WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TIMOTHY LAHEY, ***Applicant***

vs.

MEDLINE INDUSTRIES; PROPERTY INSURANCE AND CASUALTY COMPANY OF HARTFORD, administered by BROADSPIRE,
Defendants

Adjudication Numbers: ADJ15199903
Van Nuys 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/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 12, 2023

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

TIMOTHY LAHEY
SHATFORD LAW
TOBIN LUCKS

LN/pm

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

I INTRODUCTION

Applicant's Occupation:	Forklift Driver
Applicant's Age on Date of Injury:	36
Date of Injury:	June 23, 2021
Parts of Body Injured:	Low back and alleged left hip and right hip
Manner in Which Injury Occurred:	Struck a pole at five mph while driving a forklift
Identity of Petitioner:	Applicant filed the petition
Timeliness:	The petition is timely filed
Verification:	The petition is properly verified
Date of Issuance of Findings of Fact & Order	June 23, 2023

Petitioner's Contentions: That the court erred in finding no permanent disability or need for further medical treatment, pursuant to the panel qualified medical evaluator's opinion.

That the court erred in finding no temporary disability, despite the applicant making no claim for such.

II. FACTS

The applicant, Mr. Timothy Lahey, was hired by Medline Industries (Medline) on May 14, 2021. (Exhibit J1, page 3). The following month, on June 23, 2021, the applicant was driving a stock picker and struck a metal support pillar at about five miles per hour and injured his low back. (Id. at p. 2). The defendant referred the applicant for medical treatment, and the applicant treated at Occupational Medical Doctors for the next several months, up until November 2021 (Exhibits 1, 2, 4, 5, 6, and J4). During that time, the applicant secured representation and filed an Application for Adjudication of Claim (Application) dated September 22, 2021 for his back injury. He then amended his Application on January 13, 2022 to include both hips. His attorney referred him for treatment to Dr. Annu Navani who evaluated the applicant one time and issued one report dated February 16, 2022. (Exhibit 3)

The parties then utilized panel qualified medical evaluator (PQME) Mark Hellner who evaluated the applicant and issued his report dated February 10, 2022. (Exhibit J1). The PQME found causation to the injury at Medline, concluded that the applicant was not permanent and stationery and

recommended treatment and diagnostic studies, but also noted that the applicant's range of motion was excellent. Most importantly, the doctor's report reflects on page 4 that the applicant provided no history of preexisting conditions "…other than a transient level of symptomatology in the low back non-radicular in nature from a motor vehicle accident in December of 2019 from which he recovered completely and did not miss any work."

Of significance is that the PQME thereafter reviewed medical records dated between January 8, 2010 and March 15, 2022 and then issued a supplemental report dated July 7, 2022 (Exhibit J2). The doctor parses out several reports between August 17, 2016 and July 5, 2020 and describes these records as containing "several important points to be noted". (Id. at p. 1). The first report reviewed is dated August 17, 2016 from Dr. Paulo Murrieta who provides that the applicant has had "…back pain…ongoing for three years." Thus, the PQME, after reviewing the records and noting that the applicant has had back pain with radiculopathy for eight years before his injury at Medline, and now knowing that the applicant was not candid with him at the time of the initial evaluation, concluded that the applicant suffered only an exacerbation of his preexisting condition, had no increase in impairment (and actually had less impairment that prior to the injury at issue), and that there was no contribution towards his impairment from the injury at Medline. (Id. at p. 3). At no time did the applicant seek any further supplemental report or seek to schedule a cross-examination.

On August 10, 2022 the defendant filed a Declaration of Readiness to Proceed (DOR) to which the applicant objected on August 23, 2022. The MSC on November 17, 2022 resulted in the matter being set for trial over the applicant's objection. Trial was scheduled on December 29, 2022, but due to insufficient time to conduct the trial, as well as this court noting that the PQME failed to comment on the need for future medical treatment, the matter was continued and the parties were ordered to develop the record and obtain a supplemental report from the PQME on this limited issue. Neither party objected. The court also encouraged the parties to further discuss resolution because the applicant's attorney alleged a period of temporary disability (TD) that the defendant was unaware of.

The PQME issued a supplemental report dated March 16, 2023 that reiterated his prior findings and concluded that "…no additional treatment is required subsequent to…the first few days to a week or so following the injury of June 23, 2021 for any additional treatment to be provided at this point in time or in the future with respect to the episode of exacerbation of June 23, 2021." (Exhibit J3)

With that, the parties were prepared to adjudicate the matter if settlement could not be achieved. The court exhausted all efforts to facilitate resolution and gave plenty of time to do so. The Pre-Trial Conference Statement (PTCS) was perfected and the parties went forward with trial on May 31, 2023 over Lifesize

with all three PQME reports being entered into evidence jointly, as well as the one report of Dr. Navani, among other medical and subpoenaed records.

On direct examination the applicant testified that he injured his back on June 23, 2021, that he had no back pain prior to his shift, that his current symptoms include intense low back pain with radicular symptoms, that he desires more treatment, that there was not much discussion with Dr. Navani about his prior injury, that he mentioned the prior motor vehicle accident of January 2019, that he has consistent low back pain, and that he can only work off and on due to the pain. (MOH, pp. 4-5).

On cross-examination (id. at pp. 5-7), the applicant was asked about his prior treatment dating back three years before 2016, that his deposition testimony was such that he denied any prior back injuries, and that he had a motor vehicle accident in 2020. At this point the applicant raised his voice and refused to answer the preceding question stating that it was irrelevant. The applicant's attorney, upon inquiry by the court, stated that there was no objection to the defense attorney's question. The court then advised the applicant that he needed to answer. The applicant became irate, used profanity, and immediately logged off of the Lifesize App. The court discussed the matter with the attorneys, and the applicant's attorney advised opposing counsel and the undersigned that he would speak with his client about continuing and remaining professional. Trial reconvened at 3:20 p.m.

Cross-examination continued with the applicant testifying that he completed all paperwork in the PQME's office (even though the report states he did not), that he did have a motor vehicle accident in 2019, that he had two motor vehicle accidents in 2020 where he injured his back, that those records reflect back pain at an 8 out of 10, the he denies having chronic back pain for several years prior to 2020 (despite the records), that he never told the doctors his back pain in 2020 was worsening over the past few months (despite such an indication in those records), and that he had a bicycle accident in 2016. He concluded cross-examination by testifying that he began working at Tesla on September 12, 2021 but quit because he did not like the environment and that he worked at KeHE from November 16, 2021 through February 2022 but quit because of the lifting requirements.

On redirect, the applicant testified about the discrepancy between the records and his deposition testimony. His answer was that "…he misunderstood the question and forgot that he treated." (Id. at p. 7).

Based upon the applicant's demeanor, lack of credibility at trial, and the fact that only the PQME reviewed all the medical records pertaining to the extensive preexisting history of back injuries, pain, and treatment, the court issued its Findings & Order on June 22, 2023 consistent with the PQME, i.e. no permanent disability (PD) and no future medical treatment. The court also found that the

applicant was not entitled to TD based upon the stipulation by the parties that the applicant made no claim for such benefit. Because Dr. Navani's one report failed to review any medical records, and because the applicant failed to provide any history whatsoever of his extensive back injuries, this court concluded it could not form the basis for any findings.

The applicant filed a timely verified Petition for Reconsideration dated July 14, 2023. The Petition points out a mistake by the undersigned in its finding that the applicant suffered no temporary disability and suffered no permanent disability, both referencing finding of fact #3. Due to the scrivener's error, the undersigned issued an Amended Findings of Fact & Order to perfect such on July 17, 2023.

The Petition also argues that the PQME reports do not constitute substantial evidence because the PQME evaluated the applicant only once (despite the fact that Dr. Navani conducted only one evaluation as well) and that the conclusions are flawed (despite the PQME being the only doctor who reviewed all medical records), and that the applicant should now, or in the future, be allowed to litigate the issue of temporary disability (despite his representation that there was no claim for TD).

III. DISCUSSION

The applicant sustained a low back injury while employed with Medline when he was driving his stock picker, where he was secured by a four-point harness, when he struck a metal pillar at approximately 5 mph. The employer sent him for medical care and he treated. Noted nowhere in the medical reports from any treating physicians is the extensive history of low back pain and injuries for eight years prior to the injury as discussed both above and below. His deposition testimony denied any prior back injuries and his answer on the day of trial was that he misunderstood the question and that he forgot about his prior treatment.

PETITONER'S FIRST CONTENTION – SUBSTANTIAL EVIDENCE

Great weight should be afforded to the trial judge's findings because of the opportunity and ability to observe witness demeanor and weigh their statements in connection with their manner on the stand. *Power v, WCAB (1986) 179 CA3d 775, 51 CCC 114; Garza v. WCAB (1970) 35 CCC 500; Western Electric Co. v. WCAB (Smith) (1979) 99 Cal.App.3d, 44 CCC 114*

Furthermore, medical evidence that is known to be erroneous or is based on inadequate medical history or examinations does not constitute substantial evidence. *Zemke v. WCAB (1968) 33 CCC 358; Place v. WCAB (1970) 35 CCC 525; Hegglin v. WCAB (1971) 36 CCC 93; Baptist v. WCAB (1982) 47 CCC 1244; Guerra v. WCAB (1985) 50 CCC 270; Escobedo v. Marshalls (2005) 70 CCC 604; E.L. Yeager Construction v. WCAB (Gatten) (2006) 71 CCC 1687.* The entire medical opinion must demonstrate that the doctor's opinion is based upon reasonable medical probability. *McAllister (1968); Lamb (1974); Gay*

(1979). Furthermore, the board may not blindly accept a medical opinion that lacks a solid underlying basis and must carefully judge its weight and credibility. *National Convenience Stores (1981)*

In the case at bar, the applicant's demeanor at trial left much to be desired. He slouched excessively and appeared both upset and inconvenienced by the trial on direct examination. On cross- examination, he became combative with defense counsel and also to the court, going so far as to use profanity and log off Lifesize without notice. The court was nevertheless willing to allow the applicant the full opportunity to continue testifying in the afternoon and put the morning's difficulties in the past. In the afternoon, he was not combative, he was clearly annoyed by the defense attorney's questioning as evidenced by his eye-rolling, whispering under his breath, and continued unprofessional body language.

After reviewing all evidence, it is clear why. He was not forthcoming with the physicians, and the lack of candor was the centerpiece of the defendant's questioning. The applicant did not provide any physician a history that came even remotely close to his true history of chronic back pain, injuries, disability, range of motion and clinical evaluations, and treatment throughout the years. The records offered into evidence from Doctors Medical Center of Modesto (Exhibit A) reflect a longstanding history of back pain that is directly relevant to the issues of permanent disability and the need for future medical treatment.

Turning to the designated portions of Exhibit A, these records reflect the following:

8/17/2016 evaluation in the emergency department for sciatica and chronic back pain greater than three months duration, that "…left lower back pain …has been ongoing for 3 years", and a diagnosis of back pain, lumbar strain, disc herniation, and sciatica. There was no specific mechanism of injury. He was prescribed medication.

8/30/2016 evaluation in the emergency department for back pain and rated an 8/10. The diagnosis was acute back pain with sciatica. He was prescribed medication.

9/1/2016 evaluation in the emergency department resulting from a bicycle accident two days ago and noting of abrasions and contusions. He was prescribed medication.

1/20/2020 evaluation in the emergency department at 18:02 resulting from a motor vehicle accident (MVA) with an onset of "0145". He was the driver, was rear-ended, and spun out. Pain was 8/10. Diagnoses included spinal injury, trunk injury, and cervical spine injury. He was prescribed medication.

3/16/2020 evaluation in the emergency department with complaints consisting of low back pain with radiation down his left leg for six months, worsening over the past three months.

The report also reflects that the "[p]atient states that he has had chronic back pain for the last 8 years" and that he had a "MVC" in January. He was prescribed medications, had an x-ray, and the diagnosis was "Back pain, lumbar strain, disc herniation, sciatica, spinal stenosis, chronic back pain, vertebral fracture, [and] compression fracture".

7/25/2020 evaluation in the emergency department due to a motor vehicle crash six days earlier when he was the driver of a car and was sideswiped on the driver's side by another driver. Complaints were to his low back. He was prescribed medications and given a Toradol injection.

The applicant worked at Medline for less than two months prior to his injury, yet prior to that time he had back pain and problems for at least eight years as evidenced by the records of his private medical providers. It is clear that the most reliable medical opinion introduced into evidence in this case is that of the PQME. Both the PQME and Dr. Navani evaluated the applicant one time. But it is the PQME who was provided with the records reflecting the applicant's longstanding history. The PQME is the only physician who was afforded a true and accurate history. Dr. Navani never reviewed the voluminous records. The doctor issued just one report in February 2022 without knowing the true etiology and history, all because of the applicant's failure to provide an accurate history and failure to review the medical records.

The PQME reports were offered as joint exhibits, the court admitted them as such, and now the applicant objects to the conclusions. The PQME notes that the clinical examination in his office demonstrated better range of motion than the prior examinations at the applicant's private physicians. The PQME also notes that, after reviewing all records, his preexisting condition would have warranted a DRE Lumbar Category II, yet at the time of his evaluation, the applicant had excellent range of motion, was able to reach within 20 cm of touching his fingers to the floor with the knees in an extended position, and straight leg raising was negative bilaterally. The applicant's reflexes were symmetric, appropriate, and equivalent bilaterally, straight leg raising was negative bilaterally, and there was a complete absence of radiculopathy or radiculitis or findings of a radicular nature, which was present previously. When the PQME saw the applicant, he presented with less obvious subjective symptoms than he had during the visits between 2016 and 2020. In short, the applicant was *better* at the time of the PQME evaluation than before the injury.

The PQME concludes in both supplemental reports that he can say with the highest degree of medical certainty that the episode of June 23, 2021 presents purely an exacerbation of the preexistent condition already well documented

over an extended period of years which was not provided to him by the applicant, and thus there is no evidence of any impairment other than that which would have been derived on the preexisting condition. The PQME's opinions are based on the most accurate history (due to the review of records), and the reports constitute substantial evidence. Dr. Navani's single report fails in this regard. Contrary to the applicant's claim that "Dr. Navani actually spoke with and treated the Applicant whereas Dr. Hellner just issued a supplemental report", (Petition for Reconsideration, page 6, lines 20-21) Dr. Hellner also spoke with the applicant and conducted a full clinical evaluation. The applicant's claim is misleading and unfounded.

PETITONER'S SECOND CONTENTION – TEMPORARY DISABILITY

The applicant contends that the finding of fact that he should not be precluded from litigating TD "in the future" is unclear, at best. On the MOH from the first trial-setting day, it is noted that the applicant's counsel stated there was a claim for TD, although none was identified on the PTCS, and the record at that time suggested the applicant worked at two jobs subsequent to Medline. By the time of trial, the parties and the court perfected the PTCS, and the applicant maintained his position that there was no claim for TD at that time.

The undersigned is unclear as to what the applicant now argues, but only two scenarios appear reasonable. If the applicant is arguing that he may be entitled to TD in the future, then that right is viable by way of a Petition to Reopen for New and Further Disability. If, however, the applicant is arguing that he somehow reserved the right to litigate a retroactive TD issue, then that is a disingenuous argument in that the issue was the subject of discussions on all trial days. At no time did the applicant make a motion to bifurcate a retroactive TD issue or reserve any such issue. The applicant was given the opportunity to raise that issue several times over, yet did not do so.

Either scenario makes the TD issue raised in the Petition untenable. This court's intent at the time of trial was to go forward with any claim of TD, if asserted. The applicant chose not do so, and the medical record supports a finding of no TD, regardless.

IV. RECOMMENDATION

It is respectfully recommended that the Applicant's Petition for Reconsideration dated July 14, 2023 be denied.

DATE: July 18, 2023

TODD T. KELLY
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE