

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

**BRIAN BURKHARD, *Applicant***

**vs.**

**COUNTY OF MARIN, permissibly self- insured,  
administered by ATHENS ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ15316244  
San Francisco District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and Opinion on Decision 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 and Opinion on Decision, which are both adopted and incorporated herein, and for the reasons stated below, we will deny reconsideration.

As discussed in the WCJ's Opinion on Decision, panel qualified medical examiner (PQME) David Smolins, M.D., found that applicant developed left sacroiliac joint dysfunction secondary to altered mechanics from the left hip arthroplasty. (Joint Exhibit 101, at p. 1 & 3.) He assigned 15% Whole Person Impairment (WPI) for the left hip. (Dr. Smolin's 1/21/22 report, at p. 4, Joint Exhibit 102.) No WPI was attributable to the sacroiliac joint. In a supplemental report dated May 21, 2022, Dr. Smolins opined that it was appropriate to add an additional 3% for chronic pain. (Joint Exhibit 104, at p. 1.) Again, he did not state that the 3% add on was attributable to the sacroiliac joint. Therefore, the WCJ correctly interpreted Dr. Smolins' opinion as attributing the 3% add on for pain to the only body part for which impairment was found, i.e., the left hip. (See *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 631 (Appeals Board en banc) ["Because [] pain add-on can be assessed only to 'increase' other ratable impairment [], there can be no pain add-on if there is no underlying WPI for a particular body part or system."].)

Accordingly, the fact that applicant was not assigned WPI for the sacroiliac joint is irrelevant because the sacroiliac joint injury was a result of the left hip injury.

For the foregoing reasons,

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

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**OCTOBER 23, 2023**

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

**BRIAN BURKHARD  
BROWN & DELZELL  
MICHAEL SULLIVAN & ASSOCIATES**

**PAG/es**

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**

Elizabeth Dehn, Workers' Compensation Judge, hereby submits her report and recommendation on the petition for reconsideration filed herein.

### **Introduction**

On August 22, 2023, defendant filed a petition for reconsideration of my July 28, 2023 Findings of Fact and Award.

Defendant asserts that that I acted without or in excess of my powers, that the evidence does not justify the findings of fact and that the findings of fact do not support the order, decision or award.

Defendant's petition was timely filed and accompanied by the verification required under Labor Code section 5902 and Regulation 10940(c). To date, I am not aware of an answer having been filed by applicant.

### **Facts**

Brian Burkhard sustained an accepted cumulative trauma injury to the left hip, and claimed an injury to the pelvis and sacroiliac joint, during the period ending on June 27, 2020 while employed as a firefighter by the County of Marin.

The parties used Dr. Smolins as the panel selected QME. He initially opined that the applicant sustained a cumulative trauma to the left hip, for which he underwent a hip replacement, and developed left sacroiliac joint dysfunction as a compensable consequence. (Joint Exhibit 101, Report of David Smolins, M.D., dated September 17, 2021 at page 3.) At the time of the January 21, 2022 reevaluation, he opined that the applicant's condition was permanent and stationary, assigning a 15% whole person impairment ("WPI") to the left hip and no impairment to the lumbar spine. (Joint Exhibit 102, Report of David Smolins, M.D., dated January 21, 2022 at page 4.) In a supplemental report of May 21, 2022, Dr. Smolins agreed that there was an additional 3% WPI for chronic pain. (Joint Exhibit 104, Report of David Smolins, M.D., dated May 21, 2022 at page 1.)

The matter proceeded to trial on June 14, 2023. Following my consideration of the testimony of the applicant, my review of the evidentiary record, and consideration of the briefs by both parties, I issued my Findings and Award. I found that the applicant sustained injury arising out of and in the course of impairment to the pelvis and sacroiliac joint in addition to the

left hip. I also found that the applicant sustained permanent partial disability of 37%, and that the applicant was entitled to further medical treatment. It is from that Findings of Fact and Award that petitioner seeks reconsideration.

### **Petitioner's Contentions**

Petitioner contends that I erred in adding an additional 3% whole person impairment for chronic pain to the impairment outlined for the hip.

For the reasons discussed below, petitioner's contentions are without merit, and do not provide sufficient basis to grant reconsideration.

### **Discussion**

The strict interpretation of the AMA Guides allows a physician to increase the impairment by up to 3% WPI for chronic pain. Although a formal pain impairment assessment may be performed, it is not required. The permanent disability rating schedule states that in the case of multiple impairments, the physician shall attribute the WPI increments of pain to the appropriate impairments. (Schedule for Rating Permanent Disabilities, page 1-12.)

In his May 21, 2022 report, Dr. Smolins stated that he was asked to consider adding 3% for chronic pain and the SI dysfunction. (Joint 104.) Dr. Smolins opined that it was appropriate to add an additional 3% for chronic pain given the ongoing symptoms. (Id.) Dr. Smolins specifically stated the 3% was for "chronic pain." He did not state that it was for the SI dysfunction. The plain reading of the report is that Dr. Smolins found that the applicant's impairment should be increased for chronic pain. As Dr. Smolins only provided impairment to the left hip, the impairment for chronic pain was appropriately added to the impairment for the hip.

In both cases cited by defendants, the physicians impermissibly added the pain "add on" when there was no ratable impairment for any body part. (*See, Espinoza v. Southwest Airlines* (2011) Cal. Wrk. Comp. P.D. Lexis 113 and *Mercedes Felix v. Sea Dwelling Creatures, Inc.* (2011) 2011 Cal. Wrk. Comp. P.D. Lexis 271.) In this case, there is ratable impairment for the left hip following a hip replacement. As there was ratable impairment, an "add on" for chronic pain is permissible under the strict interpretation of the AMA Guides as well as the current permanent disability rating schedule.

**Recommendation**

For the foregoing reasons, I recommend that the August 22, 2023 Petition for Reconsideration be denied.

DATE: August 30, 2023

**Elizabeth Dehn**

WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE

## **OPINION ON DECISION**

This matter proceeded to trial on June 14, 2023 on the issue of nature and extent of the injury, permanent disability and attorney's fees. Documentary evidence was submitted and testimony was taken. In addition, memorandums of points and authorities were filed.

### Stipulated facts

Brian Burkhard, born [], while employed during the period ending on June 27, 2020 as a firefighter, Occupational Group Number 490, at various locations in and around Marin County California by the County of Marin, sustained injury arising out of and in the course of employment to the left hip and claims to have sustained injury arising out of and in the course of employment to the pelvis and sacroiliac joint. At the time of injury, the employer was permissibly self-insured for workers compensation purposes.

The employee's earnings at the time of injury were sufficient to warrant permanent disability at the rate of \$290 per week. The employer has furnished some medical treatment and the primary treating physician is Dr. David Goodman. Permanent disability commences on August 15, 2021.

### **Documentary evidence**

The applicant was seen by Dr. Mayle on January 19, 2021 with a new complaint of left low back pain for the past three weeks with no history of trauma. The applicant has a history of back pain but reported this is different as the pain does not radiate down the lower extremity. (Applicant's Exhibit 17, Report of Edward Mayle Jr., M.D., dated January 19, 2021.)

Dr. Goodman saw the applicant on January 20, 2021 in follow up from a total left hip replacement on November 30, 2020 performed by Dr. Mayle. The applicant developed lower back pain after New Year's that progressively worsened. He was complaining of aching from his left lower back to his left buttock which affected his sleep, sitting and driving. His left hip was doing well and he no longer used a cane or walker for assistance. He saw Dr. Mayle the day before they went over his hip and his low back pain and was prescribed prednisone. Dr. Mayle reportedly thinks the low back was due to the compensation for the new hip. (Applicant's Exhibit 15, Report of David Goodman, M.D., dated January 20, 2021.)

Dr. Goodman saw the applicant on February 3, 2021 two months post surgery. Since starting physical therapy, the applicant developed low back pain on the left side localized above

the left hip. He has been seeing his surgeon, Dr. Mayle, regularly and two weeks ago was placed on Methocarbamol for six days with no change in pain. Dr. Mayle reportedly believed that the low back problems were due to compensation for the new hip. (Applicant's Exhibit 14, Report of David Goodman, M.D., dated February 3, 2021.)

Dr. Goodman had a telehealth appointment with the applicant on April 7, 2021. He received an SI joint injection from Dr. Kelly on April 2, 2021 which helped reduce his back pain. It was noted the injection was not covered under workers' comp. Dr. Goodman noted the applicant was five months post left total hip replacement and is progressing slowly. He had ongoing back pain that was addressed with in SI joint (note: presumably injection) recently that has also contributed to improving his gait. (Applicant's Exhibit 12, Report of David Goodman M.D., dated April 7, 2021.)

Dr. Goodman performed a telehealth evaluation of the applicant on July 22, 2021. He noted the applicant's functionality in the left hip was 75% of what it was preinjury. The applicant reported that his left hip replacement impacted his SI joint to where he saw Dr. Kelly to get injections on his own accord which helped weeks ago but the SI joint pain has returned since the injection in April. Under "assessment," Dr. Goodman notes the SI joint pain had been frustrating and limiting rehab. The applicant never had prior SI joint dysfunction and it developed after the surgery. Dr. Goodman opined that, given the onset of left SI joint pain following the surgery, the SI joint dysfunction was a compensable consequence of the hip surgery and should be included under his workers' compensation claim for the hip. (Applicant's Exhibit 9, Report of David Goodman, M.D., dated July 22, 2021.)

David Smolins evaluated the applicant on September 17, 2021 as a panel selected Qualified Medical Evaluator ("QME"). He noted the applicant described the onset of left hip pain while wearing his gear working on fires, which worsened on June 27, 2020 while walking downhill at work. He underwent a left total hip arthroplasty on November 30, 2020 and underwent post-operative physical therapy. He was currently working modified duty and his surgeon, Dr. Mayle, recommended a return to full duty in November of this year. The applicant had an onset of left buttock pain month following surgery and was told it was due to the left sacroiliac joint. He was advised that it occurs with leg length discrepancy from the left hip replacement as his body becomes accustomed to the change. He did undergo a prednisone taper, however, although it did improve, the pain persisted. Dr. Smolins' diagnosis were status post left

total hip arthroplasty and left sacroiliac joint dysfunction. He opined that the applicant suffered a cumulative trauma injury to the left hip while performing his job as a fireman. He developed left sacroiliac joint dysfunction secondary to altered mechanics from the hip arthroplasty. He was likely permanent and stationary although he wanted to review medical records. He opined that the left hip and left sacroiliac joint were caused by the June 27, 2020 injury. Future medical care was recommended. (Joint Exhibit 101, Report of Panel QME David Smolins, M.D., dated September 17, 2021, pages 1 and 3.)

Dr. Smolins reevaluated the applicant on January 21, 2022. Since the last evaluation, the applicant noted improvement in regards to the left sacroiliac joint and was able to return full duty as a firefighter on November 19, 2021. He had no additional treatment. Dr. Smolins' diagnoses continued to be status post left total hip arthroplasty and left sacroiliac joint dysfunction. He opined that the applicant sustained a cumulative trauma injury to the left hip while performing his usual customer duties as a firefighter. He underwent left total hip arthroplasty and developed subsequent left sacroiliac joint dysfunction due to altered mechanics and the left total hip arthroplasty. His condition was permanent and stationary as of the date of the evaluation. Using the AMA guides he assigned 15% whole person impairment (WPI) for the hip. The lumbar spine was a DRE Category 1 with 0% WPI. There was no apportionment. Future medical care was needed. (Joint Exhibit 102, Report of Panel QME David Smolins, M.D., dated January 21, 2022, Pages 1, 2, 3 and 4.)

Dr. Smolins prepared a supplemental report dated May 21, 2022. He explained how he calculated the rating for the left hip and noted that if the applicant's pain was moderate then the impairment would increase, and offered to reevaluate the applicant and discuss in further detail his pain level. He was asked about considering 3% for Mr. Burkhard's pain and the SI dysfunction as noted in the medical reporting. He reviewed his previous reporting and did believe it was appropriate to add an additional 3% for chronic pain given the ongoing symptoms. (Exhibit 104, Report of Panel QME David Smolins, M.D., dated May 21, 2022,)

The remaining exhibits are of no additional probative value.

### **Trial briefs**

Applicant filed a post-trial memorandum of points and authorities and argued that the permanent disability should be rated with the underlying rating for the hip impairment, with a 3% "add on" for pain added to the hip impairment. Defendant filed a trial brief arguing that the



3% for chronic pain outlined by Dr. Smolins was given for the applicant's sacroiliac joint, and since there was no ratable impairment for the lumbar spine/sacroiliac joint, it was inappropriate to add the 3% to the sacroiliac joint impairment.

### **Analysis**

*Did applicant injury his pelvis/sacroiliac joint as a result of the industrial injury?*

The applicant credibly testified at trial that he began to experience SI joint pain one month after his surgery. (Summary of Evidence, page 5.) He also testified that the SI joint pain was different than the hip pain. (Id. at page 6.) He felt that there were two different types of pain in two different body parts. (Id at 6-7.)

Applicant's treating physician, Dr. Goodman, opined that the applicant had SI joint dysfunction as a compensable consequence of the hip surgery. (Applicant's Exhibit 9.) "SI" joint is a commonly used abbreviation for the sacroiliac joint, one of the joints in the pelvis. Dr. Smolins, in his September 17, 2021 report, diagnosed sacroiliac joint dysfunction and opined that it was caused by altered mechanics from his hip replacement. (Joint Exhibit 101, Page 3.) He reiterated that opinion in his January 21, 2022 and continued to find an industrial injury to the sacroiliac joint. (Joint Exhibit 102, page 3 and 4.) Based on the unrebutted opinions of Drs. Goodman and Smolins, I find that the applicant did sustain injury to the sacroiliac joint and pelvis.

*What is the applicant's level of permanent disability?*

The only reports in evidence that address impairment are that of the panel QME, Dr. Smolins. In his January 21, 2022 report, Dr. Smolins assigned a 15% WPI for the left hip, and 0% WPI for the lumbar spine. (Joint Exhibit 102, page 4.)

In his May 21, 2022 report, Dr. Smolins stated that he was asked to consider adding 3% for pain and the SI dysfunction. (Joint 104.) Dr. Smolins opined that it was appropriate to add an additional 3% for chronic pain given the ongoing symptoms. (Id.) Dr. Smolins specifically stated the 3% was for "chronic pain." The permanent disability rating schedule states that the physician shall attribute the pain to the appropriate impairments. (Schedule for Rating Permanent Disabilities, page 1-12.) He did state that it was for the SI dysfunction. The plain reading of the report is that Dr. Smolins found that the applicant's impairment should be increased for chronic pain. As Dr. Smolins only provided impairment to the left hip, the impairment for chronic pain is added to the impairment for the hip.

The permanent disability rates as follow:

**17.03.10.01 – 18% - [1.4]25 – 490I – 33- 37%**

Applicant is entitled to permanent disability of 37%, amounting to 180 weeks of indemnity payable at the rate of \$290.00 a week totaling \$52, 200.00 before attorney's fees.

*Is there a need for further medical treatment?*

The need for further medical treatment was not specifically raised as an issue by the parties in the pretrial conference statement or at the time of the trial. In addition, there is no stipulation by the parties as to the need for medical treatment. However, based on the unrebutted opinions of Dr. Smolins, who opined that there was a need for further medical care and provided recommendations for treatment for both the left hip and sacroiliac joint, I find that there is a need for further medical care. (Joint Exhibit 102, page 4.)

*Is applicant attorney entitled to a fee?*

In light of the competent representation provided to the injured worker in connection with this dispute, I found that applicant's counsel is entitled to a fee consisting of 15% of the permanent disability being awarded herein.

DATE: July 28, 2023

Elizabeth Dehn

WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE