

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

IGNACIO MAYA, *Applicant*

vs.

HARRIS FARMS, INC.;
permissibly self-insured and adjusted by
TRISTAR RISK MANAGEMENT, *Defendants*

Adjudication Number: ADJ10010246
Fresno 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.

The WCJ properly relied upon the opinion of the agreed medical evaluator (AME), who the parties presumably chose because of the AME's expertise and neutrality. The WCJ was presented with no good reason to find the AME's opinion unpersuasive, and we also find none. (See *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 18, 2021

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

**IGNACIO MAYA
BOSQUEZ & SIEMENS
SAMUELSEN, GONZALEZ, VALENZUELA & BROWN**

abs

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

**REPORT AND RECOMMENDTION
ON PETITION FOR RECONSIDERATION**

**I
INTRODUCTION**

- | | |
|----------------------------|--|
| 1. Applicant's occupation: | Beef Packer |
| Applicant's age: | 63 |
| Date of injury: | CT through 4/23/15 |
| Part of body injured: | Both upper extremities and allegation to C-spine |
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- | | |
|----------------------------|------------------------------|
| 2. Identity of Petitioner: | Defendant filed the Petition |
| Timeliness: | The Petition is timely |
| Verification: | The Petition is verified |
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- | | |
|-----------------------------|----------------|
| 3. Date of Finding & Award: | March 26, 2021 |
|-----------------------------|----------------|
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4. Petitioner contends that the WCJ erred in finding that:
- a. Applicant sustained industrial injury in reference to the Petition to Reopen involving the cervical spine.
 - b. Applicant sustained new and further permanent disability pursuant to the PQME reports from Dr. Wilker and that the Applicant sustained permanent disability to the neck consisting of a 7% WPI
-
5. Defendants, however, confirmed that they have no objection with the additional permanent disability for the right shoulder in their Petition.

**II
FACTS**

The Applicant has alleged their entitlement to new and further disability to Applicant's bilateral shoulders, including his cervical spine (neck) after Applicant timely filed a Petition to Reopen. The Applicant has alleged their entitlement to new and further disability to Applicant's bilateral shoulders including his cervical spine (neck) after Applicant timely filed a Petition to Reopen.

In this case, the Applicant had seen Dr. Wilker who rendered his PQME reports dated 5/25/16 and 7/20/16 upon which the initial settlement was based. In his report of 7/20/16 Dr. Wilker (Joint Exhibit B) stated that, "all of the patient's complaints in the bilateral upper extremities and the **neck** are emanating from the bilateral shoulder rotator cuff tears, therefore, the impairment of the rotator cuff tears is inclusive of all the complaints that she has in the rest of the

upper extremities which include the biceps, clavicle, elbow, ribs, hand, and neck. Therefore, my previous report remains unchanged.”

In the Stipulations with Request for Award (Joint Exhibit A) previously entered into by the parties, the parties stipulated that the Applicant sustained injuries arising out of and in the course of employment to the left shoulder and right shoulder. Although the parties stated in paragraph nine that partial denial letters denying certain body parts issued, there was no dismissal of any claims to those other body parts at that time. The Award issued on 2/14/17 approving the Stipulations with Request for Award. Subsequently, the Applicant filed their timely Petition to Reopen on 5/16/19.

Applicant was subsequently seen by Dr. Wilker who indicated on 12/4/19 that he was performing an Agreed Medical Re-evaluation. Defendants confirm in their Petition for Reconsideration that Dr. Wilker in this report did find new and further disability for the right shoulder. Defendant’s state that they have no objection with the additional disability for the right shoulder.

Thereafter, Applicant was seen at Sierra Medical Imaging (Exhibit 2-Applicant) wherein the Applicant underwent an MRI of the cervical spine without contrast as ordered by Dr. Wilker (see notation on first page of report from Sierra Medical Imaging). Thereafter, Dr. Wilker issued an AME supplemental report dated 3/20/20 (Exhibit 1 – Applicant) after reviewing said cervical MRI study. The AME stated that after reviewing this MRI the findings are consistent with Applicant’s symptoms and it appears that Applicant has another issue which should be included in this industrial injury. The AME stated that the cervical radiculitis arose out of employment and during the course of employment from repetitive pushing and pulling of over 20 pounds. The AME noted that he had previously given impairment ratings for the shoulders but now he noted that he should give additional impairment for the cervical radiculitis which he noted would add an additional 7% impairment for the neck, 10% of this impairment was apportioned to natural causes with 90% to industrial causes.

III ISSUES RAISED

THE EVIDENCE DOES NOT SUPPORT THE FINDINGS OF FACT:

Defendant’s argue that to reopen a case under Labor Code §5803 there must be a showing of good cause and additionally that applicant was unable to show good cause to allow disability for the cervical spine.

If an Applicant's condition has worsened, however, the fact that a condition was known, as the PQME report of Dr. Wilker dated 7/20/16, but not included in the original Award, would not prevent the Appeals Board from Awarding new and further disability for it. In that report at page 1, the PQME clearly states that, “All of the patient’s complaints in the bilateral upper extremities and the neck are emanating from the bilateral should rotator cuff tears...”. Generally, whether or not an Applicant has suffered new and further disability will be a medical question. The Applicant

should return to the same QME in connection with a Petition to Reopen. Often the parties find it convenient to use the same doctor, and the WCJ also may order an Applicant to return to the same doctor. That was indeed done here.

I found that the PQME and, ultimately the AME reports, were substantial medical evidence on the issue of new and further disability and the timely filed Petition to Reopen and subsequent medical opinion established the new and further disability to include the cervical spine disability. It is further established that pursuant to Labor Code §5803 the Appeals Board has jurisdiction over its Orders, Decisions and Awards. It is noted that prior to the initial settlement that no cervical MRIs were performed. It was only after the filing of the Petition to Reopen that the PQME/AME ordered the diagnostic study to clarify Applicant's situation (See Exhibit 2 – Applicant). Upon review of the MRI study, the AME concluded that, indeed, there was new and further disability involving the cervical spine, based upon this new medical evidence that was not available beforehand for whatever reason. This is consistent with the findings in *Alliano v. WCAB* (1979) 44 CCC 1156 wherein the reporter states that, “The finding, in the Decision of a Workers' Compensation Judge granting reopening of the case, of injury to the employee's neck, was not precluded by the original Decision which found injury only to the head. The record revealed that after the industrial injury, the employee did in fact complain of neck discomfort. Additionally, the finding in the original decision of injury to the head did not preclude findings of injury to the neck in the decision granting reopening in light of the fact that there was good cause for reopening the case.” Similarly, this is almost identical to what occurred herein.

Therefore, based on the AME reports from Dr. Wilker, Applicant is found to have sustained new and further disability to the right shoulder and to the cervical spine/neck. The left shoulder was the same as before with no increase in disability.

DEFENDANTS CONTEND THAT THE REPORT FROM THE QME, DR. WILKER, DATED MARCH 20, 2020 WAS INADMISSIBLE AND THAT THERE WAS EVIDENCE TO SUPPORT THEIR ALLEGATION:

At the time of Trial, the AME report from Dr. Wilker, dated 3/20/20 was verbally objected to by Defendant's as noted in the Minutes of Hearing dated 1/11/21 and the Court was to make a ruling as to the admissibility to that exhibit. Defendant's state in their Petition for Reconsideration that they had filed exhibits with the Court which included letters to Applicant's Attorney dated 3/25/20 and 4/24/20 objecting to the requests for supplemental reports; however, in reviewing the Minutes of Hearing, there were no letters submitted by Defendant's in that regard for the Court's consideration and therefore that argument is inappropriate for consideration. This discussion by Defendant is without merit.

Dr. Wilker had evaluated the Applicant at the parties request and had apparently requested an MRI be performed which took place at Sierra Medical Imaging on 12/18/19 (Exhibit 2- Applicant). On that diagnostic report it clearly indicated, “Ordered by Moshe Wilker, MD...”.

Based upon the evidence in front of the Court on the day of Trial, I found that Dr. Wilker's report was admissible and probative on the issue as to cervical spine disability.

**IV
RECOMMENDATION**

For the reasons stated above, it is respectfully recommended that the Defendant's Petition for Reconsideration be denied.

DATE: May 5, 2021

Brian D. Lee
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE