

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

FERNANDO PARDILLA, *Applicant*

vs.

**CENTRAL CONCRETE SUPPLY COMPANY, INC., permissibly self-insured,
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ13407033
San Francisco District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on April 28, 2021, wherein the WCJ found in pertinent part that applicant was temporarily totally disabled for the period from January 16, 2020, through November 26, 2020, and that he was entitled to temporary disability indemnity benefits for that period of time.

Defendant contends that: 1. The cause of applicant's temporary total disability (TTD) cannot be determined because applicant has not reached maximum medical improvement (MMI) status; 2. The report from orthopedic qualified medical examiner (QME) Jeffrey T. Holmes, M.D., is not substantial evidence on the issue of applicant's TTD status; 3. The opinions of primary treating physician (PTP) Adam J. Stoller, M.D., are not substantial evidence on the issue of applicant's TTD status; 4. The F&A does not address the Employment Development Department (EDD) lien or the issue of child support owed by applicant; and 5. The award of temporary disability indemnity benefits prior to applicant reaching MMI status is a denial of defendant's due process rights.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from applicant.

We have considered the allegations in the Petition for Reconsideration (Petition) and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated

by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant claimed injury to his neck, back, bilateral shoulders, bilateral arms, and gastrointestinal system, while employed by defendant as a concrete mixer driver on December 21, 2019. The injury claim for applicant's neck, back, and bilateral arms was accepted; the claim as to his bilateral shoulders and gastrointestinal system was denied.¹

On the day of the injury applicant received treatment at the Kaiser Permanente emergency department by Bill Andrew Plautz, M.D. (Def. Exh. L, Dr. Plautz, December 21, 2019.) Dr. Plautz noted that applicant's "chief complaint" was neck pain, and that applicant complained of "acute exacerbation of chest pain this morning while at work. ... He felt a snap in his neck." (Def. Exh. L, p. 1.) The doctor later stated that applicant, "...likely has degenerative disk disease. He may have acute disk rupture." (Def. Exh. L, p. 2.) On December 23, 2019, applicant received treatment at Concentra by Jorge Lopez, PA. The treatment report states:

The patient had finished pouring concrete and folded his chute when he felt a "pop" in his neck with acute onset of pain in upper back and arm, along with bilateral arm weakness. Was seen by PCP at Kaiser and was instructed to follow-up ortho spine. Currently the patient has moderate dull discomfort, worsens with lifting, improves with rest, radiates to the upper extremities and is constant. Had previously injured neck in work related incident in 2008 and had surgery done in 2009. Had most recent MRI done in 2/2019. ... ¶ ... History and mechanism of injury were obtained directly from the patient, unless otherwise noted, and appear to be consistent with presenting symptoms and physical exam. (Def. Exh. M, Jorge Lopez, PA, December 23, 2019, pp. 2 – 3.)

Applicant underwent a course of conservative treatment for the December 21, 2019 injury, performed by Yung Chen, M.D., starting January 2, 2020, and continuing through August 28, 2020. In his initial report, Dr. Chen noted:

Currently, he reports there is constant sharp pain and numbness in the bilateral aspects of the lumbar spine, with sharpness and numbness in right lower extremity, with cramping in the calves. Certain movements, such as sitting, standing, and walking, aggravate the pain whereas resting alleviate the pain. He

¹Applicant had previously sustained an industrial injury to his neck and right shoulder on November 20, 2008 (ADJ7096606) for which he underwent a cervical fusion surgery in July 2009. (See Minutes of Hearing and Summary of Evidence (MOH/SOE), April 13, 2021, p. 2.)

rates his pain intensity as a 9-10/10. ¶ He also reports of a constant aching pain and numbness in the bilateral aspects of the cervical spine, with intermittent tingling and weakness radiating down the bilateral upper extremities. (App. Exh. 1, Dr. Chen, January 2, 2020, p. 1.)

During the course of treatment, Dr. Chen consistently stated that applicant was “off work” as a result of his December 21, 2019 injury. (See App. Exhs, 1 – 10, Dr. Chen, January 2, 2020 – August 28, 2020.)²

On May 12, 2020, QME Dr. Holmes evaluated applicant regarding the December 21, 2019 injury. (App. Exh. 15, Dr. Holmes, May 12, 2020.) Dr. Holmes examined applicant and took a history but was not provided medical records to review. The doctor noted that in 2009 applicant had a two-level cervical spine fusion surgery as a result of an industrial injury. (App. Exh. 15, p. 2.) He diagnosed applicant as having a cervical, thoracic, and lumbar spine strain, and stated:

Mr. Pardilla injured his spine at work. He was lifting a chute [sic] on a concrete cement mixer truck on 12.21.2019. He had the acute onset of pain and a pop in his spine. He had persistent symptoms. The patient has not achieved maximum medical improvement. ... ¶ ... In this patient's case, his symptoms are due, at least in part, to the acute trauma of 12.21.2019. Apportionment may or may not be indicated when he achieves maximum medical improvement. I do not have the information upon which to base apportionment currently. (App. Exh. 15, p. 6.)

Dr. Holmes was provided medical records to review, and in his supplemental report regarding those records, he stated that:

They support my opinion that the patient is not yet permanent and stationary for rating purposes. Once the patient achieves maximum medical improvement, I would be happy to re-evaluate him and finalize my opinions on the multiple issues in this workers’ compensation case. (App. Exh. 16, Dr. Holmes, August 25, 2020, p. 3)

In his August 28, 2020 report, PTP Dr. Chen indicated applicant would be “off work” until September 25, 2020, the date of his next appointment. (App. Exh. 10, Dr. Chen, August 28, 2020, p. 4.)

Adam J. Stoller, M.D., became applicant’s PTP as of September 16, 2020. (App. Exh. 11, Dr. Stoller, September 16, 2020.) In his first report Dr. Stoller stated that he reviewed a June 13,

² Dr. Chen had previously treated applicant for his November 20, 2008 injury. (See Def. Exhs. C – K, May 13, 2019 – December 13, 2019.)

2020 MRI of applicant's cervical spine which showed post cervical anterior discectomy and fusion status and he reviewed a January 22, 2020 lumbar spine MRI showing neural foraminal narrowing (narrowing of the spinal canal/nerve compression) at various levels and an acute disc herniation at the L4-L5 level. (App. Exh. 11, p. 5.)

QME Dr. Holmes' deposition was taken on October 27, 2020. (Def. Exh. O, Dr. Holmes, October 27, 2020, deposition transcript.) His testimony included the following:

Q. ... So is there any doubt in your mind, Dr. Holmes, that Mr. Pardilla sustained -- or has there been any evidence provided to you that would indicate that he did not sustain an injury on 12-21-19?

A. I believe based on what I have, which is limited, that the patient sustained a specific traumatic incident on 12-21-19 to the three sections of the spine: the cervical spine, the thoracic spine, and the lumbar spine.
(Def. Exh. O, p. 21.)

Q. Doctor, just to clarify, you do not know if this is an exacerbation or an aggravation of the prior injury at the current time?

A. Cervical spine had prior injury, prior surgery, and apparently prior award. I don't have enough information to opine on any of that. That is likely going to be either the sole cause or an apportionable cause of the patient's cervical spine when it's all said and done at MMI.
(Def. Exh. O, pp. 22 -23.)

In his permanent and stationary report, PTP Dr. Stoller stated:
He cannot work currently due to the pain in his leg, the weakness in his right arm and hand, the difficulties with movement of his neck, his upper back, and his lower back.
(Def. Exh. P, Dr. Stoller, November 30, 2020, p. 2.)

Dr. Stoller later explained:

There is no cause for apportionment for the lumbar spine. He clearly has a pathology that is on the right side that is consistent with his clinical findings. There is also a pattern of injury with herniation that is consistent with an acute event and he developed the symptoms after this event on 12/21/19. ¶ The patient has been on total temporary disability from 12/21/19 until the current time. This is completely appropriate. ...
(Def. Exh. P, p. 4.)

The parties proceeded to an expedited hearing on April 13, 2021. The issues submitted for decision included temporary disability and whether applicant's temporary disability status was the

result of the December 21, 2019 injury or his previous 2008 injury (ADJ7096606). The EDD lien was deferred. (MOH/SOE, April 13, 2021, p. 6.)

DISCUSSION

We first note that an aggravation is an increase in the severity of a pre-existing condition where the underlying pathology is permanently moved to a higher level. An exacerbation is a temporary increase in the symptoms of a pre-existing condition that returns to its prior level within a reasonable period of time. The acceleration, or “lighting up” or “aggravation” of a pre-existing condition is regarded as an injury for workers’ compensation purposes. (*Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615, 617 [1935 Cal. LEXIS 590]; *Zemke v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358]; *Reynolds Electrical & Engineering Co. v. Workers’ Comp. Appeals Bd. (Buckner)* (1966) 65 Cal.2d 438 [31 Cal.Comp.Cases 421]; *Argonaut Insurance Company v. Industrial Acc. Comm. (Harries)* (1964) 231 Cal.App.2d 211 [29 Cal.Comp.Cases 279].)

It appears that all of defendant’s arguments are based on its underlying premise that until applicant’s cervical spine condition reaches MMI/permanent and stationary status, it cannot be determined whether the condition is an aggravation or an exacerbation of applicant’s prior cervical spine injury. Review of the record indicates that in this matter (case number ADJ13407033), there is no dispute that on December 21, 2019, applicant sustained an injury AOE/COE to his neck, back, and bilateral arms. Defendant has accepted applicant’s claim of injury to those body parts. In case number ADJ7096606 the parties previously stipulated that in 2008 applicant sustained injury to his neck and right shoulder.

As noted above, QME Dr. Holmes diagnosed applicant as having a cervical, thoracic, and lumbar spine strain. (App. Exh. 15, p. 6.) At his deposition, Dr. Holmes testified that applicant sustained an injury to his cervical spine, thoracic spine, and lumbar spine on December 21, 2019. (Def. Exh. O, p. 21.) He then stated that until applicant reached MMI, he would not be able to determine whether the cervical spine injury was an exacerbation or an aggravation of the prior injury. (Def. Exh. O, pp. 22 -23.) Also, PTP Dr. Stoller stated that applicant could not work because of “the difficulties with movement of his neck, his upper back, and his lower back.” (Def. Exh. P, p. 2.) He later explained that the L4-L5 level disc herniation was “consistent with an acute event and he developed the symptoms after this event on 12/21/19.” (Def. Exh. P, p. 4.)

The record is clear that although applicant previously had an injury to his neck and right shoulder, based on the opinions of Dr. Holmes and Dr. Stoller, the December 21, 2019 injury included applicant's mid and low back. Although the cervical spine may be an aggravation or an exacerbation of the previous injury, the thoracic and lumbar spine injury is a separate injury not subject to the "aggravation or exacerbation" argument.

Defendant is correct that applicant's condition has not reached MMI status. However, as discussed above, Dr. Holmes diagnosed a thoracic and lumbar spine injury (in addition to the cervical spine) and Dr. Stoller stated that applicant's L-4 L-5 level disc herniation was consistent with the December 21, 2019 injury. He also stated applicant was unable to work due to the difficulties with movement of his neck, his upper back, and his lower back.

Thus, the reports from Dr. Chen, Dr. Holmes, and Dr. Stoller are substantial evidence that applicant was temporarily totally disabled, as a result of the December 21, 2019 injury, during the period of time awarded by the WCJ. We see no factual or legal basis for disturbing the F&A.

Regarding the issue of the EDD lien, we note that Finding #3 states that applicant is entitled to indemnity benefits, "the exact amount to be adjusted by the parties with WCAB jurisdiction reserved." (F&A, p. 1) Since the EDD lien was deferred it appears that the lien is a factor to be considered by the parties in determining the amount of indemnity to be paid to applicant. The parties' settlement of the EDD lien could resolve the issues of the amount of indemnity owed to applicant and credit, if any, to be applied to indemnity benefits.

Finally, it must be noted that the issue of "child support" was not raised at trial. An issue that could have been raised at trial cannot be raised for the first time in a petition for reconsideration. (*Davis v. Interim Health Care* (2000) 65 Cal.Comp.Cases 1039, 1044 (Appeals Board en banc).)

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued by the WCJ on April 28, 2021, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 22, 2021

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

**FERNANDO PARDILLA
LAW OFFICE OF LAEL ABAYA
MATIAN LAW GROUP**

TLH/pc

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

INTRODUCTION

- 1. IDENTITY OF PETITIONER:** Defendant
- 2. TIMELINESS:** Petition was timely filed.
- 3. VERIFICATION:** A verification is attached.
- 4. DATE OF INJURY (DOI):** Specific injury on 12/21/2019 to neck, back and bilateral upper extremities (Admitted) other body parts are claimed.
- 5. OCCUPATION AT DOI:** Concrete Mixer
- 6. PETITIONER'S CONTENTIONS:** This matter was set for an expedited hearing on the issue of whether the applicant is entitled to temporary disability (TD) indemnity from 1/16/2020 through 11/26/2020 with regard to accepted industrial injury in the **2019 claim - ADJ13407033**. Petitioner contends that the WCJ erred in finding that applicant is entitled to TD as awarded.

DISCUSSION – RESPONSE TO DEFENDANT'S CONTENTION

Defendant has filed a Petition for Reconsideration, disputing the findings and award issued by the undersigned on 4/28/2021. The response to defendant's contentions were set forth in my Opinion on Decision set forth below:

OPINION ON DECISION

I. FACTS

A. 2008 Industrial injury (ADJ7096606): Applicant while employed on 11/20/2008 as a Concrete Mixer Driver, by Central Concrete, sustained an admitted industrial injury to his right shoulder and neck. The underlying case settled by Award approving Stipulations and Request for Award on 11/17/2020 in the amount of 35% permanent disability with a provision for future medical treatment.

B. 2019 Industrial injury (ADJ13407033) On 12/21/2019, FERNANDO PARDILLA, at 59 years of age, while employed as a Concrete Mixer Driver, by Central Concrete, sustained an accepted industrial injury to his neck, back, and bilateral arms while employed by defendant (permissibly self-insured and adjusted by Sedgwick) Applicant claims to have sustained an industrial injury to his bilateral shoulders and gastrointestinal system, as part of this 2019 industrial injury.

II. ISSUE

This matter was set for an expedited hearing on the issue of whether the applicant is entitled to temporary disability indemnity from 1/16/2020 through 11/26/2020 with regard to accepted industrial injury in the **2019 claim - ADJ13407033**.

III. PQME Determined TTD Period

The PQME in this industrial injury case is Dr. Jeffrey Holmes. In his report signed and dated 6/12/2020 at the bottom of page 6 (Exhibit 15), Dr. Holmes stated:

“In this patient’s case, his symptoms are due, at least in part, to the acute trauma of 12.21.2019.”

The sentence above refers to “causation of injury” and meets (along with the multitude of other medical support in evidence) the applicant’s burden of proof on the AOE/COE issue. Dr. Holmes does go on to explain that he is not yet able to determine “causation of disability” and to apportion between non-industrial factors of disability and industrial factors of disability until the applicant is permanent and stationery (P&S) or MMI, which status applicant has not yet achieved.

“Causation of injury” and “causation of disability” are different concepts with different standards of proof, and different medical – legal analyses. See the California Supreme Court decision of *South Coast Framing v. WCAB (Clark)*, (2015) 80 Cal Comp Cases 489, of the distinction between these two concepts and how they are to be applied in the California Workers’ Compensation system.

Since the applicant is not yet P&S, we are not yet concerned with “causation of disability” and level of permanent disability. Our current focus on payment of TD means that we are concerned with the medical determination for “causation of injury.” Nowhere in the record is there evidence that the QME Dr. Holmes has retracted his determination that, “In this patient’s case, his symptoms are due, at least in part, to the acute trauma of 12.21.2019.” Therefore, TD is due and owing from 1/16/2020 until defendant began to pick up TD for this claim on 11/26/2020.

Defendant seems to argue that the QME’s language seems to indicate that only “part” of the cause for applicant’s current injury is due to the 2019 incident, and that it will not be clear until the applicant is P&S whether the 2019 industrial incident, the 2008 industrial incident or a non-industrial motor vehicle accident caused the injury. As discussed above, these distinctions may be relevant for determining apportionment with regard to permanent disability, they are not relevant as to liability for temporary disability. The California Supreme Court in

Granado v. WCAB, (1968) 33 CCC 647 was quite clear in discussing its rationale for not allowing “apportionment” to non-industrial causes with regard to either medical treatment or temporary disability. We will follow the holding in ***Granada, supra***, in this case.

IV. Applicant is Entitled to TTD from 1/16/2020 – 11/26/2020

Therefore, based on the substantial medical evidence in this case and as discussed above, applicant was TTD from **1/16/2020 – 11/26/2020** and is entitled to indemnity benefits in accordance with this finding, the specifics of which are to be determined by the parties with WCAB jurisdiction reserved.

V. All other issues, such as the EDD Lien, penalties, sanction and attorneys’ fees under the labor Code are deferred at this time.

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the petition for reconsideration filed by defendant herein be **DENIED** on the merits.

DATE: 5/26/2021
Colleen S. Casey
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE