WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARTIN HUERTA, *Applicant*

vs.

KPS FIRE AND SPRINKLER WITH PAYROLL COMPANY EMPLOYERS RESOURCES; STATE NATIONAL INSURANCE COMPANY, administered by ESIS, *Defendants*

Adjudication Number: ADJ11994133 ADJ11994135
Marina Del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After 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 amend the WCJ's decision as recommended in the report, and otherwise affirm the December 20, 2021 Findings of Fact and Order.

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

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 20, 2021 Findings of Fact and Order is **AFFIRMED**, **EXCEPT** as **AMENDED** below:

FINDINGS OF FACT

* * *

5. The issue of panel qualified medical examinations in other specialties is deferred.

O R D E R:

Pursuant to the Court's authority under McDuffie, the Court Orders applicant **and defendant** to send any and all reports and/or records to Lee Lin, M.D. and Cynthia Mothersole, Ph.D. to procure one supplemental report from Dr. Lin and Dr. Mothersole, respectively, to address the issues of injury AOE/COE and temporary disability herein

If the parties are unable to resolve the matter once supplemental reports have been received, either party may file a Declaration of Readiness to Proceed in order to place the case back on calendar for determination of the issues, including whether the matters will be resubmitted for decision, or whether further development of the record is required with a regular physician per Labor Code §5701. The parties may also agree to utilize Agreed Medical Examiners to address all issues herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 5, 2022

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

BERNAL & ROBBINS
MARTIN HUERTA
HINDEN & BRESLAVSKY

PAG/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

1. Applicant's Occupation: Superintendent
   Age: 54
   Parts of Body Alleged: Head, brain, eyes, stress and psyche

2. Identity of Petitioner: Defendants
   Timeliness: The Petition was timely filed.
   Verified: The Petition was verified.

3. Date of Issuance of Findings & Award: December 20, 2021

4. The Petitioner contends:
   a) That this WCJ erred in ordering further development of the record on the issues of injury AOE/COE and TD when discovery had closed and applicant did not submit substantial medical evidence to sustain his burden of proof.
   b) Alternatively, if further development of the record is Ordered, this WCJ erred in not allowing defendants to further develop the record.

II.
SUMMARY OF FACTS

On March 4, 2019, applicant filed an Application wherein applicant alleged cumulative trauma injury to the head (headaches), brain (sleeping problems), psyche, nervous system (stress), and eyes (vision problems due to stress).

Via letter, dated May 12, 2019 (Exhibit A), defendants timely denied injury AOE/COE on multiple grounds, including, but not limited to, post-termination under Labor Code §3600(a)(10).

On January 31, 2020, applicant's attorney filed Declaration of Readiness to Proceed (DOR) for Mandatory Settlement Conference (MSC) to address compensation rate, temporary disability, AOE/COE, self-procured treatment, future medical treatment, and penalties on this case and the

companion case, ADJ11994135. On February 12, 2020, defendants timely objected to DOR. Both cases were set for MSC multiple times between February 25, 2020 and July 14, 2020. Both cases went on the record for the first time on November 19, 2020. This case (ADJ11994133) has been designated as the master file at Trial. Continuing testimony was taken on January 5, 2021, February 9, 2021, April 26, 2021, June 16, 2021, August 18, 2021, and October 12, 2021. Both parties filed post-trial briefs and the cases were submitted on November 9, 2021.

On December 20, 2021, this WCJ issued separate Findings of Fact and Order, and Opinions on Decision on each case. In this case, this WCJ Ordered further development of the record on the issues of injury AOE/COE and TD pursuant to McClune.

On January 13, 2022, defendants filed a Petition for Reconsideration herein. On January 27, 2022, applicant's attorney submitted an Answer.

III.
DISCUSSION

There is no dispute that when injury AOE/COE is at issue, applicant bears the burden of proving injury AOE/COE by a preponderance of the evidence.

After hearing applicant's testimony and comparing it to the medical record, this WCJ found that applicant's failure to disclose his felony conviction to Dr. Mothersole initially, his prior orthopedic injuries arising from the January 5, 2005 motor vehicle accident with a 9% Stipulated Award (Exhibit D) to either Christine Ha, D.C. and Edwin Haronian, M.D., as well as his multiple motor vehicle accidents and his ongoing eye issue, to the subsequent employer, NP Mechanical (Exhibit E), troublesome.

The aforementioned non-disclosures can certainly be construed as self-serving but contrary to defendants' arguments in the Petition for Reconsideration, dated January 13, 2022, this WCJ does not find that defendants completely "impeached" applicant's credibility at Trial. This is because at Trial, applicant credibly testified that he started working for the employer in 2013 with one job and then in the beginning of 2014, he was overseeing three multi-family projects. When the superintendent for Los Angeles County and Orange County quit around mid- 2014, applicant was handling that area while the employer tried to fill that position. In 2015, projects in Ventura County and high desert were added to applicant's workload. In 2015 and 2016, one superintendent after another handling Riverside County and San Bernardino County quit and applicant was asked to cover those areas temporarily too. Throughout majority of 2017, applicant was handling multi-

family and single-family projects in Los Angeles County, Orange County, Ventura County and high desert areas. Applicant even had jobs in Fontana, Ontario, and Upland. When the employer opened up a Sacramento branch in 2018, applicant was sent to Northern California to teach the superintendent how to work with copper and how to install the different mechanical things that go into a copper rise. He would fly up on Mondays and come back on Fridays, and he did this for approximately two months. When he took back his jobs in Southern California, the projects were in disarray with his right hand man, Chacho, gone. (MOH (Further)/SOE, January 5, 2021, Page 2, Line 15½-Page 5, Line 13.) This WCJ finds said unrebutted testimony about his ever-increasing and unmanageable workload across county lines highly credible, especially in light of traffic conditions in Southern California.

This WCJ also finds applicant's sincere explanation that he had to do what he had to do to keep working because he has a family to support versus going on disability credible and persuasive (MOH (Further)/SOE, August 18, 2021, Page 5, Line 20½-Page 6, Line 1½; MOH (Further)/SOE, June 16, 2021, Page 5, Line 20½-Page 6, Line 1½), which explained why he continued to drive at work despite worsening eye condition since end of 2016 or early 2017 and why he failed to disclose his condition and multiple motor vehicle accidents to his subsequent employer, NP Mechanical. Ultimately, applicant quit said job after realizing it was time to stop driving (MOH (Further)/SOE, June 16, 2021, Page 5, Lines 14½-19½).

From a medical standpoint, this WCJ did not find any of the medical evidence from Kaiser, U.S. Healthworks and/or Cynthia Morthersole, Ph.D. (Exhibits 1 to 11) substantial medical evidence to prove injury AOE/COE as explained in the Opinions on Decision.

However, there is substantial medical evidence from Kaiser documenting the worsening of applicant's eye condition since January 2017 from additional medications being prescribed to dosage of medications being increased to try to control/treat the eye condition (Exhibits 11 and F). In fact, applicant's eye condition got so bad that Dr. Lee Lin, applicant's treating neurologist at Kaiser, took applicant off work on January 25, 2019 as he did not believe applicant could drive any more (Exhibit 11, Bate stamp Page 497).

Both Dr. Peter Leung and Dr. Lin from Kaiser noted applicant having pre-existing eye twitching condition in the history of their reports. Applicant denied same at Trial (MOH (Further)/SOE, April 26, 2021, Page 5, Lines 17-23½.). Interestingly, at the time of the eye examination on September 16, 2016, David Paul West, O.D. from Kaiser, did not note any such

condition as existing since childhood or progressively getting worse (Exhibit 11, Bate stamp Pages 29-31).

Even if this WCJ were to believe that applicant did have eye twitching and/or motor tic disorder since childhood, there is no intervening medical evidence documenting progressive worsening of said condition requiring medical treatment over the years until January 2017 when applicant was 52 years old. Both parties submitted Kaiser records (Exhibits 11 and F) and applicant had visits at Kaiser in 2015 and 2016, including the aforementioned appointment with Dr. West, the optometrist, on September 16, 2016, and yet, the first record of applicant seeking treatment for his bilateral eye twitching progressively getting worse was on January 19, 2017 (Exhibit F, Bate stamp Pages 260-261). From March 8, 2018 to January 25, 2019, applicant consistently sought treatment for his eye condition and/or stress at Kaiser (Exhibits 11 and F). Neither Dr. Leung nor Dr. Lin addressed causation of the onset of significant worsening of said condition from 2017 to 2019, which resulted in multiple motor vehicle accidents because applicant eyes went from blinking to completely closing involuntarily. Dr. Lin's comment in his August 7, 2018 report (Exhibit 11, Bate stamp Page 397) that he "can't say it's necessarily work related given that he's had these symptoms since childhood" is not substantial medical evidence as it is not framed in reasonable medical probability, there is no evidence that Dr. Lin treated applicant since childhood, and he did not review any and all of applicant's prior medical records to verify natural progressive worsening of his condition since childhood. Dr. Lin's causation opinion is speculative.

As indicated above, this WCJ does understand that applicant bears the burden of proving injury AOE/COE but in light of the unrebutted and credible testimony of applicant's ever-increasing and unmanageable workload across county lines and substantial medical evidence documenting significant worsening of applicant's eye condition during applicant's employment with the employer herein, this WCJ exercised discretion to ensure substantial justice by ordering development of the record consistent with Labor Code §3202, which states as follows:

> This division and Division 5 (commencing with Section 6300) shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.

This WCJ also follows the holding in McClune. Applicant therein contends that the WCJ and the WCAB have the authority to order the taking of additional evidence when the record lacks substantial evidence to support a finding of industrial causation; and the failure to do so violated

his due process rights. The Court held that applicant therein was correct. (McClune v. WCAB, (1998), 62 Cal.App.4th 1117, 1120)

> Although the employee bears the burden of proving his injury was sustained in the course of his employment, the established legislative policy is that the Work[ers'] Compensation Act must be liberally construed in the employee's favor and all reasonable doubts as to whether an injury arose out of employment are to be resolved in favor of the employee. (Ibid at 1121)

Based on the foregoing, this WCJ did not exceed its powers to Order further development of record to address the issues of injury AOE/COE and TD as the testimonial and medical evidence support this WCJ's Order.

Defendants alternatively argued in the Petition for Reconsideration that they should also be afforded an opportunity to further develop the record if applicant is being given a "second bite at the apple" with Dr. Lin and Dr. Mothersole.

Similar to defendants' arguments about applicant having multiple opportunities to procure substantial medical evidence to prove injury AOE/COE before discovery closed, defendants also chose not to procure any medical-legal report(s) to rebut injury AOE/COE before discovery closed. In fact, defendants chose to rebut injury AOE/COE by impeaching applicant's credibility at Trial, as well as relying on the Kaiser records noting eye twitching and/or motor tic disorder since applicant's childhood (Exhibit F), especially Dr. Lin's comment in his August 7, 2018 report (Exhibit F, Bate stamp Page 458) that he "can't say it's necessarily work related given that he's had these symptoms since childhood." Thus, ordering the procurement of a supplemental report from Dr. Lin, whose opinions are relied on by both parties, is consistent with McDuffie. This WCJ did err in not allowing defendants to join applicant to send any and all reports and/or records to Dr. Lin for a supplemental report to address injury AOE/COE and TD.

Or, in the alternative, the WCAB can Order further development of the record with Panel QME's in the fields of neurology, psychology and/or ophthalmology to address applicant's allegations of injury AOE/COE and TD.

IV.
RECOMMENDATIONS

It is respectfully recommended that defendants' Petition for Reconsideration be granted to only Order further development of the record with Dr. Lin by both parties, or with Panel QME's in the fields of neurology, psychology, and/or ophthalmology for the reasons stated above.

Dated: January 31, 2022

IVY W.MI
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE