

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

JUVENAL TORRES ZAMORA, *Applicant*

vs.

**MAYA RESTAURANT; EMPLOYERS
COMPENSATION INSURANCE COMPANY,
*Defendants***

**Adjudication Numbers: ADJ10586384
San Francisco 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.*)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 9, 2023

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

**JUVENAL TORRES ZAMORA
LAW OFFICE OF KENNETH MARTINSON
MULLEN & FILIPPI**

LN/pm

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

On August 9, 2023 the Applicant filed a timely, verified Petition for Reconsideration of my July 21, 2023 Findings of Fact and Award. It appears that the Petition was filed twice, but I could discern no difference between the two filings and therefore proceed on the basis that they are identical.

Applicant does not explicitly state the grounds on which he is seeking Reconsideration under Labor Code section 5903. Based on the relief sought of further development of the record, it appears applicant is challenging Finding of Fact No. 3 where I found there is not a need for further development of the record. (Applicant's Petition, p. 14, lines 1-6; Findings of Fact and Award 7/21/2023, p. 1.) I am therefore preparing this Report and Recommendation on the assumption that applicant is seeking reconsideration based on Labor Code 5903(c), "That the evidence does not justify the findings of fact."

The general thrust of applicant's Petition is that I erred in relying on the reporting of QME Nicole Chitnis, M.D. because issues with translation at an evaluation meant that Dr. Chitnis had an inaccurate history from the applicant, and Dr. Chitnis failed to review 2,898 pages of medical records. (Applicant's Petition for Reconsideration filed August 9, 2023 ("Applicant's Petition") p. 1, line 20 - p. 2, line 2.) Applicant also asserts that I erred in not finding the applicant's testimony credible, although he does not identify which finding of fact that error would effect. (Applicant's Petition, p. 10, line 4 - p. 13, line 23.)

II. BACKGROUND

This matter first went to trial on August 23, 2022 where the stipulations, issues and exhibits were read into the record. (Minutes of Hearing for 8/23/2022 (8/23/2023 MOH).) There were then three days of testimony by the applicant. (Minutes of Hearing and Summary of Evidence for 11/15/2022 (11/15/2022 MOH/SOE); Minutes of Hearing and Summary of Evidence for 1/5/2023 (1/5/2023 MOH/SOE); and Minutes of Hearing

and Summary of Evidence for 4/26/2023 (4/26/2023 MOH/SOE.) The matter was submitted April 26, 2023.

There were QME's in four specialties in this matter, but the Petition for Reconsideration discusses only Dr. Chitnis, who served as QME in physical medicine and rehabilitation. (8/23/2023 MOH, p. 4, lines 46-47.) An issue for trial was "Whether the December 1, 2020 report of QME Nicole Chitnis, M.D., is rendered not substantial medical evidence due to applicant's allegation of inaccurate interpreting and use of multiple interpreters." (8/23/2023 MOH, p. 3, lines 18-21.) An additional issue involved whether a replacement internal QME panel was required. (8/23/2023 MOH, p. 3, lines 23-29.)

In my July 21, 2023 Findings of Fact I found that there is not a need for further development of the record. (Findings of Fact and Award 7/21/2023, p. 1.) In my July 21, 2023 Opinion on Decision I explained that applicant had not presented persuasive evidence that there was a material change in the applicant's internal medical complaints to warrant further evaluation. (Opinion on Decision 7/21/2023, p. 25.) I additionally found that the interpreting difficulties at the November 15, 2021 evaluation by Dr. Chitnis did not rise to a level that would render her report not substantial medical evidence. (Opinion on Decision 7/21/2023, p. 26.) Accordingly, I found there was not a need to develop the record. My decision was based primarily on the documentary evidence presented as I did not find the applicant's testimony credible regarding his medical history or condition. (Opinion on Decision 7/21/2023, pp. 18-19.)

Applicant does not explicitly challenge my other findings in his Petition for Reconsideration. Nor does applicant assert further development is needed other than with Dr. Chitnis. However, because applicant asserts a need for further development of the record, it is assumed he is also challenging my finding of fact that the industrial injury did not cause injury to the right foot or the bilateral knees, and the finding of 42 percent permanent partial disability, and thus challenging the resulting Award. (Findings of Fact and Award 7/21/2023, p. 1.)

III. DISCUSSION

A Workers' Compensation Judge is empowered to obtain additional medical evidence where records are inaccurate, incomplete, or inconsistent. (*McDuffie v. Los Angeles County Metro. Transit Auth.*, (2002) 67 Cal. Comp. Cases 138, 141 (Appeals Board en banc).) The Appeals Board's duty to develop the record must be weighed against each litigant's obligation to conduct discovery diligently. (*San Bernardino Community Hospital v. Workers' Comp. Appeals Bd.* (McKernan) (1999) 74 Cal. App. 4th 928.)

The applicant alleges that Dr. Chitnis's December 1, 2021 report is not substantial evidence, necessitating the need to develop the record. (Applicant's Petition, pp. 1-2.) I will address the two areas that applicant challenges Dr. Chitnis' December 1, 2021 report as not substantial evidence: interpreting issues, failure to review reports. First I will address the applicant's more general dispute with my credibility determination.

CREDIBILITY OF THE APPLICANT

I did not find the applicant's testimony credible, and having reviewed Applicant's Petition and the evidence, I still do not find the applicant's testimony credible. The applicant testified over three days, and there are inconsistencies within his own testimony.

Applicant's Petition correctly points out that my Opinion erred when I stated the applicant's leg numbness began after his final evaluation with Dr. Chitnis. (Applicant's Petition, p. 11, lines 4-9.) The applicant testified that numbness in his legs began in 2021. (1/5/2023 MOH/SOE p. 3, line 35-36.) Although testifying that the numbness in his legs changed, he also stated that numbness was felt from the time of the accident at the restaurant. (1/5/2023 MOH/SOE p. 7, line 39-44.) That error in my Opinion does not resuscitate the applicant's credibility.

Applicant's Petition alleges that I incorrectly stated in my Opinion that applicant made statements that his knee pain and numbness began after his final evaluation with Dr. Chitnis. (Applicant's Petition p. 11, lines 17-22.) Although, as stated above, the applicant stated he had leg numbness since the time of the accident, the applicant also

stated that part of the change in the leg numbness since the time of the final evaluation with Dr. Chitnis was that the numbness now reached the knee. (1/5/2023 MOH/SOE p. 7, lines 42-45.) The applicant testified on January 5, 2023 about his knee pain. (1/5/2023 MOH/SOE p. 2, line 25-33.) He further testified that the symptoms he described in his testimony on January 5, 2023 began after he was last examined by Dr. Chitnis, except for leg numbness which started in 2021. (1/5/2023 MOH/SOE p. 3, line 34-36.) Therefore the applicant is inconsistent on whether his leg numbness occurred from the time of the injury, or in 2021.

There are additional inconsistencies between the medical record and the applicant's testimony, as discussed in my Opinion. (Opinion, pp. 18-19.) In his Petition for Reconsideration, the applicant argues that I failed to examine the medical record in 2021 for evidence that the applicant's "emotions became worse after the 11/3/2020 surgery." (Applicant's Petition, p. 12, lines 13-17.) Applicant asserts I should have looked for "emotions" other than anxiety and looked also for anger, stress, and irritation. (Applicant's Petition, p. 12, lines 17-25.) I have re-reviewed the treating physician reports from 2021, and see no references to anger or irritation as an emotion. (Joint Exhibit 120: Reports of PTP Masami Hattori, M.D., dated June 28, 2021 to February 15, 2022; Defendant's Exhibit K: Reports of Hana Renor, NP, dated from October 11, 2021 through January 12, 2022; Applicant's Exhibit 4: Report of Hana Renor, NP, dated March 24, 2021.) As stated in my Opinion, there were numerous references to the applicant denying stress in 2021. (Opinion on Decision, p. 16, and for example Joint Exhibit 120, p. 37; Applicant's Exhibit 4, p. 3.) I therefore remain of the opinion that the applicant's testimony regarding a change in his emotional state after his November 3, 2020 surgery is not credible.

I remain of the opinion that the applicant's testimony was not credible regarding his medical history and conditions.

TRANSLATION PROBLEMS

Applicant asserts that the December 1, 2021 report of Dr. Chitnis is not substantial evidence because of interpreting difficulties. (Applicant's Petition, p. 1, line 22 – p. 2,

line 1.) The applicant was evaluated by Dr. Chitnis for a final time on November 15, 2021, at which there were two interpreters, Eva Ponce, and Alicia Pagliere, present. (Joint Exhibit 109, pp. 1-2.)

In her report, Dr. Chitnis stated that the applicant expressed difficulty understanding Ms. Pagliere, but Dr. Chitnis stated that communication was further clarified by Ms. Ponce. (*Id.* at p. 2.)

The parties took the deposition of Dr. Chitnis on March 7, 2022. (Joint Exhibit 110.) While acknowledging that she is not a Spanish speaker herself, Dr. Chitnis believed that she, interpreter Eva Ponce, and the applicant were comfortable in the communication at the November 15, 2021 evaluation, and a re-exam was not needed. (*Id.* at page 21, line 23 - page 22, line 7.) While there were apparent interpreting difficulties with interpreter Alicia Pagliere, the doctor and Eva Ponce went back to make sure the applicant was able to express everything he wished to say. (*Id.* at page 19, lines 2-19.)

I am not persuaded that the presence of multiple interpreters resulted in an inaccurate history that would invalidate the reporting. The applicant did not identify anything in the report that he felt was incorrect due to translation. Although the applicant cannot read the report in English for himself, if there was any question of its accuracy, the applicant's attorney could have had the report translated or discussed the report with the applicant to identify the deficiencies. Although testifying to symptoms not reflected in the report, the applicant never testified to discussing those conditions with Dr. Chitnis. I remain persuaded by Dr. Chitnis' deposition testimony that interpreter Eva Ponce was able to correct any deficiencies in the initial interpreting by Alicia Pagliere. Therefore, my opinion that Dr. Chitnis' report is substantial medical evidence is not undermined by the interpreting issues.

FAILURE TO REVIEW RECORDS

Applicant additionally alleges that development of the record is needed because Dr. Chitnis failed to review medical records. (Applicant's Petition, p. 7, line 22 – p. 10, line 3.) It is first noted that applicant alleges Dr. Chitnis did not review an April 30, 2021

lumbar MRI. (*Id.* at p. 8, lines 17-23.) In fact Dr. Chitnis did review the April 2021 lumbar MRI. (Joint Exhibit 109, p. 30.)

Applicant also alleges in his Petition that Dr. Chitnis was unaware of a February 6, 2019 motor vehicle accident that was claimed as industrial, or the November 2020 lumbar surgery. (Applicant's Petition, p. 9, line 16 – p. 10, line 3.) However, Dr. Chitnis had previously been seen for an evaluation following that accident. (Joint Exhibit 107, p. 6.) And in the December 1, 2021 report, Dr. Chitnis notes the accident in her discussion of the history of the injury at issue. (Joint Exhibit 109, p.4.) Dr. Chitnis' December 1, 2021 report indicates no surgeries and only a 10 year old motor vehicle accidents in a section titled "Past Medical History." (Joint Exhibit 109, pp. 7-8.) However, that section clearly relates to the applicant's history unrelated to the injury at issue. (Joint *Ibid.*) This interpretation is supported by the fact that Dr. Chitnis discusses the February 6, 2019 motor vehicle accident, and the November 2020 lumbar surgery in sections titled "Brief History of Injury" and "Interim History." (*Id.* at pp. 4-7.)

The applicant alleges that there is a gap in treatment records that were provided to Dr. Chitnis from the end of 2020 through her deposition in March 2022. (Applicant's Petition, p. 8, lines 1-4.) In fact Dr. Chitnis did receive and review 2 treatment records and an MRI report from 2021. (Joint 109, p. 30.) There is no evidence that the applicant sent or attempted to send medical records he felt were relevant to Dr. Chitnis in advance of the November 2021 evaluation or before the March 2022 deposition. In my review of the 2021 treatment records, I was not persuaded that there was a change in the applicant's condition to necessitate further review by Dr. Chitnis.

The applicant also alleges that Dr. Chitnis failed to review 2,898 pages of records. (Applicant's Petition, p. 7, line 22 – p. 8, line 1.) The applicant's attorney stated in Dr. Chitnis' deposition that those pages were from his office. (Joint Exhibit 110, p. 11, lines 6-11.) Dr. Chitnis indicated in her June 15, 2021 report that 2,898 pages of records were not reviewed because they were received without attestation. (Joint Exhibit 108, p.2.) There is no evidence that applicant ever sent an attestation. If applicant wished the QME to review the records, then he must send an attestation. Dr. Chitnis has previously

reviewed many thousands of pages of subpoenaed records, which were sometimes re-submitted for review. (*Id.* at pp. 13, 15, 21.) Because applicant has not identified the 2,898 pages he sent, it is not clear if they were already reviewed.

CONCLUSION

I am not persuaded by applicant's Petition for Reconsideration that there is a need to further develop the record in this matter. I continue to be of the opinion that Dr. Chitnis' reporting is substantial medical evidence. Therefore, my July 21, 2023 Findings of Fact and Award are supported by substantial medical evidence.

IV. RECOMMENDATION

For the foregoing reasons, I recommend that Applicant's Petition for Reconsideration, filed herein on August 9, 2023, be DENIED.

Date: August 23, 2023

Lawrence Keller
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE