

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

ROSA VAZQUEZ MARTINEZ, *Applicant*

vs.

**WASTE MANAGEMENT OF ALAMEDA COUNTY,
insured by ACE AMERICAN INSURANCE COMPANY,
and administered by GALLAGHER BASSETT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ17318401
Oakland District Office**

**OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Defendant seeks reconsideration of the “Order Vacating Findings and Award October 15, 2024; Findings and Award” (F&A) issued on November 25, 2024, wherein the workers’ compensation administrative law judge (WCJ) vacated the Findings and Award issued on October 15, 2024 pursuant to WCAB Rule 10961 (Cal. Code Regs., tit. 8, § 10961) and found that while employed as a dispatcher by defendant on December 19, 2022, applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her neck, spine, and bilateral shoulders. The WCJ awarded applicant medical treatment.

Defendant contends that the WCJ erroneously found that applicant sustained injury AOE/COE to the neck, spine and bilateral shoulders because the record lacks substantial medical evidence and the WCJ relied solely upon applicant’s testimony.

We received an Answer from applicant.

We received a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have reviewed the contents of the Petition, the Answer, and the Report. Based upon our review of the record, and for the reasons set forth below, we will grant reconsideration, and, as our Decision After Reconsideration, we will rescind the F&A and return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On October 1, 2024, the matter proceeded to trial on the following issues:

1. Injury arising out of and in the course of employment.
2. Parts of body injured with applicant alleging the neck, bilateral shoulders and low back.
3. Need for further medical treatment.
4. Other issues: Defendant contends that discovery is ongoing and the QME reporting is not substantial evidence.

(Minutes of Hearing and Summary of Evidence, October 1, 2024, p. 2:19-23.)

The WCJ admitted exhibits entitled QME report by Naeem Patel, D.C. dated June 1, 2023, QME report by Naeem Patel, D.C. dated November 16, 2023, and QME report by Naeem Patel, D.C. dated June 1, 2024, into evidence. (*Id.*, p. 3:3-9.)

In the June 1, 2023 Report, Dr. Patel states:

I personally examined Mrs. Rosa Martinez on 6-1-2023 . . . The history was taken by direct questions on my part, supplemented by the use of a questionnaire completed by the examinee.

. . .

Mrs. Martinez describes the accident as follows: on 12-19-2022, states she has been working for Waste Management for 23 years and has a new injury to her neck, shoulders, upper back while doing various type activities at work. Mrs. Martinez states that her neck feels like something is pinching it, she has tingling and numbness sensation down both arms and her condition progressively has gotten worse. Mrs. Martinez states the first doctor she saw was on December 19, 2022, at Kaiser hospital where they told her to have some physical therapy. The following day she went to Concentra in San Leandro, where she was examined and referred out for chiropractic treatment and acupuncture.

Mrs. Martinez states that she had twelve chiropractic sessions and twelve acupuncture sessions after that, the insurance company closed out her case, that is when she used her private insurance and started getting treatment on her own through Kaiser hospital in Hayward.

. . .

Mrs. Martinez states she has previous work injury on 2-9-2011 to her neck, upper back and both shoulders, and states she never received an award for or disability for that work injury with Waste Management.

. . .

REVIEW OF RECORDS:

There were no medical records available for this examination.

. . .

DIAGNOSTIC IMPRESSION:

Mrs. Martinez has a cervical spine sprain/strain with cervical radiculitis, right and left shoulder sprain/strain. This diagnosis is highly likely work related to the industrial injury on 12-19-2022 and an [e]xacerbation to the 2-9-2011 injury.

DISCUSSION:

After examining Mrs. Martinez and taking a complete history, it is clear that she suffered a work-related injury on 12-19-2022 during the course of performing her usual and customary work duties. This trauma resulted in a cervical spine sprain/strain with cervical radiculitis, right and left shoulder sprain/strain.

Those injuries are consistent with the mechanism of injury and patient's complaints. It is my opinion that Mrs. Martinez is not yet permanent and stationary as of 6-1-2023 and needs future medical treatment as described later in this report. (Ex. 1, QME report by Naeem Patel, D.C., June 1, 2023, pp. 1-7.)

In the November 16, 2023 Report, Dr. Patel states:

I received your cover letter dated 10-30-2023 in which you have asked me to review the cervical MRI report and the deposition transcript dated 8-22-2023 of Mrs. Rosa Martinez.

The MRI of the cervical spine dated 7-19-2022 indicated focal central disc protrusion at CS-6 causing mild spinal canal stenosis. There is moderate bilateral foraminal stenosis at this level. Minimal disc bulge at C6-7 with no spinal canal or foraminal stenosis.

(Ex. 2, QME report by Naeem Patel, D.C., November 16, 2023, p. 1.)

In the June 1, 2024 Report, Dr. Patel states:

[Y]ou have asked some questions regarding Mrs. Rosa Martinez's injury. I was given a box of medical records however the defense attorney office has said only to review the medical records that were given to me more recently consisting of 214 pages as follows: . . .

(Ex. 3, QME report by Naeem Patel, D.C., June 1, 2024, p.1.)

On October 15, 2024, the WCJ found applicant sustained injury to her neck and bilateral shoulders, that she will require further medical treatment, and that all other issues are deferred. (Findings and Award, October 15, 2024, p. 1.)

In her October 15, 2024 Opinion, the WCJ states:

Applicant's complaints include feeling in her neck like something is pinching it, along with tingling and numbness sensation down both arms, and her condition has become progressively worse. (Ex. 1 at 2.) The QME met with applicant and examined her. The QME determined that her complaints were consistent with the

mechanism on injury and her complaints but determined that she was not permanent and stationary. (Ex. 1 at 6-7.)

...

The QME opines that there is a need for medical treatment for the neck and shoulders including chiropractic treatment, acupuncture, and massage therapy. (Ex. 2 at 2.) At trial on cross-examination, applicant testified that reference to pages 21 to 22 of her deposition, she was working on a computer and she felt discomfort throughout the day so when she pulled to box, which was on the ground, she felt numbness. (MOH/SOE at 6/15-19.) Applicant's testimony in the deposition as to her mechanism of injury is substantially the same as her testimony at trial. (Ex. L at 21-22.)

...

The QME reviewed applicant's deposition transcript and affirms his findings that the injury is industrial. Applicant testified in a credible and straightforward fashion and there is no contradictory evidence in the record. Therefore, Dr. Patel's findings are consistent with the mechanism of injury.

Applicant had a prior claim with her employer from 2011 involving the same body parts: arms, neck, and back. (MOH/SOE at 6/5-7.) The QME notes that the date of the prior injury is 02-09-2011 and there is no award or finding of disability for this injury. (Ex. 1 at 3.) Applicant testified that in 2011, she was injured picking up a box while typing all day and doing her job duties. (MOH/SOE at 6/5-7.) She sought medical treatment with Concentra they sent her to different treatments like acupuncture, and chiropractic. Since 2011, Applicant has continued medical treatment for these body parts.

As noted in the Minutes of Hearing/Summary of Evidence, applicant's attorney stated that there are over 7,000 pages of prior records in this case. (MOH/SOE at 3/23 to 4/2.) Applicant's attorney conferred with defense counsel, and it was defense counsel who selected the 214 pages of records for the QME to review in the third QME report. (Ex. 3 at 1.) After reviewing the records, the QME affirms his diagnosis of cervical sprain/strain with cervical radiculitis, right and left shoulder sprain/strain. (Ex. 3 at 10.) He concludes that causation "still remains the same" that applicant had an industrial related injury on 12-1-2022 during the course of her employment and that medical treatment is indicated. (Id.)

Based on the foregoing, the injury of 12-19-2022 to the cervical spine and bilateral shoulders is found industrial. Applicant is entitled to medical care for these body parts.

(Opinion on Decision, October 15, 2024, pp. 3-5.)

On October 12, 2024, defendant sought reconsideration of the October 15, 2024 findings, arguing that Dr. Patel's reporting failed to (1) identify mechanism of injury and how it caused injury to the lower back, neck and shoulders; (2) show that he reviewed adequate medical records

with respect to his reporting of June 1, 2023; or (3) confirm explicitly that he reviewed applicant's deposition transcript. (Petition for Reconsideration, October 12, 2024, pp. 8:9-16.)

In the Report, the WCJ states:

As indicated in MOH/SOE, Applicant appeared in person at trial. She was a forthright witness having no experience with the workers' compensation adjudication system. She was patient in recollecting the incident and her past medical history to clarify the questions before her. Defense counsel asked her about the injury several times and sought clarification of her deposition testimony, and applicant's testimony was clear and consistent.

...

Applicant testified that on 12-19-2022, she was working remotely at home due to the COVID pandemic. (Id.; and at 5/8-14.) During the day, her neck felt achy. (Id.) Towards the end of the day, she moved a box of paperwork, dragging the box across the floor and she felt a shock though her left arm and it became numb. (Id.) . . . This was the first time she had ever felt this degree of pain in her neck, which traveled up and down her arm, and she was unable move her arm. (Id.) She logged out of her work and went to the emergency room at Kaiser. (Id.)

...

The QME opined that applicant sustained an injury as was consistent with her history of complaints. (Ex. 1 at p 6.)

The second QME report dated 11-16-2023 states that at defendant's request, the QME reviewed . . . a cervical MRI dated 07-19-2022, taken before the date of injury. Importantly, applicant was questioned about the mechanism of injury in her deposition. (Ex. L at p. 17-18.)

...

A third QME report issued on 06-01-2024, admitted as Exhibit 3, now an entire year after the QME's first report. The QME states he was "given a box of medical records however the defense attorney office has said to only review the medical records that were given to me more recently consisting of 214 pages." (Ex. 3 at p. 1.) At trial, applicant's attorney made an offer of proof that there are 7,000 pages of records and it was defense counsel who selected the 214 pages for the QME to review to avoid further delay in the medical-legal discovery. (MOH/SOE at p. 3-4.)

From Dr. Patel's reporting, defendant neglected to provide the 12-19-2022 Kaiser emergency room record to the QME. Defendant did not file the emergency room report as an admissible exhibit.

...

Findings and Award and an Opinion on Decision first issued on 10-15-2024 a few weeks after the trial. Defendant filed a Petition for Reconsideration on 11-12-2024 arguing that the QME did not provide a description of the mechanism of injury, nor did Dr. Patel adequately review applicant's significant history of industrial injury to the same body parts while employed by defendant. This is despite it was defendant who selected all the records for the QME's review.

...

My latest decision of 11-25-2024 focuses on the mechanism of injury and that applicant had gone to the emergency room immediately but allowed further development of the record by the QME on nature and extent. Defendant now petitions for reconsideration of the 11-25-2024 decision.

...

[A]pplicant testified that on 12-19-2022 during the day, her neck felt achy. (MOH/SOE at p. 4/lines 23-25; p. 5/8-14.) Towards the end of the day, she moved a box of paperwork, dragging the box across the floor and she *felt a shock* through her left arm *and it became numb*. (Id.) She was scared because *she could not move her hand* and thought she was having a heart attack. She testified that she had had previous discomfort in her neck, but it was never so bad that she could not move her arm. (Id.) This was the *first time* she had ever felt this degree of pain in her neck, which traveled up and down her arm, and she *could not move her arm*. (Id.) After she logged out from work, she went to the emergency room at Kaiser. To be clear, applicant suffered pain and immobility like never before and went to the emergency room immediately.

...

Applicant continues to work so there is no issue as to temporary disability indemnity. Applicant should be entitled to medical treatment without further delay.

(Report, pp. 2-7.)

DISCUSSION

I.

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:

(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 January 3, 2024, and 60 days from the date of transmission is March 4, 2025. This decision is issued by or on March 4, 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 January 3, 2024, and the case was transmitted to the Appeals Board on January 3, 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 January 3, 2024.

II.

Defendant contends that the WCJ erroneously found that applicant sustained injury AOE/COE to the neck, spine and bilateral shoulders because the record lacks substantial medical evidence and the WCJ relied solely upon applicant’s testimony.

All decisions of the WCAB must be supported by substantial evidence such as medical opinion. (Labor Code §§ 5903, 5952; *Garza v. Workmen's Comp. App. Bd. (Garza)* (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500].) 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).) “Medical reports and opinions 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 and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].)

Here, as stated by the WCJ in the Report, the finding of injury to the neck, spine, and bilateral shoulders in the F&A is based upon applicant's testimony as to how the injury occurred and the fact that she sought emergency room treatment immediately. (Report, p. 5.) Under the foregoing authorities, however, substantial medical evidence is required to establish injury AOE/COE. Therefore, we will evaluate QME Dr. Patel's reporting to determine whether the injury finding is supported by substantial medical evidence.

In the June 1, 2023 Report, Dr. Patel states that he obtained applicant's medical history by way of oral questions and a written questionnaire filled out by applicant. (Ex. 1, QME Report by Naeem Patel, D.C., June 1, 2023, p. 1.) After examining applicant, Dr. Patel diagnosed her with a cervical spine sprain/strain with cervical radiculitis, and right and left shoulder sprain/strain resulting from the December 19, 2022 injury, an injury described as an exacerbation of her February 9, 2011 injury. (*Id.*, p. 6.) Dr. Patel further opined that the "work-related injury on 12-19-2022 [occurred] during the course of performing her usual and customary work duties [and] . . . [t]hose injuries are consistent with the mechanism of injury and patient's complaints." (*Id.*, pp. 6-7.)

In the June 1, 2023 Report, Dr. Patel states that he did not review any of applicant's medical records, does not disclose what applicant told him as to how the December 19, 2022 injury occurred beyond that it was "while doing various type activities at work," and does not summarize or attach the questionnaire applicant filled out regarding her medical history. (*Id.*, pp. 1-7.)

In the November 16, 2023 Report, Dr. Patel states that he was asked to review the July 2022 cervical MRI report and applicant's deposition transcript dated August 22, 2023, but does not affirmatively state that he reviewed the transcript. (Ex. 2, QME Report by Naeem Patel, D.C., November 16, 2023, p. 1.)

In the June 1, 2024 Report, Dr. Patel states that he was given a box of medical records but defendant's attorney told him to review only 214 pages of medical records. (Ex. 3, QME Report by Naeem Patel, D.C., June 1, 2024, p. 1.)

Because this record does not reveal whether Dr. Patel obtained from applicant or her deposition transcript a specific description of how the December 19, 2022 injury occurred, the

basis for Dr. Patel's opinion that her December 19, 2022 injury was consistent with the mechanism of injury remains undisclosed.

Although this record shows that Dr. Patel reviewed 214 pages of medical records and not "thousands of pages of Kaiser records that documented medical treatment . . . over a decade prior to the alleged 12/19/22 injury," it was defendant who restricted Dr. Patel's review to those 214 pages of records. (Petition, p. 8:13-17; Ex. 3, QME report by Naeem Patel, D.C., June 1, 2024, p. 1.) It follows that Dr. Patel's alleged failure to obtain an adequate medical history resulted from defendant's own conduct and not any conduct on the part of applicant.

Hence, we conclude that while Dr. Patel's reporting is based upon pertinent facts and an adequate medical examination, it remains unclear as to whether it is based on adequate medical history.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [72 Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924]; Lab. Code §§ 5701, 5906.) The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [94 Cal. Rptr. 2d 130, 65 Cal.Comp.Cases 264].) The "Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee." (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal. App. 4th 928, 937-938 [88 Cal. Rptr. 2d 516, 64 Cal.Comp.Cases 986].) The preferred procedure to develop a deficient record is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Per *McDuffie*, if the existing physicians cannot cure the need for development of the record, the selection of an agreed medical evaluator (AME) should be considered by the parties. If the parties cannot agree to an AME, then the WCJ can appoint a physician to evaluate applicant pursuant to Labor Code section 5701.

Given that the record is unclear that Dr. Patel's reporting is based on adequate medical history, we conclude that the record should be further developed on that issue. In our view, the record should be further developed as to the (1) information Dr. Patel received from applicant or her deposition transcript regarding the mechanism of injury; and (2) opinions of Dr. Patel regarding the thousands of pages of Kaiser records he received but was told by defendant not to review.

In addition, the record does not show that Dr. Patel reviewed any records reflecting applicant's (1) Concentra treatment following the 2011 injury and on December 20, 2022; and (2) Kaiser's emergency room treatment of December 19, 2022. (Opinion on Decision, October 15, 2024, pp. 3-5; Report, p. 2-7.) In our view these records should also inform Dr. Patel's reporting.

Accordingly, we will rescind the F&A and return the matter to the trial level so that the record may be developed as to the issue of whether Dr. Patel's reporting is based on adequate medical history.

Accordingly, we will grant reconsideration and, as the Decision After Reconsideration, we will rescind the F&A and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the “Order Vacating Findings and Award October 15, 2024; Findings and Award issued on November 25, 2024” is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration by the Workers’ Compensation Appeals Board that the “Order Vacating Findings and Award October 15, 2024; Findings and Award” issued on November 25, 2024 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS’ COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 4, 2025

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

**ROSA VAZQUEZ MARTINEZ
BOXER & GERSON
SLADE J. NEIGHBORS**

SRO/cs

I certify that I affixed the official seal of
the Workers’ Compensation Appeals
Board to this original decision on this date.
CS