

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

JOSE RIOS, *Applicant*

vs.

**BRET HUMMER;
REDWOOD FIRE & CASUALTY INSURANCE COMPANY ADMINISTERED BY
BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants***

**Adjudication Number: ADJ10080187
Oakland 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.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 23, 2022

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

**JOSE RIOS
WELTIN STREB & WELTIN
LAUGHLIN, FALBO, LEVY & MORESI**

SAR/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 DEFENDANT’S PETITION FOR RECONSIDERATION**

INTRODUCTION

By a timely and verified Petition for Reconsideration (Petition) dated and e-filed on June 24, 2022, defense counsel Nathan Yannone seeks reconsideration of the Findings & Award with Opinion on Decision (F&A) dated and served on June 1, 2022, which in addition to the accepted body parts, found injury AOE/COE to Applicant’s heart and lungs, in the form of obstructive sleep apnea, obesity hyperventilation syndrome, and right sided heart failure, and awarded further medical treatment for those body parts.

Defendant’s Petition alleges generally that: 1. the Findings and Award are without or in excess of the judge’s powers; 2. that the evidence does not justify the Findings of Fact; and 3. the Findings of Fact do not support the Award. (Petition at p. 1.) In substance, defendant asserts and argues that the final opinion of the pulmonology QME, Frank Ganzhorn, M.D., which admittedly changed over time, as to injury AOE/COE for the disputed body parts of heart and lungs, was not substantial evidence because the Applicant was already overweight at the time of the specific injury, and that opinion cannot be the basis for a finding of injury AOE/COE to those body parts because it was not sufficiently explained. Applicant’s attorney has not to date filed an Answer to the Petition.

BACKGROUND

A summary of the relevant facts follows, which is an abridged version of the facts outlined in the Opinion on Decision (Opinion) at pages 4-9. Applicant sustained an accepted specific injury to his low back, left hip, right ribs, and right clavicle on July 3, 2015, while employed as a roofer by Bret Hummer DBA Modern Method Roofing, when he fell while carrying a heavy roll of roofing material, which ended up on top of his chest, crushing his torso. (*Id.* at p. 4, Minutes of Hearing and Summary of Evidence (MOH/SOE) dated 2/24/22 at pp. 5-6.) The current primary QME is pain specialist, Lawrence Weil, M.D., who evaluated the accepted orthopedic injuries and whose reporting, at this point and so far as I can tell, is not disputed. (*Id.* at p. 3.) Applicant later alleged heart and lung/pulmonary injuries either as a direct specific injury and/or as a compensable consequence. The Applicant was ultimately evaluated for that claim by QME, Dr. Frank Ganzhorn, after defendant agreed with Applicant’s request for an additional panel in pulmonology at an

expedited hearing on September 6, 2019. Dr. Ganzhorn examined the Applicant once, issued six total reports (Joint 101), and was deposed once on March 26, 2021, in a deposition noticed by the Applicant (Joint 102.)

The original QME, pain specialist Leslie Schofferman, M.D., in his initial report dated November 22, 2016, found the Applicant was not yet P&S for the orthopedic injuries. He also incidentally referenced shortness of breath complaints. (Joint 105, Report of 11/22/16 at p. 16.) In a re-exam on June 27, 2017, Dr. Schofferman found Applicant to be P&S for the orthopedic injuries, provided impairment ratings, diagnosed a pulmonary contusion, and suggested (“it would not be unreasonable”) a pulmonary consultation with respect to the Applicant’s complaints of nocturnal cough and shortness of breath. (MOH/SOE at p. 5, Joint 105, Report of 6/27/17 at pp. 16-17.) Those conditions were subsequently evaluated by a consulting pulmonologist, Narendra Malani, M.D., in November 2018, who among other things, diagnosed dyspnea, unspecified type, daytime hypersomnolence, with strongly suspected obstructive sleep apnea (OSA), GERD, and obesity, with a reported weight gain of 30 pounds in the past year. (*Id.* at p. 5, Joint 103, Report/Office Visit Note of 11/7/18 at p. 1.) At the time of that first report, Dr. Malani recorded the Applicant’s weight as 245 pounds, and by the time of a second visit with Dr. Malani on October 28, 2019, the Applicant’s weight had increased to 260 pounds. (*Id.* at p. 6, Joint 103, Report of 12/18/19 at p. 3.) By the time the QME Dr. Ganzhorn examined Applicant on August 20, 2020, the Applicant weighed 262 pounds. (*Id.* at p. 6, Joint 101, Report of 8/20/20 at p. 7.)

The Applicant testified through a Spanish interpreter at trial on February 23, 2022. (MOH/SOE at pp. 5-11.) With respect to the key issues of injury to his heart and lungs, he had breathing problems immediately after the injury, and upon release from the hospital was given a device and instructed to perform breathing exercises with it by exhaling to keep a ball in the air inside the device. (MOH/SOE at p. 6.) Over time, his breathing problems did not abate and actually got worse, and he sometimes wakes up with a choking sensation. (*Id.* at p. 6, 7.) Once post-injury, he had to go to the ER because of breathing issues, and he believes they have increased and gotten worse as his weight has increased over time. (*Id.* at p. 7.) He denied any problems with snoring or shortness of breath before his injury. (*Id.* at p. 10.)

DISCUSSION

The basic allegation in [defendant's] Petition is that Dr. Ganzhorn's opinion on injury AOE/COE with respect to the heart and lungs is not substantial evidence because he did not sufficiently explain or provide a basis for his mechanism of injury theory, which is the Applicant gained a significant amount of weight post-injury as a compensable consequence of his accepted orthopedic injuries, which reduced and limited his physical activity level, and in turn contributed to the development of obesity, OSA, hyperventilation syndrome, and right sided heart failure obesity. (See Petition at p. 3.) It is true that Dr. Ganzhorn did not come around to this opinion until his deposition on March 26, 2021, (Joint 102 at pp. 21-22, when the light seemed to come as to that concept with questioning by Applicant's attorney Ryan Smith. Specifically, that because of the Applicant's decreased physical activity due to the accepted and physically limiting orthopedic injuries, those injuries contributed, at least in part, to his significant weight gain after the injury thereby resulting in compensable consequence injuries to his pulmonary system and heart. It is undisputed that in Dr. Ganzhorn's first three reports dated August 20, 2020, October 25, 2020, and March 17, 2021, he explicitly found that these respiratory/pulmonary/heart issues were not industrial, i.e., the result of injury AOE/COE as a compensable consequence, because the Applicant was already overweight at the time of his injury. (Joint 101, e.g., Report of 8/20/20 at p 8.) However, and as Dr. Ganzhorn testified at his deposition, and consistent with the Applicant's trial testimony, he did not have any breathing and/or pulmonary issues prior to his injury. (Joint 102 at p. 14, MOH/SOE at pp. 10.) Defendant's petition cites no evidence, medical or otherwise, to the contrary.

The alleged error is my finding that the Dr. Ganzhorn's opinion on this subject, which changed during his deposition and which he stood by in later supplemental reports, is substantial medical evidence, and was a proper basis for the F&A with respect to injury AOE/COE to the heart and lungs. As I noted in the Opinion at p. 9, any finding or award by a WCJ must be supported by substantial evidence in light of the entire record. (Labor Code section 5952(d); *Escobedo v. Marshalls* (2005) (Appeals Board en banc) 70 Cal.Comp.Cases 604, 620; *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310, 314]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500, 503]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16, 22].) To be substantial evidence, expert medical opinion must be framed in terms of reasonable

medical probability, be based on an accurate history and an examination, and must set forth the reasoning used to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687, 1691]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Board en banc).) “[A] medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (Citations.)” (*Gatten*, supra, at p. 928.) I feel and believe on this record that those requirements are met.

Most significantly, when assessing industrial causation of injury and the closely related question of proximate cause, the leading California case to keep in mind is *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 80 Cal.Comp.Cases 489, 495-496, 61 Cal.4th 291, which although referenced in my Opinion at pp. 10, 11, was not formally cited. In that case, the California Supreme Court makes clear that essentially any measurable and/or discernable amount of causation or contribution to a new injury by the consequences of an accepted injury, is sufficient to render such an injury industrial as a compensable consequence. The opinion also notes there is a significant difference between the legal concepts and standards of causation and compensability in the context of California workers' compensation law as compared to tort law, and the court left no doubt as to where they stand or the applicable rule with respect to injury AOE/COE. While there might be significant other causal factors that cause or contributed to Applicant's weight gain, those go to the issue of apportionment of permanent disability related to the pulmonary and heart injuries, and not to injury AOE/COE. In *South Coast Framing*, the court also made clear that whether an industrial injury and/or its consequences proximately caused a later injury within the meaning of Labor Code section 3600, is a question of fact for the judge to determine based on all the evidence in the record. (*Id.* at p. 498.) The court's holding also reflects, at least to some extent the influence of Labor Code section 3202, which requires the liberal application and interpretation of the California Labor Code to provide workers' compensation benefits.

Applying these holdings and this caselaw to the facts of this case in my judgment results in the inescapable conclusion that the Applicant's well documented and significant weight gain after the injury, as reflected in both Dr. Malani and Dr. Ganzhorn's reporting and the deposition testimony of the latter, as well as in Applicant's trial testimony, was sufficiently causal of the breathing/pulmonary/heart symptoms and conditions to render them compensable consequence

injuries of the underlying accepted orthopedic injuries, which reduced his ability to be physically active and burn calories as he did when working as a fully health roofer. While exactly how much weight he gained post-injury and/or his specific weight the time of injury might be arguable and/or unclear, points which the Petition in my view unduly emphasizes, the bottom line is the record in this case clearly establishes by the preponderance of the evidence that the Applicant gained significant weight after the accepted orthopedic injuries, even if he was already overweight at the time he sustained the orthopedic injuries. It is undisputed that the Applicant is currently obese (265 pounds at approximately 5'8 tall, MOH/SOE at pp, 8, 10), as noted by the QME, even if he has more recently lost 10 to 15 pounds (*Id.* at p. 10), and that in the opinion of Dr. Ganzhorn, that weight is causing and contributing, in part, to his pulmonary and cardiac symptoms and conditions, which he concludes are compensable consequence industrial injuries, and that in turn require medical treatment and weight loss to ameliorate and/or to cure.

Contrary to defendant's assertion in the Petition at pp. 4-5, that Dr. Ganzhorn's "later opinions that the post-injury weight gain is due to inactivity from the orthopedic injury is not a reasonable conclusion to derive from the evidence," I believe that the medical and factual evidence in the record supports such a conclusion and the related reasoning behind it by the QME, especially as expressed and explained in his deposition testimony (Joint 102), and which he consistently reaffirmed in his latter reports of May 15, 2021, June 18, 2021, and October 10, 2021. (Joint 101.) The QME was consistent once he changed his mind on the AOE/COE issue, despite defense counsel's repeated efforts to get him to return to his original opinion on causation. It is also worth noting that although I find the defendant is liable for new compensable consequence injuries to the additional body parts as outlined above, there will likely be significant apportionment of any resulting PD, once the Applicant reaches P&S status and impairment/PD is determined. However, that is a separate question and issue and will be determined in due time by the QME, and if the parties cannot agree, by the court based on the medical/legal evidence. The only issue for determination at this trial was injury AOE/COE to the claimed and disputed additional body parts.

Having read and re-reviewed all the reports and his deposition testimony of the QME Dr. Ganzhorn, I think a fair characterization is that up until the deposition he had a misunderstanding of the applicable law and was resistant to finding injury AOE/COE for the pulmonary conditions, but that once he understood that even some weight gain due to reduced activity and physical limitations from the accepted orthopedic injuries was legally sufficient to establish injury

AOE/COE, he was and has been consistent in his opinion and conclusion that such weight gain was at least in part caused or contributed to by the effects of the orthopedic injuries. To a large extent this is common sense, and in my view he sufficiently explains his rationale and the facts he relies on for his conclusion to satisfy the requirements of South Coast Framing and Escobedo, and accordingly his opinions are substantial medical evidence, and which I rely on to find injury AOE/COE to Applicant's heart and lungs in the form of obstructive sleep apnea, obesity hyperventilation syndrome, and right sided heart failure.

Finally, the Petition does not appear to challenge or dispute my secondary finding based on the QME reporting and deposition testimony that these conditions require further medical treatment, and I direct the Board's attention to the Opinion at p. 11, where the reasoning and basis for my finding to that effect is explained based on the unrebutted medical opinion and evidence of the QME. Accordingly, I will not address that issue further.

RECOMMENDATION

In sum, for the reasons outlined and discussed above, I recommend that defendant's Petition for Reconsideration of the June 1, 2022 Findings and Award with Opinion on Decision be DENIED.

Dated: July 7, 2022

Thomas J. Russell, Jr.
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE