

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

ANTONIO ARELLANO, *Applicant*

vs.

GRIFFITH COMPANY; ZURICH AMERICAN INSURANCE COMPANY, *Defendants*

**Adjudication Number: ADJ10647918
Anaheim District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board previously granted reconsideration to further study the factual and legal issues in this case.¹ This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings of Fact and Opinion on Decision (F&O) issued by a workers' compensation administrative law judge (WCJ) on February 1, 2022. In the F&O, the WCJ found that applicant did not qualify for the 240-week exception to the 104-week cap on temporary disability benefits set forth in Labor Code section 4656(c)(3)(C),² because the partial removal of applicant's skull did not qualify as an "amputation" under the statute, as interpreted by the Appeals Board in *Cruz v. Mercedes-Benz of San Francisco (Cruz)* (2007) 72 Cal.Comp.Cases 1281 (Appeals Board en banc).

Applicant contends that the 240-week exception under section 4656(c)(3)(C) does apply, because the surgical removal of a portion of his skull qualifies as an "amputation" pursuant to *Cruz* and the plain meaning of the term.

We did not receive an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report), recommending that applicant's Petition for Reconsideration be denied.

¹ Commissioner Sweeney, who previously served as a panelist in this matter, no longer serves on the Appeals Board. Another panel member was assigned in her place.

² All further statutory references are to the Labor Code unless otherwise noted.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, it is our decision after reconsideration to affirm the February 1, 2022 F&O.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 1, 2022 F&O is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER



I DISSENT. (See attached Dissenting Opinion.)

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 28, 2023

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

**ANTONIO ARELLANO
MINAIE LAW GROUP
LAW OFFICES OF TRACEY LAZARUS**

AH/cs

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

DISSENTING OPINION OF DEPUTY COMMISSIONER SCHMITZ

I respectfully dissent from the majority opinion to affirm the WCJ's F&O issued on February 1, 2022. I would rescind the F&O and return this matter to the trial level for further development of the record.

The only issue for reconsideration is the applicability of the section 4656(c)(3)(C) exception to the 104-week cap on temporary disability benefits (TD), which is set forth in section 4656(c)(1). (Lab. Code, §§ 4656(c)(1), 4656(c)(3)(C).) Pursuant to section 4656(c)(3)(C), an employee who suffers an "amputation" may receive up to 240 weeks of TD within a period of five years from the date of injury. The applicant bears the burden of proof to establish, by a preponderance of the evidence, that the injury falls within the scope of the section 4656(c)(3)(C) exception. (Lab. Code, § 3202.5.) In *Cruz*, we held that, for the purpose of applying section 4656(c)(3)(C), the definition of "amputation" includes the severance or removal of a limb, part of a limb, or other body appendage, including both traumatic loss in an industrial injury and surgical removal during treatment of an industrial injury. (*Cruz, supra*, 72 Cal.Comp.Cases at pp. 1282-1283.) Here, applicant argues that the head is an appendage, and that the surgical removal of part of his skull, a "subset" of the head, resulted in an "amputation."

I disagree with the majority opinion to affirm the WCJ's decision that the partial removal of applicant's skull is not an "amputation" within the meaning of section 4656(c)(3)(C); under the current record, there is insufficient evidence to make this determination.

A decision must be supported by substantial evidence such as medical opinion and/or testimony considering the entire record. (Lab. Code, §§ 5903, 5952; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500].) A medical opinion is not substantial evidence when based on incorrect facts, history, examination or legal theory, or surmise, speculation, conjecture or guess. (*Place v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525].) A medical opinion should also be based on reasonable medical probability and logical and persuasive reasoning, which is consistent with the record. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417 [33 Cal.Comp.Cases 660]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Board en banc).) The record may be ordered developed when required for a decision or award to be based on substantial evidence and due process. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd. (Tyler)* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924];

McDuffie v. L.A. County Metropolitan Transit Authority (2002) 67 Cal.Comp.Cases 138, 141-143 (Appeals Board en banc).)

This matter proceeded to trial with only two exhibits: 1) a medical report from applicant's primary treating physician, Dr. David M. Kupfer, M.D., and 2) an Operative Report created by applicant's neurosurgeon, Dr. Marvin Bergsneider, M.D. (App. Exh. 1; Joint Exh. AA.) This sparse record leaves myriad questions unanswered.

First, Dr. Kupfer's report lacks the documentation, facts, or analysis necessary to support the WCJ's conclusion that the partial removal of applicant's skull was not an "amputation," where the report only addresses applicant's *orthopedic* injuries (bilateral knees, shoulders, and cervical spine), and not applicant's *skull* injury or replacement. Indeed, Dr. Kupfer specifically deferred any conclusions regarding "any neurologic impairment" of applicant to the "appropriate specialist." (App. Exh. 1, p. 17.) Additionally, although Dr. Kupfer's report does mention two reports generated by an evaluating neurologist, Dr. Thomas Schweller, M.D., said reports are not in evidence.

Dr. Bergsneider's Operative Report is similarly insufficient. The Operative Report contains a one-paragraph description of the operation procedure itself and a short set of post-operative notes, primarily addressing pre- and post-operative medications and anesthesia and containing the following statements:

Findings: right parietal partial thickness bone fracture depression, s/p elevation, cranioplasty, washout, and wound revision

Complications: None; patient tolerated the operation(s)/procedure(s) well.

(Joint Exh. AA, p. 4.)

Dr. Bergsneider's report is little more than a synopsis of the operation itself that is completely devoid of any medical opinion that would allow the WCJ or the Appeals Board to determine whether the partial removal of applicant's skull was an "amputation" within the meaning of section 4656(c)(3)(C). (Lab. Code, § 4656(c)(3)(C); *Cruz, supra*, 72 Cal.Comp.Cases at pp. 1282-1283.) Again, the WCJ and the Appeals Board have a duty to further develop the record when there is a complete absence of (*Tyler, supra*, 56 Cal.App.4th at pp. 393-395) 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 Appeals Board also 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 section 5906, I would rescind the F&O and return this matter for further development of the record.

Thus, I respectfully dissent.



WORKERS’ COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 28, 2023

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

**ANTONIO ARELLANO
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LAW OFFICES OF TRACEY LAZARUS**

AH/cs

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

REPORT AND RECOMMENDATION ON RECONSIDERATION

I

INTRODUCTION

Applicant has filed a timely and verified petition for reconsideration wherein he disputes the Findings of Fact dated 02/01/2022 finding that the 240-week exception pursuant to Labor Code section 4656(c)(3)(C) does not apply in this case. Applicant contends that the exception under section 4656(c)(3)(C) does apply in this case because the industrial injury required surgery to remove a portion of applicant's skull which qualifies as an amputation as defined by the WCAB in the case of *Cruz v. Mercedes-Benz of San Francisco* (2007) 72 Cal.Comp.Cases 1281, 1285 and 1286 (Appeals Board en banc).

II

STATEMENT OF FACTS

Applicant, born [], while employed on 08/24/2016 at Brea, California by Griffith Company, then insured by Zurich American Insurance Company, sustained injury arising out of and in the course of employment to head and neck.

A trial was held in this matter on 12/15/2021. Testimony was taken of the applicant. Following review of the testimony of the applicant and the medical reports and records of all the physicians in this matter, the Court issued a finding that the 240-week exception pursuant to Labor Code section 4656(c)(3)(C) does not apply in this case.

III

DISCUSSION

Applicant contends that the (human) skull is a “*jointed appendage*”, and therefore, the removal of skull fragments constitutes an amputation pursuant to section 4656(c)(3)(C) as defined in the *Cruz* case. This contention lacks merit.

Labor Code section 4656(c)(2) states:

“(2) Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury.”

Labor Code section 4656(c)(3)(C) states:

“(3) Notwithstanding paragraphs (1) and (2), for an employee who suffers from the following injuries or conditions, aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend for more than 240 compensable weeks within a period of five years from the date of the injury:

(C) Amputations.”

Applicant testified that the injury occurred when he was trying to remove a water pipe or tube from a trench. Applicant testified that the foreman got on a machine and used a part of the machine to lift the pipe. Applicant testified that the foreman put a lot of pressure on it, and the pipe lifted and then flipped over to the other side and fell on applicant’s entire body. Applicant testified that the pipe weighed about 500 pounds. Applicant testified that he lost consciousness as a result of the injury. (MOH/SOE 12/15/2021 Trial, at 4:14-20.)

Applicant testified that after the accident he was transported to a hospital and underwent surgery during which a part of his skull was removed and replaced by a titanium plate with screws. (MOH/SOE 12/15/2021 Trial, at 4:20-5:3.)

Applicant testified that after being released from the hospital he elected Dr. (David) Kupfer as his primary treating physician, that Dr. Kupfer continued to treat him until 11/02/2020 and that between the date of injury and the present he has not worked anywhere. (MOH/SOE 12/15/2021 Trial, at 5:4-6.)

Applicant’s Exhibit “1” consists of a medical report from Dr. David Kupfer (Plastic & Reconstructive Surgery/Hand Surgery) dated 11/02/2020. Dr. Kupfer states that applicant’s condition is maximal medical improvement as of the date of his evaluation (11/02/2020).

Joint Exhibit “AA” consists of an operative report from UCLA Neurosurgery dated 08/24/2016. This report states that the operation performed was: “*Elevation of Depression Traumatic Skull Fracture, Craniectomy, Cranioplasty, complex wound closure.*”

The description of the operative procedure contained in the report from UCLA Neurosurgery dated 08/24/2016 states:

“*The patient was brought to the Operating Room, intubated and placed under the general anesthesia. Appropriate IV access and monitoring was placed. A pre-surgical time-out was performed with all key personnel present. The head was rested on the Mayfield gel-padded horseshoe. The large right parietal incision was superficially washed with sterile saline, and the surrounding scalp cleansed. The area was prepped. The depressed skull fracture elements were removed piecemeal with a curette. Surrounding bone was waxed for hemostasis. Surgifoam used.*

Central tack ups were placed. Meningeal arteries coagulated. The defect was covered with a Leibinger titanium plate and screws. The galea was closed with 3-0 Vicryl. The skin was lacerated in a stellate manner at the center, and was closed with 3-0 nylon vertical mattress sutures combined with 4-0 simple nylon. The incision was infiltrated with 1:200,000 epinephrine 0.25% Marcaine. Sterile dressing was placed. The patient was kept intubated and taken to the PAR in stable condition."

The evidence indicates that applicant sustained a skull fracture as a result of his industrial injury and that surgery was performed to remove skull fragments from the right parietal area of the skull which was replaced by a titanium plate with screws.

In the case of *Cruz v. Mercedes-Benz of San Francisco* (2007) 72 Cal.Comp.Cases 1281, 1285 and 1286 (Appeals Board en banc) the WCAB stated:

"There are many different dictionary definitions of "amputate" and "amputation." A few examples are:

""The cutting off of a limb or part of a limb, the breast, or other projecting part." (Stedman's Medical Dictionary, 27th Edition, 2000.)

"To cut off (a projecting body part), especially by surgery." (American Heritage Dictionary of the English Language, 4th Edition, 2006.)

***"The surgical removal, by cutting, of a part of the body, as an ear or a breast, but especially of a limb, or a part thereof. The term also applies to the separation of a part or a limb from the body by accidental means, or by a morbid process, as in ainhum."** (Attorney's Dictionary of Medicine and Word Finder, 1990.) (Emphasis added.)*

"Removal of a limb, body part, or organ, usually as a result of surgery but occasionally due to trauma." (Taber's Cyclopedic Medical Dictionary, Edition 20, 2005.)

"The removal of a limb, part of a limb, or other body appendage." (International Dictionary of Medicine and Biology, 1986.)

"to cut off (an arm, leg, etc.), esp. by surgery." (Webster's New World Dictionary of American English, 1988.)

"cut off from an animal body (some part, esp. a limb because of injury or disease). (The New Shorter Oxford English Dictionary, 1993.)

"cut off (a limb), typically by surgical operation." (The New Oxford American Dictionary, 2nd edition, 2005.)

"the removal of a limb or other appendage or outgrowth of the body." (Dorland's Illustrated Medical Dictionary, 2003.)"

Dictionary definitions provide us some limited assistance, but we are guided primarily by the mandate to give words "their plain and commonsense meaning" and their "usual and ordinary meaning." In ordinary usage, the word "amputation" nearly always refers to a limb, or a part of a limb, including digits. This usage is reflected in most definitions, either directly or in an explanatory clause modifying a more general definition. Although we are not bound by dictionary definitions, we find considerable support in dictionaries for the commonsense and ordinary meaning of "amputation." Defining amputation as the severance or removal of a limb, part of a limb, or other body appendage comports with the ordinary meaning, and includes the range of potentially compensable scenarios, including both traumatic loss of a body part in an industrial injury and surgical removal during treatment. This definition conforms to our understanding of the common meaning of the term "amputation," which encompasses external projecting body parts, not internal parts, even if they include bone. It is also consistent with the definitions in the International Dictionary of Medicine and Biology, Dorland's Illustrated Medical Dictionary, and Stedman's Medical Dictionary. To the extent that some definitions refer to organs, appear to encompass all body parts, or include an equivocal "etc.," we reject them or interpret them in a manner consistent with our understanding of the term "amputation."

Applicant contends that *"the skull is considered a jointed appendage per the definition found in the diagram of life science: "Despite its shape the skull is a jointed appendage." (Jointed Appendages Life Science CK-12 PLIX Series, <https://www.ck12.org>.)"* (Pet. For Recon, at 3:24-4:2.)

The court reviewed this website and it is an educational website for teachers and students for grades K through 12. It is unclear what the basis of this definition is or what is meant by "jointed appendage." Also, no substantial medical evidence was offered by applicant to support his contention that the skull is an appendage.

Applicant contends that because the skull is a "jointed appendage" it is an external projecting body part. This contention lacks merit. Unlike the ear, the skull bone is not an external protruding body part.

Applicant contends that the removal of the skull fragments constitutes an amputation because it resulted in a reduction of the size of the skull. This contention lacks merit.

In support of his contention that the removal of the skull fragments resulted in a reduction of the size of the skull applicant relies on the case of *Parco v. Workers' Compensation Appeals Board* (2018) 83 Cal.Comp.Cases 1288 (writ denied.)

In the *Parco* case applicant sustained an industrial injury to his left thumb, left hand, and the skin of his left thumb. Applicant suffered second and third degree burns to his left hand and underwent three surgeries on his left hand. The QME, Dr. David Doty testified in his deposition that as a result of applicant's crush injury, tendon damage, and the fracture of his bone and subsequent surgery with the bone removal he had a 7mm shortening of his left thumb. The [Appeals Board] concluded that the 7mm shortening of the thumb constituted the severance or removal of a limb, part of a limb or other body appendage, including both traumatic loss in an industrial and surgical removal treatment of an industrial injury pursuant to section 4656(c)(3)(C).

This contention lacks [merit] as there is no substantial medical offered to indicate that the skull was reduced in size. The evidence indicates that skull fragments were removed and replaced by a titanium plate with screws.

IV
RECOMMENDATION

The petition for reconsideration should be denied.

DATE: [February] 1, 2022

Howard Lemberg
WORKERS' COMPENSATION JUDGE