WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CARLOS MADRIGAL, ***Applicant***

vs.

AVALON BAY COMMUNITIES, INC.;
ACE AMERICAN INSURANCE COMPANY,
administered by BROADSPIRE SERVICES, INC., ***Defendants***

Adjudication Number: ADJ11161737
Oxnard 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. Pursuant to our authority, we accept applicant's supplemental pleading. (Cal. Code Regs., tit. 8, § 10964.) 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].)

Finally, we find it necessary to admonish applicant's attorney John Sugden for failing to support his arguments with specific references to the record. (Cal. Code Regs., tit. 8, § 10945(b).) Future violations may lead to the imposition of sanctions. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10561.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

MARGUERITE SWEENEY, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 29, 2022

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

CARLOS MADRIGAL
LAW OFFICES OF JOHN SUGDEN
MCNAMARA & DRASS

PAG/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:

Applicant, born [], alleged an injury during the period 6/20/2013 through 10/31/2017 to his psyche and internal while working as a maintenance technician for the employer. Defendant denied the claimed injury.

Applicant is the Petitioner herein, and filed a timely, verified Petition for Reconsideration (hereinafter, the Petition), dated 11/10/2022. Petitioner takes issue with the Findings and Order and Opinion on Decision issued by this Court dated 10/21/2022. In that Findings and Order, this Court found that Applicant did not sustain injury arising out of and in the course of said employment as alleged. Petitioner contends the undersigned WCJ erred in so doing, contending that the Court should have relied upon the opinions given by the Applicant's personal doctor, Dr. Olney, to make a finding of injury, the Court should have relied upon the opinions given by the QME in neurology, Dr. Fieman, to make a finding of injury, the Applicant was the victim of violent acts necessitating a lower burden of proof pursuant to Labor Code §3208.3(b)(2), the reporting of the psychology QME, Dr. Appleton, is not substantial evidence, the Applicant's testimony given at trial was credible and can be relied upon by this Court to make a finding of injury, and the record should be developed by ordering the parties to utilize a new independent psyche evaluator.

II. STATEMENT OF FACTS:

This case involves a stress related cumulative trauma claim, as indicated above, that was timely denied by Defendants.

Applicant did not have any workers' compensation primary treating physician in this case. Instead, Applicant continued to see his own treating physician, Dr. Christine Olney. Dr. Olney did not issue any comprehensive medical reports in this case, so none were offered to this Court as evidence. Instead, only the two deposition transcripts of Dr. Olney were offered to the Court as evidence (*Applicant's Exhibit 1 and 2*).

To help resolve the disputed threshold issue, the parties utilized the services of a psychologist QME, Dr. David Appleton, who issued five medical reports (*Court's Exhibits X1, X2, X3, X4,* and *X5*) and had his deposition taken once (*Court's Exhibits X6*). In addition, the parties utilized the services of a neurology QME, Dr. Sherry Fieman, who issued one medical report (*Court's Exhibits Y1*).

On 9/15/2022, the parties appeared before the undersigned WCJ for trial. At that time, the parties indicated that they were unable to resolve their pending dispute and requested to proceed forward with trial. Both counsel for Applicant and counsel for Defense expressed concerns to this Court that Applicant's behavior may pose a risk to the Court, its staff, and/or counsel present. After discussing these concerns with the parties, it was agreed that the matter would be continued

to a new date so that testimony may be taken via video conference to protect all involved. This agreement was noted in that disposition (*Minutes of Hearing*, dated 9/15/2022, page 1). Before the matter was continued, the stipulations and issues were identified by the parties and the evidence was marked for the record. Because Applicant was present in the courtroom during this process, this Court requested a CHP Officer, Officer Ayala, be present to protect all parties involved (*Minutes of Hearing*, dated 9/15/2022, page 1). This is an unusual precaution for this Court, and it is one the undersigned WCJ has only taken a few times before, but it was necessary based upon the representations made by the parties to the Court at the time of the hearing. Thankfully, nothing occurred during the hearing, and the matter was continued to a new date to be held virtually.

On 10/6/2022, the parties appeared virtually for that continued trial. At that time, Applicant testified, via video conference, as the only witness offered by either party (*Minutes of Hearing And Summary of Evidence*, dated 10/6/2022, pages 2 to 12). At the conclusion of that testimony, the matter stood submitted for decision.

On 10/21/2022, this Court issued the Findings and Order and Opinion on Decision at issue herein. This Court Found that Applicant did not sustain injury arising out of and in the course of said employment as alleged based upon the medical reporting of the psychology QME, Dr. Appleton, and because Applicant's testimony was not credible and could not be relied upon as the basis for any Findings by the Court.

On 11/10/2022, Applicant filed the instant Petition. Petitioner contends, as indicated above, that the Court should have relied upon the opinions given by the Applicant's personal doctor,
Dr. Olney, to make a finding of injury, the Court should have relied upon the opinions given by the QME in neurology, Dr. Fieman, to make a finding of injury, the Applicant was the victim of violent acts necessitating a lower burden of proof pursuant to Labor Code §3208.3(b)(2), the reporting of the psychology QME, Dr. Appleton, is not substantial evidence, the Applicant's testimony given at trial was credible and can be relied upon by this Court to make a finding of injury, and the record should be developed by ordering the parties to utilize a new independent psyche evaluator.

On 11/21/2022, Defendant filed an Answer to the Petition.

III. DISCUSSION:

A. <u>Applicant's testimony was not credible, and cannot be relied upon by this Court:</u>

Many of Petitioner's allegations can be dealt with here, so the Court will address this contention first. Petitioner contends that "applicant's testimony was otherwise calm, deliberate, and detailed" (*Petition*, page 10, line 11) and should not have been ignored and rejected by the Court. In addition, Petitioner contends that "it is [un]fair to deny a claim based on demeanor when the Judge was not physically present but instead heard the testimony remotely" (*Petition*, page 10, lines 3 to 4). The undersigned WCJ strongly disagrees with both contentions.

Firstly, this Court is forced to remind Petitioner, as Petitioner conveniently forgot to mention, that the matter was held remotely at the request of both parties due to their concerns. If this Court had any trepidations that Applicant's demeanor could not be, or was not being, properly assessed

during Applicant's testimony, then the Court would have stopped the proceedings and moved the matter back to an in-person hearing, with the appropriate CHP protection. This Court had no such concerns and had a perfect opportunity to evaluate Applicant's demeanor at trial.

This Court disagrees with Petitioner that Applicant's demeanor at trial was "calm, deliberate, and detailed." The undersigned WCJ found Applicant's testimony to be exaggerated, lacking any support beyond his own memory of the events, and rather scary. The undersigned WCJ could not tell if the events Applicant described were accurately described, exaggerated, or made up entirely. It is certain that Applicant currently believes that the events described happened the way he describes them, but it became clear that Applicant's description of events could change from any given telling of those events and based upon who is asking the questions.

One particularly illuminating illustration was the following exchange during Applicant's testimony:

> "Applicant testified that he does not think that he has heard voices talking to him in the past. Counsel refers back to Applicant's deposition transcript dated 7/2/2018, at page 140, where Applicant stated he hears voices all the time. If he said that, then maybe he was hearing something. He does not hear them anymore. He has called out Satan before and has had fights with Satan where Satan tries to tear him down." (*Minutes of Hearing And Summary of Evidence*, dated 10/6/2022, pages 11, lines 7 to 11)

Here, Applicant fails to recall hearing voices in the past, immediately changes his testimony when confronted, and then transitions into a story about a confrontation he had with the devil, Satan. This testimony was given with the same demeanor and certainty that Applicant testified previously about his interactions and problems with his boss, Mr. Silveria. This testimony left the Court in shock and made the Court wonder whether any of what Applicant previously testified to actually occurred.

Petitioner posits, without support, that there might be another explanation for this impaired testimony. Petitioner states "Applicant submits the cause of any limited or distorted perceptions here is the violent [work related] trauma, not drugs/alcohol or prior head injuries" (*Petition*, page 9, lines 23 to 24). Petitioner's lay opinion about the cause of Applicant's distorted perceptions is not supported by any medical evidence. Petitioner continually ignores the other causal factors that have been well documented and found by the reporting physicians.

Those other causal factors are well illustrated by Dr. Appleton, which combine to impair Applicant's ability to accurately report events. As noted by Dr. Appleton:

> "I believe that Mr. Madrigal has impairment in cognitive functioning, short and long-term memory, and forgets what he says from moment to moment, or even when things occurred. When corrected, he will agree with what the corrected history actually is, even forgetting what he had testified to previously. Again, I do not believe there is any maliciousness in this, only purely evidence of memory impairment." (*Court's Exhibit X5*, page 33)

The doctor further noted:

> "When a patient is suffering from Major Depression with Psychotic Features, severe brain trauma with impaired cognitive functioning, and marked substance abuse on a daily basis, their self-report cannot be considered reliable or trustworthy." (*Court's Exhibit X4*, page 11)

As stated in the Opinion on Decision, this Court agrees with Dr. Appleton's conclusions in this regard. This Court observed what Dr. Appleton warned about in real time during Applicant's testimony, as illustrated in the above exchange. Applicant forgot his previous testimony, immediately agreed with the correction, and then moved directly into an alarming statement about Satan. This Court continues to maintain that Applicant's testimony is not credible and cannot be relied upon by this Court to make any findings.

This Court's credibility determination should be given great weight by the appeals board. (See *Garza v. WCAB* (1970) 35 CCC 500, 504-505). That credibility determination should only be rejected based upon contrary evidence of considerable substance. (*Lamb v. WCAB* (1974) 39 CCC 310, 314; *Western Electric Co. v. WCAB* (*Smith*) (1979) 44 CCC 1145, 1152). Here, Petitioner points to no such evidence other than the testimony of Applicant himself.

Despite the problems with Applicant's testimony and reporting of his injury, Petitioner continues to urge the Board to rely upon the medical opinions of Applicant's personal treating physician, Dr. Christine Olney, to form the basis of an injury finding. Petitioner concludes that "[b]ased upon the treating doctor, industrial injury is the predominant cause…[and this Court] erred by ignoring and/or rejecting this evidence" (*Petition*, page 3, lines 23 to 24). That opinion by the doctor was given at a deposition, appears preliminary based upon the questions asked by Applicant's counsel, is not based upon reasonable medical probability, and cannot be relied upon by the Court. In addition, this Court cannot rely upon that medical opinion for the same reason it cannot rely upon the medical opinion of Dr. Sherry Fieman, as discussed below.

Petitioner contends that the Court can rely upon the neurology QME, Dr. Sherry Fieman, to form the basis of an injury finding. This Court disagrees, for the reasons stated by the psychology QME, Dr. Appleton:

> "I appreciated Dr. Feiman's confirmation that Mr. Madrigal suffers from Chronic Traumatic Encephalopathy (CTE), a neurodegenerative disease caused by repeated head injuries (The claimant sustained these head injuries while a boxer for seven years). However, I disagreed with the majority of the other opinions offered by Dr. Feiman, particularly with regards to her findings pertaining to causation and apportionment.
>
> "I found it remarkable that Dr. Feiman, aware that Mr. Madrigal suffers from psychotic symptoms which impair his reality testing, and abusing heavy amounts of alcohol and marijuana, would go so far as to accept his allegations of work stress at their face without concurrent objective evidence, which the doctor did not have." (*Court's Exhibit X3*, page 11)

Both Dr. Feiman and Dr. Olney fail to consider that Applicant's rendition of the facts surrounding his alleged work-related stress might not be accurate. This Court agrees with Dr. Appleton, that,

absent objective evidence corroborating Applicant's work stress, the medical opinions that rely solely on Applicant's self-reporting of that work stress cannot be relied upon by this Court.

Finally, Petitioner contends that Applicant was the victim of sexual assault and battery that rise to the level of violent acts (*Petition*, pages 4 to 5), thus necessitating use of the lower causation standard of substantial cause contained in Labor Code §3208.3(b)(2). This Court did not address the substantial cause standard in the Opinion on Decision for the same reasons illustrated above. The only basis for those sexual assault allegations is Applicant's own uncorroborated testimony. That testimony is not credible and cannot be relied upon to make any Findings of fact. As stated above, the undersigned WCJ could not tell if the events Applicant described were accurately described, simply exaggerated, or made up entirely. There is no substantial evidence, therefore, to support any Finding that Applicant was the victim of a violent act as required by Labor Code §3208.3(b)(2).

This Court continues to believe that Applicant's testimony was not credible and cannot be relied upon by this Court.

A. <u>This Court can rely upon the reporting of Dr. Appleton:</u>

Petitioner takes issue with several of the facts as related by Dr. Appleton and most of the conclusions drawn by Dr. Appleton, and then concludes that Dr. Appleton's reporting is not substantial evidence (*Petition*, page 5 to 9). Petitioner also takes issue with parts of this Court's Opinion on Decision.

Notably, Petitioner states the Court's "Opinion does not explain how encephalopathy plays a role in a stress-based injury or that this condition appears to have arisen after the end date of the continuous trauma" (*Petition*, page 6, lines 13 to 15). The reason why this Court did not offer an explanation of encephalopathy, or CTE as diagnosed by the doctors, is that this Court is not a doctor and will not offer lay opinions on medical issues. Dr. Appleton explained how the diagnosis of CTE factors into Applicant's combined effects of his psychological injury. Petitioner just chooses to ignore that opinion. In addition, there is no evidence that the CTE arose "after the end date of the continuous trauma", as Petitioner contends without support. It was first diagnosed during the present proceedings by both reporting QMEs in this case, but there is no evidence that the condition itself "arose" after this alleged injury.

Petitioner makes several other allegations about Dr. Appleton's reporting, but fails to cite to the record to support those opinions given by the doctor (*Petition*, page 5 to 9). This makes it difficult to address those contentions specifically based upon the limited time this Court is given to respond to these allegations. This includes statements that "Dr. Appleton claims that the applicant was work impaired due to the claimed significant pre-existing history of depression dating back to childhood" (*Petition*, page 7, lines 9 to 10), that "Dr. Appleton's characterization of multiple head injuries is misleading" (*Petition*, page 7, line 24), that "Dr. Appleton misinterprets the alcohol and cannabis intake" (*Petition*, page 8, line 4), and that "Dr. Appleton alleges there is a Partner Relational Problems [sic]" (*Petition*, page 8, line 9). Petitioner fails to cite to any part of the record for any of those statements regarding Dr. Appleton's reporting, in violation of CCR §10945(b).

In addition, Petitioner points to several parts of Dr. Onley's deposition testimony to rebut "Dr. Appleton's hostile and inaccurate assumptions regarding the history and findings" from Dr. Onley (*Petition*, page 8, lines 15 to 16). Petitioner's loaded characterization of Dr. Appleton's reporting aside, the problems with Dr. Onley's medical opinions have been discussed above. Beyond that, it does appear that both Dr. Appleton and Dr. Onley have had a professional disagreement about the conclusions reached in this case.

Despite those differences, and despite Dr. Appleton's unique way of expressing those differences, the undersigned WCJ still believes that the opinions given Dr. Appleton do amount to substantial evidence on the issue of injury as alleged in this case. Dr. Appleton issued five comprehensive medical reports in this case (*Court's Exhibits X1, X2, X3, X4*, and *X5*) and had his deposition taken once (*Court's Exhibits X6*), giving the parties ample opportunity to address any concerns they had with his reporting. Dr. Appleton provided a comprehensive analysis of Applicant's condition based upon multiple, and difficult, evaluations of the Applicant and on the extensive data and medical record available for the Applicant. Those evaluations by Dr. Appleton were both remarkable and, apparently, quite difficult, as evidenced by the following notation by the doctor:

> "From the outset of the interview, and continuing throughout, Mr. Madrigal's behavior was remarkable. Now, based upon information gathered from the deposition (Mr. Madrigal disclosing that he uses Medical Marijuana hourly) some of this behavior can be potentially better understood.
>
> "For instance, after being handed the consent form, Mr. Madrigal went to sign it without reading it. I implored him to read the consent even if he intended to do the examination anyway.
>
> "Mr. Madrigal then disclosed to me that he has chronic attention and concentration problems, and this was subsequently reflected in later aspects of today's examination, such as Mr. Madrigal requiring the assistance of aids such as a photograph of his medications in order to tell me what he is taking at this time.
>
> "While I strived to establish a rapport with Mr. Madrigal, he proved to be a challenging examinee to interview.
>
> "For instance, in addition to a rambling, digressive discourse, Mr. Madrigal's behavior itself was unpredictable. The office we were using this day had a 9th floor panoramic view, and about 25 minutes into the interview, Mr. Madrigal abruptly stopped the interview in order to take a selfie with the windows behind him.
>
> "As he was doing so, Mr. Madrigal became transfixed upon a large tree which appeared to be about a mile away and asked if I could give him directions to get to that tree so he might visit it later that day. It was as if Mr. Madrigal had forgotten he was in an examination.
>
> "These actions were characteristic of Mr. Madrigal's behavior throughout." (Court's Exhibit X5, page 4)

These actions are also in line with what this Court observed of Applicant during testimony at trial, with Applicant testifying in a "rambling, digressive discourse" type of way. Dr. Appleton did an admirable job with a very difficult patient in this case. Dr. Appleton's opinions are well supported, and based upon reasonable medical probability and Applicant's unique history and the diagnoses given. This Court can, and properly did, rely upon that reporting to support the Findings made.

B. There is no basis to develop the record:

Despite urging the Court to rely upon the reporting of Dr. Onley (*Petition*, page 3) and/or Dr. Feiman (*Petition*, page 4) to make a finding of injury, Petitioner then claims that none of the reporting can be relied upon. Petitioner states, unironically, that Dr. Onley "freely admitted that she is not a worker's compensation evaluator…[and] used causation and apportionment interchangeably" (*Petition*, page 10, lines 20 to 21). Petitioner also states that Dr. Feiman "used imprecise and confusing language, such as "apportionment" of injury and plethora [sic] of related and unrelated conditions" (*Petition*, page 10, lines 18 to 19).

Petitioner then concludes that a "knowledgeable AME quality psychiatrist" (*Petition*, page 10, line 28) is needed to "address whether the instant take nothing is correct and that the actual remedy is a new case for the specific injury" (*Petition*, page 11, line 1). There is no legal basis given by Petitioner to allow another doctor the opportunity to "address whether the instant take nothing is correct." That is not the role of any evaluating physician. Petitioner's request for such is baseless.

In addition, there is no allegation of a "new case for the specific injury". Petitioner is grasping at straws by now claiming that the case Applicant alleged to be a cumulative trauma herein might be a specific injury. Applicant had ample opportunity to explore any such possibility with the current reporting doctors but failed to do so and presently there is no specific injury currently pending before the Board. There is no basis at this point to develop the record for this purpose.

IV. RECOMMENDATION:

The undersigned WCJ recommends that the Applicant's Petition for Reconsideration dated 11/10/2022, be denied.

DATE: November 22, 2022

Peter M. Christiano
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE