

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

JASMINE STOKES, *Applicant*

vs.

**CITY OF SANTA ROSA, permissibly self-insured,
administered by LWP CLAIMS SOLUTIONS, INC., *Defendants***

Adjudication Number: ADJ16542754

Santa Rosa District Office

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award and Order (F&A) issued by the workers' compensation administrative law judge (WCJ) on November 3, 2023, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her cervical spine, right shoulder, and low back; and that the reporting from treating physician Brendan P. Morely, M.D., is more persuasive than the reporting from orthopedic qualified medical examiner (QME) Jeffrey O. McGillicuddy, M.D. The WCJ also found that, "The record is not fully developed on the issue of the applicant's periods of partial temporally disability or total temporary disability" and ordered the parties "to develop the record with respect to the applicant's periods of temporary disability ..." (F&A, pp. 1 – 2.)

Defendant contends that it is entitled to receive a supplemental report from Dr. McGillicuddy addressing applicant's neck and right shoulder injury claim, and that the reports from Dr. Morely are not substantial evidence.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant claimed injury to her low back, cervical spine, right shoulder, right elbow, right forearm, and right hand, while employed by defendant as a bus driver on June 1, 2022. She initially received treatment at a Kaiser Permanente facility by Carrie Chanson, M.D. In the Doctor's First Report of Occupational Injury, Dr. Chanson described her physical examination of applicant, and the diagnoses were Right Trapezius [neck/shoulder muscle] Strain and Neck Sprain. (App. Exh. 1, Carrie Chanson, M.D./Kaiser Permanente, June 6, 2022, p. 2, original in upper case.) Applicant underwent a course of treatment for her neck, right shoulder, and low back, including physical therapy and medication. (See: Def. Exh. A, Jeffrey O. McGillicuddy, M.D., March 28, 2023, pp. 17 – 21, record review.) Dr. Morley was subsequently applicant's primary treating physician (PTP) and provided treatment for applicant's neck, right shoulder, and low back. (See Def. Exh. A, pp. 22 – 26, record review.) In his March 16, 2023 treatment report Dr. Morley noted that:

She [applicant] reports neck pain on the right side with radiating arm pain and numbness into the 4/5th fingers on the right. She reports pain in her right shoulder with stiffness and loss of ROM. ¶ She recently completed MRI imaging of both the neck and right shoulder on 2/21/23. MRI of the right shoulder demonstrates a posterior labral tear, extending from superior to inferior with mild posterior subluxation of the humeral head relative to the glenoid. ¶ MRI of the cervical spine show some straightening of the normal cervical lordosis with neural foraminal narrowing includes C4-5 moderate left, CS-6 mild to moderate right and C6-7 moderate left.

(App. Exh. 2, Brendan P. Morely, M.D., March 22, 2023, p. 2 [EAMS p. 4].)

On March 28, 2023, QME Dr. McGillicuddy evaluated applicant. The doctor noted that, "In addition to the medical records reviewed by me for this report, I reviewed the depositions of Ms. Stokes and Dr. Morley." (Def. Exh. A, Jeffrey O. McGillicuddy, M.D., March 28, 2023, p. 2.)

He concluded:

The examinee's description of her June 1, 2022 mechanism of injury as described is not consistent with her symptomatology or findings within a reasonable degree of medical probability. ¶ The examinee's description of her June 1, 2022 industrial injury does not describe a mechanism of injury to her right shoulder or neck. ...

(Def. Exh. A, p. 28.)

In a subsequent report, PTP Dr. Morely stated:

I did review in some detail the QME evaluation performed by Dr. Jeffrey McGillicuddy on 3/20/2023. ¶ I do disagree with his findings that there is no mechanism of injury to the right shoulder. The labrum actually can be torn in the right shoulder when the shoulder is forcefully pulled into abduction as it was in this patient, especially if there is a degree of internal rotation which the patient also claims.

(App. Exh. 5, Brendan P. Morely, M.D., June 6, 2023, p. 6.)¹

The parties proceeded to trial on August 15, 2023. The issues submitted for decision included, “Parts of body injured, with the applicant alleging right shoulder, cervical spine, right hand, right forearm, and right elbow.” Minutes of Hearing and Summary of Evidence (MOH/SOE) August 15, 2023, p. 2.) The WCJ also noted that, “The defendant objects to submission of the temporary disability issue and requests additional discovery, to wit, Supplemental Report from the panel QME Dr. McGillicuddy.” (MOH/SOE, p. 2.)

DISCUSSION

We first note that defendant makes various arguments based on the assertion that there is no evidence that applicant had a shoulder injury “until 3/16/23, or more than 9 months after the date of injury...” (Petition, p. 2.) However, in the Record Review portion of his report, QME Dr. McGillicuddy identified and summarized numerous treatment reports, during the period from June 6, 2022, through February 21, 2023, pertaining to applicant’s neck and right shoulder injury. (Def. Exh. A, pp. 17 – 28.) Council is reminded that misrepresenting the evidence in the trial record is inappropriate conduct and may be deemed sanctionable in the future.

Regarding the merits of the Petition, it is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence and the Appeals Board may rely on the medical opinion of a single physician unless it is “based on surmise, speculation, conjecture, or guess.” (*Place v. Workmen’s Comp.*

¹ Having reviewed the Electronic Adjudication Management System (EAMS) ADJ file, it appears that Dr. Morley was again deposed on June 27, 2023, but that deposition transcript was not submitted as an exhibit and was not included in the trial record.

App. Bd. (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; *Market Basket v. Workers' Comp. Appeals Bd.* (1978) 86 Cal.App.3d 137 [46 Cal.Comp.Cases 913.]

Here, Dr. Morely examined applicant several times, beginning on September 7, 2022. (Def. Exh. A, pp. 22 – 27, record review; see also App. Exhs. 2 – 5.) In addition to examining applicant, Dr. Morley reviewed various diagnostics, including cervical and right shoulder MRIs. (See e.g. App. Exh. 5, p. 3.) By his deposition testimony and his June 26, 2023 report, Dr. Morley provided a detailed explanation as to the factual basis and his reasoning for his conclusion that applicant sustained injury AOE/COE to her neck and right shoulder. The doctor's opinions do not appear to be based on surmise, speculation, conjecture, or guess. (*Place v. Workmen's Comp. App. Bd. supra.*) Thus, we agree with the WCJ that Dr. Morley's reports constitute substantial evidence.

It is also well established that a WCJ's opinions regarding witness credibility are entitled to great weight, because the WCJ has the opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500, 505]; *Sheffield Medical Group v. Workers' Comp. Appeals Bd. (Perez)* (1999) 70 Cal.App.4th 868 [64 Cal.Comp.Cases 358]; *Nash v. Workers' Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1793 [59 Cal.Comp.Cases 324]; *Greenberg v. Workmen's Comp. Appeals Bd.* (1974) 37 Cal.App.3d 792 [39 Cal.Comp.Cases 242].)

In the Opinion on Decision, the WCJ stated that he found "... applicant's testimony to be credible and consistent with the conclusions of Dr. Morley and inconsistent with the conclusions of Dr. McGillicuddy. Award was made on the basis of Dr. Morley's [sic] reporting." (F&A, p. 3, Opinion on Decision.) Again, we agree with the WCJ that applicant's testimony was consistent with Dr. Morley's opinions. When viewed together, applicant's testimony and Dr. Dr. Morley's opinions are substantial evidence and in turn, are an appropriate basis for the WCJ's Finding that applicant sustained injury AOE/COE to her cervical spine, right shoulder, and low back.

Finally, as to defendant's argument that Dr. McGillicuddy's August 21, 2023 supplemental report should be admitted into the record, as noted above, at the trial defendant objected "to submission of the temporary disability issue and requests additional discovery..." (MOH/SOE, p. 2.) In the F&A, Finding #8 specifically states that the trial record was not fully developed on the issue of applicant's periods of partial and/or total temporary disability and the parties were ordered to develop the record with respect to that issue. (F&A, pp. 1 – 2.) Since the WCJ's finding and order are consistent with defendant's objection, as stated in the MOH/SOE, we see no factual or

legal support for defendant's argument that it was denied its due process rights. Also, issues not raised at trial (e.g. whether defendant was entitled to receive a supplemental report from Dr. McGillicuddy addressing applicant's neck and right shoulder injury claim) cannot be raised for the first time in a petition for reconsideration. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151 [65 Cal.Comp.Cases 805]; *Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd. (Pinkney)* (1994) 26 Cal.App.4th 789 [59 Cal.Comp.Cases 461]; *Cottrell v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 760, writ denied.)

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the issued by the WCJ on November 3, 2023, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 23, 2024

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

**JASMINE STOKES
BOXER & GERSON, LLP
LENAHAN, SLATER, PEARSE & MAJERNIK LLP**

TLH/mc

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