

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

CYNTHIA MCCLAIN, *Applicant*

vs.

**FEDEX GROUND PACKAGE SYSTEM, INC.,
permissibly self-insured, adjusted by SEDGWICK, *Defendants***

**Adjudication Number: ADJ17649449
Riverside District Office**

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

Applicant, in pro per, seeks reconsideration of the Findings and Award and Orders (F&A) issued by the workers' compensation administrative law judge (WCJ) on October 11, 2024, wherein, the WCJ found, in pertinent part, that applicant sustained industrial injury to her right hip, which resulted in applicant sustaining no permanent disability and required no future medical treatment.

Applicant generally argues that multiple irregularities occurred during the litigation process and during the qualified medical examination (QME), and thus the WCJ's findings are not supported by substantial medical evidence.

We received an answer from defendant.

The WCJ filed a Report recommending that the Petition for Reconsideration be denied.

We have considered the allegations in the Petition for Reconsideration, the answer and the contents of the Report, and we have reviewed the record. Based upon our review of the record, we will grant applicant's Petition for Reconsideration and as our Decision After Reconsideration, we will rescind the October 11, 2024 F&A and return this matter to the trial level for further proceedings.

FACTS

Applicant was working on July 12, 2022 as a warehouse worker when she sustained an admitted industrial injury to her right hip. (Minutes of Hearing and Summary of Evidence, August 13, 2024, p. 2, lines 4-7.) Applicant was evaluated for her injury by QME James Andry, M.D., who authored one report in evidence. (Joint Exhibit 1, Repot of QME James Andry, M.D., November 14, 2023.)

Dr. Andry took the following history of injury:

Ms. Cynthia McClain is a 63-year-old female presenting for a qualified medical examination. On July 12, 2022 Ms. McClain was unloading a trailer while working for FedEx and sustained a fall, landing on her right hip. This was a witnessed fall. She was seen at Concentra on 7/15/2022 and diagnosed with a right hip contusion. She states her pain ranges from 5/10-10/10 and is worsened with ambulation and improves with rest. She was referred to Dr. Elias who is an orthopedic surgeon. He diagnosed her with right greater trochanteric bursitis and treated her with a steroid injection the right greater trochanteric bursa, anti-inflammatories and physical therapy. She was declared to have reached MMI on 10/10/2022 with no permanent disability Recommendations included returning to work without restriction along with the recommendation of wearing a knee brace from a prior injury. No time was lost from work during the course of treatment. Ms. McClain resigned from FedEx on 01/04/2023.

(*Id.* at p. 2.)

Dr. Andry noted the following complaints as to pain and impacts upon activities of daily living (ADLs):

Ms. McClain claims that she is in pain 24 hours per day that is sharp, aching and stabbing. It is in her neck, low back, and down her left medial leg and right hip over the greater trochanter.

She is able to perform all activities of daily living and has difficulty having bowel movements, standing, sitting, walking normally, climbing stairs, lifting a child and sleeping restfully.

(*Ibid.*)

Dr. Andry noted that applicant ambulates with a walker. (*Id.* at p. 6.) He took range of motion measurements of applicant's hip, which, in pertinent part showed that applicant had 30 degrees range of motion via hip external rotation. (*Id.* at p. 7.)

Dr. Andry assigned 0% whole-person impairment using the AMA Guides. (*Id.* at p. 23.) He opined on applicant’s need for future medical treatment as follows:

[A]t this time, based upon information available, no future medical care is indicated for this examinee. She does have a documented labrum tear whoever this is asymptomatic prior and after her injury. Her main injury was a contusion which has resolved. She is largely back her baseline regarding her hip.

(*Id.* at p. 24.)

DISCUSSION

I.

Preliminarily, we note that former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b) (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

(§ 5909.)

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events the case was transmitted to the Appeals Board on November 8, 2024, and 60 days from the date of transmission is Tuesday, January 7, 2025. This decision is issued by or on Tuesday, January 7, 2025, so that we have timely acted on the Petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

According to the proof of service for the Report and Recommendation by the WCJ, the Report was served on November 8, 2024, and the case was transmitted to the Appeals Board on November 8, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 20, 2024.

II.

To constitute substantial evidence “. . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.” (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) “When the foundation of an expert’s testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions.” (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

Multiple issues exist with the reporting in this matter. First, the QME took hip range of motion measurements of 30 degrees external rotation. This clearly warrants a rating pursuant to Table 17-9 of the AMA Guides, p. 537. Thus, the QME’s opinion that applicant sustained zero permanent disability is clearly in error.

Next, the QME’s opinion on future medical care does not constitute substantial evidence as the opinion is both conclusory and self-contradictory. The QME’s opinion is conclusory because

he did not explain how and why applicant's injury will not require future medical care. Applicant complained during the evaluation that she still has pain in the hip, which impacts her ADLs. The QME must address these complaints in determining whether future medical care is needed.

Next, the QME opined that applicant 'largely' returned to baseline, which necessarily means that applicant has not returned to baseline. If applicant truly is permanent and stationary as opined by the QME and applicant's condition has not returned to baseline, then the QME needs to explain why applicant requires no future medical care while remaining symptomatic. Absent an adequate explanation, the QME's opinion does not constitute substantial evidence.

Having rescinded the F&A in this matter based upon the lack of substantial medical evidence, we need not address the other irregularities raised in applicant's petition as they are moot.

Accordingly, we will grant applicant's Petition for Reconsideration and as our Decision After Reconsideration, we will rescind the October 11, 2024 F&A and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Award and Orders issued on October 11, 2024 is **GRANTED**.

IT IS FURTHER ORDERED that as our Decision After Reconsideration, the Findings and Award and Orders issued on October 11, 2024 is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 31, 2024

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

**CYNTHIA MCCLAIN, IN PRO PER
HANNA, BROPHY, MacLEAN, McALEER & JENSEN, LLP**

EDL/mc



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