

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

JOSE JUAREZ, *Applicant*

vs.

**VELLUTINI CORPORATION dba
ROYAL ELECTRIC COMPANY;
OLD REPUBLIC INSURANCE, administered by
GALLAGHER BASSETT SERVICES, *Defendants***

**Adjudication Number: ADJ13706815
San Francisco 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, both of which we adopt and incorporate, to the extent quoted in the attachment to this decision¹, we will deny reconsideration.

The employee bears the initial burden of proving injury arising out of and in the course of employment (AOE/COE) by a preponderance of the evidence. (Lab. Code, § 5705; *South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3202.5, 3600(a).) Moreover, it is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310];

¹ We do not adopt or incorporate the WCJ's statement in the Report that the rule of liberal construction applies only to the interpretation of laws and not to questions of fact. (*San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986] (quoting *Gross v. Workmen's Compensation Appeals Bd.* (1975) 44 Cal.App.3d 397, 402 [40 Cal.Comp.Cases 49] ["[L]iberal construction in favor of the employee, as codified in section 3202... extends to statutory construction as well as to factual determinations."].) However, the rule of liberal construction does not extend to ignoring a statutory mandate which happens to work unfavorably to the employee, such as the employee's initial burden of proving industrial injury as discussed further in this decision.

Garza v. Workmen's Comp. Appeals Bd. (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) “The term ‘substantial evidence’ means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...It must be reasonable in nature, credible, and of solid value.” (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Medical evidence is required if there is an issue regarding the compensability of the claim. (Lab. Code, §§ 4060(c)(d), 4061(i), 4062.3(l).) A medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Bd. 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.” (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

In this case, we agree with the WCJ that applicant did not meet his burden of proof through substantial medical evidence in the record that he sustained industrial injury as claimed. In addition, we have given the WCJ’s credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ’s credibility determination. (*Id.*)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 14, 2024

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

**JOSE JUAREZ
ARNS DAVIS LAW
WILLIAM S. FRANK, INC.**

SAR/abs

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

REPORT AND RECOMMENDATION

INTRODUCTION

Applicant seeks reconsideration of my Findings of Fact and Order dated February 20, 2024, wherein I concluded that he had not met his burden of proving an industrially compensable injury to his back and ordered that he take nothing by way of his claim. Applicant contends that (1) the evidence at trial does not justify my findings of fact and (2) the findings of fact do not support the order. Applicant's petition is timely and verified.

FACTS

1. Procedural background.

This case proceeded to trial and applicant alleged an injury to his back in connection with his employment with defendant Vellutini Corporation dba Royal Electric Company. Because the claim was denied by defendants, the compensability of the alleged injury was the sole issue being decided.

2. Evidence at trial.

At trial, three reports of qualified medical evaluator Norman L. Banks, M.D., dated June 21, 2021, November 3, 2021, and August 1, 2022, were admitted into evidence as joint exhibits 1, 2, and 3, respectively. The reports were summarized on pages 2-11 of my Opinion on Decision. Of import is Dr. Banks' last report, which was summarized on pages 9-11 of my Opinion on Decision. The following is excerpted from that summary:

“Dr. Banks then repeats his summary of the previously summarized March 22, 2021 note by Dr. Chang-Witt, indicating that the applicant reported that over a month before he was injured at work and that pain was located in the posterior left shoulder area. (See Exhibit 2, above.)

In a “supplemental discussion” section, Dr. Banks states as follows:

To first address the partial medical record of February 20, 2018, though it does mention pain in the 'right upper back' which began 2 days earlier, the examination noted tenderness about the trapezius region/upper back, which is not a thoracic spine injury rather most consistent with the cervical spine. The radicular pain noted at that time would not be associated with a thoracic spine injury. Further, the numbness noted in the lower extremities/toes would not be associated with a thoracic spine injury. Additionally, and most importantly, there is no medical evidence to substantiate ongoing pain or problems specific to the mid back, upper back, thoracic spine from this point. This is a single entry that is not supported by any diagnostic imaging

or formal treatment. Given the extensive records from that point through the present, I can confidently state that would be no basis for apportionment to this minor incident of February 2018.

Regarding the entry of March 17, 2021, it is noted the applicant was seeking treatment for pain in his left shoulder back region which was injured approximately one month prior. This does contradict the applicant's claim of injury occurring on June 16, 2020. Again, as stated in prior reports, the Kaiser records are void of any entry around June 16, 2020, which according to the applicant's testimony, he did seek treatment on his own after this incident. I further acknowledge the fact the applicant testified to working for approximately 5 different employers subsequent to his employment with Vellutini Corporation, all through the union, all performing excavation work.

The applicant's clinical presentation on May 13, 2021, was most consistent with costochondritis of the ribs T7 through T10 with components of complex regional pain syndrome type I. His subjective complaints at the time were noted to be more on the left side, which would correlate with the entry from March 2021 negating a date of injury being June 16, 2020 as the Kaiser note of March 17, 2021, indicated the applicant stated he was injured at work the month prior (February 2021), and his complaints at that time were about his upper back and left shoulder.

Given these inconsistencies, and the absence of medical evidence related to the claimed injury of June 16, 2020, with the first mention of symptoms being in March 2021, concern is raised for subsequent employment being responsible for components of the injury (and may be the injury itself). **As such I do believe industrial causation should be determined by the trier of fact as the medical evidence produced is insufficient in substantiating the claim of injury as noted by the applicant.** Of note, the applicant did state his claimed injury of June 16, 2020, was witnessed and he promptly reported it to his supervisors who did not offer him medical attention. To date I have not received any witness testimonies to corroborate this history. (*Id.*, at p. 5, emphasis added.)

Also admitted into evidence were a DWC-1 form, dated August 24, 2020 (applicant's exhibit 1; summarized on page 11 of my Opinion on Decision), photos of a truck (applicant's exhibit 2; summarized on page 12 of my Opinion on Decision), and a notice regarding denial of workers' compensation benefits, dated November 12, 2020 (defendant's exhibit A; also summarized on page 12 of my Opinion on Decision).

Since the photos of exhibit 2 included what appeared to be a text message, applicant was ordered to, and subsequently provided, written certified translations into English.

Applicant was the only witness who testified at trial. I summarized applicant's testimony at trial at pages 5-7 of the November 29, 2023 Minutes of Hearing and at pages 12-14 of the Opinion on Decision.

3. Findings of Fact and Order and Opinion on Decision.

On February 20, 2024, I issued my Findings of Fact and order and accompanying Opinion on Decision. Therein, at pages 14-18, I analyzed the case as follows:

I have carefully reviewed and considered the evidence submitted to me, including the medical records in evidence, as well as applicant's testimony at trial. In view of the overall record, I find that applicant has not met his burden of proof with regard to injury AOE/COE. See *Mendoza v. Huntington Hospital* (2010) 75 Cal. Comp. Cases 634, 644 ["it is the employee's burden to prove industrial causation, not the defendant's burden to disprove causation.]. I have reached this conclusion due to the lack of medical support of applicant's claim as well as due to the questionable factual basis for the claim.

The only medical reports in evidence are the three reports of the QME, Dr. Banks, joint exhibits 1 through 3. In his final report, joint exhibit 3, Dr. Banks states that in view of the inconsistencies with respect to reporting of when the injuries allegedly occurred, "and the absence of medical evidence related to the claimed injury of June 16, 2020, with the first mention of symptoms being in March 2021, concern is raised for subsequent employment being responsible for components of the injury (and may be the injury itself). As such I do believe industrial causation should be determined by the trier of fact as the medical evidence produced is insufficient in substantiating the claim of injury as noted by the applicant."

In view of the QME's statement that the "medical evidence is insufficient in substantiating the claim of injury as noted by the applicant", I have no medical basis for a finding of injury.

Furthermore, after carefully observing applicant's demeanor at trial, I could not afford applicant's testimony full credibility in light of the overall record.

My concerns are as follows:

- (1) Applicant testified that he told Jorge and Fernando right after the incident that he hurt and about the pain he was feeling, but he also testified that he never told them what part of his body hurt. In view of the fact that applicant testified that he told them several times over the next few days that he hurt, it appears questionable that he never mentioned what hurt or where his pain was located.
- (2) Applicant's exhibit 2, a text message applicant testified he sent at the time of the incident, refers to a scratch on the bumper of the vehicle the applicant was driving but does not refer to any injury sustained or any pain.
- (3) In addition, it appears that applicant told Dr. Banks during his first evaluation that he did not feel immediate pain at the time of the incident and first experienced symptoms "[s]ometime after he went home" (see joint exhibit 1, p. 3), contradicting his testimony at trial that he sought out Jorge and Fernando immediate after the incident and told them about his pain.

- (4) As indicated by Dr. Banks, there are no medical records around the time of the alleged injury that document shoulder or upper/mid-back complaints or reference an injury sustained on June 16, 2020.
- (5) Per Dr. Banks' summary of the records submitted to him by the parties, applicant was seen by his Kaiser family physician in the months following June 16, 2020, but the reports as summarized are devoid of any reference to an alleged injury or shoulder or upper/mid-back symptoms. Similarly, the treatment reports for a low back injury apparently sustained in early 2020 due to heavy lifting summarized by Dr. Banks' in joint exhibit 1, do not refer to a June 16, 2020 incident or shoulder, upper or mid-back pain.
- (6) The first time after the alleged June 16, 2020 injury that shoulder and upper to mid-back symptoms are mentioned in the Kaiser records as summarized by Dr. Banks is in March of 2021, more than 6 months after applicant's employment with applicant ended in August of 2020, when a March 22, 2021 progress note by applicant's family physician, Dr. Chang-Witt indicates that "over a month ago, he became injured at work" and that pain was located in the left posterior shoulder, while a May 4, 2021 progress note of Dr. Chang-Witt notes that applicant presented for follow-up of back injury that he reported was sustained at work, with pain in the mid-thoracic spine.
- (7) At trial, applicant was unable to describe what symptoms he experienced when he allegedly first sought treatment after he was terminated. He also was not able to clarify whether his lower or mid-back hurt, indicating pain "somewhere along the spine" and that "it is on the left side".
- (8) Applicant testified that he does not recall any other injury to his back and that the incident with the trailer "was when all his pains started", yet Dr. Banks's reports document a long history of lumbar back issues, including radiculopathy, preceding 2020.

Based on the foregoing, as well as the lack of substantial medical evidence of injury, I am compelled to conclude that applicant did not sustain a compensable work injury on June 16, 2020.

As to the claimed injury to the back, I found a lack of substantial medical evidence of injury. Consequently, I ordered that applicant take nothing.

1. Contentions on reconsideration.

Applicant claims that workers' compensation laws are to be liberally interpreted in a manner favoring the injured worker and that I interpreted "everything concerning Applicant's back claims to the detriment of the injured worker". (Petition for Reconsideration, filed March 15, 2024, p. 2.) Applicant also claims that the evidence in this case does not support the findings of fact. (*Ibid.*)

DISCUSSION

...

2. *Applicant has not met his burden of proof with regard to injury AOE/COE.*

The applicant appears to argue that a finding of injury should be made based on defendant's acknowledgment that a trailer attached to the truck applicant was driving became uncoupled and struck the back of the truck, that applicant sent a text message to his employer noting the trailer became uncoupled and struck the back of the truck and the fact that the parties agreed this incident happened on June 16, 2020. Applicant also refers to Dr. Banks' finding that the mechanism of injury was consistent with his diagnosis of costochondritis of the approximate groups T7 through T10 with components of CRPS type 1. As part of his argument, applicant does not address the fact that after review of additional records, Dr. Banks states in his final report that the medical evidence produced is insufficient in substantiating the claim of injury.

Applicant then indicates that he has no prior workers' compensation claims involving his thoracic spine, that Dr. Banks confirmed that prior complaints to his backs were unrelated to the diagnosis of costochondritis of the approximate ribs T7 through T10 with components of CRPS type 1, and that therefore, there is no evidence suggesting applicant's injury was caused by anything other than the "undisputed incident". (*Id.*, at p. 8.)

As indicated in my opinion on decision, it is the applicant's burden to prove industrial causation, not defendant's burden to disprove it. See *Mendoza v. Huntington Hospital* (2010) 75 Cal. Comp. Cases 634, 644.

In this case, the only medical evidence introduced into evidence by the parties at trial were the three QME reports of Dr. Banks, joint exhibits 1 through 3. In joint Exhibit 3, his final report, Dr. Banks states that in view of the inconsistencies with respect to reporting of when the injuries allegedly occurred, "and the absence of medical evidence related to the claimed injury of June 16, 2020, with the first mention of symptoms being in March 2021, concern is raised for subsequent employment being responsible for components of the injury (and maybe the injury itself). As such I do believe industrial causation should be determined by the trier of fact as the medical evidence produced is insufficient in substantiating the claim of injury as noted by the applicant." (Exhibit 3, p. 5.)

Based on Dr. Banks' opinion that the medical evidence produced is insufficient in substantiating the claim of injury, and the lack of other substantial medical evidence of injury, there is no medical basis for a finding of injury and I was compelled to conclude that applicant did not sustain a compensable work injury on June 16, 2020.

3. *Applicant's credibility was properly assessed by me during trial.*

It is the province of the trial judge to assess the credibility of each witness. *Garza v. Workers' Comp. Appeals Bd.* (1970) 35 CCC 500. In this case, I have carefully observed applicant's demeanor at trial and after doing so, could not afford his testimony full credibility in

view of the overall record. I summarized my concerns on pages 15 through 17 of my Opinion on Decision (see above).

Applicant appears to place emphasis on his allegation that only two of the concerns I raised related to applicant's testimony at trial, with the first concern referred to by applicant being that he informed his supervisors that he was experiencing pain but did not tell them where it hurts and the second concern being that at trial, applicant was unable to describe what symptoms he experienced when he first sought treatment.

Applicant overlooks one of my main concerns with respect to applicant's trial testimony as reflected in item (8) above, i.e. that applicant testified that he does not recall any other injury to his back and that the incident with the trailer "was when all his pains started", while Dr. Banks's reports document a long history of lumbar back issues, including radiculopathy, preceding 2020.

As indicated above, my concerns stem from careful observation of the applicant during his trial testimony as well as the overall record in relation to applicant's testimony.

Even if I were able to afford applicant's testimony full credibility, I would not be able to find that an industrial injury occurred on June 16, 2020, based on Dr. Banks's opinion and the lack of substantial medical evidence of injury.

RECOMMENDATION

For the foregoing reasons, I recommend that applicant's petition for reconsideration, filed herein on March 15, 2024, be denied.

DATE: March 22, 2024

JULIA E. KLUMPP
WORKERS' COMPENSATION JUDGE

OPINION ON DECISION

Introduction and Procedural History

The sole issue submitted to me in this case is compensability of the claimed injury. Applicant, claims to have sustained injury to the back on June 16, 2020. The parties agree that applicant's date of hire was May 26, 2020, and that applicant's last day worked was August 20, 2020, when he was laid off. The parties also agree that on June 16, 2020, a trailer uncoupled from a truck applicant was driving, striking the truck.

Defendant disputes injury and asserts that, even if an injury occurred, the claim is barred by the post-termination defense codified in Labor Code section 3600, subdivision (a)(10).

Documentary Evidence

The documentary record consists of three joint exhibits, two applicant's exhibits and one defense exhibit.

1. Joint exhibits

Joint exhibits 1 through 3 are comprised of the qualified medical evaluation reports of Norman L. Banks, M. D., dated June 21, 2021, November 3, 2021, and August 1, 2022 respectively.

Joint exhibit 1 is Dr. Banks's initial report, dated June 21, 2021. The applicant described his injury to the doctor as follows:

At approximately 3:30 p.m., the applicant was driving a truck and he was hauling an excavator on a trailer. The trailer became unhitched and when this occurred, he came to a stop and the trailer rear ended the right side of the truck. At the moment of impact, he had his left hand on the steering wheel. He felt a 'pulling' sensation in the left upper extremity, upper back and mid back. He was not wearing his seatbelt. The airbag did not deploy. He notified his employer and an incident report was filed. He was not offered medical treatment at the time of incident.

He did not develop an immediate onset of pain at the time of the incident. He was near the end of his shift when it happened. Sometime after he went home, he began to experience throbbing pain and tingling in the upper back and mid back. He continued working despite the pain.

On August 28, 2020 the applicant was terminated. He obtained legal representation and he was advised that a referral for medical treatment would be made." (Joint exhibit 1, p. 3.)

Dr. Banks describes applicant's pain as follows: "Pain localizes to the left lower thoracic region around (T9 posterior – laterally) pain radiates up to and throughout the axilla to the medial arm proximally. Pain notable with direct contact (even light contact). No loss of sensation or weakness... Patient denies having pain in the lower extremities or another place in his body." (*Id.*, at pp. 3-4.)

"The applicant indicates that the mid back is the most symptomatic area.

UPPER BACK: The applicant reports throbbing pain in the upper back. The applicant denies radiating symptomatology from this body part. The pain is constant with flare ups. The pain is worsened by repetitive use of the left upper extremity and bending forward. He is no longer able to sleep on his left side because it would increase the pain in his upper back. The pain is reduced by resting. The applicant describes tingling in the upper back. The applicant does not describe any cramps and muscle spasms. The applicant describes decreased range of motion and stiffness to this body part.

MID BACK: The applicant reports throbbing and tingling. The applicant denies radiating symptomatology from this body part. The pain is constant with flare ups. The pain is worsened by repetitive use of the left upper extremity and bending forward. The pain is reduced by resting the applicant describes tingling in the mid back. The applicant does not describe any cramps and muscle spasms. The applicant describes decreased range of motion and stiffness to this body part. He is no longer able to sleep on his left side because it will increase the pain in his upper back. (*Id.*, at pp. 5-6.)

Dr. Banks notes that applicant denies sustaining injuries subsequent to the subject injury. (*Id.*, at p. 5.) Dr. Banks indicates that he received 559 pages of documents, and summarizes various reports of note as follows:

A June 19, 2019 initial consultation report of Konrad Ng, M. D., with respect to the left knee. The report indicates that applicant sustained a work-related injury on January 31, 2019 while working for personnel staffing group and delivering a sofa. He was carrying it with a coworker down a flight of stairs in an apartment building and his legs gave out and he twisted his left knee with immediate onset of left knee pain. Applicant developed left groin pain a few days later. Dr. Ng diagnosed sprain of the medial collateral ligament of the knee, pain in the left knee, and pain in the left hip.

An August 1, 2019 PR -2 report of Arthur J. Ting, M.D., indicating that the that applicant stated that his knee gave up when he was carrying a sofa downstairs and that his symptoms were worse when going upstairs. Dr. Tang notes that examination shows lumbosacral paraspinal muscle tenderness he assesses as follows: pain in left knee, anterior cruciate ligament tear, left, left hip pain, tear of medial collateral ligament of left knee, patellar tendinitis of left knee, and sciatic leg pain. He notes that lumbar spine x-rays show a disc bulge. (Joint exhibit 1, pp. 11-12.)

Dr. Banks summarizes Peak Performance Physical Therapy progress notes from October 9, 2019 to November 14, 2019 as indicating that applicant received physical therapy treatments for the lumbosacral region, left knee, and left hip. He then reviews a January 29, 2020 EMC/NCV study of the lower extremities of Barry S. Mann, M.D., which notes intermittent back pain and bilateral leg paresthesias, and concludes that there is no evidence of a lumbar radiculopathy affecting the back or leg. Dr. Banks summarizes a May 6, 2020 MRI of the pelvis and a June 18, 2020 MRI of the lumbar spine. Of note, the June 18, 2020, MRI report notes under history “low back pain since lifting injury 4 months ago.” The MRI finds bulging at various levels between L1 and S1 as well as narrowing of neural foramina at multiple of the same levels, finding “marked disc degeneration and grade one (7 mm) spondylolisthesis due to bilateral pars defects with moderate bilateral foraminal stenosis”. (*Id.*, at p.12.)

Dr. Banks’s summary then lists an October 2, 2020 David W. Chow, M.D., evaluation report for date of injury January 31, 2019, indicating that the patient is seen for chronic left knee pain and pelvic pain. The report notes that the patient also reports left hip pain and right calf pain with cramping yesterday. The patient reports that he has been more sedentary recently due to his injuries. Dr. Chow notes painful decreased range of motion in all directions in the left knee and left hip and diagnosis 1 left hip pelvic pain, to left hip labral tear on MRI, 3 left hip osteoarthritis degenerative joint disease, for left knee high grade partial tearing of the medial collateral ligament origin, 5 left knee stress fracture, 6 left knee medial meniscal Sealer sprain, 7 left knee sprained anterior cruciate ligament, and 8 left knee mild insertional patellar tendinitis or strain. (*Id.* at pp. 12-13.)

Dr. Banks summarizes an October 27, 2020 consultation report of Kambiz Behzadi M.D., as follows: the applicant is seen regarding bilateral proximal leg and hip pain as well as low back pain. He worked as a driver and has been having significant difficulty with respect to his hips and legs. Past medical history is remarkable for history of diabetes. Has significant difficulty moving around even from the chair to the examining table. He appears to have mostly pain in his low back, posterior buttocks and lumbar paravertebral muscles. He has diffuse nonspecific pain throughout the back region which appears to be mostly axial. Assessment: (1) severe lumbar disc disease with grade 1 spondylolisthesis at L4 – L5 and grade 2 spondylolisthesis at the L5 – S1 level with suspected significant radiculopathy, (2) bilateral diffuse hip pain and lower back pain, (3) incidental finding of right humeral head cyst, (4) cannot rule out inflammatory condition such as polymyalgia rheumatic, and (5) diabetes.

Dr. Banks summarizes a December 2, 2020 PR – 2 report of Dr. Behzadi in which applicant reports continued pain, gait alteration and being informed at Highland Hospital that he had a gastrocnemius tear. Apparently lumbar and hamstring stretches were discussed as well as obtaining an MRI of the hips. A February 3, 2021 report of Dr. Behzadi's notes that applicant is seen for his hips and back and has "quite a diffuse and global pain pattern that involves his thighs, hips and back. This is not a localized type pain unquote Dr. Banks states that Dr. Behzadi feels that some of the pain is myofascial inflammatory and ordered labs to rule out Pulley myalgia rheumatic and that 2nd some of his trouble may be from his lumbar spine, and that finally the hips may be the source of his pain but this is the least likely.

Applicant was apparently seen again by Dr. Behzadi on February 5, 2021, and on March 22, 2021 when Dr. Behzadi stated that the applicant's condition had been aggravated because he was in a QME process for 4 to 5 hours the same day. Dr. Behzadi then apparently diagnoses (1) degeneration of lumbar inter-vertebral disc, (2) lumbar radiculopathy, (3) Polymyalgia rheumatica, and (4) osteoarthritis of the hip. Dr. Behzadi apparently suspected that a majority of the issues are lumbar spine related. The patient was then seen on April 2, 2021 by Dr. Chow with respect to the left hip and left knee, who noted that applicant has an upcoming QME appointment. On April 19, 2021 applicant was seen by Dr. Behzadi's nurse practitioner who noted that applicant's labs were reviewed and he did not have any alarming markers for polymyalgia rheumatica but that he did respond to the steroid as opposed to the use of NSAIDS. Of note, he does continue with diffuse and nonspecific pain. Schedule with Dr. Liu now that he has authorization to treat with him for lumbar spine. (*Id.*, at pp. 14-15.)

This concludes Dr. Banks's record review.¹

After physical examination of applicant, Dr. Banks diagnoses costochondritis of the approximate ribs T7 through T10 with components of complex regional pain syndrome type I. He states that he does, however, require the full medical record to determine diagnosis and etiology of his current symptoms. (*Id.*, at p. 16.) He finds that applicant has not reached maximum medical improvement. With respect to causation, Dr. Banks states that he requires the medical records to provide an accurate opinion in regards to causation of injury but that the patient's description of events is consistent with an etiology of costochondritis with CRPS type I. (*Id.*, at p. 17.)

Joint exhibit 2 is Dr. Banks's November 3, 2021 report. Dr. Banks indicates that he has received 1017 pages of additional records sent by the parties and his attention is directed to particular pages of the records. The records include the applicant's deposition as well as records from Kaiser San Leandro. Over approximately 25 pages, Dr. Banks summarizes applicant's Kaiser records starting May 15, 2013 through November 18, 2020 relating to various unrelated conditions.

Dr. Banks then documents a March 22, 2021 progress note of Judy Chang-Witt M.D., indicating that applicant reported that over a month ago he became injured at work. He needed an occupational medicine appointment at Kaiser. Pain was located in the posterior left shoulder area. He had discomfort sleeping at night and pain did not relent. Advil had not helped. Dr. Chang-Witt apparently assessed left shoulder joint pain and provided prescriptions. (Joint exhibit 2, p. 30.) A May 4, 2021 progress note, also of Judy Chang-Witt M.,D., indicates that applicant presented for follow-up of a back injury that he reported was sustained at work pain was in the mid-thoracic spine. Nebumetone and cyclobenzaprine helped but were temporizing. Applicant was interested in weaning off Seroquel as he slept well. Ongoing concerns were fatty liver, GERD symptoms doing well. With respect to physical examination of the back Dr. Chang which apparently found that there was tenderness to palpation with spasm in mid thoracic spine left more than right, normal curvature. Her assessment was as follows: (1) back pain, he is to continue NSAIDs and muscle relaxer physician added topicals, and (2) fatty liver. (*Id.*, at p. 30.) Dr. Banks' summary of the records then turns to various gastroenterology reports concluding on July 13, 2021.

¹ Dr. Banks notes that he was informed that the records of Talan Chiropractic are of a different applicant by the same name and should not be considered. It does not appear that those records were summarized in his report.

Dr. Banks then provides the following updated diagnosis: "costochondritis of the approximate ribs T7 through T10 with components of complex regional pain syndrome type I one." (*Id.*, at p. 32.)

With respect to the specific pages of the Kaiser records that his attention had been directed to, he states as follows:

- Page 64: Notes right quadriceps pain. No mention of thoracic spine pain
- Page 144: This is a patient registration form. No actual area of pain noted. No Dr. notes included
- Page 146: Neck pain and anxiety. No mention of thoracic pain. No acute trauma.
- Pages 187, 189, 190, 194, 195: Discuss pain in the cervical and lumbar spine with mention of numbness into the right arm. Diagnosis include cervical and lumbar radiculopathy. No mention of pain in the thoracic region.
- Pages 662: Telemedicine note indicating applicant had back pain due to a car accident and needed x-rays. Medication was prescribed. The date of the car accident was not noted. When initially seen in my office, the applicant described reporting his symptoms but not being provided immediate treatment. This correlates with the history.
- Pages 675, 677, 678: Discusses treatment to thoracic spine for pain in the mid thoracic spine due to back injury that occurred at work. These records correlate with the treatment noted by the applicant during his evaluation in my office on May 13, 2021. The date of work injury was not properly noted. According to the history obtained from the applicant he was not initially provided treatment and had to seek it on his own." (*Id.*, at pp. 32-33.)

With respect to disability status, Dr. Banks indicates that applicant is not reached maximum medical improvement. He recommends physical therapy with specific interventions directed at irritant therapy and that consideration "of sympathetic blocks versus neuromodulation to address current CRPS symptomology." (*Id.*, at p.33.)

With respect to causation Dr. Banks states as follows:

I have reviewed the extensive medical evidence presented along with the deposition testimony of the applicant. There is a discrepancy between the previous advocacy letters and the deposition testimony as it relates to the actual date of injury, with the applicant testifying to the injury occurring on September 24, 2020 but previous applicant advocacy letter indicating the accident occurred on June 16, 2020. I have not been provided any actual claims or application for adjudication of claim to confirm the date of injury. The most recent advocacy letters from defense do not include a date of injury, rather only include the claim #001529 – 057967 – WC – 01 (ADJ13706815). When reviewing the medical evidence produced from Kaiser there was no entry around either June 16, 2020 or September 24, 2020, but the deposition testimony provided does correlate with the history obtained from the applicant during my evaluation on May 13, 2021. Further the objective findings noted on examination at that time is consistent with

the mechanism of trauma sustained, and to subjective complaints were supported by objective findings. As such it is with reasonable medical probability the applicant did in fact sustain a specific injury to his upper/mid back while working for Royal Electric Company, and given the history obtained that the applicant was not provided immediate treatment, and the Kaiser notes indicating he received treatment around March 2021, after he reached out to them on his own, it would appear the accident occurred on September 24, 2020.

I reviewed all documents in my medical chart to determine whether date of June 16, 2020 came from, and I note when the appointment was originally set, the date of injury provided to my staff was June 16, 2020. The original advocacy letter from the applicant attorney dated May 12, 2021, also noted the date of injury being June 16, 2020 this was not accompanied by any claim.

The medical evidence from Kaiser does reveal findings of previous complaints of pain involving the low back with some radicular pain pattern. This is completely different than what the applicant presented with doing his evaluation in my office with his symptoms emanating from the lower thoracic region around the T7 to T10 levels. There were no diagnostic studies or x-rays provided in these medical records indicating prior injury and/or pain involving the thoracic spine. (*Id.*, at pp. 33-34.)

With respect to apportionment, Dr. Banks states that his final opinions on apportionment will be provided when the applicant is reached maximal medical improvement and is considered permanent and stationary. He does note that there have been medical records provided indicating a history of chronic low back pain from applicant's work in construction spending as far back as at least 2016. He indicates that if additional medical records become available pinpointing the symptoms to be around the thoracic sake region of the spine he will consider same once applicant has plateaued in treatment and his apportionment opinions are provided. (*Id.* at p. 34.)

Joint exhibit 3 is Dr. Banks's August 1, 2022 supplemental report. The report appears to have been issued in response to a request for supplemental reports by defense counsel. According to Dr. Banks's summary of the June 2, 2022 letter, the alleged date of injury is clarified as June 16, 2020. The letter also clarifies that the applicant's employment with defendant terminated on August 21, 2020 and that pursuant to applicant's deposition testimony, which was previously forwarded to the doctor, applicant estimated that he worked for approximately 5 subsequent employers after termination from defendant. The letter refers Dr. Banks to a February 2018 visit note with respect to right upper back pain and right sided neck pain and upper back tightness, as well as the previously summarized March 22, 2021 Kaiser record indicating a recent work injury, "approximately 7 months after his separation from employment with defendant and some 9 months after his claimed date of injury." (Joint exhibit 3, p. 3.)

Dr. Banks then notes the following medical reports:

A February 28, 2018 visit note by Lori Bauer, N.P., with a chief complaint noted as numbness in right arm and back problem. Applicant presented with complaints of right neck pain and right upper back pain that started 2 days before “with sometimes symptoms radiating into right hand arm” with tingling 2 days before and no symptoms since then. Has had a past medical history of same symptoms on right side 2 years before and also noted that bilateral toes were numb with low back pain and symptoms resolved after 2 hours.

Dr. Banks then repeats his summary of the previously summarized March 22, 2021 note by Dr. Chang-Witt, indicating that the applicant reported that over a month before he was injured at work and that pain was located in the posterior left shoulder area. (See Exhibit 2, above.)

In a “supplemental discussion” section, Dr. Banks states as follows:

To first address the partial medical record of February 20, 2018, though it does mention pain in the ‘right upper back’ which began 2 days earlier, the examination noted tenderness about the trapezius region/upper back, which is not a thoracic spine injury rather most consistent with the cervical spine. The radicular pain noted at that time would not be associated with a thoracic spine injury. Further, the numbness noted in the lower extremities/toes would not be associated with a thoracic spine injury. Additionally, and most importantly, there is no medical evidence to substantiate ongoing pain or problems specific to the mid back, upper back, thoracic spine from this point. This is a single entry that is not supported by any diagnostic imaging or formal treatment. Given the extensive records from that point through the present, I can confidently state that would be no basis for apportionment to this minor incident of February 2018

Regarding the entry of March 17, 2021, it is noted the applicant was seeking treatment for pain in his left shoulder back region which was injured approximately one month prior. This does contradict the applicant’s claim of injury occurring on June 16, 2020. Again, as stated in prior reports, the Kaiser records are void of any entry around June 16, 2020, which according to the applicant’s testimony, he did seek treatment on his own after this incident. I further acknowledge the fact the applicant testified to working for approximately 5 different employers subsequent to his employment with Vellutini Corporation, all through the union, all performing excavation work.

The applicant’s clinical presentation on May 13, 2021, was most consistent with costochondritis of the ribs T7 through T10 with components of complex regional pain syndrome type I. His subjective complaints at the time were noted to be more on the left side, which would correlate with the entry from March 2021 negating a date of

injury being June 16, 2020 as the Kaiser note of March 17, 2021, indicated the applicant stated he was injured at work the month prior (February 2021), and his complaints at that time were about his upper back and left shoulder.

Given these inconsistencies, and the absence of medical evidence related to the claimed injury of June 16, 2020, with the first mention of symptoms being in March 2021, concern is raised for subsequent employment being responsible for components of the injury (and may be the injury itself). **As such I do believe industrial causation should be determined by the trier of fact as the medical evidence produced is insufficient in substantiating the claim of injury as noted by the applicant.** Of note, the applicant did state his claimed injury of June 16, 2020, was witnessed and he promptly reported it to his supervisors who did not offer him medical attention. To date I have not received any witness testimonies to corroborate this history. (*Id.*, at p. 5, emphasis added.)

2. Applicant's Exhibits

Applicant's exhibit 1 is a DWC-1 form, dated August 24, 2020, for date of injury June 16, 2020, describing the injury and part of body affected as "Back & Lower extremity". The employer section is blank except for the name of the name and address of the employer.

Applicant's exhibit 2 is a screenshot of a text message in Spanish apparently sent June 16, 2020, with a photo of what appears to be a scratched and slightly dented rear vehicle bumper. At the bottom of the page a cut-off second text message is visible, also in Spanish. Applicant subsequently provided the following certified translation to English of the message text (but not the second incomplete text message): "When we put the trailer from the mini into the rented truck it slipped out and the fender got a little bit scratched I and felicito put it thank you". Applicant's exhibit 2 also includes three more pages, each of which contains a single photograph of the back of a truck.

3. Defendant's Exhibit.

Defendant's exhibit A is a notice regarding denial of Worker's Compensation benefits, dated November 12, 2020. The notice states that liability for a September 24, 2020 date of injury is denied for the following reasons: (1) "pursuant to LC 3208.3(h) Good Faith Personal Action [*sic*]", (2) "there is no medical evidence to substantiate your allegation of a work-related injury", (3) "pursuant to LC 3208.3 (b) there is no medical evidence to indicate you have met the threshold of compensability for an industrial injury" and (4) "pursuant to LC 3600 (a) (10) post-termination, you did not report an injury until after you were terminated for cause".

Witness Testimony

Applicant testified substantially as follows:

On June 16, 2020 he worked for Royal Electric. On that day, there was an incident where a trailer uncoupled from his truck and the trailer slammed into the back of his truck.

There was no witness to the incident. They were driving and he was alone. Fernando and Jorge know about the incident. He let Fernando know what happened and that it hurt and about the pain he was feeling. He called Fernando, as they were at a different place, and he went there to talk to Fernando in person. He talked to Fernando and Jorge. He told Fernando that it hurt. He did not specify which part hurt. Fernando told him that he was going to give him the right documents or papers. He assumed the papers were about going to a doctor. On June 16, 2020, Fernando did not give him any papers but said that he would do it later. He returned to work the next day. Fernando did not give him the papers that day either. He always said he would give them to him later. When he was called in to get the papers, he received a check and was told that he was laid off. Until he was laid off, he never received the papers that he understood would be for him to go to a doctor.

He does not remember the date when he first tried to see a doctor on his own, but it was later. He looked for treatment when they fired him. When he was working with them, he was hoping that they would send him to a doctor. He went to see a doctor at Kaiser. He was told that they didn't accept work injuries. He does not remember the name of the doctor well, as it is an English name and he does not know how to write it. He had an appointment with the Kaiser doctor, but when the doctor asked what happened and where and he told him where and how, the doctor canceled the appointment and refunded the money for the appointment.

He does not remember exactly what complaints he had when he saw this doctor as the pain has always been in his back. He does not know whether to call it low back or mid-back, somewhere along the spine. It is on his left side. He does not recall whether he saw a doctor at Kaiser in March of 2021. He remembers trying to see doctors but doesn't know the dates. He never told any doctor about a February 2021 injury. He does not recall having had any other injuries to his back other than when the truck was hit by the trailer that day that he was working for Royal Electric. That is when all his pains started.

He does not know whether any police reports exist for June 16, 2020. They were going to call the police the day of the accident and

they had him wait at work for several hours, but no one came to do a report. The next day someone above them came and mentioned something about the police, but no police ever came.

He does not remember the exact date of the incident. After the day of the accident at Royal Electric, he does not recall having had any other accidents that affected the same area as was injured that day at Royal Electric.

He does not know what Fernando's position was. Jorge was a supervisor. Jorge would report to Fernando, who approved all the decisions at work. If anything happened, his supervisor Jorge would say he was going to ask Fernando for authorization.

He sent Fernando a text message. The message says that the trailer of his truck came out and gave the bumper a scratch. It also says that Felicito and he put it up. He did not write in the message that he had injured his back because everything was so quick at that moment and he was in the middle of the street with traffic, so he had to remove himself.

He did not specify to Fernando what or where it hurt.

He does not remember how many subsequent employers he had after Royal Electric. He worked for Local 3, which is a union. If he doesn't have a job, he goes on the waiting list and they send him. After the Royal Electric job, his other jobs were as an operator. All the work was the same; he would operate machinery like an excavator.

Dr. Chang at Kaiser is his family doctor. He does not recall where he worked in February or March of 2021. He is not good with dates. He does not remember dates. He needs to see the date written down and he is stressed right now. He does not recall telling Dr. Chang in May 2021 about a back injury.

On the day of the incident he, Jorge, and Fernando got together with another person who he thinks was the security for the workers. He told them all about the situation, the accident and his possible injury. Fernando was the one who said he was going to give him the documents and, after that, for the next few days, Fernando said he would give them to him later. Over those next few days, he let them know several times that he was in pain, and he thinks they could see it as well.

Analysis

1. Has applicant established that he sustained an injury arising out of and occurring in the course of his employment with defendant on June 16, 2020?

I have carefully reviewed and considered the evidence submitted to me, including the medical records in evidence, as well as applicant's testimony at trial. In view of the overall record, I find that applicant has not met his burden of proof with regard to injury AOE/COE. See *Mendoza v. Huntington Hospital* (2010) 75 Cal. Comp. Cases 634, 644 ["it is the employee's burden to prove industrial causation, not the defendant's burden to disprove causation..]. I have reached this conclusion due to the lack of medical support of applicant's claim as well as due to the questionable factual basis for the claim.

The only medical reports in evidence are the three reports of the QME, Dr. Banks, joint exhibits 1 through 3. In his final report, joint exhibit 3, Dr. Banks states that in view of the inconsistencies with respect to reporting of when the injuries allegedly occurred, "and the absence of medical evidence related to the claimed injury of June 16, 2020, with the first mention of symptoms being in March 2021, concern is raised for subsequent employment being responsible for components of the injury (and may be the injury itself). As such I do believe industrial causation should be determined by the trier of fact as the medical evidence produced is insufficient in substantiating the claim of injury as noted by the applicant."

In view of the QME's statement that the "medical evidence is insufficient in substantiating the claim of injury as noted by the applicant", I have no medical basis for a finding of injury.

Furthermore, after carefully observing applicant's demeanor at trial, I could not afford applicant's testimony full credibility in light of the overall record.

My concerns are as follows:

- (1) Applicant testified that he told Jorge and Fernando right after the incident that he hurt and about the pain he was feeling, but he also testified that he never told them what part of his body hurt. In view of the fact that applicant testified that he told them several times over the next few days that he hurt, it appears questionable that he never mentioned what hurt or where his pain was located.
- (2) Applicant's exhibit 2, a text message applicant testified he sent at the time of the incident, refers to a scratch on the bumper of the vehicle the applicant was driving but does not refer to any injury sustained or any pain.
- (3) In addition, it appears that applicant told Dr. Banks during his first evaluation that he did not feel immediate pain at the time of the incident and first experienced symptoms "[s]ometime after he went home" (see joint exhibit 1, p. 3), contradicting his testimony at trial that he sought out Jorge and Fernando immediate after the incident and told them about his pain.

- (4) As indicated by Dr. Banks, there are no medical records around the time of the alleged injury that document shoulder or upper/mid-back complaints or reference an injury sustained on June 16, 2020.
- (5) Per Dr. Banks' summary of the records submitted to him by the parties, applicant was seen by his Kaiser family physician in the months following June 16, 2020, but the reports as summarized are devoid of any reference to an alleged injury or shoulder or upper/mid-back symptoms. Similarly, the treatment reports for a low back injury apparently sustained in early 2020 due to heavy lifting summarized by Dr. Banks' in joint exhibit 1, do not refer to a June 16, 2020 incident or shoulder, upper or mid-back pain.
- (6) The first time after the alleged June 16, 2020 injury that shoulder and upper to mid-back symptoms are mentioned in the Kaiser records as summarized by Dr. Banks is in March of 2021, more than 6 months after applicant's employment with applicant ended in August of 2020, when a March 22, 2021 progress note by applicant's family physician, Dr. Chang-Witt indicates that "over a month ago, he became injured at work" and that pain was located in the left posterior shoulder, while a May 4, 2021 progress note of Dr. Chang-Witt notes that applicant presented for follow-up of back injury that he reported was sustained at work, with pain in the mid-thoracic spine.
- (7) At trial, applicant was unable to describe what symptoms he experienced when he allegedly first sought treatment after he was terminated. He also was not able to clarify whether his lower or mid-back hurt, indicating pain "somewhere along the spine" and that "it is on the left side".
- (8) Applicant testified that he does not recall any other injury to his back and that the incident with the trailer "was when all his pains started", yet Dr. Banks's reports document a long history of lumbar back issues, including radiculopathy, preceding 2020.

Based on the foregoing, as well as the lack of substantial medical evidence of injury, I am compelled to conclude that applicant did not sustain a compensable work injury on June 16, 2020.

2. Is applicant's claim barred by Labor Code § 3600 (a)(10)?

Having found that applicant has not established that he sustained an injury arising out of and occurring in the course of his employment with defendant, I do not need to and will not address the validity of defendant's post-termination defense.

3. Is applicant's attorney entitled to fees for legal services?

Labor Code section 4903 subdivision (a) allows for a reasonable attorney's fee as a lien "against any sum to be paid as compensation". Since no compensation is awarded as part of the present proceeding at this time, applicant's attorney is not entitled to a fee at this time.

DATE: February 20, 2024

Julia E. Klumpp
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE