

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

STEVEN PORTOLES, *Applicant*

vs.

**FRONTIER COMMUNICATIONS Insured by AMERICAN ZURICH INSURANCE
COMPANY, *Defendants***

**Adjudication Number: ADJ11428144
Riverside 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.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 9, 2021

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

**STEVEN PORTOLES
LAGORIO LAW GROUP
FLOYD SKEREN MANUKIAN LANGEVIN**

PAG/bea

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

REPORT AND RECOMMENDATION **ON PETITION FOR RECONSIDERATION**

I

INTRODUCTION

<u>Date of Injury:</u>	May 30, 2018
<u>Age on DOI:</u>	62
<u>Occupation:</u>	Special Equipment Installer
<u>Parts of Body Injured:</u>	Orthopedic Right Shoulder and Right Arm
<u>Identity of Petitioner:</u>	Defendant
<u>Timeliness:</u>	The petition was timely filed February 16, 2021
<u>Verification:</u>	The petition was verified
<u>Date of Award and Order:</u>	January 22, 2021
<u>Petitioner's Contentions:</u>	Petitioner contends the WCJ erred by finding: A. The QME report of Donald Kim, M.D., and his opinions were substantial medical evidence on the issue of PD; and future medical care extended to applicant's right arm.

Petitioner, defendant, by and through its attorney of record, has filed a timely, verified Petition for Reconsideration on February 12, 2021, challenging the Findings and Award dated January 22, 2021.

Applicant filed an Answer on February 19, 2021, rejecting Defendant's arguments, and asserting the petition should be denied in full.

In its Petition for Reconsideration, Petitioner argues that the Board acted without or in excess of its powers, the evidence does not justify the Findings of Fact and that the Findings of Fact do not support the decision.

It is recommended that reconsideration be denied.

II

FACTS AND PROCEDURAL HISTORY

It is undisputed that applicant was involved in a work-related vehicle accident on May 30, 2018, while employed as a special equipment installer for Frontier Communications.

At the first trial setting on October 5, 2020, the undersigned continued this matter due to insufficient time because of another case-in-chief that had priority. In the court's Minutes of Hearing dated October 5, 2020, the undersigned wrote: "Trial in another case with AOE/COE. Per Labor Code section 5701, the court will allow parties to obtain supplemental medical reports from PTP and QME regarding review of other doctor's reporting and impairment assessment. AA relying on

QME's 8% wpi & Def relying on PTP's 0 wpi." (MOH Trial 10/5/20, EAMS Doc ID 73344073.) This allowance of further development was reiterated in the Summary of Evidence on December 22, 2020. (MOH/SOE Trial 12/22/20, pg. 5:15-20.)

In the context of applicant's counsel's objection to the admissibility of the primary treating physician's ("PTP") report:

LET THE RECORD REFLECT: Applicant launched an objection or further clarification about the hearing held on October 5, 2020. The Court allowed the parties to develop the record and obtain a supplemental report from the QME & PTP. The QME did provide a supplemental report, but apparently, the PTP did not; and the Court finds good cause to overrule applicant's objection and allow the PTP report in to make a complete assessment and a proper ruling at the time a decision is rendered.

The case was then submitted on December 22, 2020, and after a formal rating was issued, the undersigned issued the Findings and Award on January 22, 2021. Applicant was awarded permanent disability at 19%, based on the panel Qualified Medical Examiner ("QME") reporting of Donald Kim, M.D., which included future medical care for applicant's right shoulder and right arm.

Defendant filed a Petition for Reconsideration on February 12, 2021, asserting Dr. Kim's report is not substantial medical evidence on the issue of permanent disability, and future care should be limited to applicant's right shoulder.

Applicant filed an answer on February 19, 2021.

III DISCUSSION

The OME Report of Donald Kim, M.D., is Substantial Medical Evidence on the Issue of Permanent Disability:

Substantial medical evidence is evidence "which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. WCAB (Bolton)* (1983) 48 CCC 566, 568.)

It has been said that "The substantial evidence test is not a vehicle for [a court] to superimpose its judgment upon that of the Board." (*Mendoza v. Workers' Comp. Appeals Bd.* (1976) 54 Cal.App.3d 820, 823 [127 Cal.Rptr. 173].) The court may not simply isolate evidence which supports or disapproves the board's conclusions and ignore other relevant facts which rebut or explain the supporting

evidence, but must examine the entire record. (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317 [90 Cal.Rptr. 355, 475 P.2d 451]; *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627, 637 [83 Cal.Rptr. 208, 463 P.2d 432]; cf. *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 727 [175 Cal.Rptr. 626, 631 P.2d 60].) The board's findings on factual questions are conclusive if supported by substantial evidence. (*Martori Brothers*, supra.)

An Award for benefits must be supported by substantial medical evidence (*LeVesque v. WCAB* (1970) 1 Cal.3d 635, 35 C.C.C. 16).

The court extensively reviewed the entire medical record submitted, assessed them with applicant's testimony, and concluded the QME's reports and opinions including the doctor's assessment of permanent disability were substantial medical evidence. Following applicant's Answer stated on page 4, Dr. Kim's opinion should be accepted as his report meets the requirements laid out in *Milpitas Unified School District vs WCAB (Guzman)* (2010) 187 Cal.App.4th 808 (also known as "*Guzman III*"). The doctor's reasoning is clear and reasonable. It is not simply picked out of any chapter or method in the guides to achieve a desired result. Instead, a fair and reasonable explanation is made for the upper extremity impairment with a reasonable comparison made within the upper extremity chapter to adequately support the impairment provided.

In contrast, the medical report by Matthew Diltz, M.D., was questionable because he did not review the QME's reports or explain his contrasting conclusion. Applicant had requested to exclude the PTP report and impairment chart by Dr. Diltz (Exhibits A and B). However, the court did not exclude Dr. Diltz's report because it was probative to the case and assisted in the decision making. The court questions defendant's strategy of asserting the QME's opinion on the issue of permanent disability is not substantial medical evidence, and solely relying on an incomplete reporting of the PTP who had failed to review the QME's opinion, especially when the court had offered the parties to development the record.

Petitioner's arguments are based on selected facts from Dr. Kim's QME reports and was not viewed from the totality of the evidence which included the applicant's testimony.

The court finds Dr. Kim's opinions mirrored applicant's testimony, and the doctor's assessment was reasonable and based on reasonable medical probability. He reviewed the PTP report of Dr. Diltz, and Dr. Kim supported the basis of the assigned whole person impairment. Dr. Kim stated:

Dr. Diltz did not consider the fact that the applicant required surgical intervention to the right shoulder. The treatment involved partial resection of the acromion which was comparable to someone undergoing distal clavicle resection. The examinee also had biceps

tenodesis which is a fairly significant surgery. Therefore, the examinee was provided impairment rating based on *Almaraz/Guzman* for analogy of 10% upper extremity impairment.” (QME report of Dr. Kim dated 11/3/20, Exhibit 9, pg. 2.)

Future medical care to the right arm is warranted.

Future medical care to applicant’s right arm is warranted. Petitioner has provided limited, selected excerpts from Dr. Kim’s report dated November 23, 2019 (Exhibit 3).

Highlighting the other facts coupled with applicant’s testimony, the court extended future medical care to applicant’s right arm. Dr. Kim had noted under the heading of Current Complaints that applicant complained of stiffness in the right arm, but no pain. (QME report of Dr. Kim dated 10/23/19, Exhibit 3, pg. 1.) Dr. Kim also stated applicant had biceps tenodesis. (Exhibit 9, pg. 2.) Dr. Kim’s recommendation of future medical care was generally described and did not limit treatment to applicant’s right shoulder. (Exhibit 3, pg. 10.) And Dr. Kim had previously imposed a prophylactic work restriction of avoiding repetitive overhead work with the right upper extremity. (Exhibit 3, pg. 9; Exhibit 4.)

**IV
RECOMMENDATION**

It is respectfully recommended that Defendant’s Petition for Reconsideration be denied.

Dated: February 23, 2021

Respectfully submitted,

Eric Yee
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE