WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JUAN CONSTANZA, *Applicant*

vs.

VALLARTA SUPERMARKETS; SAFETY NATIONAL CASUALTY CORPORATION, administered by SEDGWICK, *Defendants*

Adjudication Number: ADJ8969732
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated in the WCJ's report and opinion, which are both adopted and incorporated herein, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 2, 2021

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

JUAN CONSTANZA
LAW OFFICES OF FRANK MASTRONI
GREENUP HARTSON & ROSENFELD

PAG/oo

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

REPORT AND RECOMMENDATION
OF WORKERS' COMPENSATION JUDGE
ON PETITION FOR RECONSIDERATION

INTRODUCTION

1) Juan Constanza, while employed on 03/03/2013 as a meat receiver, occupational group 460, at Valley Glen, California by Vallarta Supermarkets sustained injury to his low back, and claims to have sustained gastro-intestinal injury as a compensable consequence thereof, as a new and further disability. At the time of the 03/03/2013 date of injury, the carrier was Safety National Casualty Corporation, administered by Sedgwick CMS.
2) The parties had entered Stipulations with Request for Award, with Award of 10/14/2014 of 21 % Permanent disability to the low back based on the findings of Orthopedic Agreed Medical Evaluator William Mouradian, MD.
3) The pa1iies proceeded to trial on the Petition for New and Further on 03/11/2021.
4) As a result of the 03/11 /2021 Trial, a Findings of Fact and Order Taking Off Calendar was served July 29, 2019 in favor of Applicant, finding that:

Juan Constanza, while employed on 03/03/20 13 as a meat receiver, occupational group 460, at Valley Glen, California by Vallarta Supermarkets sustained injury to his low back, and, upon Petition for New and Further Disability sustained gastro-intestinal injury as a compensable consequence thereof, as new and further disability. The temporary disability periods are deferred; the reasonable value of the services and disbursements of applicant's attorney is deferred; the extent of impairment and permanent disability is deferred; the reports of Dr. Rahban are rejected. Based on these findings, an Award was made in favor of JUAN CONSTANZA against VALLARTA SUPERMARKETS of:

a. The Petition for New & Further Disability is GRANTED as to the gastrointestinal as a new and further condition, not arising before the prior award.
b. The pai1ies are to acquire a Panel QME in the field of internal medicine to determine nature and extent of this additional body part to include periods of temporary disability, the permanent & stationary date, extent of permanent disability, apportiom11ent, and need for further medical treatment, within a reasonable medical probability.

c. Reimbursement of self-procured medical treatment in an amount to be adjusted by the parties.

d. Future medical treatment reasonably required to cure or relieve from the effects of the injury herein.

5) The Petitioner is the Employer/Carrier in this matter. The statutory basis for Petition for Reconsideration is that the evidence does not justify the findings of fact per LC § 5903 (c), asserting that there is no substantial medical evidence to support the finding of fact that Applicant sustained gastrointestinal injury as a compensable consequence of the low back injury of March 3, 2013.

Applicant Counsel has issued a timely Answer to the Petition for Reconsideration. Applicant Counsel asserts that (although the determination as to AOE/COE is a final determination) that the determination of this Judge was an interim order, leaving the determinations as to [nature and extent] to further discovery.

FACTS

The above-referenced matter proceeded regularly for hearing as a trial before Judge Jeffrey Marrone on the issue of the Petition for New & Further Disability, noting the additional body parts of gastrointestinal system, internal and weight gain arising from the 03/03/2013 date of injury. Further, the Applicant sought additional temporary disability for broken periods of 08/30/2016-03/01/2019, determination of the permanent & stationary date and extent of permanent disability, apportionment, the need for further medical treatment, attorney's fees; whether the reports offered by Applicant are admissible as acquired outside the MPN, whether the reports of Dr. Valdez are substantial medical evidence, whether the reports of Dr. Rah ban are substantial medical evidence, laches as to the claim for injury to gastrointestinal system, internal and weight gain; weight of evidence as to the maximum medical improvement date noted by the orthopedic AME, Dr. Mouradian. The primary treating physician is Vincent Valdez, MD.

DISCUSSION

I. JURISDICTION

The jurisdiction of the appeals board in proceedings as to the allegation of new and further. Made within the 5 year statute, is a continuing jurisdiction (Labor Code § 5410)

II. EVIDENCE SUPPORTING THE FINDINGS OF FACT

The Petitioner Asserts that the evidence does not justify the findings of fact per LC § 5903 (c), asserting that there is no substantial medical evidence to support the finding of fact that Applicant sustained gastrointestinal injury as a compensable consequence of the low back injury of March 3, 2013.

First, it is noted that when the parties proceed to an AME, deference is given to the opinion of the AME as to causation. It is the Petitioner's contention that, as Dr. Mouradian is an orthopedic specialist, he is not qualified to opine on the causation of conditions arising from medication utilized to relieve the pains of the underlying orthopedic condition.

As noted, the pa11ies entered into Stipulated Findings with Request for Award, finding back injury, utilizing the report of the AME, Dr. Mouradian. Award issued thereon.

Labor Code § 4067 states that, "If the jurisdiction of the appeals board is invoked pursuant to Section 5803 upon the grounds that the effects of the injury have recurred, increased ... a formal medical evaluation shall be obtained pursuant to this article.

When an agreed medical evaluator ... has previously made a formal medical evaluation of the same or similar issues, the subsequent or additional formal medical evaluation shall be conducted by the same agreed medical evaluator ... "

Further note that Labor Code § 5402 (a) puts the onus on the employer to investigate the facts.

The parties proceeded to Dr. Mouradian for re-examination as the Applicant's complaints included further disability orthopedically. In the 12/19/2018 repo11 of Dr. Mouradian (Defense Exhibit G), page 2, under I-IISTOR Y, the doctor notes that he Applicant proceeded with pain management treatment inducing medication. History continues into page three. At the bottom of page 3 of that report, the AME notes that the Applicant had complaints of stomach problems and diarrhea. The AME did not place this in his diagnosis.

Dr. Valdez continued to treat the injured worker and noted, in each report that the medication was causing gastrointestinal issues. The Primary Treating Physician referred the matter to Dr. Rahban, who did not complete a ratable report.

The Defense petitioned for Order Compelling evaluation with Dr. Rahban in terms of the Upper GI study.

If one were to take judicial notice of the June 16, 2020 minutes of hearing by WCJ Rasmusson, it would be noted that:

> **"Per AA, the order for the upper GI endoscopy was accomplished on January 31, 2020. After that, the defense served correspondence on Dr. Rahban, asking him to address certain issues. This is after the DOR for the discovery issue was filed by defense in December, 2019. Dr. Rahban commented on the issues, but it is not a final and complete report. Per AA, the discussion of apportionment is necessary. The report does not confirm that the applicant is MMI.**
>
> **Per defense, the Dr. Rahban reporting is ratable and the matter should be continued to trial with Judge Marrone. The court has expressed reservations to both parties about the record being sufficiently developed to comply with Judge Marrone's order, but because the parties do not agree on the scope of the order, the matter is continued to Judge Marrone for a MSC."**

Although not ratable, the Rahban report found a gastrointestinal condition arising from the medication, for the periods he was taking such medication.

At this point, as there was dispute as to the validity of the reporting, and completion thereof the parties should have be going to a Panel QME. However, the time to object to the report and acquire a PQME had expired. Had the Defense disagreed with the finding of the Secondary PTP, or the PTP, they could have proceeded to the QME process.

All that was left to rely upon was the Applicant's consistent testimony to the court, to the AME, the primary treating physician and the secondary treating physician. Certainly, the secondary treating physician's report was incomplete and was disallowed.

In review of Sullivan on Comp, it is noted that in *McAllister v. WCAB* a firefighter died of lung cancer. The appeals board found that the claim was not compensable because the record did

not disclose sufficient evidence as to the toxicity of the smoke inhaled, the amount of the decedent's exposure to smoke or the manner in which smoke inhalation may have caused lung cancer. Specifically, the appeals board found that there was no convincing evidence to show that the smoke firemen commonly inhale contained the same substances as those in cigarette smoke or polluted air, and that the doctor's opinion supporting industrial causation was based on facts not in the record. The California Supreme Court, however, annulled the decision. *McAllister v. WCAB* (1968) 33 CCC 660, 667. See also *County of Sacramento v. WCAB* (Smith) (2012) 78 CCC 45 (writ denied) (PTP found it medically probable that mold exposure in applicant's workplace was a contributing factor to the development of her fungal sinusitis; WCAB concluded that to establish industrial causation, applicant need not prove that her mold exposure was materially greater than the mold exposure incurred by the general public, but only that the actual exposure was a contributing cause of her sinus injury); *Atlantic Services, Inc. v. WCAB (Duniven)* (2013) 78 CCC 682 (writ denied) (reasonable probability that work at nuclear power plant caused cancer); *McCarty v. Oak Grove Construction Co.*, 2014 Cal. Wrk. Comp. P.D. LEXIS 71 (reasonably probable that bladder and bowel incontinence were industrially caused); *Cortez v. The Regents of the University of California Riverside*, 2015 Cal. Wrk. Comp. P.D. LEXIS 377 (reasonably probable that exposure to sun as police officer contributed to skin cancer); *OneBeacon America Insurance Co. v. WCAB (Cole)* (20 16) 81 CCC 914 (writ denied) (medically probable that applicant's travel for work accounted for tuberculosis exposure); *Kuhl v. Orange County Fire Authority*, 2016 Cal. Wrk. Comp. P.O. LEXIS 642 (Lyme disease compensable when supported by substantial medical evidence); *Smith v. California Department of Forestry*, 20 18 Cal. Wrk. Comp. P.D. LEXIS 608 (meningitis compensable when supported by substantial medical evidence); *Broussard v. State a/California, Lancaster State Prison*, 2019 Cal. Wrk. Comp. P.D. LEXIS 321 (medical probability that neurological injury arose from hepatitis B vaccination).

Here, the PTP has noted that the Applicant suffered gastrointestinal upset with medications (Applicant Exhibits 7-17). Through a year. He was consistent in his repotting. Exhibit 21 indicates that the Applicant had run out of medications. It is of note that the PTP did not note GI Upset in that report.

Certainly, the PTP did not use the language of "within a reasonable medical probability." But, based on the consistency of the complaints to the PTP, the AME in Orthopedics and the applicant's believable testimony, there was substantial evidence to show AOE/COE.

This is what the WCJ was left with.

"[W]orkers' compensation liability may ... encompass a subsequent nonindustrial injury ... attributable to the initial industrial accident." (*South Coast*, 61 Cal.4th at p. 297.) It has long been the rule that "the aggravation of an industrial injury or the infliction of a new injury resulting from its treatment or examination are compensable under the [Workers' Compensation Act] and, therefore, within the exclusive cognizance of the [WCAB]." (*Fitzpatrick v. Fidelity & Casualty Co.* (1936) 7 Cal.2d 230, 232.)

In *Maher v. Workers' Comp. Appeals Bd*. (1983) 33 Cal.3d 729, 735-738 Applicant had an adverse drug reaction when treatment was required for employment.

Further, an employee is entitled to compensation for a new or aggravated injury that results from the medical treatment of an industrial injury, whether the doctor was furnished by the employer, the insurance carrier, or was selected by the employee. (*Hikida v. Workers' Comp. Appeals Bd*. (20 17) 12 Cal.App.5th 1249, 1262 (*Hikida*) citing *Fitzpatrick v. Fidelity & Casualty Co., supra*, 7 Cal.2d at p. 232.) "Aggravation of the original injury by medical treatment is considered 'a foreseeable consequence of the original compensable injury, compensable within the workers' compensation proceeding and not the proper subject of an independent common law damage proceeding against the employer.'" (*Hikida*, at p. 1261.) This rule derived "from (1) the concern that applying apportionment principles to medical care would delay and potentially prevent an injured employee from getting medical care, and (2) the fundamental proposition that workers' compensation should cover all claims between the employee and employer arising from work-related injuries, leaving no potential for an independent suit for negligence against the employer." (*Id*. at p. 1263.) In *Hikida*, the court concluded that the injured worker's chronic regional pain syndrome (CRPS) that was the result of a failed surgery for her industrial carpal tu1mel syndrome, was industrial and awarded permanent total disability based on the CRPS. (*Id.* at p. 1262.).

Here, the argument is that a non-medical provider network doctor made a determination. Dr. Rahban's reports were already determined as not substantial as to AOE/COE or other issues.

However, the reporting of Dr. Valdez is consistent in showing ongoing complaint as a result of the use of medication prescribed and or otherwise reasonably used to mollify the pains of the admitted injury. Applicant's history is consistent as between AME and the PTP, and in testimony.

RECOMMENDATION

This WCJ respectfully recommends that the Petition for Reconsideration be Denied.

In the alternative, the Appeals Board Commissioners should remand the matter with order that the parties acquire a Panel Qualified Evaluator, or Independent Medical Evaluator assigned by the Workers' Compensation Judge, in the field of Internal Medicine to assist in the determination of whether the additionally claimed body parts arise from the use of the medication utilized for the relief of the pain from the underlying orthopedic injury.

Jeffrey Marrone
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE
05/10/2021

OPINION ON DECISION

The above-referenced matter came on regularly for hearing as a trial before Judge Jeffrey Marrone on the issue of the Petition for New & Further Disability noting the additional body parts gastrointestinal system, internal and weight gain arising from the 03/03/2013 date of injury; Additional temporary disability for broken periods of 08/30/2016-03/01 /20 19; the permanent & stationary date; extent of permanent disability; app01iionment; need for further medical treatment; attorney's fees; whether the reports offered by Applicant are admissible as acquired outside the MPN; Whether the repo1is of Dr. Valdez are substantial medical evidence; whether the reports of Dr. Rahban are substantial medical evidence; laches as to the claim for injury to gastrointestinal system, internal and weight gain; weight of evidence as to the maximum medical improvement date noted by the orthopedic AME, Dr. Mouradian.

Juan Constanza, while employed on 03/03/2013 as a meat receiver, occupational group 460, at Valley Glen, California by Vallarta Supermarkets sustained injury to his low back, and claims to have sustained gastro-intestinal injury as a compensable consequence thereof, as new and further disability.

At the time of the 03/03/2013 date of injury, the carrier was Safety National Casualty Corporation, administered by Sedgwick CMS.

At the time of the injury, the applicant's earnings were $396.87 per week, warranting indemnity at the rate of $264.58 per week for temporary disability and $230 per week for permanent disability.

The carrier paid temporary disability for 05/14/20213 through 07/01 /2014 at the rate of 264.58 per week, and paid permanent disability for the period of 07/02/2014 through 10/20/2015. The parties stipulate that the Applicant was adequately compensated for all periods of temporary disability through 08/29/2016.

The primary treating physician is Vincent Valdez, MD.

The parties had entered Stipulations with Request for Award, with Award of 10/14/2014 of 21 % Permanent disability to the low back based on the findings of Orthopedic Agreed Medical

Evaluator William Mouradian, MD. 12/19/2018 found the Applicant remained at MMI and P&S. Dr. Mouradian recommends in his 12/ 19/2018 report (Exhibit D) that the Applicant's condition did not rise to give him other than a P&S status since 2014.

The report of Dr. Valdez of 01/27/20 16 (Exhibit 6) indicates the injured worker is TTD. There is no mention of GI disturbance by the medications. Therefore it is noted that the TTD would be as to orthopedic complaints and not internal medicine.

The AME Dr. Mouradian report of 07/02/2014 (Exhibit D) indicates no gastrointestinal complaints. However, in the 12/19/20 18 report (Exhibit F), the AME does take applicant's history of stomach problems and diarrhea under the heading of "Gastrointestinal." The AME notes on page 4 that he injured worker has gained 60 pounds since the injury. On page 5 of this report, Dr. Mouradian notes the injured worker's medications are Norco and Motrin. At (Exhibit D, page 13) found the Applicant at MMI. However, in the 12/19/2018 report the AME disagreed with the findings of Dr. Valdez as to TTD. The AME states that the Applicant would only be TTD again if the patient were seen by Dr. Deardorff for psychiatric clearance as to the efficacy for lumbar surgery for this patient. The TTD noted is as to Orthopedic and not internal complaints.

Based on the evidence provided, Dr. Valdez 09/16/2016 (Exhibit Sb), which includes a Request for Authorization (RF A) dated O 1/27/2016, introduces "Motrin 800 mg, #90 tid." This is noted as being in a group known as NSAIDs. This is the only RF A offered into evidence as to medication. The PR-2 report of Dr. Valdez dated 08/10/2016 (Exhibit 9) (signed 09/19/13) does indicate "GI upset with medications."

The PR-2 Report of Dr. Valdez (signed 10/08/2016, per Exhibit Sb) indicates that the applicant had failed physical therapy, NSAID medication and interlaminar epidural. Dr. Valdez provides a first note of Applicant's complains to "GI upset with medications" in the 02/24/2016 report, signed 03/10/2016 (Exhibit 7). The balance of the reports of Dr. Valdez (exhibits 8 through 22) indicate the applicant is receiving refills of Neurontin, with Prilosec being, it seems, prescribed as of the 02/01/2018 report (Exhibit 14). Prilosec is discontinued 12/11 /20 18 (Exhibitl9). Referral for GI consultation and treatment for constant GERD is noted in the 06/10/2019 report of Dr. Valdez (exhibit 21).

The 05/ 10/2018 report of Dr. Valdez is the last report indicating a TTD status. It is noted that "TTD" is not noted in the report of Dr. Valdez dated 07/ 12/20 18 (8/8/2018) report (Exhibit 18).

The record does not show that Dr. Valdez reviewed the reporting of Dr. Rahban. However, it does show gastrointestinal complaints. This doctor opines that the causation is from the NSAIDs.

Applicant was referred to internal secondary treater Dr. Said Rahban. The Initial Report is noted as 06/26/2019 (Exhibit 23). A history is taken as to applicant's medication being ibuprofen and Norco. The history does not indicate the switch to Neurontin. The review of Dr. Rahban's reports mention review of the reports of Dr. Valdez, but are not specific as to which reports of Dr. Valdez. Further, the reports do not indicate the change of medications of Neurontin. The 07/24/2019 report (Exhibit 24), however, does discuss that the Norco (opioid medications) also are a consideration for upper and lower GI complaints.

The medical report of Dr. Said Rahban dated 03/0/2020 (Exhibit 25) in which Dr. Rah ban discusses that the H Pylori Condition was aggravated by the NSAIDs. The internal medicine specialist Dr. Rahban (Exhibits 23-27) did not find Mr. Constanza TTD at any time in his reporting until 06/25/2020 rep01t (Exhibit 26), finding the Applicant would have been TTD during any period the Applicant was treated with NSAIDs. I don't see a formal review of the reports of Dr. Valdez. However, based on the history by the Applicant, in Dr. Rahban's 08/03/2020 report (Exhibit 27), the TTD would be only until March 2019, when the applicant discontinued the use of NSAID medications.

Pursuant to title 8, California Code of Regulations § 9793(h)(3), in considering the substance as well as the form of the reports of Dr. Rahban, as required by applicable statutes, regulations and case law, the reports are not capable of proving or disproving a disputed medical fact because the repo1t does not constitute substantial medical evidence. The report fails to constitute substantial medical evidence because, while the reports of Dr. Rah ban discuss causation, apportionment and level of impairment, these conclusions are not stated to be within a reasonable medical probability.

That having been said, AME Dr. Mouradian and PTP Dr. Valdez have found gastrointestinal issues arising from the condition independently form the reporting of Dr. Rahban. This is adequate to indicate that he gastrointestinal issues are new and further, not arising before the stipulations with request for award and award.

Review of the subpoenaed records from Olive View Medical Center (exhibit 4) indicates an emergency room date of service of 07/03/2015. The page stamped as "0013" indicates Was no longer taking Norco as of one month prior to the visit. There is no indication that the Applicant was temporarily disabled from work.

The records of LAC USC Medical Center are an emergency room visit with back pain increase. The Applicant was prescribes Norco and went tlu·ough 30 pills in 1.5 weeks. The Applicant was provided a hydrocodone-acetaminophen tablet and an ibuprofen 600 tablet. There were no gastro complaints noted in the records for the 08/13/2015 ER visit.

Likewise in the subpoenaed records of US Health works (Exhibit 3), the 07/05/2013 report of Dr. Lipel, page 2, there is denial of gastrointestinal disorders.

The reports of Dr. Rah ban are, therefore, rejected.

The parties did not proceed to a Panel Qualified Medical Evaluator in this matter.

Based on the reports of primary treating physician Dr. Valdez, and confirmation of the complaints by Ortho AME Dr. Mouradian, the Petition for New & Fu11her Disability as to the gastrointestinal issues is awarded as new and further condition, not arising before the stipulations with request for award and award.

The parties are to acquire a panel QME in the field of internal medicine to determine nature and extent of this additional body part.

Jeffrey Marrone
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE
4/8/2021