

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

MARC GONZALEZ, *Applicant*

vs.

**COSTCO WHOLESALE, permissibly self-insured, administered by HELMSMAN
MANAGEMENT SERVICES, LLC, *Defendants***

**Adjudication Number: ADJ12915738
Anaheim District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on February 8, 2021, wherein the WCJ found in pertinent part that applicant sustained an injury arising out of and in the course of employment (AOE/COE), to his back and right wrist while employed by defendant, during the period from 2009 through March 2, 2018.

Defendant contends that the reports from applicant's treating physicians Martin Offenberger, M.D., and Murray Andrew Greenwood, M.D., are not substantial evidence, that the reports from orthopedic qualified medical examiner (QME) Hrair E. Darakjian, M.D., Michael J. Gillman, M.D., and Wesley M. Nottage, M.D., are substantial evidence that applicant did not sustain injury AOE/COE, and that the provisions of Labor Code section 3202 are not an appropriate basis for concluding that applicant sustained injury AOE/COE.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from applicant.

We have considered the allegations in the Petition for Reconsideration (Petition) and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant claimed injury to his back and right wrist while employed by defendant as a warehouse stocker, during the period from 2009 through March 2, 2018.

Applicant received a course of treatment from Dr. Offenberger starting on December 13, 2019, and continuing through to the date of the trial. (see App. Exhs. 1 – 17; Minutes of Hearing and Summary of Evidence (MOH/SOE), January 26, 2021, p. 5.) In his Primary Treating Physician's Initial Report (App. Exh.1, Dr. Offenberger, December 13, 2019), Dr. Offenberger stated:

There are no reported industrial injuries to the right hand or wrist. However, in working up the left wrist, neurodiagnostic studies were obtained which showed the presence of carpal tunnel syndrome in the right wrist as well, and he does indeed have symptoms in the right wrist and hand. (p. 3.) ... Current Complaints included: Right wrist pain, which is less intense than the left, radiates distally into the hand. There is numbness and tingling of all the fingers of the right hand with certain activities, especially if prolonged or repetitive. ¶ Intermittent mid and lower back pain which occurs in the late afternoon and evening. The pain radiates into the right buttock and proximal posterior thigh. It is made worse by prolonged bending, stooping, prolonged sitting or standing over one hour, and lifting over 50-60 pounds. It is relieved by heat. (pp. 3 – 4) ... The patient's back condition has heretofore received only brief acute symptomatic treatment on each occasion. It was apparently placed on the backburner while his other injuries were being addressed. I recommend he receive physical therapy to the lumbar spine twice a week for three weeks and hereby request authorization. (App. Exh.1, p. 9.)

The doctor's diagnoses included lumbar strain and possible right carpal tunnel syndrome. (App. Exh.1, p. 9)

On February 21, 2020 applicant was evaluated by QME Dr. Darakjian. (Def. Exh. A, Dr. Darakjian, February 21, 2020.) In his report, Dr. Darakjian initially noted that:

The patient indicated today that the only body part that he is presenting for evaluation is the left wrist. The patient stated that he will only agree to have the left wrist evaluation as he has been instructed by his attorney. He did not wish to discuss any other parts beside the left wrist on today's evaluation on 02/21/20 in Costa Mesa, California. ¶ Furthermore, the records that have been provided to me are only regarding the left wrist. The letter from Helmsman only mentions the left wrist. ¶ Therefore, this evaluation will be limited to the left wrist only. (Def. Exh. A, p. 2.)

The doctor examined applicant, took a history, and reviewed the medical record. He diagnosed post surgery left wrist derangement and endoscopic carpal tunnel release, and recommended that applicant undergo an MRI of his left wrist. (Def. Exh. A, pp. 9 - 10.) After reviewing the MRI, Dr. Darakjian submitted a supplemental report wherein he stated that applicant's left wrist had reached permanent and stationary status and that the injury caused 7% whole person impairment (WPI). (Def. Exh. B, Dr. Darakjian, April 13, 2020.)

On June 26, 2020, applicant was re-evaluated by Dr. Darakjian. The doctor received correspondence indicating that the parties had agreed to have him examine applicant regarding the May 19, 2014 right knee injury claim; the April 23, 2016 left foot injury claim; the March 2, 2018 left wrist injury claim; and the March 2, 2009 through March 2, 2018 back, wrists, hands, knees, feet, and internal/cardiovascular system cumulative injury claim. (Def. Exh. C, Dr. Darakjian, June 26, 2020, pp. 1 – 2.) Dr. Darakjian stated that:

Regarding any other body parts, [other than his left foot and right knee] the patient really has no complaints at this time. Specifically, the patient is asked about the right wrist and hand and he has no complaints. As far as the left knee, he reports occasional aching, but otherwise no complaints. With regards to the lower back, the patient reports occasional pain, which has not been influenced by his industrial exposure. The patient does add that he is aware of the fact that there is continuous trauma claim, however, he states that this was something that 'the attorney came out with.'
(Def. Exh. C, p. 3.)

The doctor then stated that:

With regard to the left wrist, the patient has received treatment at Kaiser facility. He has not been seen by those physician for some time now.
(Def. Exh. C, p. 3.)

Dr. Darakjian concluded that:

The patient currently has no evidence to support an injury to the right wrist or hand and no injury to the back that I can summarize and no injury to the left knee on an industrial basis.
(Def. Exh. C, p. 10.)

In Dr. Offenberger's August 17, 2020 treatment report (PR-2), he indicated that he had reviewed the three reports from QME Dr. Darakjian. (App. Exh. 12, Dr. Offenberger, August 17, 2020, p. 7; see also App. Exh.17, Dr. Offenberger, October 26, 2020, p. 7.) Dr. Offenberger later stated:

I would like to make some comments on the PQME performed by Hrair Darakjian, M.D., as they pertain to the patient's continuous trauma claim of 03/02/2009 to 03/02/2018, the only one that I have any responsibility for. ... ¶ First of all, I would like to note that I have been attending the patient as his primary treating physician since 12/13/2019 for this claim and yet none of my reports were reviewed or taken into consideration in the preparation of this PQME report. ¶ Dr. Darakjian examined the patient on 06/26/20 ... When I saw the patient on 6/24/2020, two days before he was seen by Dr. Darakjian, he reported to me, ... 2. Intensified right wrist pain, which radiates distally into the hand. There is numbness and tingling of all the fingers of the right hand with certain activities, especially if prolonged or repetitive. ... 3. Intensified frequent mid and lower back pain which occurs in the evening. ¶ I personally took that history. ¶ That is certainly quite different from the history, Dr. Darakjian obtained two days later. [H]e states, ... 2. Specifically, the patient was asked about the right wrist and hand, and he has no complaints. 3. With regard to the lower back, the patient reports that occasional pain which has not been influenced by his industrial exposure. He adds that the patient told him that the continuous trauma claim is something "the attorney came up with." He reports no radiating pain in the lower extremities. ¶ ... In the discussion section of his report, Dr. Darakjian states "clearly his primary treating physician does not find any complaints in his right wrist, right hand, lower back, or the left knee to support this type of claim to these body parts." Aside from the fact that I am his primary treating physician, it appears that the other doctors that he quotes were not evaluating the patient for these particular body parts, but rather were concentrating on his accepted specific injuries. (App. Exh. 12, pp. 10 – 11.)

The parties proceeded to trial on January 26, 2021. Applicant testified regarding his job duties and the various injuries he had while employed by defendant. (Minutes of Hearing and Summary of Evidence (MOH/SOE), pp. 4 – 7.) The issue submitted for decision was injury AOE/COE. (MOH/SOE, p. 2.)

DISCUSSION

Any award, order, or decision of the Appeals Board must be supported by substantial evidence in light of the entire record. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].)

The trial record in this matter consists of the exhibits submitted by the parties and the WCJ's summary of applicant's testimony. (MOH/SOE.)

In her Report, the WCJ stated:

The Findings and Award and Opinion on Decision were based upon a review of the entire record which included that applicant's credible and unrebutted testimony along with the medical reporting. ... The Applicant's unrebutted testimony was that he was not aware of what a continuous trauma was until he saw his attorney. ... The Applicant also credibly testified that while he did have prior specific injuries including injury to his back, that he never fully recovered from his injuries and that his ongoing work duties aggravated his back and right wrist. His testimony regarding his ongoing heavy work duties and repetitive hand use was credible and not rebutted.
(Report, pp. 2 – 3.)

It is well established that a WCJ's opinions regarding witness credibility are entitled to great weight. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500, 505]; *Sheffield Medical Group v. Workers' Comp. Appeals Bd. (Perez)* (1999) 70 Cal.App.4th 868 [64 Cal.Comp.Cases 358]; *Nash v. Workers' Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1793 [59 Cal.Comp.Cases 324]; *Greenberg v. Workmen's Comp. Appeals Bd.* (1974) 37 Cal.App.3d 792 [39 Cal.Comp.Cases 242].) Based upon our review of the entire record, we see no reason to question the WCJ's opinions as to applicant's credibility.

Defendant argues that Dr. Offenberger's opinions are not substantial evidence because he "is the only doctor out of the five doctor's opinions submitted that found industrial injury to the back and right wrist." (Petition, p. 6.) It is also well established that the relevant and considered opinions of one physician, though inconsistent with other medical opinions, may constitute substantial evidence and that the Appeals Board may rely on the medical opinion of a single physician unless it is "based on surmise, speculation, conjecture, or guess." (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal. Comp. Cases 525, 529]; *Chu v. Workers' Comp. Appeals Bd.* (1996) 49 Cal.App.4th 1176 [61 Cal.Comp.Cases 926].) Clearly, defendant's argument as to Dr. Offenberger's opinions is inconsistent with the applicable case law, as cited above. Also, Dr. Gillman treated applicant for his May 19, 2014 injury, and Dr. Nottage treated applicant for his April 23, 2016 injury. Neither doctor evaluated or treated applicant for the cumulative injury with the March 2, 2018 end date. Their reports do not address the cumulative injury claim and are not pertinent to the issues herein.

To constitute substantial evidence, a medical opinion must set forth the reasoning behind the physician's opinion, not merely his or her conclusions; a mere legal conclusion does not furnish a basis for a finding. (*Granado v. Workmen's Comp. Appeals Bd.* (1970) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33

Cal.Comp.Cases 660]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (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, or guess; and the medical opinion must set forth the reasoning behind the physician's opinion, not merely his or her conclusions, a mere legal conclusion does not furnish a basis for a finding. (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workmen's Comp. Appeals Bd.*, *supra*; *Escobedo v. Marshalls*, *supra*.) Our review of the reports from Dr. Offenberger (see App. Exhs. 1 – 17) indicate that he examined applicant on several occasions, reviewed the medical record/diagnostics, and took a history including a job description. Dr. Offenberger's discussion of applicant's symptoms and the physical demands of his work are consistent with applicant's unrebutted trial testimony. The doctor explained the bases for his conclusions and his opinions do not appear to be based on surmise, speculation, or guess. Thus, his reports constitute substantial evidence, and again, based upon our review of the entire record, we see no reason to disturb the WCJ's conclusions as stated in the F&A.

Further, since Dr. Offenberger's reports and applicant's testimony constitute substantial evidence that applicant sustained injury AOE/COE, and they are the basis for the F&A, we do not need to address the issue of Labor Code section 3202.

Finally, defendant's argument that Dr. Offenberger, as the treating physician, has an "inherent bias" is not based on any evidence, is insulting to treating physicians, and is unprofessional. "It is disappointing that Defendants argue that the doctor may be biased... In any event that argument is without merit and speculative." (Report p. 4.) Defendant's argument will not be further addressed except to note that such conduct could be found sanctionable. (Lab. Code, § 5813.)¹

Accordingly, we deny reconsideration.

¹ Defendant also argues that, "EMG's are notorious for being unreliable and not accurate." (Petition, p. 11.) Defendant provides no medical or other support for its medical opinion and a party's argument is not, in and of itself, evidence.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued by the WCJ on February 8, 2021, 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

April 26, 2021

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

**MARC GONZALES
LAW OFFICES OF THOMAS F. MARTIN
GILSON DAUB**

TLH/pc

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *o.o*