

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

OMAR A. ATILANO, *Applicant*

vs.

**BURKETT'S POOL PLASTERING, INC.; CALIFORNIA CONTRACTORS
NETWORK; administered by AMERICAN CLAIMS MANAGEMENT, *Defendants***

**Adjudication Number: ADJ16048168
Stockton 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, we will deny reconsideration.

We have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*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 determination. (*Id.*)

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/ JOSÉ H. RAZO, COMMISSIONER

PATRICIA A. GARCIA, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 13, 2023

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

**OMAR A. ATILANO
OCCUPATIONAL INJURY LAW CENTER
MICHAEL SULLIVAN & ASSOCIATES
EMPLOYMENT DEVELOPMENT DEPARTMENT**

PAG/pc

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**

**I.
INTRODUCTION**

Defendant, Burkett's Pool Plastering, Inc., insured by California Contractors Network, by and through their attorneys of record, has filed a timely Petition for Reconsideration challenging the Expedited Findings of Fact, Orders, and Award dated November 22, 2022.

Defendant asserts that PQME Sclafani's opinions do not constitute substantial evidence to support an award of temporary disability and requests the Board allow further discovery from PQME Sclafani on the temporary disability issue.

Specifically defendant argues the PQME's opinions are not substantial evidence because (1) his history of injury is different than the history applicant initially provided; (2) he has not reviewed all relevant medical records; and (3) he was unaware that applicant had already been released to full duty at the time of his examination.

Defendant does not challenge the findings and orders that applicant is entitled to change treating physician or the award of medical care for applicant's back.

**II
FACTS**

At expedited hearing the parties stipulated that applicant, Omar Atilano, while employed on July 6, 2021, as a laborer by Burkett's Pool, Tile, and Masonry, sustained injury arising out of and in the course of employment to his low back. (Minutes of Hearing and Summary of Evidence, October 19, 2022, pg 2, Ins 4- 7).

On July 27, 2021, Mr. Atilano was treated at Kaiser with the assistance of an interpreter and was "counseled on the benefit of physical therapy but patient declined stating that he rather be released." (EXH A). He was returned to full duty and discharged as cured with no permanent disability or need for future medical care.

Mr. Atilano returned to work for the employer.

Defendant denied further medical treatment based on the July 27, 2021, discharge.

Mr. Atilano was seen at Kaiser on February 25, 2022, by Dr. Contreras. (EXH B). He was taken off work.

On April 1, 2022, Mr. Atilano had a telephone appointment with Dr. Williams in Neurosurgery. (EXH B). "Note: pt with sacral Tarlov cyst. These are typically asymptomatic and do not believe has anything to do with his low back pain after work injury. No surgical intervention is recommended for this. He will follow back up with his PCP for further care:"

On April 7, 2022, Mr. Atilano was again seen by Dr. Contreras who completed a one page work status report placing him off work from April 7, 2022 through April 30, 2022, and returning him work at full capacity on May 1; 2022. (EXH B).

PQME Sclafani evaluated the applicant on August 8, 2022. The doctor physically examined the applicant, took a history, reviewed the medical records provided, and issued a report dated August 14, 2022. (EXH XX).

PQME Sclafani found "Mr. Atilano has not reached maximum medical improvement and is not yet permanent and stationary for the injuries being evaluated." (EXH XX, pg. 10). PQME Sclafani further found "Mr. Atilano requires the following temporary partial work preclusions: No lifting, carrying, pushing, or pulling objects weighing over 25 pounds. No bending, twisting, stooping, or kneeling." (EXH XX, pg. 11).

Expedited Hearing was held October 19, 2022, with issues of, *inter alia*, temporary disability from the day of PQME evaluation on August 8, 2022, need for further medical treatment, and applicant's request to change treating physician.

Expedited Findings of Fact, Orders, Awards & Opinion on Decision issued November 22, 2022, ordering in part that applicant was entitled to change treating physician, awarding medical care for the back, and temporary partial disability beginning August 8, 2022.

III **DISCUSSION**

1.

Defendant has waived challenge to change of physician and award of medical care. (Labor Code §5904).

In the Petition for Reconsideration Defendant does not challenge the Order allowing a change of physician or the Award of medical care for the back. Defendant waives all objections, irregularities, and illegalities concerning the

matter upon which reconsideration is sought other than those set forth in the petition for reconsideration. (LC §5904).

2.

The history of injury is consistent.

Defendant stipulated the applicant sustained a July 6, 2021, low back injury. (MOH *supra*, pg 2, Ins 4 - 7).

Although defendant raises the ghost of "subsequent injury", (Petition for Reconsideration, pg 5, In 10), nowhere in the Petition does defendant identify when and how the claimed subsequent injury occurred. The injury described by applicant in the treating and PQME reporting occurs in July 2021, and is the accepted industrial injury. Applicant treated and testified with the assistance of interpreters. His testimony at hearing was credible.

Even if there were a "subsequent injury", temporary disability is awarded unless that injury is the sole intervening cause of the temporary disability. *McGlenn v WCAB* (1977) 68 CA3d 527, 534, 42 CCC 214. The employer bears the burden of proving the subsequent injury is the sole cause of the disability. *Maritz Travel Agency v WCAB (McCue)* (2003) 68 CCC 1227 (writ denied). Here, however, it is clear the temporary partial disability stems from the accepted July 6, 2021, injury.

There is no basis to disturb the parties stipulation that applicant sustained an industrial low back injury on July 6, 2021. Further, there is no evidence of a "subsequent injury" or reason not to find that temporary partial disability stems from the accepted July 6, 2021, low back injury.

3.

The PQME report is substantial evidence.

PQME Sclafani reviewed medical records from July 8, 2021, through March 13, 2022, including X-ray and MRI of the lumbar spine. (EXH XX, pgs 15 - 16). Dr. Sclafani physically evaluated the applicant, (EXH XX pgs 7 - 9), and took a comprehensive history. (EXH XX pgs 3 - 7). Dr. Sclafani provided diagnoses of 1. L4-5 disc disruption with annular tear (industrial), 2. L5-S1 disc disruption with annular tear (industrial), 3. Bilateral lumbar radiculopathy (industrial), 4. Myofascial pain and rigidity of the lumbar supporting musculature (industrial), and 5. L5-S3 arachnoid cyst (industrial aggravation).

Dr. Sclafani found "the overall treatment provided to the applicant is currently inadequate to determine the applicant to be permanent and stationary." (EXH XX pg 10). Dr. Sclafani provided work restrictions of "No lifting, carrying, pushing, or pulling objects weighing over 25 pounds. No bending, twisting, stooping, or kneeling." (EXH XX pg 11).

Dr. Sclafani's report is found to be substantial evidence.

4.

The April 7, 2022, release to work is not material to TPD starting August 8, 2022.

Similar to how defendant relied on isolated statements in the July 27, 2021, PTP treatment note to deny medical care, defendant now seeks to use a one page, conclusory, April 7, 2022, work status report (EXH 8) to deny temporary partial disability beginning over four months later, on August 8, 2022.

The April 7, 2022, work status report provides a prospective return date of May 1, 2022. The report is without any explanation why that day is appropriate nor why applicant was not released when seen. Such a speculative release is not substantial evidence, especially when provided four months before applicant was found temporarily partially disabled by PQME Sclafani who performed P physical evaluation, history, and medical record review.

Defendant refers to Dr. Sclafani's statement "These restrictions should be modified by the applicant's primary treating physician, as indicated, based on the clinical response-to treatments" to somehow argue the PQME would give deference to the prior treating physician regarding temporary disability. (Petition pg 7 Ins 1 - 10). The argument is unsupported by the record. Dr. Sclafani actually found "the overall treatment provided to the applicant is currently inadequate to determine the applicant to be permanent and stationary." Far from deferring to past treaters, Dr. Sclafani found the past treatment inadequate. Dr. Sclafani actually acknowledged that work restrictions may be modified based on applicant's response to *future* treatment. "These restrictions should be modified by the applicant's primary treating physician, as indicated, based on the clinical response to treatments." (EXH XX pg 11, emphasis added).

It is unclear why the April 7, 2022, work status report apparently may not have been reviewed by the PQME. Defendant provided no explanation at trial nor in its Petition for Reconsideration to establish if the April 7, 2022, work status report was provided to PQME Sclafani as part of his August 8, 2022, evaluation. As the April 7, 2022, work status report is conclusory, speculative and not probative as to applicant's temporary disability status in August of 2022, it is entirely possible the PQME may have reviewed it but not specifically listed it in the report. " Documents within the records, which are not considered of medical importance to this practitioner, may not be included in the summary though they have been reviewed in their entirety." (EXH XX pg 12).

Defendant should not benefit from this ambiguity at the expense of delay in providing temporary disability to the applicant. Defendant is charged with providing the QME "Other medical records, including any previous treatment records or information, which are relevant to determination of medical issue(s)

in Dispute". (8 CCR §35(a)(2)). Defendant has provided no explanation why the work status report was or was not provided to the PQME as required.

There is no basis to disturb the Award of temporary partial disability.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,
Paul Saltzen
Workers' Compensation Judge

Date: 12/30/2022