

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

MANUELA CARREON, *Applicant*

vs.

**VALLARTA SUPERMARKETS, insured by SAFETY NATIONAL CASUALTY CORPORATION, administered by SEDGWICK CMS; and ADP TOTAL SOURCE FLXVI, INC., dba THREE D PLASTICS, insured by AMERICAN HOME ASSURANCE COMPANY, administered by HELMSMAN MANAGEMENT SERVICES, LLC,
*Defendants***

**Adjudication Number: ADJ11738998
Van Nuys District Office**

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant ADP Total Source FLXVI, Inc., dba Three D Plastics, insured by American Home Assurance Company, administered by Helmsman Management Services, Inc. (Three D Plastics) seeks reconsideration of the May 11, 2021 Amended Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a machinist from May 1, 2016 to January 13, 2019, sustained industrial injury to the wrists, back and neck, with all other body parts deferred. Applicant had concurrent employment during the alleged cumulative trauma with Vallarta Supermarkets (Vallarta) and with Three D Plastics. The WCJ found that the reporting of Agreed Medical Evaluator (AME) Yuri Falkinstein, M.D. constituted substantial medical evidence, and relying thereon, determined that applicant sustained injury arising out of and in the course of employment (AOE/COE), attributable solely to her employment with Three D Plastics.

Three D Plastics contends that AME Dr. Falkinstein described two different causation scenarios, and that the totality of the record including the reporting of Qualified Medical Evaluator

(QME) Frank Guellich, M.D. should be relied upon to determine that applicant did not sustain injury as a result of her employment with Three D Plastics. (Petition at 3:18.)

We have reviewed the Answer filed by co-defendant Vallarta. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the May 11, 2021 F&A.

FACTS

Applicant claimed injury to her wrists, back and neck while employed by Vallarta Markets as a deli clerk, and by Three D Plastics as a machinist, from May 1, 2016 through January 13, 2019. Both defendants denied injury AOE/COE.

Yuri Falkinstein, M.D. acted as the Agreed Medical Evaluator in orthopedics, as between applicant and Vallarta. In his initial report of March 1, 2019, Dr. Falkinstein diagnosed a chronic cervical spine strain with referred bilateral upper extremity pain; positive cervical spine MRI findings; a chronic contusion/strain to the bilateral wrists and carpal tunnel syndrome, and a chronic lumbar sprain, with referred pain to hip and positive lumbar spine MRI findings. (Ex. X1, report of AME Yuri Falkinstein, M.D., dated March 1, 2019, at p.20.)

With respect to causation, Dr. Falkinstein began his analysis by comparing applicant's job duties. Based on applicant's deposition testimony, the AME noted that applicant worked 10-15 hours per week for Vallarta, standing behind a counter with a display of cold foods, and that her duties involved taking customer orders and putting them on plates or bags, weighing and serving them. (*Id.* at p.22.)

Applicant worked for Three D Plastics Monday through Friday, 40 hours per week, operating a plastic stake machine. Applicant would "grab plastic stakes coming out of the machine and cut them in half with scissors using both hands to squeeze." (*Id.* at p.22.) The work had to be done continuously so the stakes wouldn't back up, with applicant repeatedly using the scissors. (*Ibid.*)

Dr. Falkinstein concluded that the "industrial CT narrative may only apply with [applicant's] full time employment with 3D Plastics." (*Ibid.*) Citing to multiple evidence-based

texts, Dr. Falkinstein explained why applicant's occupational positional and exertional demands might precipitate the claimed injuries. (*Id.* at pp.22-24.) Dr. Falkinstein concluded:

Based on the correlated length of industrial exposure, the customary physical demands at work, and the evidence-based medical literatures, there is reasonable medical probability that the neck, bilateral wrist, and low back injuries were sustained on a cumulative industrial trauma basis while employed as [a] stake machine operator with 3D Plastics. (*Id.* at p.24.)

Additional records were submitted to the AME, who issued a supplemental report of April 23, 2019. (Ex. X2, report of AME Yuri Falkinstein, M.D., dated April 23, 2019.) Therein, the AME noted a discrepancy in the occupational history provided, and thus re-framed his causation analysis in terms of two scenarios.

In *Scenario 1*, Dr. Falkinstein relied on applicant's January 22, 2019 deposition testimony wherein she testified to working until November 6, 2018. Thereafter, neither Vallarta nor Three D Plastics offered modified duties. Under this scenario, the AME's opinion as set forth in the report of March 1, 2019 would not change, including sole causation of the injury to Three D Plastics.

However, in *Scenario 2*, Dr. Falkinstein further noted a September 22, 2017 treating physician report which placed applicant on temporary partial disability. Assuming that neither Vallarta nor Three D Plastics offered modified duties thereafter, September 22, 2017 would have been applicant's last day worked. (Ex. X2, report of AME Yuri Falkinstein, M.D., dated April 23, 2019 at p.10.) Thus, under *Scenario 2*, the dates of injurious exposure would end on September 22, 2017, and would extinguish any liability for Three D Plastics, where applicant had begun working one month prior. (*Id.* at p.11.)

The parties submitted additional records, deposition testimony and diagnostic testing to AME Dr. Falkinstein, who issued three additional reports. (Exs. X3-X5, reports of AME Yuri Falkinstein, M.D., various dates.) However, Dr. Falkinstein made no substantive changes to his previously expressed opinions.

The parties undertook the deposition of Dr. Falkinstein on June 22, 2020, and inquired with regard to causation of the diagnosed lumbar spine injury. Dr. Falkinstein testified:

A. So the reason I based my conclusion that she did injure her lumbar spine was off that initial report by Dr. Bazel, B-a-z-e-l, that was in September of 2017. At that time, he does allude to a specific injury and a cumulative trauma, and the complaints of the lumbar spine are present at that time. The mechanism of falling backwards I felt was consistent with the patient's account, and this medical

record seems to confirm the presence of an injury to the lumbar spine from a specific event.

Q. Can I interrupt you for just one second, Doctor? Because that's why I wanted to hit that history early on.

A. Yes, sir.

Q. The September of 2017 report from Bazel is September of 2018.

A. Oh, that's right.

Q. The report is misdated.

A. I apologize. Yeah, in that instance, yeah, I would definitely then have to reconsider the issue regarding the lumbar spine. Obviously the presumption that the specific injury occurred was based on the proximity of this treatment record to 2017. So if that is actually a 2018 date, that would put over a year from the date of the specific injury --

Q. Exactly.

A. -- to the time of first documentation. I apologize. I don't know how or why it got misdated.

Q. It's not your mistake, Doctor. It's misdated in Dr. Bazel's report. No idea why that happened, but it states --

A. Yeah. So obviously this was a very critical data point and a medical record point because that was the first established event showing the relation of the lumbar spine to the specific event, and you're exactly right to point out that the lumbar spine did not appear for quite a long time afterwards. I typically obviously consider the patient's account and record and the mechanism of trauma; however, the medical records do have to correlate with the patient's history. In light of that, I do think that in the absence of medical records supporting the lumbar spine occurring from the specific injury, I would have to say that the lumbar spine would then have to be attributed to the cumulative trauma entirely, same as the cervical spine. (Ex. Y, Transcript of the Deposition of AME Yuri Falkinstein, M.D., dated June 22, 2020, at 17:8.)

Dr. Falkinstein summarized his analysis of causation of the claimed injury as between Vallarta and Three D Plastics:

So I think the reason for the -- the fact that I didn't feel that there was [cumulative trauma] to Vallarta was really I felt that the type of work that she did there was much less strenuous and much more intermittent in nature. It was not like operating a machine at 3D, which was constant, continuous, static work with greater amount of hours. So I did not -- you know, all the employment that this patient had prior to working at 3D really did not amount to any significant complaints. So if there was some initial complaints or early on in her employment -- for example, in 2017, if there were some complaints, yeah, I definitely would attribute more or some to the CT at Vallarta. But there's really no medical records discussing the neck or the back while she was just employed at Vallarta. And so that makes me think that the employment at Vallarta did not cause any cervical or lumbar issues, complaints. (*Id.* at 32:5.)

Frank Guellich, M.D. acted as QME in orthopedics, as between applicant and Three D Plastics. The QME report of August 17, 2020 details Dr. Guellich's clinical examination and record review. The QME diagnosed applicant as being overweight; cervical spine protrusion, rule out disc degeneration; lumbar spine protrusion, rule out disc degeneration; right and left wrist injury, rule out ligamentous injury and possible triangular fibrocartilage tear. (Ex. BB, report of QME Frank Guellich, M.D., dated August 17, 2020, p.37.) The report did not specifically address injury AOE/COE with respect to the cumulative trauma claim, nor did it address causation as between Vallarta and Three D Plastics. Although the report ostensibly answered questions posed in the engagement letters submitted by the parties, the underlying questions do not appear to have been offered into evidence or recounted in the QME's reporting. Applicant was deemed temporarily totally disabled, with further reporting deferred pending diagnostic testing and the QME's receipt of a job description.

The parties appeared at trial on February 9, 2021, at which time the only issue framed for decision was injury AOE/COE. The WCJ continued trial to March 18, 2021 for testimony from the applicant. The applicant testified to her job duties for Three D Plastics and for Vallarta.

The WCJ issued his Amended Findings and Award on May 11, 2021, determining that applicant sustained injury AOE/COE, arising solely out of her employment with Three D Plastics. (F&A, Finding of Fact No.3.)

Defendant Three D Plastics filed its Petition on May 28, 2021, contending that "the whole medical records and applicant's testimony should be taken into account in deciding if there is an injury arising out of employment." (Petition for Reconsideration at 3:18.) Three D Plastics asserts that Dr. Falkinstein outlined two different scenarios, and that Scenario 2, finding no liability for Three D Plastics, is supported by the reporting of QME Dr. Guellich. Defendant Three D Plastics further asserts that without a formal job description, the opinion of Dr. Falkinstein does not constitute substantial medical evidence. (*Id.*, at 4:9.) Defendant Vallarta filed its Answer on June 7, 2021, asserting that the F&A is supported by the competent reporting of AME Dr. Falkinstein, and that the lack of a formal job analysis does not vitiate the reliability of Dr. Falkinstein's opinions. (Answer, at 5:14.)

DISCUSSION

Defendant Three D Plastics contends that one of the causation scenarios described by AME Dr. Falkinstein should be read in conjunction with the reporting of QME Dr. Guellich to find that applicant did not sustain a cumulative trauma injury. (Petition for Reconsideration at 4:3.) However, it appears that the causation analysis relied upon by Three D Plastics is no longer viable in light of evidence adduced following Dr. Falkinstein's original opinion of April 23, 2019.

In reviewing the record of applicant's work history, AME Dr. Falkinstein has described two possible causation scenarios, the applicability of which hinged on the dates applicant was employed by Vallarta and by Three D Plastics. (Ex. X2, report of AME Yuri Falkinstein, M.D., dated April 23, 2019, at p.10.) Dr. Falkinstein explained that in Scenario One, per applicant's deposition testimony, she continued to work for both employers through November 6, 2018, after which time neither employer offered modified duties. (*Ibid.*) This scenario results in liability for Three D Plastics, as applicant's full time employment resulted in the claimed cumulative trauma injury. The second scenario arose out of a treating physician's report dated September 22, 2017, placing applicant on "TPD status and the succeeding medical records [showing] that applicant never had the chance to return to regular and full duty status since then." (*Id.* at p.11.) In Scenario Two, applicant never returned to full time work after being placed on temporary partial disability on September 22, 2017. Scenario Two would thus extinguish liability for Three D Plastics, as applicant had only begun working for the company in August, 2017, one month prior to her last day of work. Defendant Three D Plastics contends that the reporting of QME Dr. Guellich supports the assertion of but one specific injury, and further supports the applicability of Scenario Two, which contraindicates the existence of a cumulative trauma injury.

The issue was discussed at length with Dr. Falkinstein during his deposition on June 22, 2020, at which time the parties clarified the fact that the reporting of treating physician Dr. Bazel was incorrectly dated as September 22, 2017, when in fact the reporting date was September 22, 2018. (Ex. Y, transcript of the deposition of AME Yuri Falkinstein, M.D., dated June 22, 2020, at 32:5.) Dr. Falkinstein observed that the onset of lumbar spine complaints transpired not in 2017, but one year later, after which time applicant had been working for Three D Plastics for approximately one year. Dr. Falkinstein opined, "[i]n light of that, I do think that in the absence of medical records supporting the lumbar spine occurring from the specific injury, I would have to say that the lumbar spine would then have to be attributed to the cumulative trauma entirely, same

as the cervical spine.” (*Id.* at 17:8.) Dr. Falkinstein concluded, “I would say that the lumbar spine follows the cervical spine, which would be cumulative trauma from employment at 3D Plastics.” (*Id.* at 20:8.) Additionally, applicant’s wage history at Three D Plastics further demonstrates work at part-time to full-time levels from September 11, 2017 through January 13, 2019. (Ex. B, ADP earnings statement ending January 13, 2019.) Accordingly, the causation scenario relied upon by Three D Plastics herein has been raised, considered, and then set aside by Dr. Falkinstein.

Further, the reporting of QME Dr. Guellich does not appear to have reached final opinions regarding the existence of a cumulative trauma injury, or its causation. As noted by Vallarta in its June 7, 2021 Answer, it does not appear that the QME inquired with applicant regarding her job duties for either employer. The QME notes that he became aware of the claimed cumulative trauma injury *only after* his clinical evaluation of applicant. (Answer of Vallarta, dated June 7, 2021, at 4:7.) Vallarta submits that “Dr. Guellich could not have formed a valid opinion on the issue of whether Applicant sustained cumulative trauma injury without knowing what her specific job duties were or taking a complete history,” and as a consequence the QME reporting does not constitute substantial medical evidence. (*Id.* at 4:26.) We agree.

Three D Plastics next contends that the reporting of Dr. Falkinstein may not be relied upon for want of a formal job analysis. (Petition for Reconsideration, at p.4:9.)

It is, of course, well settled that all decisions by a WCJ must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [54 Cal.Comp.Cases 349].) Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566].) When the WCJ's findings are supported by solid, credible evidence, they are to be accorded great weight by the Board and rejected only on the basis of contrary evidence of considerable substantiality. (*Lamb*, supra; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].) The trier of fact is empowered to choose among conflicting medical reports and rely on that which he deems most persuasive (*Jones v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 476 [33 Cal.Comp.Cases 221]), for the considered opinion of one physician, though inconsistent with other medical reports, may constitute substantial evidence.

(*LaVesque*, supra; *Smith v. Workmen's Comp. Appeals Bd.* (1969) 71 Cal.2d 588 [34 Cal.Comp.Cases 424].)

Here, we find Dr. Falkinstein's thoughtful analysis to be substantial medical evidence. The AME takes a thorough history from applicant, including a detailed description of her work history and work activities for both employers. (Ex. X1, report of AME Yuri Falkinstein, M.D., dated March 1, 2019, at p.3.) The physician accomplished a competent clinical examination, and has detailed his findings over multiple reports. Dr. Falkinstein's opinion that applicant's work at Three D Plastics resulted in her injury, whereas applicant's work at Vallarta did not, is further explicated in detail at the doctor's June 20, 2020 deposition. (Ex. Y, transcript of the deposition of AME Yuri Falkinstein, M.D., June 22, 2020, at 32:5.) We also observe that while Dr. Falkinstein agreed that a formal job analysis of applicant's work for Vallarta and for Three D Plastics might alter his opinions, it is not axiomatic that his prior opinions on causation do not constitute substantial medical evidence without it. Rather, Dr. Falkinstein based his opinions on the sworn deposition testimony of applicant as well as his clinical assessment, a thorough record review and his professional medical judgment. Accordingly, we find the reporting of the AME to constitute substantial medical evidence. The WCJ properly relied upon the opinion of the agreed medical evaluator (AME), whom the parties presumably chose because of the AME's expertise and neutrality. The WCJ was presented with no good reason to find the AME's opinion unpersuasive, and we also find none. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) We observe, moreover, 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].)

In sum, we find that the causation scenario originally described by AME Dr. Falkinstein and relied upon by Three D Plastics in their Petition has been superseded by evidence adduced after the reporting originally issued, and that Dr. Falkinstein has confirmed such in his deposition testimony. Because the reporting of AME Dr. Falkinstein is substantial medical evidence, whereas the reporting of QME Dr. Guellich is not, we will affirm the May 11, 2021 F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 11, 2021 Amended Findings and Award is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 22, 2022

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

**MANUELA CARREON
MICHAEL BURGIS & ASSOCIATES
GREENUP HARTSTON & ROSENFELD
BRADFORD & BARTHEL**

SAR/abs

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