

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

GARY BRYANT, *Applicant*

vs.

**THE KROGER COMPANY;
dba RALPHS GROCERY, permissibly self-insured
administered by SEDGWICK CMS, *Defendants***

**Adjudication Number: ADJ10525199
Riverside 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.

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.*)

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].)

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/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 11, 2022

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

**GARY BRYANT
HINDEN & BRESLAVSKY
BRADFORD & BARTHEL
EMPLOYMENT DEVELOPMENT DEPARTMENT**

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

Defendant, by and through their attorneys of record, has filed a timely and verified Petition for Reconsideration challenging the Findings and Award dated 1/18/2022.

Petitioner seeks reconsideration on the following grounds:

1. The evidence does not justify the findings of fact;
2. The findings of fact do not support the Order, Decision, or Award, and;
3. By such Order, Decision or Award, the Workers' Compensation Administrative Law Judge acted without or in excess of his powers.

II

CONTENTIONS

The defendant's basic contention is that the award of permanent disability is defective, in that the report of the secondary treating physician Dr. Chan's assessment of the right knee does not represent substantial medical evidence (or is not as persuasive) when compared to the opinion of the panel qualified medical evaluator (PQME) Dr. Golden. More specifically, that the report of Dr. Chan dated 4/24/2018 (Joint Exhibit "2") does not represent substantial medical evidence, nor should it be persuasive when compared to the report of Dr. Golden dated 7/19/2019 (Defendant's Exhibit "C"), and that the WCJ has "cherry picked" in selecting factors of permanent impairment and disability between the reports.

As of this date, a response has not been received on behalf of the applicant.

III

FACTS

Gary Bryant, age 44 at the time of injury, while employed during the period 4/19/2012 through 5/26/2016, in an occupation and occupational group number in dispute, at Riverside, California, sustained injury arising out of and in the course of employment to his back, and claims to have sustained injury to his psyche, stress, headache, neck, right knee, hernia and pain.

At the time of injury the employer was permissibly self-insured as administered by Sedgwick Claims Management Services.

At the time of injury, the employee's earnings and temporary disability rate were in dispute, with the parties stipulating to the statutory maximum for permanent disability of \$290.00 per week, although as set forth below this was the subject of a stipulation by the parties.

Both temporary and permanent disability have been paid according to proof.

The employer has furnished some medical treatment.

No attorney fees have been paid and no attorney fee arrangements have been made.

In connection with this case, the applicant was evaluated by treating physicians Dr. Pablo Pazmino (Applicant's Exhibit "1"), Dr. Samuel Chang (Applicant's Exhibits "2" through "7"), and Dr. Sookyung Chang, PhD. (Applicant's Exhibit "8"). Further, the applicant was evaluated by the panel qualified medical evaluator (PQME) Dr. David Golden (orthopedic surgery) (Defendant's Exhibits "B" through "D", and deposition of 4/20/2020 Defendant's Exhibit "H"), and Dr. Dmitriy Sivtsov (Defendant's Exhibits "I" and "J", and deposition of 11/16/2020 Defendant's Exhibit "K"). Additional medical reporting was taken into evidence as set forth below.

This matter proceed to Trial on 5/17/2021 by Life Size Cloud (by stipulation of the parties), with the applicant the only witness being called. The matter was otherwise continued to allow the court's review of the record with the parties prior to submission for decision.

The applicant testified in a truthful and credible manner. Noteworthy in his testimony:

1. While originally an order selector (which included loading and at times some unloading), his duties changed to that of porter in February 2014 (this was referenced in his earlier deposition testimony and also confirmed with the subpoenaed personnel file.
2. He initially started treatment with psychologist Dr. Nerenberg for stress and anxiety approximately one year prior to filing his workers' compensation claim, and later Dr. Chang, as well as the PQME Dr. Sivtsov.
3. His primary complaints were in his back (with radiation down the right leg), neck and right knee. Although being advised by Dr. Chan that there was some evidence of a hernia, this was never evaluated.

The parties appeared for Trial on 7/21/2021. At that time, the Minutes of Hearing and Summary of Evidence were reviewed, and it was confirmed that no revisions were necessary. The parties further stipulated to average weekly wages of \$1,345.00, and as such that was no longer in issue. The applicant's attorney was given until 8/4/2021 for purposes of a post-Trial Brief and Points and Authorities as to all issues presented, and the defendant given until 8/18/2021 for response.

Defendant's Trial Brief was received on 8/18/2021 (EAMS Doc ID 3788631), and contends the following:

1. Based on the report of PQME Dr. Sivtsov, the applicant was MMI from a psychiatric standpoint on 11/17/2016, and thus from a psychiatric standpoint there is no basis to award temporary disability or reimbursement to EDD in light of the prior award of EDD reimbursement ending 11/7/2016.
2. Based on the various reports of PQME Dr. Golden, there is not basis to award TD.
3. The reporting of the secondary treating physician Dr. Chan does not establish any periods of TD.
4. The reporting of PQME Dr. Sivtsov supports a finding of no injury to the psyche.
5. The applicant's award should be limited to the findings of PQME Dr. Golden.

The applicant's Trial Brief having not been received, the Order Vacating Case for Submission and Re-setting for Trial issued 8/19/2021.

The parties returned for Trial on 10/27/2021, and the applicant's attorney was given until 11/3/2021 for purposes of submitting a post-Trial Brief, and the defendant until 11/24/2021 for purposes of response, with the matter standing submitted for decision as of 11/24/2021 pending submission to the Disability Evaluation Unit (DEU).

The applicant's Trial Brief was received on 11/3/2021 (EAMS Doc ID 38893584), and contends the following:

1. Based on the opinions of Drs. Golden, Sivtsov, and Chan, applicant sustained injury AOE COE to his cervical spine, right knee, hernia and psyche.
2. The applicant is entitled to 104 weeks (statutory cap) of temporary disability on the opinion of Dr. Sivtsov, less amounts owing to the Employment Development Department (EDD).
3. The applicant should be rated at 49% permanent disability based on the opinion of Dr. Chan and an occupational category loader/unloader (occupational group number "460") or alternatively 46% based on an occupational category of porter (occupational group number "360").

The defendant's Trial Brief was received 11/15/2021 (EAMS Doc ID 39025079), and contends the following:

1. The reporting from Dr. Chan does not represent substantial medical evidence, as it lacks no date for the examination, no date of the report and no signature, and has not been reviewed by the primary treating physician.
2. The reporting of Dr. Sistov on the issue of temporary disability does not represent substantial medical evidence.
3. The Employment Development Department is entitled to reimbursement for only 6/3/2016 to 11/7/2016 only.
4. Permanent disability should be based solely on the reporting of Dr. Golden.

Based on instructions issued by this judge, the Report of Permanent Disability issued 12/8/2021, setting forth permanent disability of 24% as to the lumbar spine and right knee after consideration of the Combined Values Chart (CVC), the equivalent of 95.50 weeks of disability at the rate of \$290.00 per week in the total sum of \$27,695.00. (Court Exhibit "X").

No objection having been received as of 12/28/2021, the case otherwise stood submitted for decision.

The Findings and Award issued 1/18/2022, with the following findings:

1. Applicant, age 44 at the time of injury, while employed during the period 4/19/2012 through 5/26/2016, occupation loader/unloader and group number "360", at Riverside, California, sustained injury arising out of and in the course of employment to his lumbar spine, cervical spine, right knee and psyche, but otherwise did not sustain injury in the form of headaches, hernia or pain.
2. Based on the aforementioned stipulation of the parties, the applicant's average weekly wages (AWW) were \$1,345.00 per week.
3. The applicant was entitled to temporary disability (TD) from 5/27/2016 through 5/26/2018, based on the statutory cap as set forth in Labor Code Section 4656(c)(2), at the rate of \$896.67 per week, less reimbursement to the Employment Development Department (EDD) for benefits paid during this period (together with statutory interest as set forth in Unemployment Insurance Code Section 2629.1(3)).
4. The applicant sustained permanent disability of 24% as to the lumbar spine and right knee after consideration of the combined values chart (CVC), the equivalent of 95.50 weeks of disability at the rate of \$290.00 per week in the total sum of \$27,695.00, less the lien of Hinden & Breslavsky in the amount of \$1,000.00 to be commuted from the far end of the award.
5. There was no basis for apportionment of the permanent disability.
6. Attorney fees of \$4,154.25 to be commuted from the far end of the permanent disability award, and to be held in trust by the defendant pending an attorney fee division agreement or further Order of the Board.

7. Further medical treatment.

IV

DISCUSSION

In assessing the relative value of the reporting of Drs. Golden and Chan, specifically the level of permanent and impairment the court considered several parts of the medical record.

The report of Dr. Keolanui Chun dated 8/3/2018 (Joint Exhibit “3”) noted complaints to the right knee to include “persistent pain” and “tingling” (with these same complaints extended to the low back). He noted the applicant remained permanent and stationary with a work restriction as assigned by Dr. Chan preclude (no prolonged sitting, no prolonged standing, prolonged bending and twisting, no lifting or carry (sic) more than 20 pounds, no pushing or pulling more than 40 pounds, no kneeling, no repetitive overhead reaching, and no prolonged sitting”). He further suggested a functional capacity evaluation (“FCE”) to objectively determine his work restrictions.

Turning back to Dr. Chan, he noted the following permanent impairment assessment as to the right knee as follows in his report of 4/24/2018 (Joint Exhibit “2”):

“Right knee: “Right knee strength deficit 10%. The muscle deficit was determined to be grade 4 (tab. 17-7, p.531). Extension of the knee at grade 4 muscular deficit results in a lower extremity impairment of 12% (5% whole person impairment) (Tab. 17-8, p. 532). Similarly, flexiionof the knee at grade 4 results in 12% (5% whole person impairment). Converting to whole person and combining the two impairments (Combined Values Chart, p. 604), results in a total whole person impairment of 10%. ”

In his continuing report of 3/20/2019 (Applicant’s Exhibit “3”), Dr. Chan noted “continuing right knee pain especially with cold weather”, with the continuing diagnosis of “right knee internal derangement” (p. 2).

The opinion of Dr. Chan was then compared with that of PQME Dr. Golden, who went to indicate (p. 14):

“With reference to his right knee, the MRI is noted above. He has no evidence of ACL injury or structural issues related to stability. He has occasional fleeting pain and continues home exercises for his right knee pain. Based on his examination today, he has no strength deficit and no whole person impairment related to it.”

The diagnosis, as it pertains to the right knee, was “right knee sprain/strain” (p. 13), with the referenced MRI of the right knee appearing in his record review entry of 7/16/2019 by Dr. Steven Kong (p. 13), which indicated the following:

“IMPRESSION: Mild attenuation at the medial meniscus and chondral fissuring of the trochlear concavity with some edema of an intact iliotibial band.”

One of defendant's points of contention is that Dr. Chan failed to follow protocols as the secondary treating physician in obtain review and concurrence by the primary treating physician. However, the problem is this portion of Dr. Chan's medical treatment and assessment was on a self-procured basis, as of the date of Trial the defendant admitted injury to the low back only, denying liability to all other body parts (MOH/SOE 5/17/2021 3:4-6).

The court also noted the applicant's testimony at the same time, which the court found truthful, to which he testified:

"Now that he is back to work, his pain in the right knee has increased. The previously mentioned medications help with the right-knee symptoms."
(MOH/SOE 5/17/2021, page 8 [lines unnumbered]).

In considering the extent of permanent impairment and disability, the court was persuaded that Dr. Golden's assessment of the lumbar and cervical spines was supported by the record, and as such was incorporated into this judge's instructions and rating. The same was not true as to the right knee, wherein the reporting of Dr. Chan appeared more reflective of the applicant's level of impairment.

This was not a matter of "cherry picking", but rather considering the opinion of a treating physician as to a *denied* body part (the right knee) over that of the PQME, but incorporating the opinion of the PQME as it pertains to the *admitted* body part (lumbar spine) and *denied* body part (cervical spine). There were several options available to the court:

1. Incorporate only the opinion of the PQME Dr. Golden in spite of the court's reservations as to his findings to the right knee.
2. Order development further development of the record, to include a re-evaluation by Dr. Golden in light of the applicant's testimony, strike Dr. Golden's report and order evaluation by an agreed medical examiner (AME) or physician appointed under Labor Code Section 5701.

In this instance, the court selected the option which appeared best supported by the overall record and within the range of evidence, as discussed above, and the California Constitutions Article XIV, Section 4 in pertinent part:

". . . to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the state government."

V.
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

DATE: 2/17/2022

Robert Hill
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE