

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

SHARLENE KENNEDY, *Applicant*

vs.

VALLEJO CITY UNIFIED SCHOOL DISTRICT, *Defendant*

**Adjudication Number: ADJ12535729
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION**

Defendant seeks reconsideration of a workers' compensation administrative law judge (WCJ) Findings, Award and Orders of March 24, 2022, wherein applicant's Petition to Reopen was granted and it was found that applicant's November 14, 2018 injury had caused new and further temporary disability "from October 1, 2021 and continuing indefinitely..." In this matter, in a stipulated Award of May 21, 2020 it was found that, while employed as a school office manager on November 14, 2018, applicant sustained industrial injury to her left wrist, right shoulder, and tailbone/coccyx, causing broken periods of temporary disability, permanent disability of 7%, and the need for further medical treatment.

Defendant contends the WCJ erred in finding new and further temporary disability attributable to the November 14, 2018 industrial injury. We have received an Answer from the applicant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report, which we adopt, incorporate, and quote below, we will deny the defendant's Petition.

INTRODUCTION

By a timely and verified Petition for Reconsideration (Petition) filed on April 12, 2022, 2017, defendant seeks reconsideration of my March 23, 2022 Findings, Award and Orders, wherein I found that applicant sustained injury arising out of and in the course of employment on November 14, 2018, to her left wrist, right shoulder, and coccyx as an office manager while employed by Vallejo City Unified School District, causing temporary total disability benefits

from October 1, 2021 and continuing indefinitely thereafter. I further found that there is good cause to grant the Petition to Reopen for New and Further Disability.

Defendant contends: (1) the February 15, 2022 report of the Agreed Medical Examiner, Dr. Joel Renbaum is admissible for the expedited hearing which took place on January 3, 2022; (2) the reports of Dr. David Chow are not substantial evidence on the issues of injury to the right shoulder and temporary disability; and (3) the January 3, 2022 hearing should have also proceeded on a companion case which has a denied date of injury of August 28, 2020. Applicant filed an Answer, disputing defendant's contentions.

I have reviewed defendant's Petition, the Answer, and the entire record in this matter. Based upon my review, I recommend that reconsideration be denied.

FACTUAL BACKGROUND

The factual background of this case, as set forth at pages 1-5 of the Opinion on Decision (Opinion), is as follows:

At trial, applicant testified on direct examination that 11/11/18 is the approximate date of first injury. It was resolved via stipulations in May of 2020. Her left wrist, right shoulder and tailbone were injured then.

She has another injury date when she reinjured her shoulder in August of 2020. She was in another position where she was repetitively moving her shoulder. It was later determined that this was a new claim. She was not sent to see a physician for this injury. She was told the claim was denied because it was not deemed a new injury. She was off work for a short period but was able to work with accommodations. Her right shoulder worsened with range of motion and pain.

She was seen by Dr. Chow on 10/1/21, and was given additional restrictions. She emailed this to Ashley Stevens, at her employer, and to their HR person, Eleanor Bruton. They could not accommodate her after that through today.

She was called before the Christmas break, by someone she had never spoken to before at VCUSD, who asked if she was seen on 12/1/21.

She got a pay raise when she got a promotion to high school office manager, which was negotiated by her union.

She was off work for a non-industrial condition on 8/20/21.

She was paid partial pay from 10/1/21, which is much less than her TD rate.

On cross-examination, applicant stated that the ending date of the non-industrial condition is 11/17/21. She was taken off work for this by Dr. Fulton. She was last seen by Dr. Fulton on November of 2021. At that time, there was no discussion of extending the non-industrial disability leave. She has a follow-up appointment with Dr. Fulton at the end of January of 2022.

She recalls seeing Dr. Renbaum, the AME. She doesn't recall the level of pain then, but it was less than it is now. Regarding the frequency of pain in shoulder, she doesn't recall, either.

She doesn't recall an increase in her shoulder pain just before the August 2020 event. Her shoulder pain worsened after August of 2020. Her shoulder condition hasn't gotten better since then. Her range of motion is now limited. It pops and is much more painful and impacts her sleep and other parts of her life.

Dr. Tang, in November of 2020, had her on work restrictions, and they were the same that she had for a long period. She believes her lifting restriction was at ten pounds then. It's more extensive now.

She never returned to full duty after the first injury.

The 10/1/21 report by Dr. Chow (1 page) was provided to her employer that same day. She doesn't know if it lists her date of injury. She didn't provide a more comprehensive report to her employer. There is an 11/1/21 fax imprint date, but that's nothing she ever faxed. She hasn't discussed this report with her employer since 10/1/21.

The last date she worked for VCUSD was 8/13/21. She worked full time up until then. The school work year started 8/1/21.

She was taken off work on 8/13/21 due to arm pain from working the day before. She was seen in the emergency department, where she received a Toradal shot, and was taken off of work for five days.

She was then seen by her psychologist for a regularly-set appointment, and the psychologist took her off of work.

The shoulder has now become more symptomatic.

On 8/12/21, she believes she overused the shoulder. It had been hurting her for several days before that. She tried to be seen by a workers' compensation doctor but was unable to do so for a time.

Regarding Exhibit Q, the report of Dr. Tolentino, dated 5/25/21, she attempted to make a follow-up appointment but was unable to do so. Dr. Tolentino didn't have records or Kaiser information and she couldn't do anything for her. She was upset because Dr. Tolentino could not help her or give her any treatment.

Since 10/1/21, she got some pay from VCUSD and some disability from private insurance, in the amount of \$1,300, from American Fidelity that she pays for and gets through her employer. This covered from 8/20/21 – 11/7/21 for her psychiatric condition.

From VCUSD, she got \$1,000 for September and \$2,000 for October. She received a partial payment for November, which she believes was \$2,000. These payments are made by the employer, per the union agreement. She believes this is a short-term disability leave, and this is nothing that she pays for.

Dr. Renbaum hasn't addressed her August 2020 injury.

When she was seen by Dr. Chow, she doesn't recall if she told him about Dr. Renbaum's permanent and stationary determination. They discussed the August 2020 injury and the change in her condition. He didn't differentiate whether work restrictions were from her first injury versus her second injury.

Since 8/13/21, she hasn't worked for anyone else. No activities outside of work since August of 2021 have increased her pain.

Her last physical therapy appointment was last week.

On re-direct examination, she testified that the 8/28/20 injury was denied before she was first seen by Dr. Chow. She doesn't know if he was authorized to treat her for the second injury.

(Minutes of Hearing and Summary of Evidence, January 3, 2022 at pp. 6-9.)

DISCUSSION

The parties agreed to utilize Dr. Joel Renbaum as the Agreed Medical Examiner (AME). Dr. Renbaum's opinion had previously been relied upon as the basis for settlement at the time of the Award that was issued on May 21, 2020. In his February 6, 2020 report (Exh. R), Dr. Renbaum opined that applicant was permanent and stationary for her right shoulder, left wrist and coccyx, with permanent impairment for her right shoulder and left wrist only. Applicant then filed a timely Petition to Reopen on December 4, 2020.

She was seen for a consultation with Dr. Ethelynda Tolentino on May 25, 2021. (Exh. Q.) Dr. Tolentino found that she was in need of a surgical consultation for her right shoulder, as well as massage therapy, H-Wave therapy. Dr. Tolentino did not provide an independent assessment of permanent and stationary status. Although she referred to Dr. Renbaum's prior permanent and stationary determination, she also provided her with work restrictions of no lifting/carrying more than 20 pounds occasionally and 10 pounds frequently, and occasional use of the right arm.

She was seen by Dr. David Chow as her treating physician. In his October 1, 2021 report (Exh. 6), Dr. Chow found applicant's condition from her November 14, 2018 injury to be one of modified duty with work restrictions of no lifting, pushing, pulling or carrying more than 5 pounds, no overhead activity, no repetitive keyboarding, mousing or typing for more than 15 minutes at a time. If the employer could not accommodate these restrictions, she was temporarily totally disabled. Defendant did not offer any evidence that the employer could accommodate these restrictions. Dr. Chow reiterated his work restriction in his reports of October 27, 2021 (Exh. 7) and November 1, 2021. (Exh. 8.)

On December 30, 2020, the parties initiated a re-exam with Dr. Renbaum for March 16, 2021. (Exh. 2.) On January 4, 2021 defendant issued a written objection to Dr. Renbaum's evaluation proceeding as a telehealth evaluation (Exh. 4), and defendant requested that the telehealth evaluation be cancelled, and that applicant be scheduled for an in-person examination at the earliest possible date. No in person evaluation was provided by Dr. Renbaum. On November 9, 2021, defendant assented to a telehealth evaluation with Dr. Renbaum on February 15, 2022. (Exh. N.)

DISCUSSION OF PETITION FOR RECONSIDERATION

Any decision by the Appeals Board or a WCJ must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280–281 [39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 419 [33 Cal.Comp.Cases 659].) The opinion of a single physician may constitute substantial evidence, unless it is erroneous, beyond the physician's expertise, no longer germane, or based on an inadequate history, surmise, speculation, conjecture, or guess. (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 169 [48 Cal.Comp.Cases 566]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; see also *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620–621 (Appeals Board en banc).)

In addition to the rationale as set forth in the Opinion on Decision, I further observe that defendant chose to cancel a re-examination with Dr. Renbaum in 2021 at its own peril, and should not be allowed to benefit from its unilateral decision to do so. Whether Dr. Renbaum would have found applicant to be permanent and stationary prior to the re-examination that defendant eventually agreed to is speculative.

With respect to the substantiality of Dr. Chow's reports that support temporary disability status, applicant correctly points out at pages 8-9 of its Answer that defendant served Dr. Chow with the medical treatment file dating back to the date of injury on November 14, 2018, Dr. Chow had the entirety of the treatment history and had the ability to complete evaluations of the Applicant contemporaneous with the ongoing certifications of modified duty work, and he had access to all diagnostic studies and tests procured to address the changing nature of applicant's injuries. Furthermore, it was defendant who authorized Dr. Chow to report only on the 2018 accepted injury, and not on the denied 2020 claim of injury.

Lastly, with respect to the contention that the case should have proceeded for the denied 2020 injury at the time of the January 3, 2022 expedited hearing, this is not permissible 5502(b), which limits the issues for determination at an expedited hearing. The issue of injury arising out of and in the course of employment is not one of the issues permitted to be adjudicated at an expedited hearing.

RECOMMENDATION

Based upon the foregoing, it is respectfully recommended that reconsideration be denied.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings, Award and Orders of March 24, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER



I CONCUR IN PART AND DISSENT IN PART,

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 13, 2022

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

**BOXER & GERSON
SHARLENE KENNEDY
YOUNG COHEN**

DW/oo

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

CONCURRING AND DISSENTING OPINION OF CHAIR KATHERINE A. ZALEWSKI

Although I concur with my colleagues and the WCJ that there is substantial medical evidence of new and further temporary disability caused by the November 14, 2018 industrial injury, I would have granted reconsideration and found temporary disability only until December 29, 2021.

The evidentiary record contains a status report from primary treating physician dated November 1, 2021. However, it appears that the date is a typographical error, since the report states that applicant “is status post ultrasound-guided right shoulder subacromial cortisone injection on 11/28/21.” (November [sic] 1, 2021 report at pp. 1-2.) Additionally, attached to the report is a Request for Authorization and a disability slip each dated December 1, 2021. In any case, the disability slip states that “The patient indicated above will be able/unable to work for a period of 4 wks from 12/01/2021 to 12/29/2022 [sic]” on “full time modified duty. If unable to accommodate, then Temporary Total Disability.” The report notes that applicant was to have a follow up appointment in 4 weeks. While the slip does state 12/29/2022, seeing that this was directly preceded by “a period of 4 wks,” I interpret the 2022 rather than 2021 as a typographical error.

Thus, while I agree that Dr. Chow's reports are substantial medical evidence of temporary disability, they are evidence only until December 29, 2021. I therefore would have found temporary disability until that date, and deferred the issue of temporary disability after that date, pending evidence on the issue.



WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 13, 2022

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

**BOXER & GERSON
SHARLENE KENNEDY
YOUNG COHEN**

DW/oo

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