WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MANUEL ERIC FAGUNDES, *Applicant*

vs.

US DAIRY SYSTEMS and ARCH INSURANCE COMPANY administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ12309738
Fresno District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact, Award, and Order issued by the workers' compensation administrative law judge (WCJ) on August 4, 2022, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his brain, nervous system, and vascular system, and that the opinions of Kenneth Solomon, Ph.D., are flawed and do not constitute substantial evidence.

Defendant contends that applicant did not meet his burden of proof as to the issue of injury AOE/COE.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant claimed injury in the form of a carotid dissection [torn carotid artery] causing a stroke, resulting in injury to his brain, nervous system, and vascular system, while employed by defendant as a working project manager on May 6, 2019. As discussed by the WCJ:

> Applicant and his co-workers had been assigned to remove large milk storage tanks from a dairy barn on May 6, 2019. ¶ … Applicant took a jack to the rear of the tank and, when his co-workers had elevated the front of the tank, he positioned his pneumatic jack while working on his hands and knees. According to the testimony, Applicant pressurized the jack while in a kneeling position. When he stood up, his co-workers observed that he was struggling physically and heard him speak in a slurred manner.
> (Report, p.2.)

Neurology qualified medical examiner (QME) Robert J. Shorr, M.D., evaluated applicant on September 24, 2019. Dr. Shorr examined applicant and took a history, but he noted that he had only received one medical report to review, and he explained that:

> Causation is deferred, pending review of the medical records. If, indeed, the claimant did have a carotid dissection, this would be industrial in causation; however, I will await the medical records prior to making that determination.
> (App. Exh. 1, Dr. Shorr, September 24, 2019, p. 5.)

After reviewing the extensive medical record, Dr. Shorr submitted a supplemental report. The diagnoses included, "Right carotid dissection with right middle cerebral artery ischemic stroke." (App. Exh. 2, Dr. Shorr, March 4, 2020, p. 27.) As to the cause of applicant's various symptoms, Dr. Shorr stated:

> With reasonable medical probability, the claimant did have a carotid artery dissection, which resulted in a right cerebral artery ischemic stroke. The cause of the stroke is carotid artery dissection, which occurred at work doing heavy physical activity. This has been confirmed in the depositions from the claimant's co-workers, the claimant's wife, and the medical records. The claimant's current condition, therefore, would be considered industrial in causation.
> (App. Exh. 2, p. 30.)

Dr. Shorr was provided additional medical records and in his June 11, 2020, report he stated:

> … [I]t was my opinion that, with reasonable medical probability, and based on the medical records and imaging studies, the claimant did have a carotid artery dissection, which resulted in a right cerebral artery ischemic stroke. It was my opinion that the cause of the stroke was work doing heavy physical activity. This activity was confirmed in the depositions of the claimant's co-workers, the claimant's wife, and the medical records. I, therefore, considered the claimant's current condition and need for ongoing treatment as being industrial in causation. ¶ … [M]y opinions as set forth in my past report of March 4, 2020, remains unchanged, as noted on pages 30-31 of that report.
> (App. Exh. 3, Dr. Shorr, June 11, 2020, pp. 4 - 5.)

On June 23, 2020, Dr. Shorr's deposition was taken. During the deposition, he agreed to reserve judgment as to the ultimate question of the cause of applicant's stroke, and resulting symptoms, until he had the opportunity to review additional information regarding the nature of applicant's physical job activities. (App. Exh. 5, Dr. Shorr, June 23, 2020, deposition transcript, p. 25, lines 13 - 18.) The doctor subsequently reviewed applicant's personnel file and deposition transcripts, including the deposition of Mike Harmon who worked as defendant's regional manager. In his November 30, 2020, supplemental report, Dr. Shorr stated:

> Based on the history of inguinal hernias close in time before the dissection (evidence of heavy work) and the contemporaneous descriptions of events by the paramedics and the claimant's co-workers in their depositions, I am forced to conclude that the work events of the date of injury were the proximate cause of the claimant's stroke.
> (App. Exh. 4, Dr. Shorr, November 30, 2020, p. 9.)

Dr. Shorr was deposed again on July 7, 2021. (App. Exh. 6, Dr. Shorr, July 7, 2021, deposition transcript.) His testimony regarding the cause of applicant's injury included the following:

> A. Well, I would say that if we keep going a little bit where it says he observed Eric [applicant] bending over to pump the jack and Eric had to reposition the jack as it wasn't centered, which involved kneeling or squatting, again, it has to be pushed up and down to engage the hydraulics. It does put it into a situation where there was probably a Valsalva maneuver [forced expiration against a closed airway] that is increased intrathoracic pressure based on that alone, and then all of a sudden, he has this, "hiccup and burp," and all of a sudden, his speech is slurred. … It would be impossible for me to say that this definitely was the cause, but it certainly suggests that he was in a physiologic situation that may

> have caused that -- in that immediate situation to cause the dissection [torn carotid artery].
> (App. Exh. 6, p. 18.)

> A. …I would stand by the fact it is a probability that these activities that he was doing involved a Valsalva maneuver, which then was the proximate cause of his dissection on that day. That's what I'm saying, and I would stand by that.
> (App. Exh. 6, p. 22.)

> A. … So if we have something more specific that may show some change in the concept, I will look at it, but I still have the basic idea here that he did have the Valsalva maneuver and that led to the dissection and was related to the work that he was doing in the course of his employment.
> (App. Exh. 6, p. 29

The parties proceeded to trial on April 6, 2022. (Minutes of Hearing and Summary of Evidence (MOH/SOE), April 6, 2022.) The WCJ's summary of the testimony of applicant's witness, Julian Macias included:

> While working at the front of the tank, he had to kneel to position the jack and pressurize it (although he could do that by kneeling or bending over.) When he came around to the rear of the tank, Applicant was kneeling as well. He believes that Applicant pressurized the jack while in the kneeling position. ¶ Applicant stood up, but while facing away from him, the witness thought he heard him hiccup. He heard Alex Quair ask him "Are we ready to go?" Applicant tried to respond, but his speech was very slurred. Later, he learned that Alex recognized immediately that Mr. Fagundes was suffering a stroke.
> (MOH/SOE), April 6, 2022, p. 7.)[1]

The matter was continued and at the July 11, 2022 trial the parties chose not to submit any additional evidence and requested that the matter be submitted. MOH/SOE, July 11, 2022, p. 2.) The issue submitted for decision was injury AOE/COE. (See MOH/SOE, April 6, 2022, p. 2.)

[1] We note that Mr. Macias' testimony was consistent with the testimony of Michael Ewins and Alexander Quair who had also been called as applicant's witnesses.

DISCUSSION

Regarding Dr. Shorr's opinions as to whether his work was a cause of applicant's injury, in the Report the WCJ explained:

> The Panel QME in the case spent face-to-face time with Applicant, took a detailed history, physically examined, and evaluated him and performed necessary and relevant testing. Dr. Shorr also reviewed medical records and gave well-reasoned, cogent opinions and conclusions. It was undersigned's conclusion that Dr. Shorr's reports, and deposition *are* substantial evidence … (Report, p. 6, italics and underlining in original.)

Based on our review of the trial record, we agree with the WCJ that Dr. Shorr's reports, and deposition testimony are substantial evidence that applicant sustained injury AOE/COE, in the form of a stroke and the resulting conditions. Also, as the WCJ noted, there is no medical evidence in the record controverting or otherwise inconsistent with Dr. Shorr's opinions.

Defendant argues that the reports from biomechanics expert Kenneth A. Solomon, Ph.D., are evidence that applicant was not performing work activity that would be considered heavy lifting prior to his stroke. Dr. Solomon's initial report states in part that:

> 2. Based on our preliminary analysis, it is unlikely that Plaintiff Fagundes would have been exerting over 50 lbs. of force in order to operate the subject jack prior to his stroke.
> 3. Considering that Plaintiff Fagundes was not exerting himself significantly during the operation of the subject jack, it is impossible to definitively attribute his carotid artery dissection or stroke solely to his work the day of the subject incident.
> (Def. Exh. A, Dr. Solomon, March 1, 2022, p. 2.)

His second report, indicates that Dr. Solomon, "… performed testing of the force required to operate the subject jack by incrementally applying weight up to 1,603.2 lbs." (Def. Exh. H, Dr. Solomon, April 1, 2022, p.1, underling added.)

We first note that "the subject jack" Dr. Solomon tested was not the jack applicant was using at the time of his injury. At the trial, applicant's witness Alexander Quair was shown a photo of the jack Dr. Solomon tested and he testified that it was "very similar" to the type Applicant was using that morning." (MOH/SOE, p. 5.) Mr. Macias also testified that, "He recognized the jack in the picture as being similar to the one they used on May 6, 2019. The jack they used was a three-ton model, and this one looks similar." (MOH/SOE, WCJ summary of testimony, p. 7.) However, the fact that the jack tested by Dr. Solomon was similar to the one applicant was using on the date

of the injury, is not evidence regarding the actual jack applicant was using, nor is it evidence pertaining to applicant's physical activity while using the jack prior to his stroke. Also, Dr. Solomon's conclusion that it is unlikely applicant was exerting more than 50 lbs. of force when using the jack, and therefore, "… it is impossible to definitively attribute his carotid artery dissection or stroke solely to his work …" (Def. Exh. A, p. 2) does not constitute substantial evidence. It is well established that for the purpose of meeting the causation requirement in a workers' compensation injury claim, it is sufficient if the work is a contributing cause of the injury. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd*. (2015) 61 Cal.4th 291 [80 Cal.Comp.Cases 489].) Clearly, Dr. Solomon's conclusion is based on an incorrect legal theory. Also, it appears that since Dr. Solomon is a scientist, not a physician, his medical opinion as to the cause of applicant's stroke is outside his field of expertise and is not substantial evidence. (*Zemke* v. *Workmen's Comp. App. Bd.* (1968) 68 Cal.2d 794, 798 [38 Cal.Comp.Cases 358].) Thus, his opinions are not substantial evidence and therefore cannot be the basis for an award, order, or decision of the Appeals Board. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].)

Accordingly, we agree with the WCJ's Findings of Fact, Award, and Order, and we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact, Award, and Order issued by the WCJ on August 4, 2022, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 28, 2022

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

MANUEL ERIC FAGUNDES
BRADFORD & BARTHEL
MITCHELL & POWELL

TWH/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Defendants, US Dairy Systems and Arch Insurance Company/Sedgwick (hereafter Petitioners) filed a timely and verified Petition for Reconsideration of the undersigned's Findings of Fact, Order, and Opinion on Decision, finding injury AOE/COE, awarding Applicant treatment and benefits.

II
BACKGROUND

The issues presented to the Court for purposes of this trial were whether Applicant's il1jury arose out of, and was in the course of employment. All other issues were deferred by agreement of the parties.

In this matter, Applicant was employed as a Working Project Manager, tasked with projects at dairy locations throughout California's Central Valley. While at a job site in the Exeter/Lindsay area, Applicant and his co-workers had been assigned to remove large milk storage tanks from a dairy barn on May 6, 2019.

[III]
DISCUSSION

On the morning of his injury, one tank remained in a barn and the team, consisting of Applicant, Michael Ewins, Alexander Quair, and Julian Macias, discussed how to maneuver the tank out of the barn. The nearly 4,000 pound metal tank stood on a smooth, level cement slab surface, near the rear of the barn, with only one to two feet of clearance from the back wall.

To move the milk tank out, the team planned to use pneumatic jacks .to elevate the tank. Once fully-elevated, they planned to drag it out of the barn. Applicant took a jack to the rear of the tank and when his co-workers had elevated the front of the tank, he positioned his pneumatic jack while working on his hands and knees. According to the testimony, Applicant pressurized the jack while in a kneeling position. When he stood up, his co-workers observed that he was struggling physically and heard him speak in a slurred manner.

While there was testimony to the effect that the co-workers felt Applicant's jack worked properly, they also testified that jacks were simply replaced if they did not work as intended. Therefore, no evidence was presented substantiating the maintenance of the jacks.

His co-workers took him to a nearby hospital, but later Applicant was air-lifted to a hospital in Los Angeles where he underwent multiple procedures. Applicant was evaluated by a Panel Qualified Medical Evaluator, who found that he was totally, permanently, impaired as.a result of the aortic dissection, causing injuries to his brain, vascular system and nervous system. Applicant's claim for benefits was denied by the carrier, contending that the physicality of the work did not contribute to Applicant's cardio event. The undersigned issued the Findings of Fact, Award, Order, and Opinion on Decision on August 5, 2022. Petitioners' Petition for Reconsideration was uploaded into the Court's virtual file on August 29, 2022 and is, therefore, timely made. This Report & Recommendation is issued in support of the undersigned's Findings and Orders.

The PQME reviewed the medical records, and in his follow-up report, Dr. Shorr found that Applicant suffered a right middle cerebral artery ischemic stroke, with a history of carotid dissection and failed left carotid thrombectomy. Further, he found that Applicant suffered from "respiratory failure, hypophosphatemia, bradycardia, and hypomagnesemia, pneumonia, fluent aphasia, and dysphasia, with hemianopia due to the stroke." (Applicant's Ex. 2.) Further, he found that the record was bereft of any prior mention of hypertension and Applicant was "athletically oriented." Additionally, he noted that the record showed that Applicant's work required very heavy lifting and "heavy physical activities." Most importantly, Applicant had undergone a wellness evaluation less than one month before where it was noted that there were no "significant abnormalities noted."

In his report, marked as Applicant's Exhibit 2, Dr. Shorr found that Applicant was totally disabled and could not "anticipate any significant improvement."

After reviewing more records, Dr. Shorr issued a third report, in which he discussed the "Valsalva" maneuver and its effect:

"Based on the medical records, including the depositions from the claimant's fellow co-workers, it was noted that, ***just prior to the claimant's stroke***, ***he was involved in very heavy activity***, moving large tanks, requiring bending, squatting, and heavy lifting activities. It apparently was after using a jack to jack up one of the tanks, he was stooped over. The claimant stood up and had slurred speech. ***It was likely that being stooped over increased the abdominal pressure and his jacking up the tank created physical activity that caused a Valsalva maneuver***. ***We know that Valsalva maneuvers can cause dissections."*** (Applicant's Ex. 3. Emphasis added.)

Dr. Shorr further elaborated that: "... the work with the pallet jack moving arm equipment ***most likely precipitated his carotid dissection and secondary stroke***" ***forcing him "to conclude that the work events of the date of injury were the proximate cause of the claimant's stroke***." (Applicant's Ex. 4. Emphasis added.)

While the Panel QME noted that this is an unusual presentation, particularly in a work setting, it is "accepted in the neurology/neurosurgery practicing community that it would be associated with lifting, particularly in somebody who otherwise doesn't really have risk factors and is relatively young." (Applicant's Ex. 5.) Dr. Shorr was deposed a second time, and he supported and stood by his opinions. (Applicant's Ex. 6.)

No other medical evidence was presented -by either party. Rather, Petitioners sought the opinion of a biomechanical expert in an effort to overturn the medical evidence. Notwithstanding the stature of the expert retained, there is no legal basis to present non-medical evidence to refute medical evidence. Typically, parties attack the substantiality of the evidence, by showing that the medical/legal expert missed a step, or failed to support an opinion with medical evidence.

There was nothing presented that showed that Petitioners challenged Dr. Shorr's status as the Panel QME in the case. No effort was made to replace the medical/legal evaluator. Instead, the undersigned was presented with the opinions of the biomechanical expert, who purchased a brand--new pneumatic jack, but laid no foundation as to how it was the same or similar to the one used on the date of Applicant's cardiac event. Next, the biomechanical expert makes the conclusory that Applicant would have had to exert over fifty pounds of force to trigger the stroke, and that the aortic dissection could have been related to bicycling in the days prior. No evidence was presented that Applicant had been cycling in the days prior to the event. Further, there is no evidence that Applicant was speaking with a slurred affect, or showing any other signs of a stroke ***until just after activating the pneumatic jack***.

In addition to there being no legal basis for allowing a non-medical report to rebut the opinions of medical practitioners, the law does allow for the submission of reports from attending or examining physicians, employer reports, hospital records, and vocational reports. for the Court's consideration. (Labor Code§ 5703.)

For the past twenty-plus years, the law has made it clear that it is loath to allow even another physician, who has not treated the injured worker, nor is licensed as a QME, to contribute contrary opinions. "Allowing his opinion in evidence at this point would be ***tantamount to permitting doctor shopping*** ... " (*Sonia Quinn v. Macy's West* (2010) 38 CWCR 42, 43; Labor Code§ 4601(i). Emphasis added.)

The Panel QME in the case spent face-to-face time with Applicant, took a detailed history, physically examined and evaluated him and performed necessary and relevant testing. Dr. Shon also reviewed medical records and gave well-reasoned, cogent opinions and conclusions. It was undersigned's conclusion that Dr. Shorr's reports and deposition ***are*** substantial evidence arid those opinions were adopted and incorporated opinions herein, entitling Applicant to Workers' Compensation benefits as allowed by law.

IV
RECOMMENDATION

It is therefore recommended that the Petition for Reconsideration be denied.

Date: September 13, 2022

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GEOFEREY H. SIMS
Workers Compensation
Administrative Law Judge