

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

MARK WEST, *Applicant*

vs.

**COUNTY OF SACRAMENTO; DEPARTMENT OF WATER RESOURCES,
permissibly self-insured, *Defendant***

**Adjudication Number: ADJ13928802
Sacramento 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.

We have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id.*)

We observe, moreover, it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

Finally, we briefly address defendant's argument that the QME's report is not substantial evidence because it was based upon the premise that applicant had reported his shoulder symptoms to his treating physician, which defendant alleges is inaccurate. Although applicant testified at trial that he did not recall whether he had reported his shoulder symptoms to Dr. Cardona, one of his Kaiser treating physicians, he did testify – both at trial and in his deposition – that he reported

the injury to Dr. Nguyen, another of his Kaiser treating physicians. (See Minutes of Hearing / Summary of Evidence, 4/14/2022, at pp. 8–9; Ex. D, at pp. 21, 23, 32–34.) The QME’s statement that applicant reported his shoulder symptoms to a treating physician does not, therefore, appear to be inaccurate.

For the foregoing reasons,

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

WORKERS’ COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER



CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 20, 2022

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

**MARK WEST
LAW OFFICE OF WILLIAM R. ORR
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN**

AW/ara

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

The basis for Petitioner asserting a Labor Code § 5903(a) argument is unclear. The Board has jurisdiction over controversies between an employer and employee and shall resolve the disputes upon request of either party.¹ The parties clearly submitted the issues of Applicant's Occupational Group Number, injury AOE/COE and the nature and extent of Applicant's injury to the WCJ for decision. (MOH-SOE Page 2) Title 8 CCR § 10330 states:

In any case that has been regularly assigned to a workers' compensation judge, the workers' compensation judge shall have full power, jurisdiction and authority to hear and determine all issues of fact and law presented and to issue interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case, including the fixing of the amount of the bond required in Labor Code section 3715. Orders, findings and decisions and awards issued by a workers' compensation judge shall be the orders, findings, decisions and awards of the Workers' Compensation Appeals Board unless reconsideration is granted. (Title 8, CCR § 10330)

Petitioner has not established that the issuance of a determination regarding Applicant's Occupational Group Number, a finding of injury AOE/COE or the nature and extent of Applicant's industrial injury exceeds the authority of the WCJ. Therefore, Petitioner failed to establish a basis for granting reconsideration pursuant to Labor Code § 5903(a).

APPLICANT'S JOB DUTIES OF MANUALLY REMOVING GARBAGE FROM HOMELESS ENCAMPMENTS ON A REGULAR BASIS PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT OCCUPATIONAL GROUP NUMBER 560 IS THE APPROPRIATE MODIFIER FOR PURPOSES OF ADJUSTING HIS WHOLE PERSON IMPAIRMENT

The parties did not stipulate before trial to Applicant's Occupational Group Number, and they submitted that issue for decision at trial. Defendant asserted OGN 480 is appropriate and Applicant asserted OGN 560 is appropriate. (MOH-SOE Page 2) OGN 480 is described as:

Construction Helpers, Oil Field Workers & Some Skilled Construction Workers. Heavy laboring work at construction sites; very strenuous use of spine for lifting and exerting force; heavy demands on arms (similar to 492); leg requirements lower than 481 & 492. Typical occupations: carpenter Helper, Laborer, construction; Roughneck. (2005 PDRS 3-36)

OGN 560 is described as:

Mostly Material Handlers Requires lifting of large and/or very heavy objects or exerting very significant force – very strenuous demands placed on spine and legs. (2005 PDRS 3-37)

Both OGNs use an "H" modifier for shoulder injuries. OGN 480 applies an "I" modifier, while OGN 560 applies a "J" modifier for spine injuries.

¹ Labor Code §4604

Applicant credibly testified that his job duties changed beginning in 2010 to 2012 to include clearing out homeless encampments. These job duties included moving items that weighed over 100 pounds such as sofas and couches for disposal. (MOH-SOE Pages 4 – 5) The 2005 PDRS identifies OGN 560 as being appropriate for Garbage Collector, Manual. (2005 PDRS page 3-11) Applicant’s credible testimony that he manually collected garbage from homeless encampments that required lifting and moving items that weighed over 100 pounds was not contradicted at trial. Based on Applicant’s credible and un-contradicted testimony it was found that OGN 560 is appropriate for rating Applicant’s permanent partial disability. (OOD pages 3 – 4, FOF No. 5)

Petitioner’s assertion that the job description for Storm Utility Worker filed as Defendant’s Exhibit F limits the appropriate OGN to 480 was found to lack merit because it does not include the job duties associated with clearing out a homeless encampment. The closest job duty listed states, “Loads and transports trimmings, refuse, sediment, and litter to authorized sites for disposal.” (Def. Ex. F Page 2) The clearing of homeless encampments requiring moving beds, cabinets, chests, couches, chairs, generators, televisions, propane tanks and cooking equipment is not adequately described as refuse or litter removal and is closer to a forced eviction process followed by manual garbage removal. (MOH-SOE Page 4)

**DR. RUBIN’S EXPERT MEDICAL OPINION PROVED BY A PREPONDERANCE
OF THE EVIDENCE THAT APPLICANT HAS PERMANENT PARTIAL DISABILITY
IN HIS BILATERAL SHOULDERS THAT WAS CAUSED BY HIS WORK
FOR DEFENDANT**

Dr. Stuart Rubin, M.D. examined Applicant as a state certified Panel Qualified Medical Examiner. He provided his expert medical opinion within reasonable medical probability that Applicant suffered an industrial cumulative trauma through his last day of work, October 27, 2020 to his lumbar spine and bilateral shoulders. (App. Ex. 1 Pages 26 – 27) Based on his examination of Applicant and his review of the records provided he determined Applicant has 9% Whole Person Impairment (WPI) in his right shoulder and 7% WPI in his left shoulder. (App. Ex. 1 Page 27) He apportioned 95% of Applicant’s resulting bilateral shoulder permanent partial disability to the cumulative trauma ending October 27, 2020 and 5% to expected underlying degenerative conditions. Dr. Rubin clearly explained how and why he reached his expert medical opinion that Applicant has WPI in his bilateral shoulders as a result of his work for Defendant. Therefore, Dr. Rubin’s report was found to be substantial medical evidence on the issue of industrial causation of Applicant’s bilateral shoulder injury. (OOD Page 4 – 5)

The reports of Applicant’s Primary Treating Physical, Dr. Amilcar Cardona, M.D. and his deposition transcript were reviewed. (Joint Ex. 1, 2, 3 & 4, Def. Ex. A) An expert medical opinion must be based on an accurate history and valid legal reasoning to constitute substantial medical evidence. It cannot be based on a legally invalid theory of causation or a lack of examination. Dr. Cardona’s opinion failed the substantial evidence test in regards to Applicant’s industrial injury because he applied an incorrect legal theory of causation and because he has not evaluated Applicant’s shoulders at all. (Def. Ex A Page 17) For these reasons it was determined that Dr. Cardona’s expert opinion was outweighed by of Dr. Rubin which was based on valid legal analysis of causation, a history taken from Applicant, his examination of Applicant and the medical records provided. (OOD Page 5)

CONCLUSION

Applicant's credible testimony established his work duties included manually removing garbage from homeless encampments on a regular basis. These job duties added after 2010 or 2012 required lifting and moving heavy objects that weighed over 100 pounds. OGN 560 is the most appropriate modifier based on the express statement that a Garbage Collector, Manual has an OGN of 560 at page 3-11 of the 2005 PDRS and the general description of OGN 560 at page 3-37 of the 2005 PDRS. Therefore, a preponderance of the evidence establishes that OGN 560 is appropriate. The evidence does support the Finding of Fact and the Finding of Fact supports the Awards and Orders.

The expert medical opinion of Dr. Rubin was found to be substantial medical evidence that Applicant suffered a bilateral shoulder injury arising out of and in the course of his employment with Defendant through October 27, 2020. The opinion of Dr. Cardona did not outweigh the opinion of Dr. Rubin. Applicant did prove by a preponderance of the evidence that he suffered a bilateral shoulder injury arising out of and in the course of his employment with Defendant that has resulted in permanent partial disability.

The evidence does Support the Findings of Fact on the issues submitted for decision by the parties. The Findings of Fact do support the Awards and Orders issued. Therefore, Defendant's Petition for Reconsideration should be denied.

DATE: June 1, 2022

Christopher Brown
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE