

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

LAURA BUCIO, *Applicant*

vs.

**M.A. MEDINA FARM LABOR SERVICES;
ZENITH INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ13110945
Bakersfield 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, and the reasons discussed below, we will deny reconsideration.

The burden of proving industrial causation of injury rests with the applicant, and the applicant must carry this burden by a preponderance of the evidence. (Lab. Code, § 5705.) Moreover, all awards, orders and decisions of the Appeals Board must be supported by substantial evidence in light of the entire record. (Lab. Code § 5952(d); *Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280 [39 Cal.Comp.Cases 310].) To be considered substantial evidence, a medical opinion "must be predicated on reasonable medical probability." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416–17, 419 [33 Cal.Comp.Cases 660].) A physician's report must also be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc), 70 Cal.Comp.Cases 1506 (writ den.).)

For the reasons stated by the WCJ in the report, we agree that the opinion of panel qualified medical examiner (PQME) Yuri Falkinstein, M.D., is substantial medical evidence and that the WCJ properly relied upon it.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 26, 2021

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

**LAURA BUCIO
LAW OFFICE OF WILLIAM HENDRICKS
CHERNOW & LIEB**

PAG/ara

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

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**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

INTRODUCTION

Trial in the primary proceedings of the above-captioned case was held on January 29, 2021 and the matter was thereafter submitted for decision on February 22, 2021 to Workers' Compensation Judge Christopher M Brown. A Ruling on Evidence, Findings of Fact, Award; Opinion on Decision was issued on March 8, 2021. Defendant filed a timely, verified and sufficiently served Petition for Reconsideration on April 2, 2021.

The Petition for Reconsideration does not state the legal basis for its filing but the arguments are consistent with Labor Code Section 5903(a), (c) and (e). Specifically, Petitioner contends the medical reporting does not support a finding of industrial injury, the issue of the nature and extent of Applicant's injury should not be deferred.

STATEMENT OF FACTS

Laura Bucio (Applicant) was forty-six years old and employed as a Sorter, Occupational Group Number 221, at Bakersfield, California by M. A. Medina Farm Labor Service, Inc. (Employer) on November 12, 2019 sorting carrots when she developed pain in her upper right arm and shoulder. Defendant has denied liability for the claimed industrial injury.

Defendant initially provided Temporary Disability Indemnity benefits and medical treatment.

Applicant's injury was evaluated on July 17, 2020 by Dr. Yuri Falkinstein, M.D. as the Panel Qualified Medical Examiner. Dr. Falkinstein gave his expert opinion that Applicant experienced a period of temporary and required medical treatment in the form of surgery and post-operative rehabilitation as a result of her employment on November 12, 2019. He also found Applicant has not reached Maximum Medical Improvement and recommended a re-evaluation after she receives treatment. Dr. Falkinstein's report established Applicant suffered a specific industrial injury.

Trial was held on the issues of injury arising out of and in the course of Applicant's employment, and Applicant's need for medical treatment. No other issues were submitted at the time of trial.

DISCUSSION

**THE WORKERS' COMPENSATION JUDGE HAS AUTHORITY TO DETERMINE
IF AN INJURY AROSE OUT OF AND OCCURRED IN THE COURSE OF AN
APPLICANT'S EMPLOYMENT**

The parties submitted the issue of injury arising out of and in the course of employment for decision at the time of trial. (MOH Page 2 Line 44) The Workers' Compensation Judge has

jurisdiction to decide controversies between the employer and the employee regarding industrial causation upon the request of either party.¹ Therefore, Petitioner's argument based on Labor Code Section 5903(a) lacks merit and the Petition should be denied.

**DR. FALKINSTEIN'S REPORTING DOES CONSTITUTE SUBSTANTIAL
EVIDENCE TO SUPPORT A DETERMINATION APPLICANT SUFFERED AN
INJURY ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT
ON NOVEMBER 12, 2019**

Applicant was evaluated by Dr. Yuri Falkinstein, M.D. on July 17, 2020 as the Panel Qualified Medical Examiner for an orthopedic evaluation of her injury. (Joint Ex. 1) Dr. Falkinstein to a history that included Applicant's job description, prior employment, a history of how the injury occurred on November 12, 2019, her present complaints. (Joint Ex. 1 Pages 2–4) He documented the medical records he reviewed and relied on to form his expert opinion. (Joint Ex. 1 Pages 5–8) He performed a physical examination of Applicant's cervical spine, right shoulder. (Joint Ex 1 Pages 8–11) Dr. Falkinstein identified substantial preexisting pathology and went on to give his expert opinion that:

Therefore, what happened on 11/12/19 was an aggravation of a pre-existing permanent impairment of the right shoulder joint. ... the intervening period of temporary disability was clear in the reviewed medical records, which would be considered as reasonable and appropriate. (Joint Ex. 1 Page 13)

Dr. Falkinstein goes on to give his expert opinion regarding future medical treatment and states:

While the evidence of pre-existing permanent impairment of the right shoulder is strong, treatment cannot be apportioned. Therefore, I recommend that surgery including post-operative rehabilitation be authorized on an industrial basis. (Joint Ex. 1 Page 14)

Dr. Falkinstein has explained both how and why he reached his expert opinion that Applicant's employment as a Sorter on November 12, 2019 resulted in a period of temporary disability and a need for medical treatment. His reports proved by a preponderance of the evidence that Applicant suffered an industrial injury arising out of and in the course of her employment on November 12, 2019. Therefore, Petitioner's argument pursuant to Labor Code Section 5903(c) that the evidence does not support the findings of fact lacks merit.

Findings of Fact Number 1 that Applicant suffered an industrial injury to her right shoulder on November 12, 2019 and the Finding of Fact Number 3 she needs further medical treatment support the Award of medical care. Therefore, Petitioner's argument pursuant to labor Code Section 5903(e) lacks merit.

¹ Labor Code Sections 3600 & 4604

**THE JUDICIAL DUTY TO DEVELOP THE MEDICAL RECORD REQUIRE
DEFERMENT OF ISSUES REGARDING THE NATURE AND EXTENT OF
APPLICANT’S INDUSTRIAL INJURY**

Petitioner asserted that the CWJ erred by deferring the issue of injury to Applicant’s right elbow, back and neck. However, the only issues submitted at the time of trial were injury arising out of and in the course of employment and need for further medical care. (MOH Page 2 Lines 44–46) Dr. Falkinstein’s report provides sufficient analysis to answer the questions submitted at trial. Dr. Falkinstein’s report indicated that he performed a physical examination of Applicant’s cervical spine and her right shoulder. While it may provide a basis for determining Applicant did not suffer an injury to her cervical spine it is possible Applicant would have done additional discovery if she had known that issue was being decided.

Applicant testified that her present complaints include stress, sleep problems, neck and head pain, headaches and back pain which goes from her neck to midway down her back. (SOE Page 4 Lines 33-38) Dr. Falkinstien did not provide an expert opinion regarding Applicant’s thoracic spine, lumbar spine or her elbow or head related complaints. It is unknown how many of the complaints would resolve after appropriate medical treatment. Determining the nature and extent of Applicant’s injury without providing notice that the issue was being submitted for decision would deny both parties due process of law. Additionally, Dr. Falkinstein recommended a re-evaluation after Applicant receives the recommended treatment. (Joint Ex. 1 Page 14) Therefore, it is appropriate to defer the issues that were not set for trial until after the medical-legal discovery has been completed.

CONCLUSION

Dr. Falkinstein explained but how and why he formed his expert opinion that Applicant’s employment sorting carrots on November 12, 2019 led to temporary disability and a need for medical treatment. There for his report submitted as Joint Exhibit 1 is substantial evidence establishing Applicant suffered an industrial injury and that medical treatment should be provided on an industrial basis. The evidence submitted does support the Findings of Fact and the Findings of Fact do support the Award of medical care.

Petitioner’s argument that the WCJ exceeded the Court’s authority to find injury is directly contradicted by Petitioner’s claim the WCJ should not have deferred findings related to the nature and extent of Applicant’s injury. Injury AOE/COE and need for treatment were the only issues submitted for trial. Determining issues that were not set for trial would deny the parties due process and potential exceed the jurisdiction created by Labor Code Section 4604. Therefore, Defendant’s Petition for Reconsideration should be denied.

DATE: APRIL 12, 2021

Christopher Brown
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE