

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

CANDICE FORD, *Applicant*

vs.

**JOHN MUIR HEALTH; permissibly self- insured, administered by
CANNON COCHRAN MANAGEMENT SERVICES, INC.,
*Defendants***

**Adjudication Number: ADJ14729505
San Francisco District Office**

**OPINION AND ORDER
DENYING PETITION FOR
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 deny reconsideration.

We observe, moreover, it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 7, 2024

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

**CANDICE FORD
LAW OFFICES OF NADEEM MAKADA
MULLEN & FILIPPI**

LN/pm

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 PETITION FOR RECONSIDERATION**

INTRODUCTION

Defendant seeks reconsideration of my March 22, 2024 Findings of Fact and Award (hereinafter “the F&A”) wherein I found that applicant sustained 32% permanent partial disability (PPD) as a result of her industrial injury. In doing so, I followed the opinions of the primary treating physician and rejected the opinions of the Qualified Medical Evaluator (QME). On reconsideration, defendant contends: that the Appeals Board acted without or in excess of its powers; that the evidence does not justify my findings of fact; and, that the findings of fact do not support the award. The petition is verified and timely. Applicant filed an answer.¹

FACTS

1. Procedural background

Applicant, a 39-year-old certified nurse assistant, suffered an accepted injury to her thoracic spine while helping pull a patient into bed. The primary issue at trial was permanent disability. At trial, applicant relied on reports from the primary treating physician, Gary Martinovsky, M.D. Defendant relied on reports from the QME, Edward Jennings, D.C. The parties stipulated to the PPD ratings of Dr. Martinovsky’s report(s) (32%) and Dr. Jennings report(s) (8%).

Trial in this matter was previously set for December 18, 2023. On that day, the hearing was continued with the following orders documented in the minutes: “the matter will be continued. Discovery will remain closed with the exception that the parties SHALL request a supplemental report from the QME Dr. Jennings on the subject of the MRI film reviewed by Dr. Martinovsky.” At trial, defendant objected to several reports from Dr. Martinovsky, arguing that they were obtained after the close of discovery. I overruled the objection and admitted the reports because of the previous order allowing defendant to obtain a supplemental report from Dr. Jennings. The matter proceeded to trial on February 22, 2024, with both Dr. Martinovsky and Dr. Jennings having issued reports based on their respective review of the MRI.

2. Evidence at trial and decision

As summarized on pages 1-3 of the March 22, 2024, Opinion on Decision (hereinafter “the Opinion”), there were 12 exhibits admitted into evidence. Of those, five were reports from Dr. Martinovsky, offered by applicant, and three reports from Dr. Jennings offered by defendant. The other exhibits are letters from the parties to the QME for supplemental reports and correspondence about the MRI film.

Applicant was the only witness. Her testimony is summarized at pages 3-5 of the Opinion. She testified credibly about her injury and disability. She stated that her condition worsened between the time Dr. Jennings evaluated her on July 8, 2022 and Dr. Martinovsky’s evaluation on January 5, 2023.

I followed Dr. Martinovsky’s opinions regarding PPD. In the Opinion at pages 5-6, I stated:

Candace Ford was a credible witness regarding her injury and disability. She testified that she is working because she needs the money to support her family. However, she has difficulty and sometimes needs to ask for help at work.

Her thoracic (mid back) pain worsened since she saw Dr. Jennings in July 2022. She has pain which strong shooting pain which radiates across her rib area into her left leg and left arm. The pain affects her activities of daily living (lifting, pulling, pushing, getting dressed, sleep and housework). She uses medication, ice packs, heat packs, and lidocaine patches to help tolerate the pain.

The parties stipulated to the permanent disability ratings of Drs. Martinovsky (32%) and Dr. Jennings (8%). Dr. Martinovsky’s reports constituted substantial evidence. He took an accurate history, performed a physical examination and reviewed all the medical records. As Candace Ford’s treating physician, he was more familiar with her condition. He personally reviewed the MRI films, which he is qualified to do as a physician. Dr. Jennings was unable to review the films and simply relied on the radiologist report. Applicant’s condition appears to have worsened since the Dr. Jennings evaluation. It does not appear that Dr. Jennings reviewed all the medical records. Dr. Jennings’ report curiously describes impairment to the LEFT Thoracic spine and separately to the RIGHT Thoracic spine. For these reasons, Dr. Jennings opinions regarding permanent disability are not persuasive.

It is not unusual for two physicians to disagree about the significance of findings on an MRI. Dr. Martinovsky's opinions about the findings on the MRI constitute substantial evidence in support of his 18% rating of the thoracic spine using DRE Category III. This rating is consistent with applicant's testimony regarding her symptoms of radiating pain.

The parties stipulated to the ratings of Dr. Martinovsky's report. On the basis of Dr. Martinovsky's opinions about permanent disability and applicant's credible testimony, I will award applicant 32% partial permanent disability.

3. Contentions on reconsideration

In its petition for reconsideration, defendant contends that medical reports applicant obtained from Dr. Martinovsky should have been excluded from evidence because they were obtained after the close of discovery and the WCJ's admission of those exhibits violated defendant's due process rights; and that Dr. Martinovsky's reports are not substantial evidence.

DISCUSSION

1. Dr. Martinovsky's reports were properly admitted into evidence

Defendant objected to Dr. Martinovsky's reports (exhibits 1,5 and 7) because they were solicited after discovery closed at the MSC. Treating physician reports are generally admissible. Labor Code Sections 5703. Although these reports were obtained after the closure of discovery, I believed that they should be admitted in order to have a complete record. Additionally, defendant was afforded the opportunity to obtain a supplemental report from Dr. Jennings on December 18, 2023. Defendant did in fact get a supplemental report from Dr. Jennings. It is well established that the WCJ has broad discretion to make inquiry in a manner which is best calculated to ascertain the substantial rights of the parties. Labor Code Section 5708. Accordingly, exhibits 1, 5 and 7 were appropriately admitted into evidence.

Defendant also objected that applicant counsel had not sent them the actual disc containing the MRI, but a Xerox copy of the disc, when it was sent to the Panel QME.

Since both the primary treating physician Dr. Martinovsky and the PQME, Dr. Jennings had the opportunity to review the MRI image and report on it, there was no prejudice. Exhibit 7, applicant counsel's letter to the QME containing the MRI disc was appropriately admitted into evidence.

2. *There was no due process violation*

Defendant contends its due process rights were violated because applicant obtained reports from Dr. Martinovsky after the close of discovery. There was no due process violation because on December 18, 2023 the WCJ afforded defendant the opportunity to get a supplemental report from Dr. Jennings. Defendant obtained a supplemental rebuttal report from the QME, Dr. Jennings after the close of discovery. (Exhibit 9 – January 18, 2024 -letter from defense counsel to Dr. Jennings requesting a supplemental rebuttal report; exhibit C – January 19, 2024 supplemental rebuttal report from Dr. Jennings). Accordingly, there was no prejudice or due process violation. Dr. Jennings did not request additional information or a reevaluation. The trial proceeded with a complete record where both doctors reported on the MRI.

3. *Dr. Martinovsky's opinions constituted substantial evidence regarding permanent disability*

As I discussed in the Opinion:

Dr. Martinovsky's reports constituted substantial evidence. He took an accurate history, performed a physical examination and reviewed all the medical records. [In his report dated April 1, 2023 (exhibit 3) Dr. Martinovsky reviewed 1276 pages of medical records ranging from 2006 through his treatment of Ms. Ford to the date of that report. In his report dated August 22, 2022 (exhibit A) Edward Jennings, D.C. reviewed 36 pages of medical records from 6/8/21-11/21/21. In his supplemental report of July 21, 2023 (exhibit B) Dr. Jennings reviewed 2 reports. In his January 19, 2024 report (exhibit C) Dr. Jennings reviewed 2 reports. Dr. Jennings may have reviewed other medical records in other reports. However, none was offered.] As Candice Ford's treating physician, he was more familiar with her condition. He personally reviewed the MRI films.

In his report of April 1, 2023 (exhibit 3) at page 13, Dr. Martinovsky stated: With regards to Ms. Ford's thoracic spine, Ms. Ford is rated using the DRE method, as this is the preferred method for rating spinal impairment. Table 14-3 on page 384 of the AMA Guides was referenced in formulating this impairment rating.

Ms. Ford clinical evidence of thoracic radiculopathy correlating with MRI pathology. This places Ms. Ford into the DRE Thoracic Category III, with a range of 15-18% Whole Person Impairment.

Considering Ms. Ford's significant residual symptoms impacting many activities of daily living, Dr. Martinovsky assigned an 18% Whole Person Impairment (exhibit 4).

In his June 9, 2023 report (exhibit 5) Dr. Martinovsky explained that he examined Ms. Ford on January 5, 2023 (exhibit 2) and wrote his final report (exhibit 3) addressing permanent disability dated April 1, 2023 after reviewing the medical records. Dr. Martinovsky stated in his June 9, 2023 report (page 2):

The rating for Ms. Ford's thoracic spine impairment was provided based on clinical findings of thoracic radiculopathy which Dr. Jennings documented in her August 16, 2022 QME report where she documented burning pain extending into the trapezius and into the middle back along the left shoulder blade with occasional sharp shooting pain in her mid-back which is consistent with neuropathy/thoracic radiculopathy. This would warrant DRE Thoracic Category III, with a range of 15-18% Whole Person Impairment. The higher end of that category was chosen due to impact of her thoracic spine on her ADLs.

Defendant contends (see p. 9 of the Petition for Reconsideration) that Dr. Martinovsky relied upon Dr. Jennings's findings in his June 9, 2023 report, described above. I disagree. Dr. Martinovsky noted above that Dr. Jennings's examination findings of radiculopathy were in accord with his own. I found that Dr. Martinovsky appropriately assigned a Thoracic DRE Category III impairment rating based on his: history of treatment of Ms. Ford, examinations, findings and review of the MRI which in his impression showed disc bulges at the level of T10-11 and T11-12 indenting the thecal sac at both levels. (exhibit 1).

RECOMMENDATION

For the foregoing reasons, I recommend that defendant's Petition for Reconsideration, filed herein on April 9, 2024, be denied.

Date: April 29, 2024

Barry Gorelick
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE