

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

LUIS BARRERA, *Applicant*

vs.

**SWISSPORT CARGO SERVICE; ARCH INSURANCE COMPANY, administered by
GALLAGHER BASSETT SERVICES, *Defendants***

**Adjudication Number: ADJ11414976
Marina del Rey 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/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR



/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 30, 2021

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

**LUIS BARRERA
GORDON EDELSTEIN
SAVAGE LAW**

PAG/bea

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. <u>Applicant's Occupation:</u> | Ramp Agent |
| <u>Ages at Injury:</u> | 48 |
| <u>Parts of Body Injured:</u> | Right Shoulder, Internal System-Diabetes |
| Manner in which injury occurred: | Specific Injury |
| 2. <u>Identity of Petitioner:</u> | Defendant Swissport Cargo Service Filed The Petition |
| <u>Timeliness:</u> | The Petition is Timely. |
| <u>Verified:</u> | The Petition is Verified. |
| 3. <u>The Petitioner Contends That:</u> | |
| a) | That the WCJ erred in Finding that the applicant sustained injury arising out of and in the course of employment to his internal system-diabetes. |
| b) | That the WCJ erred in Finding that the Panel QME Dr. Robert Fisher's Medical Reports constituted substantial evidence. |

**II.
SUMMARY OF FACTS**

This matter proceeded to Trial on February 6, 2020 and January 12, 2021 on the issues of parts of body injured, diabetes internal; Permanent Disability and apportionment; Need for future medical treatment; and Attorney's fees. With respect to parts of body injured, the sole issue defendants have raised in their Petition for Reconsideration is whether or not the applicant sustained injury to his internal system-diabetes as noted in this WCJ's Findings and Award. Findings of Fact and Award, dated 05/10/2021, EAMS DOC ID NO: 74177320.

Testimony was taken at the Trials wherein only the applicant testified; defendants did not provide any witnesses. Petitioner Defendant's Petition for Reconsideration addresses the validity of the Findings of Fact and Award issued by

this WCJ as stated above. Findings of Fact and Award, dated 05/10/2021, EAMS DOC ID No.: 74177320.

III. DISCUSSION

In considering the evidence provided by the parties and considering the admitted evidence, with respect to applicant's internal system-diabetes claim, the parties selected Robert Fisher, MD, as the Panel Qualified Medical Evaluator in the field of Internal Medicine. In Dr. Fisher's Medical Report dated 03/06/2019, Dr. Fisher opined that when the applicant was restricted to light duty after his industrial injury to his right shoulder, his physical activity was markedly reduced, and it is with reasonable medical probability that his blood sugar level became elevated because of the lack of exercise. Joint Exhibit X, Medical Report of PQME Robert Fisher, MD QME dated 03/06/2019, page 58, par. 2, EAMS DOC ID NO.: 72194444. Defendants presented no evidence to the contrary.

PQME Dr. Fisher also surmised that it is within reasonable medical probability that the applicant's diabetes was prompted or lit up by his work-related injury secondary to the stress, both psychological and physiological (pain), and also due to lack of physical activity since he was placed on restrictive duty. Again, defendants presented no evidence to the contrary. Joint Exhibit X, Medical Report of PQME Robert Fisher, MD, QME, dated 03/06/2019, page 59, par. 4, EAMS DOC. ID NO.: 72194444.

Based on the totality of the medical evidence presented to this Court, and the applicant's testimony which was uncontroverted, it was found that the applicant sustained injury to his internal system-diabetes arising out of and in the course of employment.

Thus, Dr. Fisher stated that it was his medical opinion that the applicant's diabetes has an industrial component. Joint Exhibit X, Medical Report of PQME Robert Fisher, MD, QME, dated 03/06/2019, page 60, par. 1, EAMS DOC. ID NO.: 72194444.

Regarding the Permanent Disability of the applicant on an internal medical basis, PQME Dr. Fisher indicated that he utilized Table 10-8 of the AMA Guides

the criteria for rating impairment due to diabetes mellitus, with a 6% - 10% of the whole person because the applicant has a Type II Diabetes and satisfactory control of a restrictive diet and a hyperglycemic medication. He opined that the applicant has a 10% Whole Person Impairment (WPI). Joint Exhibit X, Medical Report of PQME Robert Fisher, MD QME, dated 03/06/2019, page 60, par. 1, EAMS DOC. ID NO.: 72194444.

Dr. Fisher did apply apportionment to his Disability Rating, due to the fact the applicant's family had a history of diabetes, inter alia, wherein he apportioned 50% to non-industrial factors. Joint Exhibit X, PQME Medical Report of Robert Fisher, MD, QME dated 03/06/2019, page 60, par. 1, EAMS DOC ID NO.: 72194444; Joint Exhibit Z, Deposition Transcript of PQME Robert Fisher, MD, QME, dated 06/11/2019, page 9, lines 13-18, EAMS DOC. ID NO.: 72194518.

IV.

ISSUE RAISED

DEFENDANTS' CLAIM THAT PQME DR ROBERT FISHER'S MEDICAL REPORTS AND OPINIONS DO NOT CONSTITUTE SUBSTANTIAL EVIDENCE IS SPECIOUS AND IS CONJECTURE, SINCE DEFENDANTS HAVE NOT PRESENTED ANY MEDICAL EVIDENCE TO THE CONTRARY.

As previously stated in the Discussion above, PQME Robert Fisher, MD QME concluded with reasonable medical probability that the applicant sustained injury to his internal system-diabetes as a result of his industrial injury.

It should be noted that defendants did not provide any evidence or witness to rebut applicant's internal system-diabetes claim.

Dr. Fisher's Medical Findings, based on reasonable medical probabilities which constituted substantial evidence, was based on examining the entire record, by taking a detailed history of the applicant, evaluating the applicant, reviewing **all available medical records and diagnostic testing**, and formulated his medical opinion pursuant to his specialty as a Diplomate, American Board of Internal Medicine Qualified Medical Examiner. His opinions were a probative force on the medical issues, not speculative and are fully in accordance with Escobedo v Marshalls (2005) 70 CCC 604 (Appeals Board En Banc) and Braewood

Convalescent Hospital v. Workers Compensation Appeals Board (1983) 34 Cal. 3d 159, 164 which defendants rely. Dr. Fisher's Medical Opinions were more than a mere scintilla, and relevant evidence was utilized by Dr. Fisher to reach his conclusions. As a result, his medical opinions were reasonable in nature, credible and of solid value.

Defendants' argument that the applicant may have had pre-existing diabetes before his industrial injury is surmise, conjecture and speculation, since defendants did not present any evidence whatsoever to this claim. The same is true regarding defendants' claims that Dr. Fisher relied on a unreliable family history. In fact, based on this family history, inter alia, 50% apportionment of the applicant's Permanent Disability to his internal system – diabetes was rendered to non-industrial factors.

Moreover, defendants' argument that PQME Dr. Fisher's 10% WPI Permanent Disability Rating was not substantial evidence is also specious and relies on conjecture. Defendants claiming that Dr. Fisher mistakenly relied on the A1C testing presented to him when no other medical testing was provided to him was incorrect, and flies in the face of logic. What did the defendants want him to rely on, hypotheticals not based on medical facts? More pertinent, defendants did not acquire more recent testing on this subject, therefore, why didn't they if they believed the current information was not accurate? When the Declaration of Readiness to Proceed was filed by applicant on 07/30/2019, defendants did not object, which indicates that they were ready to proceed to a Mandatory Settlement Conference where discovery would be closed. For defendants to argue that applicant's A1C count could be better, the opposite could also be true that his A1C count could be worse. Again, any of these conclusions are surmise, conjecture and speculation. Dr. Fisher appropriately relied on the evidentiary record consisting of medical facts, evaluation and review of the medical records in rendering his medical opinion. For defendants to argue otherwise lacks credibility and is without merit. As a result, PQME Robert Fisher's Medical Opinions and Conclusions Finding that the applicant's internal system – diabetes condition was industrially related was correct and proper, and constituted substantial evidence.

V.
RECOMMENDATION

For the foregoing reasons, it is recommended that Petitioners' SWISSPORT CARGO SERVICE AND GALLAGHER BASSETT SERVICES INC'S Petition for Reconsideration be denied.

DATED: 06/14/2021

Respectfully submitted,

Tommy A. Ruedaflores
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE