

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

MAURA EVELIA FLORES, *Applicant*

vs.

**JAKINA, INC. dba SCHWARTZ BAKERY and NATIONAL LIABILITY & FIRE
INSURANCE COMPANY, administered by GUARD INSURANCE, *Defendants***

**Adjudication Number: ADJ10725201
Anaheim District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on January 28, 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 her thoracolumbar spine, right shoulder, right elbow, right forearm/upper extremity in the form of radial tunnel syndrome, right wrist/hand in the form of carpal tunnel syndrome, and both knees; that applicant did not sustain injury to her left elbow; that applicant was temporarily totally disabled for the period from December 1, 2016, through February 9, 2018; that the injury caused 31% permanent disability; that applicant will require further medical treatment to cure or relieve from the effects of her injury; and that defendant unreasonably failed to pay temporary disability and permanent disability benefits, entitling applicant to a penalty on both benefits, pursuant to Labor Code section 5814.

Defendant contends that the trial record, including applicant's testimony and the reports and deposition testimony of orthopedic qualified medical examiner (QME) Mitchell Geiger, M.D., are not substantial evidence regarding applicant's injury, or the issues of temporary disability and permanent disability; and that defendant did not unreasonably fail to pay temporary disability indemnity and/or permanent disability indemnity.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from applicant. We have considered the allegations in the Petition and 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, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant claimed injury to her right shoulder, right wrist, both elbows, thoracic spine, low back, and both knees, while employed by defendant as a dishwasher on November 30, 2016.

Applicant underwent a course of medical treatment from providers including Simon Valencia, M.D., Edward Komberg, D.C., and Shahin Rad, M.D. (see App. Exhs. 4 – 10.)

On July 18, 2018, applicant was evaluated by QME Dr. Geiger. (App. Exh. 1, Dr. Geiger, July 18, 2018.) Dr. Geiger examined applicant, took a history, and reviewed the medical record including x-rays and MRIs. (see App. Exh. 1, pp. 15 – 24.) He diagnosed applicant as having: right shoulder bursitis/tendinitis, impingement syndrome; right elbow medial epicondylitis, radial tunnel syndrome; possible right hand carpal tunnel syndrome; thoracolumbar sprain/strain, degenerative disc disease; and bilateral knee contusions. (App. Exh. 1, p. 24.) Dr. Geiger stated:

I am uncertain if the applicant has reached maximum medical improvement. Additional diagnostic studies are required to provide objective findings that may or may not correlate with the applicant's subjective complaints. (App. Exh. 1, p. 25.)

Regarding the cause of applicant's condition, Dr. Geiger said:

I find industrial injury is medically probable to the right shoulder, right elbow, thoracolumbar spine, bilateral knees due to a fall from a height. She may also have carpal tunnel syndrome due to a fall. However, objective findings to verify the applicant's subjective complaints have not been accomplished as yet. (App. Exh. 1, p. 27.)

Dr. Geiger was provided additional diagnostics for review, and in his May 8, 2019 supplemental report he stated that based on his review of the diagnostics, "... applicant was permanent and stationary when evaluated by me on July 18, 2018" and he assigned whole person impairment (WPI) for the injured body parts. (App. Exh. 2, Dr. Geiger, May 8, 2019, pp. 8 - 12.)

On September 6, 2019, Dr. Geiger's deposition was taken. (App. Exh. 3, Dr. Geiger, September 6, 2019, deposition transcript.) The doctor testified in response to questions regarding each of the body parts he had previously determined to be injured. As to the cause of applicant's various conditions, the testimony included:

Q. ... So you provided a diagnosis on page 24 of your July 18, 2018, report. ¶ And your diagnosis at the bottom says right shoulder bursitis, right elbow epicondylitis, radial tunnel syndrome, carpal tunnel syndrome, thoracolumbar strain, sprain, and bilateral knees. ¶ In your opinion, if the applicant is to be believed about how the fall occurred and the time period of the pain occurring in these body parts, is it your opinion that all of those diagnoses and all of those body parts are medically, reasonably caused by the fall that she had while at work?

A. On an industrial basis, yes.
(App. Exh. 3, p. 26.)

The parties proceeded to trial on December 22, 2020, and they stipulated that applicant sustained injury AOE/COE to her low back, and both knees. (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 22, 2020.) The issues submitted for decision included parts of body injured, temporary disability/permanent and stationary date, permanent disability/apportionment, and applicant's entitlement to a Labor Code section 4650 increase in benefits and/or Labor Code section 5814 penalties. (MOH/SOE, p. 2)

DISCUSSION

It has long been the law that any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) In order to constitute substantial evidence, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Granado v. Workmen's Comp. Appeals Bd.* (1970) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

In the Opinion on Decision, the WCJ explained that during pretrial discussions with the parties, defendant asserted that Dr. Geiger's opinions did not constitute substantial medical evidence because he disregarded alternative explanations for applicant's complaints. However, defendant did not provide any further details regarding what alternative explanations it thought could have caused applicant's conditions. More importantly, defendant did not provide any

medical evidence that applicant's complaints are in fact related to any alternative causes or explanations. (see Opinion on Decision, pp. 1 - 2.) The WCJ also noted that:

Nowhere in Dr. Geiger's deposition transcript did the court find any testimony that would "rebut" his prior conclusions regarding the existence of industrial injury to various parts of the body.
(Report, p. 10.)

Having reviewed the reports and deposition testimony of Dr. Geiger, it is clear that he performed an appropriate examination of applicant and that he reviewed a large amount of medical records including the additional diagnostics he discussed in the supplemental report.

Regarding whether Dr. Geiger had an adequate and/or accurate history, in the Report the WCJ stated:

The court does not believe that applicant deliberately misstated facts or falsified information. Applicant's testimony regarding her job duties, her description of the accident, and her current complaints was found to be credible. Her testimony is consistent with medical evidence in the record from Olympia Medical Center, Dr. Simon Valencia, Dr. Edward Komberg, Dr. Shahin Rad and Panel QME Dr. Mitchell Geiger. There is nothing in the record that contradicts applicant's testimony on those points, and as previously noted, there is no dispute that the accident happened as described and that injuries resulted.
(Report, p. 8.)

It is well established that a WCJ's opinions regarding witness credibility are entitled to great weight. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500, 505]; *Sheffield Medical Group v. Workers' Comp. Appeals Bd. (Perez)* (1999) 70 Cal.App.4th 868 [64 Cal.Comp.Cases 358]; *Nash v. Workers' Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1793 [59 Cal.Comp.Cases 324].) We see no reason to question the WCJ's opinion as to applicant's credibility and in turn it appears that applicant gave Dr. Geiger an accurate and adequate history of her industrial injury.

Further, in his reports and his deposition testimony Dr. Geiger provided a detailed analysis and explanation of his opinion that applicant sustained injury AOE/COE, and that applicant's injury caused WPI as described in his supplemental report. (App. Exh. 2, pp. 10 – 12.)

Again, based on our review of the trial record, for the reasons discussed above, and as explained by the WCJ, Dr. Geiger's reports and testimony constitute substantial evidence and are an appropriate basis for the WCJ's decision as to the issues of injury AOE/COE, parts of body injured, and permanent disability.

The WCJ explained the basis for the award of temporary disability indemnity, as follows:

[T]he court's finding of temporary total disability from December 1, 2016 through February 9, 2018 is supported by the emergency room report dated November 30, 2016 taking her off of work; her employer's instruction a couple of weeks later to go home and not return until she was fully recovered; and ongoing medical reports from Dr. Valencia and Dr. Komberg declaring applicant temporarily totally disabled throughout 2017. (Report, p. 13.)

Also, in the Opinion on Decision the WCJ explained why the temporary disability indemnity award ended on February 9, 2018. He stated:

On February 9, 2018, applicant came under the care [sic] of Shahin Rad, M.D., who opined in his initial report of that date that while applicant was in need of medical treatment and not yet permanent and stationary, applicant could perform her regular work duties without restrictions. Dr. Rad reiterated that opinion in subsequent reports, while the Panel QME, Dr. Geiger, never addressed periods of temporary total disability. (Opinion on Decision, p. 2.)

We agree with the WCJ that the trial record supports the award of temporary disability indemnity for the period from December 1, 2016, through February 9, 2018, and we will not disturb his decision.

Finally, defendant objects to the penalties imposed by the WCJ. In his Report, the WCJ correctly stated that a defendant is required to take the initiative to provide the benefits to which an injured worker is entitled (*Dorman v. Workmen's Comp. Appeals Bd.* (1978) 78 Cal.App.3d 1009 [43 Cal.Comp.Cases 302]), and that the standard for determining if there has been an unreasonable delay or denial of benefits is the existence of a genuine medical or legal doubt as to the defendant's liability for benefits. (Lab. Code, § 5814; *Kenley v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 223 [36 Cal.Comp.Cases 152].)

Here, the WCJ's finding as to applicant's temporary disability status was based on the emergency room physician taking applicant off of work; the employer telling her a couple of weeks later to go home until she was fully recovered; and subsequently, the treating physicians declaring her temporarily totally disabled until February 9, 2018. (Report, p. 15.)

The WCJ had previously explained that:

All of the medical evidence in the record indicates that applicant was temporarily totally disabled from the date of injury until February 9, 2018. There is no

medical evidence otherwise. ... Defendant offered no evidence that would rebut applicant's claim to temporary total disability benefits. ¶ Similarly, the only P&S reports in the record, from Dr. Rad and Panel QME Dr. Geiger, indicate that applicant has permanent disability. ... ¶ Nevertheless, defendant paid no temporary or permanent disability benefits at all, per their stipulation at trial. Defendant offered no evidence and no explanation for their failure to do so. The record contains no evidence of genuine medical or legal doubt regarding defendant's liability for benefits.
(Opinion on Decision, p. 3.)

The WCJ is correct that defendant submitted no evidence indicating that applicant was not temporarily totally disabled for the period that benefits were awarded, nor did it submit evidence that applicant's accepted injury did not cause permanent disability. Presumably, if defendant had such evidence, it would have submitted that evidence at trial. Also, defendant submitted no evidence explaining why it did not pay the indemnity benefits that the trial record indicates applicant was entitled to receive. In its Petition defendant makes various arguments to support its contentions, but clearly a party's arguments are not, in and of themselves, evidence. We therefore see no reason to disturb the WCJ's award of Labor Code section 5814 penalties. (Lab. Code, § 5814.)

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued by the WCJ on January 28, 2021, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 1, 2021

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

**MAURA EVELIA FLORES
LAW OFFICES OF JON M. WOODS
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP**

TLH/pc

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