

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

MIGUEL GONZALES, *Applicant*

vs.

**VESTA FOODSERVICE;
SAFETY NATIONAL INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ13327834
Van Nuys 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 and Opinion on Decision 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 and Opinion on Decision, both of which we adopt and incorporate, and for the reasons stated below, we will deny reconsideration.

The only issues framed for trial were injury arising out of and occurring in the course of employment (AOE/COE) and defendant's assertion of a post-termination defense pursuant to Labor Code¹ section 3600(a)(10). (MOH/SOE, 4/20/22, at p. 2:20-23.) The parties stipulated to an August 14, 2019 date of alleged injury. (Minutes of Hearing and Summary of Evidence (MOH/SOE), 4/20/22, at p. 2:8-9.)

In his September 23, 2020 deposition, applicant testified that the injury took place on August 14, 2019 (Defendant's Exhibit F, at p. 22:1-7); that he went to the clinic three months after the injury in about November 2019 (*id.* at p. 23:6-7); and that he did not recall the date he had first gone to the clinic. (*Id.* at p. 23:20-24.) The June 16, 2022 MOH/SOE summarize applicant's testimony as follows: that he did not recall the exact date of the second injury (MOH/SOE, 6/16/22,

¹ All further statutory references are to the Labor Code, unless otherwise noted

at p. 3:15-16); that it might have been November 14, 2019 (*Id.* at p. 3:16-17); and that eventually he did see a doctor (*id.* at p. 3:18-19). On cross-examination, applicant testified that he was confused as to whether the date of the injury occurred on November 14, 2019.

In July 2023, the parties again entered into a Joint Stipulation Regarding Date of Claimed Injury stating: “The parties jointly stipulated that for purposes of litigation of this claim, August 14, 2019 will be used as the date of the alleged injury in order to avoid confusion for the Court...” A record of this stipulation was noted in the September 27, 2023 MOH/SOE on page 2, lines 1 to 3.

Having stipulated to an alleged date of injury of August 14, 2019 on two occasions, noting on the second stipulation that the purpose was to “avoid confusion for the Court,” it appears disingenuous for defendant now to assert that applicant could not have suffered injury as claimed on August 14, 2019 based applicant’s location as recorded a single trip sheet for August 14, 2019 submitted as defendant’s Exhibit E. This is particularly true given applicant’s repeated testimony that he was unsure of the actual date of injury and defendant’s apparent neglect to submit a full record of trip sheets covering the entire period during which the injury may have occurred.

Stipulations are binding on the parties unless, on a showing of good cause, the parties are given permission to withdraw from their agreements. (*County of Sacramento v. Workers’ Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1].) As defined in *Weatherall*, “A stipulation is ‘An agreement between opposing counsel . . . ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action,’ (Ballentine, Law Dict. (1930) p. 1235, col. 2) and serves ‘to obviate need for proof or to narrow range of litigable issues’ (Black’s Law Dict. (6th ed. 1990) p. 1415, col. 1) in a legal proceeding.” (*Weatherall, supra*, 77 Cal.App.4th at p. 1119.) We find no good cause to relieve defendant from the stipulation to the August 14, 2019 date of injury and agree with the WCJ that the qualified medical examiner (QME) opinion of Yuri Falkinstein, M.D., supports the finding of injury AOE/COE.

Turning to the remaining issue, defendant bears the burden of proving that applicant’s injury is not compensable because applicant filed the claim after termination. (Lab. Code, § 5705.) Defendant must meet this burden by preponderance of the evidence, and this requires “evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth.” (Lab. Code, § 3202.5)

In relevant part, section 3600 provides that,

... [W]here the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:

...

(B) The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.

...

(Lab. Code, § 3600(a)(10).)

In this case, applicant was terminated on February 20, 2020. (Defendant's Exhibit B.) However, a medical record dated November 14, 2019 from Green Cross Medical Clinic document evidence of the injury noting that applicant complained of right knee and arm pain. (Applicant's Exhibit 1, at p. 14.) Therefore, defendant failed to carry its burden of proof for this affirmative defense.

Finally, we have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*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 determination. (*Id.*)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER



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.

**MIGUEL GONZALES
GLAUBER BERENSON VEGO
WALL, MCCORMICK, BAROLDI & DUGAN**

PAG/cs

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

JUDGES REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

- | | |
|---|------------------------|
| 1. Findings & Award: | 12-11-2023 |
| 2. Identity of Petitioner: | Defendant |
| 3. Verification: | Yes |
| 4. Timeliness: | The petition is timely |
| 5. Date Petition for
Reconsideration filed | 01-03-2024 |
6. Petitioner has filed a Petition for Reconsideration contending the undersigned erred: 1) the evidence does not justify the findings of fact and the findings of fact do not support the order or decision.

II.

FACTS

The recitation of facts in the Answer are accurate.

III.

DISCUSSION

Defendant contends error in the court's reliance on a date of injury stipulated to by the parties. Why the parties may have stipulated to a date inconsistent with the applicant's trip records is unknown, I hope it was not done to deceive the court.

The court relied on the Green Cross Medical², records at a clinic where the applicant was treated. The relevant clinic records by Yesenia Orozco M.A. dated 11-14-2019 reflect complaints consistent with the applicant's claim.

While the applicant's memory was not accurate in specific regards, it does not negate the substance of the allegation of injury corroborated by the QME. It would have been helpful to have the rest of the applicant's trip sheets where he did deliver to the Culinary Institute in Pasadena, California.

Subsequent to this the applicant was involved in an auto accident that was precedent to his termination on 02-14-2020.

² Exhibit 1.

Ordinarily, I do not favor findings that I cannot track to a document or exact date. However, the applicant's testimony had the ring of truth to what he told the court. In my Opinion on Decision, I said:

“On page 24 of his report Dr. Falkenstein addresses the inconsistency in the date of injury noting that the initial evaluation by Dr. Azimzadeh that the parts of body are consistently the same to the right shoulder, low back and right knee and he believes that the Green Clinic records will clear up which date it did occur on. He believes that these events are one and the same injury and refers back to the Green Clinic records to settle it. He does have the objective findings for the right shoulder, lumbar spine and right knee arising related to the specific injury of 8/14/2019.

The applicant was terminated 02/26/2020. Evidence of treatment prior to termination negates the post term defense raised by defense counsel.”

While this reporting was not able to define the date of injury, it certainly negates the post termination defense.

IV.

RECOMMENDATION ON PETITION FOR RECONSIDERATION

It may be that the evidence needed still resides within the possession of defendant employer in the form of trip records and it might answer any questions that remain about the date of injury. Any other guidance the Appeals Board may have is always appreciated.

DATE: 01-29-2024

Lynn Devine
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

Based upon applicant's testimony and the medical report(s) of QME DR. FALKINSTEIN, M.D., dated 01/08/2021, which is more persuasive, it is found that applicant sustained injury to his back, right arm and right knee arising out of and occurring in the course of employment on 08/14/2019.

The applicant is alleging an injury on 11/14/2019 unloading merchandise from the back of the van, when he was carrying a heavy sack of potatoes, he fell from the back of the van landing on his back and right side on the asphalt feeling immediate pain in the right shoulder right, upper extremity low back, and right knee he did not report the injury and kept working.

On page 24 of his report Dr. Falkinstein addresses the inconsistency in the date of injury noting that the initial evaluation by Dr. Azimzadeh that the parts of body are consistently the same to the right shoulder, low back and right knee and he believes that the Green Clinic records will clear up which date it did occur on. He believes that these events are one and the same injury and refers back to the Green Clinic records to settle it. He does have the objective findings for the right shoulder, lumbar spine and right knee arising related to the specific injury of 8/14/2019.

The applicant was terminated 02/26/2020. Evidence of treatment prior to termination negates the post term defense raised by defense counsel.

DATE: 12-11-2023

Lynn Devine

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE