

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

MARTHA BARKER, *Applicant*

vs.

**POMONA UNIFIED SCHOOL DISTRICT, Permissibly Self-Insured; administered by
YORK RISK SERVICES, *Defendants***

**Adjudication Number: ADJ8446188
Los Angeles District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
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, we will grant reconsideration solely to amend the finding of permanent disability to 39%. The WCJ's finding of 40% permanent disability appears to be a clerical error because application of the Combined Values Chart (CVC) to the disability found (i.e., 22% for the upper GI, 17% for the lumbar spine, and 6% for the left knee) results in 39%. The Appeals Board may correct clerical errors at any time. (*Toccalino v. Worker's Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 558 [47 Cal.Comp.Cases 145].) We will otherwise affirm the findings of the WCJ for the reasons stated below and for the reasons stated in the Report and Opinion on Decision, both of which we adopt and incorporate, except the recommendation that we deny reconsideration and the discussion regarding application of the CVC.

Labor Code¹ section 3600 imposes workers' compensation liability on an employer, regardless of negligence, when the employment is one of the contributing causes without which the injury would not have occurred. (Lab. Code, § 3600.) The phrase "proximately caused by the employment" in section 3600(a)(3) merely means that the injury must be employment-caused or

¹ All further statutory references are to the Labor Code, unless otherwise noted.

connected in the sense that there be a cause and effect relationship between the employment and the injury. (*Rodgers v. Worker's Comp. Appeals Bd.*, 168 Cal.App.3d 567, 574.) The narrow definition of causation in tort law has been rejected in workers' compensation law. (*Ibid.*)

Moreover, pursuant to section 4600 and the decision in *Granado v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647], employers are liable for all medical treatment "that is reasonably required to cure or relieve the injured worker from the effects of the injury..." even if the treatment is for a nonindustrial condition. (See *Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399, 406 [33 Cal.Comp.Cases 647, 652] ["So long as the treatment is reasonably required to cure or relieve from the effects of the industrial injury, the employer is required to provide the treatment, and treatment for nonindustrial conditions may be required of the employer where it becomes essential in curing or relieving from the effects of the industrial injury itself."].) In fact, "[s]tatutory authority permits an applicant to seek medical treatment for what he perceives to be an industrial injury." (*Cooper v. Workers' Comp. Appeals Bd.*, 173 Cal.App.3d 44, 49 [50 Cal. Comp. Cases 556].) Thus, it is well settled that an employer will be liable even for the cost of treatment for a non-industrial condition, if that treatment is reasonably required to cure or relieve the effects of the industrial injury. (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 165-166 [48 Cal.Comp.Cases 566, 570] [employee with non-industrial obesity entitled weight loss program in order to facilitate his recovery from back injury]; see also (*Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249, 1261-1262 [82 Cal.Comp.Cases 679] ["the aggravation of an industrial injury or the infliction of a new injury resulting from its treatment or examination are compensable under the provisions of the Workmen's Compensation Act"].)

For the reasons stated by the WCJ in the Report and the Opinion on Decision, we agree that applicant's peptic ulcer disease, which resulted from her use of non-steroidal anti-inflammatory medication on an industrial basis, was one of the contributing causes of the need for stomach surgery.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the November 3, 2021 Findings, Award and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the November 3, 2021 Findings, Award and Order is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

3. The injury herein caused 39% permanent disability, plus a 15% increase pursuant to Labor Code section 4658.

* * *

9. Applicant's attorney is entitled to a reasonable fee of \$4,707.21, to be commuted from the far end of the award.

AWARD

AWARD IS MADE in favor of **MARTHA BARKER** and against **POMONA UNIFIED SCHOOL DISTRICT** as follows:

a. Permanent disability indemnity in the total amount of \$31,381.44, payable forthwith at the rate of \$161.76 per week for 194 weeks, less credit for any sums heretofore paid on account thereof, less attorney's fees in the amount of \$4,707.21, payable to the Law Offices of Cruz & Cruz, whose lien is hereby allowed, and less temporary disability indemnity overpayment in the amount of \$5,668.86, with jurisdiction reserved at the trial level if there is any dispute.

* * *

d. An attorney fee in the amount of \$4,707.21, to be commuted from the far end of the award, to be held in trust pending an agreement by the parties or further order by the WCJ.

ORDER

IT IS ORDERED that defendant hold attorney fees in the amount of \$4,707.21, to be held in trust pending an agreement by the parties or further order by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 21, 2022

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

**MARTHA BARKER
LAW OFFICES OF CRUZ & CRUZ
DOMINGO, ELIAS & VU
NAVA GRAHAM**

PAG/pc

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

Defendant, by and through their attorney of record, has filed a timely verified Petition for Reconsideration challenging the Findings and Award dated November 2, 2021 in which it was determined the applicant's stomach surgery was a result of her work related injury and awarded 22% WPI for upper G.I. in addition to permanent disability for applicant's left knee and low back for a total Award of 40%. Defendant disputes the finding of 22% WPI for applicant's upper G.I. injury and overall Award of 40%.

II.
STATEMENT OF FACTS

Applicant, born [], while employed on May 31, 2012, as a food service worker at Pomona California, sustained an injury to her left knee, low back, and upper gastrointestinal system, but not to her right knee while working for defendant as a food service worker on May 31, 2021.

On March 11, 2019 the matter proceeded to trial. It was determined the applicant did not sustain an injury to her right knee, the applicant's permanent disability amounted to 30% PD after adjusting for age, occupation and apportionment based on 9% WPI for gastrointestinal injury. The applicant was awarded a 15% increase in PD as the applicant did not retire and modified alternative work was not offered. The applicant was found in need of future medical care. Defendant was awarded credit for the TTD overpayment and an attorney fee in the amount of 15% was ordered. Liability for self-procured medical treatment including non-industrial treatment was deferred with jurisdiction reserved.

Applicant's attorney filed a Petition for Reconsideration on May 7, 2019. The Petition for Reconsideration was granted for further study on June 25, 2020. An Opinion on Decision was issued on April 20, 2020 finding injury to the applicant's left knee, low back and upper G.I. The applicant did not sustain a right knee injury. Applicant was found in need of future medical care. All other issues were deferred.

The parties were given an opportunity to develop the record and request clarification from Dr. Jay, but chose to proceed on the existing record. The matter was resubmitted on September 13, 2021. This WCJ had the opportunity to re-review the entire record and it was determined after careful consideration of all the evidence and applicant's testimony, the applicant was entitled to an Award of 40 based on 22% WPI for upper G.I.. A decision was issued on

November 3, 2021 indicating the same. It is from this decision defendant has filed their Petition for Reconsideration.

III. **DISCUSSION**

It is recommended the Petition for Reconsideration be denied. Applicant's complaints arising from her industrial injury caused the applicant to be misdiagnosed with cancer and resulted in an unnecessary surgery.

Defendant contends Dr. Jay found the stomach surgery was non-industrial. This assertion is not supported by the record. Dr. Jay found the applicant's use of non-steroidal anti-inflammatory medication contributed to the applicant's peptic ulcer disease. Defendant stipulated to an upper G.I. injury. The need for a biopsy stemmed from the applicant's bleeding ulcer which resulted in a false positive finding of cancer causing the need for stomach surgery.

Applicant was seen by Dr. Shah on October 31, 2013, it which it was noted under impression, the applicant had acute upper GI bleed, most likely related to use of nonsteroidal anti-inflammatories (Exh 15, pg. 7). On June 23, 2014, biopsies taken from the ulcer's base and ulcer's margin were concerning because some of the cells were suspect and could be malignant based on the clinical presentation of small ulcer and atypical appearance. A second opinion was obtained from an expert pathologist. The final diagnosis was moderately differentiated invasive adenocarcinoma in the stomach. Applicant was referred to an oncologist and oncological surgeon (Exhibit 15, pg. 9). On July 30, 2014, the applicant underwent a subtotal gastrectomy where it was determined there was no indication of a malignancy (Exhibit 15, pg. 10).

Defendant spends a great deal of time discussing Dr. Jay's findings prior to applicant's erroneous cancer diagnosis. However, the applicant's final diagnosis after her stomach surgery was peptic gastritis and duodenal ulcer. (Exhibit 14, page 13, line 6). The applicant did not have cancer. The applicant's stomach surgery was performed because the applicant's stomach complaints stemming from her ulcer. There is no dispute the applicant's ulcer was in part a result of the applicant's use of non-steroidal anti-inflammatory (NSAID) medications. (Joint Exhibit 15, pg. 19). Although Dr. Jay has indicated the industrial ulcer disease would not require surgery, the pain resulting from the ulcer caused applicant to be misdiagnosed with cancer. Therefore, had the applicant not had the ulcer, the applicant would not have gone to the hospital with gastrointestinal complaints and would not have been misdiagnosed with cancer. The complaints stem from her industrial injury. Therefore, it was found the applicant is entitled to 22% WPI for gastrointestinal injury.

Defendant also disputes applicant being Awarded 40%. However, based on the ratings after adjusting for age and occupation for the left knee (6%),

lumbar spine (17%) and upper G.I. (22%) the combined value is 40%. 22 combined with 17 is 36. 36 combined with 6 is 40%. The parties did not stipulate to the ratings, they listed the proposed permanent disability as one of the issues.

IV.
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Penny Barbosa
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE
Dated: 12/03/2021

OPINION ON DECISION AFTER RECONSIDERATION

This matter having been tried, submitted, remanded and retired, this WCJ has had the opportunity to re-review the entire record and make a determination regarding the issues remaining.

INJURY: PARTS OF BODY

Pursuant to the Boards finding of April 20, 2020, the Applicant sustained an injury to her left knee, low back and upper G.I. All other body parts are found to be non-industrial.

PERMANENT DISABILITY/APPORTIONMENT

Based on the substantial medical findings of Dr. Jay and Dr. Katz which were the only medical records submitted by the parties as joint exhibits, the applicant has permanent disability as follows:

Left Knee:	17.05.10.04-4-[2] 5 -322F-5-6
Lumbar Spine:	50%(15.03.01 -23 [5] 29 - 322F 29-34)17
Upper GI	65%(6.01 -22 [6] -29 322F-29-34) 22
	Combined Value: 40

Applicant is entitled to permanent disability of 40%, plus 15% increase pursuant to LC 4658, entitling applicant to 201 weeks of disability indemnity payable at \$161.76 a week for a total amount of \$32,513.76, less benefits paid, less attorney fees in the amount of \$4,877.6 and less TTD overpayment in the amount \$5,668.86.

The 15% increase in permanent disability pursuant to Labor Code section 4658, is applicable as applicant was not offered mod/alt/regular work. Per the applicant's un rebutted testimony, she did not retire and there was no evidence modified/alternative/regular work was offered.

The main issue in this matter was whether the applicant's stomach surgery was a result of her work related injury. Per the findings of Dr. Jay as outlined in his April 22, 2016 report, he notes, "It continues to be my medical opinion, as I testified during my deposition that she would have 22% WPI if the workers' compensation judge decides the stomach surgery was industrial." (Exhibit 11, pg. 3). Dr. Jay had found the applicant's use of non-steroidal anti-inflammatory medication contributed to her peptic ulcer disease. Applicant's peptic ulcer disease combined with her non-industrial H-Pylori are the cause of her stomach issues which in turn led to the misdiagnosis of stomach cancer. Thus, without the industrial peptic ulcer disease stemming from medication use for her work related injury, the applicant would not have been misdiagnosed with stomach

cancer. Therefore, the applicant is entitled to 22% permanent disability for G.I. complaints.

APPORTIONMENT

Per the findings of Dr. Katz, the applicant had long standing degenerative changes when taken into consideration attributed to the applicant's back injury. In his report of June 25, 2015, Dr. Katz changed his opinion on apportionment, noting: "Originally, we stated all of the injuries were 100% apportioned to the industrial injury of May 31, 2012. However, re-review of the records including the x-ray report of May 31, 2012 shows degenerative changes of the lumbosacral spine is already present. It would be impossible for those degenerative changes to have occurred on the date of injury. Rather, they would occur over a period of time. Therefore, based on the information available, barring any information to the contrary, there is a change in apportionment of the lumbosacral spine as follows: 50% is apportioned to pre-existing degenerative changes and 50% is apportioned to the industrial injury of May 31, 2012."

There is no dispute the applicant had pre-existing G.I. issues. Dr. Jay found the applicant's use of non-steroidal anti-inflammatory medication to treat her industrial injuries contributed to the applicant's peptic ulcer disease and thus, is industrial related. Dr. Jay's findings regarding apportionment are found to be substantial medical evidence in which he attributes 65% apportionment to industrial causation.

The applicant's need for stomach surgery was a result of both her industrial use of medication and non-industrial factors, thus apportionment is warranted. In *County of Santa Clara v. WCAB (Justice)* 2020 Cal.App. Lexis 461, it was noted where there is unrebutted substantial medical evidence that non-industrial factors played a casual role in producing the permanent disability, the Labor Code demands that the permanent disability "shall" be apportioned. Here there is no dispute the applicant had pre-existing non-industrial G.I. problems which contributed to her stomach problems for which apportionment is warranted.

TTD OVERPAYMENT

On November 4, 2015, the parties entered into a Stipulation which indicated defendant will commence TTD benefits from September 22, 2015 and continuing at the 2015 statutory minimum rate of \$165.49 up to the 104 week cap until the finding of P&S (MMI) status by PTP or PQME without need for a Petition to Terminate. Defendant reserved their right to claim credit for overpayment of benefits. A 15% attorney fee was withheld from all payments.

The parties stipulated that the applicant was MMI as of July 18, 2016 per Dr. Katz. The applicant was aware per the prior stipulation that TTD would terminate upon a MMI finding and that defendant would seek credit. Therefore,

defendant is entitled to a TTD overpayment in the amount of \$5,668.86 to the extent possible after payment of attorney fees.

NEED FOR FURTHER MEDICAL TREATMENT

Based upon the medical report of Dr. Katz and Dr. Jay, the applicant is in need of future medical care to cure or relieve the effects of the industrial injury.

SELF-PROCURED MEDICAL TREATMENT

Based upon applicant's credible testimony and the medical reports of Dr. Jay and Dr. Katz., it is found that applicant is entitled to reimbursement of self-procured medical treatment payable by defendant pursuant to the Official Medical Fee Schedule in an exact amount to be adjusted by and between the parties with the WCAB retaining jurisdiction in the event of a dispute.

Medical treatment cannot be apportioned. Although the applicant has non-industrial gastrointestinal issue, Dr. Jay has found that applicant's use of non-steroidal medication contributed to her peptic ulcer disease which contributed to the need for stomach surgery.

ATTORNEY FEES

Based on the complexity of the case considering the multiple medical reports obtained, and depositions conducted, applicant's attorney is entitled to a 15% attorney totaling \$4,877.06 to be commuted from the far end of the award. Attorney fees are to be held in trust pending an agreement or further order.

Penny Barbosa
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE
Dated: 11/02/2021