

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

**AVELINA GONZALEZ, *Applicant***

**vs.**

**ABBOTT CARDIOVASCULAR SYSTEMS, INC.;  
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, *Defendants***

**Adjudication Number: ADJ11244503  
San Diego District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration, the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated in the WCJ's report and opinion, which are both adopted and incorporated herein, we will deny reconsideration.

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/ CRAIG SNELLINGS, COMMISSIONER



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**April 8, 2024**

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

**AVELINA GONZALEZ  
LAW OFFICES OF MANUEL J. RODRIGUEZ, JR.  
MISA STEFEN KOLLER WARD, LLP**

**JMR/ara**

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

**REPORT AND RECOMMENDATION ON  
PETITION FOR RECONSIDERATION**

*Counsel:*

Petition for Reconsideration Filed By: Petitioner, Abbott Laboratories, through their insurance carrier, TriStar

Attorney for Petitioner: Misa Stefen Koller Ward, LLP, Jon Gower, Esq.

Attorney for Applicant: Law Offices of Manuel Rodriguez, Andrew Rodriguez, Esq.

**INTRODUCTION**

Petitioner, Frontier Communications, by and through their attorney of record, has filed a timely, verified, petition for reconsideration on the following grounds, from the trial court's January 26, 2024, Findings and, Award, pleading that:

1. The WCJ's decision is unreasonable.
2. The WCJ's decision is not based on substantial medical evidence.

**BACKGROUND**

Applicant, Avelina Gonzalez, while employed on February 27, 2014, as a Senior Operator, Occupational Group Number 221, by Abbott Cardiovascular Systems, Inc., sustained injury arising out of and in the course of employment to her neck, bilateral shoulders, back and psyche. At the time of the injury, the employer's workers' compensation carrier was Travelers Property Casualty Company of America. Applicant's primary treating physician is Dr. Jeffrey Bernicker. Applicant also presented to Dr. Wayne Inman in the capacity of the Panel QME. Parties proceeded to trial on December 13, 2023, with the undersigned issuing a Findings and Award on January 26, 2024. Defendant filed a timely, verified Petition for Reconsideration on February 6, 2024.

**DISCUSSION**

First, it should be noted that the Petitioner has failed to state any of the statutory basis on which Reconsideration should be granted. Labor Code Section 5903 states,

At any time within 20 days after the service of any final order, decision, or award made and filed by the appeals board or a workers' compensation judge granting or denying compensation, or arising out of or incidental thereto, any person aggrieved thereby may petition for reconsideration upon one or more of the following grounds **and no other**:

**(a)** That by the order, decision, or award made and filed by the appeals board or the workers' compensation judge, the appeals board acted without or in excess of its powers.

**(b)** That the order, decision, or award was procured by fraud.

(c) That the evidence does not justify the findings of fact.

(d) That the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing.

(e) That the findings of fact do not support the order, decision, or award.

Nothing contained in this section shall limit the grant of continuing jurisdiction contained in Sections 5803 to 5805, inclusive.

As a result, the WCJ requests that the Petition for Reconsideration be denied.

However, if the Board finds the Petition cites grounds upon which the decision can be appealed, including the incorporation of Labor Code Section 5952(c), this WCJ maintains that the Petition for Reconsideration should be denied as petitioner has failed to establish that the Findings and Award was not justified or it was unreasonable. Furthermore, this WCJ finds that the reporting of Dr. Jeffrey Bernicker rose to the level of substantial medical evidence such that any determination based on these reports are valid findings.

The issues at trial were whether or not applicant's permanent impairment should be based on the Panel QME, Dr. Inman, or the PTP, Dr. Bernicker and whether or not applicant was entitled to further medical treatment to cure or relieve the effects of the industrial injury. The Petition for Reconsideration raises only the issue of permanent impairment.

To address impairment, parties placed at issue which medical reporting should the Court rely upon, either PQME Inman or PTP Bernicker. A thorough review of the evidentiary record consisting of both doctors' reports led the undersigned to rely upon Dr. Bernicker.

As noted in the Findings and Award, it is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. (*Place v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525].) Although this WCJ relied upon Dr. Bernicker's reporting rather than the PQME, this does not rise to level of the determination to be unjust, as alleged by petitioner.

Petitioner's argument relies essentially on page 508, 16.8a of the AMA Guides as justification in finding Dr. Bernicker's rating as incorrect. However, as previously stated in the Opinion on Decision, this section of the Guides relies on the fact that the person's decreased strength cannot be rated in the presence of decreased motion or painful conditions *that prevent effective application of maximal force in the region being evaluated*. A thorough review of the testing performed as well as a thorough review of the reporting from both evaluators have not established that applicant's decreased strength was in any way hindered by the presence of decreased motion or pain condition inhibiting or preventing effective application of maximal force.

It is well established that any decision by the appeals board or a WCJ "must be supported by substantial evidence in the light of the entire record."<sup>1</sup> It has been well established under California Workers' Compensation law that an award for benefits must be supported by substantial evidence.<sup>2</sup> The Appeals Board may not blindly accept a medical opinion that lacks a solid underlying basis and must carefully judge its weight and credibility.<sup>3</sup> In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability.<sup>4</sup> Medical reports are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories or examinations or on incorrect legal theories.<sup>5</sup> A medical report is not substantial evidence unless it offers the reasoning behind the physician's opinion, not merely his or her conclusions.<sup>6</sup> In addition to the reasoning already given in the Opinion on Decision for the reliance on Dr. Bernicker's reporting over Dr. Inman's reporting, it should be noted that it was not only the fact that Dr. Bernicker substantiated his reasoning for his assessment of applicant's shoulder impairment. It was also Dr. Inman's incorrect assessment of the cervical spine when he did not note the 5% impairment for muscle spasm and failed to address the pain add-on. This WCJ did not find the reporting of Dr. Inman to reach the level of substantial medical evidence. Furthermore, based on the complete medical reporting of Dr. Bernicker, this WCJ found that Dr. Bernicker's report rose to the level of substantial medical evidence and gave his findings great weight.

#### RECOMMENDATION

For the reasons discussed above as well as the incorporation of the Findings and Award into this Report and Recommendation, it is respectfully recommended that the petition for reconsideration be denied.

DATE: February 14, 2024

**Alicia Hawthorne**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE

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<sup>1</sup> *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal. 3d 312, 317, 90 Cal. Rptr. 355, 475 P.2d 451, 35 Cal. Comp. Case 500

<sup>2</sup> *Le Vesque v. WCAB* (1970) 35 CCC 16; *Garza v. WCAB* (1970) 35 CCC 500

<sup>3</sup> *National Convenience Stores v. WCAB (Kesser)* (1981) 46 CCC 783, 786

<sup>4</sup> *McAllister v. WCAB* (1968) 333 CCC 660; *Rosas v. WCAB* (1993) 58 CCC 313; *E.L. Yeager Construction v. WCAB (Gatten)* (2006) 71 CCC 1687, 1691

<sup>5</sup> *Place v. WCAB* (1970) 35 CCC 525, 529; *Hegglin v. WCAB* (1971) 36 CCC 93, 97

<sup>6</sup> *Granado v. WCAB* (1968) 33 CCC 647, 653; *E.L. Yeager Construction v. WCAB (Gatten)* (2006) 71 CCC 1687, 1691

## OPINION ON DECISION

### FACTUAL BACKGROUND

Applicant, Avelina Gonzalez, while employed on February 27, 2014, as a Senior Operator, Occupational Group Number 221, by Abbott Cardiovascular Systems, Inc., sustained injury arising out of and in the course of employment to her neck, bilateral shoulders, back and psyche.

At the time of the injury, the employer's workers' compensation carrier was Travelers Property Casualty Company of America.

At the time of the injury, the employee's earnings were \$701.68 per week, warranting indemnity rates of \$467.97 for temporary disability and \$290.00 for permanent disability.

The carrier/employer has paid compensation as follows:

Temporary disability at \$467.97 weekly for the period of March 25, 2019, through May 19, 2019; And Permanent disability at \$290.00 weekly for the period of June 11, 2018, to February 21, 2019. The applicant has been adequately compensated for all periods of TTD to date.

The employer has furnished some medical treatment. The primary treating physician is Jeffrey P. Bernicker, M.D.

### PERMANENT DISABILITY

Applicant alleges that the proper permanent impairment is correctly reflected in the reporting of Primary Treating Physician Dr. Bernicker. Specifically, applicant contends that they have suffered a 35% permanent disability as a result of the February 27, 2014, industrial injury.

Defendant argues that Dr. Inman's reporting is a more accurate reflection of the applicant's permanent impairment. Defendant's argue that Dr. Bernicker incorrectly indicated that applicant's impairment is rated under both loss of range of motion and strength deficit for applicant's bilateral shoulders. Defendant's indicate applicant's proper impairment is either 15% or 20% if applicant's cervical spine is appropriately rated.

Applicant presented to Dr. Inman in the capacity of a Panel Qualified Medical Evaluator. Dr. Inman noted from his examination the following (Defendant's Exhibit A, pages 10 - 13, EAMS DOC ID 27124661):

#### **"UPPER EXTREMITIES:**

Shoulders:

She has no deformity or atrophy in either shoulder. She has diffuse tenderness around the acromioclavicular area of the right shoulder. She has mildly positive impingement sign, but no evidence of instability.

**DIAGNOSES:**

1. Right shoulder and upper extremity complaints with possible impingement syndrome.
2. Right cervical, thoracic, and lumbar myofascial pain syndrome.
3. Left ankle sprain/strain, resolved.

**MEDICAL STATUS:**

The examinee's condition has reached the point of maximum medical improvement at the time of this evaluation.

**IMPAIRMENT RATING (AMA Guides, 5th Edition):**

I feel that her impairment at this time primarily centers around her right shoulder and is demonstrated by the loss of range of motion of the right shoulder.

Looking at the measurements and using Figure 16-40 for flexion and extension, she has a 5% upper extremity impairment for flexion and a 1% for extension. Then by Figure 16-43, she has a 3% impairment for abduction and a 1% impairment for adduction and finally by Figure 16-46, she has a 1% upper extremity impairment due to loss of external rotation and a 3% upper extremity impairment for loss of internal rotation. Adding these figures gives you a 14% upper extremity impairment. Then by Table 16-3, this converts to 8% whole person impairment.

Looking at other methods, using spinal tables 15-3, 15-4, and 15-5, I feel that she does not have a specific injury to the spine and therefore would probably be considered Category 1 in these areas, which were all associated with 0% impairment and probably does not represent her impairment adequately at this time. Finally, in attempting to use of grip strength as a measure of impairment, which is generally considered unreliable, but if a number is desired in this area, Table 16-34 asserts a 44% loss of grip strength with 20% upper extremity impairment, which then again by Table 16-3 converts to a 12% whole person impairment. However, I feel this is probably less reliable than her loss of shoulder range of motion as noted above."

Dr. Inman issued another report on June 20, 2019, wherein he re-evaluated the applicant and reviewed applicant's prior medical records. Dr. Inman noted that applicant did not have evidence of specific muscle spasm in her cervical spine. (Defendant's Exhibit B, page 22) At this time, applicant was only three months postoperative from her right shoulder surgery and Dr. Inman believed applicant was not at MMI.

Dr. Inman's next re-evaluation was February 27, 2020. (Defendant's Exhibit C, EAMS DOC ID 49474433) It was at this time that applicant had serious complaints of her left shoulder. Dr. Inman did not comment either way with regard to applicant's cervical spine and whether or not there was specific muscle spasm, however, he did note that there was no muscle spasm in her thoracic and lumbar spine. Applicant was not found MMI at this time because she still needed active treatment for her left shoulder. An additional supplemental report issued by Dr. Inman reviewing the left shoulder MRI (Defendant's Exhibit D)

Applicant presented for another re-evaluation with Dr. Inman on February 1, 2022. (Defendant's Exhibit E) Again, there is no indication regarding whether or not there was any muscle spasm in

applicant's cervical spine. Furthermore, Dr. Inman wanted to review the updated MRI of applicant's left shoulder such that applicant was not MMI.

The last re-evaluation of the applicant with Dr. Inman was performed on September 28, 2022. (Defendant's Exhibit F) Dr. Inman reviewed updated medicals as well as performed an examination of the applicant. During this evaluation, Dr. Inman noted no evidence of specific muscle spasm anywhere on the applicant's spine. Dr. Inman, at this time, found the applicant MMI on all body parts. He found no impairment for applicant's cervical spine and 7% WPI for both shoulders.

The last report issued by the Dr. Inman is dated March 28, 2023, in response to a request to review Dr. Bernicker's report, specifically regarding Dr. Bernicker's method of computing impairments and his rebuttal of Dr. Inman's previous report. (Defendant's Exhibit G). Dr. Inman noted that Dr. Bernicker had found present in the applicant muscle spasm in her cervical spine. Dr. Inman noted that if the applicant had, indeed, demonstrated cervical muscle spasm, then it would be appropriate to place the applicant in Category II and apply a 5% WPI. (Defendant's Exhibit G, pages 4-5)

It is noted that in Dr. Bernicker's permanent and stationary report, dated September 7, 2023 (Applicant's Exhibit 7, page 2) he states the following:

Turning my attention initially to the cervical spine, Dr. Inman indicated on page 4 of his report, that he did not appreciate any muscle spasm at the time of his evaluation, thereby supporting his decision to assign 0% Whole Person Impairment. He indicated, however, that, "If indeed [the patient] demonstrated cervical muscle spasm at the time of (Dr. Bernicker's) evaluation, then it would be appropriate to place her in Category II and apply a 5% whole person impairment". I was indeed able to appreciate spasm at the time of my examination of the patient on 12/06/22. As such, I reiterate the 5% Whole Person Impairment rating that I had initially assigned which Dr. Inman indicated he would support. Now that I have addressed Dr. Inman's concerns, it would appear that he and I are in complete agreement with respect to the Whole Person Impairment arising out of the cervical aspect of the claim.

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With regard to the bilateral shoulders, Dr. Inman questioned my decision to assign additional Whole Person Impairment based upon the strength deficit which I identified upon resisted manual muscle testing of the rotator cuff musculature. Although Dr. Inman is correct that the author of the *Guides* traditionally advise examiners against assigning impairment based upon grip strength loss as these are "functional tests influenced by subjective factors that are difficult to control", I would direct Dr. Inman's attention to Example 16-72 on page 511 of the *Guides* where the authors themselves assign impairment based upon strength loss in the setting of a patient who undergoes a rotator cuff repair. This example clearly applies to Ms. Gonzalez who underwent a single rotator cuff repair on the right side and two attempts at rotator cuff repair on the left side. If any patient were to fall into this subcategory of patients, it would certainly be Ms. Gonzalez. Although Dr. Inman defers to the Trier-of-Facts to make a determination regarding whether "the inclusion of manual muscle testing as provided by (myself) is more accurate." I am confident that my original assessment of this case and the impairment ratings which I assigned for the bilateral shoulders are



accurate, supported by the medical evidence, and consistent with the anticipated residuals following rotator cuff repair.

In closing, while I appreciate having been given the opportunity to review Dr. Inman's supplemental report, he has not provided any new information that would cause me to revise any of my prior opinions. I stand behind all of the opinions presented in my Permanent and Stationary Report of 12/06/22.

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Based on the reporting of both Dr. Bernicker and Dr. Inman, it can be concluded that due to the presence of cervical muscle spasm found in the evaluation with Dr. Bernicker, applicant's proper WPI for her neck is the 5%. Dr. Inman concurred with this conclusion when he noted that if during Dr. Bernicker's evaluation applicant had the presence of specific muscle spasm in her cervical spine, then the 5% would be appropriate. There is nothing in the records to indicate that applicant in any way was not forthcoming, truthful, or not credible. Furthermore, Dr. Bernicker did clearly note the presence of such spasm. With these findings, and the agreement between the doctors, this WCJ does find that the 5% WPI assigned for applicant's neck is appropriate.

It is apparent that Dr. Bernicker and Dr. Inman do not agree with each other's assessment when it comes to determining impairment for applicant's shoulders. Dr. Inman takes the position that for the shoulder impairment, it is not appropriate to rate the impairment with both strength deficit and grip strength loss. Furthermore, Dr. Inman has indicated that it is up to the "Trier of Facts" to determine whether the inclusion of manual muscle testing is more accurate. In his report dated March 28, 2023, (Defendant's Exhibit G) Dr. Inman refers the reader to page 508 under 16.8a of the AMA Guides. This section appears to indicate that impairment due to loss of strength can be combined with other impairments under certain circumstances. However, decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts that prevent effective application of maximal force in the region being evaluated. He further refers the reader to page 507, 16.8c regarding Manual Muscle testing wherein it does indicate that manual muscle testing is subjective to the individual's conscious or unconscious control. However, what the undersigned does not see in any reporting by Dr. Inman, is that the applicant's performance in her testing shows applicant having not put forth her best effort or that her pain has in any way caused the testing to be invalid. It appears that Dr. Inman has failed to consider Section 16.8a which states that an evaluator finds that the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods, the loss of strength may be rated separately. Finally, Dr. Inman noted that he failed to consider a pain add-on for applicant's shoulders, which he agreed with Dr. Bernicker was appropriate in this matter.

Dr. Bernicker's reporting indicates a higher level of impairment than that of Dr. Inman when evaluating applicant's shoulders. Dr. Bernicker was given the opportunity to review and comment on Dr. Inman's report and has indicated why he did not agree with Dr. Inman's assessment of applicant's shoulder impairment. While not common, it is allowed and appropriate in certain cases to allow loss of strength to be combined with other impairments and loss of range of motion. Dr. Bernicker's reporting establishes why, in this case, his evaluation of applicant's shoulder impairment is correct and a more accurate representation of applicant's disability than that of Dr. Inman.

It is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. (*Place v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525].) Here, this WCJ finds that the reporting of Dr. Bernicker is substantial medical evidence and gives great weight to his findings. Comparing the reports of Dr. Inman and Dr. Bernicker as well as reading the AMA guidelines with a liberal interpretation in the favor of the Applicant, it is now found that Dr. Bernicker's reporting more accurately reflects applicant's impairment.

Therefore, this WCJ now finds that applicant's permanent impairment to rate as follows:

C-Spine: 15.01.01.00 -6- [1.4] 8 - 221E -7 - 8:  
R-Shoulder: 16.02.02.00 -7 - [1.4] 10 – 221G - 12-14:  
L-Shoulder: 16.02.02.00 -9 - [1.4] 13 – 221G - 15- 17:

CVC = 17 C 14 C 8 = 35%

This equates to 166.00 weeks of indemnity at a rate of \$290.00 a week for a total of \$48,140.00.

#### NEED FOR FURTHER MEDICAL TREATMENT

In accordance with the medical reports of Dr. Bernicker and Dr. Inman, the Court finds that applicant is in need of future medical care to cure or relieve from the effects of the injury herein.

#### ATTORNEY'S FEES

The reasonable value of services of the Applicant's Attorney is 15% of the permanent disability indemnity, which equates to a fee of \$7,221.00. These fees are to be commuted off the far end of the award. The Court to maintain jurisdiction over any disputes arising out of the amount of attorney's fees to be awarded.

DATE: January 26, 2024

**Alicia Hawthorne**  
WORKERS' COMPENSATION JUDGE