WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIA HERRERA aka MARIA BAUTISTA, *Applicant*

vs.

OS4LABOR dba RALLY STAFFING INVO PEO, INC.; BENCHMARK INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ11389287
Marina del Rey 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 as quoted below, 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*.)

We adopt and incorporate the following quote from the WCJ's report:

II
FACTS

> Applicant was employed as a janitor for OS4LABOR dba Rally Staffing Invo PEO, Inc., from November 14, 2017 to April 3, 2018 (a total of 140 days or 20 weeks) and claimed industrial injuries to her arms, shoulders, elbows, wrists, hands, fingers, back and lumbar spine. Defendant timely denied the claim.
>
> Applicant testified to working 8 hours a day with occasional overtime (Minutes of Hearing and Summary of Evidence, 10-22-2020, page 2, lines 14-15, EAMS Doc ID 73449917), which consisted of packing shoes, which entailed putting a

sticker on a box as it came off a conveyor belt, putting shoes in it, sealing it, and putting it in another box. (Minutes of Hearing and Summary of Evidence, 10-22-2020, page 2, lines 20-22, EAMS Doc ID 73449917) She also testified that her orthopedic complaints (for all body parts claimed except her low back) started in November of 2017, which would be within the first two weeks of her employment. (Minutes of Hearing and Summary of Evidence, 10-22-2020, page 3, lines 17-20, EAMS Doc ID 73449917) Her lumbar spine symptoms started in January of 2018. (Minutes of Hearing and Summary of Evidence, 10-22-2020, page 3, lines 16-17, EAMS Doc ID 73449917) Applicant was terminated from her temporary position on April 13, 2018. (Minutes of Hearing and Summary of Evidence, 10-22-2020, page 3, lines 8-9, EAMS Doc ID 73449917)

Applicant started treating with Dr. Zareena Khan on July 23, 2018 but failed to inform the doctor about any extra duties she did regarding packing shoes. (Applicant's Exhibit 1, page 1, History of Injury and Job Description paragraphs, EAMS Doc ID 33851337) Dr. Zareena Khan's final report also fails to indicate any extra job duties beyond those indicated in the doctor's initial report. (Applicant's Exhibit 2, pages 1-2, Job Description and History of Injury paragraphs, EAMS Doc ID 33851335) Applicant was eventually seen by a panel qualified medical evaluator, Dr. Shail Vyas, on December 26, 2019. (Defendant's Exhibit B, EAMS Doc ID 33819679). The Applicant testified that she did not tell the doctor about her working on the production line for boxing shoes because she did not think that this was important information to give to the doctor. (Minutes of Hearing and Summary of Evidence, 10-22-2020, page 4, lines 15-16, EAMS Doc ID 73449917)

Applicant filed a DOR, and at the Mandatory Settlement Conference on August 20, 2020, the case was set for trial.

On September 22, 2020, this WCJ reviewed the Pre-trial Conference Statement with the parties and determined that the trial would proceed on the issue of AOE/COE, post-termination defense, and Labor Code §5401, failure to provide a claim form. The record was opened, evidence was offered and ordered admitted. The matter was continued twice, with the Applicant and Erick Rodriguez being the only witnesses to testify, before the matter ultimately stood submitted on December 1, 2020.

It is from the finding that Applicant take nothing that Applicant seeks reconsideration.

III
DISCUSSION

To the extent that the Opinion on Decision may seem skeletal, pursuant to *Smales v. WCAB* (1980) 45 CCC 1026, this Report and Recommendation cures that defect.

Applicant's first argument is this WCJ erred in relying on the medical reporting of Dr. Shail Vyas as she contends that it is not substantial medical evidence. In support of this position, Applicant contends that there are four separate reasons that the medical report(s) do not constitute substantial evidence: (1) The job duties that Applicant testified to at trial were not taken into account by Dr. Vyas, (2) The medical report is internally inconsistent regarding Applicant's complaints of pain, (3) Applicant testified that she spent only 5 minutes with Dr. Vyas, and (4) The Dr. Vyas fails to provide an explanation for Applicant's diagnostic findings.

Applicant testified to additional job duties that she performed while working overtime. The testimony essentially reflects that the Applicant would work on the production line boxing shoes after she completed her usual and customary duties as a janitor. Dr. Vyas was not told this information and neither was Dr. Zareena Khan, Applicant's primary treating physician. It appears from the evidence submitted that her testimony on October 22, 2020 is the first time this additional work comes to light. She testified that she worked Monday to Friday but sometimes, when she was working overtime, she would also work on Saturday (Minutes of Hearing and Summary of Evidence, 10-22-2020, page 2, lines 15-16, EAMS Doc ID 73449917) for an additional 2 hours.

Erick Rodriguez, the on-site supervisor for Defendant, wasn't aware of Applicant performing any other job duties besides the janitorial work. (Minutes of Hearing and Summary of Evidence, 12-1-2020, page 3, lines 9-10, EAMS Doc ID 73587428) Further, Mr. Rodriguez credibly testified that the only overtime Applicant would have occurred was when the plant stayed open over the weekend and she would come in on those days. (Minutes of Hearing and Summary of Evidence, 12-1-2020, page 3, lines 10-11, EAMS Doc ID 73587428)

Regardless of the extent of the work done, the Applicant simply did not feel that this was important information to provide to any doctor she was seeing (Minutes of Hearing and Summary of Evidence, 10-22-2020, page 4, lines 15-16, EAMS Doc ID 73449917), and it is on this basis that the last-minute revelation of limited additional work duties, in my opinion, does not cause Dr. Vyas's report to become non-substantial medical evidence.

Applicant's second contention is that Dr. Vyas's report is internally inconsistent. On page 3 of Dr. Vyas's report (Defendant's Exhibit B, EAMS Doc ID 33819679), he indicates under History of Present Injury that Applicant informed him that she has bilateral shoulder pain which is 6 out of 10 with pain with certain movements of her shoulders. Then on page 9 when Dr. Vyas is performing the Physical Examination, he notes that she has no pain with any range of motion. These statements reflect the history taken from Applicant and the objective findings observed while performing a physical examination and

are completely consistent. Any contention that Dr. Vyas's report is internally inconsistent is specious.

Applicant's third contention is that Dr. Vyas only saw applicant for 5 minutes in person. Dr. Vyas's report indicates that he spent 60 minutes of face to face time and the attestation indicates that Dr. Vyas personally took the examinee's history and performed the physical examination himself. Applicant testified under cross-examination that her exam was scheduled for 8:00 or 9:00 in the morning and that she did not leave until 11:00 or 12:00. (Minutes of Hearing and Summary of Evidence, 10-22-2020, page 4, lines 23-125, EAMS Doc ID 73449917) She did not indicate that someone besides Dr. Vyas saw her, took her history, or did the physical examination. It is not believable that Dr. Vyas could accomplish all this in 5 minutes in order to generate the December 26, 2019 report. I therefore find Applicant's claim to be without merit.

Finally, Applicant's last basis for finding Dr. Vyas's report is not substantial is that he failed to provide an explanation for the objective findings on the MRIs performed on this 37 year old Applicant. Applicant's Petition for Reconsideration specifically refers to the MRI of Applicant's lumbar spine and right shoulder. Applicant's lumbar spine MRI shows disc protrusions from L3 to S1 all less than 3mm. Although the MRIs themselves were not offered into evidence, from the review of the MRIs done by Dr. Khan (Applicant's Exhibit 2, pages 12, EAMS Doc ID 33851335), the report only shows mild stenosis. As for Applicant's right shoulder MRI, both doctor's indicate that there is evidence of findings consistent with posterior glenoid labrum tear. Dr. Vyas opined that the Applicant did not work long enough (15 days before commencement of symptomology) to accumulate any significant trauma. (Defendant's Exhibit B, page 12. CAUSATION paragraph, EAMS Doc ID 33819679). The doctor reviewed the MRIs and simply found insufficient causal link between Applicant's work and the objective findings. There is no requirement that the doctor provide any explanation as to what might have caused the objective findings; he needs only to address whether they are industrially related or not.

Applicant's next contention is that Dr. Vyas's report is not substantial evidence because he states an incorrect legal theory in reaching his medical opinion on causation. I agree that Dr. Vyas's discussion regarding not reporting the injuries and the timing of the filing of the application are incorrect with regard to causation and would not be determinative factors. This WCAB judge did not utilize or rely on these "legal statements" but relied in part on the doctor's medical opinion regarding insufficient time to have developed symptoms and that it would be highly unlikely that all the body parts alleged would start to become symptomatic at the same time.

Finally, Applicant raises Labor Code §3202, which provides that the Labor Code shall be liberally construed by the courts with the purpose of extending benefits for the protection of persons injured in the course of their employment. This

section is utilized in the interpretation and application of the Labor Code, not in the determination of facts and credibility. California's workers compensation system is a benefits delivery system, but only for workers that have sustained an injury in the course and scope of their employment. The determination of whether or not an individual has sustained an injury is left to the courts to determine based on the evidence presented. I did not find Applicant to be a credible witness and the qualified medical examiner, Dr. Vyas, indicated that there was insufficient length of employment to have substantiated a cumulative trauma claim. Even if Labor Code §3202 was somehow applicable in this matter, Applicant would still have failed to meet her burden of proof.

IV
RECOMMENDATION

For the reasons stated above, it is respectfully requested that Applicant's Petition for Reconsideration be ordered Denied.

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/ DEIDRA E. LOWE, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 29, 2021

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

MARIA HERRERA aka MARIA BAUTISTA
HINDEN & BRESLAVSKY
PEARLMAN, BROWN & WAX

PAG/*pc*

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