

**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
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Applicant, who is representing herself, seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award (and Orders) of August 5, 2021, 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, but not to her neck, back or hips. It was found that applicant's injury caused permanent disability of 4%, constituting only right shoulder disability, after apportionment to other factors. The WCJ found a need for further medical treatment for the right shoulder only. Additionally, the WCJ issued an order denying the applicant's request for a new panel qualified medical evaluator (QME) in orthopedics. Temporary disability was not placed at issue.

Applicant's Petition is not a model of clarity. Most of the Petition consists of unspecified claims of bias against the WCJ and the reporting physicians in the case rather than claims of legal error with references to the evidentiary record. It appears that applicant contends that the WCJ should have ordered a new QME panel in orthopedics, and generally argues that the WCJ should have found industrial injury and permanent disability in all claimed body parts. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).¹

¹ We note that since our previous consideration of this case on April 8, 2015 when we issued an Order Denying Petition for Removal, previous panelist Chairwoman Ronnie G. Caplane is no longer a member of the Appeals Board. Commissioner Marguerite Sweeney has been substituted in her place.

In reaching her decisions regarding industrial injury to the left hip, the WCJ disregarded the opinion of treating orthopedist and hip specialist Michael P. Muldoon, M.D. However, at the conclusion of the Report, the WCJ writes, “It is recommended that the Petition for Reconsideration be denied. However, if the [Appeals Board] is of the opinion that Dr. Muldoon’s report of February 2, 2020, App. Ex. BB, is substantial evidence of injury to the hip, then the Findings should be amended to include the hip as an injured body part with [a] need for further medical treatment. The case would have to be remanded back in that case for decision about the percentage of causation (apportionment) attributable to the industrial exposure and the non-industrial causes.”

We have perused Dr. Muldoon’s February 3, 2020 report and find it to be substantial evidence. The WCJ did not explain in either her Opinion on Decision or Report what she considered wanting in Dr. Muldoon’s reporting, other than the fact that he does not specify apportionment beyond “single figures.” Dr. Muldoon gives a very detailed history of applicant’s bilateral hip condition, and gives an extensive explanation of his opinion on industrial causation. He explains that, while applicant had very extensive pre-existing left hip pathology, she did not become symptomatic until after the industrial fall. (February 3, 2020 report at p. 5.) Additionally, he explains that the tear sustained by the applicant on the left hip was consistent with the mechanism of injury, which was a fall on the right side because “a direct fall on a hip is less likely to cause a tear in my experience than is a twisting type injury....” (February 3, 2020 report at p. 6.) While Dr. Muldoon writes that the “underlying condition was a much greater factor than the specific injury in respect to the patient’s ultimate need for hip replacement,” the “left hip was probably injured with a reasonable degree of medical certainty on 11/26/13, and this resulted in her becoming symptomatic gradually but progressively to the point she needed a hip replacement. The early MRI obtained in January 2014 clearly demonstrated cartilage damage as well as a substantial labral tear. It is my experience that patients with labral tears that are of that nature and dysplasia are typically symptomatic, and therefore the absence of symptoms before the injury is somewhat puzzling and allows me to make the conclusion that the injury was the ‘straw that broke the camel’s back’ in this case.” (February 3, 2020 report at p. 6.)

Dr. Muldoon concludes, “When I analyze this case, I have to look both at the natural history of a significantly dysplastic hip as well as the patient’s reported injury and documented symptom presentation. If I were involved in this case as a qualified or agreed medical evaluator, I would consider the left hip injury of 11/26/13 as an industrial injury that resulted in the unmasking of

symptoms on the left hip and minimally accelerated her presentation and need for hip replacement. I would then assign a single digit percentage apportionment to the injury and attribute the rest of any disability to the underlying condition.” (February 3, 2020 report at p. 7.)

In order for an injury to arise out of employment, the employment need only be a contributing cause of the injury. (*McAllister v. Workmen’s Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 418 [33 Cal.Comp.Cases 660]; *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310].) We therefore grant reconsideration, and amend the WCJ’s decision to find industrial injury and need for further medical treatment to the left hip, and amend the decision to defer the issues of permanent disability and self-procured medical treatment to the left hip.

We will otherwise affirm the WCJ’s decision for the reasons stated in the Report, which is incorporated as quoted below. We have edited the portions of the Report dealing with the left hip so as to conform with our discussion above.

REPORT AND RECOMMENDATION
ON PETITION FOR RE[CONSIDERATION]

I
INTRODUCTION

- | | | |
|----|---|---|
| 1. | Applicants Occupation:
Occupational Variant:
Applicant’s Age:
Dates of Injury:
Parts of Body Alleged: | Fire Investigator II
490
49
November 26, 2013
Right Knee, Right Elbow,
Right Shoulder, Neck, Back,
and Bilateral Hips |
| 2. | Identity of Petitioner: | AMY SWIFT |
| 3. | Timeliness: | Petition was Timely |
| 4. | Verification: | The Petition was verified. |
| 5. | Date of Issuance of Order: | August 5, 2021 |
| 6. | Petitioner’s Contention(s): | |
| A. | CONTENTION A: The Evidence does not justify the findings of fact; do not support the Order Decision or Award; the Board acted | |

without or in excess of its powers and the order, decision or award was procured by fraud

II PROCEDURAL HISTORY

The defendant filed an Answer to the Petition for Reconsideration on September 3, 2021. The Answer sets forth a very detailed history of the case. Basically, the applicant was hired as a Fire Inspector II by the City of Chula Vista on October 31, 2005 (Def. Ex. 84:11-12). 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 be 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 went 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. (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. It is from this Award that the Applicant filed her timely verified Request for Reconsideration.

III DISCUSSION

CONTENTION A: THE EVIDENCE DOES NOT JUSTIFY THE FINDINGS OF FACT; DO NOT SUPPORT THE ORDER DECISION OR AWARD; THE BOARD ACTED WITHOUT OR IN EXCESS OF ITS POWERS AND THE ORDER, DECISION OR AWARD WAS PROCURED BY FRAUD

REQUEST FOR REPLACEMENT PANEL

The applicant was requesting another panel QME following the examinations and reports of the Court Appointed Medical Examiner (IME) Dr. Jeffrey Bernicker as she believes this reporting to be biased. The court denied this request with a detailed information setting forth the medical legal reporting and depositions to date. Further, the new reports by Dr. Muldoon were admitted into evidence and reviewed. There is no merit to the applicant's contention that this Order was in error or b[ia]sed.

At the first trial of this matter, the applicant also submitted Applicant's Exhibit AA which was admitted for ID purposes only. This was a complaint against Dr. Payam Moazzaz filed by another person entirely.

The applicant also filed a Complaint with the Medical Unit alleging that Dr. Bernicker injured her during the examination (EAMS ID: 35105123-Def. Ex. 20 7-8-2019). The medical unit responded and closed the case as with no action on November 19, 2019 (EAMS ID: 35105127-Def. Ex. 21).

The court also notes that the applicant was seen by Payam Moazzaz as a PQME (Joint Ex. A-G); Dr. Michael Muldoon as a primary doctor who treated her on a non-industrial basis for her right and left hip (Joint Ex. H, I and J) as well newly admitted Applicant's Ex. BB report of Michael Muldoon dated February 2, 2020 (answering questions asked by the IME Bernicker regarding the right and left hip) as well as a multitude of treating physician reports stemming from the date of injury of 11/27/2013 and forward (Def. Ex. 4, 5, 6, and 7). These all discuss Ms. Swift's injuries, some of them contemporaneous with the date of injury.

Finally, the court notes that the applicant was evaluated by QME's [sic] in her other cases (i.e. Dr. Garrett Tallman Def. Ex. 9 and 10) which were relied on by the Court to issue a take nothing on her earlier claims.

In reviewing all of these reports and considering the allegations, it is found that an additional panel in Orthopedics is unnecessary and will result in under delay. Therefore, the applicant's request for an additional panel in orthopedics was denied.

FAILURE TO TAKE ALL THE ADDITIONAL RECORDS

The WCJ listed the applicant's list of proposed exhibits as an exhibit. Many of the documents had already been admitted and were part of the WCAB file. Each exhibit was gone over by the WCJ. The exhibits were discussed with the applicant and her [pension] attorney, Ms. Jane Oatman. Additional records were taken in and admitted. The bulk of the records listed by the applicant were not. The applicant does not list even one of the exhibits on her list that should have been admitted at trial and why, in her Petition for Reconsideration.

This contention should be denied.

DECISION REGARDING NECK, BACK, AND BILATERAL HIPS

The Court assigned an Independent Medical Evaluator (IME) on October 22, 2018. The court specifically asked the IME to address three specific questions. These were 1) Whether the cervical spine was injured in the incident or as a compensable consequence of the right shoulder injury; 2) whether the non-industrial right hip was aggravated by the incident on 11/23/2013; and 3) whether the left hip was injured as a compensable consequence of the right hip injury (assuming the right hip to be industrial). See Minutes of Hearing 10/22/2018, page 2. Based on the reports of the IME Dr. Jeffrey Bernicker dated December 4, 2018 (Def. Ex. 18), January 15, 2019 (Def. Ex. 17); April 30, 2019 (Def. Ex. 16); March 16, 2020 (Def. Ex. 15) and his deposition of April 11, 2019 (Def. Ex. 19) it is found that the applicant did not sustain injury to her neck, back and [right hip] as a result of the fall on November 26, 2013.

The finding of non-industrial causation for these body parts is also supported by the reports of Dr. Payam Moazzaz (Jt. Ex. A-E) as well as his deposition of 12/4/215 (Jt. Ex. F and 6/30/2017 (Jt. Ex. G).

[Discussion of Dr. Muldoon's report and industrial causation of the left hip injury is omitted.]

Therefore, based on the reports of Dr. Bernicker, the IME and his well-crafted opinions regarding the [...] right hip, lumbar and cervical spine, as well as the detailed summary of the medical record contained in his report of December 4, 2018 (Def. Ex. 18) and his deposition testimony, it is found that there was no injury to the right [...] hip, neck or lumbar spine as a result of the fall on November 23, 2013.

This contention should be denied.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied. However, if the WCAB is of the opinion that Dr. Muldoon's report of February [3], 2020, App. Ex. BB, is substantial evidence of injury to the left hip, then the Findings should be amended to include the left hip as an injured body part with an is need for further medical treatment. The case would have to be remanded back in that case for decision about the percentage of causation (apportionment) attributable to the industrial exposure and the non-industrial causes.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Award (and Orders) of August 5, 2021 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 5, 2021 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 during the period of November 26, 2013 to December 1, 2013.
4. The employer has furnished some medical treatment.

II FINDINGS OF FACT

1. There is no support for the request for an additional Panel QME;
2. The applicant sustained injury to her left hip as a result of the incident on November 26, 2013.
3. The applicant did not sustain injury to her neck, back, or right hip as a result of the incident on November 26, 2013.
4. The issue of permanent disability is deferred, with jurisdiction reserved.
5. The issue of reimbursement for any self-procured medical treatment to the left hip is deferred, with jurisdiction reserved.
6. The applicant is not entitled to an unapportioned award.
7. There is need for further medical treatment to her right shoulder and left hip. There is no need for treatment for the right knee, right elbow or right hand.

ORDER

Having considered the request by the applicant for a replacement/additional panel in Orthopedics; and after review of the existing board file and reports contained therein, the request is hereby denied.

AWARD

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

- A. Future medical treatment for the right shoulder and left hip.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA LOWE, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 29, 2021

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.

CS