

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

DAVID JONES, *Applicant*

vs.

SOUTHERN CALIFORNIA GAS COMPANY, permissibly self-insured and self-administered, *Defendant*

**Adjudication Numbers: ADJ8299055, ADJ8299058
Marina del Rey District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the First Amended Joint Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on March 21, 2022, wherein the WCJ found in pertinent part that in case number ADJ8299055 applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his neck, right shoulder, bilateral wrists, lumbar spine, bilateral knees, and in the form of hypertension, and sleep disorder; that the injury caused 80% permanent disability; and that 85% of the lumbar and cervical spine permanent disability was the result of the industrial injury.¹

Defendant contends that the reports from internal medicine qualified medical examiner (QME) Thomas E. Hascall, M.D., are not substantial evidence on the issues of causation and apportionment, and based thereon, that the record needs to be further developed.

We received a Joint Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer and the contents of the Report. Based on our review of the record, and for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, we will deny reconsideration.

¹ The Findings of Fact/Award in case number ADJ8299058 have not been disputed and are not at issue herein.

It is important to note that we agree with defendant that Dr. Haskell's opinion regarding apportionment is not substantial evidence. However, in rating applicant's disability, the WCJ did not apply apportionment to the whole person impairment identified by Dr. Haskell for applicant's hypertension and sleep apnea. Thus, the WCJ's rating of applicant's disability is correct and will not be disturbed.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the First Amended Joint Findings and Award issued by the WCJ on March 21, 2022, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 8, 2022

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

**DAVID JONES
FORD & WALLACH
LLARENA, MURDOCK, LOPEZ & AZIZAD**

TLH/pc

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

JOINT REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

- | | |
|---------------------------------|---|
| 1. Applicant's Occupation | Field Assistant; Field Serv. Tech. Appliance Serv. Rep. Commercial Serv. Tech. |
| Applicant's Age | 50; 39 |
| Dates of Injury | June 9, 1989 – February 12, 2012 December 1, 2001 |
| Parts of Body Injured | Neck, rt shoulder, lumbar spine, bilateral knees, bilateral wrists, hypertension, and sleep |
| Manner in which injury occurred | Cumulative trauma; lifting |
| | |
| 2. Identity of Petitioner | <u>Applicant</u> filed the Petition. |
| Timeliness | The petition is timely. |
| Verification | The petition is verified. |
| | |
| Respondent | <u>Defendant</u> filed an Answer. |
| Timeliness | The Answer is timely. |
| Verification | The Answer is verified. |
| | |
| 3. Date of Findings and Order | March 21, 2022 |

Petitioner contends that: by the Findings and Order of the Workers' Compensation Judge that the evidence does not justify the Findings of Fact and the Findings of Fact do not support the Order, and 1) that the reporting of Internal QME Thomas Hascall, M.D. (hereinafter Dr. Hascall) is not substantial evidence and 2) argues that the record needs to be developed on the issue of *Benson* apportionment for hypertension and sleep apnea.

II.
FACTS

Applicant, David Jones, (hereinafter "Applicant") born April 18, 1962, while employed during the period of June 9, 1989 through February 12, 2012, by the Southern California Gas Company, sustained injury arising out of and in the course of employment to his neck, right shoulder, lumbar spine, bilateral knees, and bilateral wrists. Defendant denied injuries to hypertension, sleep apnea and hands. (ADJ8299055) (MOH 11/16/2021, Page 2, lines10-12; Page 3, line 2).

Applicant, David Jones also alleged a specific injury of December 1, 2001 to his lumbar spine, high blood pressure, sleep apnea and obesity. Defendant denied this date of injury. (ADJ8299058) (MOH 11/16/2021, Page 3, lines16-18).

The issues that were raised and are the issues for Reconsideration is whether applicant sustained injury, hypertension and sleep apnea, either from the specific injury (12/1/2001) or the cumulative trauma injury (6/9/1989 to 2/12/2012), *Benson* apportionment and whether Dr. Hascall's report is substantial evidence on the issues. (MOH 11/16/2021, Page 3, lines 2-4,11-12, and Page 4, lines 2, 7-8).

Applicant testified after the 2001 injury he saw Dr. Silbart (Agreed Medical Evaluator Steven Silbart, M.D. in Orthopedic Surgery) for his low back and was placed on light duty for 90 days and then returned to regular work. He did not get treatment for the 2001 injury, but would take over-the-counter Motrin. He did not receive physical therapy. (MOH 11/16/2021, Page 5, lines 17-21).

In 2006 he had carpal tunnel surgery and returned to work with 8% permanent disability. He returned to work in the warehouse because the commercial technician work was too difficult for his wrist, not his back. (MOH 11/16/2021, Page 5, line 23 – Page 6, line 2). Within the warehouse he had to walk a lot, and constant and repetitive bending, stooping, lifting, carrying, reaching and grasping throughout his shift. (MOH 11/16/2021, Page 6, lines 3-5).

He stopped working in March 2012 due to shoulder pain. From 1989 to the present most of his weight gain was after 2012. He was more active from 1989 to 2012 than when he stopped working at The Gas Company. (MOH 11/16/2021, Page 6, lines 6-9).

The first injury was to his low back in 2001. From the injury, the pain in his back went away. He does not remember testifying at deposition that after 2001 the back continued to hurt and he was a slower worker. He does remember taking Motrin, but it did not make him a slower worker. (MOH 11/16/2021, Page 7, lines 6-12).

Applicant testified he weighed 239 pounds in February of 2012. At the time of Trial he weighed 255 pounds. He had elevated blood pressure in 2005. (MOH 11/16/2021, Page 7, lines 23-24).

Applicant testified he was diagnosed with high blood pressure in 2005. He was diagnosed with sleep disorder in 2008. (MOH 11/16/2021, Page 7, lines 4-5).

Before 2001, he took Motrin for pain while working at The Gas Company due to the hard work but not for a specific injury. After 2001, he took Motrin for the pain caused by working at The Gas Company. (MOH 11/16/2021, Page 8, lines 6-7).

After 2012, he was not as physically active as before. He could not play sports, such as baseball, or exercise. He could also not walk around the warehouse. He could not do activities because of the pain and problems with his body aching, his back, and his knees. He also had shoulder surgery while working at the warehouse, and could not lift his arm up to take a shot when he played basketball. (MOH 11/16/2021, Page 8, lines 11-14).

Applicant testified he weighed 215 pounds in 2005 and 235 around 2012 and at trial in 2012 his weight was 255 pounds. (MOH 11/16/2021, Page 10, lines 10-11).

III. **DISCUSSION**

Defendant's allegation that the reporting of Internal QME Dr. Hascall is not substantial evidence.

Defendant alleges Panel Qualified Medical Evaluator Thomas Hascall, M.D.'s Internal Medical reporting regarding causation and apportionment is deficient and needs to be clarified, by way of cross-examination and or supplemental report as Dr. Hascall failed to make an independent determination regarding causation and apportionment based on the medicals provided, history provided and applicant's deposition transcript.

The WCJ found injury to the lumbar spine on both a cumulative trauma and specific injury basis. Within Dr. Hascall's December 5, 2020 report he finds the applicant's diagnosis of hypertension and sleep were potentially secondary to obesity. (Joint Exhibit "AA" Page 7). He further noted that if there was a considerable injury involving the low back dating back to 2001, which is prior to his weight gain then 100% would be apportioned to his weight gain secondary to low back pain and decreased ability to exert himself as a result of low back symptoms. (However, based upon the applicant's credible testimony and the entire record, the WCJ does not find that the applicant's 2001 back injury caused Applicant's obesity.).

Agreed Medical Evaluator Steven Silbart, M.D. issued an Orthopedic medical report dated September 30, 2016 wherein he found that causation/apportionment of the Applicant's lumbar spine disability was 15% to non-industrial degenerative disc disease and 85% to Applicant's continuous trauma injury with no demonstrable contribution of permanent impairment from the December 1, 2001 specific back injury. (Joint Exhibit, "HH").

Defendant alleges the testimony at trial is not consistent with the medical records and the applicant's deposition testimony. However, the deposition, nor any portion of the deposition were admitted in evidence. Thus, the alleged deposition testimony did not impeach applicant's testimony and Dr. Silbart had

the facts within the history of his medical report when finding the applicant had no impairment from the 2001 date of injury.

Defendant alleges that Dr. Hascall's opinion on causation and/or apportionment of hypertension and sleep hinges on the issue of applicant's "ability to perform his work and decreased ability to exert himself" subsequent to his lumbar spine injury in 2001.

Within Dr. Hascall's 54-page PQME Internal Medicine report, dated March 21, 2016, the doctor noted there were issues regarding Applicant's hypertension and sleep apnea, which were potentially secondary to Applicant's obesity, which would be secondary to his low back pain and decreased ability to exert himself and that the final opinion of the orthopedic specialist as to when he sustained the injury to the back affecting his ability to perform his work and exert himself would influence any apportionment. (Joint Exhibit "DD").

The WCJ finds the applicant's testimony and the entire record support that applicant's "ability to perform his work and decreased ability to exert himself" was not caused by the 2001 low back injury, but instead the cumulative trauma injury to the multiple body parts and his discontinuing to work in 2012. Applicant's testimony was that he continued to be active working in the warehouse up to the time he was required to stop working due to shoulder pain.

Regarding taking Dr. Hascall's deposition or obtaining additional reporting, the WCJ finds there is insufficient evidence to prove that the 2001 caused applicant's "ability to perform his work and decreased ability to exert himself" to support Dr. Hascall to find that the 2001 date of injury was a causative factor, and not the cumulative trauma injury. Further, the reporting of Dr. Silbart gives no impairment for the 2001 specific injury, but apportions the impairment 15% to non-industrial factors and 85% to the cumulative trauma injury. (Joint Exhibit "HH", Page 4).

The WCJ further finds the medical reporting of Dr. Hascall, dated March 21, 2016, June 12, 2018 and December 5, 2020 and his deposition of October 31, 2019 constitutes substantial medical evidence.

That the record needs to be developed on the issue of Benson apportionment for hypertension and sleep apnea.

There is no reason to question Dr. Hascall's findings regarding *Benson* apportionment as there is no impairment caused by the low back injury to cause the need to apportionment to the 2001 date of injury. Defendant does not dispute whether there should be impairment caused by the 2001 injury. Further, defendant continued to deny there was actually a 2001 injury up to the time of trial. Thus, they must not have believed there was any impairment from that injury.

Defendant contends that if the sleep apnea and hypertension started around 2005, then logically they must have been caused by something that preceded them, suggesting the cause was the 2001 low back injury. However, Agreed Medical Evaluator Silbart did not give any impairment for the specific injury. Applicant testified the cumulative trauma of the heavy work to his job eventually caused his disability and Agreed Medical Evaluator Silbart so found the impairment of the low back was caused by the cumulative trauma injury, not the specific injury. Applicant's credible testimony and Dr. Silbart's reporting finding other body parts that were injured on a cumulative trauma basis caused the decrease in applicant's ability to perform his work and decreased applicant's ability to exert himself.

Defendant had sufficient time from receipt of Dr. Hascall's final report of December 5, 2020 to the date that discovery closed on July 27, 2021 to obtain a second deposition of Dr. Hascall or request answers to interrogatories if they thought they had sufficient evidence to alter Dr. Hascall's opinions. They did not schedule that second deposition of Dr. Hascall. They failed to meet their burden of proving apportionment of the hypertension and sleep to the 2001 specific injury. The question is not a lack of evidence, but a failure to meet their burden of proof.

It is further noted that the Defendant did not file an objection to the Declaration of Readiness to Proceed to Mandatory Settlement Conference filed on June 25, 2021, and discovery was closed on July 27, 2021.

Defendant contends that "*if*" the 2001 low back injury and ongoing pain prevented Applicant from exerting himself, then causation for the internal medical conditions should be found caused by the 2001 injury, even if it did not result in ratable orthopedic disability being apportioned to it. The WCJ does not find that there is evidence to support that the 2001 low back injury and ongoing pain prevented applicant from exerting himself. Therefore, the WCJ finds Dr. Hascall's reporting to be substantial evidence and finds there is no reason to develop the record.

IV. **RECOMMENDATION**

It is respectfully recommended Defendant's Petition for Reconsideration be denied in its entirety.

Dated: 4/25/2022
TERRY L. SMITH
Workers' Compensation
Administrative Law Judge