WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIA LEYVA TORRES, ***Applicant***

vs.

ESPARZA ENTERPRISES, INC., Permissibly Self-Insured, ***Defendant***

Adjudication Number: ADJ16500248
(Van Nuys District Office)

OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact and Orders of June 6, 2024 wherein it was found that while employed during a cumulative period ending on July 21, 2022 as a sanitation banker applicant did not sustain industrial injury to her neck, back, right knee, right upper extremity or right foot. The WCJ thus issued an order that applicant take nothing by way of her workers' compensation claim.

Applicant contends that the WCJ erred in not finding industrial injury and in issuing the take nothing order. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

For the reasons stated by the WCJ in the Report, which we adopt, incorporate, and quote below, we will deny the applicant's Petition. We note that a WCJ's credibility determinations are "entitled to great weight because of the [WCJ's] 'opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand….' [Citation.]" (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].)

REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION

I. INTRODUCTION

> The Applicant is a 42 year old sanitation butler, Occupational Group 480, who claims cumulative injury during her employment with the Defendant from 9/1/2018 to 7/21/2022.

The Petitioner is the Applicant who claims that the undersigned erred in finding that Applicant did not sustain injury by way of cumulative trauma.

The undersigned will recommend that the Petition be denied.

II. STATEMENT OF FACTS

The Applicant herein was employed during the stated period of time performing work that involved shoveling of potatoes and mud and various other physical tasks involved in the process. The JA is reviewed (see Ex. Z, p.3).

In or about August or September, 2018 she sustained what can only be described as a specific injury when she fell on a bunch of potatoes at work causing neck complaints (Summary of Evidence, 5/29/2024, p.3, lines 14 -16). The employer was not given notice. There is no evidence of medical care ever being tendered or sought. By the time she was seen for treatment five years later she claimed that this injury caused pain in the neck, back, shoulders and hips (see Ex. Y, p.4).

She continued to work for five years at which time she was terminated in July, 2022 for reasons that go unexplained, though there is no evidence that it was related to any injury.

She then sustained an injury by way of an MVA on 8/20/2022. She was taken by ambulance and treated for neck and back complaints. By the review of records she was last seen for this injury on 9/5/2022 (See Ex. Y, p.4). She was admitted at Kern Medical Center for this MVA (Ex. 1). She complained of neck and back pain (p.20). She had been rear-ended in the MVA (p.27). She was scheduled for a neurosurgery consult by the facility (p.32). She was prescribed hydrocodone (p.62). No prior history is noted and no weakness of the extremities was found (p.50). She had improved to some degree when seen on follow up on 9/5/2022 (p54).

Eleven days later she is seen by a Dr. Freeseman for an injury allegedly on 7/21/2022 at work (Ex. Y, p.4). However the history he received is exactly the injury that occurred in 2018 when she slipped and fell in a bunch of potatoes. He began to see her based on that history of a specific injury. He makes no mention of any cumulative trauma.

More importantly he is not given a history of the MVA four weeks earlier for which she was in present treatment.

No claim for the specific injury in 2018 is made. Instead this claim for cumulative trauma was filed. The parties selected Dr. Eli Ziv as the QME.

His initial report from an exam on 2/2/2023 elicited a history of the specific

injury in 2018 (Ex. X, p.2). She had complaints in the neck, back, hips and hands. The MVA was not disclosed in that she gave a history of no prior problems.

Dr. Ziv could not make any decisions on causation due to a lack of any advocacy letters and medical records in a case that was already five years old. His only conclusion was that any hip complaints were inevitably related to the low back and not the hips.

On 2/22/2023 Dr. Ziv reviewed the records that existed (Ex. Y). His exact words were that the records created more questions than they answered. He reviewed the records of the MVA. He reviewed Dr. Freeseman's notes and clearly identified the date of injury noted by the doctor as completely erroneous. Hence he felt that further investigation was necessary on the issue of causation.

It is noticeable that Dr. Ziv fully understood that the physical demands of her job certainly could cause cumulative injury (Ex. X, p.20).

On 6/30/2023 Dr. Ziv issued his final report (Ex. Z). Based on the history of a specific injury in 2018 and based upon the MVA on 8/20/2022 he could not find medical evidence of a cumulative trauma.

Based thereon the undersigned found no injury herein.

III. DISCUSSION

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The burden of proof of injury arising out of and in the course of employment is on the Applicant. *LaTourette v. WCAB* (1993) 63 CCC 253. However the Petitioner has filed a Petition for Reconsideration claiming that it is the Defendant's burden to disprove injury (Petition for Reconsideration, p.3, lines 5 – 13).

Hence the Petitioner then attempts to set forth an argument that Dr. Ziv's report were not substantive evidence to disprove injury. By so arguing Petitioner neglects to show proof of injury which is Petitioner's burden.

For purposes of this Report, the undersigned will assume that Petitioner actually wishes to argue that Dr. Ziv's opinions failed to sufficiently determine the issue of "injury."

As the record now stands there is no medical evidence to support this claim. The medical reports reviewed by Dr. Ziv from Dr. Freeseman only support a finding of a specific injury in 2018 (Ex. Y). No such claim has been made. The medical records from Kern Medical Center only support a finding of an MVA four weeks after she was terminated with no findings of prior complaints.

No medical care was obtained due to the specific injury in 2018 or any cumulative trauma claim.

Cal. Lab. Code sec. 3208.1 states that a cumulative trauma is one:

> "occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of *which causes any disability or need for medical treatment.*" (emphasis added).

The treatment from Kern Medical Center only involved the non-industrial MVA. The treatment from Dr. Freeseman only involved a specific injury of questionable date.

Dr. Ziv pointed out that her physical job could certainly give rise to a cumulative injury. However in this matter the evidence leads him to conclude otherwise. Since there is no need for care or disability caused by any claim for cumulative injury the only conclusion that is based on the evidence is that there is no such claim.

The Applicant's testimony that much of the pain from various body parts came on gradually over time is inconsistent with all the medical evidence.

Obviously a claim for a specific injury in 2018 that was not reported to the employer until after termination would have to get passed the exclusions of Cal. Lab. Code sec. 3600(a)(10). Nonetheless no such claim has been made despite the fact that Dr. Freeseman was treating her for such.

The only issue was whether or not there is substantive medical evidence to find that there is cumulative trauma that caused either need for care or disability as required by sec. 3208.1.

Dr. Ziv reviewed the records, examined the Applicant and took a history that is quite inconsistent with all the medical evidence. His conclusions are therefore substantive. Applicant can cite no evident to the contrary.

IV. RECOMMENDATION ON PETITION FOR RECONSIDERATION

Based on the above, it is respectfully recommended that the Petition for Reconsideration be DENIED.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings of Fact and Orders of June 6, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 27, 2024

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

MARIA LEYVA TORRES
JOSEPH D. RYAN
MICHAEL SULLIVAN & ASSOCIATES

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