

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

ANDREW HEBENTON, *Applicant*

vs.

PITTSBURGH PENGUINS, carrier for the BINGHAMTON BROOME DUSTERS; SAN DIEGO HAWKS; STATE COMPENSATION INSURANCE FUND; SAN DIEGO MARINERS; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION for FREMONT INSURANCE COMPANY, in liquidation, *Defendants*

**Adjudication Number: ADJ11905880
Santa Ana 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.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id.*)

We observe, moreover, it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

For the foregoing reasons,

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

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

December 21, 2022

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

**ANDREW HEBENTON
LAW OFFICE OF LYSETTE RIOS
SAMUELSEN, GONZALEZ, VALENZUELA & BROWN
LAW OFFICES OF GUILFORD SARVAS & CARBONARA
STATE COMPENSATION INSURANCE FUND**

PAG/pc

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

REPORT AND RECOMMENDATION OF WORKERS'
COMPENSATION JUDGE ON PETITIONS FOR
RECONSIDERATION

[I]
INTRODUCTION

APPLICANT'S OCCUPATION: Professional Hockey Player

DATE OF INJURY: CT 10/01/1977 to 04/01/1980

BODY PARTS INJURED: Cervical /lumbar spine, shoulders, wrists, elbows, hands, fingers, hips, knees, feet, arrhythmia, hypertension, head, posttraumatic head syndrome, neuro-psyche, TMJ, and teeth.

PETITION FILED: State Compensation Insurance Fund filed a timely, verified Petition for Reconsideration on 11/3/2022. The Applicant's attorney filed a timely, verified Answer to the Petition for Reconsideration on 11/14/2022.

FINDINGS AND ORDER DATE: Findings and Award dated 10/12/2022.

PORTIONS APPEALED AND POSITION: Petitioner contends that by the order, decision, or award, the WCALJ acted without or in excess of its powers, the evidence does not justify the findings of fact, and the findings of fact do not support the order, decision or award. The medical reports of Dr. Michael Einbund lack substantial medical evidence because he fails to discuss the effects of obesity on the Applicant's orthopedic injuries.

[II]
STATEMENT OF FACTS

1. The Applicant, Andrew Heberton, while working as a professional ice hockey player from 1973 to 1980 for the Baltimore Clippers c/o Dallas Stars, Houston Apollos c/o Edmonton Oilers, San Diego Hawks, San Diego Mariners, and Binghamton Broome Dusters, alleges he sustained an injury arising out of and in the course of employment to the cervical /lumbar spine, shoulders, wrists, elbows, hands, fingers, hips, knees, feet, arrhythmia, hypertension, and head.

2. Dr. Michael Einbund, the Applicant's Qualified Medical Evaluator, issued reports dated 08/06/2019, 02/26/2020, and 01/21/2021 (Applicant's Exh. 5, 4, & 3). Dr. Einbund took a history of the Applicant's work activities as a goaltender and the history of the injuries he sustained, including injuries to his groin from collisions on the ice, hands, and fingers from catching hockey pucks, shoulders from falling on the ice, and to his head and neck when he collided with other players. He sustained jamming and jarring injuries involving the shoulders, elbows, wrists, hands, fingers, and ankles on a repetitive basis while playing

professional hockey. Once, he was knocked unconscious when a player's knee hit his head. The Applicant continually sought medical treatment from the team trainers, who provided temporary relief to permit him to continue playing games and participating in practices (Michael Einbund, MD, 08/06/2019, pgs. 2 – 4 [Applicant's Exh. 5]). Dr. Einbund apportions 100% of the Applicant's orthopedic disability to playing professional hockey.

3. The Defense Qualified Medical Evaluator in orthopedics, Dr. Michael Moheimani, issued a report dated 10/27/2020 (Defense Exh. A). Dr. Moheimani notes the Applicant sustained numerous injuries playing professional hockey for multiple seasons but concludes that performing yard work and the Applicant's obesity caused the orthopedic injuries. He writes, "Yard work caused this man's pain, and not playing hockey." (Defense Exh. A, pg. 22) The Applicant's "morbid obesity" was also a significant contributing factor to the orthopedic complaints (Defense Exh. A, pg. 22).

4. The Applicant's performance of his job duties as a professional hockey player caused numerous injuries resulting in the need for left hip surgery. The Applicant testified he lost stability in the knees and sometimes uses a cane to ambulate. He injured his hands and may require surgery, and he experiences problems with his memory due to concussions (MOE/SOE 03/17/2022, 7:1 – 5).

5. While working as a goaltender for the San Diego Hawks and San Diego Mariners, the Applicant experienced numerous bumps and bruises and would get taped, wrapped, iced, and be given painkillers (MOH/SOE 05/10/2022, 4:12 -13.5; 5: 18 – 19).

6. After trial on multiple issues, the Trial Court issued Findings of Fact 1 through 14. The findings are based on the QME reports of Michael Einbund, MD (Applicant's Exh. 3, 4, 5), Kenneth Nudleman, MD (Applicant's Exh. 6, 7), Prakash Jay, MD. (Applicant's Exh. 8, 9), and Michael Wells, DDS (Applicant's Exh. 11, 12). The WCJ also considered the Applicant's testimony, credibility, and demeanor as a witness. The physicians listed above provided a detailed and persuasive analysis of permanent disability and explained the reasons for their opinions on permanent disability.

7. The Trial Court found that the Applicant sustained an industrial injury to his cervical /lumbar spine, shoulders, wrists, elbows, hands, fingers, hips, knees, feet, arrhythmia, hypertension, head, posttraumatic head syndrome, neuropsychic, TMJ, and teeth. The petitioner objects to the Trial Court's reliance on Dr. Michael Einbund's reporting.

[III] **DISCUSSION**

Concerning the timeliness of the Petition for Reconsideration, because the regulations allow for five additional calendar days from the date of service when any document is served by mail, fax, or e-mail (8 CCR § 10605(a)(1)), the Petitioner for Reconsideration was timely.

Petitioner is correct that the Trial Court relied on the reports of Dr. Michael Einbund rather than the report of Dr. Michael Moheimani. A review of the record shows that Dr. Einbund considered the applicant's weight issues. Dr. Einbund reviewed the medical treatment records establishing the Applicant's weight gain began after he stopped playing professional ice hockey. Dr. Finkelstein's report dated 03/06/2008 indicates that the Applicant had gained weight over the years since his retirement from hockey (Applicant's Exh. 4, pg. 2).

The 04/17/2008 report stated that the Applicant was an ex-pro hockey player with left hip pain and erosive changes to the left hip. The Applicant was unable to walk more than a block. The Applicant's history included obesity, hip pain, and knee pain. At the time of the Applicant's hip replacement surgery in 2008, he weighed 300 pounds (Applicant's Exh. 4, pg. 3). Dr. Einbund reviewed the medical treatment records that showing the Applicant's weight gain occurred after he stopped working as a professional hockey player.

The QME in internal medicine, Prakash Jay, MD, noted the Applicant's hockey-related job duties caused chronic pain in his right hip, back, and right shoulder and the need for daily over-the-counter medicine. His "playing weight" was approximately 210 pounds, whereas his weight at the time of the evaluation was 334 pounds. According to Dr. Prakash Jay, the Applicant's weight gain was causally connected to his decreased ability to exercise and walk more than 100 yards and his diet. It was reasonable and medically probable that the Applicant's hypertension with hypertensive heart disease resulted from significant weight gain from decreased physical activity, hockey-related injuries, chronic pain, emotional stress, and the chronic use of nonsteroidal anti-inflammatory medications. Dr. Prakash Jay's reports were un rebutted, and the WCJ found them credible and well-reasoned (Prakash Jay, MD, report of 09/13/2019, pgs. 6 – 7 [Applicant's Exh. 9])

Numerous treatment records deal with the Applicant's ongoing issue with weight since he retired from working as a professional hockey player. Dr. Einbund reviewed Dr. Finkelstein's 2011 report, which indicated that the Applicant was cleared to engage in a walking program to lose weight so that he could have surgery (Applicant's Exh. 4, pg. 5). Progress notes Dr. Einbund reviewed from 2013, and 2014 noted: "severe obesity" (Applicant's Exh. 4, pg. 6, Applicant's Exh. 4, pg. 7). A doctor's note from October 2014 indicated that the Applicant was trying to get down to 275 pounds so that he could undergo right hip replacement surgery. Dr. Einbund reviewed the 2015 progress notes indicating that the Applicant had "severe obesity" and that Applicant's body

mass index needed to be lower to reduce the risks associated with surgery (Applicant's Exh. 4, pg. 8). In 2018, the treating physician noted "severe obesity" (Applicant's Exh. 4, pg. 9).

Dr. Michael Einbund noted that the Applicant weighed 300 pounds at the time of the QME appointment. The operative report from Kaiser indicates that the applicant "had been a professional hockey player for many years and encountered many injuries, leading to arthritis of both of his hips per history." (Applicant's Exh. 4, pg. 4). Dr. Einbund considered the Applicant's issues with his weight, and concluded that "100% of the patient's current disability was a result of the continuous trauma suffered during the course of his career as a professional hockey player." (Michael Einbund, MD, 02/26/2020, pg. 10 [Applicant's Exh. 4]). There was no evidence in the trial record supporting legal apportionment of the applicant's disability to weight gain. Instead, based on the Applicant's testimony, the nature of his employment duties, and the other QME reports, Dr. Michael Einbund's reports constitute substantial medical evidence.

[IV] **RECOMMENDATION**

Based on the above, the WCJ recommends that the Petition for Reconsideration filed by Defendant State Compensation Insurance Fund be denied.

DATE: November 18, 2022
Richard Brennen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE