

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EDWARD SAUCERMAN.

Applicant,

VS.

**PASADENA UNIFIED SCHOOL DISTRICT;
Permissibly Self-Insured,**

Defendant(s).

Case No. ADJ3669048 (VNO 0496153)

**ORDER DENYING
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 said report which we adopt and incorporate, we will deny reconsideration.

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1 For the foregoing reasons,

2 **IT IS ORDERED** that said Petition for Reconsideration be, and it hereby is, **DENIED**.

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4 WORKERS' COMPENSATION APPEALS BOARD

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6 ALFONSO J. MORESI

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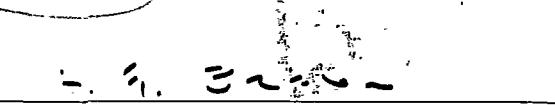
8 I CONCUR,

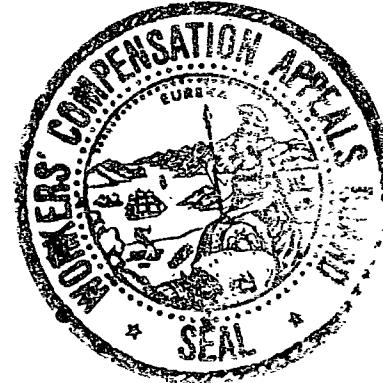
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11 JAMES C. CUNEO

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15 FRANK M. BRASS



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17 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

18 **FEB 03 2010**

19 SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT
20 THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

21 **EDWARD SAUCERMAN**
22 **LAW OFFICES OF STEVEN BARRY**
23 **TOBIN LUCKS**

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SAUCERMAN, EDWARD

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

WCAB Case No(s). ADJ 3669048 (VNO 0496153)

EDWARD SAUCERMAN,

V.

**PASADENA UNIFIED SCHOOL DISTRICT;
PERMISSIBLY SELF-INSURED**

APPLICANT

DEFENDANTS

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE
DAVID L. POLLAK

JANUARY 12, 2010

**REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE ON PETITION FOR RECONSIDERATION**

INTRODUCTION:

The Defendant filed a timely and verified Petition for Reconsideration dated December 30, 2009 alleging that the undersigned WCJ erred in his Findings & Award and Opinion on Decision dated December 14, 2009. The Defendant maintains that (1) the facts did not support the finding of a compensable consequence injury to the Applicant's right knee; (2) that *res judicata* (claim preclusion) barred the finding that the Applicant sustained a compensable consequence injury; and (3) that the Applicant should not be entitled to further medical care to his right knee since the flare-up of pain did not occur until three years after the Applicant's alleged compensable consequence injury.

STATEMENT OF FACTS:

The Applicant, while employed as a police officer for the Pasadena Unified School District, sustained two injuries. The first injury (ADJ 2799095 / VNO 0496158) was an admitted injury to the right (major) shoulder and right ankle on September 12, 2003 resulting from a suspect resisting arrest while the Applicant was placing handcuffs on him. The second injury (ADJ 3669048 / VNO 0496153) was an admitted continuous trauma injury to the right (major) shoulder and right ankle from March 24, 2004 to March 25, 2004 (two days) while performing advanced training exercises with the use of force. The first injury was deferred by the undersigned WCJ.

On March 9, 2005, the Applicant alleged that he sustained a compensable consequence injury when, after he underwent right foot surgery and was on crutches, he fell when his crutches caught on a rug while he was attempting to answer a phone causing him to twist his right knee. While this injury was clearly noted in the medical reports of Philip Sobol, M.D. (the Applicant's primary treating physician) and Roger Sohn, M.D. (the Agreed Medical Evaluator), because neither doctor found permanent disability, the issue was not raised or adjudicated at trial.

On January 18, 2007, the Honorable Judge Treadwell issued his Findings & Award and Opinion on Decision that the Applicant sustained a continuous trauma injury and that the

old permanent disability rating schedule was applicable due to significant pre-existing pathology to the right foot.¹

After the decision from Judge Treadwell, the Applicant noted, after a plane flight to Michigan, his right knee began to flare-up without explanation. After being evaluated by Dr. Sobol and undergoing an MRI of the right knee, he was found to have objective evidence of tears in the posterior horn of his medial meniscus. Dr. Sobol requested authorization for a referral to Ronald Kvitne, M.D. for possible surgical intervention. On November 17, 2008, the Applicant amended his Application for Adjudication of Claim for the continuous trauma injury to allege injury to his right knee. When the Defendant failed to authorize the referral, the Applicant filed a Declaration of Readiness to Proceed to Expedited Hearing to obtain an order to authorize the referral. The case was assigned to the undersigned WCJ for adjudication.

On December 14, 2009, the undersigned WCJ issued his Findings & Award and Opinion on Decision finding that the Applicant sustained a compensable consequence injury to his right knee arising out of and in the course of employment and is in need of further medical treatment to his right knee.

DISCUSSION:

RES JUDICATA (CLAIM PRECLUSION)

Res judicata (claim preclusion) and collateral estoppel (issue preclusion) prevent parties from relitigating the same issues or causes of action that have been fully and finally litigated. [Magliulo v. Superior Court (Gallagher) (1975) 40 Cal. Comp. Cases 376, 387] The doctrine is intended to limit litigation by preventing a party who has had one fair trial on a cause of action from again trying the same case or issues and protects people from having to litigate the same cause of action twice. [Azadigian v. Workers' Compensation Appeals Board (1992) 57 Cal. Comp. Cases 391, 404] However, merely because a dispute over a part of body was not raised does not preclude it from later being litigated unless there is a specific judicial determination of no injury² [Le Parc Community Association v. Workers' Compensation Appeals Board (Curren) (2003) 68 Cal. Comp. Cases 1041, 1051-1052] or if there is a stipulation that there was no industrial injury to that part of body. [See County of Sacramento v. Workers' Compensation Appeals Board (Weatherall) (2000) 65 Cal. Comp. Cases 1, 6 (stipulation to no continuous trauma injury and subsequent request to withdraw from it)] Therefore, issues over disputed parts of body that are not raised, in the absence of a stipulation or a judicial determination, will be deemed deferred rather than waived.

¹ While the parties admitted injury to the right (major) shoulder and the right ankle, it was clear that there was also a right foot injury given that the Applicant underwent a triple arthrodesis to his midfoot on November 9, 2004, that the Applicant was seen by Joshua M. Kaye, D.P.M. for a podiatry consultation on November 1, 2004 and that the rating instructions provided by Judge Treadwell on December 5, 2006 consisted of subjective factors of disability and work restrictions for the right foot.

² The Defendant's use of Ellis v. Workers' Compensation Appeals Board (2002) 67 Cal. Comp. Cases 1494 (writ denied) is inapposite in this case. In Ellis, the WCJ issued a specific finding that the applicant had sustained injury to her "back, right knee and both ankles only." No such specific finding was made by Judge Treadwell in this case despite the assertion from the Defendant in their Petition for Reconsideration, on page five, that a finding of no injury was specifically made.

In this case, the only salient issue that was litigated at the trial before Judge Treadwell was determining which permanent disability schedule applied in this case. Given that the stipulations entered into by the parties did not raise parts of body as an issue and that the Findings & Award did not expressly adjudicate that there was no injury to any disputed parts of body, it would be unreasonable to bar the Applicant under the doctrine of *res judicata* from litigating his claim that he sustained a compensable consequence injury.

SUFFICIENCY OF THE EVIDENCE TO FIND A COMPENSABLE CONSEQUENCE INJURY AND NEED FOR MEDICAL TREATMENT

An injury that relates back to an applicant's original industrial injury will be deemed a compensable consequence injury. [*Divjakinja v. Workers' Compensation Appeals Board* (2007) 73 Cal. Comp. Cases 142, 144-145 (writ denied)] The mere duration of time between the compensable consequence injury and the flare-up of pain that is associated with the injury is insufficient to break the causal relationship between the injury and the subsequent need for medical treatment. The true test is whether there is substantial evidence to support that the compensable consequence injury caused the present need for further medical treatment.

In this case, the undersigned WCJ relied on the contemporaneous medical reports of Dr. Sobol and Dr. Sohn that the Applicant did sustain a falling injury shortly after his right foot surgery. Although there was no finding of permanent disability at the time of the evaluation, when the Applicant's right knee subsequently flared-up and worsened, both Dr. Sobol and Dr. Sohn felt that, if the trier of fact found that the history was correct, the Applicant sustained a compensable consequence and would need further medical care. In addition, the undersigned WCJ relied on the pathological findings set forth in an MRI of the right knee demonstrating small tears in the posterior horn of the medial meniscus, chondromalacia patellae and a small joint effusion. Finally, the undersigned WCJ relied on the credible testimony of the Applicant regarding the circumstances of his falling injury and his subsequent flare-up of pain and the failure of the Defendant to rebut that the flare-up was due to anything else other than the compensable consequence injury. Therefore, based on the whole record, there was more than sufficient evidence to establish a compensable consequence injury and the resulting present need for medical treatment.

RECOMMENDATION:

The undersigned WCJ respectfully recommends that the Defendant's Petition for Reconsideration dated December 30, 2009 be denied.

Date: January 12, 2010


DAVID L. POLLAK
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Filed and Served by mail on all parties
on the Official Address Record.

By: Laura Mejia

Dated: January 12, 2010