

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

HUGO RODOLFO CRUZ VILLANUEVA, *Applicant*

vs.

**EL POLLO LOCO
ARCH INSURANCE COMPANY; administered by YORK RISK SERVICES GROUP,
*Defendants***

**Adjudication Number: ADJ12260142
Marina del Rey 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, we will deny reconsideration.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*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 determinations. (*Id.*)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 7, 2021

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

**HUGO RODOLFO CRUZ VILLANUEVA
LAW OFFICES OF DINI & PAOLETTI
SAPRA & NAVARRA
EMPLOYMENT DEVELOPMENT DEPARTMENT**

PAG/pc

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
ON PETITION FOR RECONSIDERATION**

**I
SYNOPSIS**

1. Applicant's Occupation: Cook
Date of Injury: May 26, 2017 – May 26, 2019
Parts of Body Alleged: Right Shoulder, Right Arm, Right Elbow, Right Wrist, Right Hand, Neck, Waist, Lower Back and Abdominal Pain (possible hernia)
2. Identity of Petitioner: **Applicant** filed the Petition.
Timeliness: The petition was timely filed.
Verification: The petition was properly verified.
3. Date of issuance of Findings and Award: June 22, 2021
4. **Petitioner's contention:**
 - A. WCJ erred in not finding industrial injury based upon the record.
 - B. WCJ erred in relying on non-witness testimony regarding Applicant's alleged other employer.
 - B. WCJ has a duty to duty develop the record where there is insufficient evidence on an issue.

**II
FACTS**

Applicant, Hugo Rodolfo Cruz Villanueva, filed a claim alleging that while employed during the period of May 26, 2017 through May 26, 2019, as a cook, Occupational Group number 322, at Apple Valley, California, by El Pollo Loco filed a claim alleging injury arising out of and in the course of his employment to his right shoulder, right arm, right elbow, right wrist, right hand, neck, lower back, waist, abdominal pain (possible hernia).

This case proceeded to trial solely on the issue of injury arising out of and in the course of employment. The lien of Employment Development Department was deferred, with jurisdiction reserved.

As indicated in the Minutes of Hearing, the following exhibits were marked for identification on behalf of Applicant:

1. Medical reports from Panel Qualified Medical Evaluator Dr. Donald Kim.
2. Medical reporting from Dr. Jonathan Kohan.
3. Medical reporting from Dr. Edwin Haronian.
4. Medical reporting from Dr. Curtis Montgomery.

5. MRI report from Dr. George Mendik of the right elbow taken on November 14, 2019.

As indicated in the Minutes of Hearing, the following exhibits were entered into evidence without objection on behalf of Applicant:

1. MRI report of the lumbar spine from Dr. George Mendik dated September 16, 2019.
2. MRI report of the cervical spine from Dr. George Mendik dated September 16, 2019.

As indicated in the Minutes of Hearing, the following exhibits were entered into evidence without objection on behalf of Defendant:

1. Denial letter dated June 20, 2019.
2. Wage statement from El Pollo Loco
3. Refusal of medical treatment from El Pollo Loco dated October 14, 2016.
4. Disciplinary warning notices from El Pollo Loco.
5. Personnel file from El Pollo Loco.

With the use of an interpreter, Applicant testified as summarized in the Minutes of Hearing. The trial was conducted remotely through videoconference (Zoom). He started working for El Pollo Loco around 2015 and last worked there sometime in 2019. At the beginning of 2018, he worked approximately 35-37 hours, and then later changed it to 25 hours per week. His hours changed because he requested to go to three workdays. He made the request to Rosie because he wanted to have another job, but he did not get that job. He wanted another job because the money was not enough and because he got injured at El Pollo Loco and he felt tired.

His title was cook. He cooked, clean and lifted heavy boxes. He also cleaned the chicken grills. He lifted boxes that weighed over 40 pounds that contained chicken with ice. There were also heavy soda boxes. There were also boxes with tortillas in them. He lifted the boxes every day. He lifted 6 boxes of chicken every day so that he could marinate the chicken. He lifted one soda box per day. Sometimes he would grab two boxes of chicken to marinate them and carry them together at one time. Together they would weigh approximately 90 pounds.

At some point during his employment with El Pollo Loco, he started experiencing pain in his body – right shoulder, right arm, right elbow, right hand, neck and lower back. He does not remember when the pain in his neck or right shoulder began. The pain in his low back began after the fall, sometime in December 2016.

The fall occurred when the store was closed and they had to clean. A female employee had thrown some pure soap and then some soap with water, and when he was going backwards, he slipped and fell. He wanted to hold himself, but he was not able to stop the fall. He reported the fall to Bonnie, but was not provided with a claim form or provided him with any treatment.

A back brace was not provided because of the fall. They only told him to wear it, so he wore it. They told him that with it, the pain would go away. He was told this by his managers, Bonnie, Rosa and Sirenia. They gave him the back brace that they used there to lift things. There was a back brace for the store, but they were not good.

Besides that fall, he also reported other pain while employed at El Pollo Loco. He reported that his right arm and right shoulder were hurting as well. He reported that to Sirenia and Bonnie. He does not remember when he told Sirenia. Sirenia told him to take a break of five minutes until the pain would go away and he could continue working. That was it. Sirenia did not provide him with a claim form. He reported this pain to Sirenia on more than one occasion, but he does not recall how many times he told her. He reported the pain to Bonnie on one occasion, but he does not remember when this occurred. Bonnie did not say anything to him and did not give him a claim form. While he continued to work at El Pollo Loco, the pain in his back increased, as well as the pain in his right shoulder and right hand.

He has never worked for a landscaping company. He does not recall the circumstances of why he was fired. He only recalls that he was sick and he had to go to the hospital. He had bronchitis. Bonnie and Sirenia knew he was sick. He spoke to Rosie and she told him to bring a doctor's note to return to work again. When he came back he was told he was no longer working there. He knows that Bonnie and Sirenia knew he was sick because he had called them over the phone. He did not give the doctor's note to anyone because Rosie told him that she would not accept the note because he was already fired and no longer working for them.

He is currently receiving medical treatment, which includes therapy for his back, shoulder and elbow. Since he last worked at El Pollo Loco, he has not worked anywhere else. In the last 60 days, he has felt pain in his low back, neck, right shoulder, right arm, right hand and right elbow.

On cross-examination, Applicant testified he was not told of his duties to report on the job injuries. Applicant testified that he did not remember initialing Defendant's Exhibit L, regarding General Safety practices. He denied that when he was hired he underwent physical safety training. He did not recall that when he was hired, his employer went over a training certification checklist with him. He did not remember being told that he must wear a back support belt when lifting anything over 20 pounds. He did recall that if he had to lift something that

weighed over 40 pounds, he must follow a two person lifting procedure. However, he said there was no one who would help him. On occasion, he did ask someone to help him, but they would not help. He stated that he believes that the employees he asked to help him, no longer works at El Pollo Loco. He never reported to his supervisor that other employees would not help him lift items.

Applicant denied that he has a history of not showing up at work without informing his employer. However, he did state that he had been written up multiple times for not showing up and not calling in.

Applicant did know a gentleman by the name of Manny who would come and eat at El Pollo Loco. Manny was never employed him.

Applicant went to a hospital that was located in Apple Valley that he believes was called Rosa Mary. He had a doctor's note to give to his employer, but he did not present it to her, because she had already told him that he was no longer working for El Pollo Loco.

He was not asked to come and get his final check. He called and told Rosie that he had a pending check there, but they never called Applicant to let him know. Applicant went to pick up his final check in May 2019. This was two weeks after he had been sick, not a month. When he called Rosario, she told him that he was already terminated. This is when he told her he was already terminated. He was not angry when he went to pick up his check. He did not yell at Rosie when he went to pick up his check. He did not file this suit because he was angry over losing his job.

The first time Applicant saw a doctor for his work-related injury was on June 20, 2019 with Dr. Curtis Montgomery. He was in pain prior to the time he stopped working at his job.

He saw several doctors for his work-related conditions and he was truthful. He did not lie to the doctors. He provided an accurate medical history to the doctors.

He remembers seeing Dr. Jonathan Kohn and he told him that in early 2019, he began to experience gradual onset of pain in his low back due to the nature of his work duties. He remembers seeing Dr. Donald Kim he does not remember if he told Dr. Kim that the reported his injury to his employer in 2017. He denies that the pain started in 2019.

Applicant stated that it was not true that he was only allowed to lift one box of chicken at a time and otherwise he would be written up. Applicant denies that he was written up for lifting more than one box of chicken.

He did not remember telling Dr. Montgomery that he fell on his back in 2017.

Reference was made to Applicant's Exhibit 7 (Report of Dr. Montgomery – 6/20/2019). Applicant stated he had only injury, not two separate injuries in 2016 and 2017. He also denied that he was not given a claim form because he denied being injured.

Reference was made to Defendant's Exhibit C (October 14, 2016 Refusal of Medical Treatment). Applicant did not recall signing documentation refusing medical treating. He denied being injured because he was fooling around.

Applicant testified that he did not have access to treatment prior to seeing Dr. Montgomery. It is not correct (as in a true statement) that, despite having access to treatment, he chose not to treat prior to seeing Dr. Montgomery.

He did not go to St. Joseph Health for treatment prior to his last day of work at El Pollo Loco. He did not go there in December 2018 for an unrelated condition.

On redirect, Applicant testified that Spanish is first language and he does not read English. He did not recall anyone at El Pollo Loco interpreting the General Safety Practices into Spanish. He was only told that it was a warning and he should sign it. The October 14, 2016 Refusal of Medical Treatment was not translated into Spanish either.

While he worked for El Pollo Loco, he did not have health insurance.

The hospital that he went to for the bronchitis was St. Mary and located in Apple Valley. He was able to go to the hospital for the bronchitis because he was given emergency Medi-Cal. He believes that St. Joseph is related to St. Mary.

On recross examination, Applicant stated that Rosie, Bonnie Marquez and Sirenia Gomez were his managers/supervisors. Each one of them spoke with him in Spanish.

He testified that the General Safety Practices were not discussed in Spanish with him when he was hired. He does not remember Rosario going over them with him. His supervisors would speak in Spanish, but did not discuss the safety practices with him in Spanish. They gave him the safety practices in English, so he could read it.

When he got the disciplinary notices, they told him that it was a warning. The only reason he received the disciplinary notice was because he had not reported to work.

Applicant testified that he was told that the October 14, 2016 Refusal of Medical Treatment was a warning. He thought he was signing a warning. He did not understand that he was signing a document that said that he did not want to be seen by a doctor.

He could not use the Medi-Cal emergency card to be seen for any type of pain or injury. He is limited to what he can be seen for. It is an emergency one – just to go to the hospital or to get the medication. He has not tried to be seen at the hospital for his back pain.

Applicant did not present any other witnesses.

Defendant present four witnesses. The first witness was Jackeline De Vincente who testified on direct examination that she was a former employee of El Pollo Loco and lasted worked at the location in Apple Valley in November 2020. She stopped working because she move out of state to Texas. She stated she was not promised anything for her testimony. She knows the Applicant because she worked with him.

She knows Manny. He was a friend of hers and he runs a landscaping business. He also was a frequent customer of the restaurant (El Pollo Loco) she is not sure if Applicant is still working doing landscaping, but she knows that before he quit working for El Pollo Loco, he was still doing landscaping. She has personal knowledge of this information.

On cross-examination, she stated that no one was in the room with her while she testified. She did not review any documents in preparation for her testimony. She did not speak with Rosario Johnson about Applicant's testimony today.

The second defense witness was Rosario Johnson who testified with the use of a certified English-Spanish language interpreter. She testified that she is also known as Rosie. She knows the applicant because he worked for her company, El Pollo Loco. Her current position is General Manager and it is the same position that she held while Applicant worked at El Pollo Loco. She hired the applicant and told her about his duties to report workers' compensation injuries to her. She spoke with him in Spanish.

She testified that Applicant failed to call in when he did not show up and he was written up because he did not call or show up.

She stated that the company policy requires that if something weighs 20 or more pounds, two people have to pick it up. She did write him up for lifting up boxes that weighed more than 20 pounds by himself.

She stated that initially Applicant worked full time, but change to part-time during the summer of 2018. The hours changed because he said he had another job doing construction, so he work only on weekends so during the week he can do the construction job. The change was reflected in his paycheck.

Later, he said he no longer had the construction job. She believes that the construction job lasted about four months. He did not request more hours because of a family situation with his wife, who tried to commit suicide. He wanted to keep an eye on her. His last day of work was April 26, 2019. Afterwards, he did not call in sick. She was not provided with his phone number, but he didn't report for his next shift, nor did he call in. She could not contact him because she did not have phone number for him. He did not offer to give her a doctor's note. After he stopped working, she believes May 26 was the last time she heard from him.

From the time that he last worked until the time he called in, she knew that he was working doing landscaping. When he called back, he asked for his job. She told him he had abandoned his job, and he was angry and he came in to get his final check. She saw him and spoke to him and he was angry and yelled at her. He did not report any injury to her. He did not complain of pain to her. She did not observe him touching or rubbing parts of his body as if in pain. He did not request any modified work or job duties. He did not request any medical treatment from her. He did not ask for time off from work due to an injury while working at El Pollo Loco.

On cross-examination, Rosario Johnson stated that there was no one in the room with her nor did she review any documents prior to her testimony. She doesn't know the name of the construction company. She testified that there was not a meeting where they were told that no cooks after 8:00 p.m. Along as the cooks were willing to clean the grill, they had all the hours. She denied having a conversation with a social worker regarding the applicant being sick.

The third defense witness was Sirenia Gamino. She testified that she is currently employed at El Pollo Loco as a manager's assistant. She was Applicant's supervisor. She wrote him up on several occasions for failure to call in when he did not show up for work. He told her that he was working a construction job. He stopped showing up for work about April 2019. She has personal knowledge that he was working at a landscaping company when he stopped showing up.

He also told the witness that he takes care of pigs.

He did not report a work-related injury to her. He did not tell her that he had pain in his arms. She never observed the Applicant rubbing or touching his body, indicating any kind of pain. He never requested modified duties. He did

not request medical treatment. He did not request time off of work because of an injury.

On cross-examination, witness Sirenia Gamino stated that there was nobody in the room where she was testifying. She did not review any documents in preparation for her testimony. She doesn't recall any meeting with the Applicant regarding the cooks not being needed after 8:00 pm. She was not aware that he was sick in May of 2019.

The fourth defense witness was Josefina Avelar Robles. She testified that she is currently employed by El Pollo Loco as a preparer. She prepares all the cold things. She knows the Applicant because she rented him one of her houses and later she worked with him at El Pollo Loco. He told her that he had a construction job. Also another job. One was a fence located in Lucerne Valley and another was one that was going down the hill towards Los Angeles.

On cross-examination, she stated that nobody was in the room with her that is providing her testimony. She did not review any documents. As to his jobs, it was as she testified on her direct – fence located in Lucerne Valley and another job that was located going down the hill towards Los Angeles.

A Finding of Facts issued. It is from this Finding of Facts that Applicant is aggrieved and filed a timely Petition for Reconsideration. Defendant has filed a response.

II **CONTENTIONS**

Applicant challenges the determination that there was no industrial cumulative trauma injury while working for El Pollo Loco as a Cook during the period of May 26, 2017 through May 26, 2019. Applicant asserts that the defense witness's testimony should be viewed with distrust and does not meet the standards of substantial evidence. Finally, Applicant asserts that WCJ has a duty to further develop the record where there is insufficient evidence of an issue.

It should be noted that the Opinion on Decision clearly states the basis for each issue decided. All medical reporting, testimony and documentary evidence relied upon is clearly identified. However, to the extent that the Opinion on Decision may seem skeletal, pursuant to Smales v. WCAB (1980) 45 CCC 1026, this Report and Recommendation cures that defect.

It was found that Applicant did not sustain a cumulative trauma injury to his right shoulder, right arm, right elbow, right wrist, right hand, neck, lower back, waist and abdominal pain (possible hernia) based upon Applicant's failure to meet his burden of proof. It was specifically noted that his testimony was self-serving and lack credibility.

It is well established that the determinations of credibility of witnesses by the trial judge is entitled to great weight because of the judge's observance of the demeanor of the witnesses. It is well also established that the decision must be supported by the record and based upon substantial evidence. These principles were applied in this case. It was not simply a matter of numbers as stated by Applicant. This WCJ carefully weighed the evidence of the entire record, which included assessing each witness' testimony and observing of their demeanor and then made determinations of the issues present.

As noted in the decision, Defense witness Jackeline de Vicente rebutted Applicant's assertions that he did not do landscaping. Defense witness Bonnie Marque (Assistant Manager) through the use of a Spanish interpreter, acknowledged a specific non-work related incident involving a fall, noting that Applicant did not complain of pain or discomfort, but was offered medical treatment, but decline same. Also she credibly testified that Applicant did not complain of or requested treatment to any parts of body, nor did he report any injury. Defense witness Bonnie Marque also testified about her knowledge that Applicant was doing landscaping and the fact that Applicant's employment ended with El Pollo Loco was due to job abandonment. Similar testimony was provided by the General Manager Rosario Johnson, through a Spanish interpreter, regarding outside employment and job abandonment. Two additional Defense witness, Serenia Gamino and Josefina Avelar Robles contradict Applicant's testimony on outside employment.

This resulted in a determination that Applicant's testimony was self-serving and lack credibility and a separate determination that the defense witnesses' testimony was credible and more persuasive on the issues for decision.

It should be noted the fact that there was a determination that Applicant's testimony was self-serving and lack credibility was not just due to the more credible testimony of the defense witness, but other aspects of the record as well.

Panel Qualified Medical Evaluator Doctor Kim report dated January 21, 2021 contains an inadequate history. The doctor notes in the job description that Applicant worked 8 hours day and 5 days a week. Applicant's own trial testimony reflects a reduction of hours since the beginning of 2018. Similarly, the job duties described are inconsistent with the credible testimony of defense witness regarding weight lifting limitation. It also contains an inaccurate history regarding the 2016 incident. (It was reported, document, and treatment was declined). Accordingly, this reporting is not substantial evidence on the issue of causation because it is based on a false and inaccurate history.

It is noted that Applicant appears to request an expansion of the issues for determination to include development of the record. It is asserted that development of the record is necessary to determine if there is other

employment. Applicant is also asserting that if there is a finding that other employment existed, there would be an issue regarding apportionment, but not necessarily causation. However, this matter was set solely on the issue of AOE/COE as evident in the Minutes of Hearing and the Pre-Trial Conference Statement. The determination made regarding AOE/COE is supported by the record. Accordingly, development of the record is not warranted on other issues.

IV
RECOMMENDATION

It is respectfully recommended that Applicant's Petition for Reconsideration be denied for the reasons stated above.

DATED: 8/2/2021

JACQUELINE A. WALKER

Workers' Compensation Administrative Law Judge