

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

JESSICA CHEVERIE, *Applicant*

vs.

SCRIPPS HEALTH; SEDGWICK CMS, *Defendants*

**Adjudication Number: ADJ10325000
San Diego District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION**

Defendant seeks reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration we issued on December 29, 2023, wherein we affirmed the workers' compensation administrative law judge's (WCJ) findings that (1) while employed on February 8, 2016 as a nurse case manager, applicant sustained injury arising out of and the course of employment (AOE/COE) to the face (facial contusion) and jaw/TMJ, and claims to have sustained injury AOE/COE to the nose, ear, head (consisting of a neurological disorder with traumatic brain injury) and psyche; (2) applicant did not sustain an injury AOE/COE to the nose, ear, head and psyche; (3) applicant's earnings were \$1,831.60 per week, warranting a temporary disability indemnity rate of \$1,128.43 per week, and \$290.00 statutory rate for permanent disability; (4) applicant is not entitled to additional temporary disability for the period August 13, 2016 through February 2, 2018; (5) the correct occupational code is that of a nurse case manager, code number 211; (6) the injury caused permanent disability of 8 percent payable forthwith, less credit for all sums previously paid, less the attorney's fee awarded in "Finding No. 6, below"; (7) applicant needs future medical care for her jaw/TMJ; and (8) applicant's attorney is entitled to a fee of 15 percent of the permanent disability award, to be commuted from the far end of the award, if necessary, and adjusted by the parties; except that we amended to (1) correct a clerical error referencing the finding as to the attorney's fee; (2) find applicant entitled to additional temporary disability benefits for the period of August 13, 2016 through February 2, 2018, with the amount to be adjusted parties and jurisdiction reserved to the WCJ in the event of a dispute; and (3) omit the order that applicant take nothing on her claim for temporary disability benefits for the

period August 13, 2016 through February 2, 2018; and we returned the matter to the trial level for further proceedings consistent with this decision.

Defendant contends that the record fails to support the finding that applicant is entitled to temporary disability benefits for the period of August 13, 2016 through February 2, 2018 on the grounds that (1) PQME neurologist Dr. Bakst opined that applicant's neurological functional disorder is not the result of industrial injury; (2) the reporting of PQME dentist Dr. Abri does not constitute substantial evidence on the issue of whether applicant is entitled to additional temporary disability benefits; and (3) applicant's testimony lacked credibility.

We received an Answer.

We received a Report and Recommendation on Petition for Reconsideration (Report).

We have reviewed the contents of the Petition and the Answer. Based on our review of the record, and for the reasons stated below and in our December 29, 2023 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, which we incorporate herein, we will deny the Petition.

FACTUAL BACKGROUND

The April 24, 2018 QME report of Dr. Abri includes the following:

PERMANENT AND STATIONARY STATUS

Patient is not P&S and her TMJ and myofascial pain can improve if she wears a properly fitting occlusal splint,

IMPAIRMENT RATING AND RATIONALE (ORGAN SYSTEM AND WHOLE PERSON IMPAIRMENT)

WPI is not given because patient is not P&S.

TEMPORARY DISABILITY

From a dental and TMJ and muscles pain perspective the patient was temporarily disabled, (Ex. 11, QME report of David Abri, DDS, April 24, 2018, p. 10.)

The December 6, 2020 Supplemental QME report of Dr. Abri includes the following:

I'm in agreement with the finding of her doctors regarding her injuries. With reasonable medical/dental probability, it is opined that the ongoing symptomology of pain and discomfort in her head, face, lower eye region (right-side), jaw, jaw-joint, and neck have progressed to include a trauma-induced temporomandibular

joint/myofascial pain disorder, which has resulted from her industrial-based diagnosed head, jaw, and neck injuries.

The patient will need continued treatment for her symptoms which were caused by the industrial injury.
(Ex. 12, Supplemental QME Report of David Abri, DDS, December 6, 2020, p. 3.)

DISCUSSION

Before we address the merits of the Petition, we acknowledge receipt of the Report. Under WCAB Rule 10962, petitions for reconsideration are referred to the WCJ from whose decision relief is sought so that the WCJ may provide a discussion regarding the support in the record for the decision as well as a recommendation as to what action should be taken. (Cal. Code Regs., tit. 8, § 10962.)

In this case, the decision from which the Petition seeks relief is our December 29, 2023 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, and we did not return the matter to the WCJ for further determination of any issues. Accordingly, while we appreciate the WCJ's diligence in preparing the Report, it was not necessary for the WCJ to opine on the merits of our decision or the issues raised by the Petition.

As to the merits of the Petition, defendant first argues that the record fails to support the finding that applicant is entitled to temporary disability benefits for the period of August 13, 2016 through February 2, 2018 on the grounds that PQME Dr. Bakst opined that applicant's neurological functional disorder is not the result of industrial injury.

Here, our December 29, 2023 Opinion and Order cites the WCJ's Report as follows:

PQME Dr. Bakst further stated that although the applicant claims to have suffered a traumatic brain injury and concussion, there was no objective evidence of neurological impairment. Dr. Bakst further opined that he thought the duration of the applicant's disability was unusual. In addition, PQME Dr. Bakst stated it appeared to him that the applicant has a functional neurological disorder on a psychological or psychiatric basis which is 100% non-industrial (See Deposition of Dr. Bakst dated July 14, 2022, Joint Exhibit 6, pages 8 and 9). He opined that the psychological condition does NOT rise to the level of industrial causation and because the psych does not arise to the level of industrial level causation, the neurological functional disorder flowing from the psyche is also not industrial. (See Deposition of Dr. Bakst dated July 14, 2022, joint exhibit 6, page 10).

Dr. Bakst stated that although there was a physical injury and the impact of the ball striking the applicant may have been causative to the headaches and facial pain, the

residual impact of that injury/impairment is due to a psychological condition (See Deposition of Dr. Bakst dated July 14, 2022, joint exhibit 6, pages 13 and 14).

PQME Dr. Bakst diagnosed the applicant with Somatoform functional neurological disorder. A functional disorder in neurology is a symptom complex that does not have an organic basis, and rational explanations are not present to confirm the diagnosis. (See Deposition of Dr. Bakst dated July 14, 2022, joint exhibit 6, page 15). Rather, Dr. Bakst explained that it has to do with the way information is processed in the brain.

...

Finally, Dr. Bakst is of the opinion that the applicant's ongoing symptoms are on a non-industrial basis. He assigns a WPI of 20% but states 100% of this impairment should be apportioned and is due to chronic facial pain and headache due to non-industrial functional neurological symptom disorder.

(Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, December 29, 2023, pp. 4-5.)

Hence, the record demonstrates that neither the WCJ's findings, the WCJ's recommendation to amend the findings so that applicant is entitled to temporary disability benefits for the period of August 13, 2016 through February 2, 2018, nor our own decision to accept the WCJ's recommendation to find that applicant is entitled to temporary disability benefits for the period of August 13, 2016 through February 2, 2018, was based upon the reporting of PQME Dr. Bakst.

Accordingly, defendant's argument that the record fails to support the finding that applicant is entitled to temporary disability benefits for the period of August 13, 2016 through February 2, 2018 on the grounds that PQME Dr. Bakst opined that applicant's neurological functional disorder is not the result of industrial injury is moot.

Defendant next argues that the record fails to support the finding that applicant is entitled to temporary disability benefits for the period of August 13, 2016 through February 2, 2018 on the grounds that the reporting of PQME Dr. Abri does not constitute substantial evidence as to the issue of whether applicant is entitled to temporary disability benefits.

In this regard, we observe that the purpose of temporary disability benefits is to provide interim wage replacement assistance to an injured worker during the period he or she is healing. (*Gamble v. Workers' Comp. Appeals Bd.* (2006), 143 Cal.App.4th 71, 80 [71 Cal.Comp.Cases 1015].) The existence and duration of temporary disability present a question of fact for the WCAB to determine by a preponderance of the evidence and must be supported by substantial

evidence. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993)16 Cal.App.4th 227 [58 Cal.Comp.Cases 323]; *Le Vesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d. 627, 639–640 [35 Cal.Comp.Cases 16].)

Here, the WCJ found that applicant sustained injury AOE/COE to the jaw/TMJ based upon the reporting of Dr. Abri. (Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, December 29, 2023, pp. 7-8.) Because the parties selected Dr. Abri for his expertise and neutrality, his opinion is to be followed unless there is good reason to conclude that it is incorrect or not persuasive—and we found none. (See *Power v. Workers' Comp. Appeals Bd. (Power)* (1986) 179 Cal.App.3d 775, 782-784 [51 Cal.Comp.Cases 114].)

In addition, our review of Dr. Abri's reporting indicates that he determined that applicant was not yet permanent and stationary as of April 24, 2018, and was temporarily disabled for a period beyond February 2, 2018, the last date for which applicant is eligible to receive temporary disability benefits. (Ex. 11, QME report of David Abri, DDS, April 24, 2018, p. 10; Ex. 12, Supplemental QME Report of David Abri, DDS, December 6, 2020, p. 3.)

Accordingly, we are unable to discern merit to defendant's argument that the record fails to support the finding that applicant is entitled to temporary disability benefits for the period of August 13, 2016 through February 2, 2018 on the grounds that the reporting of PQME Dr. Abri does not constitute substantial evidence.

Lastly, defendant argues that the record fails to support the finding that applicant is entitled to temporary disability benefits for the period of August 13, 2016 through February 2, 2018 on the grounds that applicant's testimony lacked credibility.

Here, we concluded that the “record supports the reasoning of the WCJ . . . that applicant's testimony was ‘self-serving and inconsistent’ . . . [and] [t]he WCJ properly included her assessment of applicant's credibility in determining issues at trial.” (Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, December 29, 2023, p. 12.)

In other words, both we and the WCJ accounted for applicant's lack of credibility in determining the issues presented.

Accordingly, we are unable to discern merit to the contention that record fails to support the finding that applicant is entitled to temporary disability benefits for the period of August 13, 2016 through February 2, 2018 on the grounds that applicant's testimony lacked credibility.

Accordingly, we will deny the Petition.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration issued on December 29, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 25, 2024

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

**JESSICA CHEVERIE
HEWGILL, COBB & LOCKARD
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN**

SRO/cs

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