WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MANUEL LOPEZ TEJEDA, ***Applicant***

vs.

ROY E. HANDSON JC MFG; STRATEGIC COMP CINCINNATI, ***Defendants***

Adjudication Number: ADJ16908650
Los Angeles District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the January 27, 2025 Findings and Order (F&O) wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant's claim was not barred by the statute of limitations and that applicant, while employed as a burner on June 14, 2018 by defendant, sustained an injury arising out of and in the course of employment (AOE/COE) to his lumbar spine.

Defendant contends that the WCJ's above determinations were "based on significant misrepresentations" as applicant presented "factually incorrect testimony" surrounding the mechanism of injury and was therefore not a credible witness. Defendant further contends that in light of applicant's inconsistent testimony and lack of supporting medicals, the October 7, 2022 report of Qualified Medical Evaluator (QME), Dr. Michael H. Penilla is not substantial medical evidence. (Petition, p. 4.)

We have not received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

It appears defendant also filed an Amended Petition for Reconsideration. The petition was filed on the same date as the original Petition for Reconsideration (Petition). There is no discernible difference between the two. As such, we find no good cause under WCAB Rule 10964 to accept the amended petition. (Cal. Code Regs., tit. 8, § 10964.)

We have considered the Petition and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny the Petition.

FACTS

Applicant claimed that while employed by defendant on June 24, 2018 as a burner, he sustained an injury AOE/COE to his lumbar spine.

The claim was denied by defendant via a letter dated April 10, 2023 wherein defendant alleged lack of "legal, medical, or factual evidence" of injury. (Exhibit A.)

The parties retained Dr. Michael H. Penilla to serve as the QME. Dr. Penilla evaluated the applicant on August 12, 2022 and issued a report on October 7, 2022. (Exhibit 2.) In preparation for the evaluation, Dr. Penilla reviewed a transcript of applicant's March 8, 2022 deposition as well as 1,426 pages of medical records spanning from September 25, 2005 – February 14, 2022. (*Id*. at pp. 10-36.)

Within his report, Dr. Penilla found, in relevant part, that based upon "reasonable medical probability" applicant sustained a specific injury to his low back on June 24, 2018 during "the course and scope of his employment." (*Id*. at p. 47.) Dr. Penilla also found reasonable medical probability of an April 20, 2017 specific work injury to applicant's left knee, and a cumulative work injury from June 21, 1980 through August 29, 2021 to the neck, right shoulder, right elbow, low back, bilateral wrists, bilateral knees, and bilateral feet. (*Ibid*.)

Applicant received treatment for his claimed injury from Chiropractors, Archibald Rodriguez and Saro Dorian.

On October 28, 2024, the matter proceeded to trial on the issues of injury AOE/COE to the lumbar spine and the statute of limitations defense.

At trial, applicant testified that on June 24, 2018, he "lost his balance and fell backwards striking his back[.]" (Minutes of Hearing and Summary of Evidence (MOH & SOE), p. 3.) According to applicant, his supervisor, Antonio Leal, saw him fall and helped him back up with the assistance of another worker. (*Ibid*.)

Applicant further testified that he was aware "he had the right to file a workers' compensation claim" but did not recall defendant "telling him about the deadline to file a claim." (*Id*. at p. 4.) He further testified that although he was treated with Dr. Rodriguez and Dr. Dorian, he did not recall them specifically mentioning the injury or how the injury occurred. (*Ibid*.)

On January 27, 2025, the WCJ issued a F&O which stated, in relevant part, that applicant's claim was not barred by the statute of limitations and that applicant, while employed as a burner on June 14, 2018 by defendant, sustained an injury AOE/COE to his lumbar spine.

DISCUSSION

I.

Preliminarily, former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected under the Events tab in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on February 28, 2025, and 60 days from the date of transmission is April 29, 2025. This decision was issued by or on April 21, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are

[1] All further statutory references will be to the Labor Code unless otherwise indicated.

notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report shall constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on February 28, 2025, and the case was transmitted to the Appeals Board on February 28, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on February 28, 2025.

II.

Turning to the merits of the Petition, defendant contends that the WCJ's decision was based on "significant misrepresentations," including applicant's "inaccurate lay testimony given at trial on October 28, 2024." (Petition, p. 4.) Defendant argues that applicant provided different accounts regarding the mechanism of injury, including one account to Dr. Penilla wherein he alleged injury from lifting a heavy machine and another account at trial wherein he testified to falling and striking his back. (*Id*. at p. 9.) Defendant believes that due to the inconsistencies, applicant should not be considered a credible witness.

Pursuant to *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500], credibility determinations of the WCJ, as the trier of fact, are entitled to great weight based upon the WCJ's opportunity to observe the demeanor of the witnesses and weigh the witnesses' statements in connection with their manner on the stand. Credibility determinations are not to be disturbed except where there is contrary evidence of considerable substantiality. (*Id*.) Unfortunately, no such evidence was provided here. Further, as expressed by the WCJ in his Report:

> "…Applicant offered unrebutted testimony that the Court found credible, and which was consistent with the reporting of PQME Penilla. The record contains accounts of several different specific injuries, including falls on different dates. The Court was persuaded that any minor consistencies in testimony regarding the exact date and mechanism of the claim injury at issue here – which occurred nearly seven years ago – was not a 'clear misrepresentation' as alleged by Petition. Rather, the Court made a finding of injury drawing the most likely inference from the lay and medical evidence which was submitted. In balancing the evidence, the Court had the choice between treating reports which omitted documented injuries, and PQME report which was supported by unrebutted and credible testimony. The choice was clear, and well within the discretion of the Court."

(Report, pp. 3-4.)

We note that pursuant to *Albertson's/Lucky Stores v. Workers' Comp. Appeals Bd.* (2006) 71 Cal.Comp.Cases 624 [2006 Cal. Wrk. Comp. LEXIS 130], minor inconsistencies do not discredit the entirety of an applicant's trial testimony. In *Albertson's*, the court denied defendant's challenge to the credibility of applicant's trial testimony in light of the relatively minor inconsistencies surrounding the reported date of injury. The court further held that the inconsistencies did not contradict "the substantial medical evidence supporting the WCJ's award." (*Id.* at p. 628.) Similarly, here, any inconsistencies between applicant's trial testimony and the QME report are relatively insignificant and ultimately do not outweigh or otherwise contradict the WCJ's finding of substantial medical evidence of injury AOE/COE. As such, we find applicant to be a credible witness.

Defendant contends that the report of Dr. Penilla lacks substantial medical evidence. (Petition, p. 4.) Defendant argues that applicant's "inaccurate" and conflicting testimony undermines Dr. Penilla's report and that the "absence of any contemporaneous medicals despite a history of applicant treating at Kaiser suggests that an injury on June 24, 2028, did not occur." (Petition, pp. 4, 7.)

As explained in *Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc), a decision "must be based on admitted evidence in the record" (*Id.* at p. 478) and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.) A medical opinion proffered as substantial evidence must be framed in terms of reasonable medical probability, be based on pertinent facts, an adequate examination, and history, set forth reasoning in support of its conclusions, and not be speculative. (*E.L. Yeager v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006)

145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Bd. en banc).) Reasonable medical probability, however, does not require that applicant prove causation by "scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700- 1701 [58 Cal.Comp.Cases 313].) Also, "[a] medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (citations) Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (citations)" (*Gatten*, *supra*, at p. 928.) "A medical report which lacks a relevant factual basis cannot rise to a higher level than its own inadequate premises. Such reports do not constitute substantial evidence to support a denial of benefits. (citation)" (*Kyle v. Workers' Comp. Appeals Bd* (*City and County of San Francisco*) (1987) 195 Cal.App.3d 614, 621.)

Based upon our review of the October 7, 2022 QME report, we find that Dr. Penilla provided adequate reasoning and relied upon relevant facts and history, including a thorough examination of the applicant. We find no evidence of bias, speculation, or inexperience on the part of Dr. Penilla and no evidence, proffered by defendant or otherwise, to rebut Dr. Penilla's findings. As such, we find that the October 7, 2022 QME report constitutes substantial medical evidence.

Lastly, defendant alleges the employer had no duty to provide a claims form since applicant failed to report the injury and provided "no action to trigger notice requirements." (Petition, p. 10.) In *Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 726, 729 [39 Cal.Comp.Cases 768], the court explained that: "The clear purpose of these rules is to protect and preserve the rights of an injured employee who may be ignorant of the procedures or, indeed, the very existence of the workmen's compensation law. Since the employer is generally in a better position to be aware of the employee's rights, it is proper that he should be charged with the responsibility of notifying the employee, under circumstances such as those existing here, that there is a possibility he may have a claim for workmen's compensation benefits." In *Reynolds*, the employer was precluded from raising a statute of limitations defense where the injured employee suffered a heart attack at work and the employer did not provide notice of workers' compensation benefits. Here, applicant testified that at the time of injury, his supervisor, Antonio Leal, was present and saw him fall. (MOH & SOE, p. 3.) Applicant further testified that although he was aware he had a right to file a workers' compensation claim, "he did not recall the employer telling him about the deadline to file

a claim. (*Id*. at p. 4.) Defendant provided no alternate testimony or other evidence to rebut applicant's statements. As such, we surmise that defendant was in fact aware of the injury and notwithstanding this awareness, failed to notify applicant of his rights with respect to workers' compensation benefits.

Accordingly, defendant's Petition is denied.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the January 27, 2025 Findings and Order is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 28, 2025

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

MANUEL LOPEZ TEJEDA
LAW OFFICES OF KHAKSHOUR & FREEMAN
EMPLOYER DEFENSE GROUP

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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.
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