

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

KARINA MORA, *Applicant*

vs.

**FRONTIER COMMUNICATIONS;
AMERICAN ZURICH INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ12630887
San Bernardino District Office**

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

Defendant seeks reconsideration of the May 3, 2022 Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a dispatch technician from December 2, 1996 to September 12, 2019, sustained industrial injury to the right shoulder and neck. The WCJ found that applicant was entitled to select secondary treating physician Jared Myers, D.O. from defendant's medical provider network. (Minutes of Hearing and Findings of Fact and Opinion on Decision (Findings of Fact), dated May 17, 2022, at 3:23.)

Defendant contends that it was denied due process because the Qualified Medical Evaluator (QME) had not responded to an August 5, 2021 request for a supplemental report for unknown reasons. (Petition for Reconsideration or in the alternative Removal (Petition), dated June 7, 2022, at 6:17.)

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be granted to amend for typographical error, but otherwise denied.

We have considered the allegations of the Petition, and the contents of the report of the workers' compensation administrative law judge with respect thereto. Based upon the WCJ's analysis of the merits of petitioner's arguments and our review of the record, we will grant

reconsideration to amend the decision as recommended by the WCJ, but otherwise affirm the May 3, 2022 Findings of Fact.

We adopt and incorporate the WCJ's background discussion as follows:

Applicant sustained injury arising out of and in the course of employment to her right shoulder and claims to have sustained injury arising out of and in the course of employment to her cervical spine and right arm during the period 12/2/1996-9/12/2019 while working as a dispatch technician for Frontier Communications in Ontario, California. All these asserted parts of body were noted in the Application for Adjudication of Claim filed 10/15/20219, which was initially pled as a specific injury of 9/12/2019. An Amended Application for Adjudication of Claim was filed on 5/22/2020 amending the injury claim to a cumulative trauma injury of 12/2/1996 – 9/12/2019, but raising the same parts of body.

Applicant was evaluated by Panel QME Hampton Gaskins, M.D., who rendered a report dated 8/24/2021, wherein his only comment as to subjective complaints was, "She stated sometimes if she is performing a physical task – she will develop right shoulder pain that is felt at the base of the right neck." [Exhibit A, Page 2] The extent of the physical examination as regarding the cervical spine was, "The examination of Ms. Mora's cervical spine was normal." [Exhibit A, Page 3] No measurements were taken of the cervical spine, nor were any diagnostic studies requested or reviewed of the cervical spine. There was no mention whatsoever of the right arm claim of injury, but Dr. Gaskins did provide opinions in regard to applicant's right shoulder. The only opinion Dr. Gaskins provides on the issue of injury to the neck is the conclusory statement, at Page 4 of the report (Exhibit A), "I do not believe that Ms. Mora injured her neck at work." The reason, rationale or basis for this conclusion was not provided, and the opinion was not couched in terms of reasonable medical probability. (Report, at p. 2.)

The Report further addresses the medical reporting of applicant's treating physician:

On the other hand, applicant's primary treating physician, Babak Samimi, M.D., issued a permanent and stationary report on 11/6/2020 (Exhibit 2). This report documents subjective complaints in the neck as, "Pt c/o neck pain that radiates to the R>L upper extremities. There is associated numbness and tingling in the RUE. Pt c/o decreased ROM and pain w/movement of the neck. Pain is worse with repetitive bending or twisting of the neck." Dr. Samimi performs an examination, documenting his findings, including tenderness to palpation over the cervical spine, positive tenderness to palpation/spasm over the upper trapezius, positive tenderness to palpation/spasm over the levator scapulae and cervical lordosis was noted to be decreased. He performed manual muscle testing, vascular testing of pulses, reflex testing, and range of motion testing to the cervical spine, which noted some deficit. He documents that he reviewed a

cervical MRI dated 3/11/2020 which identified 2-3 mm disc bulges in combination with uncovertebral hypertrophy causing moderate to severe R>L central and neuroforaminal stenosis at C3-5.

In his discussion of causation and apportionment, Dr. Samimi clearly indicates that based on his best medical judgment, lack of evidence to the contrary and based on reasonable medical probability, he believes “the patient has sustained the above injuries directly as a result of the industrial related accident on the date of injury above.” He further stated, “I reviewed the QME report of Dr. Gaskins and disagree with his assessment and opinions with respect to the cervical spine. Although the patient has indeed a significant amount of pre-existing injuries to her cervical spine, I do believe that the work place environment with a poor ergonomic work station over the course of 25 years has also contributed to and aggravated her underlying cervical spine condition.” He goes further to apportion 60% to preexisting injuries and 40% due to “combination of compensatory issues from her right shoulder and due to the cumulative trauma from the poor ergonomic position at work.” He finds applicant permanent and stationary with a 5% WPI per DRE Cervical Category II, stating this opinion is based upon the patient’s objective findings on physical examination and based on the results of the patient’s diagnostic studies. He opines that applicant can return to full duty, but recommends an ergonomic station be made available. He also recommends referral to pain management for cervical epidural injections. This report is certainly more persuasive than the meager reporting of Dr. Gaskins, and the undersigned WCALJ relied upon it as the basis for her Findings of Fact and Opinion on Decision.

It is important to note that while Dr. Gaskins’ and Dr. Samimi’s reports were generated in August and November of 2020 respectively, no party actually took steps to depose either doctor as to their findings. By defendant’s own admission in their petition, applicant’s attorney sent a proposed Panel QME Supplemental Report Request to defendant on 12/21/2020, who objected to it going to Dr. Gaskins and thus it was not sent. Again, no action was taken to further develop the record until applicant’s attorney sent a letter on 8/5/2021 to Panel QME Dr. Gaskins asking for a supplemental report, and providing a copy of the MMI report of Dr. Samimi and a defense-provided Job Description. No report issued, neither party requested assistance of the court, and no party sought to depose Dr. Gaskins.

Upon the recommendation of Dr. Samimi, the PTP, applicant sought authorization to treat with Dr. Jared Myers as secondary treating physician for the cervical spine on 11/23/2021. Defendant denied the request by their own admission. Applicant filed a Declaration of Readiness to Proceed to Expedited Hearing on 12/16/2021, asserting that they designated an MPN doctor, Jared Myers, D.O., but that authorization has not been provided. At the Expedited Hearing on 1/6/2022, defendant represented that the issue was resolved and that applicant’s attorney agreed to go off calendar. No detail as to the issue resolution

was provided to the court. Another DOR for Expedited Hearing was filed on 4/8/2022 by applicant's attorney, asserting that while an agreement had been reached before the prior Expedited Hearing that defendant would authorize treatment with Dr. Myers, defendant had yet to issue authorization. No objection to this DOR was filed by defendant and the matter was scheduled for Expedited Hearing on 5/3/2022. (Report, at pp. 3-5.)

DISCUSSION

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

Here, the WCJ's decision includes a finding of employment, injury arising out of and in the course of employment (AOE/COE), and a determination as to the nature and extent of the injury (body parts). (Findings of Fact, dated May 17, 2022, at 3:24.) All of these findings resolve threshold issues fundamental to the claim for benefits. Accordingly, the WCJ's decision contains final orders subject to reconsideration, rather than removal. (*Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122]; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 533 [45 Cal.Comp.Cases 410].)

Defendant asserts that it was denied due process of law when the WCJ ruled on the various issues submitted for decision from expedited hearing on May 17, 2022. Defendant avers it was error for the WCJ not to allow additional time for defendant to seek supplemental reporting from QME Dr. Gaskins, as requested August 5, 2021. (Petition, at 5:5.) However, we agree with the WCJ's assessment that defendant has not established timely objection to the QME report, or that it exercised due diligence in seeking amplification of the opinions of the QME, or the issuance of supplemental reporting, or in setting the deposition of the physician, in the eight months following

the August 5, 2021 request. (Report, at p. 9.) Additionally, the Appeals Board is empowered to choose among conflicting medical reports and rely on that which it deems most persuasive. (*Jones v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 476 [33 Cal.Comp.Cases 221].) Here, we agree with the WCJ's assessment that the reporting of primary treating physician Dr. Samimi is the more well-reasoned and persuasive, and constitutes substantial medical evidence upon which the WCJ could reasonably rely.

We further observe that pursuant to Labor Code section 4600, defendant is obligated to provide all medical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatuses, including orthotic and prosthetic devices and services, reasonably required to cure or relieve the injured worker from the effects of the worker's injury. (Lab. Code, § 4600(a).) Additionally, if an employer has established a medical provider network (MPN), injured workers are generally limited to treating with a physician from within the employer's MPN. (Lab. Code, §§ 4600(c), 4616 et seq.) In cases where the necessary treatment requires specialized treatment, the primary treating physician may refer applicant to a secondary treating physician, who is any physician other than the primary treating physician who examines or provides treatment to the employee, but is not primarily responsible for continuing management of the care of the employee. (Cal. Code Regs., tit. 8, § 10859(a)(2).) Here, the primary treating physician has referred applicant for consultation and treatment with a secondary physician based on that physician's specialized knowledge and experience as relevant to applicant's treatment. (Ex. 2, report of Babak Samimi, M.D., dated November 6, 2020, at p. 3.) Accordingly, we agree with the WCJ's determination that applicant was entitled to select Jared Myers, D.O. from within the defendant's MPN, as recommended by primary treating physician Dr. Samimi. (Minutes/Findings of Fact, at 4:8.)

The WCJ's report observes that the Petition appends documents that were not admitted into evidence at the time of trial. (Report, at p. 11.) We admonish defense attorney Jan-Erick Baquiran of Floyd Skeren Manukian Langevin, LLP, for attaching documents that are not a part of the record in violation of WCAB Rule 10945. (Cal. Code Regs., tit. 8, § 10945(c)(1)-(2).) Failure to comply with the WCAB's rules in the future may result in the imposition of sanctions.

The WCJ's Report further notes typographical error in the Minutes/Findings of Fact, and recommends that reconsideration be granted to reflect a finding of injury to the neck *and* right shoulder, and that *applicant* is entitled to select a secondary treating physician. Accordingly, we

will grant reconsideration to amend the decision as recommended by the WCJ, but otherwise affirm the Findings of Fact.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration or in the alternative Removal of the May 3, 2022 Minutes of Hearing and Findings of Fact is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 3, 2022 Findings of Fact and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

2. Applicant will require further medical treatment to cure or relieve from the effects of this injury to the parts of body determined to be compensable which would be the neck and right shoulder and that such treatment shall be provided in accordance with treatment dispute procedures now under the law including Request for Authorization and Utilization Review and IMR.

3. Applicant is entitled to select a secondary physician from defendant's medical provider network and that their election of Jared Myers, D.O. is appropriate.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 8, 2022

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

**KARINA MORA
PEREZ LAW
FLOYD, SKEREN, MANUKIAN & LINGEVIN**

SAR/abs

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