

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

THERESA THOMAS, *Applicant*

vs.

**VOLT INFORMATION SCIENCES, INC.; GALLAGHER BASSETT
SERVICES, INC., *Defendants***

**Adjudication Numbers: ADJ10713815, ADJ14897410
Santa Rosa District Office**

**OPINION AND ORDERS
DENYING PETITION FOR
RECONSIDERATION;
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant and applicant, in pro per, have each filed Petitions for Reconsideration of the August 9, 2021 Joint Findings and Award issued by the workers' compensation administrative law judge (WCJ). We note that applicant has not dismissed her attorney and continues to be represented. We have considered the allegations of the Petitions for Reconsideration and the contents of the report of the 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 except as noted below, we will deny reconsideration of applicant's petition, grant reconsideration of defendant's petition, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings and decision.

The WCJ properly relied upon the opinion of the agreed medical evaluator (AME), who the parties presumably chose because of the AME's expertise and neutrality. The WCJ was presented with no good reason to find the AME's opinion unpersuasive, and we also find none. (See *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

While we do not issue a final decision on this issue at this time, we request that the WCJ consider whether applicant's carpal tunnel syndrome requires an impairment number of 16.01.02.02 corresponding to a J variant.

This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the August 9, 2021 Joint Findings and Award is **DENIED**.

IT IS FURTHER ORDERED that defendant's Petition for Reconsideration of the August 9, 2021 Joint Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the August 9, 2021 Joint Findings and Award is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 2, 2021

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

**THERESA THOMAS
RAYMOND E. FROST AND ASSOCIATES
LLARENA, MURDOCK, LOPEZ & AZIZAD, APC**

PAG/ara

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 PETITIONS FOR RECONSIDERATION

I
INTRODUCTION

Both Applicant and Defendant filed timely, verified petitions for reconsideration. While the law firm Raymond E. Frost and Associates represents Applicant, the injured worker herself filed the Petition for Reconsideration.

Defendant, through its attorney of record, Llarena, Murdock, Lopez & Azizad, filed its Petition for Reconsideration.

Applicant, at age 52, suffered admitted industrial injury to her cervical spine as a result of a fall on August 9, 2016 while employed as a production associate (occupation group 370) by Volt Information Sciences, Inc. (Case No. ADJ10713815).

Applicant, at age 52, suffered admitted industrial cumulative trauma injury ending on August 9, 2016 to her bilateral wrists (carpel tunnel syndrome) as a result of repetitive motion while employed by Volt Information Sciences, Inc. (Case No. ADJ14897410).

In the August 9, 2021 Findings and Award and Opinion on Decision, the undersigned Judge awarded Applicant combined 30% permanent disability after apportionment for both dates of injury.

Defendant contends:

1) The Judge erred by combining disability for two dates of injury, and 2) the Judge erred by using occupational variant H when rating the bilateral wrist disability. Defendant is correct on both counts. The undersigned Judge recommends that Defendant's Petition for Reconsideration be granted, and that the case be returned to the trial level to correct the error as set forth in full later in these Recommendations.

Applicant contends:

1) The WCJ calculated the benefit rate and permanent disability indemnity incorrectly, and 2) The Agreed Medical Examiner (AME) engaged in fraud or relied on fraudulent information. The undersigned Judge recommends that the Applicant's petition for reconsideration be denied.

II
FACTS

Applicant worked for Volt Information Sciences, Inc. making parts for Tesla electric vehicles. On August 9, 2016, applicant stepped off a platform onto a mat and slipped. She fell backwards. She

suffered acute neck and occipital pain, with symptoms radiating to her shoulders, arms and hands within two days. (Joint Exhibit 103, page 2).

AME Alfredo Fernandez, MD, evaluated Applicant's injuries on May 19, 2020. Dr. Fernandez concluded that Applicant's wrist symptoms and neck symptoms were caused by two different industrial injuries: "Pertaining to the cervical spine, the cause of injury and the need for treatment is the specific event of August 9, 2016." "Pertaining to both upper extremities, the cause of injury and the need for treatment is cumulative trauma." (Joint Ex. 103 at. p. 11).

AME Fernandez identifies and summarizes the medical reports on pages 5 through 9 of Joint Exhibit 103.

III **DISCUSSION**

A. DEFENDANT'S PETITION SHOULD BE GRANTED.

1. THE JUDGE ERRED BY COMBINING DISABILITY FOR DIFFERENT DATES OF INJURY.

Labor Code §§ 4663 and 4664 abrogated the Wilkinson rule, which provided that when two dates of injury reach permanent and stationary status at the same time, disabilities are combined. Benson v. The Permanente Medical Group, 72 CCC 1620 (WCAB en banc). Now, "we must determine and apportion to the cause of disability for each industrial injury." Id. at page 1622.

Therefore, the undersigned Judge erred by combining the bilateral carpal tunnel disability which was the result of cumulative trauma ending on August 9, 2016 with the disability caused by the specific injury to the neck.

The August 9, 2016 specific injury to the neck, after apportionment, rates as follows: 70% (15.01.01.00-8-[1.4]11-370G-13-16) 11%. Applicant is entitled to 34.25 weeks of indemnity payable at \$290.00 per week, in the total amount of \$9,932.50 in ADJ10713815.

2. THE JUDGE ERRED BY USING OCCUPATIONAL VARIANT H FOR THE WRISTS. THE CORRECT VARIANT IS J.

When drafting the Award and Opinion on Decision, I used the occupational variant for the wrist as shown on page 3-34 of the 2005 Schedule for Rating Permanent Disabilities (Schedule), which indicates that variant J applies generically to wrist injuries for Occupational Group 370. However, the Schedule at page 4-7 provides a greater level of detail. Variant J is used for a wrist injury where the physician measures impairment using the range of motion method. Here, AME did not use the range of motion method. Instead, AME Fernandez used the page 495 of the AMA Guides--impairment due to carpal tunnel syndrome. Therefore Variant H applies pursuant to page 4-7 of the Schedule, (16.04.02.00 WRIST-OTHER).

Case No. ADJ14897410: The bilateral wrist cumulative injury rates as follows:

Right wrist 16.04.02.00-3-[1.4]4-370H-6-7%
Left wrist 16.04.02.00-3-[1.4]4:370H-6-7%

Combine 7% with 7% using combined value chart results in 14%

In ADJ14897410, Applicant is entitled to an award of 14% permanent disability, payable for 46.25 weeks at the rate of \$290.00 per week in the total amount of \$13,412.50.

B. APPLICANT’S PETITION SHOULD BE DENIED.

1. THE WEEKLY PERMANENT DISABILITY RATE IS \$290.00.

Applicant calculates permanent disability indemnity by use of Labor Code § 4658. (Applicant’s Petition at top of second page). The result is incorrect because the calculation omits the Labor Code § 4453 limit on average earnings for purposes of calculating the permanent disability rate. Section 4453(b)(9) states in relevant part:

“In computing annual earnings for purposes of permanent partial disability indemnity ... the average weekly earnings shall be taken at: ... (9) For injuries occurring on or after January 1, 2014, not less than two hundred forty dollars (\$240) nor more than four hundred thirty-five dollars (\$435).”

The \$435 limit on earnings produces the \$290 maximum PD rate (\$435 times .66667 equals \$290).

2. THE RECORD CONTAINS NO EVIDENCE OF FRAUD.

Applicant contends that the dates of medical reports reviewed by AME Fernandez show that fraud took place. In Applicant’s words:

“In the QME medical report written by Dr. Fernandez on May 19, 2020, there are reports listed that can not exist and if they really do exist they are fraudulent reports.” ... “The reports that were written by Dr. Nothmann at Queen of the Valley hospital ER in Napa, CA, where I live can not all exist as stated. The only time that I went to the hospital as it pertains to this case is on 8/11/16. It was close to midnight and the appointment extends into 8/12/16. That is the only report from that hospital. However it is stated in Dr. Fernandez’s report that I had seen Dr. Nothmann on three separate occasions, 8/11/16, 8/12/16 and 8/13/16. He stated that he had three doctor reports. This is incorrect information and any other than the report for 8/11/16 - 8/12/16 is a bogus fraudulent report and should not exist.”

Applicant has personal knowledge of the Queen of the Valley Hospital visit. But she does not state that she has reviewed the records from the hospital, which would give her personal knowledge of the reports. She concludes that one emergency room visit produces one report. However, an ER

visit will typically result in an intake report, an examining physician report and a discharge report, at a minimum. Imaging studies and diagnostic tests will generate additional reports. The fact that the ER visit began on August 11 and extended into August 12 explains two dates. The fact that doctor reports are often transcribed after dictation can account for the August 13 date.

Applicant raises similar points regarding reports by Dr. Manchester (“The report for 8/12/12 should not exist.”) At most, this suggests that Dr. Fernandez entered an inaccurate date in his report.

Applicant comments that Dr. Fernandez states he reviewed a QME report by Dr. Kimelman. She states, “I have never seen Dr. Kimelman for a QME appointment. There can not be a report saying so.”

Dr. Kimelman’s role in this case was to perform an EMG/nerve conduction study on July 27, 2017 on referral by prior QME Michael H Jaffin, MD. (See Applicant’s Exhibit 2, page 1). The fact that AME Fernandez misidentified Dr. Kimelman as a QME does not suggest fraudulent conduct on the part of any party.

Similarly, Applicant states:

“In Dr. Fernandez’s report it state that there is a report from Napa Pain Institute, by Dr. Singa, on January 30, 2020, indicating evidence of a dental abscess. That is not possible, Dr. Singa is not a dentist and I have never seen him for a tooth problem.”

An evaluation by a pain specialist would rationally note the presence of a dental abscess. The pain management specialty is concerned with finding and alleviating the sources of pain. The absence or presence of dental abscess is relevant to a pain management evaluation assessing neck pain.

Nor is the mention of abscess indicative of an inaccurate history. Applicant received treatment for abscess in the past. “[S]he was admitted on 05/13/14 with a dental abscess which was treated with incision and drainage in the emergency room and then she was admitted for IV antibiotics.” (Applicant’s Exhibit 1 at page 2).

Finally, Applicant refers to an April 20, 2020 MRI report that “indicates I have CSF, I have fluid leaking from my ventral cord in three places. Also something touching up against my ventral cord in two, maybe four, places.”

Dr. Fernandez refers to an April 20, 2020 report on page 3 of the AME report, and to an April 30, 2020 MRI report on page 9, but describes no such findings. At most, Applicant has demonstrated that Dr. Fernandez listed the date of the MRI report incorrectly on page 9. This proves sloppiness or lack of proofreading. It does not suggest fraud.

3. THE ISSUE OF FRAUD WAS NOT RAISED AT TRIAL.

The issue of fraud was not raised or adjudicated at trial. It is inappropriate to raise the issue for the first time in a petition for reconsideration, absent newly discovered evidence.

IV
RECOMMENDATION

It is recommended that the Defendant's Petition for Reconsideration be granted. The case should be returned to the trial court to enable the Judge to issue an Amended Findings and Award. The Amended Award in ADJ10713815 will award Applicant 11% permanent disability for the August 9, 2016 injury to the cervical spine, entitling Applicant to 34.25 weeks of indemnity payable at \$290.00 per week, in the total amount of \$9,932.50, less attorney fee. The Amended Award in ADJ14897410 will award Applicant 14% permanent disability, payable for 46.25 weeks at the rate of \$290.00 per week in the total amount of \$13,412.50, less an attorney fee.

It is recommended that Applicant's Petition for Reconsideration be denied.

DATE: September 15, 2021

Peter H. Hink
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE