

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

TINA SOLANO, *Applicant*

vs.

WAL-MART ASSOCIATES, INC.; AMERICAN HOME ASSURANCE, *Defendants*

**Adjudication Number: ADJ8111569
Santa Barbara District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant, American Home Assurance, on behalf of its insured, Wal-Mart Associates, Inc., and applicant, Tina Solano, have each filed a Petition for Reconsideration from the Findings and Award, served August 27, 2020, wherein the workers' compensation administrative law judge (WCJ) found that applicant Tina Solano sustained 82% permanent disability due to her March 6, 2006 industrial injury to her bilateral upper extremities, neck and thoracic outlet syndrome, while employed as a stocker by Wal-Mart Associates, Inc.

Defendant contests the award of 82% permanent disability, contending the opinion of Qualified Medical Evaluator Dr. Mays, upon which the rating was based, does not constitute substantial medical evidence as video evidence demonstrating applicant's physical capabilities is not consistent with Dr. Mays' AMA Guides rating based on paralysis of the brachial plexus. Defendant further contends that the April 17, 2020 report of applicant's primary treating physician, Dr. Scheinberg, which was not admitted into evidence at trial, should be considered in the rating of permanent disability. Defendant asserts that Dr. Scheinberg's impairment findings should be followed as it is more consistent with the medical evidence and the AMA Guides than the opinion of the QME.

Applicant has filed an Answer to defendant's Petition for Reconsideration, contending that the WCJ's determination is supported by substantial medical and factual evidence, and that Dr. Scheinberg's April 17, 2020 report was properly excluded because the parties had agreed to close discovery on April 1, 2020, and it was improper to cite a report excluded at trial from a physician who has not been applicant's primary treating physician since 2016.

Applicant's Petition for Reconsideration contends that there was a clerical error in the calculation of benefits owed applicant and the attorney fee, as the Disability Evaluation Unit calculated applicant's accrued benefits using an incorrect permanent disability start date of July 15, 2012, rather than April 27, 2007, as the WCJ held in the Findings and Award.

No Answer to applicant's Petition for Reconsideration was received. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that applicant's petition be granted and defendant's petition be denied on the merits and because it was untimely filed from the date the Findings and Award was signed by the WCJ on August 25, 2020.¹

We have considered defendant's Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the Findings and Award and return this matter to the trial level for further proceedings, at which time the WCJ shall admit and consider Dr. Scheinberg's April 17, 2020 supplemental report, and permit applicant to obtain an updated report from Dr. Mays. The WCJ shall then issue a new Findings and Award. In view of this determination, the issue raised in applicant's Petition for Reconsideration is moot.

This matter has been considered by the Appeals Board on several occasions, following final determinations made at the trial level.

In a 2014 Findings of Fact and Award, the WCJ found applicant sustained 82% permanent disability as a result of her March 6, 2006 admitted injury to her wrists in the form of bilateral carpal tunnel syndrome, as well as industrial injury to her upper extremities and cervical spine. We granted reconsideration of this determination on the grounds that the findings and opinion of Dr. Scheinberg on the extent of applicant's permanent disability were more persuasive than the

¹ As noted in defendant's Request to Consider Legal Brief, which we accept for filing per WCAB Rule 10964, the Findings and Award was served on the parties on August 27, 2020. The Petition for Reconsideration was filed on Monday, September 21, 2020, the 25th day after the Findings and Award was served. Therefore, the petition was timely filed. (Labor Code section 5903; Cal. Code Regs. tit. 8, §10605.)

opinion of Dr. Mays, upon whom the WCJ relied. The matter returned to the trial level for a new permanent disability rating based upon the findings of Dr. Scheinberg.

In an October 2, 2017 Findings and Award, the WCJ found applicant sustained 14% permanent disability as a result of her March 6, 2006 injury to her wrists in the form of bilateral carpal tunnel syndrome, and to her upper extremities and cervical spine, based on Dr. Scheinberg's 2013 impairment rating. We granted applicant's Petition for Reconsideration from this determination because though Dr. Scheinberg changed his opinion and agreed that applicant did sustain a thoracic outlet syndrome (TOS) injury, the Findings and Award was issued without further reporting from him. We concluded that the record was not adequate to make a final determination, and returned the matter to provide Dr. Scheinberg an opportunity to address the extent of applicant's impairment in view of his agreement that she sustained an industrial injury in the form of TOS.

Dr. Scheinberg issued several reports, after reviewing the reporting of Dr. Mays and Dr. Jordan, and had his deposition taken on April 1, 2020. He issued a supplemental report dated May 29, 2019, in which he indicated his agreement with the diagnosis of TOS by Dr. Mays and Dr. Jordan. In a supplemental report dated October 7, 2019, Dr. Scheinberg reviewed surveillance video taken of applicant on April 17, 2019, as well as a letter from Jaime Solano describing applicant's continuing pain in her upper extremities. In neither report did he offer a current assessment of applicant's impairments.

In his deposition testimony, he was asked to review the AMA Guides rating by Dr. Mays for applicant's TOS. Because the AMA Guides was not available to him at the deposition, and because he indicated that he was unable to give an "off the cuff" answer to technical rating questions, he requested the opportunity to prepare another supplemental report to address the issues. Dr. Scheinberg issued a supplemental report on April 17, 2020.

The Minutes of Hearing from the trial on June 3, 2020, reflects the parties' stipulation that discovery would be closed at the conclusion of Dr. Scheinberg's deposition on April 1, 2020. Though the minutes do not reflect applicant's objection to the admissibility of Dr. Scheinberg's April 17, 2020 supplemental report, it was marked for "identification only" as Exhibit EE. The WCJ indicated in the Minutes that he would address its admissibility in his Opinion on Decision. There was, however, no discussion regarding the admissibility of the report in the Opinion on Decision. Addressing this issue further in his Report, the WCJ conceded that there was no

indication in his Findings and Award that the objection to the admission of Dr. Scheinberg's supplemental report was sustained. However, referring to his Opinion on Decision, he noted that he based his findings on Dr. Scheinberg's reporting, and that "since Dr. Scheinberg is a treating physician his report is admissible."

Applicant argues, strenuously, that Dr. Scheinberg's supplemental report is not admissible because it was obtained in violation of the parties' stipulation that closed discovery at the conclusion of Dr. Scheinberg's deposition.

Defendant argues that because Dr. Scheinberg was unable to provide the answers regarding the proper rating of applicant's TOS impairment at his deposition, the supplemental report he requested the opportunity to prepare is admissible as a continuation of his deposition testimony.

We concur with defendant and the WCJ that Dr. Scheinberg's April 17, 2020 supplemental report is admissible, and should be considered, as a report of a treating physician. Though prior to the scheduled deposition the parties agreed to close discovery at the conclusion thereof, Dr. Scheinberg requested the opportunity to address the defendant's questions regarding the proper impairment rating under the AMA Guides through a supplemental report. The report he generated to respond to defendant's deposition questions are relevant to the issue of the proper impairment rating for applicant's TOS condition, as the WCJ indicated that Dr. Scheinberg's opinion was material to his award of permanent disability. The reports of a treating physician are admissible pursuant to Labor Code section 4061 et seq. (*Mission Linen Supply Co. v. Workers' Comp. Appeals Bd.* (2000) 65 Cal. Comp. Cases 947 (writ den.)) Here, applicant was on notice of Dr. Scheinberg's request to submit a supplemental report to respond to the questions posited at his deposition. At that time, applicant did not raise an objection to Dr. Scheinberg's request to provide an additional report to clarify his rating.

The WCJ's contention that his findings were based, in part, upon all of Dr. Scheinberg's reporting is belied by the fact that the WCJ made no mention of this report on the record, though he concedes that the report is admissible as that of a treating physician. We are persuaded that the WCJ should consider all relevant evidence, and though the contested report was prepared after the close of discovery, applicant was on notice that the report was imminent when Dr. Scheinberg made his request to be provided the opportunity to answer defendant's questions regarding the proper rating of applicant's impairment.

Accordingly, we will return this matter to the trial level at which time the WCJ shall formally admit Dr. Scheinberg's April 17, 2020 supplemental report into the record, and applicant shall be provided the opportunity to obtain an update from Dr. Mays regarding Dr. Scheinberg's supplemental report. The WCJ shall then issue a new final determination of applicant's permanent disability.

In view of this disposition, applicant's request for correction of the clerical error in the DEU's calculation of applicant's permanent disability benefits is moot.

For the foregoing reasons,

IT IS ORDERED that, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the Findings and Award issued August 27, 2020 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion, and for a new final determination.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 21, 2021

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

**TINA SOLANO
HOURIGAN, HOLZMAN & SPRAGUE, LLP
MULLEN & FILIPPI**

SV/pc

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