained injury to his left shoulder and left elbow on September 22, 2017, and developed a compensable injury to the cervical spine. (See App. Exh. 1, pp. 15 – 16; Def. Exh. C, p. 13.) Thus, having reviewed the trial record, it is clear that Dr. Newton's reports, and his opinions stated therein, constitute substantial evidence.

Regarding defendant's various arguments, as noted by the WCJ, defendant claims: that Dr. Newton improperly combined impairments for shoulder range of motion and loss of strength; that Dr. Newton failed to provide an appropriate analysis for impairment to the left elbow; that applicant has not met the burden of proving compensable consequence injury to the neck; and that the Award should rely upon Dr. Sall. (Report, p. 1.)

First, Dr. Newton stated that he used both the weakness and loss of motion in determining impairment since both were objective findings that independently affected applicant's activities of daily living, so both were used in order to accurately describe applicant's loss of function. "Per the requirements" of the AMA Guides "Chapters 1 and 2, accurate impairment rating is to be based on accurate reflection of an individual's loss of function." (App. Exh. 1, p. 16.)

As to the left elbow, Dr. Newton explained:

With respect to left elbow, this applicant has ongoing weakness. On examination this applicant has residual atrophy and significant grip loss. This grip loss is due to the altered mechanics of the upper extremity due to the injuries and will affect normal function in terms of ADLs requiring forceful gripping and grasping. Although grip loss is not used frequently per the strict interpretation of the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Edition, it should be used when there is no alternative method of rating since a 0% WPI would not be an accurate reflection of this applicant's current condition. Grip loss is ratable per the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Edition and, in this case, should be used for rating purposes to accurately rate this applicant's loss of ADL function.
(App. Exh. 2, p. 15.)

Pertaining to applicant's neck injury, California Workers' Compensation law has long followed a principle commonly known as the "compensable consequences" doctrine. Under this doctrine, where a subsequent injury is the direct and natural consequence of an original industrial injury, the subsequent injury is considered to relate back to the original injury, and it generally is not treated as a new and independent injury. (*Southern California Rapid Transit District, Inc. v. Workers' Comp. Appeals Bd. (Weitzman)* (1979) 23 Cal.3d 158 [44 Cal.Comp.Cases 107]; *Rodgers v. Workers' Comp. Appeals Bd.* (1985) 168 Cal.App.3d 567 [50 Cal.Comp.Cases 299].) As quoted above, Dr. Newton stated:

... [I]t is not unusual for an individual with a chronic left upper extremity condition to overcompensate and develop a strain injury to the adjacent cervical spine. Many of the muscles that are injured with the shoulder injury connect/extend from the shoulder to the neck.
(Def. Exh. C. p. 13.)

Finally, regarding whether the WCJ should have relied on the reports from Dr. Sall; although it appears Dr. Sall did not review the medical record discussed by Dr. Newton (including the most recent x-rays taken in Dr. Newton's office) for the purpose of argument, we will not dispute defendant's argument that the reports from by Dr. Sall are substantial evidence. In that

context, we note it is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence and the Appeals Board may rely on the medical opinion of a single physician unless it is “based on surmise, speculation, conjecture, or guess.” (*Place v. Workmen’s Comp. App. Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; *Market Basket v. Workers’ Comp. Appeals Bd.* (1978) 86 Cal.App.3d 137 [46 Cal.Comp.Cases 913].) As explained above, the reports from Dr. Newton constitute substantial evidence but his opinions conflict with those of Dr. Sall. When dealing with conflicting medical evidence it is the responsibility of the Appeals Board, including the WCJ, to consider and determine which of the doctors’ opinions are based on pertinent facts, adequate examinations, and accurate histories, and which of the doctors’ opinions are more consistent with the evidence underlying the injury claim. (*Power v. Workers’ Comp. Appeals Bd.*, (1986) 179 Cal. App. 3d 775 [51 Cal.Comp.Cases 114]; *Escobedo v. Marshalls*, *supra*). Having reviewed each of the reports from Dr. Newton and Dr. Sall, we agree with the WCJ that after examining applicant and reviewing the medical record, Dr. Newton explained his analysis of the relevant factors and the basis for his conclusions. Review of the record indicates the WCJ is correct that Dr. Newton’s reports are thorough, well-reasoned, and more persuasive than the reports from Dr. Sall. Therefore, the WCJ did not err in basing his decision on the opinions of QME Dr. Newton.

Accordingly, we agree with the WCJ’s decision, and we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings, Order and Award issued by the WCJ on December 6, 2022, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 17, 2023

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

**JASON WUEST
LAW OFFICES OF PISEGNA & ZIMMERMAN
HANNA, BROPHY, MacLEAN, McALEER & JENSEN, LLP**

TLH/mc

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