WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KENT KAFENTZIS, *Applicant*

vs.

SAFETY-KLEEN SYSTEMS, INC.; RELIANCE NATIONAL INDEMNITY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ7320497
Long Beach District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and the Opinion on Decision 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 and opinion, which are both adopted and incorporated herein, 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*.)

Finally, we admonish defense attorney Frank Cannizzaro with the law firm of Lewis, Brisbois, Bisgaard & Smith for using offensive, inappropriate, and disrespectful language in the Petition for Reconsideration as described on page six (6) of the Report. (See Lab. Code, § 5813; see also Cal. Code Regs., tit. 8, former § 10561(b)(9)(B), now § 10421(b)(9)(B) (eff. Jan. 1, 2020) [sanctionable conduct includes "using any language in any pleading or other document […] [w]here the language or gesture impugns the integrity of the Workers' Compensation Appeals Board or its commissioners, judges, or staff"].) The failure to comply with the WCAB's rules in the future may lead to the imposition of sanctions.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 19, 2021

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

KENT KAFENTZIS
LAW OFFICES OF RICHARD MARK BAKER
LEWIS, BRISBOIS, BISGAARD & SMITH

PAG/*pc*

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

REPORT AND RECOMMENDATIONON PETITION FOR RECONSIDERATION

I
INTRODUCTION

This matter involves an applicant who was exposed to toxic chemicals in 1995 while working for defendant and subsequently was diagnosed with renal cell carcinoma (cancer) which has spread affecting his abdomen (kidney), back circulatory system and excretory system. Defendant's QME Richard Hyman, M.D. was the first QME to find injury AOE/COE and applicant 100% permanently totally disabled. Applicant's QME Nachman Brautbar, M.D., was the next to find injury AOE/COE and applicant 100% permanently totally disabled. These medical reports being the better reasoned and more persuasive, this WCJ found applicant to have sustained injury AOE/COE and that applicant is 100% permanently totally disabled. Defendant now petitions for reconsideration primarily asserting that this WCJ erred in not relying on an inadmissible medical report of another physician Peter Shields, M.D., which defendant obtained after the reporting of their QME Dr. Hyman whom they were clearly dissatisfied with.

II
FACTS

Applicant was employed by defendant Safety-Kleen Systems ("Safety-Kleen") as a warehouseman/sales route person for the period of 05/01/1995 through 11/30/1995. His duties required him to handle and come in contact with toxic chemicals that were contained in the cleaning solvent(s) that Safety-Kleen sold and installed in cleaning sinks for their various clients. This solvent was used primarily in cleaning/degreasing automotive parts at vehicle dealerships and/or repair facilities. The applicant breathed in these toxic chemicals on a daily basis as he did not utilize any type of respirator device. Additionally, the toxic chemicals came into direct contact with his skin including soaking through his clothing on many occasions. He reported this toxic chemical exposure and contact to Safety-Kleen while working there. Several years after working there, applicant developed the renal cell carcinoma. He then hired his attorney and filed [the] instant claim and application.

After filing the claim defendant disputed injury AOE/COE and this being a 1995 year of injury and pursuant to Sec. 4060 set an evaluation with Richard Hyman, M.D. as their selected defense QME. Dr. Hyman issued medical reports dated 07/10/2014 and 07/17/2014, both of which found injury AOE/COE and applicant to be 100% permanently totally disabled. Thereafter, applicant pursuant to Sec. 4060 set an evaluation with Nachman Brautbar, M.D. as their selected applicant QME. Dr. Brautbar issued medical reports dated 02/27/2015,

03/27/2015 and 05/16/2016 which found injury AOE/COE and applicant to be 100% permanently totally disabled.

Defendant, being dissatisfied with the findings of their QME Dr. Brautbar, obtained an industrial hygienist report of a John Spencer, dated 08/17/2017. Thereafter, and without any designation or appointment, defendant sent the hygienist report to Peter Shields, M.D. Without examining the applicant, Dr. Shields issued a report, dated 08/25/2017 finding that applicant did not develop the renal carcinoma from any exposure while working at Safety-Kleen. Defendant then sent this report of Dr. Shields to their QME Dr. Hyman for review. Dr. Hyman issued a supplemental report on his review of the reporting of Dr. Shields and agreed with Dr. Shield's determination. As such, defendant maintained their continual denial of the claim.

The matter proceeded to trial with testimony on the following dates: 02/18/2020, 03/10/2020, 08/25/2020 and 09/16/2020.

At the 03/10/2020 trial proceeding applicant had objected to defendant's exhibits "B" and "C" the medical report of Peter Shields, M.D., dated 08/25/2017 and the industrial hygienist report of John Spencer, dated 08/17/2017 being admitted into evidence, asserting, among other things, that they were inadmissible pursuant to of Sec. 4628(c). In response defendant represented to this WCJ that the medical report and hygienist report was admissible and properly obtained in compliance with the Labor Code and was reviewed and reported on by their QME Dr. Hyman and agreed to provide further clarification as to the type of evaluation provided by Dr. Shields and to explain why this WCJ should rely on such reporting in their post-trial brief. No evidence having yet been reviewed by this WCJ, the exhibits were allowed it into evidence, but in light of the objections of applicant this WCJ would give the reports their due weight and to see what defendant's QME Dr. Hyman might have said and as to the weight and persuasiveness to give this supplemental report of Dr. Hyman, dated 09/07/2018. (MOH 03/10/2020 Pg. 2, Lines 23 – 25; Pg. 3, Lines 1 – 7). (In retrospect, this WCJ acknowledges he should have marked Exhibit "B" and "C" for I.D. only at the time of the 03/10/2020 trial and issued a ruling as to their admissibility in the Findings and Award. Had this occurred, this WCJ would have ruled the medical report of Dr. Shields, dated 08/25/2017, inadmissible as shall be seen hereinafter).

The final trial testimony was completed on 09/16/2020 and the matter was submitted for decision on 10/13/2020 to afford the parties time to submit post-trial briefs.

On 12/14/2020, this WCJ issued an Order Vacating Submission for Decision and Notice of Hearing, resetting the matter for trial on 02/10/2021 due to the fact that applicant, in the post-trial brief, had attached various documents to the trial brief which were not offered into evidence prior to submission for

decision and it appeared applicant wished to offer them into evidence. It should be noted that this WCJ did not review the attached documents at any time other than to reference to see if previously offered into evidence. Defendant had filed an opposition thereto.

At the 02/10/2021 trial, this WCJ admonished attorney for applicant for simply attaching the documents to the trial brief rather than petitioning to reopen the record to offer them. After some discussion, attorney for applicant elected to withdraw the trial brief and requested to file a new trial brief without the attachments or references to them. There was no objection to this by defendant. As such, applicant was granted 20 days for file a new post-trial brief with the matter being submitted for decision on 03/02/2021. (See MOH dated 02/10/2021).

On 05/28/2021, this WCJ issued the Findings and Award and Opinion on Decision finding applicant to have sustained injury AOE/COE and to be 100% permanently totally disabled based on the findings of Dr. Brautbar and Dr. Hyman. This WCJ gave no weight to the industrial hygienist report of John Spencer as it was based on questionable data and samplings. Additionally, no weight was given the medical report of Dr. Shields as defendant had not explained adequately the status of this physician in this matter in their trial brief and that Dr. Shields apparently did not examine the applicant which makes the report inadmissible pursuant to Sec. 4628(c). As a result, this WCJ did not give any weight to Dr. Hyman's 09/07/2018 subsequent review and reporting regarding the report of Dr. Shields. It is from this finding that defendant files their petition for reconsideration.

III
DISCUSSION

Defendant's main assertion is that this WCJ erred in not relying on the industrial hygienist report of John Spencer, the medical report of Dr. Shields and the supplemental report of Dr. Hyman regarding his review of same.

At the 03/10/2020 trial, this WCJ heard the arguments both for and against the admission into evidence of the hygienist report, dated 08/17/2017, and the report of Dr. Shields, dated 08/25/2017. The attorney for defendant asserted that all were obtained in accordance with the Labor Code and admissible. Additionally, their QME Dr. Hyman had reviewed them and issued a report thereon. Wishing to strike a balance, this WCJ admitted them into evidence, but clearly indicated that they would be given their due weight in light of applicant's objections. Defendant failed to explain in their trial brief the status of Dr. Shields, especially since they already had their QME evaluator, Dr. Hyman. Having reviewed the medical reporting of Dr. Shields, and defendant now clarifying for the first time on petition for reconsideration that this is an "additional" QME doctor reporting for defendant, it is apparent that the report

is inadmissible pursuant to Sec. 4628(c) as Dr. Shields did not conduct an examination/questioning of the applicant as is required of a QME pursuant to Sec. 4060 and 4628(c). Additionally, Dr. Shield's medical report does not contain the declarations under penalty of perjury required by Sec.'s 139.3 and 4628(j). Even if the medical report of Dr. Shields is admissible, it does not constitute substantial medical evidence. As stated above, Dr. Shields did not examine the applicant. Additionally, the underlying hygienist report of John Spencer which Dr. Shields relied upon is not substantial evidence of applicant's exposure to the toxic chemicals at Safety-Kleen. The hygienist report is based upon recorded samplings at the Safety-Kleen warehouse from 1995 which were performed by Safety-Kleen employees. There was no foundation laid by defendant that these employees had the requisite training to properly conduct such samplings, nor was there any reporting as to applicant's particular density of exposure to the toxic chemicals such as when applicant was servicing the degreasing/cleaning sinks at the various dealership/repair shop locations. Applicant's unrebutted testimony indicated he spilled the toxic chemicals on his skin many times directly and from soaking through his clothing. He also would be in confined spaces servicing the degreasing/cleaning sinks and breathing-in the toxic chemicals as he was not provided with any respirator. Where are the samplings from this exposure? There are none. As such, and though this WCJ allowed the report of Dr. Shields into evidence, this WCJ gave it no weight whatsoever as it does not constitute substantial medical evidence. As indicated above, this WCJ should have marked the medical report of Dr. Shields for I.D. only at the time of the 03/10/2020 trial and ruled on its admissibility in the Findings and Award. If this had occurred, this WCJ would have reviewed and commented on the report, but would have ruled it as inadmissible pursuant to Sec.'s 4060 and 4628(c). Additionally, since the supplemental medical report of Richard Hyman, M.D., dated 09/07/2018, was based upon the reporting of Dr. Shields, this WCJ found it did not constitute substantial medical evidence either.

Turning to the remaining evidentiary record, the reporting of applicant's QME Dr. Brautbar and defendant's QME Dr. Hyman finds the applicant to have sustained injury AOE/COE regarding his renal cell carcinoma and associated body parts and that applicant is 100% permanently totally disabled. As stated in the Opinion on Decision, the predicate upon which the finding of injury AOE/COE is based upon is the principle set forth in McAllister v. WCAB (1968) 33 CCC 660. In proving causation in a toxic exposure injury, the applicant is not required to provide a detailed account of the alleged industrial causation such as the exact amount of hazardous substance to which he or she was exposed or the precise danger to the applicant from the exposure to the substance. An applicant need only prove causation be a reasonable medical probability, not an absolute certainty. This was established by the detailed and substantial medical opinions of applicant's QME Nachman Brautbar, M.D. who has demonstrated that he is well-qualified to make such a determination and has eminently done so. Defendant's QME Richard Hyman, M.D. previously found the same as set forth in his medical reports dated 07/10/2014 adn07/17/2014. As indicated, this WCJ

did not give credence to Dr. Hyman's report dated 09/07/2018 as it was based on the medical reporting of Dr. Shields which in addition to not constituting substantial medical evidence, was actually inadmissible. Also, applicant provided credible and unrebutted testimony as to his daily exposure to the toxic chemicals, especially when doing the deliveries and setting up the solvent sinks. He was in extremely close and confined proximity to the toxic chemicals and absorbed them through his skin and by breathing them in, as he wore no respirator.

As to credit asserted by defendant against the 100% PD awarded for any periods applicant may have worked since working at Safety-Kleen is unsupported. An applicant found to be 100% permanently totally disabled may still work for an employer and receive the PD payments from defendant without any such credit to defendant. This is set forth by the California Supreme Court, en banc, in Smith v. IAC (1955) 20 CCC 82. 86, which states in pertinent part:

> "It is settled law in this state that an employee may receive a permanent disability rating of 100 per cent and be entitled to disability payments incident to such rating although he is able to return to work at the wages he receive before the injury which caused the disability." (Id. at 84)

Lastly, defendant inappropriately implies in argument "A" caption on Page 13, Lines 15 – 17 that this WCJ improperly reviewed documents applicant attempted to introduce by way of their post-trial brief and incorporated such conclusions in the opinions and findings. As stated above, except for noting the documents attached to applicant's post-trial brief, this WCJ has never reviewed those documents. This WCJ vacated the submission of the matter and addressed this with the parties and admonished attorney for applicant for attaching them. Applicant's attorney withdrew the documents and filed an amended post-trial brief without the attached documents, as set forth above. As such, any and all documents that were so previously attached are not part of the evidentiary record. The defendant has therefore alleged that this WCJ viewed documents outside of the evidentiary record which is a very serious accusation to make against this WCJ and subjects defendant to the imposition of sanctions pursuant to Sec. 5813 and Reg. 10421. As such, this WCJ recommends that the Appeals Board at a minimum admonish attorney Frank Cannizzaro, Esq. of Lewis, Brisbois, Bisgaard & Smith, LLP for leveling such an offensive and unfounded accusation against this WCJ which impugns the integrity of the WCAB.

IV
RECOMMENDATION

Based on the above discussion it is respectfully recommended that the petition for reconsideration be denied.

DATE: 07/22/2021
Michael T. Justice
WORKERS' COMPENSATION JUDGE

OPINION ON DECISION

INJURY AOE/COE

Based upon applicant's credible and unrebutted testimony and the medical reports and depositions of Nachman Brautbar, M.D., dated 02/27/2015, 03/27/2015, 05/16/2016 and his depositions of 06/03/2016 and 12/02/2016, which are the better reasoned and more persuasive, it is found that applicant sustained injury in the form of renal cell carcinoma (cancer) affecting his abdomen (kidney), back, circulatory system and excretory system, arising out of and occurring in the course of employment on during the period 05/01/1995 to and including 11/30/1995.

The predicate upon which the finding of injury AOE/COE is based upon the principle set forth in McAllister v. WCAB (1968) 33 CCC 660. In proving causation in a toxic exposure injury, the applicant is not required to provide a detailed account of the alleged industrial causation such as the exact amount of hazardous substance to which he or she was exposed or the precise danger to the applicant from the exposure to the substance. An applicant need only prove causation be a reasonable medical probability, not an absolute certainty. This was established by the detailed and substantial medical opinions of applicant's QME Nachman Brautbar, M.D. who has demonstrated that he is well-qualified to make such a determination and has eminently done so. And to be clear, his medical reports constitute substantial medical evidence. His opinions were essentially mirrored by defendant's QME, Richard Hyman, M.D. as set forth in his medical reports dated 07/10/2014 adn07/17/2014. The court did not give credence to Dr. Hyman's report dated 09/07/2018 as it was based on questionable self-serving documents subsequently obtained by defendants which Dr. Hyman, as defense QME, merely rubber-stamps. Also, applicant credibly testified to his daily exposure to the toxin chemicals, especially when doing the deliveries and setting up the solvent sinks. He was in extremely close and confined proximity to the toxic chemicals and absorbed them through his skin and by breathing, as he wore no respirator.

As to defendant's hygienist report of John Spencer, dated 08/17/2017, in which he was hired by the defendant's, similar to competing vocational experts that parties hire, wrote the report in favor of defendant's position in an attempt to diminish the exposure applicant had to the toxic chemicals. This report fails to discuss or understand in the terms Dr. Brautbar did, the daily levels of exposure of applicant (i.e. multiple spills/skin burns and daily inhalation) of the toxic materials and the effect on applicant. The report contains no review of the testing at any of the locations where applicant delivered the toxic chemicals regarding the levels of toxins applicant was inhaling when servicing the solvent cleaning sinks. Dr. Brautbar, and Dr. Hyman did discuss and affirmed this exposure and determined causation to be a reasonable medical probability. Their

combined medical opinions, without this self-serving defense hygienist report, are the best evidence of causation.

Now, as the so-called reporting of Peter Shields, M.D., though this WCJ allowed this report into evidence over applicant's objection, this WCJ indicated it would give it is due weight in light of the unknown status of this doctor in this matter. It is noted that being an injury occurring in 1995, the parties obtained their respective QME doctors Brautbar and Hyman, as noted above. But, who is Dr. Shields? How does he come into play? This is not adequately explained by defendant in their trial brief. Dr. Shields wasn't a treating physician authorized by defendant. He was not a medical-legal evaluator (That was QME Dr. Hyman). He didn't even evaluate the applicant, as far as this WCJ can tell. The appearance to this WCJ is that defendant, being dissatisfied with the fact their QME Dr. Hyman agreed with applicant's QME Dr. Brautbar that applicant sustained injury AOE/COE and was 100% permanently totally disabled, did a bit of "doctor shopping" and obtained the hygienist report and this after-the-fact review and report of Dr. Spencer. This likely renders the report inadmissible, but this WCJ wished to give the chance to the defendant to explain this occurrence and was willing to see what this doctor had to say on the matter. Having reviewed the report and consistent with this WCJ's ruling as to the weight the report would be given, this WCJ gives it no weight whatsoever as it is clear that it was obtained by defendant in an attempt to get "a second bite of the apple" on causation, since defendant was clearly dissatisfied with the findings of their QME Dr. Hyman.

PERMANENT DISABILITY

The factors of permanent disability based upon applicant's testimony with due consideration to his credibility as a witness and the medical reports of Nachman Brautbar, M.D., dated 02/27/2015, 03/27/2015, 05/16/2016 which are the better reasoned and more persuasive, it is found that applicant is entitled to a permanent total disability award of 100 percent, payable for life and payable at the rate of $432.90 per week, commencing 08/21/2009.

NEED FOR FURTHER MEDICAL TREATMENT

Based upon the medical report of Nachman Brautbar, M.D., dated 02/27/2015, 03/27/2015, 05/16/2016 it is found that applicant is in need of further medical treatment to cure or relieve from the effects of the industrial injury.

SELF-PROCURED MEDICAL TREATMENT

This issue is deferred per the request of the parties. Jurisdiction reserved.

ATTORNEY FEES

Based on the Title 8, Cal. Code of Regs., § 10775 and the guidelines for awarding attorney fees found in Policy and Procedural Manual Index No. 6.8.4, it is found that this matter is one of average complexity and that a reasonable attorney fee is 15% of the accrued total permanent disability awarded and 15% of every indemnity payment thereafter. Jurisdiction reserved in the event of a dispute in calculations between the parties.

DATE: May 28, 2021
Michael T. Justice
WORKERS' COMPENSATION JUDGE