WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DARRELL TOLE, ***Applicant***

vs.

BIAGI BROS INC.,
ZURICH AMERICAN INSURANCE COMPANY
ADMINISTERED BY COTTINGHAM & BUTLER CLAIMS,
Defendants

Adjudication Numbers: ADJ16120106
Santa Rosa District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION 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 below, and in the WCJ's report, which we adopt and incorporate, we will grant reconsideration, amend the WCJ's decision to admit defendant's Exhibits A (Medical Report of QME Dr. Vanessa Vagt, dated November 18, 2022) and B (EDD Lien and Medical Certifications, dated March 2022), and otherwise affirm the WCJ's decision.

We observe that it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].) Here, we agree with the WCJ's decision to rely on the reporting of qualified medical evaluator (QME) Diane Michael, M.D., and the determination that applicant sustained industrial injury to the right knee.

However, with respect to defendant's contention that defendant's Exhibits A and B, the psychiatric QME report and documentation from the Economic Development Department (EDD),

were improperly excluded from evidence, we provide clarification. Here the WCJ determined that the records are not relevant to the issue of causation for applicant's right knee injury. We disagree with the evidentiary conclusion applied in this case. In determining whether to admit evidence, we are governed by the principles of Labor Code section 5708, which states that the Appeals Board "shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division." (Lab. Code, § 5708.) The weight accorded the evidence, including the weighing of medical-legal reporting in evidence, is a matter to be determined by the WCJ and by the Appeals Board. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312. 317 [35 Cal.Comp.Cases 500]; *Lundberg v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 436, 440 [33 Cal.Comp.Cases 656].) All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law. (Lab. Code, § 3202.5.)

Accordingly, the probative value of the records in disputing causation of applicant's injury is more properly considered in determining the weight of the evidence, rather than the exclusion of the exhibit. In this case, the WCJ discusses and considers the excluded evidence, and on the basis alone, the evidence should have been admitted. (See Report, pp. 7-8.). Based on our review of the documents, while Exhibits A and B are admissible, we do not believe that this evidence is enough to overcome the substantial evidence relied upon by the WCJ in their finding of injury arising out of and in the course of employment to the right knee. Therefore, we amend the WCJ's decision and admit defendant's Exhibits A and B, and otherwise affirm the WCJ's decision.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the decision of January 5, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of January 5, 2024 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

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ORDER

IT IS ORDERED THAT defendant's Exhibits A (Medical Report of QME Dr. Vanessa Vagt, dated November 18, 2022) and B (EDD Lien and Medical Certifications, dated March 2022) are admitted into the evidentiary record.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 26, 2024

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

DARRELL TOLE
KNOPP PISTIOLAS
MULLEN FILIPPI

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

Defendant, by and through its counsel, Anne Hernandez of Mullen & Filippi, filed a timely and verified Petition for Reconsideration challenging the Findings and Award dated January 5, 2024.

On February 18, 2022, the applicant sustained injury to his right knee while employed as a truck driver at Biagi Bros, Inc. when the applicant crawled under a truck trailer to inspect it for damage. The applicant was 57 years old on the date of injury.

The sole issue for Trial on December 12, 2023 was injury AOE/COE for applicant's right knee. (MOH/SOE, page 2, lines 24 thru 27.) In the Findings & Award (F&A), the undersigned WCJ found injury arising out of and in the course of employment to the right knee on February 18, 2022, and ordered Defendant's Exhibits A and B excluded from the evidentiary record on relevancy grounds.

Petitioner asserts the undersigned WCJ erred in excluding Defendant's proposed Exhibits A and B, and failed to reconcile employer witness testimony and defense exhibits contradicting Applicant's testimony. Petition, page 1, line 26 thru page 2, line 7.

II
FACTS

On February 18, 2022, the applicant injured his right knee while working as a truck driver at Biagi Bros, Inc. after crawling under a truck trailer to inspect it for damage. (MOH/SOE, page 5, lines 11 thru 21.) The applicant testified that on the night of the injury, he was feeling pain in his right knee while going up and down the stairs, showering and putting on socks. (Id. at page 6, lines 22 thru 27.)

The applicant had a telephone appointment with Kaiser on February 22, 2022. (Id. at page 6, lines 12 thru 20.) That same day, the applicant testified that he reported the injury to Jason Rodriguez, his load coordinator and dispatcher.

(Id. at page 5, lines 37 thru 47.) Applicant testified that Jason Rodriguez told him that he would inform Kathy Mathews, the transportation manager, about his injury (Id. At page 6, lines 5 thru 10.)

Ms. Mathews testified that she did not learn of the work related injury until February 27, 2022. (Id. at page 9, lines 1 thru 4.) John Franco, the corporate compliance manager, and Chris Relva, the transportation supervisor, testified on behalf of the employer that Jason Rodriguez never told them the applicant was injured at work. (Id. at page 9, line 16 thru page 10, line 24.) Defendants denied the claim, but a Notice of Denial was not filed as a trial exhibit.

The applicant was later diagnosed with a meniscal tear and fluid in his right knee. (MOH/SOE, page 6, lines 29 thru 36.) Dr. Diane Michael evaluated the applicant on October 13, 2022 issuing a report dated November 11, 2022. (Joint Exhibit 2.) Dr. Michael re-evaluated the applicant on August 31, 2023 and issued a report dated the same. (Joint Exhibit I.) Dr. Michael also submitted to a deposition on July 13, 2023. (Joint Exhibit 3.) In her reporting and testimony, Dr. Michael finds injury to applicant's right knee on February 18, 2022 while working at Biagi Bros Inc. Petitioner does not assert that Dr. Michael's reporting is not substantial medical evidence.

This matter was submitted on December 12, 2023. In the Findings & Award (F&A), the undersigned WCJ found injury AOE/COE to applicant's right knee and ordered Defendant's Exhibits A and B excluded from the evidentiary record on relevancy grounds. It is from this F&A that petitioner seeks reconsideration. Petition, page 1, line 26 thru page 2, line 7.

III
DISCUSSION

a. THE APPLICANT MET HIS BURDEN OF PROOF IN ESTABLISHING THAT HIS INJURY AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT

Applicant has the burden of proving, by a preponderance of the evidence, that he sustained an injury arising out of employment. (Labor Code §3202.5.) The employee must establish industrial causation by a "reasonable probability." (*McAllister v. WCAB* (1968) 33 CCC 660, 662.) If a reasonable probability is shown, the claim could be upheld even though the exact causal mechanism is

unclear or even unknown. (*Federal Insurance Co. v. WCAB (Doe)* (1995) 60 CCC 422 (writ denied).)

In the case at hand, the applicant testified to sustaining an injury at work. (MOH/SOE, page 5, lines 20 thru 21.) The February 28, 2022 first report of injury (Applicant's Exhibit 1, page 1), and Qualified Medical Evaluator's (QME's) reports of Dr. Diane Michael corroborated applicant's testimony. (Joint Exhibit 1, page 1; Joint Exhibit 2, page 2.) Applicant's testimony did not change, and neither did the QME's reporting after her deposition. As such, based on applicant's testimony and substantial medical evidence, the undersigned WCJ found, and continues to find, that the applicant has met his burden of establishing industrial causation by a reasonable probability as required by law.

b. **THE WCJ PROPERLY WEIGHED THE EVIDENCE AND MADE A FINDING OF INDUSTRIAL INJURY BASED ON THE RECORD AS A WHOLE**

Petitioner alleges they are aggrieved because the undersigned WCJ did not consider the testimony of the three employer witnesses and Defense Exhibits C, D, E, and F. Petition, page 2, lines 20 thru 24. On the contrary, the undersigned WCJ took all evidence into account but finds the weight of evidence supports a finding of injury AOE/COE. Moreover, on questions of credibility, judgment is deferred to the WCJ, who is in the best position to observe the demeanor of the witness. (Garza v. Workmen's Comp. App. Bd. (1970) 3 Cal. 3d 312, 318.) When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence. (Labor Code §3202.5.)

Petitioner asserts that the applicant and employer witness Kathy Mathews have differing stories as to whether the applicant reported his mechanism of injury to the employer. The applicant testified he told Jason Rodriguez that he injured his knee while crawling under the trailer and that Jason said he would tell Kathy Mathews. (MOH/SOE, page 6, lines 6 thru 8.) However, Kathy Mathews testified that Mr. Rodriguez did not tell her it was work-related. *Petition, page 4, lines 1 thru 4.* Whether Mr. Rodriguez informed Ms. Mathews about the applicant's injury does not negate the applicant's testimony that he told Mr. Rodriguez about his injury. Both can be true.

John Franco and Chris Relva also testified as employer witnesses. Both Mr. Franco and Mr. Relva testified that Jason Rodriguez never told either of them that the applicant sustained his right knee injury at work. *Petition, page 4,*

line 14 thru page 5, line 5. The fact that Mr. Rodriguez (who was not a witness at Trial) may not have reported that to Mr. Franco or Mr. Relva is irrelevant to the issue of causation.

Mr. Franco additionally testified that he believed the applicant knew he had to timely report workplace injuries because he had a prior 2021 workplace injury. (MOH/SOE, page 9, lines 40 thru 41.) Petitioner's argument that the injury was not timely reported does not hold water when Kathy Mathews testified that she knew the injury was work-related just nine (9) days after it occurred, on February 27, 2022. (MOH/SOE, page 9, lines I thru 4.)

Regarding Defendant's Trial Exhibit E, petitioner seems to suggest that text messages to the employer from the applicant somehow confirm that the applicant sustained injury to his knee from being overweight. *Petition, page 3, lines 5 thru 8.* However, this text is not a medical record. Moreover, the applicant explained this text exchange at Trial. The applicant testified that there was a phone call with Jason Rodriguez prior to that text message in which Mr. Rodriguez called the applicant "fat" and the applicant's text was in response to that phone conversation. (MOH/SOE, page 7, lines 34 thru 43.) Because Mr. Rodriguez was not called as an employer witness at Trial, there is no way to know Mr. Rodriguez's version of events, and the undersigned WCJ found the applicant's testimony credible.

Petitioner further asserts that "in that long text" of Defense Exhibit E, applicant "made no mention of injuring his knee crouching under a trailer." Petition, page 3, lines 8 thru 9, This is somehow supposed to indicate that because the applicant did not text the mechanism of injury to the employer, the injury did not occur, There is no basis for this conclusion, and again, we cannot confirm what the applicant discussed with Mr. Rodriguez on the phone just prior to that text, because Mr. Rodriguez was not a witness at Trial. This text message does nothing to disprove causation as it is out-of-context and is not medical evidence.

Petitioner next asserts that the Court should rely on Defendant's Exhibit C, a Kaiser telephone note from Dr. Shulan Ding dated February 23, 2022 which allegedly states that the applicant did not sustain injury at work. *Petition, page 3, lines 19 thru 25.* The phone note stated that the applicant told Dr. Ding that he went home on February 22, 2022 and felt pain in his right and left knees going up and down the stairs. (Def. Exhibit C, page 1090.)

The QME Dr. Diane Michael was deposed on July 13, 2023 and was asked about this Kaiser phone note. In response, Dr. Michael stated, "I don't see that he said he hurt his knee coming down the stairs. It said he felt pain coming down. I think there's a difference there." (Joint Exhibit 3, page 10, lines 18 thru 20.) Dr. Michael further testified that the phone note stating "no injury" was not a conflict and did not change her mind on causation. (Id., page 11, lines 2 thru 6.) The undersigned WCJ finds Dr. Michael more persuasive than a phone note from Kaiser wherein the doctor did not evaluate the applicant or review any records.

With regard to Defendant's Exhibit D, the undersigned WCJ did not find this Kaiser report probative of causation. Defense Exhibit D is a Kaiser report dated September 2, 2022, seven (7) months after the injury. This report is a routine office visit for ophthalmology concerns and a toothache. (Def. Exhibit D, pages 1 thru 3,) The undersigned WCJ fails to see how this report is substantial medical evidence regarding causation of a right knee injury that occurred seven months prior when this report does not even discuss the knee.

Defendant's Exhibit F is an email from Jason Rodriguez to Kathy Mathews indicating that the applicant "reiterated everything in the text messages" and that the applicant was in Reno.

There is no evidence to indicate which text messages are being referenced in this email, and the fact that the applicant may have gone to Reno (even though the applicant testified he did not), has no relevance to causation. The applicant could have an injury and still go to Reno.

The court has reviewed all the evidence submitted by the parties, both testamentary and documentary. Based upon same, and having weighed the testimony offered by the applicant and the employer witnesses, the undersigned WCJ resolved discrepancies in the evidence in the applicant's favor. It is certainly within the judge's discretion to find that the medical evidence coupled with the applicant's testimony possess a greater convincing force than the employer's testimony. As such, industrial causation is found.

c. **THE WCJ PROPERLY EXCLUSED DEFENDANT'S EXHIBITS 'A' AND 'B' BECAUSE THEY ARE IRRELEVANT**

Petitioner contends that Defendant's Exhibits A and B were improperly excluded from evidence. Petition, pages 5 thru 7. The undersigned WCJ disagrees.

Defendant's proposed Exhibit A is a psychology QME report from Dr. Vanessa Vagt for evaluation of two dates of injury - August 19, 2020 and February 18, 2022. Although Dr. Vagt is the psyche QME for the injury herein, February 18, 2022, there was no psyche issue alleged at Trial. Petitioner asserts that Dr. Vagt's report is relevant because it "indicates there were inconsistencies in Mr. Tole's account of events regarding his alleged psychological injury that could suggest a lack of credibility." *Petition, page 6, lines 8 thru 16.* It would appear that the petitioner is asking the Court to find that the applicant lacks credibility regarding his right knee injury simply because applicant is alleged to have been inconsistent in his account of the events of a psychological injury. This does not follow and would suggest that the Court engage in assumptions about applicant's overall character rather than actual evidence presented at Trial. As such, Defendant's proposed Exhibit A was properly excluded.

Defendant's proposed Exhibit B is EDD documentation accompanied by a medical certification form. This is not a medical report but a certification for disability benefits only, and EDD was not at issue for Trial. Moreover, there is no discussion of causation in this medical certification form, and there is no signature on the form so it cannot be authenticated. Lastly, the form does not list a date of injury, so it is impossible to tie this medical certification form to applicant's February 18, 2022 injury. As such, Defendant's proposed Exhibit B was properly excluded.

IV
RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Date: February 6, 2024

Heidi K. Hengel
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE