

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

CUAUHTEMOC MENDOZA, *Applicant*

vs.

**USA WASTE OF CALIFORNIA, INC.;
ACE AMERICAN INSURANCE, administered by
GALLAGHER BASSETT, *Defendants***

**Adjudication Number: ADJ12278560
Van Nuys District Office**

**OPINION AND ORDER
DENYING PETITIONS FOR
RECONSIDERATION**

We have considered the allegations of the Petitions for Reconsideration and the contents of the report 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, which we adopt and incorporate, except as noted below, we will deny reconsideration.

We do not adopt or incorporate the Report to the extent that it may imply that defendant's failure to object to the rating instructions or to request to cross-examine the rater waived those issues.

We have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id.*)

For the foregoing reasons,

IT IS ORDERED that the Petitions for Reconsideration are **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 20, 2022

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

**CUAUHTEMOC MENDOZA
LAW OFFICES OF MICHAEL SHINKARIK
SLADE NEIGHBORS**

PAG/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

- 1. Applicant’s Occupation: Welder
Applicant’s age: 70
Date of Injury: September 18, 2018
Parts of Body Injured: Left shoulder

- 2. Identity of Petitioner: Applicant
Timeliness: Yes
Verification: Yes

- 3. Applicant’s Contentions: The applicant contends that he should be entitled to temporary disability benefits from [7/22/20], when his PTP, Dr. Bahk, began the process of requesting a reverse total left shoulder replacement, until 3/29/21, when the procedure was denied by IMR. An attorney's fee is requested on any TD awarded.

- 4. Defendant’s contentions: Defendants also filed a Petition for Reconsideration

- 5. Timeliness: Yes, served on Sunday, July 25, 2022 and filed on Monday, July 26, 2022.

- 6. Verification: Yes

- 7. Defendant’s contentions: Defendants argue that the rating of the PQME report was inaccurate as the WCJ rated the impairments the left shoulder that included a strength deficit rating. They argued that the doctor is required to apply the strict method of impairment under the AMA guides and that failure to do so renders the report materially defective. Defendants assert that loss of strength should not be rated where there is a painful condition which prevents the effective application of maximal force in the region being evaluated. They seek a new rating, eliminating the use of loss of muscle strength from the impairment.

OPINION ON DECISION

STATEMENT OF FACTS

A. APPLICANT CLAIMS HE IS ENTITLED TO TEMPORARY DISABILITY

The matter was tried and the WCJ issued an F&A dated June 29, 2022. Applicant file a timely verified Petition for Reconsideration on the issue of applicant's entitlement to additional temporary disability (TD) payments during the period from 7/22/20 when Dr. Bahk, a treating doctor was requesting a reverse total left shoulder replacement, until 3/29/21, when the procedure was denied by IMR. Applicant argues that under the *Braewood* case, (1983) 48 CCC 566, he is entitled to TD until the 104 week limit described in Labor Code Section 4656 (c) (2), is reached. Applicant asserts that the WCI' s finding that applicant is entitled to TD from September 8, 2018 to March 12, 2020, based on the PQME reports of Dr. Antoine Roberts is not supported by the evidence and should be set aside. He further asserts that attorney fees awarded should be adjusted accordingly.

B. PQME DR. ANTOINE ROBERTS DECLARED APPLICANT MMI ON MARCH 12, 2020

The applicant first underwent left shoulder surgery on October 24, 2018 at the hands of Dr. Paul Simic. He had left shoulder arthroscopic debridement and a Mumford procedure was performed. (Joint Exhibit "L"). Thereafter on May 1, 2019, he was provided medical treatment and examined by Dr. Michael Bahk, his designated primary treating physician. He was then advised that he should have surgery for replacement of his left shoulder with a reverse arthroplasty. However, the applicant did not know what was involved and according to the history noted in the March 12, 2020, report from Dr. Antoine Roberts, PQME, decided he would not proceed with the surgery because at that time as he was not having any shoulder pain. (Joint Exhibit "K", page 3, para 5-6). The report states that the applicant's only complaint was his inability to lift his arm against gravity. Dr. Roberts concluded that the applicant should have future medical care for the left shoulder. He reported that, "if in the future the examinee should be encumbered with chronic pain from the left shoulder, he should have the option to proceed with a reverse total shoulder arthroplasty for relief of intractable pain in his left shoulder." (Joint Exhibit "K", page 25, para 6.) He was declared MMI in that report of March 12, 2020.

C. APPLICANT WAS PAID TD FROM OCTOBER 10, 2018 THROUGH APRIL 13, 2020, DURING BROKEN PERIODS, IN THE AMOUNT OF \$58,721, INCLUDING A PERIOD OF OVERPAYMENT OF \$5,092.36, DURING THE PERIOD MARCH 13, 2020 TO APRIL 13, 2020. THERE IS NO SUBSTANTIAL MEDICAL EVIDENCE TO SUPPORT A CLAIM FOR ADDITIONAL TD.

At trial, the parties stipulated to the TD paid. The claimed overpayment was in dispute, however, the WCJ found the overpayment valid based on the PQME report of Dr. Roberts who declared him MMI on March 12, 2020. Applicant raised the issue of entitlement to additional temporary disability from September 18, 2018 through January 31, 2019, and from August 5, 2019 to date and continuing. Applicant claimed that he was not yet MMI based on the reports of Dr. Bahk. In their Petition for Reconsideration, applicant states that he should have been TD from at least 7/22/20 to 3/29/21, when the IMR denied the surgery.

Applicant relies on the *Braewood Convalescent Hospital vs. WCAB* case, 34 Cal. 3d 159, 193 Cal. Rptr. 157, 48 CCC 566 (1983), to support their claim. The argument espoused is that in *Braewood* the court found that an injured worker who is undergoing diagnostic testing and treatment is unable to work and is considered temporarily totally disabled. The applicant fails to delve into the rationale relied upon in *Braewood*. In that matter the applicant had sustained an industrial injury to his back and right elbow. At that time he weighed over 422 pounds and his doctors advised him that he needed to lose weight in order to facilitate recovery from his injuries. In *Braewood*, the Applicant is noted to have presented evidence that he was unable to work while participating in the weight loss program, including a letter from one of the weight loss doctors saying that he was still experiencing limited motion of the lumbosacral spine. The Defendants in that case, however, "presented no evidence demonstrating that applicant should not be considered disabled during his participation in the (weight loss) Clinic." (Page 169).

The facts in the Cuauhtemoc Mendoza matter at hand are distinguished from *Braewood*. First, Mr. Mendoza was neither participating in any diagnostic testing nor any secondary treatment related to his left shoulder injury. All diagnostic tests had been completed, but, Dr. Bahk continued to find the applicant TTD without any explanation. Secondly, as noted in the Opinion on Decision, Dr. Bahk's reports contained no explanation for the continuing TTD despite the fact that the applicant's symptoms remained unchanged over a period of several months at least from August 2020 to February 3, 2021. Thirdly, Dr. Bahk did not address the issue raised by Dr. Roberts who indicated in his report of March 12, 2020, that the applicant had decided not to have the total reverse shoulder arthroplasty. Dr. Roberts' report stated that, "after discussion held the examinee he fully understood what the proposed surgery is, its risks, and the purpose of the type of surgery, he decided he did not want to proceed with surgery of this type, because he is not in pain at the present time." (PQME Roberts, March 12, 2020, page 25, para 6). On page 23 of that report, Dr. Roberts questioned whether Dr. Bahk, in his report of November 23, 2019, explained the risk of surgery to the applicant. (Page 23, para 4).

At trial, the applicant denied telling either Dr. Bahk or Dr. Roberts that he did not want to undergo the surgery, however, he did admit that he was hesitant because he thought he might not have a good result. (SOE, Page 7, lines 15-19). The WCJ found applicant's testimony on this issue to be unreliable. Throughout his testimony at trial, the applicant reversed his testimony on several issues including whether he went back to modified work after September 8, 2018. (SOE, page 8, lines 9-11). He did not recall getting a second letter from his employer about light duty, (SOE, page 8, lines 4-5); He first said that he did go back for transitional work but then changed his testimony to say that he did not recall. (SOE Page 8, lines 12-15). He did not recall going to Kaiser in 2012 although the records confirm he did. (SOE Page 9, line 2) He also did not recall the time period of his light duty or his exact time of employment with the Defendant. (SOE, page 9 (lines 6-9). Given the applicant's changing and unreliable memory on many issues at trial, the WCJ found his denial of the statement purportedly made to Dr. Roberts to be unreliable. Dr. Roberts' comments that the applicant declined the surgery in March of 2020 are bolstered by two factors. The first is that he reports that, during the interview and evaluation, the examinee was shown illustration and video of reverse total shoulder arthroplasty and when he actually realized that this was the operation he was going to have, he decided that he was not going to proceed with that type of surgery because at present time he has no pain in his shoulder." (PQME Dr. Roberts March 12, 2020, page 3, para.5). It seems unlikely that this commentary and discussion about the video

would have been added simply for historical reference. The WCJ can infer that Dr. Roberts added this information to his report as further evidence of the veracity of the comments made by the Applicant. Second, when viewed in the light of applicant's several comments that he was not having pain in his left shoulder and his unreliable memory of certain significant events, the WCJ believes that the comments made by Dr. Roberts accurately reflect the applicant comments made on March 12, 2020, indicating that he did not want to have the shoulder surgery.

The totality of the evidence, including the substantial medical report of Dr. Roberts support a finding that the applicant was not TTD. Unlike *Braewood*, there is evidence to support a finding of no TD. Unlike *Braewood*, the report of Dr. Bahk was not substantial on the issue of applicant's TD status. Unlike, *Braewood*, the applicant here had made a declaration that he did not wish to undergo the surgery on his left shoulder, which according to applicant should be the basis for his continuing TD pending the outcome of the IMR decision.

D. UTILIZATION REVIEW AND IMR DETERMINATIONS OVERRIDE A STRICT BRAEWOOD ANALYSIS

At the time of the *Braewood* decision, UR and IMR determinations were not issues to be reckoned with by the WCJ. However, these factors must now be addressed in the question of the ongoing entitlement to TD. In a recent noteworthy panel decision, the WCAB in a split decision, found that the Defendant could rely on an IMR decision denying a surgical procedure as a basis for terminating TD. In, *Keltner v. California Guest Services, Inc.*, 2017 Cal. Wrk. Comp. P.D. LEXIS 94, *1-2 (Cal. Workers' Comp. App. Bd. February 22, 2017), the WCAB, affirmed WCJ's finding that the determination of agreed medical examiner, Joel Renbaum, M.D., indicating that in absence of surgery applicant's lumbar spine injury had reached permanent and stationary status, was substantial evidence despite fact that Dr. Renbaum did not review utilization review (UR) reports denying lumbar surgery. The WCAB concluded that applicant's condition met the definition of permanent and stationary status because there was no medical evidence that his condition was likely to substantially improve under his current medical treatment and that because surgery was denied by UR, the WCJ lacked authority to consider the merits of applicant's need for surgery and, therefore, there was no pending approved medical treatment to support a finding of continuing temporary disability, and that since the UR determination disallowing surgery was final for one year, absent changed circumstance there was no basis to award continuing temporary disability indemnity.

In the case at hand, the UR determination was appealed and an IMR decision issued denying the surgery. The question of the validity of the IMR decision was not before the court. Also, unlike the applicant in *Keltner*, there is also the issue of applicant declination of surgery in this matter and the lack of substantial medical findings on the TD claim by Dr. Bahk. Further, there is evidence that the employer had offered the applicant modified work during periods of claimed TTD.

E. THE WCJ'S DECISION REGARDING TEMPORARY DISABILITY IS CONSISTENT WITH THE MEDICAL EVIDENCE AND SUPPORTED BY THE CASE LAW AS DR. BARK'S REPORTS ARE NOT SUBSTANTIAL EVIDENCE OF TTD STATUS

A review of the reports of Dr. Bahk reflect that they are not substantial evidence on the question of applicant's entitlement to temporary disability. Each report simply reiterates that

applicant's complaints to the left shoulder are the same. They provided no analysis as to why the applicant is temporarily totally disabled. In fact, they contain no indication of what work the applicant is unable to perform. No work restrictions are provided. The term "temporary disability" is not specifically defined in the Labor Code, however, appellate decisions interpreting the workers' compensation laws have provided definition. Temporary disability has been classified as the incapacity to work that is reasonably expected to be cured or materially improved with proper medical treatment.

During the entire period of time while the question of the shoulder replacement surgery was being addressed by UR and IMR, applicant continued to treat and his condition did not change. More importantly, according to the medical review process, the surgery had it been done, was not expected to reasonably cure or materially improve the applicant's condition. The final IMR decision stated that "there is no clear documentation indicating significant deficits." The surgery was found to be medically unnecessary. ((Exhibit I, Page 4, Para 1). Therefore, like in *Keltner*, supra, there was no pending surgery since it had been denied by UR and IMR and declined by the applicant.

F. THE PERMANENT DISABILITY RATING IS APPROPRIATE

Defendant's failed to object to the rating instructions issued by the WCJ on May 3, 2022, nor did they make any effort to request cross examination of the rater. The issue raised their Petition for Reconsideration is that the report of Dr. Roberts cannot use loss of strength as a factor of impairment in the face of pain. Defendants argue that "pain at the level reported would prevent the effective application of maximal force during strength testing." There is, however, no evidence to support that fact, especially when the applicant reported to Dr. Roberts that he did not have pain. However, Dr. Roberts did indicate that the applicant had suffered a massive non-repairable rotator cuff tear in the left shoulder, accompanied by rotator cuff arthroplasty and rupture of the long head of the biceps tendon. He said that there was weakness in the left shoulder to abduction, flexion, internal and external rotation. (March 12, 2020, page 24, para 3). Using table 16-35 for the left shoulder, strength deficits of 5 to 25% were noted along with weakness in the upper extremity. Significantly, the applicant had lost 90% of his functional capacity for work at or above shoulder level with his left upper extremity. The factors of permanent disability are based upon applicant's testimony with due consideration to his credibility as a witness and the medical report(s) of Antoine Roberts, M.D., dated March 12, 2020. (Joint Exhibit "K"). The applicant denied pain in his left shoulder when commenting to Dr. Roberts. In fact, that was his rationale for declining the surgery. Yet, Dr. Roberts did find loss of strength, however, he does not comment on any impairment related to pain as claimed by Defendant.

Defendants offer case law regarding application of [Almaraz]/Guzman without pointing to Dr. Roberts' specific application of that methodology. The WCJ found Dr. Roberts' ratings to be reasonable and supported by applicant's comments that he did not have pain, however, there was a significant loss of strength. While Defendants take issue with the rating impairments set forth by Dr. Roberts, no effort was made by Defendants to cross examine Dr. Roberts as to those findings. The parties indicated that they were ready to proceed on this record. The WCJ did consider all of the factors noted above when formulating the rating instructions to the DEU and found Dr. Roberts' rating to be substantial medical evidence in light of the applicant's comments that he lacked pain but did experience significant loss of strength. The Judge inferred from the QME findings that he was providing these ratings of strength loss based on the applicant's loss of 90% of his function

capacity for work at or above shoulder level with the left upper extremity. Neither the report of Dr. Roberts, nor his rating impairments, nor the rating instructions regarding the report were challenged until this appeal. The WCJ finds the rating appropriate and requests that it be upheld by the WCAB.

IV. CONCLUSION

Both Petitioners have failed to demonstrate that the WCJ has acted in excess of her authority or in a matter inconsistent with the evidence of record. No contentions are set forth by either party in accordance with Labor Code section 5908 which would warrant granting the Petition for Reconsideration. Based upon the above, it is recommended that Applicant's and Defendant's Petitions for Reconsideration be denied.

Date: 8/4/22

MARTHA HENDERSON
WORKERS' COMPENSATION JUDGE