

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

TERESA SCHUL, *Applicant*

vs.

**RIVERSIDE UNIFIED SCHOOL DISTRICT, PERMISSIBLY SELF-INSURED;
Administered by SEDGWICK CMS, *Defendants***

**Adjudication Numbers: ADJ2385867 (RIV 0084327); ADJ7741846
Riverside 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 observe, moreover, it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 9, 2021

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

**TERESA SCHUL
ROSE KLEIN & MARIAS
KUNTZ & BUSI**

PAG/oo

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

**REPORT & RECOMMENDATION OF JUDGE ON PETITION FOR
RECONSIDERATION**

Introduction

Petitioner Teresa Schul (hereafter applicant), by and through her attorney of record, filed a Petition for Reconsideration on 5/14/2021 contesting the Findings of Award, dated 4/19/2021. The applicant alleges that by the award the WCJ acted without or in excess of his powers; that the evidence does not justify the findings of fact; and that the findings of fact do not support the order, decision, or award. The Petition is verified.

Respondent, Riverside Unified School District, (hereafter defendant), by and through their counsel; Law Offices of Kuntz & Busi; filed a verified Answer to the Petition for Reconsideration. Defendant contends that the Board did not act without or in excess of its powers; the evidence does justify the findings of fact; and the findings of fact do support the Decision and Award.

Applicant contends that Dr. Max Matos' medical report should be followed instead of the medical report by Dr. Lee Silver. Applicant is not contesting the finding that there is no psychiatric injury arising out of employment.

FACTS

Regarding ADJ2385867, Teresa Schul, born ..., while employed on 4/20/2007, as a Cafeteria Worker, occupational group number 322, by Riverside Unified School District, sustained injury arising out of and in the course of employment to her right shoulder. On 9/17/2008, this case was resolved by a Stipulations with Request for Award, based on 3% permanent disability. A Petition to Reopen for New and Further Disability was filed on 6/22/2011.

Regarding ADJ774186, Teresa Schul, born ..., while employed on 1/13/2011, as a Cafeteria Worker, occupational group number 322, by Riverside Unified School District, sustained injury arising out of and in the course of employment to her back, both wrists, right elbow, and both shoulders. She claims to have sustained injury arising out of employment to her cervical spine and psyche.

At the trial on 2/23/2021, the applicant testified that she slipped and fell on 1/13/2011. Her buttock, back, shoulders, and wrists hit the floor. After the injury, she had pain in her neck, back,

buttocks, and left wrist. She was taken by ambulance to Riverside Hospital. She had a CT scan to different body parts and got a cervical collar. She attributes the neck and back complaints to the fall. She continues to have neck and back pain.

The applicant denied any prior injury to her neck before 1/13/2011 (SOE, page 4:17-19). Dr. Lee Silver, at his deposition on 10/15/2014 (Exhibit 8), had a history of the applicant hanging Christmas lights on 12/5/2010, and having neck and right shoulder complaints (page 13). The applicant testified that she doesn't remember being diagnosed with degenerative disc disease or arthritis in the back (SOE, page 7:3).

It is noted that the applicant was testifying as to events that occurred ten year earlier. Her testimony did not correspond with the medical reporting. The applicant was not a reliable witness. Defendant notes that the credibility of the applicant was rebutted on several occasions with respect to her recollection of medical history.

REVIEW OF MEDICAL REPORTS

Lee Silver, M.D., prepared a QME report dated 9/13/2012 (Exhibit 4). The applicant reported that she was injured on 1/13/2011 when she slipped on an "ice pillow" and fell to the left and injuring the cervical spine, the lumbar spine, the left knee, both wrists, and right elbow, and both shoulders. She had complaints to the neck, back, right shoulder and occasional left shoulder pain. Dr. Silver reviewed 5" of records. Records showed back pain on 11/9/1999, and right shoulder pain in 2007. Records from 1/7/2011 note right shoulder pain with x-rays of the right shoulder and cervical spine, from helping to hang Christmas lights. Dr. Silver stated that the cervical condition was the result of the combined effects of naturally occurring degenerative changes as well as her activities hanging Christmas lights in December 2010. The cervical spine condition is nonindustrial.

In his report dated 9/13/2012 (Exhibit 4), Dr. Silver reviewed medical reports from John Portwood, M.D. from 2011. In a report dated 2/15/2011, Dr. Portwood noted that the applicant landed on her back, wrists, left shoulder, and right elbow. In a P&S report by Dr. Portwood, dated 4/23/2011, there is a 20% WPI based on a DRE Lumbar Category IV (Exhibit 4, page 10). On 8/16/2011, Dr. Portwood reviewed a pain diagram (dated 2/14/2011) that did not indicate any neck symptoms and no mention of cervical complaints. It is noted that symptoms preexisted the 1/13/2011 injury.

Dr. Silver reviewed additional records and prepared a report dated 12/11/2012 (Exhibit 5).

Dr. Silver reviewed additional records and prepared a report dated 3/8/2013 (Exhibit 6). If the applicant were not to proceed with additional treatment, she would be P&S. The injury of 1/13/2011 caused involvement of the lumbar spine, the left shoulder, and the upper and lower extremities. Dr. Silver states that the cervical spine condition is nonindustrial.

Dr. Silver reviewed additional records and prepared a report dated 7/12/2013 (Exhibit 7). There was a Stipulations with Request for Award, dated 6/23/2008, noting 3% PD for an injury on 4/20/2007 to the right shoulder.

Dr. Silver, evaluated the applicant and prepared a report dated 10/7/2013 (Exhibit 2). Reports from Dr. Matos, dated 9/6/2012 to 7/16/2013, and reports from Dr. Dorsey were reviewed. A MRI of the cervical spine showed degenerative central stenosis. She was a candidate for additional treatment.

Dr. Silver reviewed additional records and prepared a report dated 5/5/2014 (Exhibit 1).

Dr. Silver, evaluated the applicant and prepared a report dated 6/24/2014 (Exhibit 3). The applicant reported constant pain in the cervical spine and occasional pain in the left shoulder. There was no pain in the right shoulder. There constant back pain. He confirmed that the cervical spine condition was non-industrial. There was impairment for the right shoulder, left shoulder, and lumbar spine. Apportionment was considered and applied.

The deposition of Dr. Silver was taken on 10/15/2014 (Exhibit 8). Dr. Silver was asked about whether the applicant injured her cervical spine on 1/13/2011. Dr. Silver mentioned the record from 12/27/2010 where the applicant was seen for pain after hanging Christmas lights on 12/5/2010 (page 13). Dr. Silver did not change his opinion that the cervical spine condition was not industrial.

Applicant contends that Dr. Max Matos' medical report should be followed instead of the medical report by Dr. Lee Silver.

Applicant contends that the primary treating physician, Dr. Max Matos, provided an opinion that should be followed instead of the QME report by Dr. Lee Silver.

Max Matos prepared a Treating Physician's P&S Report dated 10/17/14/2014 (Exhibit 11). He stated that he initially saw the applicant on 10/8/2011. The applicant had complaints to her cervical spine, lumbar spine, bilateral shoulders, right elbow, both wrists, and left knee. Dr. Matos

reviewed the history of the treatment, records, and reports. He disagreed with Dr. Silver's finding that the cervical spine was not industrially related. In the report, Dr. Matos reviewed articles regarding neck injuries.

Regarding apportionment for the cervical spine, Dr. Matos noted that there was degenerative findings on x-rays. He assigned 10% of the PD for the cervical spine to pre-existing condition and the remaining 90% of her disability to injury of 1/13/2011. This opinion does not adequately consider that the applicant was having symptoms that preexisted the 1/13/2011 injury, and is not supported by the medical evidence.

The reports by Dr. Matos meet the requirements of the Cal. Code of Regulations and constitutes substantial medical evidence. However, Dr. Matos relied upon the history provided by the applicant, who was not a reliable witness.

WCJ found the reports by Dr. Lee Silver to be more persuasive.

In reviewing the medical evidence, the WCJ found that the medical reports of Max Matos, M.D., and Lee Silver, M.D., were both substantial medical evidence. As is usually presented, both medical opinions had strengths and weaknesses. In determining, the more persuasive and impartial report, WCJ followed the opinion of Lee Silver, M.D.

Willette v. Au Electric Corpartion (2004) 69 Cal. Comp. Cases 1298, at 1308 (en banc) states, that when faced with differing medical opinions from the panel QME and the treating physician on the issue of whether prescribed treatment is reasonably required to cure or relieve that effects of the employee's injury, the WCJ or the Appeals Board need not rely on the opinion of a particular physician. It is the WCAB, not any individual physician, which is the ultimate trier of fact on medical issues.

Willette v. Au Electric Corpartion (2004) 69 Cal. Comp. Cases 1563 (en banc) states, that "[I]n determining whether to rely on the panel QME, the treating physician, or the utilization review physician, the WCJ or the Appeals Board will consider the weight to be given to the respective opinions and will consider whether they constitute substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280–281 [520 P.2d 978, 113 Cal. Rptr. 162] [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [475 P.2d 451, 90 Cal. Rptr. 355] [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's* [*1566] Comp.

Appeals Bd. (1970) 1 Cal.3d 627, 637 [463 P.2d 432, 83 Cal. Rptr. 208] [35 Cal.Comp.Cases 16]; see also, Cal. Code Regs., tit. 8, § 10606 [compliance with Rule 10606 goes [**8] to weight to be given report]; Insurance Co. of North America v. Workers' Comp. Appeals Bd. (Kemp) (1981) 122 Cal.App.3d 905, 917 [176 Cal. Rptr. 365] [46 Cal.Comp.Cases 913] [a report that is 'woefully inadequate' in its compliance with Rule 10606 should not be relied upon].)"

Dr. Silver, in his medical report dated 9/13/2012, reviewed records from 1/7/2011 that note right shoulder pain with x-rays of the right shoulder and cervical spine, from helping to hang Christmas lights. Dr. Silver stated that the cervical condition was the result of the combined effects of naturally occurring degenerative changes as well as her activities hanging Christmas lights in December 2010. The cervical spine condition is nonindustrial.

In his report dated 9/13/2012, Dr. Silver reviewed medical reports from John Portwood, M.D. from 2011. In a P&S report by Dr. Portwood, dated 4/23/2011, there is a 20% WPI based on a DRE Lumbar Category IV (Exhibit 4, page 10). On 8/16/2011, Dr. Portwood reviewed a pain diagram (dated 2/14/2011) that did not indicate any neck symptoms and no mention of cervical complaints. Dr. Portwood re-enforced Dr. Silver's opinion that the cervical condition was nonindustrial.

As a witness, the applicant was found not to be a reliable source of information. Dr. Frank, in his report dated 9/10/2019, notes that the applicant was an extremely poor historian regarding lifetime history of any psychiatric diagnoses and treatment (page 26, 27). The applicant's credibility issues were taken into consideration.

Applicant contends that the opinion of Dr. Silver is not substantial medical evidence.

In support of the issue whether the medical reports of Dr. Silver constitute substantial medical evidence, the applicant and the defendant prepared trial briefs.

Applicant contends that the QME reports by Dr. Silver are not substantial medical evidence because Dr. Silver did not find the cervical spine complaints to be industrially related, at least in part. Applicant contends that Dr. Silver disregarded or ignored the entry that the applicant had complaints to her cervical spine after the 1/13/2011 accident. Applicant contends that Dr. Silver did not give an opinion based on medicine.

Applicant attorney contends that the applicant has significant findings in the cervical spine. There is no dispute the applicant has these findings. Dr. Silver is of the opinion that the findings pre-date the injury on 1/13/2011, and is related to the Christmas lights around 12/5/2010.

Labor Code section 4628 states that the physician who signs the medical-legal report shall examine the employee or participate in the non-clerical preparation of the report, including taking a complete history, review and summarize medical records, and compose and draft the conclusions of the report.

Defendant's Trial Brief states that Dr. Matos did not provide a thorough medical history as to prior significant injuries, resulting medical treatment, and disabilities. Defendant contends that the memory of the applicant was not consistent with the medical record. Defendant also contends that the credibility of the applicant was questioned in Dr. Joel Frank's report dated 1/8/2014. Considering that the injury was in January 2011, it is expected that an applicant would have some memory problems and the medical records may be a more reliable source of the facts.

Dr. Silver took a history, he examined the applicant, and he reviewed medical records and reports. He prepared 7 medical reports. His reports contain his opinion and conclusion that the applicant's cervical spine condition is not industrial related. Dr. Silver has many years of experience preparing worker compensation med-legal reports. An unfavorable opinion in the QME report does not make the report not substantial medical evidence. If there is a deficiency alleged by a party, a deposition of the QME may be scheduled. The deposition of Dr. Silver was taken on 10/15/2014 (Exhibit 8).

According to Dr. Silver and his review of the medical records, the applicant had hurt her right shoulder and neck approximately on 12/5/2010 while hanging Christmas lights. She went to the doctor on 1/7/2011, still having complaints regarding her right shoulder and neck. The applicant was having significant enough complaints to go see a doctor. The evidence shows that the applicant had right shoulder and neck complaints prior to the injury on 1/13/2011. It may be reasonable to consider that the applicant's cervical spine was aggravated by the fall on 1/13/2011, but Dr. Silver did not make that finding. A disagreement with a doctor's opinion does not make the doctor's report not substantial medical evidence, otherwise any report could be found to be unsubstantial.

Based upon the medical reports of Lee Silver, M.D., which are the better reasoned and more persuasive, it was found that applicant also did not sustain injury to her neck arising out of and occurring in the course of employment.

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

DATED AT RIVERSIDE, CA

DAVID THORNE
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE
5/28/2021