WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CRISTIAN SIMMONS, *Applicant*

vs.

BIMBO BAKERIES INC., ACE AMERICAN INSURANCE; ESIS, *Defendants*

Adjudication Number: ADJ11582221
Sacramento District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to further consider the factual and legal issues. This is our decision after reconsideration.[1]

Defendant seeks reconsideration of the April 21, 2022 Findings and Award wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed from February 28, 2000 through August 8, 2018, sustained an injury arising out of and in the course of employment to his lumbar spine thoracic spine and right hip. The WCJ found that the injury caused permanent disability of 19% after apportionment.

Defendant contends that the WCJ should have found that applicant's claim for a cumulative trauma injury was barred by the statute of limitations. Defendant also contends that the WCJ should not have awarded self-procured medical expenses, or, in the alternative, should have awarded applicant a specific amount for defendant's liability for self-procured medical treatment, and that the WCJ's award of "self-procured medical treatment" failed to adequately address the evidence on the issue. In addition, defendant contends that the WCJ used the wrong occupational variant and wrong permanent and stationary date when awarding permanent disability. Finally, defendant also argues that it should be allowed a credit for a temporary disability overpayment if the permanent and stationary date is in error.

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[1] Commissioner Lowe was a panelist when a prior decision issued in this case. She no longer serves on the Appeals Board and another panelist has been substituted in her place.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration. (Report) We have reviewed the Report and the record in this matter. For the reasons stated below and for the reasons stated in the WCJ's report, which we adopt and incorporate by reference, we will affirm the WCJ's decision.

As mentioned above, this case involves a cumulative injury. "For the purpose of establishing the date of injury, section 3208.1 distinguishes between 'specific' and 'cumulative' injuries." (*Bassett- McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1109–1110 [53 Cal. Comp. Cases 502]; see also *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (*1993) 16 Cal.App.4th 227, 234 [58 Cal. Comp. Cases 323].) A specific injury occurs "as the result of one incident or exposure which causes disability or need for medical treatment," while a cumulative injury results from "repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment." (Lab. Code, § 3208.1.) The date of injury for a cumulative injury "is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (Lab. Code, § 5412.) For statute of limitations purposes, the date of injury " 'requires concurrence of two elements: (1) compensable disability and (2) knowledge of industrial causation.' " (*Bassett-McGregor v. Workers' Comp. Appeals Bd., supra,* 205 Cal.App.3d 1102, 1110.) An employee therefore may file a claim alleging a cumulative injury up to one year after the employee either knew, or should have known, a disability was industrially related. "Whether an employee knew or should have known his disability was industrially caused is a question of fact." (*City of Fresno v. Workers' Comp. Appeals Bd.* (1985) 163 Cal.App.3d 467, 471 [209 Cal. Rptr. 463, 50 Cal. Comp. Cases 53].) (*City of Fresno.*) "The running of the statute of limitations is an affirmative defense (§ 5409), and the burden of proving it has run, therefore, is on the party opposing the claim." (*Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57, 67, fn. 8 [702 P.2d 197, 216 Cal. Rptr. 115, 50 Cal. Comp. Cases 411].)

While an employer's burden of proving the statute of limitations has run can be met by presenting medical evidence that an injured worker was informed a disability was industrially caused, "[t]his burden is not sustained merely by a showing that the employee knew he had some symptoms." (*City of Fresno, supra,* 163 Cal.App.3d at p. 471, 473.)

An employee is not charged with knowledge that his or her disability is job-related without medical advice to that effect, unless the nature of the disability and the applicant's training, intelligence and qualifications are such that he should have recognized the relationship between the known adverse factors involved in his employment and his disability. (*City of Fresno, supra*, at 473; *Newton v. Workers' Co. Appeals Bd.* (1993) 17 Cal.App.4th 147 [58 Cal.Comp.Cases 395].)

In this case, defendant stipulated that applicant sustained an industrial injury. Defendant argues that applicant's claim for injury should be barred by the statute of limitations because applicant had both disability and knowledge that his disability was caused by an industrial injury more than one year before he filed the claim.

According to the Minutes of Hearing and Summary of Evidence, at trial, applicant testified that, in 2011, "applicant told his boss, Randy, that he was having constant low back pain. Randy took applicant off the route and told applicant to get some physical therapy through his private doctor during work hours." (February 1, 2022 Minutes of Hearing and Summary of Evidence [MOH/SOE], pp. 6-7.) Randy did not give the applicant a claim form in 2011. (MOH/SOEC, p. 8.) "When the applicant told his supervisor, Randy, he was having back issues, he did not tell him it was work-related. In 2011, applicant did not report an industrial injury because he thought a claim would negatively impact his future at defendant employer." (MOH/SOE, p. 9.) Defendant does not argue that the time applicant took off from work to receive medical treatment in 2011 was disability.

In essence, defendant argues that the employer had no reason to believe that applicant might have sustained a work-related injury, while applicant, a layperson, had actual knowledge that the cumulative effect of his work duties caused an injury to his back. Defendant assumes that applicant's 2011 insight that his back problems might be caused by work was still present when he went off work in 2016 and argues that applicant had both disability and knowledge that his injury was work related in 2016. (Petition for Reconsideration, p. 4.) Applicant, as a layperson with respect to medical matters, might naturally have suspected that his back pain was related to the heavy lifting he did at work. However, this suspicion of work-relatedness is not knowledge. Defendant has not shown that applicant was provided with a claim form outlining his workers' compensation rights or medical advice that his symptoms were work related. Defendant has not shown that applicant had special medical training or qualifications.

In short, defendant has not shown that applicant had actual knowledge that his back disability was caused by work. Accordingly, defendant did not meet their burden of showing that applicant's claim is barred by the statute of limitations.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the April 21, 2022 Findings and Award is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 5, 2022

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

CRISTIAN SIMMONS
MARCUS REGALADO MARCUS & PULLEY
STOCKWELL HARRIS WOOLVERTON & HELPHREY

MWH/oo/mc

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

INTRODUCTION

On May 13, 2022, defendant ("petitioner") through its counsel filed a Petition for Reconsideration of Findings and Award which issued on April 21, 2022. The Petition for Reconsideration was timely filed and verified.

Petitioner asserts the evidence does not justify the findings of fact and by order, decision or award the Appeals Board acted without or in excess of its powers. Specifically, petitioner contends applicant's claim is barred by the statute of limitations. Petitioner contends the Appeals Board failed to address the liability for applicant's self-procured medical treatment request. Petitioner contends the correct occupational group number is 251 which results in permanent disability of 16 percent. Petitioner contends the permanent and stationary date is September 13, 2018. Petitioner contends it has a temporary disability overpayment credit of $14,583.24. Petitioner contends PQME, Mark Bernhard, MD's, reports are not substantial medical evidence. Petitioner contends applicant is not entitled to reimbursement for self-procured medical treatment.

Per the Minutes of Hearing at page 2, lines 9-12, applicant suffered an accepted industrial injury to his lumbar spine through August 8, 2018, and is claiming injury to his thoracic spine and right hip. The thoracic spine and right hip injury may be denied nature and extent. The application for adjudication of claim was filed on October 9, 2018, within a few months of applicant's last day of work. Per the Minutes of Hearing, the statute of limitations defense was not an issue for trial.

On May 20, 2022, applicant filed a verified answer to the petition.

Based on the facts and discussion that follows, it is recommended that the Petition for Reconsideration be denied.

THE FACTS

This matter came on for trial on February 1, 2022, before Sarah L. Lopez, Workers' Compensation Judge. Documentary evidence was received; applicant testified; employer witness, Justin Hansen, testified; applicant filed a post-trial brief on February 4, 2022; and petitioner filed a post-trial brief on February 22, 2022. Evidence revealed the following facts:

1. On February 28, 2000, applicant began working for defendant employer as a route sales professional. (Exhibit AA at p. 2.)
2. A route sales professional is responsible for building orders of product to be delivered to stores; transporting the orders to stores; stocking the store shelves with fresh product and pulling back old/unsold product. (MOH at p. 5:7-14.) This work required extensive bending and lifting including floor level for stocking and overhead as racks of product are stacked up to 12 trays high and stacks are transported onto the delivery truck via ramp. *(Id.* at p. 5:9-10.) This work contemplated lifting/carrying 50 pounds overhead/at shoulder level and pushing/pulling up to 200 pounds. (Exhibit AA page 2.)
3. In 2002 or 2003, applicant injured his low back at work while sharing one rack with another employee at a store; he filed a claim; and, he treated with physical therapy. (*Id*. at p. 2.)
4. Applicant's pain got better but came back intermittently. (*Id*. at p. 2.) In 2003, applicant was pain free right after he completed physical therapy but he does not know if this injury resolved completely. (MOH at p. 7:6-7.)
5. In 2005, applicant sought treatment for left-sided tingling and numbness of the legs.(Exhibit AA at p. 11.)
6. In 2006, applicant promoted to market sales lead and continued in this position until his last day of work. (MOH at p. 5:14-15.) A market sales lead oversees different routes and has additional supervisory duties. (*Id*. at p. 5:15-17.) However, when a route sales professional is unavailable for work for sickness or vacation, a market sales lead does their delivery job. (*Id*. at p. 5:18-20.)
7. From 2006 through 2018, when he was a market sales lead, applicant covered delivery routes. (*Id*. at p. 6:2-5.)

8. In October 2009, applicant sought treatment for bilateral legs pain. (Exhibit AA at p. 12.)
9. In July 2010, applicant sought treatment for right low back pain. (*Id*. at p. 13.)
10. In 2011, after covering several routes for route sales professionals who called in sick, applicant sought treatment for back pain. (*Id*. at p. 3.)
11. In 2011, applicant told his supervisor, Randy Scheske, about his worsening back pain. (MOH at p. 6:25.) Randy Scheske told applicant to get some physical therapy during work hours after product left the depot. (*Id*. at pp. 6-7:25-1; Exhibit AA at p. 3.)
12. In 2011, Randy Scheske did not give applicant a claim form. (MOH at p. 8:16-17.) In 2011, applicant chose not to report as industrial. (*Id*. at p. 7:17-18.)
13. After treatment in 2011, applicant felt better, but the pain never went away. (*Id*. at p. 7:6-7.)
14. In early 2016, applicant was experiencing low back discomfort most of the time.(Exhibit AA at p. 3.) Applicant felt this 2016 injury was the same injury he had in the past. (*Id*. at p. 3.)
15. In early 2016, physical therapy made applicant's pain worse. (*Id*. at p. 3.) In April 2016, applicant's treater noted failed physical therapy. (*Id*. at p. 17.)
16. In May 2016, applicant was taken off work due to back issues. (*Id*. at p. 18.)
17. By August 2016, spine surgery was recommended to applicant but he chose not to proceed with surgery. (*Id*. at p. 19.)
18. In September 2016, applicant was released back to work with restrictions. (Exhibit BB at p. 4.) Neither party offered testimony about the availability of modified work at this time.
19. In April 2017, applicant returned to care and wanted to discuss proceeding with the spine surgery previously recommended. (Exhibit AA at p. 19.)
20. Exhibit BB at page 5, on June 14, 2017, applicant underwent an L5-Sl posterolateral fusion. Transforaminal lumbar interbody fusion, L5-S 1 interspace. Pedicle screw instrumentation, L5-S 1. Cage placement L5-S 1 interspace. LS complete laminectomy with complete inferior facetectomies of LS, medial facetectomies and foraminotomies. L4-5 bilateral hemilaminotomies, medial facetectomies. Left L3-4 hemilaminotomy and medial facetectomy with right sided L3-4 hemilaminotomy, medial facetectomy, from left sided approach. Utilization of intraoperative fluoroscopy. Harvest of local bone graft.

21. On August 30, 2017, applicant underwent a core decompression of the right hip.(Exhibit BB at p. 7.)
22. In January 2018, about seven months post-operatively, applicant was released to work with the restrictions of avoiding heavy, awkward bending and twisting. (Exhibit AA at p. 8.)
23. When applicant returned to work postoperatively, in January 2018, Mr. Sandretto, regional sales manager, along with human resources, made sure applicant's work restrictions were honored. (MOH at p. 8:18-21.)
24. Until Mr. Sandretto's retirement, applicant was not doing heavy work. (MOH at p. 8:21-23.)
25. Mr. Sandretto retired at the end of April 2018 or beginning of May 2018 and there was other restructuring at defendant employer's site. (Exhibit AA at p. 4.)
26. When Mr. Sandretto retired, applicant began pulling loads for delivery again. (Exhibit AA at pp. 4-5.) This was regular work.
27. In 2018, five to ten times, applicant completed partial routes. (MOH at p. 6:15-16.)
28. In 2018, five times or less, applicant loaded/unloaded trucks with the power jack. (*Id*. at p.6:16-18.)
29. In 2018, applicant completed split accounts wherein he did half a route and all of his market sales lead work in the same day. (*Id*. at p. 8:8-10.)
30. To Justin Hansen, operational sales leader, applicant reported he was sore or hurt himself in this business. (*Id*. at p. 9:21-23.) Mr. Hansen did not take' the report seriously. (*Id*. at p. 9:21-23.)
31. After his low back and right surgeries in 2017, neither the applicant's low back nor his right hip condition worsened. (*Id*. at p. 7:20-21.)
32. On October 9, 2018, applicant filed an application for adjudication of claim alleging injury to his low back and bilateral hips through September 8, 2018.
33. As stipulated by the parties, applicant suffered an accepted injury to his lumbar spine through August 8, 2018; thoracic spine and right hip injuries were claimed. (MOH at p. 2:9-12.) Petitioner paid temporary disability benefits and furnished some medical treatment for the accepted lumbar spine. (*Id*. at p. 2:4-5.)

DISCUSSION

STATUTE OF LIMITATIONS

Applicant suffered an accepted industrial injury to the lumbar spine. Thoracic spine and right hip may be denied nature and extent. Statute of limitations defense was not an issue for trial. Nonetheless, Dr. Bernhard determined applicant suffered one cumulative trauma injury and an application was filed timely a few months thereafter.

Dr. Bernhard determined with reasonable medical probability that applicant developed his spine condition in part due to cumulative given that he engaged in many years of lifting, pushing, pulling, transporting, riding in vehicles and riding equipment while employed at defendant employer for over 18 years. (Exhibit AA at p. 22.) Industrially, applicant suffered injury to the right hip avascular necrosis due to the frequent amount of time weight-bearing and squatting for 18 years. (Exhibit BB at p. 10.) Hence, Dr. Bernhard opined the applicant suffered one long cumulative trauma injury through his last day of work.

In *Western Growers*, and from cases since then, it has been determined that an applicant can sustain one long cumulative trauma injury despite separate periods of temporary disability. *Western Growers Insurance Co. v. WCAB* (*Austin*) (1993) 58 CCC 323. The case specific facts are carefully considered. In the case at hand, evidence shows applicant suffered one long cumulative trauma injury because there were no specific injuries; there was a continuity of care throughout the applicant's employment; and, there was no new disability or need for medical treatment during the applicant's last year of regular employment, 2018, after being off work in 2017.

In 2002 or 2003, applicant injured his low back at work while sharing one rack with another employee and treated with physical therapy. (Exhibit AA at. p. 2.) Applicant sought low back treatment intermittently in 2005, 2006, 2009 and 2010. (*Id*. at pp. 11-13.) In early 2011, applicant

sustained cumulative exposure after covering several routes when route sales professionals were unavailable. (*Id*. at p. 3.) In 2016, this "same" low back injury reoccurred. (*Id*. at p. 3.) After physical therapy failed (*Id*. at p. 17), it appears applicant was off work from about May 2016 through September 2016. (Exhibit AA at p. 18; Exhibit BB at p. 4.) During this period, spinal surgery was recommended to applicant, but he declined surgery and returned to work. (Exhibit AA at p. 19.)

On September 30, 2016, applicant followed up with his primary care physician. (*Id*. at p. 19.) Applicant's treater noted that he was continuing to work with a chiropractor and he had ongoing tingling and numbness in his feet from time to time. (*Id*. at p. 19.) By December 5, 2016, applicant was referred back to physical therapy for a reevaluation. (*Id*. at p. 19.)

On April 6, 2017, applicant returned to his primary care physician and he wanted to discuss the spinal surgery previously indicated. (*Id*. at p. 19.) Applicant completed the preoperative testing. (*Id*. at p. 20.) Then, on June 14, 2017, applicant underwent spine surgery. (Exhibit BB at page 5.) On August 30, 2017, applicant underwent right hip surgery. (*Id*. at p. 7.) It appears applicant was off work from at least June 14, 2017, through January 2018. In January 2018, applicant was released to work with restricted duties. (*Id*. at p. 8.)

From January 2018 through about April 2018, applicant returned to defendant employer and worked restricted duty under the direction of Mr. Sandretto. (MOH at p. 8:18-23.) After Mr. Sandretto retired around the end of April 2018 and there was other restructuring, applicant began doing heavy or unrestricted work again. (Exhibit AA at p. 4; MOH at pp. 6:15-18; 8:8-10.) On April 24, 2018, applicant complained of spine pain. (Exhibit BB at pp. 8-9.) Applicant's treater reviewed a contemporaneous, April 20, 2018, lumbar spine X-ray and did not see any difference

between it and the prior September 28, 2017, X-ray. (*Id*. at pp. 8-9.) Applicant was encouraged to work on his body mechanics and core strength. (*Id*. at pp. 8-9.)

By August 2, 2018, applicant reported a worsening of his low back pain and some intra-scapular thoracic pain after his workload increased at the end of April 2018. (Exhibit EE at p. 10.) Applicant's treating surgeon opined that his heavier work was likely exacerbating his pain and the applicant needed to avoid heavier work. (*Id*. at p. 10.) Applicant was referred back to physical therapy. (*Id*. at p. 10.)

First, there are no specific injuries throughout the course of applicant's employment. In 2002 or 2003, applicant reported an industrial low back injury after lifting trays. In 2011, applicant was covering multiple routes and this caused him to seek treatment. In 2016, applicant reported ongoing pain which became unbearable and was operative in nature. In 2016, applicant declined surgery. When the applicant returned to care in April 2017, no specific injury was reported. After modified work and heavier work in 2018, no specific injury was reported on August 2, 2018, when applicant was experiencing an exacerbation.

Second, there is a continuity of care in this case. From 2003 onward, applicant treated with physical therapy. At physical therapy, he was taught home exercises. (Exhibit AA at p. 3.) In 2011, applicant returned to physical therapy and learned core strengthening exercises. (*Id*. at p. 3.) In 2016, physical therapy failed and applicant was a surgical candidate. In 2017, applicant underwent the surgeries. In early 2018, applicant was on restricted duties because of the surgeries. In April 2018, applicant was encouraged to practice the body mechanics and core strengthening exercises previously learned. Due to a retirement or restructuring, by May 2018, applicant began doing heavier work. Within about three months, on August 2, 2018, applicant had an exacerbation of the low back and was referred back to physical therapy. Throughout this entire period, applicant

treated with his primary care physician with regularity and continued with physical therapy. Applicant's primary care physician also noted applicant was proceeding with chiropractic care.

Third, there is no evidence of new disability or new treatment before applicant's last day of work, August 8, 2018. Specifically, the April 20, 2018, X-ray was the same as the prior September 28, 2017, X-ray. (*Id*. at pp. 8-9.) Additionally, applicant testified credibly that neither his low back condition nor his right hip condition had worsened after surgical interventions which were in 2017. (MOH at p. 7:20-21.) This statement contemplates the unrestricted work done from May 2018 through September 2018.

Hence, applicant's lumbar spine claim is accepted and based on Dr. Bernhard's opinion which is substantial in nature and substantiated by the record, applicant suffered one long cumulative trauma injury through his last day of work, August 8, 2018. Applicant filed his application for adjudication of claim timely, a few months later.

OCCUPATIONAL GROUP

Based upon applicant's credible testimony and the job description reviewed by Dr. Bernhard, it is found that applicant was employed as a market sales lead with route sales professional duties which takes the occupational group number 350.

In his last year of injurious exposure, 2018, applicant still had to be available to cover routes. (MOH at p. 6:2-3.) In 2018, applicant went to stores and stocked two days' worth of product; completed partial routes; and, loaded/unloaded product with a power jack. (*Id.* at p. 6:9-17.) This work included lifting and carrying up to 50 pounds overhead/over shoulder and pushing/pulling 150/200 pounds. (Exhibit AA at p. 2.)

The market sales lead position is similar to those duties listed in occupational group number 350, specifically: Truck driver or lunch truck driver. It is well established that "when the workers'

duties embrace the duties of two forms of occupation, the rating should be for the occupation which carries the highest percentage. This is known as the 'dual occupation rule.'" (*Grossmont Union High School v. Workers' Comp. Appeals Bd*. (Burns) (1997) 62 Cal.Comp.Cases 687 (writ denied)). For rating purposes, applicant's occupational group number is 350.

PERMANENT DISABILITY

The purpose of utilizing the AMA Guides is to remove the extreme variances in the reporting of physicians. The guides are utilized in order to provide independent assessment of the whole person impairment (WPI) based on objective findings so that the WPI could be verified and repeated by different physicians regardless of who sought the evaluation without bias for or against any party.

According to the appeals board, the language of Labor Code § 4660(c) provides that "the schedule ... shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." The appeals board went on to state that the language of Labor Code § 4660(d) provides that the schedule shall promote consistency, uniformity, and objectivity.

The factors of permanent disability are based upon applicant's testimony with due consideration to his credibility as a witness and the medical report(s) of Dr. Bernhard which rate as follows after apportionment:

.85(15.03-12-[l.4]17-350G-19-20)17%;

.5(17.03-3-[l.4]4-350G-5-5)3%;

17c3=19% permanent disability.

It is found that applicant is entitled to a permanent disability award of 19%, equivalent to 70.50 weeks of indemnity payable at the rate of $290.00 per week, in the total sum of $20,445.00.

PERMANENT AND STATIONARY

Applicant claims he was permanent and stationary or MMI on July 29, 2019. Petitioner claims applicant was permanent and stationary or MMI on September 13, 2018. Based upon the medical reports(s) and deposition transcripts of PQME, Mark Bernhard, M.D., it is found that applicant was permanent and stationary or MMI on July 29, 2019.

Initially, on July 29, 2019, after reviewing medical treatment records, Dr. Bernhard declared the applicant to be retroactively MMI as of September 13, 2018. (Exhibit BB at p. 10.) Subsequently, on March 25, 2020, Dr. Bernhard changed the applicant's MMI date to July 29, 2019. (Exhibit DD at p. 2.)

Dr. Bernhard revised his opinion because the applicant was not stable on September 13, 2018. (Exhibit GG at p. 76:10-13.) Specifically, as of August 2, 2018, the applicant's condition was worsening to such an extent that thoracic spine symptomatology developed. (Exhibit EE at p. 10.) It appears that Dr. Bernhard did not have this record showing thoracic spine involvement, dated August 2, 2018, until March 25, 2020.

SELF-PROCURED MEDICAL TREATMENT

Petitioner contends the Appeals Board failed to address the liability for applicant's self-procured medical treatment request and petitioner contends applicant is not entitled to reimbursement for self-procured medical treatment.

PQME, Mark Bernhard, M.D., opined applicant's self-procured treatment was reasonable and necessary to cure and/or relieve the effects of the industrial injury to low back and right hip.

(Exhibit DD at p. 2.) The treatment was helpful in achieving MMI as it was necessary and consistent with the ACOEM Guidelines. (*Id*. at p. 2.)

Based upon applicant's credible testimony (MOH at p. 8:10-13) and the reporting of Dr. Bernhard, it is found that applicant is entitled to reimbursement of self-procured medical treatment as presented in Exhibit 1. The exact amount to be adjusted by and between the parties with the WCAB retaining jurisdiction in the event of a dispute.

First, petitioner needs to accept that applicant is entitled to reimbursement for self-procured medical treatment. Then, the parties need to work together to adjust the amount owed. Applicant must prove his reimbursement request with specificity. If there is a dispute, the parties may return to the WCAB.

TEMPORARY DISABILITY OVERPAYMENT CREDIT ASSERTED

Petitioner is not entitled to any temporary disability overpayment credit asserted as applicant was not permanent and stationary or MMI until July 29, 2019.

SUBSTANTIALITY OF PQME, MARK BERNHARD, MD

Dr. Bernhard took a complete history, performed necessary testing and reviewed appropriate medical records. Dr. Bernhard's reports are clear, concise and provide intellectually consistent reasoning. The opinions are clearly predicated on reasonable medical probability and are not speculative. The reports of Dr. Bernhard are found to constitute substantial evidence. It appears issues arose because Dr. Bernhard did not have the medical treatment records *before* he evaluated applicant in-person. At deposition over the course of two days with repetitious questions, Dr. Bernhard offered further explanations, but did not change his opinions.

Recommendation

For the foregoing reasons, I recommend that petitioner's May 13, 2022, Petition for Reconsideration be denied.

DATE: May 26, 2022

Sarah Lopez
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE