WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GONZALO CERVANTES, ***Applicant***

vs.

VOLUNTEERS OF AMERICA OF LOS ANGELES; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, ***Defendants***

Adjudication Number: ADJ14929271
Santa Ana 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/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 23, 2022

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

GONZALO CERVANTES
MEHR & ASSOCIATES
ALTMAN & BLITSTEIN

AS/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

I
INTRODUCTION

1. Date of Injury: April 6, 2001

2. Identity of the Petitioner: Defendant filed the Petition
   Timeliness: The Petition is timely filed[1]
   Verification: The Petition is verified.

3. Date of Findings & Award: 7/7/2022

4. Petitioner's Contentions:

   (a) The evidence does not justify the findings of fact.

II
BACKGROUND

On July 7, 2022, the undersigned issued a Findings and Award finding industrial injury to Applicant's lumbar spine and left knee. Defendant contends in pertinent part that a) Applicant's testimony taken in consideration with the entire record is not substantial evidence to support industrial injury; b) QME, Dr. Smith's, report is not substantial medical evidence; and c) this trial court's finding of industrial injury is not supported by substantial evidence in light of the entire record.

III
FACTS

This claim involves a denied specific injury on April 6, 2021. (Minutes of Hearing and Summary of Evidence, "MOH/SOE" dated June 23, 2022, p. 2:11-13). The Applicant initially treated with his own physician, Dr. Ghalili, at S&S Medical Group beginning on April 23, 2021, (MOH/SOE p. 5:4-10; see also Applicant's Exhibit 1) and then later at Concentra through his employer.[2] *Id.* Dr. Smith served as the QME in Orthopedics, issued one report, and was deposed once as will be discussed supra. Also offered as evidence by Defendant, was a report of Dr. Khalid B. Ahmed, M.D.[3] (Defendant's Exhibit B).

[1] Defendant filed an initial Petition for Reconsideration on 7/29/2022 and an amended Petition for Reconsideration on 8/1/2022.

[2] No report from Concentra was offered as evidence.

[3] The undersigned did not rely on the report of Dr. Ahmed in its Findings & Award

MEDICAL HISTORY

The first evidence of any treatment by the Applicant is the Physician Progress Sheet of Dr. Ghalili dated April 23, 2021. (Applicant's Exhibit 1). The report, albeit mostly illegible, highlights 'pain' under the joint and ext. section. *Id*. Dr. Ghalili issued a subsequent Certificate to Return to Work/School dated May 11, 2021, (Applicant's Exhibit 2), with a note of lumbar disc disease, meniscal tear of the knee, and restrictions of no lifting for two months. *Id*. Dr. Ghalili issued a similar Physician Progress Sheet on May 28, 2021. (Applicant's Exhibit 3).

Dr. Smith issued his initial report after an evaluation on October 25, 2021. (Joint Exhibit Y). In Dr. Smith's report, the mechanism of injury is described as occurring on April 6, 2021, while carrying a container weighing approximately 180 to 200 pounds from one vehicle to another when he felt a pinch in his back and a crack in his left knee and left foot. *Id*. at p. 3. Dr. Smith diagnosed Applicant with a left knee meniscus tear and lumbar strain disc bulge. *Id*. at p. 18. Dr. Smith also reported symptom magnification or malingering and multiple medical symptoms not related to work injuries. *Id*. However, he ultimately concluded that the back and left knee symptoms, impairment and findings are consistent with the injuries claimed by the Applicant. *Id*. at p. 19.

Defendant deposed Dr. Smith on April 18, 2022. (Joint Exhibit X). The crux of the deposition related to the issues of credibility to wit: inconsistencies in Applicant's account of the mechanism of injury, and Dr. Smith's concern of magnification and malingering. Applicant presented to Dr. Smith's evaluation with crutches. *Id*. at p. 6:1-17. Dr. Smith expressed concern that Applicant would not get on the exam table, attempt to do any back motion, walk on his toes, heels, or even walk without crutches. *Id*. at p. 6:1-17. Dr. Smith testified: "[h]e's about 75 percent not credible. So, in other words, I *do think he has hurt his back lifting whatever he was doing*, and it is also reasonably possible, could [sic] have also hurt his knee at the same time." (*Id*. at p. 7:15-19) (emphasis added).

Dr. Smith also expressed concerns with additional red flags related to Applicant's late reporting of the injury and post-termination claim. *Id*. at p. 11-12. Both counsels disputed that Applicant had been terminated. *Id*. at 12:7-25; 13:1-4. Defendant represented the following: "I don't think that that's true, Doctor; so I don't want you to have that information." *Id*. at 12:16-17. The following additional testimony occurred between counsel for Applicant and Dr. Smith:

> Q: . . . are you saying that from a medical standpoint, there is no evidence of injury, or are you deferring to the trier of fact of whether or not the issue of credibility should weigh in . . .
>
> A: No, he has findings on his MRIs. He has a torn meniscus, and he has a bulging disc in his back. He's got some findings and it's certainly possible that what he said happened could have actually happened, but there's all these other red flags to go along with it. . .

Id. at p. 16:22-25; 17:2-7.

Q: But as the defense even represented, the employer would testify or would say 60 pounds. You still think lifting 60 pounds could cause the type of injury that he has objective findings for?

A: Yeah, I think lifting 60 pounds could cause you to have a back injury and a knee injury...

Id. at p. 17:2-7.

The deposition concluded with the following questions from Defense counsel:

Q: I just want to clarify something because we're using the word 'could' a lot. Can you state within reasonable probability that this would cause an injury?

A: I *would* say it's reasonably medically probable that he could have injured his back and his knee. Nothing else.

Q: Okay. But you're deferring to the trier of fact as to the factual issues and with respect to the mechanism of injury; is that correct?

A: The mechanism of injury, the reporting, presentation of the patient, all those factors, I think should be taken into consideration.

Id. at p. 18:25; 19:1-11. (emphasis added)

TRIAL TESTIMONY

At the onset of trial, Applicant testified that he did not know how to spell his own name. (Partial Transcript of Trial Proceedings dated June 23, 2022, p.4:12-16 EAMS Doc. Id#75726021). Applicant testified that he worked as a cook for Volunteers of America and his job duties consisted of cooking, pulling out food, arranging it, putting it on carts, loading delivery trucks, and making food deliveries. (MOH/SOE 4:16-18). Moreover, through his testimony on direct and cross-examination, Applicant was answering questions very generically and unrelated to the call of the question. During direct examination by Applicant's attorney, Applicant testified to his job duties as inclusive of preparing food, packing meat into boxes, and delivering the food to other locations. (Partial Transcript of Trial Proceedings, *supra* at p. 6-7). The undersigned presents the following narrative from trial between Applicant and his attorney to best illustrate Applicant's inept communication skills and literacy level.

Q: On April 6, what specifically were you carrying when you injured yourself?

A: At 6:00 O'clock in the morning when you arrive, the main cook go [sic] to the freezer and will take the food that we have to prepare, because we have different type [sic] of foods and we have to move everything to get the boxes of what we needed [sic].

Q: Okay.

A: Because all of them have a label. The specific labels.

Q: And on the day you injured yourself, do you recall specifically what you were carrying when you injured yourself?

A: Yes, Meat.

Q: And the meat, does it come prepacked like plastic containers?

Id. at p. 8:1-16.

During cross-exam of the Applicant the following transpired:

Q: When you were taking the Cambros from one area to the delivery van, is that how you hurt yourself?

A. No. It was at the meat.

Q: What about the meat?

A: Okay. When I am going to change the Cambro from one cart to another is when I feel [sic] the pull all the way from here, all the way down.

Q: You were moving the Cambro from one cart to another cart?

A: Yeah, These are plastic boxes that we move from here to there. That's when it happened. But *I also do the delivery of the Cambros when I finish cooking.*

Id. at p: 15:21-25; 16:1-7 (emphasis added).

After parties were done with direct and cross-examination, the court posed several questions to the Applicant with continued difficulty:

> Q: You mentioned that there were bags of meat and then you referenced container. So let's talk about the bags. The bags of meat you were referencing. What are these? Can you describe them?
>
> A: It's packages of meat. Packages of meat, about that size. Depends on the order. But we have to put them into the containers.
>
> Q It's very important when I am asking you questions that you just answer the question I am asking. Forget the containers. My question is now the meat. The packages of meat.

Id. at p. 26:24-25; 27:1-9.

> Q: Now, if you haven't already explained it, talk about the cart. Is the cart the item on the meal wheels that you described earlier?
>
> A: It's metal and plastic wheels.
>
> Q: To clarify, the cart is metal but the wheels are plastic?

A: They're all metal, but they also have plastic.

Q: Where is the plastic?

A: The Wheel

Id. at p. 27:18-25; 28:1-2.

Q: Are the boxes different from the containers?

A: Every box has [sic] different weight.

Q: That was not my question.

Id. at p. 28:20-22.

Q: And do you know approximately how many bags of meat were in there?

A: Depending on the program, because it has a label of the number of boxes and

Q: Let me stop you. I don't want to know about the program. I want to know about the particular box you were carrying.

Id. at p. 29: 17-21.

Q: So, you are saying it's the height of the little ledge by the court reporter, which is approximately three feet is that correct.

A: Yes.

Q: And both of them were about the same height?

Interpreter: Can I explain to him that this is regarding the moment of the injury? Because he is now saying there are other carts of different sizes.

Q: Okay, No. I will.

Q: Mr. Cervantes, when you give your testimony right now, I just want the particular moment when you have alleged you were injured. Not what happened other times. Just that moment.

Id. at p. 31:5-17.

Q: How far apart were the carts from each other?

A: We need to move everything, because sometimes the meat is behind in the freezer. Q: Stop, Very specific.

Id. at p. 31:22-25.

With respect to the injuries sustained on April 6, 2021, Applicant testified to injuring his left knee and back. *Id*. at p. 9:1-21. However, initially he referred to his back as his waist. *Id*. It was not until an actual physical demonstration and discussion off the record, that counsels conferred and agreed that Applicant was referring to his lower back. *Id*. at p. 9:1-25. Applicant testified that the pain to his shoulders and arms started after he began using the crutches prescribed by Concentra. *Id*. at p. 13:5-6. He also complained of pain in the left foot, which he believes is triggered from the left knee. *Id*. at p. 14:1-4. Finally, he testified to depression and sleep problems related to the injury and pain. *Id*. at p. 12:14-23.

Defendant presented three witnesses at trial. Most probative to the issue of late reporting was the testimony of Martha Rocha the Food Service Program Manager. She testified that Applicant complained to her about knee and sciatic pain and she told him to go see a private doctor and that this conversation could have happened as far back as April. (MOH/SOE *supra* at p. 11:20-23).

IV
ANALYSIS

APPLICANT'S TESTIMONY IS NOT SUBSTANTIAL EVIDENCE TO SUPPORT INDUSTRIAL INJURY

Defendant argues that Applicant simply could not keep his story straight and is not credible. The trial court is the "sole judge" of witness credibility. *David v. Kahn*, 7 Cal.App.3d. 868, 874. The fact finders determination of the veracity of a witness is final. *People v. Bobeda*, 143 Cal.App.2d. 496, 500. Credibility determinations thus are subject to extremely deferential review. *La Jolla Casa De Manana v. Hopkins*, 98 Cal.App.2d 339, 345-346. In workers' compensation, the trier of fact must weigh all the evidence, including testimony and its credibility, to determine whether there is a sufficient record based upon which to make a finding. See generally *Garza v. Workers' Comp. Appeals Bd*., 3 Cal.3d 312. The credibility determinations of the workers' compensation judge are entitled to *great weight* and should not be disturbed when supported by substantial evidence because the judge has the opportunity to observe the demeanor of witnesses and weigh their statements with their manner on the stand. *Id*. at 319.

Applicant testified credibly at the time of trial. He was calm and respectful through questioning. He appeared to put forth best effort to answer the questions. What was conspicuously obvious to the undersigned during the trial was Applicant's inability to understand and answer questions. Defendant argues that there was no evidentiary record establishing Applicant's literacy level. This statement is erroneous. His literacy level was evidenced by his inability to spell his own name. However, even absent this patent revelation on the record, the court is able to make a reasonable inference based upon observations at trial. Defendant also argues that a certified interpreter was present mitigating any language barrier. The fallacy herein was also demonstrated on the record when Applicant testified that he injured his waist. It was not until further probing by the attorneys, a physical demonstration in the courtroom, and discussion off the record, that the court was able to ascertain that Applicant was referring to his back as 'waist'. An interpreter cannot account for cultural variances nor is an interpreter the solution to an Applicant's inept communication skills and literacy level.

The undersigned does not find these variations call into question Applicant's credibility in light of the observations made by the court. Defendant also relies on other variables to question the court's credibility assessment to wit: the injury was not witnessed and the injury was not reported to Martha Rocha until June 1, 2021. For the sake of brevity, the court must dispense of this latter argument as there is no requirement that an injury must be witnessed to be credible. With respect to the late reporting of injury, this trial court also found otherwise. Defendant's witness, Martha Rocha, testified that Applicant complained about his back and sciatic pain possibly as early as April and she sent him to see his personal doctor. The record supports that the Applicant began treating with his personal doctor the same month of the injury.

WHETHER DR. SMITH'S OPINIONS CONSTITUTE SUBSTANTIAL MEDICAL EVIDENCE

A medical opinion must be predicated on reasonable medical probability. *E.L. Yeager Construction v. Workers' Comp. Appeals Bd*., 71 Cal. Comp. Cases 1687; *see* also *McAllister v. WCAB*, 33 Cal. Comp. Cases 660. That being said, this is not a cookie cutter analysis. Just as adding the phrase 'reasonable medical probability' in a report does not convert the report into substantial medical evidence neither is the inverse. *See generally Delgado v. Kaiser Permanente*, 2014 Cal. Wrk. Comp. P.D. LEXIS 224 (rejecting the use of the word 'reasonable medical probability' as sufficient); *see also Bates v. Workers' Comp. Appeals Bd.*, 77 Cal. Comp. Cases 636 (holding that a report may be considered substantial evidence even if the doctor does not explicitly use the term 'reasonable medical probability'). The trial court is thus faced with reviewing the record in its entirety to make the appropriate determination.

Here, the undersigned finds that Dr. Smith's report is substantial medical evidence. Dr. Smith confirmed that Applicant did have findings consistent with the mechanism of injury. Defendant is hinged on the word 'could' to challenge the report as not substantial, wherein the following was stated "I *would* say it's reasonably medically probably that he '*could*' have injured his back and his knee." After this statement, Dr. Smith then deferred to the trier of fact for the credibility determination. The use of the word 'could' was inevitable given that Dr. Smith deferred to the trier of fact for the credibility determination.

Dr. Smith had concerns with symptom magnification/malingering, late reporting, and post-termination filing. Both the late reporting and post-termination filing were never substantiated. The pending question deferred to the trier of fact was decided and is wholly within the ambit of the trial court. Dr. Smith could not have asserted his findings in any more certain terms absent a credibility determination by the court. Therefore, the undersigned finds Dr. Smith's report is substantial.

WHETHER THE EVIDENCE TAKEN AS A WHOLE IS SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING OF INDUSTRIAL INJURY

This argument by Defendant is a reiteration of the arguments *supra*, considered holistically. Defendant presented six scenarios within its Petition wherein it illustrated inconsistencies in Applicant's testimony. In the Findings and Award, the undersigned noted that with respect to the discrepancies within the medical reports, the court must also account for the double hearsay. There is no disputing that there were inconsistencies in the Applicant's account

of how he was injured, but after an opportunity to observe the Applicant on the stand, the court finds these variations are reasonably and easily elucidated. As discussed *supra*, Applicant was reminded frequently, to answer the question posed and not speak in generalities. The interpreter, also, intervened asking for permission to redirect the Applicant to the question asked. Applicant was often narrating the events of his job duties, which in sum included getting meat out of the freezer, taking it to the kitchen, cooking, and ultimately carrying the food to the van to be delivered. After the opportunity to observe the witnesses at trial and review the record, the undersigned finds the Applicant was credible and that there is substantial evidence to support a finding of industrial injury to Applicant's left knee and lumbar spine.

V.
RECOMMENDATION

For the reasons stated above, it is respectfully requested that the decision not be disturbed and Defendant's Petition for Reconsideration be denied.

DATE: 8/11/2022

Josephine Broussard
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE