WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LAKEISHA HOWARD, ***Applicant***

vs.

OPTUM 360 SERVICES, A UNITED HEALTH GROUP COMPANY; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA (TIL), ADMINISTERED BY SEDGWICK, ***Defendants***

Adjudication Numbers: ADJ16773219; ADJ16653843
Oakland 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.

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 April 8, 2025 and 60 days from the date of transmission is Saturday, June 7, 2025. The next business day that is 60 days from the date of transmission, is Monday, June 9, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Monday, June 9, 2025, 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 April 8, 2025, and the case was transmitted to the Appeals Board on April 8, 2025. 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 April 8, 2025.

Accordingly, we deny applicant's Petition for Reconsideration.

[1] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 3, 2025

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

LAKEISHA HOWARD
THE FLETCHER B. BROWN LAW FIRM
LAW OFFICES OF BRADFORD & BARTHEL, LLP

AS/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

AND

NOTICE OF TRANSMISSION TO THE APPEALS BOARD

I.

INTRODUCTION

1.	Applicant's Occupation:	Clerk
	Applicant's Age:	50
	Date of Claimed Injury:	Through May 22, 2022
	Parts of Body At Issue:	Left Knee and Left Ankle
2.	Identity of Petitioner:	Applicant
	Timeliness:	Yes
	Verification:	No[1]
3.	Date of Findings and Award:	March 11, 2025
4.	Applicant's Contentions:	That Dr. Granado's reporting is admissible pursuant to Labor Code § 4605; that the reporting from the panel qualified medical evaluator is not substantial evidence, that applicant established that she sustained a cumulative injury and a compensable consequence injury.[2]

[1] The verification was executed by a case manager, and not by an attorney or an authorized hearing representative listed on the October 9, 2024 "Authorization of Unlicensed Representation."

[2] There were not any findings regarding whether applicant suffered a compensable consequence related to the injury assigned case numbers ADJ10530484/ADJ10393287.

II.

STATEMENT OF THE CASE AND FACTS

Applicant claims injury arising to her left knee and ankle arising out of and in the course of her employment for defendant during the period ending on May 22, 2022. Previously, on November 11, 2014 applicant injured her left knee while working for defendant, and that injury resolved via Stipulations at 2% based on reporting from her primary treating physician, Dr. Lo. (ADJ10530484; ADJ10393287[3].)

On April 22, 2015, Eddie Lo, M.D., the primary treating physician for applicant's 2014 knee injury issued a report stating in relevant part that applicant had some pain with running or squatting too far, but applicant was able to tolerate full duty without significant limitations. (Exhibit 7, Report of Eddie Lo, M.D., April 22, 2015, p. 1.) Dr. Lo stated that applicant had a left knee meniscal tear, that applicant had a 1% whole person impairment and that applicant might be a candidate for arthroscopy if her knee continued to flare up. (*Id*. at pp. 6-7.)

On July 28, 2022, a physician at Kaiser stated that applicant fell while roller skating causing a left ankle fracture. (Exhibit 8, Kaiser Report, July 28 2022.)

On December 15, 2022, John Welborn, Jr. M.D., the qualified medical evaluator for this injury, issued a report stating that applicant believed that her roller-skating injury was a result of her left knee buckling, that applicant ultimately required left ankle surgery, and that applicant felt that her left ankle fracture caused an increase in her left knee pain. (Joint Exhibit 101, Report of Dr. Welborn, December 15, 2022, p. 3.) Dr. Welborn further stated that in 2018, applicant saw a physician for her left knee because the knee was catching but not giving way and that after approximately six months, applicant was discharged from care and had not sought further treatment to he left knee. (*Ibid*.) Dr. Welborn also stated that applicant had been unemployed since May of 2022. (*Id*. at p. 5.) Dr. Welborn discussed causation as follows,

[3] A filing error appears to have caused one injury to be assigned two case numbers that are venued at two district offices.

> It was my opinion that she did suffer a left knee contusion that did arise out of employment on November 11, 2014, which was eight years ago. She did have an MRI done in January 2015 that showed a partial thickness medial meniscus tear. She was evaluated by an orthopedic surgeon and was told that it did not need surgery. Apparently, she was not having any significant mechanical symptoms of locking or giving way at that time. She was granted 1% impairment by her surgeon but was subsequently granted 2% impairment on her settlement as well as future medical treatment. She subsequently went three years and did not get any treatment until January 2018 and was treated with more physical therapy and her left knee pain improved. It is my opinion that if her left knee buckled and gave way, that would not be industrially related and the injury happened when she was roller-skating and that her roller-skating accident that occurred in July 2022 was not due to her left knee small meniscus tear. Her increased left knee pain since falling would be due to this injury of falling and would not be industrially related and therefore, her falling and breaking her left ankle is not industrially related as a subsequent injury. It is more than likely possible that her fall while she was roller-skating may have caused increased injury to her left knee, however, it is my opinion that this would not be industrially related and would be a separate injury and since it was not while she was working, it is not industrially related.
>
> It is my opinion that her job is a sedentary job and would not cause a cumulative trauma to her left knee. I was asked by a lawyer what was the mechanism of injury. The mechanism of injury as noted above is that she banged her left knee on a desk back in 2014.
> (Id. at p. 24.)

Dr. Welborn discussed applicant's need for future medical care as follows,

> It is my opinion that Ms. Howard does need future medical care at this point on a nonindustrial basis for her left knee injury that occurred in July when she was rollerskating (sic) and this would be on a nonindustrial basis. I would recommend starting off with x-rays of her knee and then more than likely would need an MRI and further treatment would be dependent on findings on x-ray and MRI, possible cortisone injection, and possible knee arthroscopy.
> (*Id*. at p. 25.)

On September 14, 2023, Dr. Welborn testified in relevant part as follows: Applicant told him she had a specific injury in 2014 to her left knee. (Joint Exhibit 102, Deposition of Dr. Welborn, September 14, 2023, p. 6:6-6:24.) Applicant told him that her job involved working from home at a desk answering phones, keyboarding, mousing, and sitting for seven to eight hours a day. (*Id*. at p. 9:16-9:23.) Sitting would not cause a cumulative trauma to the knee, and standing up three times

out of the day would not cause such a cumulative trauma. (*Id*. at p. 11:11-11:21.) A cumulative trauma requires traumatic activity. (*Id*. at p. 12:17.) Applicant saw doctors for her left knee in January 2018, February 2018, March 2018, June of 2018 and January of 2021. (*Id*. at p. 15:13-15:24.) Applicant's symptoms in 2018 were not a new cumulative trauma, aggravation or an exacerbation of the 2014 injury. (*Id*. at p. 16:20-17:22.) Applicant's right knee pain was neither a new cumulative trauma nor a compensable consequence of the 2014 injury. (*Id*. at p. 17:23-18:7.) If applicant's knee gave way at the time that she was roller-skating, then the left ankle fracture would be a compensable consequence of the 2014 injury. (*Id*. at p. 18:19-18:23.) Applicant's employment would not cause applicant's meniscal tear to increase in size. (*Id*. at 24:19-24:21.) Applicant's sedentary job would not have caused a cumulative injury to her knee or ankle. (*Id*. at p. 30:1-30:5.)

On October 10, 2023, defendant filed a Declaration of Readiness to Proceed stating that discovery was complete, and on October 23, 2023, applicant objected to the DOR arguing that Dr. Welborn' s reporting was not substantial evidence. The resulting January 4, 2024 hearing was taken off calendar at the party's joint request.

On December 7, 2023 and December 12, 2023, applicant issued notices of deposition of Dr. Granado. (Exhibit 3, Deposition Notice, Exhibit 4, Deposition Notice.)

On December 15, 2023, applicant sent an email to defendant stating in relevant part, "[s]ee attached report from Dr. Granado. I believe I forwarded it to your office a while back." (Exhibit B, Email from Applicant's attorney.) The attached report reflected that Zylna Granado, D.C., charged $525 to consult and examine applicant. (Proposed Exhibit 1, Report of Dr. Granado, May 17, 2023, p. 1.) Dr. Granado issued a report stating that applicant "would limit her work activities and in pain when stooping, prolong sitting, bending, kneeling and lifting." (*Id*. at p. 4.) Dr. Granado recommended that applicant see a doctor, obtain an MRI of her left knee, and possibly consult with an orthopedist. (*Id*. at p. 6.) Dr. Granado discussed causation as follows,

> the fall that caused her to fracture her left ankle would not have occurred without the prior injury to the left knee. She sought out care periodically for pain in the left knee since the injury. She often complained that increased activity would increase pain levels beyond threshold. She would often feel fatigue in the left knee with increased activity. After roller skating, she felt her left knee fatigue, when she tried to step out of the rink to rest, as she turned, pivoting on her left knee, she fell to the ground breaking her left ankle. …

> Ms. Howard's left knee injury on November 11, 2014, contributed to the fall that led to the left ankle fracture. The probability of Ms. Howard falling due to left knee fatigue was highly likely.
> (*Ibid*.)

On January 16, 2024, defendant filed its Petition for Emergency Stay of Cross Examination arguing in relevant part that it received a notice of Dr. Granado's deposition and then Dr. Granado's report, that applicant never designated Dr. Granado as a treater, and that as a chiropractor, Dr. Granado was not qualified to issue opinions on knee surgery. (Petition for Emergency Stay.)

On January 16, 2024, applicant filed an objection to defendant's Petition stating in relevant part that "Dr. Granado was brought in on the case to give an opinion in regard to the denied cumulative trauma injury and the subsequent compensable consequence." (Joint Exhibit 103, Objection to Petition.)

On January 16, 2024, the acting Presiding Judge issued an order approving defendant's Petition for an Emergency Stay. (Order Approving.)

On May 8, 2024, Dr. Granado issued a second report stating in relevant part that,

> On July 28, 2022, Ms. Howard was roller skating. At some point, she felt the need to rest since her left knee started to fatigue. When she turned to step out of the rink, she felt her left knee give out and she fell to the ground. She fractured her left ankle due to the fall. She received surgery for the ankle and rehabilitation. Since breaking her left ankle, her left knee has increased in pain. Wearing a boot and using a scooter while the left ankle was healing has aggravated the existing left knee injury.
> I have reviewed all medical records that were available to at the time of Ms. Howard's initial evaluation on 4/26/2023 and 5/8/2024.
> To clarify, I believe Ms. Howard suffered an initial left knee injury on 11/11/2014 and a subsequent cumulative injury of 11/11/2014 to 5/22/2022. Since surgery was not recommended at the time of the initial injury to the left knee, Ms. Howard continued to suffer intermittent left knee pain with associated stiffness and fatigue. Due to inadequate treatment of the left knee leading to a now cumulative trauma, Ms. Howard fell and broke her left ankle on 7/28/2022.
> (Proposed Exhibit 2, Report of Dr. Granado, May 8, 2024, p. 3.)

On March 4, 2025, the matter progressed to trial on the issues of whether applicant sustained an injury arising out of and in the course of employment, the admissibility of Dr. Granado's reporting, and whether applicant could take the deposition of Dr. Granado.

In relevant part, applicant testified in relevant part as follows, she began working from home for defendant in June of 2013, and her job duties required her to sit at a desk and take phone calls for

eight hours a day. Her last day of working for defendant was May 22, 2022. In November of 2014, she injured her knee while working, and her doctor told her that she was not a surgical candidate. She returned to work because the job was sedentary, but her knee locked up with prolonged sitting. She followed her doctor's recommendations, took breaks, and used a sit stand desk. She saw a doctor in 2018 because she was having trouble walking. In July of 2022 she fell and injured her ankle while roller skating because her knee gave out. She saw Dr. Granado twice. The first time was at her attorney's referral and the second time she made her own appointment. Dr. Lo told her she did not need work restrictions.

On March 11, 2025, the Findings of Fact and Orders issued. As relevant herein, it was determined that the record did not require development, that applicant did not sustain a cumulative injury to her left knee and ankle, that Dr. Granado's reports were inadmissible, that applicant did not have the right to depose Dr. Granado, and that applicant was entitled to future medical care for her November 11, 2014 injury.

On April 4, 2025, applicant filed her Petition for Reconsideration.

III.

DISCUSSION

The Admissibility of Dr. Granado's Reports

Labor Code section 4060 provides that,

> (a) This section shall apply to disputes over the compensability of any injury.
> This section shall not apply where injury to any part or parts of the body is accepted as compensable by the employer.
> (b) Neither the employer nor the employee shall be liable for any comprehensive medical-legal evaluation performed by other than the treating physician, except as provided in this section. However, reports of treating physicians shall be admissible.
> **(c) If a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2**.
> (Lab. Code, § 4060(a)–(c), emphasis added.)

However, section 4064(d) provides that,

> The employer shall not be liable for the cost of any comprehensive medical evaluations obtained by the employee other than those authorized pursuant to

> Sections 4060, 4061, and 4062. However, **no party is prohibited from obtaining any medical evaluation or consultation at the party's own expense**. In no event shall an employer or employee be liable for an evaluation obtained in violation of subdivision (b) of Section 4060. **All comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board except as provided in Section 4060, 4061, 4062, 4062.1, or 4062.2**.
> (Lab. Code, § 4064(d), emphasis added.)

Further, section 4605 states that,

> **Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires. Any report prepared by consulting or attending physicians pursuant to this section shall not be the sole basis of an award of compensation**. A qualified medical evaluator or authorized treating physician shall address any report procured pursuant to this section and shall indicate whether he or she agrees or disagrees with the findings or opinions stated in the report, and shall identify the bases for this opinion. (Lab. Code, § 4605, emphasis added.)

The Court of Appeal addressed the interplay of these statutes in *Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal. App. 4th 1009. In *Batten*, the panel QME determined that applicant's claimed psychiatric injury was not industrially caused, and applicant retained her own medical expert, Dr. Gary Stanwyck, who opined that she had sustained a compensable psychiatric injury. Dr. Stanwyck's report was forwarded to the QME who issued a supplemental report commenting on the report. Ultimately, applicant petitioned for writ of review arguing that Dr. Stanwyck's report was admissible. The Court of Appeal acknowledged that only section 4061 of the five sections identified in section 4064(d) contains an express prohibition on the admissibility of a medical evaluation. (*Batten, supra*, 241 Cal. App. 4th at p. 1014.) The Court stated that,

> **the term "consulting physician" in section 4605 means "a doctor who is consulted for the purposes of discussing proper medical treatment, not one who is consulted for determining medical-legal issues in rebuttal to a panel QME."** ... Section 4605 provides that an employee may "provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires." **When an employee consults with a doctor at his or her own expense, in the course of seeking medical treatment, the resulting report is admissible**.
> (*Id*. at p. 1016, emphasis added.)

The *Batten* Court held that,

> Section 4605 permits the admission of a report by a consulting or attending physician, and section 4061, subdivision (i) permits the admission of an evaluation prepared by a treating physician. **Neither section permits the admission of a report by an expert who is retained solely for the purpose of rebutting the opinion of the panel qualified medical expert's opinion**. (*Ibid*.)

Here, applicant argues that Dr. Granado's reports are admissible pursuant to section 4605 because she obtained Dr. Granado's reports to discuss proper medical treatment. Applicant disputes that the recommendations were generic, and applicant further argues that the determination that Dr. Granado's reports were obtained for the sole purpose of rebutting Dr. Welborn's reports must be set aside because Dr. Granado did not review those reports. However, applicant's arguments are undercut by Dr. Granado's failure to provide any recommendations for medical treatment in her second report. (See proposed Exhibit 2.) Furthermore, applicant does not explain why the reports are needed to rebut the recommendations for future medical treatment that Dr. Welborn made since both physicians recommended the same course of treatment. Similarly, applicant does not address why generic recommendations for treatment would render a report admissible. Therefore, Dr. Granado's reporting is not admissible pursuant to section 4605.

The fact that Dr. Granado did not review Dr. Welborn's reporting does not affect the determination that her reporting was obtained for the sole purpose of rebutting Dr. Welborn's reporting. As previously explained, the primary focus of these reports is Dr. Granado's opinion is the causation of applicant's claimed knee and ankle injury. (See generally Exhibits 1 and 2.) Also, there is no evidence reflecting that applicant disclosed the existence of or served the reports until after Dr. Welborn's deposition took place. Therefore, Dr. Granado's reports are inadmissible. As her reports are inadmissible, there is no basis to allow applicant to depose Dr. Granado.

Causation

It is well established that all of a WCJ's decisions must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627.) 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).)

Additionally, applicant bears the burden of proving injury AOE/COE. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302; Lab. Code, §§ 5705; 3600(a); *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc).) The Supreme Court of California has long held that an employee need only show that the "proof of industrial causation is reasonably probable, although not certain or 'convincing.'" (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413.) "That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701.)

Here, it is undisputed that applicant resolved her November 11, 2014 left knee injury via Stipulations and that the settlement included a provision for medical treatment. It is *possible* that the November 11, 2014 injury contributed to applicant falling while roller skating. However, that claim was not activated for hearing, and the parties did not present any admissible reports addressing that issue. Accordingly, a finding regarding whether the rollerskating injury was a compensable consequence of the November 11, 2014 injury cannot be made at this time. (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Board en banc) [Appeals Board decisions "must be based on admitted evidence in the record."]

Further, Dr. Welborn found that the sedentary nature of applicant's job would not cause a cumulative trauma to applicant's knee or ankle. (Exhibit 101 at 24: Exhibit 102 at pp. 11:11-11:21, 16:20-18:7; 24:19-24:21, 30:1-30:5.) His determination [i s] substantial evidence as [i t] is based on an adequate medical history, and his description of applicant's job duties matches applicant's testimony. Further, Dr. Welborn's opinion regarding the causation of the meniscus tear that was discovered in 2015 does not form a basis to reject his reporting. Moreover, applicant's testimony does not support a finding that applicant had a cumulative injury because applicant did not testify as to any sort of change in the intensity or frequency of this symptom. Accordingly, applicant has not met her burden of proving an injury to her left knee and ankle through May 22, 2022.

Based upon the above, I recommend that applicant's Petition for Reconsideration be denied.

IV.

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.

Date: April 8, 2025

Alison Howell
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE