WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TAMIKA MOSBY, ***Applicant***

vs.

INGLEWOOD UNIFIED SCHOOL DISTRICT; Permissibly Self-Insured, Administered by KEENAN & ASSOCIATES, ***Defendants***

Adjudication Number: ADJ11495225
Van Nuys 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 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*.)

Labor Code[1] section 4663(a) provides that "[a]pportionment of permanent disability shall be based on causation." (Lab. Code, § 4663(a).) Section 4664(a) states that "[t]he employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (Lab. Code, § 4664(a).) The defendant has the burden of proof on the issue of apportionment. (*Kopping v. Workers' Comp. Appeals Bd*. (2006) 142 Cal.App.4th 1099, 1114 [71 Cal.Comp.Cases 1229].)

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[1] All further statutory references are to the Labor Code, unless otherwise noted.

We agree with the WCJ that the opinion of panel qualified medical examiner (PQME) Michael Luciano, M.D., is not substantial medical evidence supporting a finding of apportionment. (*Hegglin v. Workers' Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc) [a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions].) In order to consist of substantial medical evidence on the issue of apportionment, a medical opinion

> [M]ust be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.
>
> For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability.
>
> And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.
>
> (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621-622 (Appeals Board en banc).)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 13, 2021

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

TAMIKA MOSBY
GOLDSCHMID, SILVER & SPINDEL
MICHAEL SULLIVAN & ASSOCIATES

PAG/ara

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
PETITIONERS' CONTENTION:

Petitioner, defendant Inglewood Unified School District, P.S.I., administered by Keenan & Associates, files this verified and timely Petition for Reconsideration contending: (l) that the applicant is less credible than the defense witnesses; (2) that the applicant is not credible; (3) that the medical reporting does not constitute substantial evidence; and, (4) that apportionment was not properly applied as to applicants permanent disability/impairment.

II
RELEVANT PROCEDURAL HISTORY

Applicant filed her original application for adjudication of claim with the WCAB on 9/7/18, claiming a specific injury during her employment on 8/19/18.

The injury as filed and as set forth at trial involved applicant being struck by a utility cart operated by a co-employee, while at work.

Petitioner did not and has not filed an answer in violation of 8 Cal.Reg. 10465.

It was represented to the Court that the injury was admitted and then later denied (at trial).

Applicant was seen by a number of doctors, with reports issuing from and placed into evidence from only Michael Luciano, M.D., dated 5/20/19 and 4/20/2020. (See joint exhibits "Y" and "Z").

At trial, applicant testified as to the events surrounding her injury.

Percipient witnesses Louie Ramirez and Donna Smith testified as to the events causing injury.

Witnesses Nora Roque and Tiffany Egan, called by defendant, testified as to their later understanding of the events surrounding applicant's injury and the investigation undertaken thereafter.

The witnesses each testified on direct examination and were cross-examined.

The Court was able to observe the demeanor and observe the testimony of each witness.

The case was submitted based on the two medical reports of Dr. Luciano and the testimony of the above six (6) witnesses.

III
DISCUSSION

INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

As noted above, applicant filed her original application for adjudication of claim with the WCAB on 9/7/18, claiming a specific injury during her employment on 8/19/18.

The injury as filed and as set forth at trial involved applicant being struck by a utility cart operated by a co-employee, while at work.

Petitioner did not and has not filed an answer in violation of 8 Cal.Reg. 10465 which states in relevant part:

> "Any Answer to an Application for Adjudication of Claim shall be filed and served no later than the shorter of either: 10 days after service of a Declaration of Readiness to Proceed, or 90 days after service of the Application for Adjudication of Claim.
>
> (c) Evidence upon matters and affirmative defenses not pleaded by Answer will be allowed only upon such terms and conditions as the Appeals Board or workers' compensation judge may impose in the exercise of sound discretion."

It was represented to the Court that the injury was admitted and then later denied (at trial).

The Court had the opportunity to review the evidence, the medical reports, and the testimony of the witnesses.

Each of the percipient witnesses, including the applicant, generally agreed that "something" happened. The applicant and the utility cart did collide in some manner.

Applicant's testimony was generally credible and reliable.

The testimony of Louie Ramirez was somewhat reliable as to the incident occurring, but then varied from the other witnesses.

The testimony of Donna Smith varied from the other witnesses as to the accident occurring. She had difficulty explaining why she and Mr. Ramirez waited at the site for ten minutes after nothing happened, in her recollection, to make sure everything was alright. The Court found her testimony unreliable.

The testimony of Nora Roque and Tiffany Egan generally verified that the accident occurred, but they were apparently suspicious as to injuries.

Based on the medical reporting of Michael Luciano, M.D., dated May 20, 2019 and April 20, 2020, along with the testimony of the witnesses, applicant met her burden as to injury AOE/COE.

Injury arising out of and in the course of employment did not appear to have been an issue raised in good faith by Petitioner.

The Court again notes that Petitioner did not and has not filed an answer in violation of 8 Cal.Reg. 10465.

Petitioner did not object to the Declaration of Readiness ultimately setting this matter for trial (or any prior Declaration of Readiness filed).

CREDIBILITY OF DEFENSE WITNESSES

Each of the percipient witnesses, including the applicant, generally agreed that "something" happened. The applicant and the utility cart did collide in some manner.

The testimony of Louie Ramirez was somewhat reliable as to the incident occurring, but then varied from the other witnesses. He indicated that he, as the driver of the utility cart, did "bump into" the applicant. He asked her if she was "okay" and, ten seconds or so later, left the scene with his passenger.

The testimony of Donna Smith, a passenger in the utility cart, varied from the other witnesses as to the accident occurring at all. This witness testified that the utility cart did not strike the applicant. She then had some difficulty explaining why she and Mr. Ramirez waited at the site for ten minutes after "nothing" happened, in her recollection, to make sure everything was alright.

The Court found her testimony unreliable.

The testimony of Nora Roque and Tiffany Egan generally verified that the accident occurred, but they were apparently suspicious as to injuries. The testimony of these witnesses added little to the issue of injury arising out of and in the course of employment. Their testimony appeared directed more towards "motivation" for filing this case.

CREDIBILITY OF APPLICANT

For reasons unknown, at trial, Petitioner, defendant Inglewood Unified School District, P.S.I., administered by Keenan & Associates, raised the issue of injury AOE/COE at time of trial.

In this matter, the evidence was not truly disputed that the utility cart and Ms. Mosby collided. Other than the rather unusual testimony of the utility cart's passenger Donna Smith, the dispute appeared to center on the degree of injury, a medical issue, rather than the fact that applicant was injured.

The utility cart driver, Louie Ramirez, indicated that there was a collision, and that he checked with the applicant and left ten seconds later. This testimony was at variance with that of his passenger who testified, again, that no collision occurred but that she and Mr. Ramirez waited at the scene for about ten minutes to make sure everything was alright.

The Court was able to form an opinion as to the credibility off the defense percipient witnesses.

Left with the testimony (generally) that a collision had occurred, the Court relied on the testimony of the applicant.

The applicant did report the injury and, while Petitioner's counsel did confuse the applicant and or the applicant became confused on cross-examination, her rendition of the facts of the incident and injury was generally credible and consistent.

The Court did discount testimony as to the speed of the truck and the impact, leaving the sequelae to the medical opinions.

As to later work undertaken by the applicant, she testified honestly and truthfully as to her work at the food counter at the local stadium (pre-Covid), and noted, without rebuttal, that she was allowed to sit and stand at will. Her later work at JC Penney also involved the ability to sit and stand at will. This did not appear to be inconsistent with the medical reporting.

Applicant testified truthfully and credibly, although with some seeming embellishment as to the collision itself.

The Court was unsure why discovery was being conducted during the trial as opposed to any time prior, but found the explanations offered by applicant to be within the medical reporting obtained prior to the initial medical reporting's.

Again, the testimony of witnesses Nora Roque and Tiffany Egan generally verified that the accident occurred, but they were apparently suspicious as to injuries. The testimony of these witnesses added little to the issue of injury arising out of and in the course of employment. Their testimony appeared directed more towards "motivation" for filing this case. The Court notes that applicant was injured and had/has the legal right to file for workers' compensation benefits, which she did.

MEDICAL REPORTING/SUBSTANTIAL EVIDENCE

The medical records of Michael Luciano, M.D., dated May 20, 2019 and April 20, 2020, are deemed to constitute substantial medical evidence. These reports were the only medical reporting's offered into evidence by either of the parties and were, in fact, offered jointly.

The medical records/reports are consistent with applicant's testimony and the mechanism of the injury.

Defendant was unable to articulate any reason it did not or could not conduct its discovery during the intervening twenty-nine (29) months between the injury date and Trial.

Defendant was unable to demonstrate that its late and/or untimely obtained records and or filming/video could or would alter the opinion of Dr. Luciano and/or the Court.

Based on the record created for trial, applicant's later temporary employment and/or activities appeared to be within the restrictions as set forth in the only medical evidence, offered jointly by the parties, to wit: the reports of Michael Luciano, M.D., reporting as a PQM E, dated 5/20/19 and 5/20/2020.

APPORTIONMENT

Based upon the medical reporting of Michael Luciano, M.D., dated May 20, 2019 and April 20, 2020, along with the stipulations of the patties, the documentary evidence, there is no legal basis for apportionment to other conditions or injuries, as also set forth in the rating instructions.

The Court particularly relied on the reporting of Michael Luciano, M.D., dated May 20, 2019 and April 20, 2020, as they were the only medical records offered into evidence.

The Court again notes that Petitioner did not and has not filed an answer in violation of 8 Cal.Reg. 10465.

As to the **reporting of Dr. Luciano dated 5/20/2019,** reporting as the PQME, the doctor took a history from the applicant including a history of a fall at age 14, requiring surgery to her right knee at that time. (See page 4, paragraph 9 through page 5, paragraph 1).

No history of residual problems with the right knee were noted.

A history noting "greater than ten years ago", the applicant sustained a whiplash injury to her neck. After therapy, her symptoms improved. (See page 5, paragraph 2).

No history of continued problems with her neck is noted.

Ms. Mosby noted that when she was pregnant with her (then) four-year-old daughter, she had right-sided sciatica, which has persisted since the pregnancy. (See page 5, paragraph 3).

Ms. Mosby noted that she "may have had" concurrent employment performing odd-jobs, but not for employers. (See page 6, paragraph 2).

Dr. Luciano noted in his reporting:

> "The following medical records are available for my review today: No records related to right knee injury in school, with surgery; no records related to 2001 personal injury claim against her landlord for lumbar spine; no records related to slip- and-fall injury in 2013 with personal injury claim against Walmart for her cervical spine, right knee and lumbar spine; no records related to her most recent slip-and-fall personal injury claim against the Housing Authority for the City of Los Angeles, with injuries to the cervical spine, thoracic spine, lumbar spine, bilateral elbows, left thigh and bilateral knees/calves."
> (See page 6, paragraphs 4-5).

Pre-injury records from T.H.E. Clinic from the period 2/10/2004 - 10/8/2018 were reviewed by the doctor, without serious relevant notation. Other than the records from T.H.E. clinic.

Dr. Luciano reviewed the following:

> "July 10, 2009 - Joan Kim, D.C. - Joon Him Chiropractic: Personal Injury Report. Date of Injury: February 25, 2009. Date of First Visit: February 28, 2009. History: Ms. Mosby reported that she was the driver of a vehicle involved in an accident on February 25, 2009. The impact caused left-side-air bags to deploy. She denied loss of consciousness. Presenting the following complaints: Neck and upper back pain and stiffness, intermittent to near continuous; low-back pain and stiffness, intermitted; intermittent headaches over the back of the head and extending to the forehead; constant, moderate to severe left lower chest pain. Past History: Denied. Initial Examination: Height 5'3", weight 162 lbs; increased tenderness over left lower rib; shoulder exam within normal limits bilaterally; movement of neck slightly guarded; moderate spasm, with associated tenderness, over the base of the occiput and along the cervical paraspinal musculature bilaterally; upper trapezius and rhomboids moderately spastic and tender; neck pain with cervical compression; neck pain bilaterally with shoulder depression; neck pain with Soto-Hall; cervical range of motion restricted, with pain, in all planes; lumbar corset being used; gait unremarkable; moderate to severe spasm, with associated tenderness over the dorsal aspect of the paraspinal musculature of the lumbar spine bilaterally; tenderness over bilateral sacroiliac joint and lumbosacral regions; lower back pain bilaterally with Kemp and Lasegue's tests; restricted lumbar range of motion, with pain, in all planes. XRays: X-rays of the cervical spine showed mild posterior subluxation of C4 pertaining to CS; otherwise unremarkable. Diagnoses: 1) Motor vehicle traffic accident. 2) Cervical spine myoligamentous sprain/strain injury, with segmental dysfunctional and myofasciitis. 3) Thoracic spine myoligamentous sprain/strain injury, with segmental dysfunction and myofascial tis. 4) Lumbar spine myoligamentous sprain/strain injury, with segmental dysfunction and myofascial tis. 5) Muscle tension cephalgia. 6) Chest wall contusion. Course of Treatment: The patient underwent multimodality physical therapy and chiropractic manipulative therapy, with periodic reevaluations. On June 25, 2009, Ms. Mosby reported considerable improvements in her neck and upper back symptoms. On exam, there was no appreciable tenderness or spasm over the cervical and thoracic paraspinal region, with minimally limited range of motion. The lumbar spine region was still mildly tender, with mildly limited range of motion. The patient was found to have reached Maximum Medical Improvement with their treatment and subsequently released from active care."

(See page 7, paragraph 2 through page 8, paragraph 1).

No other records were sent by defendant or reviewed by the doctor.

Based on the reporting of Dr. Luciano (supra) there were no further medical records provided to the court or the doctor to substantiate apportionment of disability.

California Code of Regulation section 35 states in relevant part:

> "(a) The claims administrator, or if none the employer, shall provide, and the injured worker may provide, the following information to the evaluator, whether an AME, Agreed panel QME or QME:
> (1) All records prepared or maintained by the employee's treating physician or physicians;
> (2) Other medical records, including any previous treatment records or information, which are relevant to determination of the medical issue(s) in dispute."

Apparently, the parties and more particularly the defendant did not feel that further medical records were necessary for review by the doctor and therefore the court and the doctor must rely on the joint exhibits offered into evidence.

The Court notes that it is the responsibility of the defendant to forward records to the PQME.

As to **Dr. Luciano's reporting of 4/20/2020**, the doctor re-recited the history as given in his prior report. (See page 5, "PAST MEDICAL HISTORY").

The doctor reviewed further records of post-injury treatment.

No records of prior complaints or treatment were sent to the PQME.

As to causation, Dr. Luciano does find industrial causation, noting that as to applicants right shoulder, right elbow and right wrist, the injuries have resolved. The Court so found.

Dr. Luciano finds permanent disability (impairment) as set forth in the rating instructions and Findings and Award.

The Court notes no objection to the rating instructions and/or request to strike the instructions or cross-examine the rater.

Dr. Luciano does discuss apportionment in this report at pages 27, 28 and 29.

As to the **cervical spine**, the doctor notes:

> " ....it is in the realm of medical probability that apportionment is 30% to pre-existing medical conditions including the prior 2009 non-industrial motor vehicle accident and the December 6, 2017 event, and 10% to daily living activities, and 60% to the 8/29/18 event". (See page 28, paragraph 5).

The records, sparse as they are, as to the auto mobile accident note no further problems (as above).

There are no records of a Walmart fall allegedly occurring on 12/6/17 (or 2013, perhaps), and addressed only in a letter from defendant as reviewed by the doctor.

As to the lumbar spine, the doctor again notes that "...it is in the realm of medical

Probability that apportionment is 30% to pre-existing medical conditions including the prior 2009 non-industrial motor vehicle accident and the December 6, 2017 event, and 10% to daily living activities, and 60% to the 8/29/18 event".

Again, the records, sparse as they are, as to the automobile accident note no further problems (as above).

There are no records of a Walmart fall allegedly occurring on 12/6/17 (or 2013, perhaps), and addressed only in a letter from defendant as reviewed by the doctor.

As to the **left knee,** the doctor again notes that "... it is in the realm of medical probability that apportionment is 20% to previous injury of December 6, 2017, and 10% to daily living activities, and 70% to the 8/29/18 event".

As to the **right knee,** the doctor notes that he would like to see records of a Walmart fall of 2013. He then states that "... it is in the realm of medical probability apportionment is 30% to the December 6, 2017 event and the surgery as a child, and 10% to daily living activities, and 60% to the 8/29/18 event".

The Court appreciates that the doctor attempts to define apportionment with a paucity of records and a history as defined both by the applicant herself in-person and defendant by letter. This does not appear to be sufficient.

The Walmart fall and/or incident of December 6, 2017 are neither defined nor certain. They appear to be based on surmise and/or conjecture. If they did occur, and in the absence of records, any "disability" would be purely conjecture or surmise. It is not appropriate to apportion to such "guessing".

In this regard, petitioner failed to meet its burden of proof.

As to applicant's right knee surgery as a child, occurring some twenty-eight (28) years prior, there were no records given to the doctor of the surgery.

The Court notes that applicant worked for this employer for some twenty (20) years, without complaint as to her knee until this incident. In fact, there do not appear to be any physical complaints during her employment until this accident of 8/29/2018.

The doctor never states that it is medically probable that there is apportionment as to any body part…he does state that "...it is in the realm of medical probability apportionment…"

Based on the medical records reviewed the doctor was unable to issue a definitive opinion on apportionment and therefore the court found no legal apportionment.

The comments regarding apportionment as to each body part appear to be based on surmise and/or conjecture. In the absence of records, of any prior “disability” would be purely conjecture or surmise. It is not appropriate to apportion to such “guessing”.

The Court notes three filings of a Declaration of Readiness by applicant.

Petitioner/defendant objected to none of them.

By the time of trial, some twenty-nine (29) months had elapsed. This would appear to be more than enough time to investigate an (initially) admitted injury.

Defendant did not meet its burden of proof at trial as to the issue raised of apportionment, as raised at trial. The Court found no legal apportionment.

IV
RECOMMENDATION

For the reasons stated above, it is respectfully submitted that the Petition for Reconsideration filed by Petitioner, defendant Inglewood Unified School District, P.S.I., administered by Keenan & Associates, be **denied**.

DATED: 4/7/2021

CRAIG A. GLASS
Workers’ Compensation
Administrative Law Judge