

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

AARON SMITH, *Applicant*

vs.

**ARC LONG BEACH; CYPRESS INSURANCE COMPANY, Administered By
BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants***

**Adjudication Number: ADJ11407468
Van Nuys District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

In order to further study the factual and legal issues in this case, on February 26, 2021, we granted defendant's Petition for Reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact of December 8, 2020, wherein it was found that while employed during a cumulative period ending on July 20, 2018, applicant sustained industrial injury to his cervical spine, shoulders, lumbar spine and right wrist. All other issues were deferred.

Defendant contends that the WCJ erred in finding industrial injury. We have not received an answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We will affirm the WCJ's decision. Both reporting doctors in this case, primary treating physician physical medicine specialist Benham Sam Tabibian, M.D. and panel qualified medical evaluator orthopedist Antoine Roberts, M.D., opined that applicant sustained industrial injury based on a history provided by the applicant which the WCJ deemed credible.

Dr. Tabibian wrote in an August 15, 2019 report:

The patient's job duties did require him to work eight hour a day, five days per week. This work required prolonged standing, walking, as well as also requiring bending, stooping, squatting, kneeling, twisting, turning, forceful pushing, pulling, forceful gripping, grasping, torqueing, lifting and carrying up to 20 pounds and standing and walking, as well as maneuvering of his finger and hands to perform his work duties as a job coach.

As a result of these job duties, the patient developed symptoms in his cervical

spine, lumbar spine, shoulders, elbows, wrists, and hands and right knee. He also has symptoms in the right foot, but apparently, this condition has resolved and is asymptomatic.

(August 15, 2019 report at p. 28.)

Similarly, Dr. Roberts, whose conclusions defendant does not impugn in its Petition, wrote in his March 27, 2019 report:

There appears to be sufficient medical evidence to indicate that the examinee has sustained injury on an industrial basis to his neck, both shoulders, lumbar spine, right wrist, left hand, right knee, all toes on right foot, however these injuries are all superimposed on degenerative changes in the musculoskeletal system of this individual. This statement is made with reasonable medical probability.

(March 27, 2019 report at p. 22.)

Although defendant's Petition states that Dr. Tabibian's conclusions are suspect because he did not review old medical records evidencing prior treatment to the shoulders, Dr. Roberts did review these medical records, and stated "After reviewing the above medical record, I find no reason to change my opinion set forth in my original report." (July 23, 2019 report at p. 7.)

Thus, both reporting physicians opined that applicant sustained industrial injury. While both reporting physicians noted that applicant had conditions that pre-existed his cumulative injury, all that is necessary to satisfy the requirement that a physical injury arose out of and in the course of employment is that employment is a "contributing cause" of the injury. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Guerra v. Workers Comp. Appeals Bd.* (1985) 168 Cal.App.3d 195 [50 Cal.Comp.Cases 270].) Defendant's Petition notes that, at his deposition, Dr. Roberts ultimately opined that applicant's cumulative injury did not contribute to his level of permanent disability. However, "The issue of the causation of permanent disability, for purposes of apportionment, is distinct from the issue of the causation of an injury. [Citation.] Thus, the percentage to which an applicant's *injury* is causally related to his or her employment is not necessarily the same as the percentage to which an applicant's *permanent disability* is causally related to his or her injury." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 [Appeals Bd. en banc].)

At trial, applicant testified to the physical nature of his work, microinjuries sustained on the job, as well as the physical effects of the cumulative injury. The WCJ found applicant's

testimony to be credible. A WCJ's credibility determinations are "entitled to great weight." (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].)

Because both experts found applicant's injury industrial based on a history found to be credible by the WCJ, we will affirm the WCJ's decision. As noted above, Dr. Roberts did review the extensive medical records predating the industrial injury. Although both reporting physicians find extensive apportionment to applicant's preexisting conditions, that issue was deferred, and, like the WCJ, we express no opinion of the ultimate resolution of that issue.

Although we affirm the Findings of Fact, we are confused by the WCJ's statement in the Opinion on Decision and in the Report that "Dr. Roberts stepped outside of his role in this matter and opined as to injury arising out of and in the course of employment." (Opinion on Decision at p. 1, Report at p. 5.) Not only was it proper for Dr. Roberts to opine on the compensability of the injury, it was required, and was his statutorily defined role. (Lab. Code, § 4060, subd. (c).) Generally, and especially in cases of cumulative injury, medical causation cannot be established without corroborating expert medical opinion. (*Peter Kiewit Sons v. Ind. Acc. Comm. (McLaughlin)* (1965) 234 Cal.App.2d 831, 838-839 [30 Cal.Comp.Cases 188].) Here, Dr. Roberts properly opined regarding medical causation, and we relied upon his opinion in affirming the WCJ's decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact of December 8, 2020 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 8, 2021

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

**AARON SMITH
GLAUBER BERENSON VEGO
WAI & CONNOR**

DW/oo

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