

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

FRANK TELLEZ MUELA, *Applicant*

vs.

**CITY OF WHITTIER, Permissibly Self-Insured,
Administered by KEENAN & ASSOCIATES, *Defendants***

**Adjudication Number: ADJ10724008
Long Beach District Office**

**OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

We have considered the allegations of the Petition 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, we will grant reconsideration, amend the WCJ's Findings and Award (F&A) as recommended in the report, and otherwise affirm the F&A of April 21, 2022.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the F&A of April 21, 2022 is **GRANTED**.

IT IS FURTHER ORDERED that the F&A of April 21, 2022 is **AFFIRMED, EXCEPT** that subdivision (c) of the Award is **AMENDED** as follows:

AWARD

(c) Attorney fees in the amount of \$11,484.00 shall be held in trust by defendant, pending a fee split arrangement between applicant's former counsel, Jon Dodart and the law offices of Perona, Langer, Beck, Serbin, Mendoza & Harrison, and current counsel, Leon Kleyman and the law offices of Hinden & Breslavsky, in writing, to be released by defendant without further Court Order.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 11, 2022

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

**FRANK TELLEZ MUELA
HINDEN & BRESLAVSKY
LISTER MARTIN**

AH/oo

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 OF
WORKERS' COMPENSATION JUDGE ON
PETITION FOR RECONSIDERATION**

**I
INTRODUCTION**

City of Whittier, hereinafter "Petitioner", through its legal representative, filed a timely and verified Petition for Reconsideration to the April 21, 2022, Findings and Award which found that applicant sustained 49% permanent disability to the left knee, left hip, and found compensable injury to the low back and sleep based on the reporting of Petitioner's original treating physician, Dr. Pham, rather than that of the Qualified Medical Examiner, Dr. Kolesnik. Petitioner asserts that the Court acted in excess of its powers, the evidence does not justify the Findings and the Findings do not support the Award.

Essentially, Petitioner argues 1) that the applicant received "extensive" treatment after the report of Dr. Pham thereby rendering the original ratings obsolete; 2) that the Court should have found apportionment to the left knee simply because of minimal degenerative change from an MRI reviewed by Dr. Kolesnik; 3) that Dr. Pham does not properly address low back pain or sleep disturbance; 4) that there are no objective findings to support the Court's assessment of permanent disability; 5) that the 3% pain add-on included by Dr. Pham is unsupported; 6) that the Court should have relied on Dr. Kolesnik's opinions; 7) that the fees should have been Ordered to be held in trust.

With the exception of the last point, which the Court recommends an amendment to its Award in that fees should be held in trust pending an attorney fee split agreement in writing and released without further Order, the Court otherwise requests that its Findings be upheld. The Court relies upon the reasoning and analysis set forth in its April 21, 2022, Opinion and Decision but also sets forth supplemental analysis below.

**II
FACTS**

There were no objections from either party regarding the admission of the evidence. The reports of Dr. Pham were submitted jointly. The applicant sustained an admitted injury to his left knee arising out of and in the course of his employment as a sewer equipment operator, Occupational Group Number 480, on October 12, 2015. The applicant worked modified duty prior to going off work for his first surgery.

He received physical therapy and medication without benefit. (Exhibit H, p. 1). He came under the care of Dr. Longacre, orthopedic surgeon at HealthFirst Medical Group, who performed an MRI December 1, 2015 to reveal a radial tear of the medial meniscus and mild sprain of the medial collateral and anterior cruciate ligaments. Post arthroscopic medial meniscectomy and synovectomy in February 2016, he required knee aspiration due to continued effusion. This became a recurrent symptom. An MRI performed June 17, 2016, showed a recurrent tear of the body and posterior horn of the medial meniscus. Over time, he stated that he developed low back

pain, hip pain and right knee pain. He began using an orthotic knee brace as needed for instability. (Summary of Evidence 2/17/22, 7:12-14).

An MRI of the left hip performed October 14, 2016 revealed moderate hip arthritis with degenerative change. The applicant was subsequently evaluated by another orthopedic surgeon who diagnosed him with left hip flexor tendinitis. (Exhibit H, p. 2). Though the applicant indicated that his hip complaints were asymptomatic by the time of Trial, all of the treating physicians who had evaluated the applicant from 2017 through 2019 had indicated industrial causation to the left hip. (Joint Exhibit K, Exhibit 4, Exhibit 1).

The applicant had undergone a second unsuccessful knee surgery in January 2017. The applicant then transferred care to Kaiser Permanente. (Exhibit H, p. 2). Thereafter, Dr. Pham provided a ratable report dated June 5, 2017, but indicated that applicant would need to continue medical treatment, including pain management, for the next five years to maintain his status. (Joint Exhibit K, p.9). Dr. Price, the applicant's subsequent primary treating physician, diagnosed the applicant with left hip sprain and left knee internal derangement in September 2017, though aside from pain management and toxicology tests, the applicant did not undergo any other significant treatment with Dr. Price. (Exhibit 4, pp. 2, 5). There was no evidence of significant treatment from 2017 through 2018. The applicant subsequently underwent an arthrogram in June 2018, which is a diagnostic tool, not treatment *per se*. From 2018 through 2019, the applicant was seen by Dr. Ahmed, who had recommended pain management consults, as well as left knee surgery. A third surgery was ultimately not recommended by Dr. Kvitne and Dr. Kharrazi at Kerlan Jobe, the approved orthopedic consult, and the applicant only completed six additional physical therapy sessions and one injection. (Exhibit C, pp. 3-4). The record reviews performed by the QME through 2020 do not reflect any "significant treatment" was authorized after the applicant's last knee surgery.

The applicant returned to treat with Kaiser in January 2020, where his doctors continue to manage his pain with conservative modalities, provided additional injection and continue to relegate him to sedentary work. In February 2020, the applicant became increasingly frustrated that his treatment recommendations were not being authorized by the employer. (Exhibit C, p. 6). Pursuant to records reviewed in 2020, the applicant continues with limitations in bending, squatting, kneeling, lifting, and carrying. (Exhibit C, p. 6). With regard to the applicant's level of disability and physical limitation since 2017, Dr. Pham had also previously relegated the applicant to sedentary work with intermittent use of bracing and an assistive walking device in 2017. (Exhibit J, p. 7). Dr. Pham noted the applicant's activities of daily living, such as bathing, dressing and sleep were affected; therefore, the pain add-on was used. (Joint Exhibit K, pp. 8-9). The applicant testified that he is still taking medication for pain, uses his knee brace, and his sleep is disrupted due to pain to his knees. (Summary of Evidence 2/17/22, 7:19-21). AS of the last re-evaluation by the QME, the applicant continued to have antalgic gait. (Joint Exhibit K, p. 10).

III DISCUSSION

A. The applicant did not receive “extensive treatment” as to render the ratings by Dr. Pham obsolete.

Dr. Pham estimated that the applicant would need ongoing medical care as necessary five years beyond last report of 6/5/2017, for the applicant to maintain his status quo. (Joint Exhibit K, p.9). Just because an injured worker continues to receive treatment, it does not necessarily follow that his permanent disability is reduced when the medical evidence suggests otherwise.

Dr. Pham had found gait derangement, edema, tenderness, and decreased muscle strength in the left lower extremity based on his clinical exam. (Joint Exhibit J, K). In 2019, Dr. Ahmed had reviewed Dr. Pham’s ratings and agreed on the left knee rating as both physicians found similar flexion contracture and limited motion of the knee. (Exhibit 1). As of the last QME exam of 2020, the applicant continued to have antalgic gait. (Exhibit C, p. 10).

His ongoing symptoms were also confirmed by the most recent treating physicians in the review of 2020 treatment reports by the QME, indicating the applicant still uses his knee brace, has severe tenderness and antalgic gait with significant pain frequently with difficulty bending, climbing and squatting and trace effusion in the left knee. He still has notable quadriceps atrophy, and a positive McMurray’s sign. His most recent treating physicians still recommend sedentary work. (Exhibit C, p. 6).

It is because the applicant’s clinical and objective findings have been consistent between multiple treating physicians that the Court did not find Dr. Pham’s opinions to be obsolete.

B. Dr. Pham’s assessment of the low back and sleep disturbance is corroborated by the medical record, though no additional PD is derived from either.

Though the Court did not find a reliable rating for the low back, the Court did find that the low back sprain was a compensable consequence of the original injury. The applicant’s ongoing low back problems have continued since the applicant last saw Dr. Pham in 2017. His Kaiser physicians have noted it more recently in 2019 and 2020. (Exhibit C, p. 5). Based on his noted gait derangement, his history of cane use and his complaints of back pain noted to both the QME and Dr. Ahmed, of whom neither denied industrial causation to the low back, the Court reaffirms its findings herein.

As for the applicant’s sleep complaints, Labor Code §4660.1(c) precludes adding on permanent disability but it does not preclude an injured employee from receiving other benefits such as medical treatment or temporary disability arising from such conditions. The applicant’s ongoing issues with pain to the surgical knee is well documented by his treating physicians, both past and present (Pham, Price, Ahmed, Nguyen), as well as noteworthy orthopedic consults like Drs. Kharrazi and Kvitne. All of the more recent corroborating evidence support Dr. Pham’s original assessment of sleep disturbance due to pain.

C. The Court cannot find apportionment without a medical interpretation, which must be substantial.

The Court has previously established the requirement that apportionment be based on causation, and the burden of apportionment falls on the defendant alone. *Benson v. The Permanente Medical Group*. (2007) 72 Cal.Comp.Cases 1620, 1635 (*en banc*).

The lack of apportionment, or apportionment analysis by Dr. Klolesnik and Dr. Ahmed rendered the reports insubstantial and the Court could not rely upon them for this issue. In his first report, Exhibit H, the QME defers apportionment. Apportionment is not mentioned again until the last report, Exhibit A, where Dr. Kolesnik very briefly indicates it “is not a factor.” (Exhibit A, p.3).

Dr. Ahmed’s apportionment in Exhibit is a valiant attempt but the Court cannot parcel out to which body parts the apportionment applies. (Exhibit 1, p.5).

The Court chose the report of Dr. Pham for being the most inclusive in its findings and analysis on PD and adopted treating clinician’s apportionment, but only where it was justifiable and substantial as the diagnostics reviewed did not note degenerative changes to the knee. (Joint Exhibit K, p. 5).

D. The objective findings support the finding of PD.

Cal. Labor Code §3202.5 states that “All parties ... shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence....” Dr. Pham’s report had an accurate history, accurately depicted the applicants relevant treatment and surgical history, diagnostic history and discussed causation with rating strings directly referencing the AMA Guides. (Joint Exhibit K). It accurately described the mechanism of injury as well as provided reasoning behind the methods used to assess impairment, and included Activities of Daily Living (ADL’s) in its overall assessment. The Court found no fault in Dr. Pham’s reasoning in assessing which symptoms were proximately caused by the original left knee injury.

The Court concluded that Dr. Pham’s reporting is both comprehensive and substantial for determining causation to the left knee, left hip, low back and sleep and found, that the applicant had met its burden of proof by a preponderance of the evidence.

E. The pain add-on is reasonable and supported by the medical evidence.

In 2020, the applicant’s orthopedic consults, Dr. Kvitne and Kharrazi, have noted the applicant’s ongoing pain management regimen for the left knee. He has persistent pain to the left knee for which he sought orthopedic consultation to determine whether additional surgery was necessary. Dr. Kvitne noted significant nerve pain, hypersensitivity, color changes and swelling of the left knee. (Exhibit C p. 4, 6). Whether the pain add-on itself is relevant to any applicant is a medical determination. In constructing the rating for the applicant’s permanent disability, the Court found it reasonable to conclude the pain add-on noted by Dr. Pham should remain with the left knee, considering the applicant testified that his left knee was impeding his sleep, and that his hip is currently asymptomatic. Based on the assessment of the applicant’s activities of daily living and

the corroborating opinions of by more contemporary, independent consults and specialists of QME quality in their fields of the current state of the left knee, the Court made the inference to attach the pain add-on to the left knee only. The Court may make such reasonable inferences if the evidence permits. See *Boatman v. City of Los Angeles* 2011 Cal. Wrk. Comp. P.D. LEXIS 6, citing *Ybarra v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 987, 990.

F. The Court could not rely on the opinions of Dr. Kolesnik.

A report is not substantial medical evidence simply because it favors the preferred outcome for the Petitioner. In evaluating the evidentiary value of medical evidence, the physician's report and testimony must be considered as a whole, not in segregated parts. The reports in their entirety must demonstrate that his/her opinion is well-reasoned. *Bracken v. Workers Compensation App. Bd.* (1989) 214 Cal.App.3d 246, 254. The QME report is weighed equally with all other treating physician reports.

The Court found the reports incomplete, contradictory, and/or conclusory, with little to no analysis. In Exhibit H, Dr. Kolesnik indicates the applicant's subjective complaints include prior left hip pain, and bilateral knee pain, but only provides diagnoses for the left knee without any discussion as to why the other body parts examined are not relevant to the original injury, or discuss industrial causation. In Exhibit G, Dr. Kolesnik again reviews the applicant's symptoms regarding his bilateral knees, performs a clinical exam, but aside from recognizing right knee pain this time in his assessment, does not provide a causation discussion. In Exhibit F, again, Dr. Kolesnik recognizes symptomology of the bilateral knees, but only discusses the left knee. In Exhibit E, Dr. Kolesnik acknowledges that applicant has a recurrent tear of the medical meniscus, and still indicates the applicant should continue working his usual and customary capacity, which made the Court doubt that the QME had read the job description. Exhibit D is a review of the arthrogram with single line conclusions and no discussion on causation or further extrapolation of what the ongoing right knee symptoms mean. Exhibit C is a re-evaluation report, he evaluates the low back, lower extremities, hips and thighs, and the bilateral knees but provides no analysis or discussion as to whether these other body parts are industrially related. Exhibit B is the review of a requested bone scan, and requests additional studies. Exhibit A is the final report with actual ratings, but only for the low back and the left knee, without any causation discussion or analysis on other body parts complained of, evaluated, or alleged in the application. He also recognizes the applicant has an antalgic gait, but does not bother to provide any analysis as to why it should or should not be rated. (Exhibit C, p. 10). Though there are multiple QME reports in evidence, the Court as the trier-of-fact was no closer to having a comprehensive analysis and determination of what the applicant's actual level of impairment was between the first and the last reports.

The trier-of-fact cannot rely on inaccurate or incomplete reports that either do not evaluate all the body parts alleged, or explain why there is no diagnosis for the body parts examined, or why there is no rating for the body parts diagnosed. Dr. Kolesnik's reports cannot be construed as substantial and all discovery was completed within the confines of Labor Code §5502(d)(3). The Court made its determination upon thoroughly examining the evidence presented at the end of all discovery. See also *County of Sacramento v. Workers Compensation App. Bd. (Estrada)* (1999) 64 Cal. Comp. Cases 26.

G. Fees should be held in trust.

The Court agrees with Petitioner in that the attorney's fees should be held in trust, pending fee split arrangement between prior and former counsel in writing, to be released by the defendant without further Court Order.

IV
RECOMMENDATION

With the exception of the matter of attorney's fees, which the Court agrees the Award should be amended to hold the fees in trust, the Court incorporates its Opinion on Decision by reference in support of its respectful request that the Petition for Reconsideration otherwise be denied.

DATE: May 25, 2022

Julie Feng
WORKERS' COMPENSATION JUDGE