

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

**GERARDO MORENO, *Applicant***

**vs.**

**ROBERT MICHAEL LTD; INSURANCE COMPANY OF THE WEST, *Defendants***

**Adjudication Number: ADJ10341376  
Santa Ana District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR RECONSIDERATION  
AND DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Order of June 2, 2023, wherein it was found that while employed on April 16, 2014 as an upholsterer, applicant sustained industrial injury to the right testicle, but that the injury did not cause any compensable permanent disability or need for future medical treatment.

Applicant contends that the WCJ erred in not finding any compensable permanent disability or need for further medical treatment. Applicant argues that the medical record should be further developed. We have not received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

We will grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level for further development of the record and decision.

Applicant was evaluated by panel qualified medical evaluator urologist Ernest H. Agatstein, M.D. on April 5, 2018. Dr. Agatstein reported that applicant had sustained a straddle injury to his right testis. (April 5, 2018 report at p. 2.) Both clinical examination and ultrasound imaging suggested the presence of a hydrocele. (April 5, 2018 report at p. 7.) Dr. Agatstein diagnosed "Right hydrocele secondary to direct contusion to his testicle. He may have had epididymitis as well from direct trauma, which has resulted in a multiloculated right hydrocele" (April 5, 2018 report at p. 8.) Dr. Agatstein considered applicant permanent and stationary "unless [applicant] wishes to have surgical therapy" for the condition. With regard to permanent impairment in the event that applicant did not go forward with surgical intervention, Dr. Agatstein

wrote, “I do find evidence of a hydrocele. This can be rated according to the AMA Guides rating permanent impairment due to testicular disease as on page 159. He has testicular disease as under class 1, 7% impairment of the whole person due to his moderate amount of pain.” (April 5, 2018 report at p. 8.)

Applicant was evaluated by his treating physician urologist Jonathan N. Warner, M.D. on August 24, 2020. Dr. Warner stated, “Appears to be an epididymal cyst as the testicle is still palpable and not surrounded by fluid. This seems to be the source of his pain. I would anticipate performing a right epididymectomy.” In an operative report of December 2, 2020, Dr. Warner reported excising a “massive right epididymal cyst incorporating the entirety of the epididymis.”

Dr. Agatstein reevaluated applicant on April 19, 2021. Dr. Agatstein reported that applicant “lots of pain and swelling” after his procedure, “but that all resolved, and he is not having any pain in his right testicle any longer.” (April 19, 2021 report at p. 2.) While Dr. Agatstein reiterated that applicant’s surgery was a direct result of his industrial injury (April 19, 2021 report at p. 9), Dr. Agatstein wrote:

At this point the patient has no symptoms and has a normal testicle on examination. I do not believe the patient has any impairment at this time. He has 0% impairment. He can go back to his normal duties. he does not need any further medical treatment, except for his non-industrial issues of an enlarged prostate gland an phimosis, for which treatment should be provided by his regular doctors.

(April 19, 2021 report at p. 9.)

However, subsequent to his evaluation by Dr. Agatstein, applicant presented to his primary treating physician Dr. Warner with complaints of right sided scrotal pain on June 28, 2021.

Applicant presented to new treating physician urologist Roger W. Satterthwaite, M.D. on September 15, 2021. Applicant again complained of testicular pain, and Dr. Satterthwaite referred applicant to pain management. On October 20, 2021, applicant again was evaluated by Dr. Satterthwaite with complaints of right testicular pain. Dr. Satterthwaite wrote, “Much of his pain is likely musculoskeletal or neuropathic in etiology without a urinary basis. Dr. Satterthwaite noted that “His current scrotal [ultrasound] is unremarkable. There is no further urologic procedure to be done in the scrotum in my opinion. he may also wish to pursue another medical opinion.”

Despite his continued complaints of testicular pain, Dr. Agatstein wrote in supplemental reports of July 6, 2022 and February 6, 2023 that he continued to opine that applicant had no ratable impairment and no need for further medical treatment. In his July 6, 2022 report, Dr. Agatstein wrote:

I do not find that reviewing these records caused me to change any of my opinions that I have expressed in my 04/19/2021 report. When I examined him, he had normal testicles on the right and left side without any pathology, without any symptoms, without any complaints. In my 04/19/2021 report, I would continue to stand by the opinions that I quoted in that report. I see that Dr. Warner saw him 06/02/21 [sic] and perhaps he was still healing after his spermatocectomy. I had the benefit of seeing him later In [sic] his course, he was not having any symptomatology.

(July 6, 2022 report at p. 3.)

We are confused by this passage, given that Dr. Warner's evaluation in June of 2021 was after Dr. Agatstein's April 2021 evaluation.

In his final February 6, 2023 report, Dr. Agatstein wrote that "The patient has no symptoms and a normal testicle on examination." (February 6, 2023 report at p. 6.)

At trial, contrary to the history taken by Dr. Agatstein, applicant testified that he did not feel any improvement after surgery. (Minutes of Hearing and Summary of Evidence of August 17, 2022 trial at p. 5.) He testified that he has a lot of pain in his right testicle that is causing trembling. (Minutes of Hearing and Summary of Evidence of September 29, 2022 trial at p. 2.)

All findings of the WCAB must be based on substantial evidence. (*Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620 [Appeals Bd. en banc].) As the Court of Appeal wrote in *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687], "In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. [Citation.] Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. [Citation.] Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citation.]"

In light of the records from Dr. Warner and Dr. Satterthwaite and applicant's trial testimony that he was still experiencing right testicle pain, it appears that Dr. Agatstein's conclusions are

based on an inadequate medical history or on facts that are no longer germane. Additionally, a more thorough discussion of applicant's permanent impairment is necessary, given that Table 7-7 allows a permanent impairment rating of up to 10% WPI even when no continuous treatment is required. (AMA Guides, Table 7-7, p. 159.) To the extent that applicant's symptoms are being caused by non-industrial conditions, especially given that these symptoms arise in the same region as an admitted industrial injury after surgery, causation of these symptoms must be discussed in a non-conclusory manner.

The WCJ and the Appeals Board have a duty to further develop the record when there is a complete absence of (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) medical evidence on an issue. The WCAB has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) Since, in accordance with that mandate, "it is well established that the WCJ or the Board may not leave undeveloped matters" within its acquired specialized knowledge (*Id.* at p. 404), pursuant to Labor Code section 5906, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level for further development of the record and decision on the issues of permanent disability and further medical treatment. The parties and the WCJ should consider whether this case is best served by an agreed medical evaluator or an independent medical evaluator. Additionally, the applicant may require evaluation by other specialties. We express no opinion on the ultimate resolution of this matter.

For the foregoing reasons,

**IT IS ORDERED** that Applicant's Petition for Reconsideration of the Findings and Order of June 2, 2023 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order of June 2, 2023 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ NATALIE PALUGYAL, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**August 25, 2023**

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

**GERARDO MORENO  
SOLOV & TEITELL  
LAUGHLIN, FALBO, LEVY & MORESI**

**DW/oo**

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