

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

AGUSTINA PEREZ TREJO, *Applicant*

vs.

BENIHANA RESTAURANTS, ET AL., *Defendants*

**Adjudication Numbers: ADJ13431716; ADJ11237713
San Jose District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and Opinion on Decision 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 and Opinion on Decision, which are both adopted and incorporated herein, we will deny reconsideration.

We have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id.*)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 13, 2022

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

**AGUSTINA PEREZ TREJO
LAW OFFICES OF ROBER T. BLEDSOE
FLOYD SKEREN MANUKIAN LANGEVIN**

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

1. Applicant, Agustina Perez Trejo, born [], while employed on 1/23/2018 (ADJ11237713) and during the period ending 3/28/2018 (ADJ13431716) as a prep cook (group 322) at Cupertino, California, by Benihana Restaurants, insured for worker's compensation liability by Zurich North America Insurance Co., adjusted by Broadspire, sustained a specific injury (ADJ11237713) and cumulative injury (ADJ13431716) arising out of and in the course of this employment to her neck, shoulders, upper extremities, and back.

2. A Petition for Reconsideration has been filed by the Defendant. The Petition was timely filed, and verified in accordance with law. Applicant has not yet filed an Answer.

3. Defendant seeks Reconsideration from a Findings and Award that issued 2/16/2022, which found injury AOE/COE in both cases.

4. Defendant seeks Reconsideration based upon the following contentions; (1) the Applicant's testimony regarding her specific injury appears to be inconsistent on one point with the reports of the PTP, Dr. Dugal, and (2) the history of the Applicant's work duties taken by the QME, Dr. Betoushana, was not supported by testimony at trial.

II

SUMMARY of FACT

The Applicant, Agustina Perez-Trejo, worked as a prep cook for Benihana Restaurant from 2/20/2017 until 3/28/2018. During that time, she suffered two injuries to her neck, shoulders, and upper extremities. The first injury was a specific injury, which occurred on 1/23/2018, and the second was a period of cumulative trauma ending 3/28/2018. Both injuries were denied AOE/COE, and the cases came to trial, jointly, before the undersigned on 1/27/2022. Injury was the sole issue in both cases. Applicant testified credibly at trial on her own behalf, and no other witness testified for either party.

The Applicant stated during her testimony that she began experiencing pain in her left shoulder and arm shortly after carrying a heavy bag of rice at work. She reported the injury promptly and was referred for medical care, although she delayed actually seeing a doctor for about a month. Applicant saw Dr. Dugal whose reports (Exhibits D, D, and E) are generally consistent with Applicant's version of events, except that Dr. Dugal records the symptoms as right-sided, whereas the Applicant insisted that they were left sided at the time she saw Dr. Dugal. Applicant testified that she was unable to account for this discrepancy, and did not know why Dr. Dugal did not record her claimed neck and low back complaints.

On cross-examination, no questions were posed regarding the nature of Applicant's job duties as a prep cook for Benihana. Dr. Dugal's reports were the only evidence offered to rebut the history given by Applicant to the QME, Dr. Betoushana.

Following testimony, the parties requested and were granted time to submit post-trial briefs. The matter was submitted for decision on 2/6/2022, and a decision finding injury AOE/COE on both cases issued 2/16/2022. From this Findings and Order, Reconsideration has been sought.

III

DISCUSSION

With respect to the disputed 1/23/2018 specific injury, Defendant's sole contention is that Applicant's testimony regarding her injury may be wholly disregarded because, while she states that she injured her *left* shoulder, Dr. Dugal records *right* sided shoulder complaints. Based upon this discrepancy, Defendant argues that all of Applicant's testimony may be disregarded and given no weight. Any suggestion that the error lay, not with Applicant, but Dr. Dugal, should be dismissed as 'speculative'. I disagree.

I found Applicant's testimony credible and straightforward. Dr. Dugal's report, while perfectly adequate for what they are, are not primarily medical-legal in nature. In my experience, it is far from uncommon for reports from first encounters with treating physicians of this kind to contain errors of detail, nor is it unusual for those errors to be repeated in subsequent reports. Physicians in Dr. Dugal's role are often pressed for time, and perfection is not to be expected. Other than the right/left discrepancy, the history recited by Dr. Dugal is entirely consistent with the history testified to by Applicant. Given the choice between believing in the mendacity of the Applicant or a simple error by the examining physician, I find the error much simpler and more believable, if only by application of Occam's Razor. In any event, the injury is claimed to be bilateral, further diminishing the significance of the error.

Defendant's sole contention in support of denial of the CT injury is the claim that Applicant's failure to testify as to her precise job duties invalidates Dr. Betoushana's conclusions as a matter of law. Legal research on my part has failed to locate any statutory or decisional authority for this statement, and Defendant cites none in its Petition. Dr. Betoushana's report contains, as required, a sworn statement that he obtained a history of, among other things, Applicant's work duties, from the Applicant and the provided medical records. Had Defendant wished to contest that description of Applicant's job, they were free to cross examine the Applicant at trial on this point, or obtain and submit a job analysis, or present Employer testimony, or to provide other evidence that Dr. Betoushana's report contained an incorrect history. Defendant did not do so, and in fact the first reference to this as an argument that I am aware of came to my attention upon reading this Petition.

IV
RECOMMENDATION

DENY Reconsideration.

David L. Lauerma,
Workers' Compensation Judge

Filed and served by Mail on 3/29/22

OPINION ON DECISION

The 1/23/2018 specific injury was found compensable based upon the un rebutted testimony of the Applicant, which was supported by the reports and deposition of D. Betoushana (Exhibits 1, 2, and B) as well as the reports of Dr. Dugal (Exhibits S, D, and E). While Dr. Dugal describes problems in the right shoulder and not the left as testified to by the Applicant, I accept Dr. Betoushana's explanation (given at Exhibit B) of this as no more than a transcription error. This conclusion is buttressed by Defendant's Exhibit G, which shows treatment for a specific left shoulder injury took place approximately 2 weeks after the injury in question took place. The cursory and conclusory nature of Dr. Dugal's reports, and the general paucity of explanatory detail and logic they contain, lead me to conclude, with Dr. Betoushana, that the reports were composed in haste. In fairness to Dr. Dugal, he does not appear to have been given the opportunity to review any records, or to comment on what now appears to have been simple error. This accounts for the error, which was then transposed into the subsequent reports.

As to the claim of cumulative injury, I relied only upon the reports of Dr. Betoushana. I read, but did not rely upon, the reports of Dr. Hatami. These reports were admitted because they were reviewed and incorporated by Dr. Betoushana. I thought it imprudent to rely upon them because they were not subject to cross examination. No other physician comments upon this part of the claim.

I did not make any Award of benefits because such issues were not raised.

DAVID L. LAUERMAN,
Workers' Compensation Judge