

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

**AMY SWIFT, *Applicant***

**vs.**

**CITY OF CHULA VISTA, Permissibly Self-Insured, Administered By INTERCARE  
HOLDINGS INSURANCE SERVICES, INC., *Defendant***

**Adjudication Number: ADJ9247606  
San Diego District Office**

**OPINION AND ORDER  
DENYING APPLICANT'S PETITION FOR RECONSIDERATION,  
GRANTING DEFENDANT'S PETITION FOR RECONSIDERATION  
AND DECISION AFTER RECONSIDERATION**

Applicant, who is representing herself, and defendant each seek reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award (and Orders) of August 11, 2022, wherein it was found that, while employed on November 26, 2013 as a Fire Investigator II, applicant sustained industrial injury to her right knee, right elbow and right shoulder, and left hip, but not to her neck, back or right hip. It was found that applicant's injury caused permanent disability of 7%, after apportionment to other factors. Additionally, the WCJ found, "The applicant sustained periods of temporary disability for treatment of the left hip subject to the 104 week cap on temporary disability in an amount to be adjusted by the parties with the WCAB reserving jurisdiction." Previously, in a Decision after Reconsideration of October 29, 2021, we<sup>1</sup> affirmed the WCJ's finding (in a Findings and Award of August 5, 2021) that applicant "did not sustain injury to her neck, back, or right hip as a result of the incident on November 26, 2013." (Decision After Reconsideration of October 29, 2021, Finding No. 3.)

Applicant appears to contend that the WCJ erred in not finding industrial injury to the back and the neck. As noted above, we already affirmed a finding of no industrial injury to those body parts in our Opinion and Decision of October 21, 2021, and applicant did not seek judicial review of our decision, thereby rendering it final. Defendant contends that the WCJ erred in finding that

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<sup>1</sup> Since the issuance of our Opinion and Decision of October 29, 2021, Commissioner Deidra Lowe has retired from the Appeals Board. Commissioner Katherine Williams Dodd has been substituted in her place.

the applicant sustained periods of temporary disability as a result of her industrial injury, arguing that temporary disability was never placed at issue in these proceedings. We have not received any answers, and the WCJ has filed a Report and Recommendation on Petitions for Reconsideration (Report) addressing both of the petitions.

We note that defendant has attached numerous documents to its Petition that are already in the adjudication file in violation of Appeals Board Rule 10945(c)(1). Defendant is reminded to comply with Appeals Board rules or risk sanctions in future proceedings. Applicant has attached a document to its Petition which is not part of the adjudication file, and does not appear to be material newly discovered evidence, and thus violates Appeals Board Rule 10945(c)(2). (Cal. Code Regs., tit. 8, § 10945, subd. (c).)

We will deny the applicant's Petition for the reasons stated in the WCJ's report, which we adopt, incorporate, and quote below. Our Decision After Reconsideration of October 29, 2021 had affirmed the WCJ's finding of no industrial injury to the neck and back. Applicant did not seek a writ of review of our decision pursuant to Labor Code section 5950, and that decision is now long final.

With regard to defendant's Petition, we will grant reconsideration and amend the WCJ's decision to remove the finding that the injury caused temporary disability. As noted in our Opinion of October 29, 2021 (at p. 1) and in the WCJ's report, temporary disability was not placed at issue in these proceedings. Additionally, temporary disability was not placed at issue at the July 27, 2022 trial. (See Minutes of Hearing and Summary of Evidence of July 27, 2022 trial.)

We incorporate the following Report from the WCJ:

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

**I**

**INTRODUCTION**

- |                           |   |
|---------------------------|---|
| 1. Applicants Occupation: | Fire Investigator II  |
| Occupational Variant:     | 490   |
| Applicant's Age:          | 49  |
| Dates of Injury:          | November 26, 2013   |
| Parts of Body Alleged:    | Right Knee, Right Elbow,<br>Right Shoulder, Neck, Back,<br>and Bilateral Hips |

- 2. Identity of Petitioner: **AMY SWIFT**
- 3. Identity of Cross-Petitioner: Defendant **CITY OF CHULA VISTA ADM BY INTERCARE**
- 4. Timeliness: Petitions were Timely
- 5. Verification: The Petition was verified.
- 6. Date of Issuance of Order: August 11, 2022
- 7. **Petitioner’s AMY SWIFTS’ Contention(s):**
  - A. That the WCJ erroneously failed [to] find in Applicant’s favor on the cervical spine, back and lumbar spine.
  - B. That the WCJ falsely stated that Ms. Jane Oatman, Esq. was part of an “exhaustive review” of Applicant’s evidence on May 25, 2021.
- 8. **Petitioner CITY OF CHULA VISTA’s Contention:**
  - A. That the Finding of Fact and Award of Temporary Disability was in error as that issue was not raised at the MSC on February 15, 2018 or at any subsequent Trial proceedings.

## II PROCEDURAL HISTORY

First, both parties attached multiple documents to their Petitions for Reconsideration filed August 24, 2022 (Applicant) and August 25, 2022 (defendant) in violation of the Board Rule, and thus should be disregarded.

The applicant was hired as a Fire Inspector II by the City of Chula Vista on October 31, 2005 (Def. Ex. 8 4:11-12). The applicant filed workers compensation claims for injuries claimed on April 15, 2007 (ADJ8536948) and October 1, 2003 through July 26, 2012. The body parts claimed in the 2007 DOI were neck, right shoulder and right hip. The body parts claimed in the CT ending on July 26, 2012 were her neck, right shoulder and right hip. These cases were litigated. A “Take Nothing” on both cases was Ordered by WCJ Thomas Harwayne on February 3, 2014.

The applicant filed a new claim of injury alleging that on November 26, 2013, as a result of an unwitnessed fall she injured her right elbow, right hip, right knee and right shin. The left hip and neck were added subsequently as part of this claim. This is the date of injury which is the subject of the Findings and Awards

issued August 5, 2021 and from which the applicant filed her Petition for Reconsideration.

This case was initially set for trial on June 22, 2016, the matter was continued to October 2016 because the applicant was recovering from surgery for her cervical spine. The case was continued then to January 10, 2017 so that the PQME could review additional records. The January 10, 2017 trial date was vacated for additional discovery and on March 17, 2017 the applicant was re-evaluated by PQME Payam Moazzaz. As a result of the re-evaluation Dr. Moazzaz found that the right shoulder was industrially caused, albeit with apportionment. He did not change his opinion that the neck, back and bilateral hips were non-industrial.

The case then returned to Trial before the undersigned WCJ on May 7, 2018. The applicant was represented by an attorney throughout the proceedings. The parties stipulated to submit the case on the current evidentiary record without testimony due to the potential for contradictory testimony regarding the facts of the injury. After having submitted the case and upon reviewing the totality of the evidence, the WCJ issued an Order vacating the submission and setting the case for Status Conference on October 2, 2018 because there was no substantial evidence on the cervical spine, back and bilateral hips. The parties agreed to go to Dr. Bernicker as the IME. The applicant [was] evaluated by Dr. Bernicker a multitude of times. Dr. Bernicker was deposed by the applicant attorney on April 11, 2019.

On July 9, 2019 the applicant filed a Complaint with the Medical Unit against Dr. Bernicker alleging he injured her during the examination causing her to require surgery to her right knee, hardware removal from the low back and a dislocation of her right hip. The Medical Unit dismissed the Complaint as lacking in merit.

Applicant's counsel filed a Petition to be Relieved as Counsel of Record. A Notice of Intent to grant the petition was issued by WCJ Michelle Utter on June 9, 2020, taking the Status Conference set before her for 7/15/2020 off calendar. The status conference was then reset before Judge Atcherley for July 20, 2020. Ms. Swift did not appear. The matter was continued to another Status Conference for September 24, 2020. The applicant agreed on or about August 28, 2020 to dismiss her attorney. On September 24, 2020, the parties appeared before Presiding Judge Levy. The applicant stated she filed a complaint requesting Judge Atcherley b[e] removed from the case. The complaint was never received by the court and Judge Levy as the Presiding Judge had not received any such complaint. Judge Levy continued the matter to December 17, 2020 before Judge Atcherley. The applicant requested an Order for a New Panel. The defendant objected. This became an issue for trial along with the issues as to injury.

The parties appeared on March 16, 2021. The applicant offered thousands of pages of records, many of which were already in the WCAB file. The applicant was asked if she intended to pursue disqualifying Dr. Bernicker. The defendant was prepared to put on the nurse from Dr. Bernicker's office that was present during the exam. The applicant indicated that she was no longer pursuing that issue, but still wanted an Order for a Replacement PQME Panel. The case was continued April 19, 2021 to allow the court time to review the additional materials. The case was then continued to May 25, 2021.

On May 25, 2021, the applicant had her retirement/pension attorney with her on the line. The WCJ could not find exhibits as listed on Applicant's exhibit list but w[ent] through the list and her issues exhaustively. Finally, the parties were ready. The applicant was asked if she desired to testify and she responded that she did not and the case was submitted on the current record, again. (See MOH/SOE 5/25/2021 cover page, and page 5 lines 2-19.)

On August 5, 2021 a Findings and Award/Opinion on Decision issued finding injury and disability to the right shoulder. The neck, back, and bilateral hips were not found to be industrial. The Applicant filed her timely verified Request for Reconsideration and the defendant filed an Answer.

On October 29, 2021 the WCAB issued its Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration. The WCAB ordered that the Findings and Award dated August 5, 2021 be affirmed (including the finding that that the applicant did not sustain injury to her neck, back or right hip as a result of the incident on November 26, 2013) and amended the Findings of Fact to add "2. The applicant sustained injury to her left hip as a result of the incident on November 26, 2013"; amend 4 to state "4. The issue of permanent disability is deferred with jurisdiction reserved and add "5. The issue of reimbursement for any self-procured medical treatment to the left hip is deferred with jurisdiction reserved". The Award was amended to state "A. Future medical treatment for the right shoulder and left hip".

Thereafter further proceeding at the trial level were held. The defendants authorized and applicant attended an Independent Medical Exam with Dr. Michael Muldoon on July 6, 2022 to address the issues with the left hip. Dr. Muldoon issued his report which is filed under EAMS ID 92248066. The parties then attended the trial on July 27, 2022, admitting into evidence Dr. Muldoon's report as Applicant's exhibit EE and the Rebuttal of Dr. Bernicker MD as Applicant's FF. The case was submitted after testimony by the Applicant (MOH/SOE 7/27/2022 2:23-3:16). A new Findings & Award issued on August 11, 2022. It is from this Findings and Award that the parties filed their timely Petitions for Reconsideration.

### III DISCUSSION

**APPLICANT’S CONTENTION A: THAT THE WCJ ERRONEOUSLY FAILED [TO] FIND IN APPLICANT’S FAVOR ON THE CERVICAL SPINE, BACK AND LUMBAR SPINE**

The WCAB affirmed the denial of the cervical spine and lumbar spine. The decision of the Trial Court denying these body parts in the Findings and Award August 5, 2021 was affirmed by the WCAB in its Order Granting Petition for Reconsideration and Decision after Reconsideration dated October 29, 2021. Therefore, this Contention should be denied.

**APPLICANT’S CONTENTION B: THAT THE WCJ FALSELY STATED THAT MS. JANE OATMAN, ESQ. WAS PART OF AN “EXHAUSTIVE REVIEW” OF APPLICANTS’ EVIDENCE ON MAY 25, 2021**

The applicant attached an email from Ms. Oatman to her Petition for Reconsideration. That email proves that Ms. Oatman was present. Please also see the MOH/SOE 5/25/2021 Page 1.

There is no basis for this contention and it should be denied.

**DEFENDANT CITY OF CHULA VISTA CONTENTION A: THAT THE FINDING OF FACT AND AWARD OF TEMPORARY DISABILITY WAS IN ERROR AS THAT ISSUE WAS NOT RAISED AT THE MSC ON FEBRUARY 15, 2018 OR AT ANY SUBSEQUENT TRIAL PROCEEDINGS**

This contention is correct. Finding of Fact No. 9 should be stricken from the Findings of Fact, page 5 and the Award on page 6 should be amended to delete “C” from the Award.

### IV **RECOMMENDATION**

It is recommended that the Petition for Reconsideration be denied except as to Defendant’s Contention A.

With regard to Defendant’s Contention A, the Findings of Fact and Award should be amended so as to delete the award of temporary disability, to wit: Finding of Fact No. 9 should be stricken from the Findings of Fact, page 5 and the Award on page 6 should be amended to delete “C” from the Award.

For the foregoing reasons,

**IT IS ORDERED** that Applicant's Petition for Reconsideration of the Findings and Award (and Orders) of August 11, 2022 is **DENIED**.

**IT IS FURTHER ORDERED** that Defendant's Petition for Reconsideration of the Findings and Award (and Orders) of August 11, 2022 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award (and Orders) of August 11, 2022 is **AFFIRMED** except that it is **AMENDED** as follows:

## **I STIPULATED FACTS**

1. **AMY SWIFT**, while employed on November 26, 2013 as a fire Investigator II, Occupational Group Number 490, by the **CITY OF CHULA VISTA**, sustained injury out of and in the course of employment to her right knee, right elbow, right shoulder, and claims to have sustained injury arising out of and in the course of her employment to her neck, back, and bilateral hips.
2. At the time of injury, the employer was self-insured.
3. At the time of injury the employee's earnings were \$1,508.39 per week warranting indemnity rates for permanent disability at \$230.00 week. The applicant received compensation pursuant to Labor Code §4850 at \$1,508.39 per week during the period of November 26, 2013 to December 1, 2013.
4. The employer has furnished some medical treatment.

## **II FINDINGS OF FACT**

5. There is no support for the request for an additional Panel QME;
6. The applicant sustained injury to her left hip as a result of the incident on November 26, 2013.
7. The applicant did not sustain injury to her neck, back, or right hip as a result of the incident on November 26, 2013.
8. The applicant has sustained permanent disability of 7% after apportionment, this equates to \$4830.00 payable for 21 weeks at \$230.00 per week, less advances.

9. The issue of reimbursement for any self-procured medical treatment to the left hip is deferred, with jurisdiction reserved.

10. The applicant is not entitled to an unapportioned award.

11. There is need for further medical treatment to her right shoulder and left hip. There is no need for medical treatment for the right knee, right elbow or right hand.



**AWARD**

**AWARD IS MADE IN FAVOR OF AMY SWIFT against CITY OF CHULA VISTA of:**

- A. Permanent Disability in the amount of 7%, equating to \$4,830.00 payable for 21 weeks at \$230.00 per week, less advances.
- B. Future medical treatment for the right shoulder and left hip.
- C. Claims for reimbursement for self-procured medical treatment for the right hip are to be adjusted by the parties with the WCAB to retain jurisdiction in case of a dispute.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE A. ZALEWSKI, CHAIR

**I CONCUR,**

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



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

**October 24, 2022**

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

**AMY SWIFT  
TROVILLION INVEISS & DEMAKIS**

**DW/oo**

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