WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KEVIN SOLIS, *Applicant*

vs.

MAMA MANAGEMENT USA, LLC;
INSURANCE COMPANY OF THE WEST, *Defendants*

Adjudication Number: ADJ15334962
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the March 6, 2024 Findings and Order, wherein the workers' compensation judge (WCJ) found that applicant had not met his burden of proof demonstrating that he sustained cumulative injury arising out of and in the course of employment (AOE/COE) to various body parts while employed by defendant as bar barback from September 24, 2019 to August 24, 2020, and was therefore not entitled to any compensation in this case.

We have received an Answer from defendant. We received a Report and Recommendation from the WCJ, which recommends that the Petition be denied.

Labor Code section 3600(a)[1] provides for liability for injuries sustained "arising out of and in the course of the employment." An employer is liable for workers' compensation benefits "without regard to negligence." (Lab. Code, § 3600(a).) An employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing, Inc. v. Workers'*

[1] All further statutory references are to the Labor Code unless otherwise noted.

Comp. Appeals Bd. (Clark) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a), 3202.5.) Whether an employee's injury arose out of and in the course of employment is generally a question of fact to be determined in light of the particular circumstances of the case. (*Wright v. Beverly Fabrics* (2002) 95 Cal.App.4th 346, 353 [67 Cal.Comp.Cases 51].)

Here, applicant, while employed during the period September 24, 2019, through August 24, 2020, as a barback, claims to have sustained injury arising out of and in the course of employment to his back, bilateral knees, and bilateral legs. Applicant last worked on August 24, 2020, for this employer and was terminated on September 9, 2020.

The case initially went to trial on October 11, 2022, on the issue of whether the injury occurred AOE/COE. (10/11/22 Minutes of Hearing (MOH), p. 2.) Applicant was not present on that date of the hearing. (10/11/22 MOH, p. 1.) Following the day of the hearing on January 11, 2023, the WCJ ordered applicant to appear at the next hearing date. (1/11/23 MOH, p. 1; 1/27/23 Notice to Attend Trial.) On February 6, 2023, applicant filed a Petition for Reconsideration or in the Alternative Removal regarding the WCJ's January 11, 2023 Order for the applicant to appear at the next trial date. On April 7, 2023, the Appeals Board dismissed the Petition for Reconsideration and denied the Petition for Removal.

The case then returned to trial for two additional days on November 22, 2023, and January 30, 2024. New issues were added for these trial dates, including whether the claim was barred by the post-termination defense pursuant to Labor Code section 3600(a)(10). (11/22/23 Minutes of Hearing/ Summary of Evidence (MOH/SOE), p. 2.) Applicant testified that he sustained a stress injury on August 24, 2020, due to verbal harassment by his manager Phil. (11/23/23 MOH/SOE, p. 3.) He stated he received psychiatric treatment from Dr. Scott Frazier but did not mention any other injuries to Dr. Frazier. (11/23/23 MOH/SOE, p. 3.) He testified that he told his manager Phil about his orthopedic injuries before his termination. (11/23/23 MOH/SOE, p. 3.) After his employment with defendant, he worked at Dream Hotel for two months and then Katsuya. (11/23/23 MOH/SOE, pp. 4, 6.) He settled his earlier claim for psychiatric injury for $15,000.00 through a Compromise and Release Agreement that he signed on April 15, 2021, and was approved on October 4, 2021. (11/23/23 MOH/SOE, pp. 4-5.) He was in a car accident in December 2014 but did not recall his injuries or treatment. (1/30/24

MOH/SOE, p. 2.) He did not recall receiving medical treatment from any doctors following the accident. (1/30/24 MOH/SOE, pp. 2-3.)

Manager Philip Smith testified that applicant never reported a work-related injury to him and never asked for treatment. (1/30/24 MOH/SOE, p. 4.) He told applicant to go home on August 4, 2020, when applicant refused to remove trash from the bar. (1/30/24 MOH/SOE, p. 4.) If an injury is reported by an employee, they would give the employee a form, ask if they wanted medical treatment, and send them for treatment if it was an industrial claim. (1/30/24 MOH/SOE, p. 5.)

As relevant herein, in the WCJ's Opinion on Decision, the WCJ stated that:

> On the second day of testimony January 30, 2024, Applicant testified that he did not recall being in a motor vehicle accident on December 28, 2014, nor did he recall a back injury arising from that accident. (SOE, January 30, 2024, page 2, lines 7 to 10). He did not recall treatment received at California Hospital or telling the doctor that his back pain was a 9 out of 10. He did not recall whether he had injuries to his neck or lower back. The applicant did not recall getting an MRI to his cervical spine in March 2015. He also did not recall treatment from Dr. Nazar at the Nazar Family Chiropractic Clinic involving his neck, mid back, right shoulder, and low back. (SOE, January 30, 2024, page 2, lines 11 to 18).
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> The witness could not recall seeing Dr. Philip Lee at Green Cross Medical Center. It was his testimony that he did not recall seeing five providers who did various diagnostic studies after the motor vehicle accident. He could not recall having an attorney or getting a settlement, nor did he recall reporting any prior lumbar spine injury to the PQME or any other doctors that evaluated him. He did not recall reporting any non-industrial or industrial injury. (SOE January 30, 2024, page 2, lines 18 to 25).
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> Mr. Solis generally did not recall the history which he provided to Dr. Pietrusika or Dr. Kwok both of whom evaluated him as part of this current claim. (SOE, January 30, 2024, page 3, lines 1 to 6).
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> The witness was terminated from Mama Management but denied being aware of any injury to his back prior to his termination. He said that neither PQME Zardouz nor any other doctor told him that he has a permanent or temporary disability to his back or knees before he was terminated. The evidence indicates that applicant was terminated on September 9, 2020, and he testified that he was not aware of any injury to his back prior to his termination, however, in the report from Dr. Zardouz, he apparently said that the back pain started 2 months after he started working for the company in September 2019, according to his CT claim.

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SUMMARY OF MEDICAL EVIDENCE

PQME Dr. Shawn Zardouz, in his report dated May 20, 2022, detailed the following history:

> Mr. Kevin Solis is a 27 year old right handed male, who presents for QME evaluation. The examinee does not recall a specific date of injury. He notes that he was injured during a cumulative trauma claim while working as a barback. There were two bars, a rooftop bar upstairs and in the lobby downstairs. He notes that he was told by his employer that other barbacks would be helping out. However, he notes that they would leave the job due to the hostile work environment. He notes that at times the elevators would not work. He was advised that he needed to carry alcoholic beverages, buckets of ice, and trash up and down four flights of stairs as the rooftop was on the fifth floor. He mentioned to his supervisor that he would have difficulty carrying up these heavy items, but he was told this was his job duty. He notes that he had a trash bin on the rooftop, which was at his shoulder length and it would be filled up with trash. He notes that he would dump the trash into plastic bags and carry them downstairs to prevent the trash bin from overflowing. He notes that he would throw the trash into a bigger trash bin, which was downstairs. He would ask for help, and he was told it was his job, and if it was not done, he would be written up. He brought up these concerns to his supervisors, Alicia and also Phil (food and beverage director. Page 2, Paragraph 1.

Applicant's testimony is inconsistent with the evidence that he gave Dr. Zardouz. During the trial, he said that neither PQME Zardouz nor any other doctor told him that he had a permanent or temporary disability to his back or knees before he was terminated. The evidence indicates that applicant was terminated on September 9, 2020, and he testified that he was not aware of any injury to his back prior to his termination, however, in the report from Dr. Zardouz, he apparently said that the back pain started 2 months after he started working for Mama Management in September 2019. If that is true, he knew that he had back pain as early as November of 2019 which was well in advance of his termination date of September 9, 2020.

He also provides Dr. Zardouz with a history of prior injury which is not recalled at the time of trial. In the report under additional injuries on page 4, he recalled a fender-bender, but not the date. He denied being injured in that fender-bender. There was also an accident in 2014 where his left shoulder was injured but he failed to discuss the back injury which is mentioned in the review of records from Dr.Zardouz. (Page 4, para 4.) He also does not discuss the prior stress claim that

was settled. The history given by the applicant is not reliable and leads to the conclusion that the report cannot be viewed as substantial medical evidence.

The report of Dr. Pietruszka dated March 2, 2022, contains no history of prior orthopedic injuries or motor vehicle accidents. In fact, on page 3, paragraph one,

> The patient denies any history of previous medical or surgical conditions. He has no known allergies. There is no history of prior accidents or injuries. There is no other significant medical history.

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Further, the discussion regarding causation in Dr. Pietruszka's report lacks any analysis and is not substantial. The history provided by Dr. Pietrusuzak is clearly inaccurate.

Dr. Kwok found applicant alleged back complaints non-industrial. Also, Dr. Frazier's reports relate to specific injury of 8/24/2020 and do not address the CT claim in issue and are not relevant to this matter.

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CREDIBILITY OF APPLICANT

Labor Code Section 3202.5 requires that all parties shall meet the evidentiary burden of proof by a preponderance of the evidence. The Trier of Fact must weigh all the evidence including testimony and its credibility, to determine whether there is a sufficient record based upon which a finding of employment can be reached. *Garza v. WCAB (1970) 3 Cal.3d 312.* The credibility determinations of the workers' compensation judge are entitled to great weight and should not be disturbed when they are supported by substantial evidence because the judge has the opportunity to observe the demeanor of witnesses and weigh their statements with their manner in testifying. *Garza v. Workers' Comp. Appeals. (1970) 3 Cal. 3d 312, 318-319, 35* CCC *500.*

The applicant's credibility is questionable and his testimony is unreliable. He provides an inconsistent medical history and is an undependable historian as he does not recall prior treatment, prior accidents. injuries or symptoms. His subsequent work history also leads one to conclude that he was ab] to continue in his nom1al employment. He did not seek any medical treatment while still employed and there is no evidence of treatment until over a year after his termination. He fails to disclose all of his subsequent employment to Dr. Pietruzska or Dr. Fraizer. Also, there is no substantial medical evidence of a work related injury during the claimed continuous trauma.

He did not report an injury during the continuous trauma period. He did not seek any orthopedic medical treatment prior to his termination and did not report the claim.

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He does not offer any evidence of orthopedic treatment during his employment at Mama Management.

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The court looked at evidence presented which addresses the issue of whether the injury arose out of applicant's employment. . . . Here, the court is not addressing the statute of limitations defense, nor is the WCJ addressing the question of whether the C&R that was signed and read by the applicant bars the CT case. . . .[N]o specific rulings are made on these issues other than AOE/COE.

The court finds that the applicant has failed to meet his burden of proving injury arising out of and occurring in the course of employment. Given the weight of the medical evidence, the unreliability of the applicant's testimony and the credible testimony presented by defense witness Phillip Smith, the court finds that applicant has not met his burden of proof.

(Opinion On Decision, pp. 2-6.)

Accordingly, we deny the Petition for Reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 4, 2024

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

KEVIN SOLIS
ALBERT AND MACKENZIE
SHATFORD LAW

JMR/mc

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