

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

**PHIL ZARUBIN, *Applicant***

**vs.**

**CITY OF RICHMOND, AIMS (SACRAMENTO) et al., *Defendants***

**Adjudication Number: ADJ16362715  
Oakland 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 arbitrator with respect thereto. Based on our review of the record, and for the reasons stated in the arbitrator's report, which we adopt and incorporate, we will deny reconsideration.

Finally, we also admonish defense attorney Nicholas Rosen, with Stockwell, Harris, Woolverton & Fox, for attaching approximately 36 pages that were either already part of the record in violation of WCAB Rule 10842(c) (Cal. Code Regs., tit. 8, § 10842(c)) or that were never admitted into evidence, in violation of Appeals Board Rule 10945. (Cal. Code Regs., tit. 8, § 10945(c)(2).) Future compliance with the Appeals Board's rules is expected.

For the foregoing reasons,

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

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

I CONCUR,

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



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

**September 25, 2023**

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

**PHIL ZARUBIN  
BOXER & GERSON, LLP  
STOCKWELL, HARRIS, WOOLVERTON & FOX  
RTGR LAW  
RAYMOND E. FROST & ASSOCIATES**

**PAG/ara**

*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 OF ARBITRATOR  
RE: DEFENDANT'S PETITION FOR RECONSIDERATION  
DATED JUNE 23, 2023**

**I. INTRODUCTION**

The above captioned case was heard under the jurisdiction of the City of Richmond/Richmond Firefighter's Association (IAFF Local 188) Workers' Compensation Alternative Dispute and Resolution Program Agreement (ADR "Carve-out" Program). Applicant's original claim was filed with the WCAB on or about June 29, 2022. Subsequently, the parties agreed to submit this case to the ADR program for adjudication, and I was duly appointed arbitrator pursuant to the stipulation of the parties and their respective counsel of record.

I thereafter made Findings of Fact and issued an Award on May 31, 2023. Defendant timely filed its Petition for Reconsideration on or about June 30, 2023. Applicant filed his Answer to Defendant's Petition on or about July 7, 2023.

Defendant's Petition alleges that: (1) the Finding and Award is not based on substantial evidence (LC Section 5952(d)); (2) the Finding and Award is arbitrary and unreasonable (LC Section 5952(c)); (3) the evidence does not justify the findings of fact (LC Section 5903(c); and (4) the findings of fact do not support the Arbitrator's Finding and Award (LC Section 5903(e) (Petition 1:23-27).

Factually, Defendant's Petition rests on five (5) assertions: (1) The A-IME Report of Dr. David Pang is not substantial evidence (lacking the the [sic] "complexity and depth" of Dr. Feinberg's Reports); (2) Dr. Pang's Report fails to support how and why his findings support a new injury AOE/COE; (3) Applicant stated from February 2019 through December 2020 that he wanted to return to work; (4) Applicant didn't complain in the medical records about his "new" body part injuries until after he filed his claim; and (5) [As to (3) and (4)] Dr. Pang fails to "explain these discrepancies" (Petition 5:2-13).

**II. STATEMENT OF THE CASE AND MATERIAL FACTS**

PHIL ZARUBIN (Applicant) began working as a Firefighter for the CITY OF RICHMOND Fire Department (Defendant) on or about 2006. His regular job duties as a Firefighter/first responder included answering medical emergencies, calls to structural fires and other emergency/crisis calls within the City of Richmond.

Applicant suffered an injury to his lower back in 2012 during a training exercise, as well as a CT through February 7, 2019. As a result of the CT injury, Applicant was off work from February 7, 2019 through December 21, 2019. This 2019 CT injury was an accepted injury, and Applicant received LC Section 4850 benefits and TD benefits from February 17, 2019 through December 15, 2020. Applicant returned to full duties at work on December 21, 2020.

On December 23, 2020, Applicant fell backwards, at work, onto his buttocks and tailbone while pulling a fire hose from which Applicant alleges a new injury. Applicant was followed medically by his treating physicians, Arthur Ting, MD, Mark Sontag, MD, David Smolins, MD, and George Rakkar, MD before the December 23, 2020 incident through January 6, 2023, and continuing.<sup>1</sup> Applicant's treating physicians have rendered concurring opinions that Applicant has been, and is, unable to return to work since December 24, 2020 (i.e., Dr. Ting's Work Status Report, pgs 2,3; Applicant's Exhibit 28; See also Dr. Sontag's 6-28-2022 Work Status Report, pg 5; Applicant's Exhibit 13).

A lumbar MRI on March 26, 2021 reported a compression fracture at L2 (Mark Sontag, MD Request for Authorization DCW Form RFA, dated 4-1-2021, pg 2, "DIAGNOSTICS" #4, Applicant's Exhibit 26). Dr. Sontag noted that Applicant was experiencing symptoms in his neck and upper back, in addition to his lower back. He also opined that Applicant was P&S as to the February 7, 2019 injury but was not MMI as to his December 23, 2020 injury. Dr. Sontag's conclusions (that Applicant was not MMI, and was unable to return to work) was reiterated in his June 28, 2022 Work Status Report (See Applicant's Exhibits 14 and 27). Dr. Rakkar (taking over upon Dr. Sontag's retirement) continues to find Applicant unable to return to work through the present time (See Applicant's Exhibits 5 and 6).

Applicant was subsequently seen by Dr. Steven Feinberg, MD, Defense IME, and Dr. David Pang, MD, Applicant's IME.

### **Defendant's Arguments**

Defendant properly states that the dispute here is "whether Applicant suffered a new, standalone injury or a recurrence of an old injury" noting that D-IME Dr. Feinberg<sup>2</sup> does not definitively find industrial causation (Petition 6: 17-19). Defendant then asserts that "if a subsequent incident does not rise to the dignity of a permanent aggravation and remains a temporary exacerbation or recurrence of an original injury, then no new industrial injury has occurred" (citing to *Erickson Lumber Corp, v. WCAB (Neves)*, 58 CCC 635 (W/D-1993)) (Petition 6: 19-21).

From this Defendant argues that the current "medical" does not support a new injury. This is based on Dr. Feinberg's two statements that this 12/23/20 injury may be temporary exacerbation which he [Dr. Feinberg] would need to address [later] as to whether this is a new injury. (Dr. Feinberg, 03/22/2021, p. 19, P8; 05/13/2021, p.7.) (cite by Defendant {Petition 6:27- 7:1}).<sup>3</sup> In the second statement cited by Defendant, Dr. Feinberg reports, "As I reported to you, I was not convinced that this was more than a temporary aggravation [sic] and that issue is going to have to be addressed once he becomes permanent and stationary" (Feinberg 05/13/2021, p. 7). Based on these statements, Defendant concludes that there is no evidence yet of new, compensable injury (Petition 6:27 - 7:5).

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<sup>1</sup> Dr. Sontag was a treating physician from June of 2019. Dr. Ting was a treating physician from April of 2019.

<sup>2</sup> Dr. Feinberg is errantly named "Dr. Anderson" here in Defendant's Petition (Petition 6: 18).

<sup>3</sup> Dr. Feinberg actually stated in his 3/22/2021 Report, "It appears he [Applicant] was only back to work for one day when he suffered a specific work related re-injury and worsening of his condition. *Unless he returns to baseline, which appears unlikely, this should be considered a new injury*" (Feinberg 3/22/2021 Report, pg 19 [emphasis added]).

Defendant concludes that "Dr. Feinberg's medical opinion is supported by the battery of tests provided to Applicant by a board-trained orthopedist, the interviewing process, his review of the medical record, and the methodology was laid out as to how and why the diagnosis was reached." Therefore, Defendant contends, "the reporting of Dr. Feinberg constitutes substantial medical evidence" (Petition 7:9-13).

As noted above, Defendant argues that the A-IME Report of Dr. Pang is not substantial evidence as it lacks the "complexity and depth" of Dr. Feinberg's Reports, and fails to state how and why his findings support a new injury AOE/COE. Defendant also maintains that Dr. Pang failed to explain "discrepancies" (regarding Applicant's repeated statements about wanting to return to work, and then injuring himself "on the job" within a day of returning to work, together with Applicant's "failure" to report his "new" body part injuries prior to filing his present claim) (Petition 5:2-13).

Based on all the above, Defendant asks the Board to render a finding that Applicant did not sustain an injury AOE/COE "for the specific injury of December 23, 2020 (Petition 7:20-21).

### III. DISCUSSION

Decisions by the Appeals Board must be supported by substantial evidence. To constitute substantial evidence " ... a medical opinion must 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" (*Escobedo v. Marshalls* (2005) 70 CCC 604, 621 (Appeals Board, *en banc*)). "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Heggin v WCAB* (1971) 4 Cal.3d 162, 36 CCC 93).

By way of preface, the details of the reporting of Drs. Feinberg and Pang are set forth in the 5/31/2023 Findings, Award, and Opinion and Decision, on which the present Petition is based (see 5/31/2023 F&A pgs 9-16). Applicant's and Defendant's original arguments are also summarized in the same Findings and Award (5/31/2023 F&A, pgs 17-20).

As to Defendant's present objections, there is no argument that Dr. Feinberg presents detailed and thorough reports. Further, the degree of medical reporting is not relevant to the issue of apportionment, but is, for the purposes of this arbitration, exclusively limited to the issue of industrial causation of the specific injury of 12/23/2020. More specifically, whether the injury(ies) is/are completely new injury(ies), a permanent aggravation of a previous injury, or merely a temporary exacerbation of earlier conditions.

Defendant claims that Dr. Feinberg's Reports are substantial evidence even though he provides no determination on whether Applicant's 12/23/2020 specific injury is a new injury or not. Defendant contends that if there is no express finding of a new injury (or at least not such a finding presently), there is no basis for payment of benefits for same.

In the two statements relied on by Defendant, Dr. Feinberg states that *if* Applicant does not return to baseline, which is unlikely<sup>4</sup> then this 12/23/2020 specific injury *should be considered a new injury* (Feinberg 3/22/2021 Report, pg 19). In his second statement, Dr. Feinberg states, "As I reported to you. I was not convinced that this was more than a temporary aggravation [sic] and that issue is going to have to be addressed once he becomes permanent and stationary" (Feinberg 05/13/2021, p. 7).

When reviewing these statements conjunctively, Dr. Feinberg is saying it is likely that the 12/23/2020 injury is a new injury, although he is not convinced that it is more than an a temporary aggravation of earlier injuries, but defers final determination on this issue until Applicant is P&S. None of this is helpful, as it appears to be contradictory at worst, and confusing and non-committal at best.

However, Dr. Feinberg is not the only IME reporting in this case. Dr. Pang, Applicant's IME, provided a detailed job description, history of the injury, and prior injuries, complete list of current complaints, the results of his physical examination of the Applicant, and review of the medical records, the content of which is substantially the same, in form and general content, as that which was provided in Dr. Feinberg's Reports.

Contrary to Dr. Feinberg, Dr. Pang's medical opinion regarding the causation of the 12/23/2020 injury(ies) the nature of the 12-23-2020 lumbar spine injury (i.e., a new injury or exacerbation/temporary worsening of an pre-existing condition) was that Applicant had suffered chronic cervical strain, chronic thoracic strain and low back pain syndrome, as well as pelvic/coccygeal contusion (Pang 8-18-2021 IME Report, pg 6). Dr. Pang reports that Applicant did suffer a new injury as a result of the event of 12/23/2020. Where Dr. Feinberg renders no medical opinion regarding Applicant's neck, cervical spine, pelvic/coccygeal injuries, Dr. Pang opines as follows:

Neck, back, pelvic/coccygeal injuries are commonly caused by falling which is how Mr. Zarubin states that the injury occurred; therefore, in the absence of any other medical information to the contrary, I feel that it would be medically reasonable to state that an injury of his neck, upper back/shoulder girdle and lower back/pelvis is medically consistent with the mechanism of injury and sequence of events as described in the preceding paragraphs (Pang 8-18-2021 IME Report, pgs 6-7) [para] Based upon the currently available information I feel that the December 23, 2020 events resulted in a new injury to the lower back and an injury to the neck and upper back, pelvis/coccyx and the right shoulder girdle (Pang 8-18-2021 Report, pg 7).

Defendant charges that Dr. Pang's Report is not substantial evidence because he fails to state how and why his findings support a new injury AOE/COE. However, Dr. Pang provides a description (above) of the mechanism whereby such injuries, as those complained of by Applicant after the 12/23/2020 incident, occur, to wit: such injuries are consistent with a fall, such as Applicant's fall onto his tail bone and back on 12/23/2020.

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<sup>4</sup> Here, it is not clear if Dr. Feinberg thinks it is unlikely that Applicant will not return to baseline, or if it is unlikely that he will return to baseline. If one removes the double negative, it would state that "if Applicant does return to baseline, which is likely ..." This is how the Arbitrator is reading Dr. Feinberg's statement.

Defendant also claims that Dr. Pang fails to address the "discrepancies" (that Applicant repeatedly stated his desire to return to work, and then injured himself after one day back on the job; and his failure to report the "new" body part injuries until after the filing of his present claim). Neither objection has merit, and neither renders Dr. Pang's Reports to be not substantial evidence.

First, there is an inference in Defendant's contention regarding Applicant's desire to return to work and then injuring himself the next day after actually returning to work, that the incident and/or subsequent injuries are somehow contrived. Unless Dr. Pang had factual evidence that Applicant's physical complaints had no footing in the events of 12/23/2020, there is no basis for him to discount the medical records of Applicant's treating physicians post-12/23/2020, or the objective findings and subjective complaints of Applicant regarding injuries resulting from this event.

Second, as to the late reporting of the "new" injuries, again, barring evidence that Applicant was manufacturing injuries from the 12/23/2020 event, it would be pure speculation on Dr. Pang's part to opine as to why any such delay occurred. His reports and findings are based on his review of medical records and interview and examination of the Applicant. Again, there is nothing in Defendant's present objections that warrant a finding that Dr. Pang's reports and opinions are not substantial evidence.

Finally, the present Findings and Award at issue are summarized in the following (as also set forth in the subject Findings and Award):

1. Applicant's earlier lumbar spine injuries (from 2012 through 2019), present diagnoses of cumulative and ongoing degenerative conditions and stenosis, with some bulging/tearing, coupled, with lumbar strain/sprain, but without fracture (See Feinberg 3-22-2021 IME Report, pg 3, 7).
2. A post-12-23-2020 MRI from March of 2021 reports a compression fracture at L2 (See Mark Sontag, MD Request for Authorization DCW Form RFA, dated 4-1-2021, pg 2, "DIAGNOSTICS" #4, Applicant's Exhibit 26). This alone, without more, presents a distinct and different type and degree of lumbar injury than existed prior to the 12-23-2020 incident.
3. Applicant was diagnosed with injury to, not only his lumbar spine, but his cervical and thoracic spine, upper back, pelvis, coccyx and right shoulder girdle. Once again, these are different body parts than Applicant's prior injuries to the lumbar spine, knees, feet, lungs (from smoke inhalation), and facial and arm abrasions suffered by Applicant and referenced prior to 12-23-2020.
3. Dr. Sontag and Dr. Feinberg both cleared Applicant to return to work in December of 2020 (see Sontag 12-2-2020 Work Status Report and Feinberg 11-23-2020 IME Report). This presents evidence that Applicant was both P&S and MMI as to his 2-07-2019 CT injury prior to 12-23-2020, and had sufficiently recovered from that CT injury to reassume the rigorous duties of a Firefighter with the City of Richmond.
4. Immediately following the incident on 12-23-2020, Applicant was once again deemed medically unable to work from that date, and continues to remain unable to work. His disability was medically connected to the injuries sustained as a result of the work incident of 12-23-2020 (See

Ting 1-15-2021 Work Status Report; Applicant's Exhibit 28). Here, Applicant infers that his medical release to work just prior to the 12-23-2020 incident, and his subsequent medical inability to work after this incident, speak to an industrially caused injury on 12-23-2020, resulting in his current and ongoing disability.

5. Dr. Feinberg's opinion regarding whether Applicant's injury is a new injury or an exacerbation/worsening of an old injury is non-committal at best, and appears contradictory as between Dr. Feinberg's two separate, stated opinions. First he opines that, "[i]t appears he [Applicant] was only back to work for one day when he suffered a specific work related reinjury and worsening of his condition. Unless he returns to baseline, which appears unlikely, this should be considered a new injury (Feinberg 3-33-2021 IME Report, pg 10). He later states, " ... I was not convinced that this was more than a temporary aggravation and that issue is going to have to be addressed once he becomes permanent and stationary" (Feinberg 5-13-2021 Supplemental IME Report, pg 7). There is nothing in these statements to medically rule out or confirm that Applicant did not sustain a new injury on 12-23-2020. To the contrary, as noted above, Dr. Feinberg subjunctively allows for the possibility that it very well could be a new injury.

6. Dr. Pang's conclusion (that Applicant's injuries arising out of and from the 12-23-2020 work incident and constitute new, industrial injuries) is based on the mechanics of how Applicant was injured, and the nature and type of injuries he sustained. Dr. Pang stated that "neck, back, pelvic/coccygeal injuries are commonly caused by falling, which is how Mr. Zarubin states that the injury occurred ... I feel that it would be medically reasonable to state that an injury of his [Applicant's] neck, upper back/shoulder girdle and lower back/pelvis is medically consistent with the mechanism of injury and sequence of events as described in the preceding paragraphs ... Based upon the currently available information I feel that the December 23, 2020 events resulted in a new injury to the lower back and an injury to the neck and upper back, pelvis/coccyx and the right shoulder girdle" (Pang 8-18-2011 IME Report, pgs 6-7). Hence, there appears to be a medically sufficient causal mechanism and link between Applicant's 2-23-2020 fall and the resulting injuries he suffered, as identified and described by Dr. Pang.

7. Dr. Feinberg fails to address most of Applicant's injuries outside of the lumbar injury, except for his summary dismissal of Applicant's cervical injury (as not resulting from the 12-23-2020 incident). Again, no explanation is given as to why the cervical spine injury is not AOE/COE from the 12-23-2020 incident, and no discussion or reason is provided by Dr. Feinberg to definitively establish that no new industrial injury has occurred as to the cervical, thoracic, pelvic, coccyx, and/or right shoulder girdle resulting from the 12-23-2020 incident.

Based on all of the foregoing, and with no sufficient medical evidence presented to the contrary, Dr. Pang's analysis and opinion constitutes substantial evidence, and presents as more persuasive, to wit: Applicant suffered a new and distinct injury to his lumbar spine, cervical and thoracic spine, pelvis, coccyx, and right shoulder girdle as a result of the work-related incident of 12-23-2020.

These injuries are the kind to be expected from a fall, such as occurred here with Applicant; these injuries involve body parts separate and apart from those referenced in injuries listed prior to 12-23-2020 (except for the lumbar region); and the present lumbar injury manifests a compression fracture at L2 that is not present in the pre-12-23-2020 diagnostics and medical records.



Finally, outside of the prior lumbar spine injuries, none of the other 12-23-2020 body part injuries at issue here were factors in Applicant's prior medical history, in that they simply are not present in the records as body part injuries at all (prior to 12-23-2020). No evidence has been presented to affirmatively defeat these evidentiary points.

Therefore, and based on the foregoing, the finding in this case is that the injuries to Applicant's lumbar spine, cervical and thoracic spine, pelvis, coccyx, and right shoulder girdle are new injuries that arose AOE/COE from the 12-23-2020 work-related incident.

#### **IV. RECOMMENDATION**

For all of the foregoing reasons, it is recommended that Defendant's Petition for Reconsideration be DENIED.

Dated: 7-25-23

RAYMOND E. FROST, Arbitrator