WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TRAVIS JOHNS, *Applicant*

vs.

CLAYTON HOMES MANUFACTURING;
XL INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ17453317; ADJ17769785
Van Nuys 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, which we adopt and incorporate below, we will deny reconsideration.

We have given the WCJ's credibility determination(s) great weight because the WCJ had the opportunity to observe the demeanor of the witness(es). (*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(s). (*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/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 10, 2024

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

TRAVIS JOHNS
JIMENEZ LAW
AMARO BALDWIN

DLM/oo

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

JOINT REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

The Applicant is a 47-year-old production laborer (group 380) who claims injury on or about 1/23/2023 to his right foot, left knee and back. The issues at trial were (1) injury aoe/coe, (2) body parts and (3) Defendant's request for a replacement panel under Cal. Code of Regs. sec. 31.5.

The Petitioner is the Defendant who has filed a timely and verified Petition for Reconsideration claiming that the undersigned erred in finding (1) industrial injury to the right foot and shin, (2) deferring injury to the left knee, and (3) denying that there was good cause to replace the QME due to bias[1].

II. STATEMENT OF FACTS

The Applicant was installing glass into a 6 ft. 100 lb. picture frame. He dropped some paperwork. Upon stooping over to pick up the paperwork the empty frame fell over the Applicant and ultimately struck his right foot and shin. The frame completely fell over the Applicant missing his head and body. His supervisor was right there near him and witnessed the accident.

At this point the evidence diverges significantly. As stated, Applicant maintains the frame struck his right foot and shin. It was reported as such to the supervisor who was right there. He continued to work. But the following day Applicant went to the ER at Sutter Hospital (Ex. X5). There was swelling of the foot. He took photos of his foot and shin and sent them to the employer (Exs. 2 & 3). The Sutter Hospital records document the visit on 1/24/2023 (p.275). It was reported as work-related. The history was consistent with the Applicant's testimony. X-rays showed fractures of the 2nd and 3rd metatarsal bones of the right foot. The history is found on p.285 of the Sutter records.

Treatment for the fractured foot continued with Concentra where the history confirms the work-related injury (Ex. X4, p.127).

Dr. Gerard Dericks acted as PQME. The Defendant sent a letter to the QME in which they requested (among other issues) whether or not the Applicant sustained an industrial injury to the right foot. (X-1, p.2). He opined that the injury was work related (Ex. X-1). However, in deposition he conceded that the actual event should be decided by the trier of fact (Ex. X-3,p.10).

Dr. Dericks did indicate that the facts of the case would support a finding of injury. This was clearly his opinion of the lay facts.

[1] ADJ17729785 was dismissed as a duplicate filing.

Dr. Dericks could make no findings regarding the lower back. While there were symptoms in the left knee, the existence of a prior knee replacement surgery left him without any conclusions on that body part.

The supervisor testified that the frame missed the Applicant completely. There was controversy as to what was stated by the Applicant and the supervisor at the moment of the accident.

There was no evidence presented that set forth another mechanism of injury.
The undersigned conducted the trial on January 8, 2024. After the testimony was completed on that day, the undersigned continued the matter to April 10, 2024, and ordered the parties to develop the record by obtaining and filing the subpoenaed records of Sutter Hospital and Concentra along with any relevant written communications mentioned in testimony.

On April 10, 2024, the handwritten note to the employer penned by the Applicant the following day was admitted (Ex. 1). The texts regarding the injury were also admitted (Exs. 2 & 3).

The undersigned issued Findings of Fact dated 4/11/2024. The findings were as follows:

(1) Applicant sustained injury to his right foot and shin.
(2) Applicant did not sustain injury to his low back.
(3) The claim for injury to the left knee was deferred.
(4) The Defendant's request for a replacement panel under sec. 31.5 was denied.
Petitioner claims that findings of fact numbered 1,3 & 4 above were all in error.
The undersigned will recommend that the Petition be denied.

III. DISCUSSION

Injury aoe/coe
It was found by the undersigned that Applicant sustained a work-related injury to his right foot and shin as he described.

The Applicant's testimony is consistent with the injury to the right foot. The follow up photos taken the next day certainly support the injury as reported. More importantly the medical records from Sutter Hospital and Concentra show that the injury was reported within 24 hours and the history was consistent with the claim.

The foot X-rays revealed two fractures. There was significant swelling. Inevitably swelling takes some time to develop, so it is not inconsistent for the symptoms to have significantly worsened by the next day when he reported to the ER. Dr. Gericks indicated that he had significant swelling the next day. So, the medical records of 1/24/2023 and 1/25/2023 support the finding of injury.

The employee was well liked by the employer as he was described as a good employee. The fact that this large picture frame fell over the Applicant barely missing his head seems to the undersigned as a situation where a much more serious injury was thankfully avoided. It also seems to the undersigned that when 6 foot 100lb. picture frame suddenly falls over one's head and

lands of the floor, the individuals standing there may very well not recall exactly what each person said in the heat of the moment.

The facts remain that the incident definitely occurred as reported by both the Applicant and the supervisor. The photos taken within 24 hours showed the injury. The injury was reported. The medical care sought within 24 hours and the histories taken are consistent with the injury.

The testimony is that the swelling became apparent the next morning (Min/Hrg, 1/8/2024, p.3, line 20 and p.4, line 5). He noted scratches on the foot (p.4, line 7). But his photo that he took for the employer showed those scratches and abrasions to be on the shin (Exs. 2 & 3).

The Petitioner questions why the undersigned did not make inquiry on any "alternative theories" as to how the injury may have occurred.

The Petitioner cites a few oral comments made by Applicant at the immediate time of the incident. His comments center around whether or not his job was secure. Such comments are common among employees who are missing work for whatever reason.

The undersigned does understand why the employer questioned the Applicant's credibility stemming from the alleged comments.

However, the evidence is overwhelming that the Applicant's recitation of events is far more credible. The employer would have one believe that between 5PM on 1/23 and 7AM on 1/24 a separate right foot injury occurred that manifested itself with two bone fractures in the foot and significant swelling by 7AM! Swelling takes some time to develop. So, when the Applicant appeared at the ER in the morning of 1/24 he already was suffering with significant swelling. Hence the Petitioner's "alternative theory" must be that Applicant sustained a separate non-industrial right foot injury fracturing two metatarsals between 5PM and bedtime on 1/23. This supposed "theory" is not supported by any evidence.

Hence the preponderance of evidence strongly favors a finding of injury at work on 1/23/2024 to the right foot.

Injury to the shin

Petitioner devotes the first four pages of its Petition to the finding of fact that Applicant also sustained injury to his right shin.

The Applicant testified to the fact that his injury was to his right foot and shin. He notes scratches and abrasions on the foot (Min/Hrg 1/8/2024, p.4, line 7). In addition, Exs. 2 & 3 clearly show those abrasions to be on the shin portion of his calf.

There is no further mention of the shin other than there were scrapes and abrasions noted. The photos show the abrasions to the shin. There is no evidence at all that anything further has come

of this notation. Dr. Gericks makes no findings of any kind regarding the shin. However, the evidence is that the shin was part of the injury no matter how insignificant.

The undersigned believes that noting such body part (no matter how insignificant) is still needed on the off chance that any further complication such as an infection or cellulitis could somehow occur.[2]

The issue of "body parts" asks the Court to decide what body parts were injured and by implication which were not. By not finding "shin" as a body part the Court is literally finding "no injury" to that body part. This in turn will have *res judicata* effect.

Hence to notice the obvious injury to the shin (no matter how minor) is in line with the facts of the case and should stand.

Replacement Panel under Cal. Code of Regs. sec. 31.5

Cal. Code or Regs. sec. 31.5(a) lists 16 separate reasons why the Medical Director may issue a replacement QME panel. None of those reasons specifically designate "bias" as one of those reasons.

However, Cal. Code of Regs. sec. 31.5(a)(13) allows the Medical Director to order a replacement panel in cases where the QME has demonstrated a violation of the conflict-of-interest provisions of Cal. Code of Regs. sec. 41.5.

Cal. Code of Regs. sec. 41.5 defines conflict of interest. In subsection (d)(4) there is a penumbra description of such a conflict as follows:

> "Any other relationship or interest not addressed by subdivisions (d)(1) through (d)(3) which would cause a person aware of the fact to reasonably entertain a doubt that the evaluator would be able to act with integrity and impartiality."

Cal. Code of Regs. sec. 41 details the ethical requirements of any QME. Subsections detail the ethical requirements of any QME. Subsection (c)(4) states in part:

> "All conclusions shall be based on the facts and on the evaluator's training and specialty-based knowledge and shall be without bias either for or against the injured worker or the claims administrator, or if none, the employer."

Hence any significant bias demonstrated by the QME would create in the mind of the parties the QME's inability to act impartially. Such would then constitute a conflict of interest warranting a replacement panel under se. 31.5.

[2] The Applicant previous had a cellulitis infection (Min/Hrg, 1/8/2024, p.4, line 16).

Petitioner maintains that the QME "changed his opinion" on causation of injury to the low back and left knee when he testified that his exam of the low back and left knee was "cursory." (Ex. X-3, p.21). He had noted in his report (Ex. X-1) that there were no findings in the knee or low back (as Petitioner pointed out).

In no manner of observation can it be construed that a QME admitting to only a cursory physical examination somehow constitutes bias in favor of the Applicant. In this case the major injury was to the right foot which was fractured. Very little attention was brought regarding the left knee and low back.

In order to determine industrial causation, it is necessary for the physician to conduct a full and complete examination. Here Dr. Gericks is basically admitting that his exam of the low back and left knee probably did not rise to that level. In fact, if one reads the letter from the Defendant to Dr. Gericks it is clear that he was not even asked to examine the low back or the left knee nor was he asked to opine about those body parts. (Ex. X-1, pp.2 -3).

This is not bias at all.

The undersigned found that there was no injury to the lower back. This finding is based upon the fact that there were no complaints elicited in the low back at all. The pain diagram filled out by Applicant in Ex. X-1 does not reveal low back complaints.

The petitioner does not question that finding of fact.

The Applicant did undergo a total knee replacement on the left in 2019. He also continues to have knee complaints. Since the exam was "cursory" by his own admission, the undersigned deferred any finding on injury to the left knee.

Petitioner asks that the testimony from Dr. Gericks demonstrates a bias against the Defendant and in favor of the Applicant.

Petitioner complains that there are no findings in the left knee. However, the Applicant has undergone a previous knee replacement. Under Table 17-33, p. 546 of the AMA Guides a TKA in the knee with a good result is a 15% wpi rating. This pre- exists this injury. A pre-existing total knee replacement can hardly be described as "no findings." Also he appears to still have complaints. So, whether or not there is a compensable consequence in the left knee still awaits further analysis and certainly more than a "cursory" examination. Hence the undersigned deferred a finding of injury to the left knee.

In no way can any of this argument be construed as bias by Dr. Gericks. He was not specifically instructed to examine the knee.

IV. RECOMMENDATION ON PETITION FOR RECONSIDERATION

Based upon the arguments set forth above, it is respectfully recommended that the Petition for Reconsideration herein be DENIED.

DATE: 4/26/2024

Dean Stringfellow
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE