WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ADRIAN NUNURA, ***Applicant***

vs.

TRICOR COURIER & CARGO SYSTEMS; TRAVELERS PROPERTY CASUALTY COMPANY, ***Defendant***

Adjudication Number: ADJ9103770
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings of Fact of September 23, 2019, the Workers' Compensation Judge (WCJ) found that applicant, while employed as a driver/loader/unloader during the period July 14, 2008 to July 24, 2013, sustained industrial injury to his cervical spine, lumbar spine, bilateral shoulders, bilateral wrists, left knee, and right ankle, and that applicant did not sustain industrial injury to his right knee, elbows, left ankle, feet, head, skin, abdomen (hernia), cardiovascular system (hypertension), endocrine system (diabetes and obesity), gastrointestinal system (GERD/gastritis), sleep loss or psyche.

Applicant filed a timely petition for reconsideration of the WCJ's decision. Applicant contends that the previous WCJ assigned to this case, now retired, erred in further developing the medical record by appointing Dr. Brown as a "regular physician" to evaluate applicant's claims of orthopedic injury. Applicant further contends that the current WCJ denied him due process by relying upon the previous WCJ's Minutes of Hearing and Summary of Evidence to determine the nature of applicant's actual job duties, that the current WCJ erred in concluding that applicant did not lift more than 70 pounds "on a constant basis," and that his job duties as a driver/loader/unloader were extremely arduous and physically demanding, consistent with the mechanism of his claimed orthopedic injuries and hernia. In addition, applicant contends that the

WCJ erred in finding that applicant did not sustain an industrial hernia injury due to cumulative trauma, and that the medical opinion of Dr. Pietruszka justifies a finding of cumulative trauma injury of diabetes and hypertension, GERD/gastritis, weight gain, psoriasis, sleep disorder, and headaches. Finally, applicant contends that defendant waived objection to the admissibility of Dr. Pietruszka's reports, upon which the WCJ should have relied to find compensability of applicant's claimed internal injuries.

Defendant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

In reference to the WCJ's finding on the orthopedic body parts, applicant specifically contends that the WCJ erred in denying injury to his right knee and left ankle. (Petition for Reconsideration, p. 3:23-24.) On that contention, as well as applicant's contentions that the previous WCJ erred in selecting Dr. Brown to evaluate his orthopedic claims, that the current WCJ denied due process by relying upon evidence entered into the record by the previous WCJ, and that the current WCJ erroneously underestimated the physical demands of applicant's job, we have considered these contentions and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated in said Report, which we adopt and incorporate to the extent further detailed below, we affirm the WCJ's finding that during the period July 14, 2008 to July 24, 2013, applicant sustained industrial orthopedic injury only to his cervical spine, lumbar spine, bilateral shoulders, bilateral wrists, left knee, and right ankle. Specifically, we adopt and incorporate the first eleven pages of the WCJ's Report, and through the second full paragraph of page twelve, with the following exceptions and explanation.

We do not adopt or incorporate the WCJ's statements/suggestions on pages four, five and seven of his Report that by not filing a petition for removal earlier in this proceeding, applicant waived objection to the previous WCJ's Summary of Evidence and his selection of Dr. Brown to evaluate applicant's orthopedic claims. Although applicant's objections lack substantive merit, we disagree with the current WCJ's reasoning that the objections were waived. That is, applicant did not waive his objections by waiting to raise them in the instant petition for reconsideration. As expressly set forth in WCAB Rule 10955(a), a petition for removal must include a showing that reconsideration will not be an adequate remedy after the issuance of a final order, decision or award. (Cal. Code Regs., tit. 8, § 10955(a).) Here, once the current WCJ issued his Findings of Fact of September 23, 2019, which is a "final order, decision or award" within the meaning of

Labor Code sections 5900 *et seq*., applicant did not waive his objections but had an adequate remedy to raise them by filing a petition for reconsideration.

Turning to applicant's claims of internal injury, we are persuaded that further development of the medical record is required to properly address and resolve the claims. Therefore, we will amend the WCJ's decision to rescind the finding on the internal injuries, and we will defer the issue and return this matter to trial level for further proceedings and new decision by the WCJ.

Concerning applicant's claim of hernia injury, he alleges that the June 17, 2014 medical report of Dr. Pietruszka, his treating physician, supports a finding that his hernia injury is the result of cumulative trauma related to his job. (Defense Exhibit E.) On page 11 of said report, Dr. Pietruszka states, "[i]n 2010 it was discovered that [applicant] had an umbilical hernia as a result of continuous lifting of heavy boxes at work." In his Report and Recommendation, the WCJ states, "the evidence submitted could support a conclusion that applicant sustained a hernia on an industrial basis as a result of a specific incident, as pled in [the companion case] ADJ9103317, *or as a result of a continuous trauma* ending sometime in 2010 or 2011. However, no such claims are before [the WCJ]." (Italics added.) Although the period of claimed injury is July 14, 2008 to July 24, 2013, the WCJ thus concedes that the evidence may support a cumulative trauma hernia injury in 2010 or 2011. This date is within the period of alleged cumulative trauma, subject to conforming the claimed period of injury to proof. (WCAB Rule 10517, Cal. Code Regs., tit. 8, § 10517.) Further, the fact that applicant may have sustained a specific hernia injury around the same time does not preclude a finding he also sustained a cumulative trauma injury, e.g., during the period 2008 through 2010 or 2011. In any case, "the Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further [inquiry or] evidence." (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1164 [66 Cal.Comp.Cases 1290].) Therefore, we conclude that the WCJ must further develop the medical record concerning applicant's claimed cumulative trauma hernia injury. It seems clear that the WCJ does not have confidence in the reporting of Dr. Pietruszka. Therefore, if the parties are unable to agree on an Agreed Medical Evaluator (AME), the WCJ may consider appointing a "regular physician" to further develop the medical record concerning this issue. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 [Appeals Board en banc].)

Applicant next contends that Dr. Pietruszka's medical opinion supports a finding that his diabetes, hypertension, and gastritis/GERD are industrial cumulative trauma injuries because they resulted from his industrial orthopedic injuries. In his Report, the WCJ states, "[w]ith Dr. Garcia having formally diagnos[ed] applicant with gastritis/GERD, obesity, and diabetes, and with applicant treating for hypertension as of June 11, 2009, [this WCJ's] determination that applicant's diabetes and hypertension preexisted his industrial orthopedic claims is well founded." We disagree with the WCJ's legal analysis on this point. The WCJ indicates in his Report that applicant was diagnosed with diabetes and was being treated for hypertension by June 11, 2009, almost one year after the claimed period of cumulative trauma began. This chronology raises the question whether applicant's work during that one-year period contributed to the development of his diabetes and hypertension. In addition, applicant claims that his orthopedic injuries contributed to the development of his internal injuries. To the extent the WCJ has reasoned that applicant's diabetes and hypertension are not industrial because they preexisted his orthopedic injuries, the WCJ's reasoning is incorrect because the diabetes and hypertension may be industrial if the industrial orthopedic injuries accelerated or aggravated those conditions. (See *Place v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 372, 375 fn. 2 [35 Cal.Comp.Cases 525]; *Guerra v. Workers' Comp. Appeals Bd.* (2016) 246 Cal.App.4th 1301, 1307-1308 [81 Cal.Comp.Cases 324], citing *California etc. Exchange v. Ind. Acc. Com.* (1946) 76 Cal.App.2d 836, 840 (Industrial liability exists for disability arising from a preexisting nonindustrial condition, brought on by any strain or excitement incident to the employment; the acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration.).) Further, the percentage to which an applicant's injury is causally related to his or her employment is not necessarily the same as the percentage to which an applicant's permanent disability is causally related to his or her injury. The analyses of these issues are different and the medical evidence for any percentage conclusions may be different. (*Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223 [Significant Panel Decision].)

Applicant further alleges the WCJ erred in concluding he did not suffer industrial weight gain during the cumulative trauma period July 14, 2008 to July 24, 2013. In his Report, the WCJ rejects the allegation because Dr. Pietruszka recorded applicant's weight at 290 pounds in February and March 2014, whereas Dr. Rosario recorded his weight at 230 pounds on June 3, 2014; this would mean applicant lost 60 pounds in about four months. By implication, the WCJ believes this

to be an incredible loss of weight in a short time; another reason to conclude that Dr. Pietruszka's medical opinion is not substantial evidence, according to the WCJ. Even if we assume that the doctor failed to accurately record applicant's weight, we note that this happened in 2014, outside the claimed period of cumulative trauma. Meanwhile, the WCJ notes in his Report that within the claimed period of cumulative trauma, the medical record demonstrates applicant weighed 232 pounds on December 30, 2008, 240 pounds on March 27, 2010, and 256 pounds on August 5, 2013, as recorded by Dr. Sirakoff. (Applicant's exhibit 6.) Thus, according to the WCJ, there is trustworthy evidence that applicant gained almost 25 pounds during the alleged period of cumulative trauma. This means that even if Dr. Pietruszka's reporting is disregarded, the issue of whether applicant experienced industrial weight gain from July 14, 2008 to July 24, 2013 requires further medical inquiry.

The same is true of applicant's claim that he developed psoriasis on an industrial basis during the cumulative trauma period. The WCJ states in his Report that in absence of Dr. Pietruszka's medical opinion, "the record indicates that applicant began experiencing skin issues in April 2011 and possibly as early as December 2008." Both of those dates are within the alleged period of cumulative trauma, so further development of the medical record is required to evaluate whether applicant's work and/or industrial orthopedic injuries contributed to his psoriasis during that period.

Applicant's last substantive contention is that the WCJ erred in disallowing his claim of industrial headaches and sleep disorder. Based on the WCJ's Report, it appears he again rejected Dr. Pietruszka's medical opinion on this issue because the doctor inaccurately recorded applicant's weight. Regardless of whether this inaccuracy is germane to the headache and sleep disorder claim, we note the WCJ evidently found applicant credible in testifying that he has headaches, which interfere with his sleep. We further note the WCJ refers to no medical evidence rebutting Dr. Pietruszka's opinion that applicant's headaches and sleep disorder are industrial in origin. (See WCJ's Report at p. 26.) As with applicant's other claims of internal injury, we are persuaded that further medical inquiry is necessary to determine whether applicant's headaches and sleep order may be industrial, in reference to the claimed period of cumulative trauma.

Finally, applicant's allegation that defendant waived objection to admission of Dr. Pietruszka's reports appears to be a moot point, as the WCJ's Opinion on Decision indicates that Dr. Pietruszka's reports were admitted in evidence. Invoking the doctrine of invited error,

applicant further alleges that "defendant cannot after the fact object to its own evidence presented in trial." However, the WCJ correctly points out in his Report that regardless of whether defendant timely objected or not, the issues of admissibility and substantiality are distinct. The fact that Dr. Pietruszka's reports were admitted into the record did not obligate the WCJ to find they constitute substantial evidence.

In summary, we affirm the WCJ's decision on applicant's claim of orthopedic cumulative trauma in ADJ9103770, but we return this case to the trial level for further development of the medical record on the claims of internal injury, as discussed above. The WCJ has discretion to further develop the record by resort to physician(s) other than Dr. Pietruszka. We express no final opinion on the claims of internal injury in ADJ9103770. When the WCJ issues a new decision on them, any aggrieved party may seek reconsideration as provided by Labor Code sections 5900 *et seq*.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact of September 23, 2019 are **AFFIRMED**, except that Finding 2 is **RESCINDED**, and the following Finding 2 is **SUBSTITUTED** in its place:

FINDINGS OF FACT

2. Applicant did not sustain industrial injury to his right knee, elbows, left ankle, feet or psyche during the period July 14, 2008 to July 24, 2013. The issue of whether applicant sustained industrial injury to his abdomen (hernia), cardiovascular system (hypertension), endocrine system (diabetes and obesity), gastrointestinal system (GERD/gastritis), psoriasis, headaches or sleep disorder is deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and new determination of the outstanding issues by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 22, 2022

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

ADRIAN NUNURA
LAW OFFICES OF J. FELIX MCNULTY
TROVILLION, INVEISS & DEMAKIS

JTL/ara

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 OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

1.	Applicant's occupation	:	Driver/loader/unloader
	Applicant's Age	:	38
	Date of Injury	:	7-14-08 through 7-24-13
	Parts of Body Injured	:	cervical spine, lumbar spine, bilateral shoulders, bilateral wrists, left knee, and right ankle.
	Manner in which it occurred	:	Repetitive Job Duties
2.	Identity of Petitioner	:	Applicant Adrian Nunura
	Timeliness	:	Petition is timely
	Verification	:	Petition is verified
3.	Date of Findings and Order	:	September 23, 2019

4. Petitioner contends that the WCJ erred in finding that:

a) Applicant did not sustain injury arising out of and during the course of employment to his right knee, elbows, left ankle, feet, head, skin, abdomen ("hernia"), cardiovascular system (hypertension), endocrine system (diabetes and obesity), gastrointestinal system (GERD/gastritis), sleep loss or psyche.

II
FACTS

Applicant Adrian Nunura (Applicant), while employed during the period of 7-14-08 to 7-24-13 as a driver/loader/unloader at Anaheim, California by Tricor Courier & Cargo System, claimed to have sustained injury arising out of and during the course of employment to his back, neck, lower extremities, knees, upper extremities, hernia, skin, hypertension, diabetes, GERD and/or gastritis, weight gain, sleep, ankles, feet, head, hernia and psyche.

Applicant filed an application for adjudication on August 21, 2013 and Defendant denied liability for applicant's claim of injury on October 10, 2013. The application alleged that applicant injured his back, upper extremities, lower extremities, right ankle, hernia, internal, psych, sleep disorder, skin while lifting a pallet (ADJ9103770).

Applicant also has filed four other applications. The first is a claim of injury to his abdomen, hernia, internal, psych, and sleep disorder as a result of a specific injury on April 20, 2010 (ADJ9103317).

The second is for injury is to applicant’s lower extremities, ankle, nervous system, internal, psyche, and sleep disorder as a result of a specific injury on March 19, 2011(ADJ9103318).

The third claim is for injury to applicant’s back, internal, psych, and sleep disorder as a result of a specific injury in January 2010 (ADJ9103316).

Applicant’s fourth application is for injury to his lower extremities, ankle, nervous system, internal, psyche, and sleep disorder as a result of a specific injury March 19, 2011(ADJ9103318).

Retired Judge Blas issued a Findings and Award dated April 25, 2017, finding as fact that Applicant sustained injury AOE/COE on his orthopedic complaints.

A petition for reconsideration was filed by defendant, which was granted with instructions for the trial judge to determine if further proceedings were necessary for the WCJ to issue a new decision making a finding as to whether applicant sustained a work related injury and if so to which body parts.

The matter proceeded to hearing on September 5, 2017, and the matter was resubmitted for further review of the record.

On October 18, 2017, Judge Blas reviewed the record and was not satisfied with the condition of the medical record and was affording the parties the opportunity to select an AME.

Judge Blas gave the parties ten days to select an AME in orthopedics to assist the Undersigned Judge in resolving this issue. If the parties were incapable of selecting an AME, the Undersigned Judge would entertain appointing an IME.

On November 28, 2017, having received no agreement from the parties, Judge Blas appointed Dr. Mark Brown as an independent medical examiner. No objection was filed by the parties and no petition for removal was filed.

Dr. Brown evaluated the applicant on December 19, 2017, and issued a report dated January 26, 2018.

Dr. Brown was deposed, regarding the applicant on November 30, 2018 and issued a supplemental report dated December 17, 2018.

Defendant filed a Declaration of Readiness to proceed on December 27, 2018 to which no objection was filed. The matter proceeded on the record before this judge on June 24, 2019, with additional testimony from the applicant and was submitted for determination on July 24, 2019, after the parties were given opportunity to file trial briefs.

On September 23, 2019, the this Judge issued a Findings and Award, finding that applicant had sustained injury arising out of and during the course of employment to his cervical spine, lumbar spine, bilateral shoulders, bilateral wrists, left knee, and right ankle.

This Judge further found that applicant did not sustain injury arising out of and during the course of employment to his right knee, elbows, left ankle, feet, head, skin, hernia, cardiovascular system (hypertension), endocrine system (diabetes and obesity), gastrointestinal system (GERD/gastritis), sleep loss or psyche.

III
DISCUSSION

Appointment of an Independent Medical Examiner

Applicant's first assertion is that Judge Blas erred in appointing an independent medical examiner and failed to give the parties the opportunity to develop the record, in accordance with *McDuffie vs. Los Angeles County Metropolitan Transit Authority 67 CCC 138*.

The undersigned Judge assumed the handling of this file after Judge Blas, who had retired, conducted the trial proceedings and authored the original Findings and Award and Opinion on Decision.

The appeals board vacated the Findings and Award and Ordered, instructing Judge Blas to determine if further proceedings were necessary for the WCJ to issue a new decision as to whether applicant sustained a work related injury and if so to which body parts.

Upon review of the record Judge Blas informed the parties that he was not satisfied with the condition of the medical record and afforded the parties the opportunity to select an AME. The parties were given 10 days in which to agree to an AME or the Undersigned Judge would entertain appointing an IME.

The parties appeared before Judge Blas at a hearing on November 28, 2017 and informed the Undersigned Judge that an agreement could not be reached between the parties as to the election of an Agreed Medical Examiner. Judge Blas then appointed Dr. Brown as the Regular Physician to examine the applicant.

[…]

Review of Judge Blas's Minutes of Hearing and Summary of Evidence indicates that he found the reporting of both doctors to be insufficient, and advised the parties that he was considering appointing an IME or Regular Physician. This Judge only had the benefit of Judge Blas's recorded opinion in determining his reasoning for ordering development of the record as to an IME or Regular Physician.

However, upon review of the medical reporting, this Judge agrees with Judge Blas's determination that the medical record required development. While Judge Blas's order does not strictly adhere to the Undersigned Judge 's Opinion in *McDuffie v. Los Angeles County Metropolitan Transit Authority 67 CCC 138*, the this Judge considered himself bound by Judge Blas's order and therefore accepted the reports of Dr. Brown into evidence.

[…]

Wherefore, the Undersigned Judge was not in error in accepting as evidence the medical reporting of Dr. Brown and relying on said medical reporting as a basis for his finding of fact.

Denial of Due Process Rights

Applicant asserts that the Undersigned Judge erred making a findings of fact based on a review of the minutes of hearing and summary of evidence put forth by Judge Blas and that in doing so denied applicant his due process rights.

As part of applicant's assertion, the applicant contends that the undersigned Judge issued findings that were inconsistent with Judge Blas's findings.

A review of the prior Findings and Award and Opinion on Decision shows that the Judge Blas found that " . . applicant worked long hours, made multiple stops and lifted and carried heavy items."(Opinion on Decision 04/25/17 page 4 paragraph 3)

The undersigned Judge in its September 23, 2019 Findings and Award and Opinion on Decision found that "applicant was not required to lift 130 to 140 pounds and carry this weight a distance of 40-50 feet for four to five hours constantly."

This finding is consistent with the prior findings and Award and Opinion on Decision and was a determination that needed to be made by the undersigned Judge, as this was the work description provided to the Panel Qualified Medical Examiner Dr. Rotenberg and upon which Dr. Rotenberg relied in forming his opinion as to causation of applicant's orthopedic injuries.

In addition, upon review of all the Minutes of Hearing and Summary of Evidences the undersigned Judge is unable to locate any testimony by the applicant that he was required to lift 130 to 140 pounds and carry this weight a distance of 40-50 feet for four to five hours constantly. The closest the undersigned Judge could find was in the November 2, 2016 Minutes of Hearing and Summary of Evidence page 9 line 19 when the Judge Blas asked if the applicant did, in fact, lift 130 to 140 pounds by himself, to which he stated yes. The two remaining identified duties concerning distance and time/frequency were not testified to.

The undersigned Judge's finding that applicant was not required to lift 130 to 140 pounds and carry this weight a distance of 40-50 feet for four to five hours constantly is not inconsistent with applicant's own testimony.

As to applicant's assertion that the undersigned Judge denied applicant his due process rights, the undersigned Judge points to the fact that the summary relied upon by the undersigned Judge was the summary of testimony obtained at trial and under oath. At the time the testimony was provided, applicant and applicant's counsel were present and had the opportunity to hear the testimony and cross examine the witnesses which included the applicant.

Due process requires that the right of the person affected to be present before the Tribunal; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved.

In this matter applicant was present at the time of trial, was afforded the opportunity to be heard, and was given the right to present testimony or documentary evidence to controvert both the testimony of defense's witness and documentation.

[…]

Wherefore, the applicant was not denied his due process rights by the undersigned Judge's reliance on the summary of evidence and testimony obtained by Judge Blas.

Orthopedic Injuries

Applicant asserts that the undersigned Judge erred in not finding injury to applicant's right knee, elbows, left ankle, and feet claiming that Dr. Rotenberg specifically testified that applicant sustained injury to these body parts. This misstates the evidence submitted in this matter.

Dr. Rotenberg issued a report dated January 6, 2014 in which he diagnosed applicant with injury to his left knee, lumbar spine, right ankle, left shoulder and right shoulder and opined that applicant's injuries were industrial in nature without being specific as to whether or not the injuries were specific injuries or the result of a continuous trauma. (Applicant's Exhibit 11 Page 40)

Also submitted was the deposition of Dr. Rotenberg dated March 11, 2015. In that deposition Applicant's Attorney, while questioning Dr. Rotenberg, represented to the doctor, claiming to be reading from the doctor's report, the doctor's conclusions and requesting Dr. Rotenberg confirm his diagnoses.

The undersigned Judge notes in the deposition that prior to being read the list of body parts applicant claims were diagnosed, Dr. Rotenberg states that "I'm looking at my summary. I think that's the best thing". (Applicant's Exhibit 11 page 9 line 25)

Applicant's Attorney then proceeded to read the purported diagnosed body part to Dr. Rotenberg, citing page 42 and 43 of the January 6, 2014 report. According to the applicant's attorney Dr. Rotenberg diagnosed applicant with injury to his right shoulder, left shoulder, right knee, left knee, right ankle, left ankle and lumbar spine. Dr. Rotenberg in the deposition assents to this. (Applicant's Exhibit 11 page 10 lines 2 to 14)

However, the undersigned Judge in reviewing the report in question notes that page 42 and 43 of the report do not in fact provide the diagnoses identified by the applicant's attorney but discusses permanent disability. (Applicant's Exhibit 13 pages 42 & 43) Dr. Rotenberg in his AMA Impairment Rating section does provide an analysis of permanent disability for applicant's right knee (0%) and left ankle (0%) but provides no indication or opinion that these body parts were injured on an industrial bases. (Applicant's Exhibit 13 page 43)

Under further cross examination Dr. Rotenberg testified that with respect to the left knee, lower back, right ankle, left shoulder, and right shoulder, the cumulative trauma was not a component of causation. (Applicant's Exhibit 11 page 45 lines 7 through 13). Dr. Rotenberg went on further to state that "I'm not a very high believer in cumulative trauma", (Applicant's Exhibit 11 page 45 line 24) and that he would say that most of them (applicant's injuries) were specific injuries. (Applicant's Exhibit 11 page 46 line 2).
Dr. Rotenberg stated that the injury to the left knee was a specific injury. (Applicant's Exhibit 11 page 46 line 5). He further provided that applicant's lumbar spine was a specific injury. (Applicant's Exhibit 11 page 47 line 21).

As discussed previously, Dr. Rotenberg premised his opinion of causation, in part, on applicant's job duties; duties described as lifting 130 to 140 pounds and carrying that weight a distance of 40-50 feet for four to five hours constantly. (Applicant's Exhibit 13, page 2 Paragraphs 2 and 3)

When ask if his opinion would be affected if applicant had misrepresented, either intentionally or inadvertently, the weight of objects lifted, he responded "probably". (Applicant's Exhibit 11 page 49 lines 4 through 9)

The undersigned Judge found that Dr. Rotenberg's understanding of applicant's job lifting requirements was inaccurate and that inaccuracy, by Dr. Rotenberg's own testimony, could affect his opinion.

Therefore, the reporting of Dr. Rotenberg was not supported by the evidence and was unsubstantial evidence upon which the undersigned Judge could not rely.

The undersigned Judge would like to point out that should the medical reporting of Dr. Brown be removed from consideration, that based on the testimony of the applicant and the reporting and deposition of Dr. Rotenberg applicant could have sustained injury as a result of the alleged continuous trauma at most to his right ankle, left shoulder and right shoulder.[1]

Reviewing the medical reports submitted by Dr. Sirakoff it is noted that Dr. Sirakoff diagnosed applicant with a lumbosacral sprain/strain, cervical sprain/strain, thoracic sprain/strain, umbilical pain secondary to umbilical hernia repair in 2010, bilateral inguinal ligament strain, left shoulder sprain/strain, right shoulder sprain, left knee sprain/strain, and right ankle sprain/strain. (Applicant's Exhibit 26, page 13)

The undersigned Judge found that Dr. Sirakoff did not fully address causation in his discussion stating "[t]he details of the patient's mechanism of injury to the areas in my diagnosis of the patient is described in detail under the history of work related injury heading of this report." (Applicant's Exhibit 26, page 13)

In reviewing Dr. Sirakoff's report, in the history of work related injury section Dr. Sirakoff provides a general description of applicant's job as during his approximate 5 years of repetitive and continuous motion with both upper extremities and lower extremities in the performance of

[1] The WCJ does note that in his deposition Dr. Rotenberg defers his opinion on injury to applicant's cervical spine to his treating physician. (Dr. Sirakoff) (Applicant's Exhibit 11 page 25 lines 6 through 12).

his duties as a driver and a warehouseman. Dr. Sirakoff further provides that Applicant's job required frequent sitting, standing, walking, bending, twisting, crawling, climbing, reaching overhead, kneeling, balancing, repetitive use of his feet and hands, and lifting objects from 0 to 100 pounds. (Applicant's Exhibit 26, page 2)

Upon review of the record as a whole the undersigned Judge determined that Dr. Sirakoff's analysis of causation lacked the specificity required to support a finding of industrial injury and was therefore unpersuasive.[2]

With both Dr. Rotenberg's and Dr. Sirakoff's reporting having been found unsubstantial evidence or inadequate to support a finding of industrial injury the undersigned Judge looked to the reporting of the Undersigned Judge appointed regular physician Dr. Brown.

Dr. Brown diagnosed applicant with chronic cervical spine sprain/strain, chronic right shoulder strain with mild impingement syndrome, chronic left shoulder strain, elbow complaints unrelated to the industrial injuries in question, bilateral carpal tunnel syndrome, chronic lumbosacral sprain/strain, chondromalacia patella, left knee, and chronic right ankle sprain. (Joint Exhibit Y pages 15 & 16)

In regard to causation, Dr. Brown stated the job duties the applicant performed for the employer were a viable mechanism of cumulative trauma injury and that the amount of weight applicant lifted was not an issue as applicant spent a lot of time loading and unloading packages, standing, driving, twisting his neck and back, bending and stooping, activities which were reasonably arduous.

The undersigned Judge found the opinions of Dr. Brown were based on an accurate understanding of applicant's employment duties and medical history and as such were found persuasive.

Though not acknowledged by petitioner, even though the undersigned Judge found the opinions of Dr. Sirakoff and Dr. Rotenberg unsubstantial evidence, the undersigned Judge's finding on orthopedic injuries is not inconsistent with either doctors' diagnoses. Furthermore, as demanded by petitioner, had the undersigned Judge followed the medical reporting of Dr. Rotenberg the undersigned Judge would be compelled to find that applicant sustained no orthopedic injuries as a result of the alleged continuous trauma.

In the alternative, the undersigned Judge relied on the medical opinions of Dr. Brown and found that applicant had sustained injury to his cervical spine, lumbar spine, bilateral shoulders, bilateral wrists, left knee, and right ankle as a result of a continuous trauma between 7-14-08 to 7-24-13 while in the employ of Tricor Courier & Cargo System.

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[2] It can be noted that Dr. Sirakoff also did not diagnose applicant with injury to his right knee or left ankle. (Applicant's Exhibit 26, page 12 & Applicant's Exhibit 18 Page 16)

The undersigned Judge further found based on the medical reporting of Dr. Brown that applicant had not sustained injury to his right knee, elbows, left ankle, feet, and head as a result of a continuous trauma between 7-14-08 to 7-24-13 while in the employ of Tricor Courier & Cargo System.

Wherefore, the undersigned Judge did not error in relying on the reporting of Dr. Brown and the undersigned Judge's findings are supported by the evidence and testimony submitted.