WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ARTEMIO FAJRDO, *Applicant*

vs.

AMAZON FRESH;
AMERICAN ZURICH INSURANCE, *Defendants*

Adjudication Number: ADJ15748945
Long Beach 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/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 29, 2022

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

ARTEMIO FAJARDO
LAW OFFICES OF JONATHAN BRIAN
ACUMEN LAW

AS/abs

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

1.	Applicant's Occupation: Applicant's Age: Date of Injury: Parts of Body Injured:	Grocery Associate 58 December 17, 2021 Right arm, Right hand, Neck
2.	Identity of Petitioner: Timeliness: Verification:	Defendant Yes Yes
3.	Date of Challenged Order:	June 7, 2022
4.	Defendant's Contentions:	The medical report of the authorized PTP does not constitute substantial medical evidence and, that despite not making a request to convert the Expedited Hearing to MSC, the undersigned should have done so and violated Defendant's Due Process rights by proceeding with trial.

II.

STATEMENT OF CASE AND FACTS

The Applicant filed an Application for Adjudication on February 3, 2022 for an injury occurring on December 17, 2021. The Application stated that the Applicant was going up a ladder to stock on the top shelf and he twisted his right arm when he was listing merchandise. In addition to that statement in the Application, the neck, arm, and hand are claimed as body parts.

The Applicant had a cervical laminectomy with fusion of the C3-T1 levels on March 23, 2022 at Kaiser Permanente. Thereafter, the Applicant comes under the care of Dr. Shirzad Abrams, who finds that the Applicant sustained an injury to his neck, right arm, and right hand.

Applicant's Attorney filed a Declaration of Readiness to Proceed to Expedited Hearing on the issue of Temporary Disability on May 16, 2022. On May 19, 2022, Defendant's Attorney filed an Objection to Declaration of Readiness to Proceed, stating that they were "clarifying the actual work status and causation of the need for disability benefits with the PTP."

On June 1, 2022, the matter came around on calendar for an Expedited Hearing. The undersigned met and conferred with the attorneys for each side, attempting to resolve the disputed concern prior to court intervention. The parties were at an impasse, with the Defendant's position before going on the record generally being that there was a PQME exam scheduled for August 5, 2022 and that the issue would need to wait for that exam to take place. Applicant's Attorney continued his demand for temporary disability.

It was from this impasse that the undersigned proceeded on the record and issued the eventual Findings and Award at issue herein, on June 7, 2022. Prior to proceeding on the record, Defendant did not motion for the matter to be re-designated as a Mandatory Settlement Conference. The F&A found injury to Applicant's neck, entitlement to temporary disability, and attorney fees on the accrued indemnity. It is from this F&A that Defendant's Attorney files the instant Petition for Reconsideration.

III.

DISCUSSION

Dr. Abrams' report is substantial medical evidence.

It is well established that determinations made through the workers' compensation process in California must be supported by substantial medical evidence.[1] Physicians must use a correct legal theory,[2] their opinions may not be based on "surmise, speculation, conjecture or guess,"[3] and medical reporting must not be based on inadequate medical history or examinations."[4]

Applicant introduces the sole medical report into evidence. (Applicant's Exhibit 1). In the report, Applicant's Primary Treating Physician, Dr. Abrams, takes a medical history from the Applicant and also reviews available medical records. (Applicant's Exhibit 1, Page 2 & Pages 7-10 in PDF). The Applicant reports pain in his neck, right arm, and right hand on December 17, 2021 while performing his work duties. (Applicant's Exhibit 1, Page 2). The Applicant then went to Kaiser's ER for treatment in January 2022. [5] (Applicant's Exhibit 1, Page 2 & Page 9 in PDF). Dr. Abrams has the benefit of Applicant's Kaiser Records at the time of his medical report and conclusions. He notes in his record review pre-existing right upper extremity complaints and he also notes that work activities have contributed to issues of the neck. (Applicant's Exhibit 1, Page 4). In his causation section and apportionment discussion, the doctor notes that there are pre-existing issues, but still concludes there is an industrial neck injury. More precisely, Dr. Abrams' conclusion is that the neck is work-related, but nature and extent is certainly an issue. Dr. Abrams has the benefit of a medical exam and personal care records from the Applicant going back to at least 2007.

The Petition for Reconsideration (hereinafter "Petition") instead attempts to focus on the medical diagnoses provided by the doctor and arguments are made about pre-existing issues. (Petition, Pages 12-13). There is no rebuttal medical evidence offered by Defendant to support these concerns or explain Defendant's layperson interpretation of Applicant's medical condition. The Applicant relayed to the doctor that he injured his neck on December 17, 2021 when he was lifting merchandise. This matches the claims set forth in the Application. The Applicant discusses that he has had pain in his neck prior to December 17, 2021, which also matches what is found in

[1] Escobedo v. Marshalls, CNA Ins. Co., 70 Cal. Comp. Cases 604, 620 (W.C.A.B. April 19, 2005)

[2] *See* Zemke v. Workers' Comp. Appeals Bd., 68 Cal. 2d 794

[3] *See* Garza v. Workers' Comp. Appeals Bd., 3 Cal. 3d 312

[4] *See* West v. Industrial Acci. Com., 12 Cal. Comp. Cases 86 (Cal. App. May 16, 1947)

[5] Dr. Abrams's report, on page 2, indicates January 2021, but a plain reading and interpretation of the chronology indicates this is January 2022, which is corroborated by the January 7, 2022 MRI on Page 9 in the PDF

the Kaiser records. The Applicant also appears to have reported to the doctor in a forthcoming manner that his neck was giving him trouble prior to December 17, 2021.

The Petition also takes issue with the statement by Dr. Abrams where he says that he has "issues explaining the cause or causes of such condition." (Petition, Page 12, Lines 9-14). The Petition is selectively interpreting this statement, as Dr. Abrams indicates he is unable to explain the neurological findings in the upper extremities, but not a finding of injury. (Applicant's Exhibit 1, Page 4). This does not preclude an industrial injury, specifically when Dr. Abrams goes on to state in the same section of the report that the Applicant's "[w]ork activities have contributed to the issues of the neck and upper extremities. Underlying condition has not been discounted." (Applicant's Exhibit 1, Page 4). This is a nature and extent analysis at that point, not a causation of injury analysis as the Petition seems to believe.

Moreover, Applicant did not testify at the Expedited Hearing. Defendant had the opportunity to subpoena the Applicant to appear and submit to cross-examination, but Defendant did not take that opportunity. Defendant could have sent an interrogatory to the doctor or scheduled his deposition, but Defendant did not. The report of Dr. Abrams therefore must be read on its own, without the benefit of any additional evidence.

Therefore, Applicant has set forth the only medical report in evidence, which takes a work history, reviews personal care records, and conducts a clinical exam. Defendant chose, perhaps strategically, not to cross-examine the Applicant, take the doctor's deposition, or undertake other discovery concerns. In reading the report on its own, with the limited record the parties have chosen to set forth before the undersigned, the reporting of Dr. Abrams is deemed substantial. Applicant has the burden of proof on the issue of body parts and temporary disability; Applicant has carried that burden.

Defendant has received Due Process

It is well established that Due Process is satisfied by notice and opportunity to be heard. Often times, ongoing discovery concerns offered by one party are enough to sustain an "off calendar" motion or undertake a different disposition to a matter; however, claims administrators must also conduct said discovery in a reasonable and timely manner. [6]

The Petition cites the process for obtaining a panel under the Labor Code. (Petition, Pages 16-17). The undersigned acknowledges that Defendant objected timely to the reporting of Dr. Abrams. The parties even stipulated to this fact at trial. The undersigned finds this fact and stipulation irrelevant for the concern at hand. The stipulation is simply just that something was done timely, that has no bearing on additional Due Process concerns. Defendant has timely objected to the report upon receipt, but Defendant has not timely engaged in its obligation to investigate the claim in good faith. Applicant has claimed an injury for December 17, 2021. The record is silent as to any effort by Defendant to investigate the claim of injury brought by the Applicant. In providing a benefit of the doubt to Defendant, even if the undersigned were to take the February 3, 2022 filing of the Application as notice of the injury, the undersigned is not convinced that Defendant has acted diligently in obtaining any discovery to date. The undersigned

[6] CCR §10109 (a)

notes as well that Dr. Abrams had the Applicant's Kaiser Records and the history of his cervical spine surgery. It appears the parties had possession of the records, and therefore knowledge of the surgery to the neck (a claimed part of body), yet no affirmative action is taken by Defendant to investigate that, either. Defendant chooses, perhaps strategically, to introduce no evidence regarding this as well.

Although no benefit notices are presented in evidence, the parties represented to the undersigned before trial, and via stipulated fact, that the claim was admitted to the right arm and hand. At some point, Defendant must have had some idea that there was an industrial injury of some sort to have admitted the claim and undertaken the obligation to administer benefits. Applicant Attorney had to file a previous Declaration of Readiness to Proceed to Expedited Hearing to obtain authorization for treatment from Defendant.[7] This stemmed from a letter dated February 15, 2022 and this no doubt brought about delay in the Applicant obtaining additional medical treatment as Applicant produces a report from the authorized doctor dated May 2, 2022, three months post-application.[8]

From there, Defendant appears to undertake no further action on this claim until Applicant Attorney again files a DOR to Expedited Hearing, which resulted in the trial at issue on body parts and temporary disability.[9] The DOR is dated May 16, 2022 and Defendant's Attorney objects to the Dr. Abrams report on May 18, 2022. The objection is nearly two weeks after Defendant's receipt of said report, albeit timely, but seemingly prompted by Applicant's claim for temporary disability benefits, i.e., the DOR. This does not appear to be diligent compliance with the duty to investigate in good faith as Defendant appears to merely be responding to actions set forth by Applicant's Attorney. Defendant instead seems to be only preparing objections and defenses on this claim to date and arguing that Applicant has not met their burden of proof, which violates the regulations.[10]

The Petition apparently takes issue with the undersigned's characterizing of the objection as "boilerplate." Said characterization was made to demonstrate the weight of the evidence as Defendant wishes to focus on temporary disability concerns and a body part issue, but the objection rendered appears to be a quick template form, where the addressee is not even filled in, nor more specific concerns are raised. The undersigned notes that the objection raises the issue of permanent disability, yet there is no impairment discussion in the report whatsoever. (Defendant's Exhibit A).

Additionally, the undersigned notes that Defendant's second exhibit regarding the panel strike is equally unpersuasive. (Defendant's Exhibit B). The undersigned is not certain how Defendant obtained a panel list utilizing an objection dated May 18, 2022, and then struck on the panel via letter May 19, 2022. An objecting party is required to wait until the first working day that is 10 days after the mailing of an objection to request a panel; however, that issue is not raised before the undersigned and the undersigned will not comment further on it.[11]

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[7] EAMS DOC ID 40413484

[8] Objection to Declaration of Readiness to Proceed, dated May 19, 2022, Exhibit A (EAMS DOC ID 41563283)

[9] EAMS DOC ID 41500898

[10] CCR §10109(b)(1)

[11] Labor Code §4062.2(c)

The Petition then takes issue with the fact that Defendant's Attorney did not have a medical report to rebut the Dr. Abrams report and states that the undersigned denied Defendant an opportunity to obtain a rebuttal report. This contention is misplaced as the undersigned notes that the only items in evidence offered by Defendant were an apparent boilerplate objection and panel strike letter. The undersigned notes that Defendant has failed to comply with the regulations in that there are no temporary disability notices in evidence.[12] Defendant has admitted the claim and admits to having received the work status reporting of Dr. Abrams on May 6, 2022.[13] The work status report checks a box which appears to say "Able to Return to Work;" however, Defendant's analysis of this status is misguided. The box that is checked is next to the box returning the Applicant to full duty; it does not logically follow that a work status slip from the doctor would have two boxes to check indicating that the Applicant can return to work. Moreover, the word "able" is obstructed by the formatting of the box and reasonably appears to be a formatting error on the report. The undersigned understands how there can be ambiguity on this report, but it appears that no effort was undertaken to explore this first notice of the Applicant's work status. This is more evidence of Defendant receiving information and taking zero affirmative action to investigate the claim, only choosing to respond when Applicant Attorney seeks board intervention. Defendant was obligated to issue a Notice of Delay regarding the temporary disability benefit if they disputed said concern and apparently did not.[14] Furthermore, the undersigned notes what appears to be the delay in Defendant authorizing medical treatment which resulted in the first Expedited Hearing on this matter. Defendant cannot delay Applicant's care, then complain that they only just received treating reports to obtain rebuttal discovery through the panel process.

Furthermore, the objection to the DOR stated that Defendant was pursuing clarification from the PTP. The undersigned inquired at the hearing as to the status of discovery. Nothing was stated at hearing regarding any follow up with the PTP, instead the parties represented there was an examination scheduled for August 5, 2022 with a PQME. Now, the Petition indicates the exam has been pushed back another two weeks. (Petition, Page 8, Footnote 2). The undersigned weighed concerns about additional delay in this matter. In doing so, the undersigned weighed Defendant's discovery rights against the Applicant's rights to obtain benefits expeditiously. The objection only indicated Defendant sought discovery with the PTP, but Defendant had not done so at the time of hearing. Defendant then at the hearing, and now through the Petition, claims they wanted discovery through the PQME. The undersigned again finds this not in compliance with the duty to investigate in good faith, as the Applicant will now be receiving a PQME examination approximately six months after filing the Application for an admitted claim and three months after introducing evidence of potential entitlement to temporary disability.

On balance, Defendant had Due Process. Defendant was put on notice of Applicant's claim for benefits as early as February 3, 2022. The record is silent as to any affirmative steps by Defendant to investigate said claim until Defendant, three months later, reactively initiates the panel process in response to Applicant's claim to temporary disability. At the time of hearing, Defendant had not undertaken any discovery with the PTP, despite claiming that was their desire in the objection to DOR. Instead, Defendant claimed their desire to obtain a PQME report, but said examination was nearly two months out from hearing, which has now been rescheduled to two

[12] CCR §9812(a)(2)

[13] Objection to Declaration of Readiness to Proceed, dated May 19, 2022, Exhibit A (EAMS DOC ID 41563283)

[14] CCR §9812(a)(2)

months and two weeks out from the hearing date at issue herein. The Petition also claims that the undersigned should have converted the Expedited Hearing to an MSC; however, Defendant made no such motion prior to proceeding on the record or on the record itself. (Petition, Page 2, Lines 12-17). The regulations are clear, body part disputes and temporary disability disputes are subject to Expedited Hearing determination.[15]

Defendant received Due Process, they had notice of the claim for benefits (both parts of body and temporary disability), chose not to affirmatively undertake any effort to investigate or document said claim until Applicant sought hearing. Defendant then played defense on the claim in violation of the regulation requiring affirmative investigation. Moreover, Defendant claimed a desire for certain discovery in the objection to DOR, then changed said desire at the hearing. The undersigned weighed the foregoing in evaluating whether the matter needed to be delayed and the undersigned felt that Applicant, who was not receiving any temporary disability on an admitted claim, had waited long enough to obtain adjudication over entitlement of benefits that are afforded to him under the law.

Sanctions

The undersigned had a discussion with the parties before going on the record, and the undersigned had expressed a concern to Defendant about the lack of exhibits being introduced and the ability to properly present a defense. This was documented in the minutes via minute reflection. After reading Defendant's Petition and reconsidering the evidence, the undersigned would like to clarify a couple points.

First, this is in fact distinguishable from the Tito Torres *En Banc* decision in that Defendant does not have the burden of proof of temporary disability. The burden rests with the Applicant. Torres stands for the proposition that proceeding forward on the record with evidence incapable of meeting one's burden of proof is sanctionable conduct. Therefore, the undersigned's concern about Defendant's presentation of a defense as it relates to Torres is imprecise as Applicant had the burden herein, not Defendant. Defendant is not required to introduce evidence as they do not have the burden of proof.

However, the regulations do provide that presenting a defense that is indisputably without merit is sanctionable conduct. The undersigned has concerns that "playing defense" on an admitted claim of injury, failing to document the file properly via mandatory benefit notices, and proceeding forward to trial on a boilerplate medical dispute and panel strike letter would fall under the orbit of this contemplated conduct.16 The undersigned respectfully recommends that the Appeals Board review Defendant's conduct in presenting this defense and determine if it was brought forward in bad faith.

[15] CCR §10782

IV.

CONCLUSION

Based on the foregoing, the undersigned respectfully recommends the following:

(a) that the Petition for Reconsideration be DENIED,

(b) and, that the Appeals Board review Defendant's conduct in presenting their defense under CCR §10421(b)(6)(A)(i) and determine if sanctions are appropriate.

DATE: July 1, 2022

Michael Joy
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE