

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

Case No.

Applicant,

vs.

MARKET;
and
COMPANY,

Defendants.

**FINDINGS AND ORDER
and
OPINION ON DECISION**

The above-entitled matter having been heard and regularly submitted, the Honorable
Workers' Compensation Judge, now decides as follows:

FINDINGS OF FACT

1. Applicant, _____, born _____ 1977, while employed during the period 5/18/2020 through 5/18/2021 as a deli worker, in Sunnyvale, California, by _____ did not sustain an injury arising out of and arising in the course of employment to the left hand and left wrist.
2. On the date of injury, the employer's workers' compensation insurance carriers were _____ for dates 1/01/2021 through present, and _____ Insurance Company for dates 1/01/2020 through 12/31/2020.
3. Applicant's Exhibit 2, the 7/15/2022 report of Dr. _____ is admitted into evidence.
4. All other issues are rendered moot by the finding that there was no industrial injury arising out of and occurring in the course of employment during the period 5/18/2020 through 5/18/2021.

ORDER

ORDER IS MADE in favor of Defendant and against Applicant as follows:

- 1) Liability for injury as set forth in Findings No. 1 and 2;
- 2) Discovery as set forth in Findings No. 3;
- 3) All other issues as set forth in Findings No. 4.

DATE: 02/22/2023

WORKERS' COMPENSATION JUDGE

DATE: 02/23/23
Served by mail on all parties listed on the
Official Address record on the above date.
BY:

SERVICE:

OPINION ON DECISION

ADMISSIBILITY OF EXHIBIT 2 (7/15/2022 REPORT OF DR.

Defendant objects to the admissibility of Applicant's Exhibit 2, the 7/15/2022 report of PTP Dr. [REDACTED] on the basis that applicant lacked due diligence in requesting the report and that applicant misused the discovery process to buy time to obtain the report. Defendant asserts the report is not based on substantial medical evidence and is unsupported by any other doctor's causation analysis.

The 5/11/2022 MSC was ordered off calendar to allow for the QME deposition that had been set in July. Defendant argues that "the PQME deposition notice was a sham to buy time at the MSC of May 11, 2022, for other discovery with the PTP that had been commenced literally on the eve of the MSC and which would have been clearly inadmissible had the matter been set for trial at that time." (Defendant's Pre-Trial Brief, p. 6) Whether this was in fact applicant's counsel's intention at the time is unknown. However, the 7/15/2022 report of PTP Dr.

[REDACTED] was served on defendant the day of the MSC and listed on the pre-trial conference statement as an exhibit. Defendant had an opportunity to request additional time for further discovery, based on receipt of the report on the day of the MSC. If defendant had so requested and the matter had been set for trial over defendant's objection, then removal would have been defendant's remedy. As such, applicant's Exhibit 2, the 7/15/2022 report of PTP Dr.

[REDACTED] is hereby admitted into evidence.

INJURY AOE/COE

Applicant testified she is currently employed in the deli department for employer and has been has been working there since May of 2007. Her duties include preparing guacamole, shrimp ceviche, salads and salsas. She packs cream, transports cheeses, slices ham, and washes vegetables. She uses machinery weighing approximately 20 pounds and applies force on the machinery when cutting. (12/5/2022 MOH/SOE, p. 2: 35-44) Her shift was seven to eight hours per day and would use her hands most of the shift. (12/5/2022 MOH/SOE, p. 3: 1-6)

On 5/20/2021, applicant filed a claim for cumulative trauma for dates 5/18/2020 through 5/18/2021 for injury to her left and right arm and left and right wrist.

On 6/17/2021, after years of undergoing treatment for her hands with Kaiser Permanente Medical Group (Kaiser), applicant started treating with Dr. Dr.

diagnosed applicant with left wrist/thumb pain, left thumb contracture, left hand atrophy and right hand/wrist surgery in 2016 and recommended work restrictions as applicant was working in the deli department. Dr. indicated the findings were consistent with a “CT injury from working in her job for years” and requested the Kaiser records for review. (Exhibit 13)

On 8/16/2021, defendant Insurance Company denied the claim. (Exhibit A)

On 10/06/2021, Panel Qualified Medical Examiner (QME) M.D. examined applicant and issued his first report. Dr. indicated he had reviewed 2,261 pages of Kaiser Medical records and current primary treating physician records and provided a summary of records in his report. On page 8 Dr. opined,

Based on today's examination and careful review of extensive medical records from Kaiser dating back to January of 2016, it appears from the records that the patient had multiple encounters with multiple medical staff members for pain in her left wrist, but at no time was there any reference to a work-related injury.

Dr. _____ indicated that at the present time, there did not appear to be sufficient medical evidence for a work-related cumulative trauma claim. He noted that the symptoms she was currently experiencing were already present prior to her return to modified deli duties and are all due to poor surgical results from her left carpometacarpal arthroplasty surgery done on a non-industrial basis. (Exhibit B)

On 3/08/2022, Dr. _____ issued a supplemental report in response to a written request by applicant's counsel clarifying the date of the alleged cumulative trauma to be 5/18/2020 through 5/18/2021, and not beginning on 5/18/2021 as Dr. _____ had indicated in his October 2021 report. Three progress reports by Dr. _____ not available at the time of the initial evaluation, were included with the request. Following review of the reports, Dr. _____ opined his overall impressions as expressed in his 10/06/2021 QME evaluation remained unchanged. (Exhibit C)

On 5/31/2022, Dr. _____ issued a third report, also in response to a written request by applicant's counsel requesting further clarification as to why Dr. _____ felt the cumulative trauma claim should not be accepted as industrial. On page 3, Dr. _____ opined,

First, it is important to note that the extensive medical records from Kaiser dating back to January of 2016 show the patient had multiple encounters with multiple medical staff members for complaints of pain in her left wrist and thumb but during all those encounters at no time was there any reference by the patient or the evaluating medical staff that there was work related injury component.

I found that extremely important in making my final opinions.

...

However, the patient, as I indicated in review of her medical records, always does poorly recovering from any surgery of any type and following surgeries on her thumb, this was again true. After the patient had been released back to a trial of modified duties beginning on 05/18/2021, because of persistent symptoms, it

was for the first time alleged that she had sustained work-related cumulative trauma.

Based on my evaluation of the patient, all of the symptoms she was complaining that existed before she returned back to work.

At this time, it is very important to note that all of the symptoms that she was complaining of existed following her surgery before she returned back to work on 05/18/2021.

Dr. [redacted] indicated that while it was possible for applicant to have sustained cumulative trauma injury, he did not feel it was probable that she had. He indicated that, having gone back and reviewed his reports and available records, multiple doctors did not find applicant's condition to be industrial in nature. He opined applicant was struggling with the same symptoms she had experienced before returning to work on a trial basis. (Exhibit D)

On 7/15/2022, Dr. [redacted] issued a medical-legal report at the request of Applicant. Dr. [redacted] also summarized the medical record and found no mention of a work-related injury component in any of the medical records, other a 4/28/2021 note by Dr. [redacted] in which the doctor noted applicant's left hand pain was worse with repetitive use at work. On page 8, under causation, Dr. [redacted] noted there was a dispute regarding causation of injury to applicant's left thumb, for which applicant was alleging cumulative trauma injury from 5/18/2020 through 5/18/2021 while employed by

On page 9, Dr. [redacted] opined,

Considering that her job at the deli over many years required extensive repetitive use of her hands along with repeated strength grasping that was predominantly done with the left hand as she was left handed, it is medically reasonable and probable that she developed the left thumb/radial wrist pain from repetitive activities with her left hand over many years working in the deli with

In her deposition, she testified that Dr. [redacted] advised her that her left thumb condition was caused from repetitive use at work and that she proceeded to advise her employer but an injury claim was not filed. I do not have a report from Dr. [redacted] wherein he noted that opinion. Unfortunately, she had poor

outcome from the initial surgery that necessitated the subsequent two surgeries again with poor outcome. After the left thumb CMC arthroplasty on 2/01/20, Ms. [redacted] did not return to work until December 2020 when she worked as a cashier for one week. She testified that the cashier position was easier and did not cause pain in her left thumb. She was then off work for one month due to COVID-19 and returned back to work on 1/07/21 as a cashier for another week. Subsequently, she returned to work in the deli department doing the same work as she did prior to the initial thumb surgery but mostly used her right hand. She has continued working in the deli to this day and has developed pain in her right hand as a result of overuse to compensate for her limited ability to use her left hand. *There would not be any cumulative trauma from the initial claimed period of 5/18/20 to December 2020 as Ms. [redacted] was not working. There would not be any cumulative trauma from work for the one week she worked as a cashier in December 2020 and another week in January 2021 as she testified to that job being easier and did not cause left thumb pain.* When she subsequently returned to work in the deli in January 2021, she tried to primarily use her right hand but still required use of the left hand/thumb which caused increased left thumb pain.

I agree with Dr. [redacted] that Ms. [redacted] already had issues and limitations in her left thumb as a result of the surgeries and poor outcome prior to returning to work and that she continues to suffer from. There is documentation that her left hand was made worse from repetitive use when she returned to work in the deli. A report from Dr. [redacted] dated 4/28/21 noted that Ms. [redacted] chronic left hand pain was worse with use of the hand and repetitive use at work. She noted Ms. [redacted] reportedly tried to inform her workplace about the pain being worse with repetitive use at work but a report of the injury was not made. *Although the predominant cause of her left thumb condition is the surgeries and resultant poor outcome, there is contributory causation from when she returned to work in the deli.* As such, it is my opinion that the threshold for an industrial injury to the left thumb/wrist on a cumulative trauma basis has been met.

(Exhibit 2, emphasis added)

On page 10, under Apportionment, Dr. [redacted] noted:

Apportionment will be warranted given the multiple thumb surgeries with poor outcome prior to this industrial injury. I will address this issue once Ms. [redacted] is permanent and stationary.

Pursuant to Labor Code Section 3202.5, applicant has the burden to prove by preponderance of evidence that her injury arose out of and in the course of her employment.

Here, Dr. [redacted] reviewed extensive medical records dating back to 2016. He indicated he found no mention of a work-related injury component in any of the records. Applicant has

treated with Kaiser Permanente on a private basis for many years. Applicant testified that in 2019 she began treatment for her left hand and wrist. At that time, she believed the pain was caused by the work she did for [redacted]. Applicant testified that in 2019 Dr. [redacted] told her the problems with her left wrist were caused by work. (12/5/2022 MOH/SOE, p. 3: 23-30) However, neither doctor could locate a report by Dr. [redacted] that indicated as such, and applicant's evidence was void of such a report. As Dr. [redacted] noted, review of the extensive medical record did not reveal any mention of industrial causation for applicant's symptoms and resulting surgery throughout the years she treated with Kaiser.

Both Drs. [redacted] and [redacted] agree that the cause of applicant's left thumb condition were due to the surgeries and resultant poor outcome. However, their opinions differ in the period after applicant returned to modified work. Dr. [redacted] has opined that applicant's complaints already existed following applicant's surgery but before returning to work, while Dr. [redacted] opines there was cumulative trauma when applicant subsequently returned to modified work in the deli in January 2021 through May 18, 2021. Applicant alleges there was an increase in pain in her left hand after she returned to modified work. However, the medical evidence notes applicant had pain with the use of her left hand since undergoing the surgeries and had difficulty returning to the deli job, but was able to work as a cashier. In fact, applicant's return to modified work was delayed several times due to pain in her left hand, and once having returned to modified work, the same pain required more restrictions. It is well-established that a Judge may select amongst admissible reports and rely upon those which are more persuasive. Here, the more persuasive reports are those of Dr. [redacted].

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Based upon review of the documentary and testimonial evidence herein, the undersigned finds the reports of Dr. _____ are substantial medical evidence that applicant did not sustain cumulative trauma injury during the period 5/18/2020 through 5/18/2021 to her left hand and left wrist.

ALL OTHER ISSUES

All other issues are rendered moot by the finding that there was no industrial injury arising out of and occurring in the course of employment during the period 5/18/2020 through 5/18/2021.

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WORKERS' COMPENSATION JUDGE

DATE: 02/23/23

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