

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

CHRISTOPHER CHEN, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Number: ADJ15446830
San Jose District Office**

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

Applicant Christopher Chen seeks reconsideration of the May 23, 2024 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found, in pertinent part, that applicant has not met his burden of proving his entitlement to Subsequent Injuries Benefits Trust Fund (SIBTF) benefits because the medical reports of Donald Lee, D.O., Demeil Betoushana, D.C., and Benjamin Greer, M.D., are not substantial evidence and cannot be relied upon as evidence due to conflicts of interest between these medical providers and applicant.

Applicant contends that there are no disqualifying conflicts between him and Dr. Lee, Dr. Betoushana and Dr. Greer and, even if there were, applicant should be allowed to develop the record and supplement the evidence.

We received an answer from SIBTF. We also received SIBTF's petition to exceed page limitation for its answer. Cal. Code Regs, title 8, section 10940, provides that an answer to a petition for reconsideration shall not exceed 10 pages unless allowed by the Appeals Board. We accept SIBT's reasons to exceed the page limitations for its answer and we have considered all 16 pages of its answer.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on the Report, which we adopt and

incorporate, except for the discussion on pp. 13-14 about developing the record and not meeting the requirements of Labor Code, section 4751 (from the paragraph that starts with the word “Therefore” on p. 13 to the rest of p. 14), and for the reasons discussed below, we grant reconsideration, amend findings number 6-8 to defer the issue of whether applicant is entitled to SIBTF benefits, and return to the trial level for further proceedings.

We agree with the WCJ that pursuant to Cal. Code of Regs., tit.8, section 41.5, there are conflicts of interest between applicant and Drs. Lee, Betoushana, and Greer. However, the remedy for such conflict, pursuant to Cal. Code of Regs., tit. 8, section 41.6, is to obtain new medical evaluators. We note that the WCJ relied on the report of Mark Zarrabian, D.C., to determine that applicant did not meet the eligibility threshold requirements for SIBTF benefits. We are not making any opinions here as to whether Dr. Zarrabian’s medical opinions are substantial evidence. Our opinion here is based on the remedy provided in Cal. Code of Regs., tit. 8, section 41.6.

For that reason, we grant reconsideration, amend findings number 6-8 to defer the issue of whether applicant is entitled to SIBTF benefits, and return to the trial level for further proceedings. We encourage the parties to seek Agreed Medical Evaluators who do not have conflicts of interest with applicant. If the parties are not able to agree to Agreed Medical Evaluators, the parties must follow Cal. Code of Regs., tit. 8, section 41.6(c)(2) to obtain new medical evaluators.

For the foregoing reasons,

IT IS ORDERED that applicant Christopher Chen’s Petition for Reconsideration of the May 23, 2024 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers’ Compensation Appeals Board, that the May 23, 2024 Findings and Order is **AFFIRMED EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

...

6. The issue of applicant’s entitlement of SIBTF’s benefits is deferred.

ORDER

There are no orders at this time.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 16, 2024

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

**CHRISTOPHER CHEN
THE LAW OFFICES OF BRIAN C. ITO, P.C.
OD LEGAL – OAKLAND**

LSM/oo

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. **INTRODUCTION**

1. Applicant's Occupation : Chiropractor
Applicant's current Age : 62
Date of Injury : 4/01/2019 – 4/08/2021
2. Identity of Petitioner : Applicant filed the Petition.
Timeliness: The petition was timely filed on 06/17/2024.
Verification: The Petition was properly verified.
3. Date of Issuance of Order : 5/23/2024
4. Petitioner's contentions: Petitioner contends that 1) the evidence does not justify the WCJ's findings of fact; and 2) the findings of fact do not support the findings and orders.

Defendant has filed an Answer.

II. **FACTS**

Applicant, Christopher Chen, while employed as 100% owner of Christopher Chen, M.D., Inc., during the period 4/01/2019 through 4/08/2021, sustained injury arising out of and in the course of employment to the cervical spine and lumbar spine, and claims to have sustained injury arising out of and in the course of employment to the bilateral upper extremities, bilateral lower extremities and left shoulder.

On 2/14/2022, an Award issued for the underlying workers' compensation claim approving Stipulations with Request for Award of 65% for the lumbar spine, cervical spine, left shoulder and bilateral carpal tunnel syndrome, based on the medical-legal report of applicant's primary treating doctor' Donald Lee, D.O. Applicant was represented by attorney, Mason Bledsoe.

Thereafter, applicant pursued a claim for benefits from SIBTF on the cumulative trauma case alleging injury to the upper extremities, neck, back, and leg, with pre-existing disability due to internal organs, bilateral upper and lower extremities, spine, and psyche. Mr. Bledsoe also represented applicant for the SIBTF case. (Exhibit K) Applicant alleges he has met the Labor Code section 4751 threshold and that he is 100% permanently and totally disabled. Defendant alleges applicant did not meet the threshold and is not entitled to SIBTF benefits. Massoud Mahmoudi, D.O. and Dr. Demeil Betoushana, D.C. served as applicant's medical-legal evaluators for his

SIBTF claim. Defendant SIBTF did not obtain its own medical-legal reports. Trial was held via video conference on 12/13/2023 and on 2/21/2024.

On 5/23/2024, the undersigned issued Findings and Order and Opinion on Decision finding that applicant has not met his burden of proving his entitlement to SIBTF benefits pursuant to Section 4751 and is thus not entitled to SIBTF benefits. Due to various conflicts of interest thoroughly discussed in the Opinion, the undersigned is unable to rely on the reports of Dr. Betoushana, Dr. Lee, and Dr. Greer as evidence of applicant's entitlement to SIBTF benefits and thus finds they are not substantial evidence. The undersigned further found the inconsistencies and conflicts with his medical evaluators have created serious credibility issues for the applicant.

III. **DISCUSSION**

Applicant is a licensed Qualified Medical Evaluator and has been so for 15 years. Applicant, initially unrepresented in his workers' compensation case, subsequently retained Mr. Mason Bledsoe to represent him in his workers' compensation case and in his claim for SIBTF benefits. As indicated above, based on the reporting of applicant's primary treating physician, Donald Lee, DO., applicant settled his workers' compensation case by Stipulations with Request for Award of 65% and thereafter filed a claim for benefits from the Subsequent Injuries Benefits Trust Fund (SIBTF).

In order to provide a thorough understanding of the conflict issues identified by the undersigned, which are the basis for finding that applicant is not entitled to benefits from the SIBTF, the complete summary as listed in the Opinion is provided below.

PRIMARY TREATING PHYSICIAN DONALD LEE, D.O.

On 3/09/2021, applicant predesignated Donald Lee, D.O. as his personal physician for his work-related injury using DWC Form 9783. On 3/15/2021, Dr. Lee agreed to the predesignation. (Exhibit A) On 4/22/2021, applicant was examined by Dr. Lee, who issued a Doctor's First Report of Occupational Injury or Illness. Number 16 of the form notes Dr. Lee had not previously treated the applicant. (Exhibit B)

Applicant testified that prior to the date of injury, 4/08/2021, Dr. Lee was not his regular physician, but that he had directed his medical treatment. (12/13/2023 MOH/SOE, p. 19: 43-45) He testified he thought he saw Dr. Lee prior to 4/08/2021 for aches and pains. (12/13/2023 MOH/SOE, p. 20: 2-3) In his deposition, Dr. Lee testified he first saw applicant as a patient on

4/22/2021. (Exhibit L, p. 14: 9-12) Applicant also testified Dr. Lee evaluated him at 42658 Christy Street in Fremont, California, which is listed as one of his own QME sites, and that he has access to the common key to this office and has used the office to evaluate patients. He testified that in April of 2021, he did not pay Dr. Lee for the use of this office, but that he now pays him \$200 per day for its use. (12/13/2023 MOH/SOE, p. 20: 10-22) The QME Database lists the Christy Street address as one of Dr. Lee's and applicant's QME locations. (Exhibits AA and BB)

On 11/01/2021, Donald Lee, D.O. issued a comprehensive medical-legal report in applicant's workers' compensation case. Dr. Lee reviewed records, including Dr. Zarrabian's 10/05/2021 report, Dr. Greer's 10/16/2021 pain management consult report, and Dr. Greer's 10/27/2021 lumbar EMG and 10/28/2021 EMG for the bilateral upper extremities. On page 7, Dr. Lee indicated he had reviewed Dr. Zarrabian's 10/05/2021 QME report. He noted, "Because of Dr. Chen's frustrations with the workers' comp system, he has obtained EMGs." He stated the 10/28/21 EMG had found bilateral carpal tunnel syndrome and ulnar and radial neuropathy (worse on left), with radiculopathy. The 10/27/21 EMG found significant right L5 radiculopathy. (Exhibit G) Applicant testified that after he received the 10/05/2021 medical- legal report of Dr. Zarrabian, he obtained EMG testing from Dr. Greer. He has known Dr. Greer for over 20 years and previously worked with him. Dr. Greer has the same address as one of his QME locations at 710 South Broadway in Walnut Creek, California. (02/21/2024 MOH/SOE, p. 3: 21-28) Applicant testified Dr. Zarrabian "said he should get EMG's due to his radiculopathy, but that to his knowledge, Dr. Zarrabian never made a referral for EMG's. He had EMG's done by Dr. Greer and his private insurance paid for them. (12/13/2023 MOH/SOE, p. 16: 6-10)

On 9/20/2022, Dr. Lee was deposed. Dr. Lee testified applicant is a friend and rents his office at 42650 Christy Street in Fremont to do QME evaluations. He testified he does not have a rental agreement with applicant. (Exhibit L, p. 12: 11-17) He also testified that applicant comes in to do QME evaluations a few times a year, but because he is a friend of his, he does not charge him. (Exhibit L, p. 13: 7-12) He testified that he had treated one or two patients at applicant's office, but that it was "probably some time ago." He indicated he first met applicant seven or eight years ago, when they met through CAPS. He has never had any business relationship with applicant. (Exhibit L, p. 13: 13-25) Dr. Lee testified he first saw applicant as a patient on 4/22/2021. (Exhibit L, p. 14: 9-12) He testified he uses the 42650 Christy Street address and uses Microsoft Word to create his medical reports. (Exhibit L, p. 14: 19-25) He testified applicant did

come into his office and that he showed him a copy of the med-legal report. (Exhibit L, p. 26: 14-17) When asked why the med-legal report Word document showed the author as “Windows User” when the doctor’s first report and PR-2 showed the author as Donald Lee, Dr. Lee stated, “So what I was trying to say is that Dr. Chen likely—either I send him a copy that he opened or that he actually got onto—you know, I help him to get—log into my Dropbox to open that report.” (Exhibit L, p. 26: 18-25) He testified he may have emailed him the report and he might have opened that. He testified that when applicant was at his office, he might have opened up his computer, logged into his Dropbox, and showed applicant the report and told him it was done and that he would send it to him or he may have printed it, he did not remember the specifics. (Exhibit L, p. 27) Applicant testified he did not know why Dr. Lee’s 11/01/2021 report showed he was the last person to modify the report, but he did not alter it. He testified Dr. Lee sent him the report and he downloaded it, then emailed it to his former attorney Mr. Bledsoe, who had asked him for the report. (12/13/2023 MOH/SOE, p. 21: 1-8)

Labor Code section 4600(d)(2) allows an employee to predesignate his treating physician before a work injury and choose to be treated by that physician to circumvent the employer’s control of medical treatment. A personal physician under this section must be the employee’s regular physician and must be the employee’s primary care physician and has previously directed the medical treatment of the employee, and who retains the employee’s medical records, including the employee’s medical history. However, Dr. Lee had not been applicant’s primary treating physician prior to the work injury. Defendant is correct that applicant violated section 4600(d)(2) by improperly predesignating Dr. Lee as his primary treating physician. While a violation of this section would be limited to a determination of whether applicant may circumvent the employer’s control of medical treatment, in this instance, the violation significantly affects applicant’s credibility, as applicant testified that prior to 4/08/2021, Dr. Lee was not his primary treating physician, but had directed his medical treatment and that he thought he had previously seen Dr. Lee for his aches and pains. However, Dr. Lee’s reports and his deposition testimony leave no doubt that the first time Dr. Lee saw applicant as a patient was on 4/22/2021.

Further, with regard to Dr. Lee’s 11/01/2021 medical-legal report, upon which the stipulations with request for award were based (Exhibit G), applicant testified Dr. Lee evaluated him at 42658 Christy Street in Fremont, California, and that this address is listed as one of his own QME sites. He testified he has access to the common key to that office, and has used the office to

evaluate his patients. And, while applicant did not reveal his friendship with Dr. Lee, Dr. Lee testified he considered him a friend and had not charged applicant for the use of his office because of their friendship. Applicant and Dr. Lee both testified the medical-legal report had not been edited nor altered. However, Dr. Lee testified it was possible that applicant may have logged on as Dr. Chen in either one of his computers or one of Dr. Lee's. (Exhibit L, p. 32: 14-21) Applicant testified Dr. Lee had sent him the report via e-mail and that he opened it and read it several times, then sent it to his attorney, Mr. Bledsoe. (2/21/2024 MOH/SOE, p. 5: 42-43) He testified Mr. Bledsoe did not open it and sent it directly to the defense attorney because he was eager to send it to him right away. (2/21/2024 MOH/SOE, p. 6: 2-5) Applicant made no mention of having been in Dr. Lee's office, nor of having used one of his computers or Dr. Lee's computers to access the report. While applicant may not have edited nor altered Dr. Lee's medical-legal report, his ability to access and view the medical-legal report by using one of Dr. Lee's computers, a privilege likely not available to any of Dr. Lee's other patients, creates a serious appearance of conflict. Applicant and Dr. Lee's friendship, access to Dr. Lee's office, shared office locations, with access to his computers were conflicts of interest which could potentially significantly interfere with Dr. Lee's ability to engage in objective and impartial medical decision making.

Further, applicant argues that Section 41.5 specifically excluded Dr. Lee from any disclosure requirements, as he was the applicant's treating physician. As explained in the opinion, the undersigned cannot rely on Dr. Lee's reporting for various reasons. First, applicant was not forthcoming as to his relationship with Dr. Lee, indicating initially that Dr. Lee had directed his medical treatment prior to 4/08/2021 and that he thought he had seen Dr. Lee prior to that date for aches and pains. However, Dr. Lee testified he first saw the applicant as a patient on 4/22/201. Further, Applicant also testified Dr. Lee evaluated him at 42658 Christy Street in Fremont, California, which is listed as one of his own QME sites; that he has access to the common key to this office; and that he has used the office to evaluate patients. He testified that in April of 2021, he did not pay Dr. Lee for the use of this office, but that he now pays him \$200 per day for its use. (12/13/2023 MOH/SOE, p. 20: 10-22) The QME Database lists the Christy Street address as one of Dr. Lee's and applicant's QME locations. (Exhibits AA and BB) Most significantly, applicant did not mention that he had been in Dr. Lee's office to view the report, nor of having used one of his computers or Dr. Lee's to access the report.

Applicant further asserts that the undersigned cited no authority in support of the conflict of interest and did not point to any specific points in Dr. Lee's reporting which appeared to be the product of his connections with the applicant and further asserts that "it cannot be determined from reading the F&O whether the undersigned even read Dr. Lee's report. As outlined in the Opinion, there were various conflicts and by way of applicant's own testimony that led the undersigned to conclude the report of Dr. Lee could not be relied upon. First, applicant was not forthcoming with regard to Dr. Lee's selection as his primary treating physician. Second, the undersigned found applicant's relationship with Dr. Lee to be so intertwined in self-interest and potential economic interest as to render Dr. Lee's reporting unreliable. Third, applicant testified Dr. Lee evaluated him at 42658 Christy Street in Fremont, California, which is listed as one of his own QME sites, and that he has access to the common key to this office and has used the office to evaluate patients. The undersigned found applicant's inconsistent testimony, his relationship with Dr. Lee, his access to the common office key, and his ability to log on to Dr. Lee's computer and access the medical-legal report significant and concerning as to render Dr. Lee's medical-legal reporting unreliable and untrustworthy.

Finally, although applicant asserts that "it cannot be determined from reading the F&O whether the undersigned even read Dr. Lee's report, page 8 of the Opinion discusses Dr. Lee's 11/01/2021 report, along with referenced page numbers. The undersigned spent countless hours reviewing and taking copious notes of all of the admitted evidence. It is this careful review that led the undersigned to conclude that applicant and the reports of Dr. Lee, Dr. Betoushana and Dr. Greer lack credibility and were thus not considered.

MARK GREER, M.D.

In his 1/26/2023 deposition, Dr. Greer testified he is the CEO, CFO, director and shareholder of Vital Total Health Medical Group, Inc. (Vital). (Exhibit M, p. 8: 5-9) He first saw applicant on 10/16/2021 during consultation, and conducted EMG studies for the lower extremities on 10/27/2021 and for the upper extremities on 10/28/2021. (Exhibit M, p. 11: 2-6) He testified applicant is a colleague who used to work for him under a different medical group called Redwood Rehab Medical Group. (Exhibit M, p. 11: 7-11) Dr. Greer testified applicant discussed with him that he was under the care of another doctor and that they wanted some EMG studies. (Exhibit M, p. 12: 8-10) Dr. Greer testified that Vital uses the location at 4439 Stoneridge Drive in Pleasanton as a marketing strategy to be visible in a certain area. The medical office located at 4429 Stoneridge

Drive in Pleasanton is applicant's office. (Exhibit M, p. 14) Dr. Greer also testified he used that address as the mailing address in the Articles of Incorporation Vital filed on 2/14/2019. He testified he did not recall if he approached applicant to ask him if he could use the Stoneridge Drive address as the corporate address for Vital because it had been so long ago. (Exhibit M, p. 18: 1-14) He testified applicant may have known he was using the Stoneridge Drive address but that he did not remember the discussion because it was so casual and it was "like not of any concern." (Exhibit M, p. 18: 15-24) He testified he met applicant around the year 2000, 2001 or 2002. He testified he does not manage patients day to day. His role is to develop the programs and to expand the business. (Exhibit M, p. 23: 13-18) He testified he would see a patient when they would ask him to say "Hi" to this patient, or "what do you think about that." Or they would ask him questions for difficult cases. (Exhibit M, p. 24: 17-25) The last time he saw a patient was earlier this month. (Exhibit M, p. 25: 1) He testified that he saw applicant during consultation and performed electrodiagnostic studies in October of 2021. Since that time, he has performed approximately a dozen electrodiagnostic studies while training other doctors. (Exhibit M, p. 25: 10-23) He testified the reason why another doctor did not perform the electrodiagnostic studies on applicant was because applicant asked him to do it, and that at the time in 2021, the doctor who did them had just started earlier that year, so it would have taken her a lot more time to be experienced in EMG's. He testified applicant knew that Dr. Lee did them all the time. (Exhibit M, p. 25: 24- 25; p. 26: 1- 5) Finally, he testified the bill for services provided to applicant was billed to Blue Shield of California and paid by Blue Shield. (Exhibit M, p. 28: 4-10)

Without a referral from his primary treating physician, Dr. Lee, nor from QME Dr. Zarrabian, applicant asked Dr. Greer, his friend of over 20 years, to conduct EMG testing and bill his private insurance company, even though he had an accepted workers' compensation claim. Dr. Greer testified applicant "mentioned to me that there was, in some way, the symptoms were related to his work. But, he did not give me a case number or any workers' comp insurance or an attorney or any case manager or adjuster. He told me he had a primary doctor handling all of this, so I left it at that." (Exhibit M, p. 13: 6-14) Dr. Greer testified he does not see patients and only conducts EMG testing when he trains other doctors, however, he conducted the testing for applicant. Further, although he was aware applicant had a workers' compensation claim, he billed applicant's private insurance. Dr. Greer also testified he has used applicant's office address in his articles of incorporation for Vital Health and as a marketing strategy, which he considered to be of value. Dr.

Greer testified that applicant asked for money in order to use his address to advertise for Vital on their website, but he said no, because he was not seeing people there. Dr. Greer testified, “So you know, as an exchange, I bartered with him. So there is something of value.” (Exhibit M, p. 15: 3-23)

Applicant asserts that he chose Dr. Greer to perform EMG testing because he has faith in him. However, rather than have his treating physician or QME request the EMG testing if they felt it necessary, applicant took it upon himself to ask his friend of 20 years, to do the testing. The undersigned found this specific request to be suspect in light of the fact that there had not been a request by his treating physician, nor of the QME. Further, and significant to the undersigned, was that although applicant testified Dr. Zarabian told him he should obtain EMG studies, once he obtained them, he did not send them to Dr. Zarabian. Also troubling is the use of applicant’s office address by Dr. Greer in his articles of incorporation for Vital Health as a marketing strategy. Dr. Greer testified he bartered with applicant as this had something of value. In this instance, applicant obtained the EMG testing from Dr. Greer and indicated he did so because Dr. Zarrabian asked him to, however, he did not provide the EMG results to QME Dr. Zarrabian. He only provided them to Dr. Lee and Dr. Betoushana. As such, the undersigned was unable to rely on Dr. Greer’s EMG testing nor on Dr. Lee and Dr. Betoushana’s opinions which relied on the EMG results. That applicant obtained the EMG from his longtime friend without a request from either of his doctors, billed under his private insurance, and the potential financial interest with Dr. Lee, led the undersigned to question the reliability of the testing.

QME DEMEIL BETOUSHANA, DC

Applicant’s former attorney, Mr. Bledsoe, represented applicant from 11/19/2021, until 8/24/2023, when he was substituted by Mr. Ito. Mr. Bledsoe also represented Dr. Betoushana from 8/15/2022 through 9/10/2023. At the time this matter was set for trial on 4/24/2023 and Dr. Betoushana’s report was listed as applicant’s exhibit, Mr. Bledsoe was representing both, applicant and Dr. Betoushana. Further, applicant had also been predesignated as treating physician in Dr. Betoushana’s SIBTF claim.

Applicant testified Dr. Betoushana had been in his office, but he never saw him physically and only spoke to him about a half hour about his case; that he was the primary treating physician in Dr. Betoushana’s case; and that he authored one report and two or three were authored by his nurse practitioner. (12/13/2023 MOH/SOE, p. 22: 24-32; 2/21/2024 MOH/SOE, p. 2: 45)

Applicant testified he did not recall when he had been the primary treating physician for his QME Dr. Betoushana. (2/21/2024 MOH/SOE, p. 3: 2-10) However, after his recollection was refreshed, he recalled he had served as Dr. Betoushana's primary treating physician in December of 2021. This was only 3 months prior to 3/19/2022, the date when Dr. Betoushana evaluated him for his SIBTF case. (Exhibit 3) Dr. Betoushana did not disclose that applicant had been his primary treating physician in his own SIBTF case at the time he wrote his report, nor did he disclose that he was represented by Mr. Bledsoe, who was also representing applicant at the time. Dr. Betoushana had a duty to disclose the conflict but chose not to disclose it.

Applicant asserts that it is not surprising that neither Dr. Betoushana nor Mr. Bledsoe perceived a conflict. However, it is difficult to believe that an experienced attorney and experienced QME's would not appreciate that there could be a conflict when hiring one of his own clients to serve as QME and evaluate another one of his clients, and then have that client use his own patient to evaluate him in his SIBTF claim.

In an attempt to distance himself of the doctor-patient relationship between applicant and his own QME, applicant argues there is no evidence that he fulfilled his duties as primary treating physician in his QME Dr. Betoushana's case. This belies the doctor-patient relationship that exists as applicant testified he is the pre-designated primary treating physician for Dr. Betoushana in Dr. Betoushana's workers' compensation case. Further, applicant asserts there is no known authority supporting the contention that an SIBTF evaluator is conflicted if he issues a report concerning a doctor from whom he may have received treatment in the past. However, applicant served as Dr. Betoushana's pre-designated primary treating physician just three months prior to the date Dr. Betoushana evaluated applicant for his SIBTF case. Further, applicant's assertion that there is "no language in Section 41.5 requiring an evaluator to disclose a doctor/patient relationship" is incorrect, as Section 41.5(e) indicates a QME may disqualify himself or herself if he or she has a relationship with a person or entity, including a doctor-patient relationship.¹

Applicant argues it is not clear that CCR Section 41.5 applies to SIF evaluators and that there is no published authority allowing for Section 41.5 to be used by a WCJ to exclude or ignore

¹ An Agreed Medical Evaluator or a Qualified Medical Evaluator may disqualify himself or herself on the basis of a conflict of interest pursuant to this section whenever the evaluator has a relationship with a person or entity in a specific case, including doctor-patient, familial, financial or professional, that causes the evaluator to decide it would be unethical to perform a comprehensive medical-legal evaluation examination or to write a report in the case. [8 CCR § 41.5(e)]

medical evidence. To be clear, the undersigned did not exclude nor ignore the medical evidence. Further, Section 41.5 applies to all Qualified Medical Evaluators, which would also include SIBTF evaluators who hold themselves out as QME's. All QME's, including those reporting in an SIBTF case, are bound by the ethical requirements and duties of a DWC Qualified Medical Evaluator. Title 8, Section 60, subdivision (b)(5) of the Division of Workers' Compensation Qualified Medical Evaluator Regulations provides, in part,

(b) The Administrative Director may, based on a complaint by the Medical Director, and following a hearing pursuant to section 61 of Title 8 of the California Code of Regulations, suspend, terminate or place on probation a QME found in violation of a statutory or administrative duty as described in the Administrative Director Sanction Guidelines for QMEs under section 65 of Title 8 of the California Code of Regulations. Such violations include, but are not limited to:

(5) failure to comply with the disclosure, ethical or conflict of interest requirements pursuant to sections 40, 41 or 41.5, respectively, of Title 8 of the California Code of Regulations.

Section 41.5(d)(4) broadly defines a disqualifying conflict of interest as "[a]ny other relationship or interest" that would cause a person to "reasonably entertain a doubt that the evaluator would be able to act with integrity and impartiality." In a field that is dependent on expert medical opinions, the impartiality and appearance of impartiality of the panel- qualified medical evaluator is critical.²

It bears emphasizing that applicant is not an innocent bystander in this instance. His actions and inconsistent testimony were his own. He is an experienced qualified medical evaluator who has undergone testing and continuous education on the ethical standards required of QME's. His current and former attorneys are also experienced attorneys with ethical standards imposed on them by the State Bar.

Applicant argues defendant surprised the applicant and the trier of fact with its conflict of interest argument. This statement is disingenuous. At the 8/28/2023 trial, the undersigned thoroughly discussed the various conflicts with the parties. Applicant and defense counsel appeared telephonically and applicant's counsel, Mr. Ito, made an in person appearance. The undersigned has notes documenting the discussion. As indicated in the Opinion, the undersigned found this statement puzzling since applicant's counsel has been present at every trial date. The

² *Alvarez v. Workers' Comp. Appeals Bd.* (2010) 187 Cal. App. 4th 575, 589 [114 Cal. Rptr. 3d 429, 75 Cal.Comp.Cases 817]

conflict of interest issue based on CCR section 41.5 that defendant has raised was thoroughly discussed by the undersigned with the parties. Further, it is apparent that due to the conflict, applicant's counsel, Mr. Ito, replaced applicant's former counsel, Mr. Bledsoe, given the fact that a substitution of attorney was filed in both applicant and Dr. Betoushana's cases at around the same time. Thus applicant counsel's assertion that he was left in the dark as to the conflict of interest issue is perplexing to the undersigned, considering the discussions the undersigned had with the parties during the various trial dates and considering applicant's former attorney's reasons for withdrawing from representation. Applicant's counsel had the opportunity to review all evidence and was present during multiple trial dates.

THE SUBSEQUENT INDUSTRIAL INJURY

Pursuant to section 4751, the permanent disability resulting from the subsequent industrial injury, when considered alone and without regard to or adjustment for the occupation or age of the employee, must be 35% or more. Here, applicant settled his underlying workers' compensation claim by Stipulations with Request for Award of 65% permanent disability, based on the reporting of applicant's predesignated primary treating physician, Donald Lee, D.O. Defendant SIBTF has objected to Dr. Lee's reporting and correctly asserts it is not bound by the findings and award against the employer in the underlying case and may litigate the question of whether the employer's liability should be more than what was found against it or settled with it in order to reduce its liability. As discussed above, there are various conflicts of interest rendering Dr. Lee's medical-legal reporting unreliable.

On 9/10/2021, applicant was examined by QME Mark Zarrabian, D.C. for the SII cumulative trauma injury through 4/08/2021. Dr. Zarrabian issued his report dated 10/05/2021. On page 1, Dr. Zarrabian noted applicant "states that over time, repetitive pushing and pulling overhead, pulling gurneys and lifting patients caused neck and lower back pain along with sharp bilateral arm and shoulder ache. Dr. Zarrabian noted applicant had begun care with Donald Lee, D.O. with medications and was recommended to seek orthopedic consultation, which applicant rejected. He noted, "The patient believes that his condition has been stabilized and plateaued since April." Dr. Zarrabian rendered applicant permanent and stationary as of 9/10/2021. He opined that 70% of applicant's current conditions are related to his cumulative work injury through 4/08/2021, and 30% are due to pre-existing degenerative condition in his spine. Under work status, he indicated applicant has been performing his full duties all along, and is not a qualified injured

worker (QIW). Dr. Zarrabian rated applicant's cervical spine under DRE Category II at 8% WPI, and his lumbar spine under DRE Category II, at 5% WPI. (Exhibit E) Before apportionment, Dr. Zarrabian's report rates as follows:

Cervical spine: 15.01.01.00 – 8 – [1.4] 11 – 220E – 10 – 13

Lumbar spine: 15.02.01.00 – 5 – [1.4] 7 – 220E – 6 – 8

CVC: 13 C 8 = 20

Prior to adjustment for age and occupation, Dr. Zarrabian's report rates as follows: Cervical spine:

15.01.01.00 – 8 – [1.4] 11

Lumbar spine: 15.02.01.00 – 5 – [1.4] 7

CVC: 11 C 7 = 17

[OMITTED]

IV. RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be DENIED.

DATE: 07/08/2024

**NORMA L. ACOSTA
WORKERS' COMPENSATION JUDGE**