

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

GEORGE BALLANTYNE, *Applicant*

vs.

**COUNTY OF SACRAMENTO, permissibly self-insured
and self-administered, *Defendant***

**Adjudication Number: ADJ16629007
Sacramento 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.

I.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id.*)

II.

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].)

III.

Former Labor Code 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, Labor Code 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.

Under Labor Code 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 September 19, 2024, and 60 days from the date of transmission is November 18, 2024. This decision is issued by or on November 18, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers’ compensation administrative law judge, the Report was served on September 19, 2024, and the case was transmitted to the Appeals Board on September 19, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 19, 2024.

Accordingly, we deny the Petition for Reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 7, 2024

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

**GEORGE BALLANTYNE
GOLDEN STATE WORKERS COMP
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN**

MB/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
AND
NOTICE OF TRANSMISSION TO THE APPEALS BOARD**

INTRODUCTION

Issue:	Disagreement with Findings & Award/Witness Credibility
Date of Findings and Award:	August 23, 2024
Petitioner:	Defendant
Timeliness of Petition:	Timely
Verification of Petition:	Verified

PETITIONER'S CONTENTION(S)

Petitioner contends that the undersigned failed to consider and/or rely upon the PQME, Charles Xeller, MD's, deposition testimony in finding AOE/COE for applicant's lumbar spine.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Initially, applicant's claim was accepted. Eleanor Loomis, MD, served as PTP. Charles Xeller, MD, served as PQME. Dr. Xeller evaluated applicant once in person, on December 22, 2022. (Exhibit AA.) Dr. Xeller issued three supplemental reports: March 30, 2023, (Exhibit BB); April 28, 2023, (Exhibit CC); and June 22, 2023, (Exhibit DD.) Dr. Xeller was subsequently deposed on January 15, 2024. (Exhibit EE.)

On December 22, 2022, applicant told Dr. Xeller that the industrial injury occurred as follows: A car going 55 mph struck him. (Exhibit AA at p. 2.) On December 22, 2022, Dr. Xeller stated that the best he could ascertain, applicant had increased, chronic coccygeal pain. (*Id.* at p. 23.) Dr. Xeller wanted information about the ganglion impar procedure and applicant to undergo a diagnostic bone scan. (*Id.* at pp. 23-24.)

On March 3, 2023, Dr. Xeller reviewed the ganglion impar block #1 and whole body scan reporting. (Exhibit BB at p. 2.) Dr. Xeller concluded, if the MVA were minor and applicant was wearing a seat belt, applicant should not have suffered a permanent or drastic increase in coccygeal pain. (*Id.*) Dr. Xeller found applicant to have 8% WPI (including pain) but questioned if it were related to the industrial MVA since applicant was wearing a seat belt. (*Id.* at p. 4.) Dr. Xeller released applicant to work. (*Id.*) Dr. Xeller deferred his apportionment analysis. (*Id.* at p. 5.)

In the April 28, 2023, report, Dr. Xeller stated that applicant may have jarred his back in the industrial MVA. (Exhibit CC at p. 3.) Accordingly, 25% of his disability is industrial in nature. (*Id.*) Dr. Xeller found applicant to have 8% WPI of the lumbar spine because of severe pain. (*Id.*) Dr. Xeller indicated future medical treatment was indicated and assigned applicant a permanent work restriction. (*Id.* at p. 4.)

At time of trial, applicant testified credibly about the jarring mechanism of injury:

He was stopped at a stop sign, waiting for a car to pass. The approaching car veered towards applicant. Applicant clenched the steering wheel, held down the break and prepared for impact. The car hit applicant's front bumper. After the applicant was hit, he let go of the steering wheel. (MOH/SOE at p. 4:13-15.)

In his vehicle, applicant felt the boom of the crash, his truck almost lifted off the ground. It was a very strong jolt. (*Id.* at p. 4:19-20.)

Based on the foregoing substantial evidence, a Findings and Award issued finding that Applicant has 3% permanent disability to the lumbar spine and that Applicant did not suffer industrial injury to the hip.

DISCUSSION

Defendant contends that the undersigned failed to review and/or rely upon the deposition transcript of Dr. Xeller, Exhibit EE, in making my findings. The undersigned did review Dr. Xeller's deposition transcript and found it to be unreliable and/or unsubstantial evidence. Specifically, Dr. Xeller's hypothetical opinions at deposition were based on an inaccurate history.

Specifically, Dr. Xeller's deposition was more than two years after his single evaluation of applicant. At his initial evaluation of applicant, Dr. Xeller had/reviewed the CHP report. (Exhibit AA at p. 3.)

At his initial evaluation of applicant, Dr. Xeller accounted for discrepancies in mechanism of injury and applicant's presentation. Dr. Xeller understood from applicant it was a minor accident and wanted additional diagnostic studies to make sure he was not "missing something." (*Id.* at p. 24.) On March 30, 2023, Dr. Xeller indicated there might be psychological stresses impacting the case. (Exhibit BB at p. 4.) By June 22, 2023, Dr. Xeller described it as potential psychosocial stress. (Exhibit CC at p. 2.)

Thereafter, it is unclear why, at his deposition, Dr. Xeller was convinced applicant had lied to some doctor about his mechanism of injury. From Exhibit EE, deposition of Dr. Xeller:

Q: Okay. Was that your understanding, that he was rear-ended?

A: Well, that is my understanding. And it was also the recitation by two of his doctors in the records. (Page 6:20-23)

Then:

Q: Do you have any documentation to suggest that he was rear-ended, other than perhaps some inaccurate histories?

A: I do not. Just from the Dr. Eleanor Loomis, who writes he was driving the box truck, stopped at a light and the car rear-ended him....

A: And, of course, that's the history Mr. Ballantyne gave me also. Certainly the police report is quite different. (Page 8:9-14.)

From Findings and Award; Opinion on Decision at page 3 of 6:

On May 5, 2022, applicant told Dr. Loomis that he was driving his work box truck and was stopped at a light when a compact car sedan driving about 55 mph hit him on the driver's front bumper. (Exhibit AA at p. 15.)

On May 25, 2022, applicant told Dr. Loomis that the industrial injury occurred as follows: He was driving his work box truck and was stopped at a light when a compact car sedan driving about 55 mph hit him on the driver's front bumper. (Exhibit 1 at p. 1.)

On December 22, 2022, applicant told Dr. Xeller that the industrial injury occurred as follows: A car going 55 mph struck him. (Exhibit AA at p. 2.)

Applicant told neither Dr. Loomis nor Dr. Xeller that he was rear-ended by a car traveling 55 mph. Hence, Dr. Xeller's opinions at his deposition are not based on credible evidence and are therefore unreliable. Based on a totality of the credible evidence, including applicant's credible testimony, the findings that issued herein are appropriate and just.

RECOMMENDATION

Based on the foregoing, it is respectfully recommended that the Petition for Reconsideration be denied.

NOTICE OF TRANSMISSION:

Pursuant to Labor Code section 5909, the parties and the appeals board are hereby notified that this matter has been transmitted to the appeals board on date set out below.

Dated: September 19, 2024

Sarah L. Lopez
WORKERS' COMPENSATION JUDGE