

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

WALBERTO GALVAN, *Applicant*

vs.

JC FARM MANAGEMENT; ZENITH INSURANCE COMPANY, *Defendants*

**Adjudication Number: ADJ11231953
Fresno District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
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 grant reconsideration, and amend the WCJ's decision as recommended in the Report and otherwise affirm the March 14, 2023 Amended Findings of Fact, Award, and Order. We also clarify for the parties that the allowance of "net" costs and the order that the parties adjust all payments allows the parties to adjust the amount due to cost petitioner, with credit to defendant for any payments made on account thereof, subject to proof, with jurisdiction reserved at the trial level if there is any dispute.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the March 14, 2023 Amended Findings of Fact, Award, and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the March 14, 2023 Amended Findings of Fact, Award, and Order is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

9. Dr. Abri issued a December 16, 2019 panel QME report which included a discussion about causation based on findings of bruxism/parafunctional habit (clenching and grinding of teeth) secondary to stress and emotional factors, psychological factors, sleep disorder, xerostomia, and dry mouth.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 5, 2023

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

**LAW OFFICES OF TAPPIN & ASSOCIATES
CHERNOW & PINE**

PAG/ara

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

Defendants herein, JC Farm Management and Zenith Insurance Company (hereafter “Petitioners”), through counsel, filed a timely and verified Petition for Reconsideration of the undersigned’s amended March 14, 2023 Findings of Fact, Order, Decision and Award, finding that the claim for medical/legal costs made by Cost Petitioner, David Abri, D.D.S., be sustained.

Having read and considered Petitioners’ moving papers, and reviewing Cost Petitioners’ Answer to Reconsideration, it is the undersigned’s Recommendation that the Petition for Reconsideration be denied, as follows:

BACKGROUND FACTS

The facts of this case are largely not in dispute. However, to complete the record, the following facts are noted. Applicant sustained an arm injury while pruning in a grape vineyard on December 27, 2017. He reported his injury and the claim for injuries to his hand, wrist, and arm were accepted.

Applicant was initially represented by counsel, however, that relationship apparently soured and Applicant’s counsel was relieved by Court order in late September 2018. Substitute counsel was retained and jaw and teeth were added to the claim. The Court was not provided with any evidence relating to whether the claim for these additional body parts was accepted or denied and it is assumed that these additional body parts are accepted pursuant to the provisions of Labor Code § 5402.

Applicant was seen by a Dental QME David Abri, D.D.S. who was sent cover letters by each party. Applicant’s counsel requested that Dr. Abri address issues of causation and injury AOE/COE, while Defendants’ cover letter to Dr. Abri specifically admonished him to not address causation or he would not be reimbursed for his work.

Dr. Abri issued his report on December 16, 2019.

In billing for his efforts, Dr. Abri noted that causation was considered as a complexity factor in scheduling his report as an ML-104. On receipt of his bill, Defendants refused to pay, citing their cover letter restricting the PQME’s evaluation scope regarding causation.

Although the undersigned’s Decision concluded that there was no discussion regarding causation, that is in error and the undersigned will request that the Reconsideration Unit issue an amended finding that Dr. Abri issued his Panel QME Report on December 16, 2019, which included causation findings that the bruxism/parafunctional habit (clenching and grinding of teeth) was secondary to stress and emotional factors, psychological factors and sleep disorder, in conjunction with a diagnosis of xerostomia or dry mouth. (Panel QME Report, David Abri, D.D.S., 12/16/2019, Cost Petition Ex. 4, at pg. 8.)

Trial in this matter proceeded by submission, with no testimony presented by either party.

DISCUSSION

Petitioners contend that Title 8, CCR § 10786 applies to this case. However, the report was issued in late 2019, therefore, Title 8, CCR§ 10451.1 applies to medical-legal disputes. As it was the controlling statute at the time of Applicant's injury and Dr. Abri's evaluation, this would be a 11011-IBR issue as to whether or not the claimed medical/legal expense was incurred for the purpose of proving or disproving a contested claim. Petitioners' contention that this is an Independent Bill Review (IBR) dispute is in error.

The facts, as set forth above, clearly show that this was a *legal* issue as to whether or not causation was addressed and whether parties had asked that the issue be included - or excluded - from Dr. Abri's reports. Additionally, the issue of whether Dr. Abri's medical research should be incorporated into his findings.

As noted in the undersigned's Decision, Applicant .counsel's cover letter to Dr. Abri was quite clear in asking that he address the issue of causation. No evidence that dental injuries were disputed was presented to Dr. Abri nor to the Court. As noted in the undersigned's Decision, Applicant counsel's cover letter clearly states that Dr. Abri should "discuss causation of injury arising out of and through the course of employment for all the denied body parts and/or body systems that fall within your specialty of medical expertise." (Cost Petition Ex. 2, at pg. 2.)

As Cost Petitioner correctly points out, the California Code of Regulations clearly sets forth the duties of medical/legal evaluators:

"The evaluator shall address all contested medical issues arising from all injuries reported on one or more claim forms prior to the date of the employee's appointment with the medical evaluator that are issues within the evaluator's scope of practice and areas of clinical competence. The reporting evaluator shall attempt to address each question raised by each party in the issued cover letter sent to the evaluator as provided in subdivision 35(a)(3).)" (Title 8, CCR § 35.5(c).)

Petitioners' cover letter to Dr. Abri is likely the source of the confusion that led to this dispute. Petitioners' cover letter very clearly states that Applicant's claim was accepted for the wrist, which would lead any reasonable reader to conclude that (1) since Dr. Abri's opinion is being sought (and he is a dental specialist) that (2) since only the wrist is "accepted" that he must address the issue of causation in regard to dental issues. Further, Petitioners requested Dr. Abri to address the issue of apportionment and, since causation must be a component factor in an analysis regarding apportionment, Dr. Abri had no choice but to address causation. Which he correctly did.

The undersigned identified further issues in Petitioners' denial of Dr. Abri's billing, including referring to his billing as ML-103, when it was actually billed as ML-104 and that his research - which is *de minimus* - was clearly tied to his conclusions in regard to bruxism, xerostomia, and dry mouth.

RECOMMENDATION

For all the above-reasons, it is recommended that the Petition for Reconsideration be denied, with prejudice.

It is further recommended that the Reconsideration Unit issue a corrected Finding No. 9 so it correlates to Dr. Abri's findings. It is recommended that Finding No. 9 be amended to read as follows:

“Dr. Abri issued his Panel QME report on December 16, 2019, which included a discussion about causation based on findings of bruxism/parafunctional habit (clenching and grinding of teeth) secondary to stress and emotional factors, psychological factors, sleep disorder, xerostomia and dry mouth.”

DATE: 4/13/2023

Geoffrey H. Sims
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE