

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

ANA MARROQUIN, Applicant

vs.

CHIPTON-ROSS STAFFING, INC.; ZURICH NORTH AMERICA, *Defendants*

**Adjudication Number: ADJ11599995
Van Nuys District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION**

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact of December 22, 2023, wherein it was found that while employed as a maintenance worker during a cumulative period ending on June 11 2018, applicant did not sustain industrial injury to her shoulder, back, knees, ankles, feet, and hands. The WCJ thus issued an order that applicant take nothing by way of her workers' compensation claim.¹

Applicant contends that the WCJ erred in not finding industrial injury. We have received an Answer from defendant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

¹ Previously in this matter, in a Findings and Order of November 18, 2020, a different WCJ had found industrial injury, ruling that applicant's claim of injury was industrial by way of the Labor Code section 5402(b) presumption of injury, which had not been rebutted. In an Opinion and Decision After Reconsideration of February 26, 2021, we rescinded the November 18, 2020 decision and returned the matter back to the trial level for further proceedings and decision on the applicability of the Labor Code section 5402(b) presumption and applicant's claims of industrial injury. The panel for our February 26, 2021 decision included former Commissioner Marguerite Sweeney, who has retired from the Appeals Board, and Commissioner Katherine Williams Dodd, who is unavailable to participate in the current proceedings. They have been replaced in the instant proceedings by Commissioner Joseph V. Capurro and Deputy Commissioner Lisa A. Sussman. We note that the Findings of Fact of December 22, 2023, the WCJ found that the Labor Code section 5402(b) presumption was not applicable (Finding No. 3), but the instant Petition does not raise any claim of error as to that finding.

For the reasons stated by the WCJ in the Report, which we adopt, incorporate, and quote below, we will deny the applicant's Petition for Reconsideration.

JUDGE'S REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

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|---|------------------------|
| 1. Findings & Order | Dated 12-21-2023 |
| 2. Identity of Petitioner: | Applicant |
| 3. Verification: | Yes |
| 4. Timeliness: | The petition is timely |
| 5. Date Petition filed: | 01-02-2024 |
| 6. Petitioner asserts that the undersigned's decision 1)erroneously relied on PQME Dr. Andrade's reporting contending it is not substantial medical evidence; 2) contending there was no evidence commenting on correlation between diabetes and obesity. | |

The issue of diabetes and obesity were not at issue, merely AOE/COE.

II. FACTS

This case was initially tried by Judge Seymour and made its way to recon on December 3, 2020. On February 26, 2021, the Appeals Board to address the issue of the presumption on injury. Eventually the matter returned to the trial level for further decision and analysis on the presumption.

Upon its return, Judge Seymour set this for hearing, parties required to additional time to meet and confer. On May 20, 2021, parties were pending a supplemental from the QME reviewing the trial testimony July 28, 2021 for status conference.

At the next hearing on parties informed the judge that the deposition of the PQME taken in the civil trial and applicants' attorney needed to review the deposition testimony of the doctors and other witnesses. The matter was continued to September 29, 2021

At the hearing on September 29, 2021, the Minutes reflected applicant's attorney is waiting for an MMI report from PTP. The civil case set for November. Additional reports from the PQME were being reviewed by PTP and the matter is continued to December 8, 2021.

At the December 8, 2021 hearing Judge Seymour comments note that defendant requested trial and yet the documents listed on defendant's exhibit lists were received that day by applicant's attorney who requested time to review and reply which was granted and the matter was continued to February 28, 2022.

At the hearing on February 28, 2022, the case was reassigned to the undersigned with challenge waived and the new updated pretrial conference statement was ordered to be filed by March 1 of 2022. For whatever reason the hearing day was not set.

The next hearing date was August 1, 2022, before Judge Graff who set out in the comments section that this matter was previously before WCJ Seymour and went up on recon. Judge Seymour reassigned it for further proceedings on February 28, 2022, before Judge Devine, challenges were waived, however, the case was never set for trial. The case is now set before Judge Devine as previously planned. A trial date was given of October 3, 2022.

On October 3, 2022, this matter came before P.J. Velzy who granted a remote trial for parties as the undersigned was engaged in another trial at the time. The trial was then set for December 28, 2022. On that date another continuance was given to parties due to unavailability of the judge and the matter was reset to March 22, 2023.

On March 22, 2023, parties wish to proceed on the prior record +2 additional exhibits. Defendant wanted to request transcripts where testimony had been given, I noted that the cases post recon and was reassigned to another new judge. A continuance was granted.

The matter was continued to May 17, 2023, defendant was still in the process of procuring the transcripts and promised to place it in the FileNet after service I discussed the Appeals Board instructions with the parties and that after dealing with the presumption, it would be AOE/COE only.

Parties have been making noise about substantial evidence and I advised after I reviewed the evidence that I would appoint a regular physician since they have been struggling on the issue of medical evidence for quite some time.

The next hearing was July 5, 2023 at that time all evidence in file was in file and we were going to proceed on the issues originally set forth by Judge Seymour. Trial was continued to September 27, 2023.

The record was opened and discussed, evidence was admitted without objection specifically joint Exhibit L a deposition of Dr. Andrade dated February 23, 2021; applicants #9 a medical report of Dr. Russman dated September 25, 2021, and

Exhibit C report of Dr. Andrade dated July 19, 2021. The matter stood submitted.

III. DISCUSSION

No testimony was provided but for the prior record. The prior record reflected directly opposing renditions of the sequence of events. Whenever I find that in a case, I look to what is independent of what witnesses might say and what is supported independent of what witnesses say.

I cannot judge credibility without the live testimony, which parties decided not to present. Presenting prior testimony is simply the entrenched opinion the parties have after years of litigation. I cannot rely on that either. I also relied on personal medical records precedent to the events alleged in this case.

So let us look at this case in time sequence. Back in June 2018, the applicant was working without complaint on a part-time basis.

On June 11, 2018, the applicant's son was killed in a motor vehicle accident. Any parent will tell you how horrific this is, and it is the worst possible thing for a parent. Her medical records indicate that upon being informed of her son's death she struck her right fist against wall in her yard. I assume it was done in anguish. It was x-rayed for fractures, which were fortunately negative, but it remained painful and swollen.

After this, she saw her personal medical physician on June 14, 2018, and was given "calming medication" as well as follow-up for her diabetes. She also obtained extended bereavement from her employment. She indicated she did not feel she could work after her son's death. She obtained additional time off, as she wanted to return home, assuming her country of origin. On September 6, 2018, after a three-month leave, she attempted to return to work and was informed she had been replaced.

She told the PQME she would not have filed a claim if they had allowed her to return to work. She had hurt feelings because she had been there 13 years and believed everyone liked her. She then files her claim approximately three months after her last day of work.

Dr. Andrade, the QME, did not find any arthritic disability and felt her complaints should have dissipated if she had not worked in over three months. She had advised the QME that her work was not overly strenuous.

As I read the medicals, it became clear that the applicant did not understand what she described as "the bone out of place in her foot", a calcaneal spur that is simply a calcium deposit of no clear medical etiology and often possibly related to obesity and diabetes. The first person to diagnose this calcium deposit was

Dr. Espinosa, her personal medical physician, and there is nothing in those records that indicate she told the applicant it was due to her work.

The Findings and Award with Opinion issued on December 21, 2023. I did not find injury. Applicant's contention that the QME of Dr. Andrade was not substantial evidence was quite candidly, the best evidence in FileNet on the medical issues of AOE/COE and finally I did not find the presumption applicable in this case based on the record of evidence.

In my opinion, I pointed out that given the finger pointing at each other the most accurate and closest factually was set forth in the reporting of Dr. Andrade and the records of Dr. Espinosa.

The applicant's loss of her child is heart wrenching. There is nothing that can compensate for this kind of loss.

In this Petition for Reconsideration applicant's counsel complains that I didn't rely on any of the reporting's of the multiple chiropractors reporting cosigning with Dr. Russman. Quite frankly, they provide no information beyond range of motion. Nothing in these early reports establishes in the facts of causation. Nothing explains the gap in reporting or why she left work in the first place.

Applicant at the time of her alleged injuries was working part time, not full time and described her job as "not strenuous." I believe she was being honest when she made that statement to the QME, and I simply do not find chiropractic ranges of motion helpful in determining causation. I also don't find Dr. Russman's review of records to be insightful in tying it all into a coherent report on causation.

Applicant's counsel also complains that I did not consider the applicant's testimony. I cannot judge credibility from the transcript without some sort of factual independent corroboration. There is nothing to support the gradual symptoms she claims to Dr. Russman, there is nothing to indicate severity, the failure to refer for medical care and not being taken seriously, cannot be independently corroborated.

She does disclose she saw her personal medical doctor for her foot. Dr. Espinosa was not pushing her for surgery merely providing the options for relief. The three-month she took off after the death of her son, negate declining surgery because she could not afford to be off work.

Records do not support the applicant was terminated on June 12, 2018. Finally, the reason she obtained legal counsel is that she was angry and upset when she did not get to return to work.

The applicant was not working full time during her last years of employment

and was not engaged in prolonged heavy lifting, carrying activities, she was not the only one in charge she had a supervisor who was in charge of the more responsible needs of staff. Her inability to find subsequent employment was never explored.

I find the complaints regarding the parts of body to be wholly inconsistent with claiming to be fit to return to her job. The bone spur in the foot is completely omitted from Dr. Russman's reporting and of the psychological emotional components. She completely negates the death depression, anxiety, as well as medication prescribed to calm her after the death of her son. This version is revisionist history made up of whole cloth. Dr. Russman did not review any diagnostics in preparation of her final report.

Even when you get to the end of the report Dr. Russman has still not indicated a firm link as to causation of the applicant's various complaints to all parts of the body.

IV. RECOMMENDATIONS ON RECONSIDERATION

I do not believe there is actual evidence to support injury AOE/COE.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings of Fact of December 22, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

JOSEPH V. CAPURRO, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 4, 2024

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

**ANA MARROQUIN
NORDANYAN LAW
MAVREDAKIS PHILLIPS CRANERT**

DW/oo

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