WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ROBERT BACKUS, *Applicant*

vs.

SCHIRESON BROS., INC., dba VOLUTONE and EMPLOYERS ASSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ11847265, ADJ11741978
Oxnard District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Joint Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on April 6, 2022, wherein the WCJ found that applicant did not sustain injury arising out of and occurring in the course of employment (AOE/COE) to his low back and lower extremities; and the WCJ Ordered that applicant take nothing by way of his injury claim.

Applicant contends that the reports from QME Allen Fonseca, M.D., were not properly considered regarding the issue of injury AOE/COE, that the reports from Dr. Fonseca are substantial evidence, that the decision was based on a "partial and unsubstantial record," that applicant's "unimpeached and uncontradicted" testimony must be accepted as substantial evidence, and that the record should be further developed.

We received a Joint Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petition, 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 to his low back and lower extremities while employed by defendant as a salesperson during the period from January 3, 2017, through January 3, 2018 (ADJ11847265). Applicant also claimed injury to his low back and lower extremities while employed by defendant as a salesperson on December 13, 2017 (ADJ11741978).[1]

The parties proceeded to trial on September 28, 2021. The issues identified by the parties included injury AOE/COE regarding both injury claims. (Minutes of Hearing and Summary of Evidence (MOH/SOE), September 28, 2021, pp. 2 - 3.) Applicant testified at the trial and the matter was continued for further testimony. At the January 5, 2022 hearing, applicant testified and Rossana Harris was called as witness by defendant. The trial was continued and at the February 23, 2022 hearing no additional exhibits were offered and there was no testimony; the matter was submitted for decision

DISCUSSION

It is well established that the burden of proof rests upon the party holding the affirmative of the issue. (Lab. Code, § 5705; *Lantz v. Workers' Comp. Appeals Bd*. (2014) 226 Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd.* (*Obernier*) (1995) 34 Cal.App.4th 1204 [60 Cal.Comp.Cases 289].) The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297–298 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3202.5, 3600(a).) "Preponderance of the evidence" is defined by section 3202.5 as:

> [T]hat evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence.
> (Lab. Code, § 3202.5.)

It appears that most of applicant's arguments are premised on his contention that the WCJ erred by not considering the reports from QME Dr. Fonseca. As noted by the WCJ in his Report:

[1] Applicant had previously sustained an industrial injury to his left arm and low back while employed by Spheric Trafalgar on April 7, 2011. (See App. Exh 5, Brent Pratley, M.D., May 3, 2012.)

> It is the employee's burden to provide substantial medical evidence to establish industrial causation. Petitioner [applicant] admits that there is no such evidence, and as such ostensibly admits that he didn't meet his burden. ¶ Petitioner appears to argue that substantial evidence exists in the form of reports from Dr. Fonseca. But those reports were not offered into evidence.
> (Report, p. 4.)

Having reviewed the entire trial record, it is clear that the WCJ is correct; the trial record contains no reports from Dr. Fonseca and "there is no substantial evidence of industrial causation." (Report p. 6.)

Regarding applicant's "unimpeached and uncontradicted" testimony. Again, as the WCJ stated in the Report, applicant, "…had highly questionable credibility due to the fact that he failed to disclose his prior back injury to either examining physician"… "and initially denied such injury under oath until confronted with the records of same." (Report p. 6.) The WCJ also noted that applicant's testimony, "was in fact rebutted by Defense witness Rossana Harris." (Report p. 6.) It is well established that a WCJ's opinions regarding witness credibility are entitled to great weight. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500, 505]; *Sheffield Medical Group v. Workers' Comp. Appeals Bd. (Perez)* (1999) 70 Cal.App.4th 868 [64 Cal.Comp.Cases 358]; *Nash v. Workers' Comp. Appeals Bd*. (1994) 24 Cal.App.4th 1793 [59 Cal.Comp.Cases 324].) The WCJ set forth his decision, with his reasoning thereon. We accept his determination regarding applicant's credibility and we do not disturb his decision that applicant did not sustain injury AOE/COE.

As to the issue of whether the record should be further developed, applicant is correct that the Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue. (Lab. Code §§ 5701, 5906.) However, if a party fails to meet its burden of proof by failing to introduce competent evidence, it is not the job of the Appeals Board to rescue that party by ordering the record to be developed. (Lab. Code, § 5502; *San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Telles Transport Inc. v. Workers' Comp. Appeals Bd*. (2001) 92 Cal.App.4th 1159 [66 Cal.Comp.Cases 1290]; *Guzman v. Workers' Comp. Appeals Bd*. (2013 W/D) 78 Cal.Comp.Cases 893; see also, Report, p. 5, footnote 2.)

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Joint Findings and Order issued by the WCJ on April 26, 2022, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 27, 2022

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

ROBERT BACKUS
PERONA, LANGER, BECK, SERBIN AND HARRISON
TOBIN LUCKS LLP

TLH/*pc*

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

JOINT REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Robert Backus, a 40-year-old salesman for Schireson Bros, Inc., dba Volutone, filed Applications for Adjudication on 12/5/18 and 1/14/19, respectively alleging that on 12/13/17 and during the period commencing 1/13/17 through 1/13/18, he sustained injury arising out of and occurring in the course of employment to his low back and lower extremities. The claims were denied by the employer.

Applicant has filed a timely, verified Petition for Reconsideration of the Joint Findings and Order dated 4/6/22 alleging that:

1. The evidence does not justify the finding of fact.

Petitioner contends that:

a. The Court erred in finding no injury when there was no substantial evidence to support such a finding, and;

b. The Court erred in not ordering further development of the record, and;

c. The Court erred in not considering medical reports which were not in evidence;

d. The Court erred when it did not rely on Applicant's testimony.

Petitioner has attached documents to the Petition which violate Title VIII CCR section 10945(c)(1) and (2).

Applicant sustained an injury to his low back and other body parts on 4/7/11 as a result of fourteen feet from a ladder while working for Spheric Trafalgar (Applicant's exhibit 5). When Petitioner was evaluated for that injury by Panel Qualified Medical Examiner (PQME) Lee Silver on 2/23/15, he complained of constant pain in the lumbar spine (Defense exhibit L). Dr. Silver observed muscle guarding, asymmetric range of motion, and muscle spasm sufficient to assign a DRE category II whole person impairment of 8% (Defense exhibit L). Future medical care for the low back was indicated by Dr. Silver.

Petitioner was also evaluated by a PQME in the specialty of psychology on 12/21/15. The corresponding report from PQME Dr. Selya reflects that Petitioner had trouble sleeping due to back pain and that MRI's and x-rays revealed two herniated discs in his lumbar spine (Defense exhibit L). Dr. Selya also documented complaints of back pain 24 hours a day as well as constant tingling and stiffness.

One week after the alleged specific injury in this case, Petitioner was evaluated at Inland Regional Medical Group by Dr. Cutler. In Dr. Cutler's report corresponding to the evaluation of 12/21/17, it was documented that Petitioner had been suffering from chronic low back pain ever since a fall that took place six years earlier (Defense exhibit K). No mention was made of any aggravation or new back injury while working for Shireson Bros.

In regards to the subject claims of injury, the first doctor to comment on industrial causation was Dr. Haronian who was acting as a surgical consult on 11/6/19. According to the corresponding report, Petitioner gave a history of the prior injury in 2011, but did not advise Dr. Haronian that the low back was injured in that incident (Applicant's exhibit 9). Dr. Haronian found the alleged back injuries to be industrially caused.

Petitioner was ultimately evaluated by PQME Fonseca. His reports were not offered into evidence by either party (Minutes of Hearing/Summary of Evidence, 9/28/21). However, the parties took the deposition of Dr. Fonseca on 5/4/20 (Defense M). The doctor testified that in regards to his initial evaluation of 12/4/19, Petitioner did not mention that he had a preexisting back injury (Page 7, lines 1-25, page 8 lines 1-4). Dr. Fonseca agreed that Petitioner has a credibility problem and deferred the determination of injury AOE/COE to the trier of fact (page 14, lines 8-20).

At the trial proceedings of 9/28/21, Petitioner testified that he was experiencing back pain on 12/13/17 that first started the previous July. He further testified that his supervisor Rossana attempted to crack his back using a folding chair (SOE, page 6, lines 13-17). At the trial proceedings of 1/5/22 Petitioner testified that he did not have any symptoms in his low back prior to working at Volutone (Shireson Bros). He changed that testimony to reflect that had some back pain here and there prior to working for the employer, but that he never had a low back injury prior to working there (SOE, page 2, lines 9-11). He also testified that he did not have back pain as a result of his injury in 2011, but after being confronted with the reporting of Dr. Silver who evaluated him for the 2011 injury, he admitted that he had low back pain at that time (SOE, page 2, lines 14-19). Petitioner's supervisor Rossana Harris testified that contrary to Petitioner's testimony, she did not rub Petitioner's back using a folding chair. She also testified that Petitioner told her that his back pain was from a prior injury (SOE, page 3, lines 7-9).

The Court issued a Joint Findings and Take Nothing Order on 4/6/22 wherein it was determined that Petitioner did not sustain injury AOE/COE. The basis for the decision was that Petitioner did not meet his burden due to a lack of substantial evidence as well as Petitioner's highly questionable credibility.

III

DISCUSSION

LACK OF SUBSTANTIAL EVIDENCE

Labor Code section 5705 states that "The burden of proof rests upon the party or lien claimant holding the affirmative of the issue." It is the employee's burden to provide substantial medical evidence to establish industrial causation.[1] Petitioner admits that there is no such evidence, and as such ostensibly admits that he didn't meet his burden.

Contrary to Petitioner's assertion, the Court did not rely on any medical evidence in its determination. The determination was made based on a lack of substantial evidence to support Petitioner's burden of proof.

Petitioner appears to argue that substantial evidence exists in the form of reports from Dr. Fonseca. But those reports were not offered into evidence. It appears that the report dated 8/27/20 was obtained after the closure of discovery, but again, it was not offered into evidence.

DUTY TO DEVELOP THE RECORD

Although it is well settled that the Court has a duty to develop the medical record when there is no substantial evidence on which a decision can be based, it has also been held that the duty to develop the medical record should not be used to rescue an Applicant who does not present substantial evidence to support a claim.[2] In this case, Applicant failed to tell either of the examining physicians in this case about his prior back injury in 2011. Additionally, Applicant denied any such injury at the time of trial until he was confronted with said records. Thus, this is exactly the type of situation where it would be improper to develop the medical record to rescue the Applicant.

Petitioner has asserted that the Court declined to review Dr. Fonseca's reports. This assertion is patently false. Dr. Fonseca's reports were never offered into evidence.

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[1] *Barajas v. Vessey & Co., Inc*., 2015 Cal. Wrk. Comp. P.D. LEXIS 652; *Thomas v. WCAB* (2015) 80 CCC 1507 (writ denied)

[2] Rivas v. Posada Whittier/Berg Senior Services, 2010 Cal. Wrk. Comp. P.D. LEXIS 114. This decision was reaffirmed by the appeals board at Rivas v. Posada Whittier/Berg Senior Services, 2010 Cal. Wrk. Comp. P.D. LEXIS 384. See also City of San Buenaventura v. WCAB (Deck) (2006) 71 CCC 1322 (writ denied); Azzolin v. WCAB (2013) 78 CCC 1250 (writ denied) (no duty to develop the record when applicant provided two treating physicians with false history, chose physicians who did not analyze all medical records, or both); Salazar v. Payless Shoe Source, 2014 Cal. Wrk. Comp. P.D. LEXIS 729 (no duty to develop record when applicant failed to present substantial evidence of injury AOE/COE and had ample opportunity to do so); Marquez v. Long Beach Care, 2015 Cal. Wrk. Comp. P.D. LEXIS 48 (no duty to develop the record when applicant sought to close discovery and set the matter for trial); Wunderlich v. City of Inglewood, 2017 Cal. Wrk. Comp. P.D. LEXIS 430 (applicant's request to develop the record denied when he did not present substantial evidence to support finding of new and further disability); Chavez v. Sysco, 2017 Cal. Wrk. Comp. P.D. LEXIS 532 (no duty to develop the record to rescue applicant who cannot meet burden of proof).

CONSIDERATION OF ENTIRE RECORD

Again, Petitioner has asserted that the Court didn't consider the reports of Dr. Fonseca in crafting its determination. Petitioner is correct. The Court cannot consider documents that are not part of the evidentiary record. Dr. Fonseca's reports were not offered. It is unknown why Petitioner did not offer said reports into evidence. It could have been an oversight on Petitioner's part. In any event, the failure of Petition to offer Dr. Fonseca's original QME report into evidence is not significant considering he deferred his opinion to the trier of fact when his deposition was taken. Based on the evidentiary record as presented by the parties, there is no substantial evidence of industrial causation. Dr. Haronian's opinion was based on a substantially false and inaccurate medical history[3], and Dr. Fonseca deferred his opinion to the trier of fact.

APPLICANT'S TESTIMONY

Petitioner argues that the Court must accept Applicant's unrebutted testimony. Of course that is false. If Applicant's testimony is not credible, then it doesn't matter if it is unrebutted. In this case, the Court opined that Petitioner had highly questionable credibility due to the fact that he failed to disclose his prior back injury to either examining physician in this case, and initially denied such injury under oath until confronted with the records of same.

Additionally, Petitioner's argument is not valid because his testimony was in fact rebutted by Defense witness Rossana Harris. Ms. Harris denied that rubbing Petitioner's back with a folding chair. She also testified that Petitioner attributed his back pain to a prior injury and that he never reported any type of aggravation of his pre-existing back pain due to the hand massage she provided to him. In is befuddling to the Court how Petitioner can argue that his testimony was not rebutted.

IV

RECOMMENDATION

For the foregoing reasons, the undersigned WCALJ recommends that the Petition for Reconsideration be **DENIED**.

[3] *20th Century Fox Film Corp. v. WCAB* (*Conway*) (1983) 48 CCC 275 (doctor's opinion not substantial evidence when he admitted that his "commentary on this case is limited by inadequate information"). See also *Perez v. Massive Prints*, 2017 Cal. Wrk. Comp. P.D. LEXIS 423; *Lane v. San Bernardino County*, 2017 Cal. Wrk. Comp. P.D. LEXIS 444; *Nichols v. Capitol Factors*, 2018 Cal. Wrk. Comp. P.D. LEXIS 4; *Peckham v. State of California — Department of Social Services IHSS*, 2019 Cal. Wrk. Comp. P.D. LEXIS 395; *Ellis v. California Department of Social Services,* 2019 Cal. Wrk. Comp. P.D. LEXIS 450.