WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ERNESTO MONTES, *Applicant*

vs.

LILY TRANSPORTATION CORP.;
ACE AMERICAN INS. CO., administered by CBCS, *Defendants*

Adjudication Numbers: ADJ11181762, ADJ11451754
Los Angeles District Office

OPINION AND ORDER DISMISSING 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, the Petition is untimely and must be dismissed.

There are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.) To be timely, however, a petition for reconsideration must be filed with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10940(a), 10615(b).)

This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v. Workers' Comp. Appeals Bd*. (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73].)

The Petition in this matter was filed on June 21, 2024. This was more than 25 days after the service of the WCJ's May 22, 2024 decision and beyond whatever extension of time, if any, the defendant might have been entitled to under WCAB Rule 10600. Thus, we will dismiss the Petition. If the Petition had been timely, we would have denied it on the merits for the reasons stated in the WCJ's report, which we adopt and incorporate.

WCAB Rule 10945(b) provides, in relevant part: "[e]very petition for reconsideration … *shall support its evidentiary statements by specific references to the record.*" (Cal. Code Regs., tit. 8, § 10945(b), emphasis added.) Rule 10945(b) then explains how references to the record must be made.

The requirements of WCAB Rule 10945 regarding specific references to the record are consistent with case law regarding proper citation to the record in appellate proceedings. (*Flores v. Cal. Dept. of Corrections and Rehab*. (2014) 224 Cal.App.4th 199, 204 ("an appellant must do more than assert error and leave it to the appellate court to search the record … to test his claim"); *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287 ("[r]ather than scour the record unguided, we may decide that the appellant has waived a point urged on appeal when it is not supported by accurate citations to the record"); *Salas v. Cal. Dept. of Transp*. (2011) 198 Cal.App.4th 1058, 1074 ("[w]e are not required to search the record to ascertain whether it contains support for [plaintiffs'] contentions"); *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 ("[t]he appellate court is not required to search the record on its own seeking error" and "[i]f a party fails to support an argument with the necessary citations to the record, … the argument [will be] deemed to have been waived"); *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 923 [50 Cal.Comp.Cases 104] ("Instead of a fair and sincere effort to show that the trial court was wrong, appellants brief … is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness … . An appellant is not permitted to evade or shift his responsibility in this manner."); see also Cal. Rules of Court, Rule 8.204(a)(1)(C) ("Each brief must … [s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears").) Moreover, "[t]he larger and more complex the record, the more important it is for the litigants to adhere to appellate rules." (*City of Santa Maria v. Adam, supra*, 211 Cal.App.4th at p. 287.)

Here, defendant not only violated WCAB Rule 10945(b), but failed to make even a reasonable effort to include specific citations to the record. A petitioner may not evade this

responsibility and place the burden on the Appeals Board to discover where the evidence supporting the petition can be found in the record.

At the conclusion of his report, the WCJ requests that we admonish defendant for its conduct in bringing this Petition. We agree.

All parties before the WCAB are expected to comply with the statutory and decisional law and the WCAB's Rules of Practice and Procedure and to refrain from conduct that is frivolous or without merit under Labor Code section 5813 and WCAB Rule 10421 (Cal. Code Regs., tit. 8, § 10421). ***We admonish defendant Lily Transportation Corp., insured by Ace American Insurance Company, administered by CBCS, Inc., and defendant's attorneys Michael A. Forbes and Michael Sullivan and Associates, LLP, for their conduct, which borders on frivolous, in bringing this meritless Petition. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421.)***

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 20, 2024

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

ERNESTO MONTES
LAW OFFICES OF RAMIN R. YOUNESSI
MICHAEL SULLIVAN & ASSOCIATES LLP

AS/mc

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

REPORT AND RECOMMENDATION
ON DEFENDANT'S JOINT PETITION FOR RECONSIDERATION

I

INTRODUCTION

Applicant, a trucker born in 1965, brought disputed claims of cumulative trauma (CT) injury to multiple body parts, as well as a specific claim of hernia injury due to moving heavy materials on 10/15/17. The matter went to trial before the undersigned on 3/28/24. At trial, the parties agreed to submission of the case, without live testimony, based on a large quantity of documentary evidence, including multiple panel qualified medical evaluator PQME reports, multiple transcripts of the applicant's depositions and multiple sub rosa investigation reports.

Following such submission, I issued finding and award on 5/22/24. Therein, I found injury on a cumulative trauma basis to multiple orthopedic body parts, as well as in the form of gastritis, mastication dysfunction and hernia. As to the specific injury claim, I found injury in the form of umbilical hernia and mastication dysfunction.

I awarded permanent disability (PD) of 62% after apportionment in the cumulative trauma claim. I awarded PD of 18% after apportionment in the specific hernia claim. I also awarded 25 days of temporary disability benefits in the hernia case only.

Defendant's verified but untimely reconsideration followed. Therein, defendant appears to contend substantially as follows:

1. The judge abused his discretion when he did not vacate submission so that the examining experts could review sub rosa investigation information based on nine days of defense surveillance done between August and October 2023.
2. The judge erroneously relied on a dental PQME who did not find the applicant to have reached permanent and stationary status.
3. The judge abused his discretion in relying on the independent reporting of the qualified medical examiners because the sub rosa evidence showed that the applicant was not credible, and was "performing activities that were inconsistent with his claimed disability and purported limitations."

4. The judge's PD findings were inconsistent with the PQME PD ratings to which the parties had stipulated.

II

FACTS

PROCEDURAL HISTORY:

Mr. Montes, through counsel, filed application for adjudication in the CT case on 1/13/18. He filed application in the specific injury claim on 8/30/18. Despite compensable PQME reports in four specialties, all claims remain denied by defendants.

The within trial proceedings ensued via applicant's filing of a declaration of readiness on 11/25/23. Defendant filed an objection on 12/7/23, stating that discovery was not complete for the sole reason that "Defendant would like to set the cross-examination of the QME."

I was assigned to both the MSC and the trial in this case. At the 1/10/24 MSC, I set the matters for trial over defendant's objection. In connection this ruling, I wrote the following in the minutes of hearing:

> No objection in EAMS to DOR although apparently [objection] was sent 12/7/23 and received by AA but not found in EAMS. [This appears to have been an error on my part as said objection was in fact filed in EAMS, but in only one of the two cases.] Objection at the time of hearing based on need to [cross-examine orthopedic] QME Halbridge whose last report was in 2020 and info DA states he just received from his clients own civil lawyer which is not good cause to delay applicant's case. Therefore set for trial on both cases over DA objection. Settlement discussions took place today but per DA there is 'zero authority.'

I continued the matter from the first trial date of 2/15/24 because no joint pretrial conference statement had been previously prepared. The parties completed this document at the 2/15/24 hearing.

Therein, under "other issues," defendant wrote, "Defendant contends [surveillance] showed change of circumstances & a QME reevaluation is needed."

At trial on 3/28/24, , the parties submitted the case, without testimony, by agreement, on a large documentary record, consisting mainly of transcripts of the applicant's depositions on three different dates; reports of surveillance on nine different dates in late 2013; and nine PQME reports in the specialties of orthopedic surgery, dentistry, internal medicine and surgery.

Neither side objected to the admission of any of these exhibits. Per the court reporter's minutes of hearing, neither side raised any objection on the date of trial to the matter going forward or to having the matter submitted on documentary evidence. While I only claim some independent recollection of the 3/28/24 trial proceedings, I have no recollection an objection by either side to proceeding in this manner. In addition, nothing in the trial minutes allowed for submission of post-trial briefing, nor do I recall this.

Nevertheless, on 4/15/24, defendant filed a "Post Trial Brief" addressing asserted issues that the applicant needed to be re-evaluated by orthopedic PQME Neil Halbridge in part because he last saw the applicant on 7/26/19 so his reporting was "stale." As noted above, I recall no such "issue" raised at trial, nor is this reflected in the court reporter's trial minutes.

As noted above, on 5/22/24, I issued joint findings and award in both cases, finding industrial injury in both cases and awarding permanent disability of 62% in the CT case and 18% in the specific injury case. The defendant's untimely reconsideration petition followed.

SUBSTANTIVE FACTS

Deposition Transcripts

Per agreement, in lieu of any live testimony, I reviewed 138 pages of transcripts of the applicant's three depositions taken at various times in 2018, prior to the date that any of the PQMEs had declared applicant permanent and stationary. The following information is based on these transcripts, as well as similar histories the applicant gave to the examining experts.

The applicant had worked continuously as either a truck driver or as a driver/loader/unloader from approximately 1999 to 2017. Prior to receiving training to be a truck driver, he had worked ten years as a janitor. (Exh. 1, pp. 20-21; pp. 36-47.)

He worked as a driver/loader/unloader for defendant herein from 6/15/15 to 12/27/17, at which time his employment terminated. (See Exh. 1, p. 48.)

In response to a series of deposition questions, the applicant described his job duties with defendant in some detail. Overall, the position impressed me as being quite difficult and arduous.

Specifically, the applicant's work hours were normally six days a week, from 9 pm at night until 7 pm the following night—a 22 hour shift. The applicant was able to work these hours because driving duties would be shared with a co-driver. The job consisted mainly of delivering grocery and other items from Southern California to various cities in Arizona, including Tucson

and Scottsdale. The applicant and presumably the other driver were also responsible for unloading six to ten pallets of merchandise at a time using a pallet jack. (Exh. 1, pp. 49-53; Exh. 2, pp. 87-89.)

During much of the time applicant worked there, he would have to do the driving himself because either no co-driver was assigned or none was available for the shift. Often when unloading, the applicant was moving meat and fish in a refrigerated trailer. (Exh. 9, pp. 3-4.)

On or about 10/15/17, the applicant felt a pulling sensation in his stomach when pulling a heavy pallet jack full of merchandise from the back to the front of the truck trailer. This was subsequently diagnosed as a hernia, which led to surgery in May 2018, after the applicant's termination. (Exh. 2, pp. 80-81.)

The applicant's termination took place after a heated argument with a dispatcher shortly after Christmas in 2017. The applicant had worked a series of shifts before, during and after Christmas Day, partly to make of for lost earnings due to a three-day suspension arising from a truck yard collision. The last such shift was a drive to and from Arizona, which the applicant volunteered for because there were no other drivers available during the holidays. Apparently, there was a disagreement over whether the co-driver the applicant took with him was actually authorized to share the driving duties with the applicant. Per the applicant, there were a number of intense, profanity-laden discussions of this with the dispatcher and other supervisors. During one such argument, as the applicant candidly acknowledged, he used "inappropriate" and threatening language toward a dispatcher. Presumably because of this incident, the applicant was suspended and then terminated for cause shortly afterwards. (See Exh. 1, pp. 54-60; Exh. 9, pp. 4-5.)

During these depositions, the applicant also provided detailed information regarding his day-to- day activities since his termination. The applicant acknowledged that he was capable at that time of doing his "at-home activities," including operating a 15 pound leaf blower for about 30 minutes once a week. He also stated that he would normally walk two miles a day on his doctor's recommendation. He acknowledged being able to drive a car, which he did to pick up and drop off his grandchildren for school. He acknowledged that he could lift his arms above his head, and did not need to use either a cane or a brace. (Exh. 3, pp. 120-128.)

The applicant stated at deposition that, based on a test done at his doctor's office, he did not think he could lift more than 15 or 20 pounds. (Exh. 3, p. 127.)

Regarding his claimed injuries, the applicant stated at deposition that his orthopedic complaints were limited to his neck, right shoulder and low back. (Exh. 2, p. 86.)

The applicant attributed his orthopedic complaints to the physical demands of his position, including his ongoing unloading duties at his various drop-off points. He attributed his hernia condition to a specific injury occurring around two months before his termination when he was pulling a large load off his truck trailer. The applicant was vague about whom he reported any injuries, aches or pains to anyone at work other than his regular co-driver, Jose Aguirre. (See generally, Exh. 2, pp. 83-90.)

Sub Rosa Evidence

Without objection, defendant placed three sub rosa reports into evidence, detailing some nine days of surveillance at the applicant's residence in August, October and December 2023. (Exhs. B-D.)

For the most part, any sub rosa observations of the applicant over this period of time were limited to routine errands and other essentially sedentary activity.

The investigator did observe the applicant, on two occasions, use a hand-held blower in his yard, and pick up and dispose of leaves and debris. Judging by the time entries in the report, the first such activity lasted no more than 47 minutes; the second, no more than 18 minutes. [1] (Exh. B p. 8; Exh. D, p. 8.)

Also, in one instance, the applicant was apparently involved in purchasing or otherwise acquiring a washing machine that he brought to his home. He was assisted in this by another male individual both at the pickup point and at his home. The investigator observed these individuals transported the washing machine to a pickup truck with a dolly, and manually load and unload the washing machine onto the bed of the pickup truck. (Exh. C, p. 13.)

Also of interest was the fact that applicant was in possession of a tractor-trailer with a business name written on the side, namely, "Montes and Preciado Trucking Service, LLC.) Taking judicial notice of public records from the California Secretary of State, I noted that in my opinion on decision that the applicant was in fact listed as a manager of this LLC, which was first registered on 4/11/22. However, nine days of surveillance revealed no activity of substance in relation to his

[1] As noted above, the applicant had specifically acknowledged at his deposition that he routinely used a 15-pound blower to clear debris in his yard around once a week. (Exh 3, pp. 122, 128.)

enterprise except that, on 10/26/23 at around 12:30 pm, the applicant drove the vehicle to a shipping yard about eight miles away and was not observed after that. (Exh. B, p. 3.)

PQME Medical Reporting

As noted above the applicant saw independent panel qualified medical evaluators in four specialties: 1) Orthopedic Surgery; 2) Internal medicine; 3) Surgery; 4) Dentistry. I will summarize their findings herein as follows:

Orthopedic PQME Dr. Neil Halbridge saw the applicant on a single occasion, on 7/26/19. However, he prepared a total of four reports which incorporated subsequent testing and record review, the last such report having been prepared on 6/24/20[.]

Based on a thorough evaluation and record review, Dr. Halbridge found industrial injury to both wrists, both shoulders and the lumbar and cervical spine. Dr. Halbridge found permanent disability within the DRE Category II for both the cervical and lumbar spine, based on muscle guarding, motion loss, x-ray and MRI abnormalities and other findings during Dr. Halbridge's office evaluation. He based permanent disability for the shoulders on loss of range of motion. Impairment for the wrists was based on abnormal EMG studies as per page 495 of the AMA guides. Dr. Halbridge also included a pain add-on of 2%, based on 1% for each shoulder. (Exh. 8, pp. 8-15.)

Dr. Halbridge found apportionment of 10% of the cervical and lumbar disability to facet hypertrophy demonstrated on MRI studies. Dr. Halbridge gave other factors of apportionment based on earlier employment as a truck driver with other employers. (Id. at pp. 11-13.) However, as noted in my opinion on decision, I rejected this other apportionment as invalid under Labor Code section 5500.5.

Dr. Halbridge provided a number of recommended work restrictions, including no repetitive work above shoulder level, no driving for more than 1 hour and 50 minutes at a time without a 10-minute break and no lifting weights more than 15 pounds. (Exh. 4, p. 8.)

Surgery PQME Dr. Joseph Moza prepared a single report based on his 3/2/21 evaluation. He assigned 5% impairment for the applicant's post-operative hernia, based on complaints of occasional discomfort by the hernia site. Dr. Moza provided a prophylactic restriction against very heavy lifting. Dr. Moza apportioned this impairment equally between the CT and specific injury claim. (Exh. 12, pp. 78-82.)

Internal PQME Dr. Sanford Scott prepared three reports, the most recent dated 1/25/23 based on Dr. Scott's evaluation on that date. With little explanation, Dr. Scott dismissed applicant's considerable internal medicine issues regarding hypertension, hyperlipidemia, diabetes and tachycardia as being nonindustrial. Dr. Scott did find 10% WPI because of a GERD condition, which Dr. Scott apportioned 90% to nonindustrial factors, including a hiatal hernia and a history of H. pylori infestation, and 10% to NSAID use during industrially related treatment. (Exh. 11, pp. 62-66.)

Dr. Scott limited the applicant to light work with [sic] undue stress" due to his "multiple medical conditions" which, in his view, made it improbable that the applicant would return to the open labor market. (Exh. 11, p. 65.)

Finally, Dental PQME Dr. David Abri prepared a single report based on his evaluation on 9/17/21. He found dental impairment of 10% based on mastication difficulties. Dr. Abri apportioned this 15% to his prior dental condition and the balance to the specific and CT injuries. Causation was assigned in part to the industrial injuries due to the applicant's medication use, which Dr. Abri believed to have negatively affected his dentition, and the clenching and grinding of teeth due to orthopedic pain. Dr. Abri imposed no specific work restrictions. (Exh. 4, pp. 10-15.)

Dr. Abri noted that the above findings were "conditional" permanent and stationary findings, explaining, "If the applicant denies future dental treatment or the insurance carrier denies recommended treatment, then the applicant is considered P&S as of the date of my evaluation. Otherwise, I state again that the patient is not MMI and not P&S." Exh. 4, p.12.)

There is no indication anywhere in the record that defendant, who has denied both of the applicant's claims in their entirety, ever offered or authorized the course of care recommended by Dr. Abri, consisting of deep cleaning, a course of Botox treatment and a night guard. (Exh. 4, p. 12.)

As noted above, the parties very helpfully agreed to PD "rating strings" for all of the above WPI findings, prior to any apportionment that might apply. The document listing these rating strings is set forth in the WCAB file as "Parties Proposed Ratings" with an entry date of 3/28/24.

In reaching my PD determinations, I relied on each of these proposed ratings for each component of permanent disability that I ultimately found in both cases. I also relied on the very same factors of apportionment expressed by the PQMEs, except that, pursuant to Labor Code

section 5500.5(a), I rejected any apportionment based on earlier employment in the same career as a truck driver. My disability findings, with apportionment, and CVC computations for each claimed injury are set forth in detail at page 5 of my opinion on decision[.]

III.

DISCUSSION

TIMELINESS OF PETITION

The within joint petition appears to this judge to be clearly *untimely*. Defendant appears to tacitly acknowledge this, noting a decision date of 5/22/24 and a date of petition of Friday, 6/21/24, some 30 days later. The petition provides no explanation of this obvious problem. Absent some type of unusual issue regarding service of documents, etc. which defendant has not presented, the Board would appear to have no jurisdiction to act on this untimely petition. (See, e.g., *Noyce v. West Contra Costa USD*, 2024 Cal.Wrk.Comp.P.D. LEXIS 66, and cases cited therein.)

Failure of PQMEs to Review Sub Rosa Films

One of defendant's main contentions appears to be that their reports of nine days of sub rosa films based on surveillance in late 2023 now entitles defendant to what they were unable to obtain prior to trial, namely a right to carry out continued further discovery over six years after the case originally opened.

For multiple reasons, I find no merit to this contention.

Defendant has alerted us to no authority that, simply because a party decides to undertake nine days of surveillance, they are automatically entitled to have this reviewed by all of the examining experts, no matter how much delay this imposes on an applicant seeking to resolve their denied claims after over six years of litigation.

I agree there is potentially good cause for this where the films present the applicant in a "markedly different" manner. (See *Mandonado v. Barrett Bus. Serv*., 2019 Cal.Wrk.Comp.P.D. LEXIS 56.) Here, however, most of the nine days of surveillance undertaken by defendant showed the applicant engaged in sedentary activity, although he was seen on two occasions using a leaf blower in a manner entirely consistent with activities, he freely acknowledged at his deposition five years earlier.

One exception would be that, on a single occasion over a nine-day period, the applicant was seen moving a washing machine on a dolly from one location to another, and putting this item on and off a pickup truck with the assistance of another person. Having occasionally moved these items myself; I would agree this is a very heavy object that would exceed a prophylactic 15-pound lifting restriction imposed by Dr. Halbridge.

However, I noted that these restrictions are provided for the guidance of the injured worker and employer in terms of deciding what activities are or are not appropriate for week- in, week-out work. I do not view them as an iron-clad bar against any activity at any time that might exceed this restriction. As I noted in my opinion on decision, there is no suggestion that this is a habitual activity of the applicant's. In addition, it is unknown what price, if any, the applicant might have had to pay for this the next day or thereafter. (See 5/22/24 Opn. on Decision, pp. 6-7.)

I further note that nothing in the sub rosa surveillance would appear to discredit a series of PQME findings based on office evaluations and objective diagnostic evidence such as x- rays, MRIs and EMG studies.

I also disagree that the sub rosa evidence, viewed as a whole, damaged the applicant's credibility. With the exception of a few moments spent lifting a heavy appliance in and out of a pickup truck during one of nine days of observation, I find nothing in the films inconsistent with the manner in which the applicant presented himself at deposition and to the examining experts. As there is no indication the applicant is in the appliance business, I do not find it reasonable to completely discredit the applicant based on this single observation.

In reaching this conclusion, I note that, overall, I gave the applicant high marks for credibility based on the record that I reviewed. As I noted in my opinion on decision, he appeared to be quite candid about the circumstances surrounding his termination, including is admission of having behaved inappropriately during a heated argument with a dispatcher. (See, e.g., Exh. 1, p. 60.) He was also candid in limiting his orthopedic complaints to a few body parts, rather than a robotic repetition of every part of his anatomy, as is not unusual in contested WCAB cases. (Exh. 2, p. 86.) I have also considered that the applicant appears to have had a long and solid work history in what seems to this judge to be a difficult career.

As I specifically noted in my opinion, sub rosa investigation did disclose his ownership of a commercial vehicle connected with a business he registered in 2022. However, as I stated in my opinion on decision:

> I take judicial notice from the California Secretary of State's website that this particular operation, now listing applicant as manager, was registered with the SOS on 4/11/22, after every QME had seen the applicant with the exception of an updated evaluation and report from internist Dr. Scott on 1/25/23. However, this 1/25/23 report from Dr. Scott provides no specific history I can find regarding the applicant's occupational activities. Dr. Scott states at the conclusion of this report that the applicant was unemployed but it is not clear where Dr. Scott got this information from or whether Dr. Scott simply assumed this from earlier reporting. Given that the applicant was quite forthcoming at his deposition about such matters as having threatened a coworker during an argument, I believe the more likely inference is that Dr. Scott simply assumed the applicant was unemployed. Thus, I am unpersuaded that applicant ever tried to conceal his work or business activities regarding a trucking company in which he appears to be named as the 'senior partner.' Once again, I am not seeing how this information impeaches the findings of the QMEs regarding earlier events leading to the industrial injury, or the factors of disability herein based largely on objective factors. Given that the sole observed business activity during eight days of surveillance was to drive the semi-truck to a shipping yard on one occasion, I am not persuaded that this position is anything like the 100+ hours that applicant worked for defendant herein. Injured workers are encouraged to return to the labor force. I am not inclined, because the applicant is evidently motivated to still make something of his life, to reject findings based primarily on the objective factors found by the examining physicians herein.

(Opn. on Decision, 5/22/24, pp. 7-8.)

Finally, I would submit that if hypothetically there were any error in not re-starting discovery after the trial proceedings herein, such error was invited by the defendant.

In essence, defendant seeks to impeach orthopedic findings from a 2019 evaluation based on surveillance they decided to carry out over five years later. We have been provided with no explanation of the reasons for this long delay, or how this could be deemed consistent with the due diligence mandate of Labor Code section 5502.

Moreover, it appears defendant was not forthcoming about the existence of these films prior to the legally mandated closure of discovery at the MSC. Although the surveillance starting in August 2023 would appear to be known to the defendant when they filed their DOR objection on 11/7/23, their objection, which merely stated a general need to cross-examine PQME Halbridge, disclosed no information about this.

Even more significantly, my detailed notes of the 1/10/24 MSC, after which all the sub rosa had been completed, showed that defendant's sole asserted reason to prolong discovery was to evaluate "info [defense counsel] just received from his client's civil lawyer . . . ." I certainly do

not recall any mention of sub rosa at the MSC and if defense counsel had mentioned this, it would be my normal custom and habit to note this in the minutes of hearing and evaluate this accordingly.

Indeed, even as of the first trial date on 2/15/24, no joint pretrial conference statement had been prepared. While the "5 pager" prepared on that date did include surveillance on "various" dates in the list of exhibits, it is unknown to this judge whether this was ever disclosed any earlier.

Obviously, it was incumbent on defense counsel to "put their cards on the table" at the MSC in the interest of avoiding surprise at trial and encouraging resolution. It is very far from clear that this was done. The MSC is designed to engender "a productive dialogue either leading to the resolution of the dispute or thoroughly and accurately framing the stipulations and issues for hearing." (*Co. of Sacramento v. WCAB (Estrada)* 64 CCC 26.) Instead, one could posit that the strategy was to avoid any mention of the films at the MSC, gambling that the trial judge, upon seeing this "smoking gun," would then decide to vacate submission.

Obviously, rewarding such an approach would be inconsistent with such cases as *Telles Transport v. WCAB*, 66 CCC 1290, in which the court noted that, "condoning such tactics would encourage parties not to list relevant and probative evidence at the MSC and later surprise their opponent at the hearing."

I would also note that defendant raised no specific objection at trial to determination of the issues presented. By deferring all this to an unexpected post-trial brief and reconsideration petition, I believe this tactic unfairly denied applicant the opportunity to present any opposing arguments prior to submission of the matter at trial.

To sum up, I do not believe substantial justice would be served by now allowing defendant to reopen discovery in claims they have continued to deny for over six years, despite compensable PQME reports in four different specialties, based on belated presentation of belated sub rosa surveillance. While [I] agree that defendant is entitled to a record that allows reasoned determination of the issues presented, they have not persuaded me that their inconclusive sub rosa either tarnishes the applicant's credibility or causes me to question any of the expert's findings based mainly on the PQMEs' office examinations and objective testing.

Permanent and Stationary Reporting of Dental PQME

Defendant asserts at page 3, line 6, of their petition that Dental PQME Dr. David Abri "never found the applicant permanent and stationary." Presumably, this statement is asserted as a

claim of error, as it would obviously be improper to award permanent disability benefits if the applicant had not reached permanent and stationary status.

With all due respect, I believe this statement omits material information and thus mischaracterizes the record in this case. Dr. Abri makes clear in his sole report that the applicant was "conditionally" permanent and stationary, the "condition" for defeating this status being either that the applicant would self-procure such care as a mouth guard and Botox treatment or that the employer would provide it. There is not an iota of evidence that the applicant ever purchased such care on his own, or that a defendant, who is denying all claims, ever offered this.

Taking defendant's assertion at face value, the applicant can never be found permanent and stationary or bring his long-disputed claims to finality until he pays for the treatment recommended by Dr. Abri out of his own pocket. I submit this type of outcome is not fair or reasonable, nor would this serve the Board's mission of substantial justice.

Rating of PQME Reports

I likewise believe defendant's claims of error regarding the undersigned's rating computations are based on a misstatement of the record. The trial minutes of hearing specifically provide that "the parties stipulate that if the DEU were to rate the reports referred to in [the "Parties' Proposed Ratings placed in EAMS], they would come up with the same *string ratings before any apportionment*." [Emphasis added.]

"String rating" is a commonly accepted workers' compensation term meaning the adjustment of a given whole person impairment for Future Earning Capacity adjustment, and occupation and age. (See, e.g. *Lund v. Ryko Solutions, Inc.*, 2020 Cal.Wrk.Comp. P.D. LEXIS 373,)

As I carefully pointed out in my opinion on decision, my apportionment findings (which were clearly left to the judge as noted above) differed in several instances from those of defendant because of erroneous apportionment to earlier jobs the applicant held during his career as a trucker. (Opn. on Decision, pp. 4-5.) Defendant has also omitted any discussion of this circumstance from their petition, which I believe may be deemed a concession that this type of apportionment was in fact invalid.

As the appealing party, I believe petitioner bears the burden of showing some specific error in my use of the "string ratings" agreed to by the parties, my apportionment determinations, or my

combined value chart (CVC) computations that were also left to the trial judge. Instead, defendant simply complains that my final numbers differed from defendant's.

Defendant apparently expects the Board or the judge to laboriously go through these computations and try to uncover some error on their own. As defendant has not alerted us to any specific computational error, I believe their claim of such error herein is without merit.

IV.

RECOMMENDATION

It is my normal practice, at this point in my report, to simply indicate whether I believe the party's petition should either be granted or denied. However, because the within petition seems to be typical of many I have responded to in the last year or so, I would first like to take this opportunity to raise some additional concerns.

Responding to this petition, by my estimation, took up more than an entire workday, spread out over several days including one weekend day. In addition to my trial calendar, a weekly conference calendar at which over 90 parties appeared last week and pending decisions, I currently have over 140 pending "EAMS tasks," consisting mainly of joinder petitions, dismissal petitions, petitions to be relieved, discovery petitions, cost petitions, etc., all having been filed within the last 30 days. This number would be much higher were it not for settlements, petitions to compel and calendar requests that I have already processed under tighter deadlines. The members of the public who filed these pleadings and the parties to other pending matters are clearly entitled to prompt determination of their issues.

However, none of this can take place while responding to petitions such as this one.

As noted above, the within petition is clearly untimely, with no explanation of why it should be considered notwithstanding the missed deadline. However, judges are expected to use the same amount of time to respond to untimely petitions as to timely petitions.

With all due respect, it is unclear what time or effort petitioner took to actually review the record or to consider the reasons I gave for my determination of the issues. I must admit it can be vexing that a largely skeletal petition requires the judge to take up far more of their own time to explain the record than does a carefully prepared petition.

On multiple occasions, petitioner has omitted material information, such as the reasons for my apportionment findings, the applicant's disclosure at deposition of his activities such as driving

or using a leaf blower, the actual agreement of the parties regarding use of their proposed ratings, or the actual findings of the dental QME.

As noted above, this type of pleading style seems far from unusual, as presentation of this type of document seems to carry no adverse consequences. I would note, however, that per rule 10945(a), "Every petition for reconsideration shall *fairly state all* of the material evidence relative to the point or points at issue." [Emphasis added.} Also, every petition "shall support its evidentiary statements by specific references to the record." (Rule 10945(b).)

For the reasons stated above, I believe these rules have been honored herein more in their breach than their observance. Therefore, I would ask that the board consider admonishment of defendant or other such remedies in connection with their decision on reconsideration. I also recommend that the petition either be denied or dismissed, as I believe it is both untimely and unmeritorious.

Respectfully submitted,

DANIEL A. DOBRIN
Workers' Compensation Judge