WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ANDY HURTADO, *Applicant*

vs.

USG CORPORATION; AMERICAN HOME ASSURANCE, *Defendants*

Adjudication Number: ADJ13077517
Riverside 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, and for the reasons discussed below, we will deny reconsideration.

It is well established that for the purpose of meeting the causation requirement in a workers' compensation injury claim, it is sufficient if the work is a contributing cause of the injury. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd*. (2015) 61 Cal.4th 291 [80 Cal.Comp.Cases 489].) "...[T]he proximate cause requirement of Labor Code section 3600 has been interpreted as merely elaborating on the general requirement that the injury arise out of the employment. The danger from which the employee's injury results must be one to which he or she was exposed in the employment." (*Id*., at 297 - 298 [citations omitted].) The acceleration, aggravation or 'lighting up' of a preexisting condition "is an injury in the occupation causing the same." (*Id*., at 301, quoting *Tanenbaum v. Industrial Acc. Com*. (1935) 4 Cal.2d 615, 617 [1935 Cal. LEXIS 590]; see also *Zemke v. Workers' Comp. Appeals Bd*. (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358]; *Reynolds Electrical & Engineering Co. v. Workers' Comp. Appeals Bd. (Buckner)* (1966) 65 Cal.2d 438 [31 Cal.Comp.Cases 421].) Thus, the issue here, is not whether applicant's walking at work was the cause of his arthritic condition, but whether it was a cause, i.e. a contributing factor.

For the reasons stated in the WCJ's report, we agree that the opinion of panel qualified

medical examiner (QME) James McSweeney, M.D., is substantial medical evidence upon which the WCJ properly relied. To be considered substantial evidence, a medical opinion "must be predicated on reasonable medical probability." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416–17, 419 [33 Cal.Comp.Cases 660].) A physician's report must also be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc), 70 Cal.Comp.Cases 1506 (writ den.).)

Moreover, we have given the WCJ's credibility determination 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*.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 13, 2021

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

ANDY HURTADO
LAW OFFICE OF BRENT THOMPSON
SAMUELSEN, GONZALEZ, VALENZUELA & BROWN
EMPLOYMENT DEVELOPMENT DEPARTMENT

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

Date of Injury:	09/12/2019
Identity of Petitioner:	Defendant
Date of Findings of Fact; Opinion on Decision:	09/28/2021
Date of Filing of Petition for Reconsideration:	10/14/2021
Timeliness:	The petition was timely
Verification:	The petition was verified

Defendant, by and through their attorneys of record, has filed a timely Petition for Reconsideration challenging the Findings of Fact and Opinion on Decision. In the petition the defendant argues that the undersigned ruled 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 defendant also argues that the basic issue in the case is causation and specifically that the panel QME report of Dr. McSweeney does not constitute substantial medical evidence supporting a finding of causation.

The applicant through his attorney filed an Answer to the Petition for Reconsideration on October 19, 2021. The applicant attorney responded by stating that the facts and the evidence introduced at trial support a finding of industrial injury to applicant's right knee arising out of and in the course of employment. Further the case relied on by defendant regarding causation, Newton v. Industrial Acci. Com. (1928), 204 Cal. 185, can be distinguished as the medical expert in that case determined that the injury did not arise out of employment or in the course of employment and Dr. McSweeney in the Mr. Hurtado's case found that there was an industrial injury.

It is recommended that reconsideration be denied.

II
FACTS AND PROCEDURAL HISTORY

Applicant, Andy Hurtado, born on [ ], 60 years of age, while employed as a heavy equipment mechanic on 09/12/2019 at Imperial, California by USG Corporation, and Insured by American Home Assurance, has claimed an injury arising out of and in the course of employment to his right knee.

The application for adjudication alleging right knee injury was filed on February 20, 2020. The defendant filed a declaration of readiness for a priority

conference on 12/23/2020. Priority conferences were held on 02/11/2021, 04/01/2021, and 05/13/2021. Trial was initially set on 06/24/2021 and was continued to 08/10/2021 due to the WCJ being unavailable. The trial on 08/10/2021 was held on AT&T audio format only. Testimony of applicant was taken and only joint exhibits were submitted and admitted. The parties filed post-trial briefs. The case was considered submitted on 09/07/2021. Findings of fact and opinion on decision were issued on September 28, 2021. The defendant has filed a timely Petition for Reconsideration on 10/14/2021.

III
DISCUSSION

The petitioner contends that there is no evidence of causation and that there is no substantial medical evidence that proves causation. The essential argument is that Dr. McSweeney does not support injury arising out of employment (AOE). The petition states that Dr. McSweeney made a mere conclusion and that the conclusion is based on inadequate medical history and incorrect legal theory. Further, the argument is that Dr. McSweeney's reporting is not substantial medical evidence. The petitioner also argues that a major prong of Dr. McSweeney's causation analysis is that he used a premise that there was no evidence of an injury outside of work.

It is a fundamental principle of the workers' compensation system that an employer is liable for an injury to an employee, "...arising out of and in the course of the employment..." (Lab. Code, § 3600(a); *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 732-733 [48 Cal.Comp.Cases 326] (*Maher*).) "In applying it, this court must be guided by the equally fundamental principle that the requirement is to be liberally construed in favor of awarding benefits. (Lab. Code, § 3202; *Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 777-778....; *Garza v. Workmen's Comp.*)

The phrase "arising out of employment" is the causal element and refers to the origin of the accident. (Scott v. Pacific Coast Borax Co. (1956) 21 CCC 138.) The employment must be said to be the cause of the injury. For an injury to "arise out of" the employment, it must "occur by reason of a condition or incident of the employment. The employment and the injury must be linked in some causal fashion." (*Madin v. IAC (Richardson*) (1956) 21 CCC 49, 50; *Maher v. WCAB* (1983) 48 CCC 326, 329; *LaTourette v. WCAB* (1998) 63 CCC 253, 256; *South Coast Framing, Inc. v. WCAB (Clark*) (2015) 80 CCC 489.)

All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law. "Preponderance of the evidence" means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not

the relative number of witnesses, but the relative convincing force of the evidence. (Labor Code 3202.5)

Dr. McSweeney stated in his February 18, 2020 report that "It is my medical opinion, based on the information provided, that Mr. Hurtado did sustain an industrial related injury to the right knee when he was walking on uneven terrain. (Joint Exhibit 8. Page 10). He also stated under "Causation" that "The patient's present symptoms, descriptions of the injury, review of the provided medical records, and the physical examination are consistent with the mechanics of injury as described by Mr. Hurtado (Joint exhibit 8, Page 9, EAMS Doc ID 35514230).

Mr. Hurtado testified that he was on a flat surface with dips in it. It was also semi-rough (Summary of Evidence page 5, line 17 (hereinafter SOE)). He also testified that there was a little dip and a tapered edge and he stepped on the edge (SOE, page 6, lines 13-14).

The test of substantiality is measured on the basis of the entire record. The appeals board may not isolate a fragment of a doctor's report or testimony and disregard other portions that contradict or nullify it; it must give fair consideration to all of the doctor's findings. (*Garza v. WCAB* (1970) 35 CCC 500, 503; *Braewood Convalescent Hospital v. WCAB (Bolton*) (1983) 48 CCC 566, 568-569; *Greenberg v. WCAB* (1974) 39 CCC 242, 247; *City of Santa Ana v. WCAB (Taylor)* (1982) 47 CCC 59, 63; *Bracken v. WCAB* (1989) 54 CCC 349, 355; *Rodriguez v. WCAB* (1994) 59 CCC 14, 23; *Gaytan v. WCAB* (2003) 68 CCC 693, 706.) In evaluating the evidentiary value of medical evidence, the physician's report and testimony must be considered as a whole, not segregated parts. The entire report and testimony must demonstrate that the physician's opinion is based on reasonable medical probability. (*Bracken v. WCAB* (1989) 54 CCC 349, 355)

The entire record, including testimony of the applicant, the medical reporting of the panel doctor, the diagnostic studies performed in the case and reviewed by Dr. McSweeney as a whole lead to the conclusion that there is an industrial injury to the right knee on 09/12/2019. This has not been controverted with impeachment of the applicant or another medical doctor's opinion. The credible testimony of the applicant demonstrates that the opinion of the panel QME Dr. McSweeney is based on reasonable medical probability.

The applicant's testimony was credible. The medical reports of Dr. McSweeney constitutes substantial medical evidence. Based on the credible testimony of applicant and the reporting of James McSweeney dated 02/18/2020 and 10/21/2020 the applicant sustained an injury arising out of and in the course of employment to his right knee on 09/12/2019 (Joint Exhibit 8 and 5). There is sufficient direct evidence and circumstantial evidence to find injury AOE/COE. (*Guerra v. Workers' Comp. Appeals Bd.* (2016) 246 Cal.App.4th 1301, p. 1307)

Based upon the reasonable inferences from the evidence in the case, including applicant's testimony, the medical reporting of Dr. McSweeney, contemporaneous medical reporting from Dr. Mulvaney (Joint exhibits 10-15) and Open System Imaging (Joint Exhibit 11), the applicant reporting his injury to employer, it is reasonably concluded that the applicant did suffer and injury arising out and in the course of employment to his right knee on 09/12/2019.

IV
RECOMMENDATION

Based on the totality of the facts, medical reporting of panel QME Dr. McSweeney, and the supporting statutes and case law, it is respectfully recommended that Defendant's Petition for Reconsideration be denied.

Respectfully submitted,
Eric Thompson
Workers' Compensation Judge

OPINION ON DECISION

PROCEDURAL HISTORY

The application for adjudication alleging right knee injury was filed on February 20, 2020. The defendant filed a declaration of readiness for a priority conference on 12/23/2020. Priority conferences were held on 02/12/2021, 04/01/2021, and 05/13/2021. Trial was initially set on 06/24/2021 and was continued to 08/10/2021 due to the WCJ being unavailable.

The trial on 08/10/2021 was held on AT&T audio format only. Testimony was taken and only joint exhibits were submitted and admitted. The defendant requested two weeks to file a trial brief and the applicant attorney was given two weeks to file a responsive trial brief after that. The case was considered submitted on 09/07/2021.

TRIAL BRIEFS

The defendant has submitted a trial brief on 08/23/2021. The defendant has argued that the applicant was not injured at work or his knee injury or condition was not caused by his work.

The defendant cites to a Mayo Clinic statement online that state that "a torn meniscus can result from any activity that causes you to forcefully twist or rotate your knee, such as aggressive pivoting or sudden stops and turns. Even kneeling, deep squatting or lifting something heavy can sometimes lead to a torn meniscus. In older adults, degenerative changes of the knee can contribute to a torn meniscus with little or no trauma."

These statements essentially indicate that there can be different causes and this makes the issue analogous to one of apportionment. It does not state that degenerative changes are the only cause of a torn meniscus. The initial statement uses the word "can" which is essentially one of several potential causes. It is dependent on a medical opinion.

The defendant cited the case of *Newton v. Industrial Acci. Com.* (1928), 204 Cal. 185. In that case the medical expert stated that the there was no extra strain on the patella that would have caused an injury. The commission found that "The evidence does not establish that said fracture was caused by injury or strain arising out of or occurring in the course of his employment."

The defendant is essentially arguing that applicant was engaged in normal body movement and therefore the injury did not arise out of employment. The defendant also argues that the report of Dr. McSweeney is based on a faulty premise in that he only made his decision based on "there has been no medical documentation indicating that the patient developed right knee symptoms as a

result of activities other than being at work." This will be further discussed in the Injury AOE/COE section.

The applicant attorney submitted a brief on 09/08/2021. The applicant attorney is arguing that the applicant was walking on a semi-rough surface with gravel and he was checking equipment at the time. There was a dip with a tapered edge that he stepped in and he injured his right knee.

INJURY AOE/COE:

The applicant has the burden of proof since it was denied and must meet the evidentiary burden of proof by a preponderance of evidence. The burden rests with the employee to prove his or her claim and all necessary elements. The employee has the initial burden of proving that the injury arose out of and in the course of the employment. *Wehr v. WCAB* (1985) 50 CCC 165.

Labor Code 3600 necessitates liability for injury "arising out of" and "in the course of" employment. If both conditions are met, the injury is or may be compensable unless barred by a legal theory.

Employment and the injury must be linked in some causal fashion to be industrial. *Madin v. IAC (Richardson*) (1956) 21 CCC 49, 50; *Maher v. WCAB* (1983) 48 CCC 326, 329; *LaTourette v. WCAB* (1998) 63 CCC 253, 256; *South Coast Framing, Inc. v. WCAB (Clark*) (2015) 80 CCC 489.

Pursuant to Labor Code 5705, "The burden of proof rests upon the party or lien claimant holding the affirmative of the issue." The applicant has the affirmative on proving injury arising out of employment and in the course of employment (AOE/COE).

Labor Code 3202.5 requires all parties and lien claimants to meet the evidentiary burden of proof on all issues by a "preponderance of the evidence." This means "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth."

It is a fundamental principle of the workers' compensation system that an employer is liable for an injury to an employee, "...arising out of and in the course of the employment..." (Lab. Code, § 3600(a); *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 732-733 [48 Cal.Comp.Cases 326] (Maher).) "In applying it, this court must be guided by the equally fundamental principle that the requirement is to be liberally construed in favor of awarding benefits. (Lab. Code, § 3202; *Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 777-778....; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317...; *Scott v. Pacific Coast Borax Co.* (1956) 140 Cal.App.2d 173, 178...)" (*Maher, supra,* 33 Cal.3d at 733 (emphasis in the original).)

Applicant bears the burden of proving injury AOE/COE. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302; Lab. Code, §§ 5705; 3600(a).) The concept of "in the course of the employment" generally, "...refers to the time, place, and circumstances under which the injury occurs." (*Maher, supra,* 33 Cal.3d at 733.) "Arising out of' employment generally refers to the causal connection between the employment and the injury. (*Id.*) In other words, the employee must be exposed to the "danger from which the injury results" as a result of his or "particular employment." (*Maher, supra*, 33 Cal.3d at 734 n.3 citing *Industrial Indem. Co. v. Ind. Acc. Com.* (1950) 95 Cal.App.2d 804, 809.) The burden of proof shifts to the employer once an applicant makes a "prima facie showing...of exposure to the danger involved." (*McAllister v. Workmen's Comp. Appeals Board* (1968) 69 Cal.2d 408, 416 [33 Cal.Comp.Cases 660] (*McAllister*).)

In order for an injury to arise out of employment, the employment need only be "'one of the contributing causes"' of the injury. (*Clark, supra*, 61 Cal.4th at pp. 297-29 quoting *Latourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253] (*Latourette*) quoting *Maher, supra*, 33 Cal.3d. at p. 734, fn. 3.)

In order to establish that an applicant's injury can "fairly be traced to the employment" and not "from a hazard which the workman would be equally exposed apart from the employment" (*Clark, supra*, 61 Cal.4th at p. 300), an employee need only show that the "proof of industrial causation is reasonably probable, although not certain or 'convincing.'" {*McAllister v. Workmen's Comp. Appeals Board* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660] {*McAllister*).')

The Supreme Court held that "a medical opinion that industrial causation was "'not zero'" was sufficient contribution..." {*Guerra v. Workers' Comp. Appeals Bd.* (2016) {*Guerra*) 246 Cal.App.4th 1301, 1310 quoting *Clark, supra*, 61 Cal.4th at. 303.)

When direct evidence of causation is unavailable, "'[circumstantial evidence is sufficient to support an award of the commission, and it may be based upon the reasonable inferences that arise from the reasonable probabilities flowing from the evidence; neither absolute certainty nor demonstration is required."' (*Guerra v. Workers' Comp. Appeals Bd.* (2016) 246 Cal.App.4th 1301, p. 1307.)

The applicant testified that he was injured on September 12, 2019 (MOH and Summary of Evidence p. 5, lines 16-17). He was checking equipment and felt a pop in his knee. He was on a flat surface with dips in it. It was semi-rough and had gravel. The dip tapered to another level. He testified to stepping on that edge (MOH and Summary of Evidence p. 6, lines 13-18).

The applicant was a heavy equipment operator and he would not be presumed to be a medical doctor or have any medical training. The medical expert in the case, Dr. McSweeney, however, after looking at all of the evidence concluded that there was an injury to a reasonable medical probability. The applicant reported his injury and was taken at a later time to Pioneer Hospital. He was examined at Pioneer Memorial Hospital on 09/12/2021(EAMS Doc ID 35514235). This is the same day as the alleged injury. He was on light duty until his surgery on February 4, 2020.

The applicant was treated by Dr. Mulvany from 09/13/2019-11/05/2019.

The applicant has treated with Veerinder Anand MD from 06/03/2020-04/14/2021. Dr. Anand provided an interim history in which he stated in every report virtually the same thing: Andy Hurtado sustained a documented industrial injury during the course of his employment with USG Corporation on 09/12/2019 as to his right knee as a mechanic. Dr. Anand does not discuss causation and mainly focuses on and discusses treatment.

The reports from the Veterans Administration from an appointment dated 08/09/2005 (Joint exhibit 20, EAMS Doc ID 36914927) document that he continued to have bilateral knee pain, at Bates stamp 790. There is another entry at Bates stamp 197 (Joint exhibit 19, EAMS Doc ID 36914926) that indicates "limited flexion of the knee twice with a listing in parentheses the number "10%." The applicant testified he did not remember that. In a report of x-rays taken on 10/23/1992 (Joint exhibit 18, EAMS Doc ID 36914925) it was noted he had narrowing of both patellofemoral compartments that was compatible with a history of chondromalacia. They were otherwise unremarkable.

The applicant underwent an MRI of the right knee on 11/04/2019 (EAMS Doc ID 36923707, page 2). One of the findings on an MRI indicated that there was a "Bone contusion involving the medial femoral condyle with findings consistent with a linear subchondral fracture of the medical femoral condyle. Soft tissue edema is present adjacent to the medial femoral condyle."

Dr. McSweeney in his initial report dated 02/18/2020 (EAMS Doc ID 35514230, p. 10, first full paragraph) stated "… that Mr. Hurtado did sustain an industrial related injury to the right knee when he was walking on uneven terrain. This resulted in a tear of the medial meniscus with an industrial aggravation of a preexisting degenerative condition of the right knee based on MRI findings.

The Panel QME, Dr. McSweeney, stated in his report dated 10/21/2020 (EAMS Doc ID 35514229, page 5, second full paragraph) that "Regardless whether the surface was leveled or uneven, based on the history provided by the patient, along with medical records, it is my medical opinion, within a reasonable degree of medical probability, Mr. Hurtado did sustain an industrial related injury to the right knee out of and during the course of his employment at USG Corp." This

has not been controverted by defendant. It can be reasonably inferred from the circumstantial evidence that the applicant was injured due to circumstances arising out of employment.

The defendant noted that the panel QME Dr. McSweeney stated (EAMS Doc ID 35514229, page 5, middle of 2nd full paragraph): There has been no medical documentation indicating the patient developed right knee symptoms as a result of any activities other than being at work. The defendant's argument is that his conclusions were therefore based on a mistaken legal premise. This is not persuasive. This was one of several factors Dr. McSweeney used in making his decision and it appears to be in reference to apportionment and not necessarily to causation. He also based his decision on his examination, interview with applicant, the deposition transcript, and the medical records reviewed in the case. The conclusion of the panel QME must be looked at in there totality.

The applicant's testimony was credible. Based on the credible testimony of applicant and the reporting of James McSweeney dated 02/18/2020 and 10/21/2020, it is found that the applicant sustained an injury arising out of and in the course of employment to his right knee on 09/12/2019. There is sufficient direct evidence to find injury AOE/COE based on the totality of evidence. Further, "circumstantial evidence is sufficient to support an award of the commission, and it may be based upon the reasonable inferences that arise from the reasonable probabilities flowing from the evidence; neither absolute certainty nor demonstration is required." (*Guerra v. Workers' Comp. Appeals Bd.* (2016) 246 Cal.App.4th 1301, p. 1307.). Based upon the reasonable inferences from the evidence in the case, including applicant's testimony, the medical reporting of Dr. McSweeney, contemporaneous medical reporting, the applicant reporting his injury to employer, the applicant did suffer and injury to his right knee on 09/12/2019.

Attorney's Fees:

Attorney fees in case in chief are deferred pending final resolution or litigation of the impairment portion of case.

Liens:

The lien of EDD is deferred. Consequently, jurisdiction over the liens is reserved and the issue deferred.

CONCLUSION

The applicant's testimony was credible. The medical reporting of Dr. McSweeney is considered substantial medical evidence. Based on the credible testimony of applicant and the medical reporting of Dr. McSweeney it is found that the applicant injured his right knee on 09/12/2019.

DATE: 09/28/2021
Eric Thompson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE