

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

GEORGE HAMILTON, *Applicant*

vs.

**CITY OF SAN JOSE;
administered by INTERCARE, *Defendant***

**Adjudication Numbers: ADJ10757290, ADJ10757289
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant City of San Jose, permissibly self-insured, seeks reconsideration of the Joint Findings and Award, issued August 24, 2021, wherein the workers' compensation administrative law judge (WCJ) found that applicant George Hamilton, while employed as a police officer, sustained industrial cumulative trauma injuries over the period ending November 16, 2016, to his back, and over the period ending January 19, 2017, in the form of basal cell carcinoma (neck), squamous cell carcinoma (left upper arm), cancer of the bladder, retrograde ejaculations, sleep disturbance, and tinnitus. The WCJ found the injuries caused permanent total disability, finding applicant rebutted the scheduled rating based on vocational evidence.

Defendant contends the WCJ erred in finding the opinion of the Agreed Medical Examiner (AME) in urology constituted substantial medical evidence, arguing that the AME's findings were based on applicant's subjective symptoms without having the opportunity to review corroborating objective testing. Defendant further argues that the WCJ erred in relying upon the AME's opinion on applicant's vocational incapacity, asserting the AME is not qualified to offer a vocational opinion. Finally, defendant contends the opinion of the vocational expert, upon whom the WCJ relied, is not adequate to rebut the scheduled rating because the vocational expert erroneously assumed applicant's back injury was an element of the cumulative trauma injury that supported the finding that applicant is permanently totally disabled.

We have received and reviewed applicant's Answer to the Petition for Reconsideration. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations and arguments of the Petition for Reconsideration, as well as the answer thereto, and have reviewed the record in this matter and the WCJ's Report and Recommendation on Petition for Reconsideration of September 24, 2021, which considers, and responds to, each of the defendant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate as the decision of the Board, we will affirm the WCJ's Joint Findings and Award, and deny the Petition for Reconsideration.

Additionally, we note that the WCJ's determination was predicated in part upon her finding that applicant was a credible witness, which supported the AME's reliance upon applicant's subjective complaints. The WCJ's credibility determinations are due great weight because the WCJ had the opportunity to observe applicant's testimony and judge its veracity. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505].) These credibility determinations may only be rejected where they are not supported by substantial evidence. (*Ibid.*) Defendant has offered no basis to challenge the veracity of applicant's testimony.

Furthermore, we disagree with defendant's assertion that the AME in urology was unqualified to offer an opinion on applicant's ability to perform work in the open labor market, where his assessment is based upon his medical expertise in evaluating the real-life impact of applicant's impairments caused by his industrial injury. His opinion, considered in combination with the vocational evidence, provides additional substantial evidence of applicant's lack of vocational feasibility. (See *Qualcomm, Inc. v. Workers' Comp. Appeals Bd. (Brown)* (2019) 84 Cal.Comp.Cases 531 [writ denied]; *Barrett Business Services, Inc. v. Workers' Comp. Appeals Bd. (Gallagher)* (2013) 78 Cal. Comp. Cases 1318 [writ denied].)

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Joint Findings and Award, issued August 24, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 29, 2021

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

**GEORGE HAMILTON
NOVEY LAW GROUP
CITY OF SAN JOSE, OFFICE OF CITY ATTORNEY**

SV/pc

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

Dates of Injury in ADJ10757290:	CT 01-19-2011 to 01-19-2017
Occupation:	police officer
Party of Body Injured:	basal cell carcinoma (neck), squamous cell carcinoma (left upper arm), cancer of the bladder, retrograde ejaculations, sleep disturbance and tinnitus.
Dates of Injury in ADJ10757289:	CT ending 11-16-2016
Occupation:	police officer
Party of Body Injured:	back
Petitioner:	Defendant City of San Jose
Timeliness:	The petition of 09-13-2021 is timely
Verification:	The petition is verified

Petitioner's Contention: Defendant City of San Jose contends that the rating of 100% for internal injury (bladder cancer) is not supported by the record because AME reporting by Dr. Matthew Duncan is not substantial evidence and further contests the finding that Applicant George Hamilton is not capable of working in the open labor market.

II. BACKGROUND

Applicant George Hamilton was employed as a police officer for defendant the City of San Jose from 1990 to 2018. Applicant sustained injury to various body parts and the injuries are accepted.

In case number ADJ10757289, applicant sustained a cumulative trauma to his back. The AME is Dr. Max Moses and the parties stipulated to a corrected date of injury per the AME is CT ending 11-16-2016 as well as 13% permanent disability with a need for future medical treatment. There is no issue pertaining to this injury or body part.

The focus of defendant's Petition for Reconsideration is case number ADJ10757290, wherein the AME is Dr. Matthew Duncan. By Joint Findings, Award and Opinion on Decision of 08-24-2021, applicant was awarded 100% permanent disability based on applicant's inability to compete in the open labor market. Consideration was also given to applicant's vocational reporting by Mr. Frank Diaz. Defendant contends that the rating for bladder cancer by is inaccurate as it is based on subjective factors and not objective testing, namely urodynamic studies requested by Dr. Duncan. Furthermore, defendant contends that the AME's opinion that applicant is not vocationally feasible is invalid as

Dr. Duncan is not qualified to render a vocational opinion. Finally, defendant contends that the reporting by Mr. Diaz's conclusions are erroneous.

The Findings and Award of 08-24-2021 determined the *AMA Guides* WPI impairment ratings for each body part as follows: 13% WPI for the back; 2% WPI permanent disability for tinnitus; 5% WPI for skin cancer; 9% WPI for sex dysfunction; 4% WPI for sleep disturbance; and 60% WPI for bladder cancer.

The most serious of applicant's injuries is cancer of the bladder. The following excerpt from pages 4 and 5 of the Opinion on Decision dated 08-24-2021 summarizes applicant's testimony and physical condition:

At the time of trial, applicant testified, and the record reflects, surgeries to treat this cancer on January 19, 2017, March 2, 2017, June 29, 2017, in January of 2018, in June of 2019, and in March of 2021, the last of which caused delay in the trial. In addition, to the six surgeries, applicant underwent chemotherapy three times, which was debilitating according to his testimony. At trial, applicant credibly testified to his physical limitations due to the bladder cancer including leaking, bed-wetting, and limitations when traveling in a car. (MOH/SOE at p. 9, lines 38-46; p. 15, line 44 to p.16, line 3.) His sitting tolerance is generally limited to one hour, after which time he generally needs to empty his bladder. Generally, he must urinate eight to ten times per day, and it takes extra time to make sure that the bladder is completely voided. (MOH/SOE at p. 10, line 43 to p.11, line 3.) The bladder also spasms. (MOH/SOE at p. 11, lines 46-47.) When he stands for an extended period, he feels a "pulling sensation in his abdomen" and he "constantly" feels an urge to urinate, even after he has done so. Furthermore, sneezing, coughing, and bending over may cause a loss of bladder control. (MOH/SOE at p.11, lines 33-44.) Lifting something up definitely causes a loss of bladder control. (Id.) With driving or travel in a car in excess of one hour, he "feels it sloshing around" and it may be painful if there is too much motion. (Id.) Despite these feelings, when driving a distance, he does not know how full his bladder is until he exits and stands up; if the bladder drops, he needs to urinate immediately. (Id.) Techniques to avoid leakage or accidents include dehydrating himself before a long car ride, using a pad, using supportive undergarments, being close to a bathroom, and carrying a portable plastic container to use. (MOH/SOE at p. 10, lines 20-32; p. 14, lines 22-35; p.16, lines 21-27.)

Applicant testified at the onset of his cancer, he had leaking of urine several times at night. (MOH/SOE at p. 9, lines29-33.) A mattress pad was required. (Id.) Applicant also testified to the effects of chemotherapy which causes "chemo brain" or lack of

memory. (MOH/SOE at p. 9, lines 22-27.) He believes that the “chemo fog” would interfere with work activity; it appears to impair his social life according to his wife. (MOH/SOE at p. 18, lines 3-14.) In addition, treatment has caused lack of taste and smell, blurred vision, and painful erections. (Id. at p. 9, lines 14-15.) In general, he suffers from “low energy” or fatigue and interrupted sleep. (MOH/SOE at p. 11, lines 5-10; p. 11, lines 23-31; p. 16, lines 29-38.)

Because of the bladder cancer, applicant retired in June of 2018 with a service retirement although he had hoped to work for several more years. (MOH/SOE at p. 12, lines 16-18.) (Joint Findings, Award and Opinion on Decision at 4-5.)

Ultimately, all of the scheduled ratings are subsumed in the award of 100% permanent disability.

Applicant filed an Answer dated 09-23-2021.

II. DISCUSSION

AME Dr. Duncan issued fifteen reports between 05-30-2017 and 12-07-2020. Initially, applicant was rated at Class II for bladder cancer with a rating of 40% WPI because at the time, he did not have loss of bladder control and was still working at modified duty. (Ex. O.) Upon reevaluation on 01-10-2019, Dr. Duncan elevated the rating to Class III at 70% WPI based on no control of bladder and incontinence. (Ex. K at 5, 6.) Dr. Duncan also reported that it would not be feasible for Applicant to work in any capacity because of frequency and incontinence. (Id. at 7.) In a supplemental report, Dr. Duncan indicated that urodynamic studies would be appropriate to assess Applicant’s level of incontinence. (Ex. J at 2.) Urodynamic testing is used to study how the bladder and urethra are performing the job of storing and releasing urine. (Ex. D at 2.) Such testing is used to diagnose patients with urinary incontinence. (Ex. D at 3.) Applicant claimed that the urodynamic studies were too painful to complete. (Ex. H at 2.) As a result, Dr. Duncan suggested two non-invasive alternatives to the urodynamic studies: uroflometry or post-void residual measurement. (Ex. G at 2.)

Defendant argues that the rating based on loss of bladder control and incontinence is not substantial medical evidence, as applicant did not complete the diagnostic testing requested by the AME. However, there is sufficient evidence to show that Applicant has in fact debilitating loss of bladder control and suffers from incontinence.

Importantly, Applicant *did* attempt diagnostic testing by attending an appointment in August of 2019 and testified that multiple attempts to insert the

catheter failed, due to his excruciating pain. (Minutes of Hearing/Summary of Evidence dated 07-12-2021, hereinafter “MOH/SOE,” at p. 17: 4-9.) Understandably, Applicant could anticipate the pain as the result of six bladder cancer surgeries and three rounds of chemotherapy. Applicant was also following the advice of his private treating physician. Because the claim was not initially accepted, Applicant procured private treatment and, as of the date of trial, he had not obtained treatment within the employer’s MPN. Any subpoenaed physician reports offered by Applicant (marked as Exhibits 4 through 9) which are relevant to applicant’s injuries herein are admissible and should be admitted. In reference to Exhibit 7, Applicant was already diagnosed with male stress incontinence as of 07-01-2019 by his private physician Dr. Saleh. (Ex. 7 at 2.) It is only defendant who has objection to the rating without the testing, this is not an issue with the AME. Ultimately, the AME did provide *AMA Guides* ratings at 60% WPI.

Bladder function is condition familiar to every person. As states in the Opinion on Decision:

Bladder control is fundamental to a person’s everyday functioning. Bladder control is typically learned early age. As such, applicant’s credible testimony in and of itself should be sufficient. With bladder dysfunction, the patient is fully capable of describing symptoms including urgency, heaviness, spasm, discomfort, and pain. As the AME states, in the case of bladder dysfunction, the physician must rely upon the patient’s first hand description of leaking, frequency, leakage, and bed-wetting. As *any* type of incontinence negatively affects quality of life, both the subjective and objective factors are important factors to consider for treatment. This bodily function that requires attention, and in applicant’s case, it requires immediate attention all day and night. There is no upside to embellishment or exaggeration symptoms. Applicant’s testimony is therefore regarded as fact and Dr. Duncan’s reporting, adopting applicant’s description of symptoms, constitutes substantial medical evidence.

(Joint Findings, Award and Opinion on Decision at 6.) Accordingly, AME Dr. Duncan determined that Applicant is not capable of working in any capacity as the result of his frequency and incontinence due to the bladder cancer. (Ex. K at 7.) This is also supported by the vocational evidence.

With regard to the vocational evidence,

Applicant’s vocational expert Frank Diaz describes work preclusions as set forth by Dr. Duncan on page 8 of Exhibit 3. Mr. Diaz opines that applicant’s loss of bladder control and incontinence would not allow him to maintain a work pace appropriate to a given

workload. (Ex. 3 at 9.) Unscheduled breaks for indeterminate amounts of time are not usually tolerated in the workplace. (Ex. 3 at 23.) Bladder dysfunction and accidents require immediate attention. Moreover, Mr. Diaz opines that from a vocational standpoint, the need to take time off for treatment may be an issue. (Ex. 3 at 10.) To date, applicant has had six surgeries, due to recurrence of the cancer.

(Joint Findings, Award and Opinion on Decision at 6-7.)

As noted by Applicant in his Answer, the low back injury was not considered by Mr. Diaz or by the undersigned in the determination that applicant is precluded from the open labor market. In relevant part, Mr. Diaz opines that applicant's loss of bladder control and incontinence would not allow him to maintain a work pace appropriate to a given workload. (Ex. 3 at 9.) Unscheduled breaks for indeterminate amounts of time are not usually tolerated in the workplace. (Ex. 3 at 23.) As the medical evidence and un rebutted testimony supports this, applicant cannot be regarded as competitive in the open labor market.

Based on the foregoing and the entire record, the award of 100% must be affirmed.

III. RECOMMENDATION

It is respectfully recommendation that Petition for Reconsideration be **DENIED**.

DATE: 09-24-2021

Therese Da Silva

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE