WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

AGUSTINA CABRERA, ***Applicant***

vs.

AG FORCE, LLC; permissibly self-insured member of CALIFORNIA FARM MANAGEMENT, INC.; administered by INTERCARE HOLDINGS,
Defendants

Adjudication Number: ADJ18102810
Fresno 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 and Opinion on Decision, which we adopt and incorporate, we will deny reconsideration.

Defendant contends that the WCJ erroneously found that applicant sustained injury to the psyche on the grounds that the reports of Dr. Lyons and QME Dr. Tribble are unsupported by substantial medical evidence.

All decisions by a WCJ must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [83 Cal. Rptr. 208, 463 P.2d 432, 35 Cal.Comp.Cases 16]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [262 Cal. Rptr. 537, 54 Cal.Comp.Cases 349].) Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566].) 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 [93 Cal.Rptr. 15, 480 P.2d 967, 36 Cal.Comp.Cases 93, 97].)

Defendant fails to present evidence controverting the reasons or grounds for QME Dr. Allen Fonseca's reporting. As stated in the Report, the WCJ relied upon evidence in the form of QME Dr. Fonseca's reporting and applicant's uncontroverted testimony. (Report, p. 2.) Thus, the WCJ was presented with no good reason to conclude that Dr. Fonseca's opinion is unpersuasive—and we also conclude that it constitutes substantial medical evidence. (*Power v. Workers' Comp. Appeals Bd*. (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 12, 2024

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

AGUSTINA CABRERA
JHM LAW OFFICE
WEITZMAN ESTES

LN/md

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

I
INTRODUCTION

INTRODUCTION

1. Applicant's Occupation: Farm Laborer
   Age at Injury: 52
   Date of Injury: CT - legal date of injury disputed
   Parts of Body Alleged Injured: lumbar spine, bilateral hands, bilateral arms, neck, right wrist, bilateral shoulders, psychiatric and headaches
   Manner in Which Injury Alleged Occurred: Cumulative Trauma

2. Identity of Petitioner: Defendant
   Timeliness: The Petition was timely filed on 6/11/24
   Verification: The Petition was Verified.

3. Date of Award: 5/17/24

4. Petitioner contends:

a. The reporting of PQME, Dr. Fonseca, does not constitute substantial medical evidence because the report is internally inconsistent and the doctor's opinions were based upon surmise, speculation, conjecture and guess, as well as an inadequate medical history.

b. The report of PQME, Dr. Fonseca, cannot be relied upon to establish a date of injury after Applicant's termination as an exception to LC section 3600(a)(10) prohibition on post-termination claims.

II
FACTS

The applicant worked as a farm laborer employed by defendant from 2016 until she was laid off on July 3, 2023. (Minutes of Hearing and Summary of Evidence, hereinafter MOH/SOE, 3/14/24, pg. 3:23.) She testified that her job duties included picking fruit using a ladder, checking on irrigation, pruning, using shears and carving around tree trunks. Her duties required her to kneel and crouch all day, use her upper extremities constantly, lift up to 35 pounds and carry a ladder and heavy bags of fruit and lift items repetitively every day. She worked about 40 hours per week. (MOH/SOE, 3/14/24, pg. 4:1 - 6.)

After the applicant was laid off she filed a claim for cumulative trauma injury through the last day of her employment. The claim was denied and the applicant

was evaluated by PQME, Dr. Allen Fonseca, on November 7, 2023. In his report of the same date, Dr. Fonseca provided the following opinion on causation:

> Ms. Cabrera has presented with a viable mechanism of industrial injury CT 01/20/2013 - 07/03/2023 (neck, low back, bilateral shoulder, bilateral wrist and hand). This is not supported by medical reports. It is my opine [sic.] that her current symptoms and findings on physical exam are consistent with the mechanism of the industrial injury described above. If further documentation is submitted proving otherwise, I reserve the right to modify my opine.[sic] My medical opine [sic.] is based on her stated history, cover letter and correspondence, her self-reported and formal job description, my physical examination, and my understanding of orthopedic pathophysiology based on 31 years in clinical practice as a board-certified orthopedic surgeon. (Exh. A, Dr. Allen Fonseca QME report, 11/7/23, pg. 23 - 24.)

Defendant continued denial of applicant's claim and the matter was submitted for decision on the following issues: Injury arising out of and in the course of employment; temporary disability with the employee claiming periods pursuant to PQME; whether the applicant's claim is barred under LC section 3600(A)(10) as a post-termination claim; and the legal date of injury under 5412.

The undersigned found that the report of Dr. Fonseca constitutes substantial medical evidence; the date of injury pursuant to LC section 5412 is 11/7/23; the applicant sustained an industrial injury to her neck, low back, bilateral shoulders, bilateral wrists and bilateral hands and her claim is not barred as a post-termination claim pursuant to LC section 3600(a)(10)(D). Defendant was ordered to provide workers' compensation benefits in accordance with the findings of fact. It is from these Findings and Order that defendant seeks reconsideration. As of this time, Applicant has not filed a response. It is further noted that Defendant submitted a transcript of the trial proceedings but never petitioned the court to correct or make changes to its Summary of Evidence.

III
DISCUSSION

Petitioner contends that the PQME report upon which the undersigned relied does not constitute substantial evidence because the doctor failed to take a history of the applicant's current job duties as a housekeeper with her new employer. While applicant's duties at a subsequent employer may become relevant as to whether there is contribution by another employer during the cumulative trauma period, such information is not relevant to the issues presented for decision. The doctor's opinion as to whether or not or to what extent applicant's subsequent employment contributed to her injury can be addressed at a later time. Since the defendant did not request that the QME

address any potential contribution to causation of applicant's injury by the subsequent employer, the doctor's failure to address this issue cannot be used as an excuse to invalidate his reporting.

Petitioner also contends that the doctor's opinion is based upon surmise, speculation, conjecture or guess because he failed to obtain any diagnostic studies that would determine if there were any objective pathology to substantiate or refute the applicant's allegation of injury. Whether or not diagnostic testing is necessary to determine if an injury exists and, if so, whether it was industrially related is a matter for the physician to determine. Defendant seeks to substitute their own opinion for that of the medical expert. In this case, the doctor's diagnoses consist of soft tissue injuries of strains and sprains of ligaments and muscles. Defendant suggests that radiographs would be particularly relevant, however, lacking the expertise and training of a physician, defendant cannot know whether such studies would be necessary or even helpful.

It is further noted that on page 24 of Dr. Fonseca's report, under the heading of **FUTURE MEDICAL TREATMENT**, the doctor recommends several diagnostic studies be performed on a med-legal basis and the radiological interpretation and actual films be forwarded to him for review. (Exh. A, pg. 24.) The defendant made no effort to obtain any of the recommended diagnostic studies, but rather used the lack of studies to claim that the report failed to constitute substantial medical evidence.

Defendant contends that Dr. Fonseca's report fails to constitute substantial medical evidence because the doctor failed to discuss the differences between the applicant's description of her job duties and the description of job duties submitted by Jaime Mendoza, the WC administrator. However, the doctor thoroughly reviewed both descriptions and summarized them in his report. (Exh. A, pgs. 6 & 20.) The doctor also indicated under the heading **CAUSATION**, that his medical opinion is based upon the applicant's stated history, her self-reported and formal job description, as well as his physical examination and his expertise and training as a board-certified orthopedic surgeon with 31 years of clinical practice. (Exh. A, pg. 24) It is clear that the doctor reviewed and took into consideration both the applicant's statement of her job duties and the statement provided by the defendant. It is not within the realm of the physician expert to resolve disputed facts. That is within the realm of responsibility of the Trier of Fact. In this case, the applicant's testimony under oath about her job duties was consistent with what she reported to Dr. Fonseca. This testimony was unrebutted and presumed to be correct in the absence of any contradictory evidence submitted under penalty of perjury.

Defendant contends that Dr. Fonseca's report is internally inconsistent because he provided prophylactic work restrictions and stated the applicant was unable to perform all the essential functions of her usual and customary work activities

despite the fact that the applicant had not missed work and was actually physically able to do her job duties prior to being laid off. Defendant is misconstruing the purpose of prophylactic work restrictions, which are intended to prevent further injury and allow time for healing. Prophylactic work restrictions are not an indication that the applicant is physically incapable of doing a particular activity only that she should not do so. The doctor's statement that the applicant is unable to perform all of the essential functions of her usual and customary work activities is an indication that some of those essential functions exceed the prophylactic restrictions. The provision of these restrictions is completely consistent with the doctor's opinion that it was those work duties that caused the applicant's injury on a cumulative trauma basis.

The defendant contends that the doctor's report is internally inconsistent because he provided prophylactic work restrictions and unable to perform the essential functions of her usual and customary work while also indicating N/A under temporary total disability, temporary partial disability and regular work.
The undersigned also initially misinterpreted this portion of the doctor's report by failing to note that this section is titled **DISABILITY**: From the medical reports (emphasis added). (Exh. A, pg. 22) Since the doctor was not provided any medical reports, his notation of not applicable is accurate and consistent with the lack of medical reports addressing these issues. The fact that the doctor failed to provide his own opinion as to whether there were any periods of temporary total or temporary partial disability does not render the remainder of his report unsubstantial. It did, however, prevent the undersigned from issuing a decision on the issue of temporary disability, which is why it was deferred pending further development of the record.

Defendant contends that the doctor's report contains inconsistencies because while he was clearly not provided with any medical reports there were places in his report where the words "medical reports" were used. The fact that the doctor's report utilizes the headings of "medical reports" when he is reviewing any document provided to him such as a job description does not make his report inaccurate nor is it based upon incorrect facts or history. Similarly, a statement in one place in the report that there was no "formal job analysis/description" submitted while he actually reviewed a "Description of Employee's Job Duties" does not render his report unsubstantial. In fact, it is accurate that there was no formal job analysis performed by an outside party submitted for his review only an informal description of job duties, which the doctor actually reviewed. Furthermore, it is not inaccurate for the doctor to note that the industrial injury was not supported by the medical reports since there were, in fact, no medical reports.

Finally, defendant contends that due to the above "inconsistencies" and because the doctor did not explain how and why he provided prophylactic work restrictions, there was insufficient evidence to support a determination of a date of injury after the applicant was laid off from her job.

Labor Code section 3208.1 states that a cumulative injury occurs as a result of "repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or the need for medical treatment." Per LC 5412, the date of injury in cumulative injury cases is the date the employee (1) first suffered disability and (2) "either knew, or in the exercise of reasonable diligence should have known" that the injury was caused by employment. In this case, Dr. Fonseca did not comment specifically on whether or not there were periods of TTD or TPD but he did provide for prophylactic work restrictions, and noted that applicant was unable to perform all of the essential functions of her usual and customary work activities. He also opined that she had not achieved maximum medical improvement as of the date of his examination. He further noted objective factors including limitation in ranges of motion of the cervical spine, lumbar spine, bilateral shoulders and bilateral wrists, as well as diminished sensation at C6, C7, L4 and LS on the left, all of which could support findings of impairment under the AMA Guides. All of which support a determination of disability as of the date of the doctor's examination. In addition, the applicant testified that she knew the nature of the claimed injury when she consulted an attorney and filed a claim. (MOH/SOE, 3/14/24, pg. 5:13 - 15.)

There was no evidence submitted to indicate that the applicant had suffered any disability prior to her termination.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Date: June 25, 2024

Debra Sandoval
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE