

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

JUAN JOSE RUIZ, *Applicant*

vs.

**SK FLOOR COVERING and STATE COMPENSATION INSURANCE FUND,
*Defendants***

**Adjudication Number: ADJ11060751
San Jose District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant, in pro per, seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on January 6, 2021, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his left shoulder, chest, low back, both knees, both ankles, psyche, and nose/sense of smell; that the injury caused 23% permanent disability; and that the permanent disability indemnity rate was \$290.00 per week.

Applicant contends that he is entitled to an additional 5% permanent disability for his psychiatric injury, that he was not allowed to present testimony from witnesses at trial, that the additional material he was allowed to provide after the trial was not considered, and that further development of the record is needed regarding his earnings.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

We have considered the allegations in the Petition for Reconsideration (Petition) the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate, and for the reasons discussed below, we will affirm the F&A.

BACKGROUND

Applicant claimed injury to his left shoulder, chest, low back, both knees, both ankles, psyche, and nose/sense of smell, while employed by defendant as a carpet installer during the period from July 20, 2016, through July 20, 2017.

On April 5, 2018, applicant was evaluated by pain medicine qualified medical examiner (QME) Ilya Sabsovich, M.D. (Def. Exh. D, Dr. Sabsovich, April 5, 2018.) Dr. Sabsovich examined applicant, took a history, and reviewed the medical record. The doctor diagnosed applicant as having left shoulder bursitis, left shoulder rotator cuff syndrome, sternum pain, thoracic sprain/strain, lumbar sprain/strain, lumbago, right knee sprain/strain, and bilateral ankle pain, and he noted that applicant's condition had reached maximum medical improvement/permanent and stationary (MMI/P&S) status. (Def. Exh. D, p. 16.)

On June 26, 2018, applicant was seen for a psychological evaluation by clinical psychologist Robert Perez, Ph.D. (App. Exh. 5, Robert Perez, Ph.D., July 3, 2018.) Dr. Perez diagnosed, "Depressive Disorder, NOS Somatic Symptom Disorder with Predominant pain," and determined that the predominate cause of applicant's psychiatric condition was his employment with defendant. (App. Exh. 5, pp. 4 – 5.)

Otolaryngology QME Ronald L. Rubenstein, M.D., evaluated applicant on November 12, 2018. (Def. Exh. I, Dr. Rubenstein, November 12, 2018.) Dr. Rubenstein re-evaluated applicant on September 10, 2019, and he found that applicant had reached MMI/P&S status. (Def. Exh. I, p. 1.) In his supplemental report, Dr. Rubenstein concluded that applicant's "difficulty in smell" did not cause any whole person impairment (WPI). (Def. Exh. E, Dr. Rubenstein, October 18, 2019.)

On January 21, 2020, QME Dr. Sabsovich re-evaluated applicant. (Def. Exh. A, Dr. Sabsovich, January 21, 2020.) The doctor's re-examination of applicant and review of the interim medical record, did not change his opinions previously stated in his April 5, 2018 report. He also noted that there was "no medical evidence of compensable consequence injury to the left hip." (Def. Exh. A, p. 15.)

The parties proceeded to trial on October 6, 2020, and the matter was continued for the parties to develop the record and clarify the issues to be tried. The Minutes of Hearing (MOH) include the following:

Applicant is to meet with an I&A [information and assistance] officer and revise the Issues page of the pre-trial conference statement (5-pager) to the worker's compensation claims he intends to make and excluding non-worker's comp issues. ... Applicant is to meet with I&A and revise his exhibit list to include any psychiatric reports needed to prove his claim and exclude any material not having to do with this case.

(MOH, October 6, 2020, p. 2.)

At the December 14, 2020 trial the parties stipulated that the proper permanent disability indemnity rate was \$290.00 per week; the issues submitted for decision included parts of body injured and permanent disability/apportionment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 14, 2020, p. 2.) In the MOH/SOE, the WCJ stated:

LET THE MINUTES REFLECT that it is the Court's understanding that the parties wish to admit the matter for decision on the existing record without testimony. Also it is the Court's understanding that Mr. Ruiz wishes the Court to accept the written statements contained in his Exhibit 1, which are parts 1 and 2 of that exhibit, in lieu of his testimony.

(MOH/SOE, December 14, 2020, p. 4.)

DISCUSSION

In his Report, the WCJ stated:

I have read the contentions set forth in the Petition. Several are simply incorrect. Applicant claims that his documents were not reviewed. This is simply incorrect, as set forth above. Applicant claims his witnesses were disallowed. This is not true ... ¶ The errors alleged in the medical record, which Applicant's documents described, seem trivial in nature. Try as I might, I am unable to understand how any of these 'errors', if correctly described, could have produced or contributed to any errors in the doctor's conclusions or changed the result reached on those reports.

(Report, p. 4.)

We have reviewed the trial record and the complete EAMS ADJ file. Based on our review of these proceedings, for the reasons explained by the WCJ, we see no factual and/or legal basis for disturbing the WCJ's F&A.

Finally, we note that "Earnings" was an issue raised at trial and mentioned in defendant's Answer. The F&A notes that applicant's earnings warranted a permanent disability indemnity rate of \$290.00 per week and the permanent disability benefits were awarded based thereon. Review

of the December 14, 2020 MOH/SOE indicates that the parties stipulated to the \$290.00 weekly rate. (MOH/SOE, December 14, 2020, p. 2.) More importantly, Labor Code section 4453(b)(9) identifies \$290.00 per week as the maximum permanent disability rate. (Lab. Code, § 4453.) Since temporary disability indemnity was not an issue raised by the parties, and permanent disability benefits were awarded at the maximum rate, applicant's earnings are not relevant to any issue to be addressed by the Appeals Board.

Accordingly, we affirm the F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued by the WCJ on January 16, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 6, 2021

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

**JUAN JOSE RUIZ
STATE COMPENSATION INSURANCE FUND**

TLH/pc

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

1. Applicant, Juan Jose Ruiz, while employed during the period 7/20/2016 through 7/20/2017, as a carpet installer (group 481) at Newark, California, by SK Floor Covering, insured for worker's compensation liability by State Compensation Insurance Co., sustained cumulative injury arising out of and in the course of this employment to his low back, left shoulder, nose/smell, right knee, left knee, both ankles, chest , and psyche.
2. A Petition for Reconsideration has been filed by the Applicant. The Petition was timely filed, and verified in accordance with law. Defendant has filed an Answer.
3. Applicant seeks Reconsideration from a Findings and Award which issued 1/6/2021, which awarded, among other things, 23% PD and further medical care to body parts which had been in dispute.
4. Applicant seeks Reconsideration based upon; (1) an additional 5% PD should have been awarded for the psyche, based upon informal remarks Applicant claims were made to him at the MSC by WCALJ Suh, the MSC judge; and (2) Applicant was not allowed to present testimony from additional witnesses; and (3) this WCALJ failed to review the additional material provided (with permission) post trial to rebut the PQME opinion; and (4) further discovery was necessary to clarify the earnings issue.

II SUMMARY of FACT

The parties agree that Applicant suffered a CT injury during his employment as a carpet installer during the period ending 7/20/2017. Multiple body parts were in dispute, all of which have been found to be part of the injury. Since Defendant has not filed for Reconsideration, these body parts are no longer in dispute and will not be discussed.

This matter came before WCALJ Suh for MSC on 6/11/2020. A pre trial conference statement was prepared by the parties and approved with amendments by Judge Suh. Defendant listed a number of potential witnesses, but Applicant did not list any.

The case was set for trial on 12/14/2020 and went forward as scheduled. Applicant then, for the first time, indicated a desire to call two previously undisclosed witnesses. Since injury was admitted, it was unclear what lay witnesses could contribute. Nevertheless, I told Mr. Ruiz (through the interpreter) that if his witnesses were available that day to testify, I would consider accepting their testimony. He indicated to me that they were not available to testify. Since these witnesses had not been identified to anyone prior to trial and were unavailable in any event, I declined to delay proceedings in order to secure their testimony. I was unable to learn from Applicant which issues this testimony would concern.

Following this, we discussed a format for taking Applicant's testimony since he was unrepresented. Mr. Ruiz stated that he wished to make the Court aware of a number of errors he had found in some of the medical reports. I pointed out to him that his proposed Exhibit 1 already contained such a discussion. He responded that he had found additional errors and wanted to point them out. In an effort to accommodate Applicant's wishes, I ruled Applicant's Exhibit 1 admissible in the nature of an offer of proof. After more discussion, the parties agreed that Applicant would be given additional time to prepare an additional document setting forth his objections of the medical record in lieu of testimony, and that this document would be considered. Without objection, Applicant was given until close of business 12/20/2020 to file this additional statement, and Defendant requested and was granted until 1/4/21 to respond. The matter was submitted for decision as of 1/4/21. Applicant did submit a document dated 12/19/20 which was indistinguishable from his Exhibit 1. Defendant advised that they had decided not to present any further argument prior to submission.

Neither document gave the reader any basis for determining what if any additional earnings Applicant had been entitled to over and above that described in the documents provided by Defendant. Applicant did show that he had obtained a substantial settlement from the Employer, which covered a number of issues, one of which was the underpayment of wages. The documents provided did not set forth any means of determining that portion attributable to unpaid past wages.

After a careful review of all of the documents submitted, I issued a Findings and Award on 1/6/2021. From this Award, Applicant seeks Reconsideration. After the issuance of the F&A, the case was set for conference. I have no idea how this occurred, but it appears to have been a clerical error brought on by short staffing due to the pandemic. Both parties appear to have been advised not to appear at this setting, although Applicant appeared anyway. He was advised that the case had been decided and the hearing set in error.

III

DISCUSSION

I have read the contentions set forth in the Petition. Several are simply incorrect. Applicant claims that his documents were not reviewed. This is simply incorrect, as set forth above. Applicant claims his witnesses were disallowed. This is not true, since additional witnesses were never identified and not available at trial. The decision was not to disallow Applicant's witnesses. The decision was to deny Applicant's request for a continuance, since it was a request made at the last minute and without any showing of the most basic due diligence. Since we have no idea what purpose such testimony would serve, there was never any basis for delaying a trial to permit this last-minute request.

The errors alleged in the medical record, which Applicant's documents described, seem trivial in nature. Try as I might, I am unable to understand how any of these 'errors', if correctly described, could have produced or contributed to any errors in the doctor's conclusions or changed the result reached on those reports. Finally, Applicant appears to have prepared this list of 'errors' several months before the MSC, and never asked the various QME's to correct the errors or to state whether correction of these 'errors' would change the result of their respective evaluations.

In summary, I do not understand the basis of Applicant's Petition, nor do I understand what errors the Applicant believes I committed, nor do I understand what Applicant believes I should have done instead.

IV RECOMMENDATION

DENY Reconsideration.

David L. Lauerman,
Workers' Compensation Judge