

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

MICHAEL BROWN, *Applicant*

vs.

**STATE OF CALIFORNIA/CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION, legally uninsured, administered by
STATE COMPENSATION INSURANCE FUND, *Defendant***

Adjudication Number: ADJ11262036

Sacramento District Office

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Applicant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on October 13, 2023, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and in the course of employment (AOE/COE) to his neck, right shoulder, and right wrist, that the injury caused 27% permanent disability, and that applicant is entitled to future medical care for his right wrist and right shoulder.

Applicant contends that the reports from orthopedic agreed medical examiner (AME) Gerard H. Dericks, M.D., are not substantial evidence regarding applicant's neck condition, and therefore the record should be further developed.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant claimed injury to his neck, right shoulder, and right wrist, while employed by defendant as an office assistant on December 27, 2017.

Applicant was initially evaluated by AME Dr. Dericks on June 24, 2019. Dr. Dericks examined applicant, took a history and reviewed the medical record. He found that applicant had not reached maximum medical improvement/permanent and stationary (MMI/P&S) status regarding his neck and right shoulder and that he had reached MMI/P&S status as to his right wrist. (Joint Exh. 7, Gerard H. Dericks, M.D., July 23, 2019, p. 18.) The doctor recommended that applicant undergo additional diagnostics for his cervical spine, right shoulder, and right wrist. (Joint Exh. 7, p. 18.)

On November 16, 2020, Dr. Dericks re-evaluated applicant. He re-examined applicant, took an interim history, and reviewed additional medical records. As to the issues of causation and apportionment, Dr. Dericks concluded:

Medical records note a past medical history of neck pain, currently being treated through his other work comp claim. It is possible that the 12.27.17 injury either exacerbated or aggravated his cervical symptoms. I would like to review the recommended CT scan as well as all of his medical records associated with his Workers' Comp claim, possibly with another employer, prior to addressing causation or apportionment. ¶ Medical records also suggest a prior right shoulder injury for which he underwent diagnostic studies in 2016 that showed a labral tear. It does appear that he aggravated his right shoulder condition on 12.27.17, although I would like to review his prior medical records in order to address possible apportionment in this case. ¶ He also injured the right wrist on 12.27.17. Final comments on apportionment are deferred pending review of the recommended CT scan.

(Joint Exh. 5, Gerard H. Dericks, M.D., December 15, 2020, p. 13.)

Dr. Dericks again re-evaluated applicant July 19, 2021. During the re-examination, applicant said, “He has ongoing neck pain, which appears to have gotten worse in the absence of the required epidural steroid injections every four to six months, which were very helpful in the past.” (Joint Exh. 3, Gerard H. Dericks, M.D., July 19, 2021, p. 3.) The medical records Dr. Dericks reviewed included a March 4, 2021 CT (computed tomography) of applicant’s cervical spine, conducted by A. Khosla, M.D., and an April 26, 2021 treatment note from C. Guzman, P.A., that stated:

He requests replacement heating pad today. He was denied for cervical epidural steroid injection at C7-T1 with sedation. Impression: (1) Cervical radiculitis. (2) Cervical radiculopathy. (3) Degeneration of cervical intervertebral disc. (4) Condition influencing health status. (5) Shoulder problem. (6) Chronic pain syndrome. (7) Long-term prescription opiate use. (8) Myalgia. (9) Neck pain. ... Ordered heating pad replacement, interlaminar C6-7 epidural steroid injection with sedation extension. Appealed interlaminar C7-T1 epidural steroid injection with sedation.
(Joint Exh. 3, p. 9.)

On March 14, 2022, Dr. Dericks re-evaluated applicant. Applicant told Dr. Dericks that his, "Neck pain is only when I have to hold my head up to look at the computer monitor too long." (Joint Exh. 2, Gerard H. Dericks, M.D., March 14, 2022, p. 4.) Dr. Dericks noted that, "Physical examination once again demonstrated a positive Spurling's sign [neck pain], indicating marked cervical radiculopathy. Range of motion was again limited." (Joint Exh. 2, p. 13.) He concluded:

It is my opinion, based on a reasonable degree of medical probability, that 100 percent of the cervical spine permanent disability was caused by the 2009 injury and progression thereof, with a temporary exacerbation on 12.27.17. ¶ ... The primary treating physician should monitor the progression/regression of the cervical spine condition with the ability to make justifiable treatment plan modifications including, but not limited to updated diagnostic testing and corresponding specialty referral. This [sic] should be considered on the basis of the prior 2009 injury.
(Joint Exh. 2, p. 15.)

The parties proceeded to trial on October 2, 2023. The issues submitted for decision included permanent disability/apportionment, and the need of further medical treatment for applicant's neck. (Minutes of Hearing and Summary of Evidence (MOH/SOE), October 2, 2023, p. 2.)

DISCUSSION

We first note that based on our review of the Electronic Adjudication Management System (EAMS) ADJ file, it appears that applicant did not object to defendant's June 28, 2023 Declaration of Readiness to Proceed. Also, review of the October 2, 2023 MOH/SOE indicates that applicant did not object to the trial proceeding, nor did applicant request that the matter be continued or ordered off calendar for further development of the record. It has long been the law that an issue that could have been raised at trial cannot be raised for the first time in a petition for reconsideration. (*Davis v. Interim Health Care* (2000) 65 Cal.Comp.Cases 1039, 1044 (Appeals

Board en banc); *City of Anaheim v. Workers' Comp. Appeals Bd. (Evans)* (2005 W/D) 70 Cal.Comp.Cases 237, 238; *Los Angeles Unified School District v. Workers' Comp. Appeals Bd. (Henry)* (2001 W/D) 66 Cal.Comp.Cases 1220.) The issue of further development of the record was first raised in applicant's Petition.

Further, it appears that the argument for further development of the record is based on applicant's testimony that he "underwent an MRI and electrodiagnostic study for his neck ... approximately two to three months ago." (MOH/SOE, p. 4.) There is no evidence in the record indicating that applicant submitted the MRI or the electrodiagnostic study to Dr. Dericks and thereon requested a supplemental report. If, based on newly obtained medical records a request for a supplemental report from the AME had been made, and additionally if those records had been offered into the record as newly discovered evidence, the WCJ may have determined that there was good cause for continuing the trial or ordering it taken off calendar. However, absent the newly obtained medical records and a request for a supplemental report, there is no factual and/or legal basis for the WCJ to make that ruling.

Finally, although under various circumstances the Appeals Board has the discretionary authority to develop the record (see Lab. Code, §§ 5701, 5906), the discretion to develop the record must be balanced with the parties' obligation to exercise due diligence to complete necessary discovery prior to a mandatory settlement conference and/or proceeding to trial. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986].) If a party fails to meet its burden of proof by obtaining and introducing competent evidence, it is not the responsibility of the Appeals Board to rescue that party by ordering the record to be developed. (Lab. Code, § 5502; *McKernan, supra.*) Here, as discussed above, prior to filing the Petition applicant took no action in support of the assertion that the record should be further developed. The only evidence pertaining to applicant's argument is his testimony that his neck and shoulder symptoms were getting worse. Having reviewed the trial record, we agree with the WCJ that:

Applicant's testimony, taken into context with the medical record did not warrant development of the record as there is no evidence that applicant's alleged worsening symptoms are due to the current cumulative trauma.
(Report, p. 2.)

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Award issued by the WCJ on October 13, 2023, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 5, 2024

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

**MICHAEL BROWN
MASTAGNI HOLSTEDT, A.P.C.
STATE COMPENSATION INSURANCE FUND, LEGAL**

TLH/mc

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

INTRODUCTION

1. Order issued: October 13, 2023
2. Identity of Petitioner: Applicant
3. Verification: The petition is verified
4. Timeliness: The petition is timely
5. Date Petition for Reconsideration filed: November 7, 2023
6. Petitioners alleges: The Court erred in not developing the record.

Applicant sustained an industrially related injury on December 27, 2017, to his right shoulder, right wrist, and neck. The parties were unable to agree on the level of permanent disability; evidence submitted, the Court found that applicant sustained 27% permanent disability.

Applicant filed a Petition for Reconsideration arguing that the Court should have developed the record based upon applicant’s testimony that his condition is worsening.

The parties utilized Dr. Derricks as the PQME. Dr. Derricks provided the several reports. Dr. Derricks opined that all of applicant’s permanent disability and future medical treatment for the cervical spine was due to a separate 2009 workers compensation injury.

Applicant testified that he recently had an MRI for his cervical spine; the MRI was not submitted as an exhibit. Mr. Brown testified that his neck and shoulder symptoms were worsening and was told that his shoulder symptoms were due to a nerve impingement in his neck. There are no current treating physician reports in evidence. As noted in the Opinion on Decision, there is evidence that it was recommended that applicant have surgery to his cervical spine when he suffered his 2009 injury. It is specifically noted that Dr. Derricks opined that as part of applicant future medical care for the cervical spine applicant should have “updated diagnostic testing and corresponding specialty referral. This should be considered on the basis of the prior 2009 injury.” (emphasis added)(Exhibit 2 p. 15)

Applicant testified that his symptoms were increasing in that he had more muscle spasms, cramping and locking and pain from the shoulder to the forearm. (Summary of Evidence p. 4 lines 8-10) When applicant was evaluated by Dr. Derricks in 2022, his pain level was noted on a scale of 1-10 as follows: lifting-10, carrying-10, overhead use of arms-8, pushing-8, pulling-10, grasping,-6, repetitive hand use-10. (Exhibit 2 p. 4).

Applicant's testimony, taken into context with the medical record did not warrant development of the record as there is no evidence that applicant's alleged worsening symptoms are due to the current cumulative trauma.

It is therefore recommended that the Petition be denied.

DATE: November 17, 2023

Darcy Kosta
WORKERS'
COMPENSATION
ADMINISTRATIVE LAW JUDGE