

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

**COLBY CALVERT, *Applicant***

**vs.**

**CALIFORNIA INSTITUTE OF TECHNOLOGY; LIBERTY MUTUAL administered by  
HELMSMAN MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ12149152  
Pomona 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, 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.).)

We agree with the WCJ that there is no duty to develop the record here to save applicant from the lack of due diligence to conduct the necessary discovery to obtain admissible evidence in support of the claimed injury to the bilateral eyes. (See Lab. Code, §§ 5502(d)(3) 3202.5; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal. Comp. Cases 138, 141 (Appeals Board en banc); *Lozano v. Workers' Comp. Appeals Bd.* (2002) 67 Cal.Comp.Cases 970 (writ den.))

Lastly, we note that the only issue set for trial in this matter was injury arising out of and occurring in the course of employment (AOE/COE) to the bilateral eyes. Thus, it was the only issue decided by the WCJ and all other issues were deferred. Petitioner may not raise issues for the first time on reconsideration which were not raised at the time of trial.

For the foregoing reasons,

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

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ DEIDRA E. LOWE, COMMISSIONER**

**I CONCUR,**

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

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



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

**June 4, 2021**

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

**COLBY CALVERT  
DIEFER LAW GROUP  
SION & ASSOCIATES**

**PAG/pc**

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

**REPORT AND RECOMMENDATION**  
**ON PETITION FOR RECONSIDERATION**

Applicant, born November 8, 1979, while employed by California Institute of Technology on February 22, 2019 allegedly sustained injury arising out of, and occurring in the course of employment to his eyes and psyche. Decision issued herein on March 12, 2021.

Applicant has filed a timely Petition for Reconsideration, objecting to said decision in the following particulars:

1. Petitioner contends that the undersigned erred by relying on a medical report that is not substantial evidence.
2. Petitioner further contends that the undersigned erred in not ordering further development of the record regarding applicant's claim of injury.

FACTS ON DISPUTED ISSUE(S)

Applicant was exposed to lasers in a hallway at his workplace. This was reported to the employer and medical attention was provided. Applicant has been treated and evaluated by specialists in the fields of neurology, ophthalmology, neuro-ophthalmology and optometry. He was seen by a QME in the field of ophthalmology as well. The matter proceeded to trial only on the issue of whether applicant sustained injury to his eyes. The question of injury to the psyche was deferred. All other issues were deferred. Applicant did not testify at trial. The record was contained within the documents submitted. These included medical notes or reports from several physicians and a deposition of the QME. After review of the entire record, it was found that the record did not contain substantial medical evidence to support applicant's claim of injury to the eyes as pled. It is that decision that is the basis for the present Petition.

DISCUSSION

The first issue noted by Petitioner to be presented is identified as related to the time for filing for workers' compensation benefits under Labor Code §5405. (Petition for Reconsideration, hereinafter Petition, pg. 2, line 11-12) That issue did not arise during the proceedings in the current matter. The issue is also listed as a bold heading in the Argument section of the Petition but is not actually discussed in the Petition. It therefore appears this is an error in the Petition and I will not address it at this time.

Petitioner identifies the next issue by stating the court relied on the reporting of Dr. Macy, which applicant argues is not substantial evidence. There is a quotation provided without any specific citation, which refers to further medical evaluation. The issue is apparently that the court relied on a medical report that is not substantial evidence. (Petition, pg. 2, line 13-14) As also

explained below, the undersigned found Dr. Macy's report to be very well reasoned and his conclusions to be supported by the facts and medical record.

The next issue listed is a reference to a medical report by Dr. Wogenson, followed by a quote apparently from his report discussing what reads like descriptions related to testing and treatment for brain issues. (Petition, pg. 2, line 18-21) If that is the situation, then these concerns are not appropriately raised in this Petition, as they were not part of this trial. This is a suitable place to discuss the fact that, despite Petitioner's statements to the contrary, there was no order denying all benefits issued in this case. Petitioner refers to the decision here as what is sometimes called a "take nothing", meaning applicant's case had a final determination issued that there was no injury and no benefits due. (Petition, pg. 4, line 2-3) That was not the result here, and the entire question of injury was not submitted. As noted above, and in the Minutes of Hearing from the trial, only the claim of injury to the eyes was submitted. The issue of injury to the psyche was specifically deferred. (MOH/SOE, 2/17/21, pg. 2, line 14-16) I am not aware of applicant having filed a claim for a physical injury to his brain. But I may not be aware of all the aspects of this claim. I can state however that no injury of that nature was submitted as part of the present trial. If applicant's plan to develop the record in this case relates another portion of the claim, the decision issued here does not preclude that.

The final issue listed is an objection to the fact that the undersigned did not order further development of the record to determine whether applicant is entitled to workers compensation benefits. (Petition, pg. 2, line 22-25) No examples are provided as to exactly what development is recommended. Later in the Petition the request is made for a neuropsychological evaluation. As discussed above, that sounds like it may be related to another aspect of the claim.

Petitioner began the Argument section of the Petition with a bold heading identifying Labor Code §5405. There is no explanation about how that relates to this case and I again believe this is an error in the preparation of the pleading.

Petitioner next provided a discussion about a case regarding the ability and duty of the Board to develop the record and ensure evidence is obtained when required. This discussion is concluded with a statement that the standard requires reasonable doubts to be resolved in favor of the injured worker. (Petition, pg. 4, line 20 to pg. 5, line 23) There is nothing linking these factors to the present case. After some additional case quotations, Petitioner concluded with a paragraph that explained what the argument in favor of further development of the record is based on. It is noted that applicant had only some mild vision issues prior to the incident, and now has multiple complaints. (Petition, pg. 6, line 17-21) Based on this, it is argued that further medical legal discovery is needed. (Petition, pg. 6, line 22-24) There is no discussion as to what aspects of any of the medical evidence is incomplete, or what additional discovery is actually needed. No examples from the medical record are

provided. As Petitioner does not point out any specific portions of the medical record he believes require development, my ability to respond is limited. I again however confirm my determination following review of the record submitted at trial that the applicant has had a thorough and complete medical evaluation of his eyes and opportunity to obtain treatment for his complaints. The record in this case does not include contradictory or inconsistent medical reporting. There is no doctor I am aware of who found any injury to applicant's eyes. I am not aware of any objective findings of change to his vision following the incident. The treating doctors have tried to address his complaints and provide whatever treatment they have available. All the medical reports were reasonable, but the treating doctors accepted the existence of an injury without any actual physical findings. Their conclusions were based solely on applicant's history. In contrast, the medical reporting of the QME Dr. Macy was thorough, complete and analytical. He conducted an examination and reported his findings. He reviewed the records of the prior providers. His expertise was confirmed during his deposition. He was the one evaluator who summed up the lack of findings on examination by reaching a stated conclusion on the issue. He could find no evidence of injury to the eyes. I found his conclusion to be persuasive.

The Conclusion of the Petition contains the request for development of the record in the form of a neuropsychological evaluation. There is no statement as to how that relates to the claimed eye injury. The title of the specialty suggests instead it is related to an injury to the psyche, which was deferred, or some other aspect of the claim.

It is the opinion of the undersigned that the record in this matter does not require further development on the issue of injury to the eyes. All other issues were deferred.

#### CONCLUSION

It is respectfully recommended that the Petition for Reconsideration be denied.

DATE: April 16, 2021  
Catherine J. Coutts  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE