WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANDREW RUSSELL, *Applicant*

vs.

SOUTHERN CALIFORNIA EDISON;
permissibly self-insured, *Defendant*

Adjudication Number: ADJ15337248
San Bernardino 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.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ NATALIE PALUGYAI, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 15, 2023

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

ANDREW RUSSELL
THE LAW OFFICE OF MARK A. VICKNESS
MICHAEL SULLIVAN & ASSOCIATES

JB/*cs*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Identity of Petitioner:	Applicant, through his Attorney Mark A. Vickness.
Timeliness:	The petition was filed timely.
Verification:	The petition was properly verified.
Date of Issuance of Findings & Order:	February 17, 2023

II. CONTENTIONS

1. The WCJ acted without or in excess of its powers;
2. The evidence does not justify the findings of fact; and
3. The findings of fact do not support the order, decision or award.

Petitioner listed two additional contentions that are outside the scope of Labor Code Section 5903 and therefore are not addressed herein.

III. FACTS

Andrew Russell, hereinafter Applicant, alleged a cumulative trauma to his right knee arising out of and in the course of his employment for Southern California Edison in Bishop, California during the period September 10, 2020 through September 10, 2021. An application for adjudication consistent with the above was filed dated October 20, 2021.

The matter proceeded to Trial on January 10, 2023 on issues of whether the Applicant was entitled to a replacement PQME or further development of the record prior to proceeding to Trial on AOE/COE and injury arising out of and in the course of employment. Documentary evidence was received and the Applicant testified on his own behalf. The matter was submitted on January 10, 2023. On February 17, 2023 a Findings and Order issued, as well as an Opinion on Decision.

By verified Petition for Reconsideration dated and filed on March 14, 2023, Applicant, by and through his attorney of record, Mark A. Vickness, seeks reconsideration. Defendant, by and

through their attorney of record, Kalani E. Lopez filed a verified Answer to Petition for Reconsideration dated and filed on March 23, 2023.

IV. DISCUSSION

Applicant contends the undersigned erred by finding the Applicant did not sustain a cumulative trauma injury arising out of and in the course of employment. Further, Applicant contends the undersigned ignored relevant facts and evidence in the record by failing to give due consideration to the entire record. Contrary to Applicant's assertion, all documentary evidence and testimony was reviewed and considered by the undersigned.

The undersigned found the Applicant to be credible when he testified with respect to his job duties. Furthermore, Dr. Hall's reporting regarding the Applicant's job duties was consistent with the Applicant's testimony at trial. Contrary to Applicant's assertion that his job duties were not considered, the undersigned did take into consideration his duties. However, since the Applicant's credibility was not called into question and there was no evidence offered to suggest his job duties were contrary to his testimony the undersigned was not compelled to discuss his duties in detail in the Opinion on Decision dated February 17, 2023 as they were accepted as accurate.

Contrary to Applicant's assertion, the undersigned did consider all of the medical reports admitted into evidence. Where there is conflicting evidence, it is well-settled that the WCJ may choose the most appropriate and convincing evidence among conflicting medical evidence. (*Place v. WCAB* (1970) 3 Cal. 3d 372, 378.) Therefore, the undersigned turns to the medical evidence offered in support of the Applicant's alleged cumulative trauma injury.

The parties jointly offered the reporting of PQME Dr. Jerome Hall dated March 11, 2022 and his deposition from July 12, 2022 which was discussed in depth in the Opinion on Decision dated February 17, 2023. (Joint Exhibits Y and X.) Dr. Hall opined the Applicant "is simply dealing with the sequelae of his previous injury from July 25, 2012, and that currently he has not sustained a new injury work related to his right knee." (Joint Exhibit Y page 16.) A report may be considered substantial evidence even if the doctor does not explicitly use the term "reasonable medical probability." (See *Bates v. WCAB* (2012) 77 CCC 636 (writ denied); *McKinney v. WCAB* (2014) 79 CCC 1456 (writ denied).) The undersigned found the reporting of Dr. Hall is found to

be substantial medical evidence and his reporting did not support a finding of a cumulative trauma injury.

Applicant offered an MRI of the right knee dated October 1, 2021 (Applicant Exhibit 2), and an X-Ray of the right knee dated September 10, 2021 (Applicant Exhibit 3). Standing alone, neither support a finding of industrial causation as they lack any discussion of causation. Further, Dr. Hall did review these two diagnostic studies, in additional to numerous other medicals when forming his opinion that the Applicant did not sustain a cumulative trauma injury.

Applicant also offered a report from Brittania Cogin, PA-C at Mammoth Hospital dated September 10, 2021 (Applicant Exhibit 4). Applicant asserts the report from Mammoth Hospital dated September 10, 2021 alone constitutes substantial medical evidence of a cumulative trauma injury. However, while the September 10, 2021 report from Mammoth Hospital does conclude there is a "work injury" the report does not offer any explanation as to when this "injury" occurred and does not support a finding of a cumulative trauma as alleged by the Applicant. A medical report is not substantial evidence unless it offers the reasoning behind the physician's opinion, not merely his or her conclusions. (*Granado v. WCAB* (1968) 33 CCC 647, 653; *E.L. Yeager Construction v. WCAB (Gatten)* (2006) 71 CCC 1687, 1691.) The report captures the Applicant's recitation of his symptoms which support he is having pain in his right knee. However, the reporting from examiner Cogin is conclusory and does not discuss causation beyond stating there is a "work injury." The undersigned did not find the September 10, 2021 report from Mammoth Hospital to be substantial medical evidence or even persuasive evidence as it was conclusory and did not specifically state the Applicant sustained a cumulative trauma injury.

Applicant also offered the reporting from Dr. Doty, who was the PQME for the prior injury, dated May 23, 2019 (Applicant Exhibit 5) and November 27, 2018 (Applicant Exhibit 6). While the reporting of Dr. Doty does provide a background for the prior injury, it does not address whether there is a new injury as it predated the current cumulative trauma injury alleged. Further, Dr. Hall reviewed the reporting of Dr. Doty in connection with his evaluation and concluded the symptoms were related to the prior 2012 injury.

Labor Code Section 3202 requires liberal construction of the law in favor of the injured worker, not the facts and "does not relieve a party from meeting its evidentiary burden of proof." (*Rogers v. Workers' Comp. Appeals Bd*. (1985) 172 Cal. App. 3d 1195, 1202; *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 753.) In the present matter, there is no substantial medical

evidence presented which supports a finding of a cumulative trauma. No medical report was offered by either party that concluded the Applicant sustained a cumulative trauma injury as a result of his continued work and symptoms. Whereas, Dr. Hall opined that although the Applicant is experiencing pain during activities, this does not indicate there has been a new injury. (Joint Exhibit X page 21 lines 18-20.)

In conclusion, while all evidence was considered in the present matter, the undersigned found the reporting from Dr. Hall to be substantial medical evidence and more persuasive than any of the other evidence submitted. A WCJ may develop the record pursuant to *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal. Comp. Cases 138 [en banc] if after trial the WCJ deems it necessary after review of the medical evidence and witness testimony. While a WCJ may have a duty to develop the record where the entire record is inadequate to enable a decision, this duty does not permit a judge to rescue a party from their obligation of developing their own case and obtaining medical evidence (*see San Bernardino Community Hospital v WCAB (McKernan)* (1999) 64 CCC 986). Since the reporting from Dr. Hall was found to constitute substantial medical evidence and addressed the allegation of cumulative trauma injury there was not a need to develop the record.

Applicant's Attorney also contends the undersigned erred by finding the Applicant was not entitled to a replacement panel where the Applicant was unable to obtain the PQME's deposition within six months of request. This issue was not raised in the Declaration of Readiness to Proceed, nor listed on the Pre-Trial Conference Statement, and no evidence was submitted in support of this contention at the time of trial. Although, this may have been one of Applicant Attorney's items discussed in preparation for the Trial, it was not part of the issues submitted for decision. It has been held that if there is a failure to raise an issue at the MSC, the issue is deemed waived (*Hollingsworth v. WCAB* (1996) 61 CCC 715). Here, Applicant asserts the alleged delay in obtaining the PQME's deposition entitles the Applicant to a replacement PQME, but this was only raised in the Petition for Reconsideration and since it was not as an issue raised at Trial any attention to the issue should be disregarded.

However, despite the above, the undersigned takes judicial notice of the Petition for Appointment of Replacement QME filed on May 2, 2022 as it is relevant to conclude that even had the issue been raised, there was no violation. Within the petition, Applicant's Attorney asserts the deposition of Dr. Hall was noticed on April 25, 2022, but that Dr. Hall's office advised the

earliest date available for a deposition was October 11, 2022 which is 141 days after the date of notice. However, Joint Exhibit X shows that the deposition of Dr. Jerome Hall went forward on July 12, 2022 which was only 78 days from the notice date. Furthermore, the deposition of Dr. Hall did go forward on July 12, 2022, which was after the Petition for Appointment of Replacement PQME was filed. Considering Applicant's Attorney proceeded with the deposition, he is deemed to have waived his objections with respect to the timeliness of the deposition of Dr. Hall. Since Applicant's Attorney participated in the deposition, within the required timeframe, it would not be equitable to allow a replacement PQME simply because Applicant does not agree with the conclusions expressed within the deposition.

V. RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration dated March 14, 2023 be denied in its entirety.

Date: March 27, 2023

/s/ Heather L. Hirsch

Heather L. Hirsch
Workers' Compensation
Administrative Law Judge