

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

JORGE GOMEZ, *Applicant*

vs.

**JAM-MART CRYSTAL PROMOTIONS; EMPLOYERS PREFERRED INSURANCE
COMPANY, *Defendants***

**Adjudication Numbers: ADJ12131630 (MF), ADJ12131247
Van Nuys District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.¹

In the Joint Findings and Order of August 31, 2021, the Workers' Compensation Administrative Law Judge ("WCJ") issued findings in two case numbers.

In ADJ12131630, the WCJ found that applicant, while employed during the period November 24, 1984 through February 5, 2019 by Jam-Mart Crystal Promotions, then insured by Employers Preferred Insurance Company ("Preferred"), sustained injury arising out of and in the course of employment ("industrial injury") to his neck, bilateral shoulders, bilateral wrists, lumbar spine, bilateral hips, bilateral knees, and bilateral ankles, that the issue of whether applicant sustained industrial injury to his head, headaches, psyche and internal-digestive system is deferred pending medical evaluations in the appropriate specialties, and that the primary treating physician is Kim Torres, D.C. ("Dr. Torres").

In ADJ12131247, the WCJ found that applicant, while employed on October 15, 2018 by Jam-Mart Crystal Promotions, then insured by Preferred, did not sustain industrial injury to his lumbar spine, and that the primary treating physician is Dr. Torres.

¹ Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated November 12, 2021. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

Defendant, Employers Preferred Insurance Company, filed a timely Petition for Reconsideration of the Joint Findings and Order of August 31, 2021. Defendant contends that the WCJ erred in relying upon the medical reporting of Dr. Torres because it is not substantial evidence, and that the WCJ erred in failing to explain why Dr. Torres's reporting is credible and persuasive.

The Board did not receive an answer from applicant.

The WCJ submitted a Report and Recommendation ("Report").

At the outset, we admonish defense counsel, Franco Yaconelli of the law firm Tobin and Lucks, for filing a petition for reconsideration that violates WCAB Rule 10945 in several respects. (Cal. Code Regs., tit. 8, § 10945.) In violation of subdivision (b) of Rule 10945, Mr. Yaconelli failed to support his evidentiary statements by specific references to the record. Rule 10945(b)(2) requires that specific references must be made to exhibit numbers and other details; mere reference to the date and author of a medical report does not satisfy the Rule. Mr. Yaconelli also violated subdivision (c) of Rule 10945 by attaching twenty-three pages of excess documents to the petition for reconsideration. Mr. Yaconelli is admonished to follow the Board's Rules of Practice and Procedure, including but not limited to Rule 10945, in all future matters.

Turning to the merits, based on our review of the record we conclude the evidence justifies a finding, in ADJ12131630, that applicant sustained industrial injury during the period November 24, 1984 through February 5, 2019 to his lumbar and cervical spine, bilateral shoulders and bilateral wrists. Though applicant also alleges he sustained injury to other body parts/systems in ADJ12131630, we conclude that those claims require further development of the record, as well as applicant's claim of specific injury on October 15, 2018, in ADJ12131247.² (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1164 (66 Cal.Comp.Cases 1290) [Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence].) As our Decision After Reconsideration, we will affirm the WCJ's decision in part and amend it in part, and we will return this matter to the trial level for further proceedings and new decision by the WCJ on the outstanding issues.

² In its petition for reconsideration, defendant apparently does not object to the WCJ's finding in ADJ12131247 that applicant did not sustain industrial injury to his lumbar spine on October 15, 2018. Upon reconsideration, however, the Appeals Board is not limited to consideration of the issues defined by the parties. (See *Ramirez v. Workers' Comp. Appeals Bd.* (2017) 10 Cal. App. 5th 205, 221 [82 Cal.Comp.Cases 327, 336], citing *Tate v. Industrial Accident Comm.* (1953) 120 Cal. App. 2d 657, 663.)

FACTUAL BACKGROUND

On August 17, 2021, these two cases were submitted for decision solely on the issue of industrial injury, with the record consisting of medical reports from Dr. Sharma, the Panel Qualified Medical Evaluator (“PQME”) in orthopedics, and from applicant’s treating physician, Dr. Torres. (See Minutes of Hearing, 8/17/21, pp. 2-4.)

In a comprehensive report dated May 8, 2020 (Joint Exhibit AA), Dr. Sharma undertook a lengthy review of applicant’s treatment record, including the treatment reports of Dr. Torres dated April 9, 2019, May 9, 2019, June 12, 2019, July 16, 2019, August 16, 2019, September 18, 2019, October 21, 2019, November 22, 2019, and December 23, 2019. In light of this treatment record, Dr. Sharma reported the history of injury and description of applicant’s job duties and physical complaints set forth below; the doctor also provided his diagnoses and opinion on injury and causation:

HISTORY:

Mr. Jorge Gomez is a very poor historian and does not remember the date he worked for Jam-Mart International, Inc. The examinee started working there on November 24, 1984, and stopped working on February 5, 2019. His job was general laborer sales, doing everything in the store and warehouse at Jam-Mart International, California. He used to work eight hours a day, five days a week. Last day worked, February 5, 2019. Has not returned to work since then.

JOB DUTIES:

Official job analysis [was] not available, but he states that he would go to warehouse, he would have to purchase and receive the merchandise on a pallet jack, open the boxes, and then display them. Physical requirements for the job [were] constantly standing, frequently squatting, constantly walking, frequently climbing, occasionally kneeling, stooping, constant reaching, frequently bending, frequently twisting, occasionally driving, sitting while driving, constant hand work, lifting. There was lifting on a constant basis of boxes which could weigh up to 20 to 25 pounds, pushing, pulling constantly merchandise on carts which could be up to 200 pounds, constantly work looking up, constantly work looking down, and occasional hand work. At present, he is temporarily totally disabled by his treating doctor.

HISTORY OF INJURY/TREATMENT:

When he started working, it used to be in a warehouse and he did not have any problems. He stated he had an injury in 2018, he states he was lifting a heavy air-conditioning unit on a pallet jack, had pain in the lower back area, reported this to the employer, [but] did not take any action. He reported to David, who was the company's owner; David did not take any action. No paperwork was done. He

continued working; then he started having pain in his arm, neck area, though did not report it. He states he went on his own to a family doctor and they told him he has problems and they told them to stay off work. He never notified the employer about this. Subsequently, he got himself legal representation and through this legal representation the examinee was then referred to Tri-City Clinic in Long Beach. There, he has been under the care of Dr. Torres and receiving multiple specialty evaluations and treatment, receiving physical therapy. Multiple radiographs were done, which were abnormal and waiting to have an MRI scan.

PRESENT COMPLAINTS:

Constant severe low back pain, on a scale of 0 to 10 is 9. Pain radiating to both legs, left is worse than the right. Pain increases with lifting, pulling, pushing, turning, and twisting. Constant pain in the neck that does not radiate at all. Pain in both upper extremities, constant pain in both feet and he declined he has no pain in his hips [sic], he has no pain in his shoulders and lower extremities, but he has severe back pain radiating, going up and down the back, and he denies that he has any other complaints.

DIAGNOSES:

1. Chronic lumbosacral sprain and strain with intermittent radiculopathy.
2. Chronic cervical sprain and strain with intermittent radiculopathy.
3. Bilateral shoulder strain.
4. Bilateral negative ulnar variance of the wrist with possible wrist tendinitis and carpal tunnel syndrome.

DISCUSSION:

Mr. Gomez has been working at Jam-Mart International, Inc., for the past 34 years. He had one particular onset of pain and he was not treated, complained of pain, no case was filed, no treatment was rendered. He started complaining of pain and he took off work. I do not know whether he notified his employer or not.

Official job analysis is not available to me at this time. However, he is at present receiving treatment under the care of Dr. Torres at Tri-City Health Group in Long Beach, California. Dr. Torres is a chiropractor who is giving him chiropractic treatments and also receiving chiropractor treatments from Dr. Cline at the same clinic.

He was also seen by Arlen Green, D.O. concerning his complaints of lumbar symptomatology and also by Timothy Katzen, M.D., a hand surgeon. He has negative ulnar variance. EMG/NCV had been recommended. No radiographs were done which is significantly abnormal. [Sic.]

CAUSATION:

His symptoms are the result of continuous microtrauma to the musculoskeletal system due to working from 1986 to 2019 when he stopped working because treatment was denied by the employer. I feel that diagnostic work such as MRI scan of the lumbar spine, cervical spine and shoulders should be done to rule out lumbar disc, cervical disc problem and a rotator cuff problem. He will also need MRI scan of both wrists to rule out avascular necrosis of the wrist which is commonly noted with people who have negative ulnar variances.

After Dr. Sharma issued the above report, MRI scans were done on applicant's bilateral wrists, bilateral shoulders, bilateral knees, and cervical and lumbar spine. Dr. Sharm reviewed the reports of the MRI scans and provided the following opinion in a supplemental report dated October 8, 2020 (Joint Exhibit BB):

Mr. Gomez at present is still under the care of Tri-City Group in Long Beach. After reviewing all these MRI studies which are significantly abnormal, I feel this gentleman needs aggressive orthopedic care for his lumbar spine, cervical spine, bilateral shoulders, and knees as well as his wrists and hands. He is still not at MMI. I will request that he be seen by a spine surgeon for the cervical and lumbar pathology to determine if he is a surgical candidate. As for the shoulders, the shoulders can be treated conservatively, but one cannot rule out any interventional therapy. As for the wrists, I do not see any need for surgical intervention. I feel that the examinee needs to see an orthopedic surgeon for surgery of the knees. Also requested that he be seen by a gastroenterologist and a neurologist.

DISCUSSION

Applicant has the burden of establishing “the reasonable probability of industrial causation.”³ (*McAllister v. Workmen’s Comp. App. Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) In the instant matter, we are persuaded that Dr. Sharma’s reports, which the petition for reconsideration fails to mention,⁴ are substantial medical evidence that satisfy

³ Concerning the burden of proof, the WCJ’s Report has an incorrect statement on page four that places a negative burden on defendant. There the WCJ states that defendant did not “sustain its [burden of proof] to establish that the applicant did not sustain injury [.]” As noted before, applicant has the burden of proving industrial injury. Of course, this means that defendant does *not* have the burden of establishing that applicant did *not* sustain an industrial injury. Whatever the WCJ’s confusion on this issue, it does not change our conclusion that the WCJ’s decision should be affirmed for the most part.

⁴ On behalf of defendant, Mr. Yaconelli mentions that serving as PQME, Dr. Sharma examined applicant and found that he did not reach maximum medical improvement (“MMI”). However, Mr. Yaconelli fails to mention that Dr. Sharma issued two reports wherein the doctor found that applicant sustained cumulative trauma injury (and temporary disability). Mr. Yaconelli’s apparent choice to “hide the ball” is another violation of WCAB Rule 10945, subdivision (a) of which states in pertinent part, “[e]very petition for reconsideration...shall fairly state all of the material evidence relative to the point or points at issue.” (Italics added.)

applicant's burden of proof that he sustained orthopedic industrial injury by way of cumulative trauma. Dr. Sharma's reporting is substantial evidence because it describes applicant's job duties and history of injury, it includes a comprehensive review of Dr. Torres's early treatment reports, it provides a diagnosis confirmed by Dr. Sharma's review of MRI studies, and it includes an unrebutted discussion of industrial causation.

Specifically, Dr. Sharma diagnosed applicant with chronic lumbosacral sprain and strain with intermittent radiculopathy, chronic cervical sprain and strain with intermittent radiculopathy, bilateral shoulder strain, and bilateral negative ulnar variance of the wrist with possible wrist tendinitis and carpal tunnel syndrome. In connection with those diagnoses, Dr. Sharma stated in his May 8, 2020 report that applicant's "symptoms are the result of continuous microtrauma to the musculoskeletal system due to working from 1986 to 2019 when he stopped working because treatment was denied by the employer." Having reviewed a series of recent MRI studies, Dr. Sharma described them as "significantly abnormal," further opining that applicant "needs aggressive orthopedic care for his lumbar spine, cervical spine, bilateral shoulders, and knees as well as his wrists and hands." Dr. Sharma recommended that applicant be seen by a spine surgeon for his cervical and lumbar pathology, that applicant's shoulders should be treated conservatively but "interventional therapy" could not be ruled out, and that applicant did not need wrist surgery. In his October 8, 2020 report, Dr. Sharma also stated that applicant needed to see an orthopedic surgeon for knee surgery, and the doctor further recommended consultation by a gastroenterologist and a neurologist. We note, however, that Dr. Sharma did not diagnose applicant with bilateral knee problems in his initial report of May 8, 2020, and that the doctor did not state in his October 8, 2020 report that the need for applicant to see an orthopedic surgeon for bilateral knee surgery is the result of industrial injury. Therefore, although we do not make a final determination, at present the record does not support a finding that applicant sustained industrial injury to his bilateral knees by way of cumulative trauma.

We further note that in his May 8, 2020 report, Dr. Sharma referred to the possibility that applicant sustained a specific low back injury in 2018 as a result of lifting a heavy air-conditioning unit on a pallet jack. Yet it is uncertain whether the doctor was referring to a specific injury that occurred on October 15, 2018, as alleged by applicant in case number ADJ12131247. Therefore, we conclude that the record requires further development concerning this issue. Further, for the reasons stated above, we conclude that further development of the record is required on the alleged

cumulative trauma injury to applicant's bilateral knees in ADJ12131630, as well as the alleged injury to his head, headaches, hernia, hips, psyche and internal/digestive system. These injuries were claimed at trial on August 17, 2021, but they have yet to be medically evaluated. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 [Appeals Board en banc].)

Having disposed of the issue of industrial injury, we close by addressing defendant's sole contention; defendant objects to the reporting of Dr. Torres as it relates to temporary disability. Defendant alleges that the reports of Dr. Torres dated August 13, 2019, January 21, 2021, March 30, 2021, and June 9, 2021 are not substantial evidence because they fail to include a medical record review, job analysis, and job description. First, we note that of those reports, the only one in evidence is the report dated June 9, 2021 and as such it is the only one that requires a response to defendant. (Joint Exhibit DD.) Although defendant complains that the report lacks the content mentioned above, it makes no difference because Dr. Sharma's reporting does have the necessary content to support our conclusion that applicant sustained orthopedic injury by way of cumulative trauma. We further note that defendant's petition is limited to the allegation that Dr. Torres's reporting does not support an award of temporary disability. However, the allegation is irrelevant because the issue of temporary disability is not before us; it was not raised at trial on August 17, 2021 and it was not decided by the WCJ. In short, there is no final order on temporary disability from which a petition for reconsideration is properly taken; defendant's petition was subject to dismissal as premature but it was necessary for the Board to take the occasion to completely address the issue of industrial injury.⁵ (*Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].)

⁵ Defendant may have waived the issue of industrial injury under Labor Code section 5904, but again, we found it necessary to thoroughly address the issue upon reconsideration.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings and Order of August 31, 2021 is **AFFIRMED**, except that Findings 1, 2 and 3, and paragraph (b) of the Order, are **AMENDED** to reflect as follows:

JOINT FINDINGS OF FACT

1. (ADJ12131630) Jorge Gomez, while employed during the period November 24, 1984 through February 5, 2019 at Los Angeles California, by Jam-Mart Crystal Promotions, sustained injury arising out of and in the course of employment to his cervical and lumbar spine, bilateral shoulders, and bilateral wrists.
2. (ADJ12131630) The issue of whether applicant sustained injury arising out of and in the course of employment to his head, headaches, hernia, hips, lower extremities, psyche and internal-digestive, as alleged at trial on August 17, 2021, is deferred, pending evaluations by the appropriate medical specialties and determination by the WCJ, with jurisdiction reserved at the trial level.
3. (ADJ12131247) The issue of whether applicant, while employed on October 15, 2018, at Los Angeles California, by Jam-Mart Crystal Promotions sustained injury arising out of and in the course of employment to his lumbar spine is deferred pending further development of the record and determination by the WCJ, with jurisdiction reserved at the trial level.

ORDER

- (b.) It is hereby ordered that the outstanding issues of injury described in Findings 2 and 3 are deferred pending further development of the record and determination by the WCJ, with jurisdiction reserved at the trial level.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that ADJ12131630 and ADJ12131247 are **RETURNED** to the trial level for further proceedings and new decision on all outstanding issues by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 5, 2024

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

**JORGE GOMEZ
IGLOW & BACHRACH
TOBIN LUCKS**

JTL/ara

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