WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

KUANE WASHINGTON, *Applicant*

vs.

SANTA CLARA VTA, Permissibly Self-Insured, *Defendant*

Adjudication Number: ADJ11562102
Stockton District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant, who is representing herself, seeks reconsideration of a workers' compensation administrative law judge's Findings of Fact, Award[1] and Orders of October 26, 2022, wherein it was found that applicant did not sustain industrial injury in the form of acquired odor disorder while employed as a bus operator on September 19, 2018. The WCJ thus issued an order that the applicant take nothing by way of her workers' compensation claim.

Applicant contends that the WCJ erred in not finding industrial injury. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We will deny the applicant's Petition for the reasons stated by the WCJ in the Report, which we adopt, incorporate and quote below. Applicant argues that the WCJ did not take into account a September 20, 2018 emergency room report which purportedly showed increased carbon monoxide levels. All decisions of the WCAB must be based on evidence admitted into the record. (*Hamilton v. Lockheed Corp.* (2001) 66 Cal.Comp.Cases 473, 476 [Appeals Bd. en banc].) All evidence sought to be admitted into the record must be disclosed at the mandatory settlement conference. (Lab. Code, § 5502, subd. (d)(3).) Here the September 20, 2018 emergency room record was not disclosed on the pretrial conference statement, nor did applicant attempt to introduce this document into the evidentiary record at trial. Accordingly, it cannot be considered.

[1] Despite being titled Findings of Fact, Award and Orders, there is no award and only a single finding of fact and a single order.

Although the Petition for Reconsideration states that this exhibit is attached to the Petition, there was no attachment to the Petition for Reconsideration in the electronic record. Even if this were newly discovered evidence, WCAB rules require "a full and accurate statement of the reasons why the testimony or exhibits could not reasonably have been discovered or produced before submission of the case" before such evidence can be considered on reconsideration. (Appeals Board Rule 10974(e), Cal. Code Regs., tit. 8, § 10974, subd. (e).) In any case, we note that qualified medical evaluator internist Peter W. Yip, M.D. summarized this document in his July 11, 2020 report, and his summary does not note any increased carbon monoxide levels. (July 11, 2020 report at p. 2.)

The Petition also complains of the omission of "Dr. Allen's QME report." However, no report by a Dr. Allen was listed on the pretrial conference statement or in the minutes of any of the hearings, or even in the summary of medical records in any of Dr. Yip's reports.

With regard to the WCJ's following the conclusions of Dr. Yip over prior qualified medical evaluator environmental medicine specialist Miriam Shipp, M.D., the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. (*Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 639 [35 Cal.Comp.Cases 16].) The WCJ is empowered to choose among conflicting medical reports and rely on those deemed most persuasive. (*Jones v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 476, 479 [33 Cal.Comp.Cases 221].) Here, the WCJ carefully explained why he found Dr. Yip's conclusions more persuasive. As noted by the WCJ in the Report, Dr. Yip's history and conclusions were more consistent with the applicant's deposition and trial testimony that applicant did not smell any noxious odors prior to the onset of her symptoms.

While the applicant's Petition hints at bias by the WCJ in coming to his findings, the WCJ carefully explained his reasoning with reference to the medical record. We therefore deny applicant's Petition for the reasons stated above, and the reasons stated by the WCJ in the Report, which we quote below.

INTRODUCTION

> This is a timely filed and verified petition for reconsideration by Applicant, herself of a final order of [10-26-22]. Applicant was … represented by counsel. [Former] Applicant Attorney was at all hearings including the final day of trial in which testimony was taken, 9/13/22.

Applicant was sworn and testified. Her testimony was consistent with her prior testimony in her prior deposition of 8/17/20. WCAB X. Applicant testimony was consistent with the history she gave to the current QME Dr. Yip. (Def-A-D)

This reconsideration was filed challenging the finding that Applicant did not sustain injury arising out of and in the course of employment to the respiratory injury/acquired odor disorder.

Applicant contends tba QME Dr. Yip who the Court relied on is not substantial evidence and the Court failed to consider other relevant evidence.

I found the opinions of Dr. Yip substantial evidence and found Applicant did not sustain an industrial to the respiratory injury/acquired odor disorder.

RECOMMENDATIONS

Applicant's petition for reconsideration should be denied.

DISCUSSION

Issue submitted for decision

Injury arising out of and in the course of employment to the respiratory injury/acquired odor disorder.

The parties appeared for hearing which was set to begin at 10:30 am. The Attorneys were advised of this time change 1 week before the hearing due to my medical appointment. I arrived with my right arm still bandaged and braced from previous surgeries. Applicant was advised of this personally by me at trial with both attorneys present.

FACTS

Procedural history

Injury AOE/COE was an issue raised by Defendant's DOR on 1/8/21. Applicant Attorney objected to the DOR citing further discovery. At the MSC of 3/3/21 a pretrial conference statement (PTCS) was prepared, and the matter was set for trial. Issues, stipulations, exhibits and witnesses were listed therein. Applicant's Attorney was present.

Trial was set for 5/21/21. At the trial I was made aware there had been a mass shooting at Applicant's work 5/20/21. I was further made aware by the

Attorneys and Applicant that she knew some of the employees killed the day before.

The Applicant wanted to proceed as did the Attorneys. However, I found it reasonable and responsible to continue the trial to ensure an accurate record, not influenced by the tragic events of the day before. The record would include Applicant's testimony.

There after the case was continued by the parties' requests until trial on 9/13/22.

Prior to trial the stipulations and issues were confirmed as stated and agreed to by the parties in the Minutes of Hearing and Summary of Evidence (MOH/SOE) dated 5/27/21. The exhibits were reviewed and confirmed as accurate. No objections were made, nor additional exhibits offered than were previously listed by the parties in the 5/27/21 MOH/SOE.

Exhibits

Exhibits were listed and admitted without objection from the attorneys in the MOH/SOE of 5/27/21.

DEFENDANT'S EXHIBIT A:
(*Admitted into evidence without objection*)
Report of Dr. Yip, dated 4/30/2020.

DEFENDANT'S EXHIBIT B:
(*Admitted into evidence without objection*)
Report of Dr. Yip, dated 7/11/2020.

DEFENDANT'S EXHIBIT C:
(*Admitted into evidence without objection*)
Report of Dr. Yip, dated 9/4/2020.

DEFENDANT'S EXHIBIT D:
(*Admitted into evidence without objection*)
Report of Dr. Yip, dated 11/22/2020.

WCAB EXHIBIT X:
(*Admitted into evidence without objection*)
Depositions of applicant, dated 1/31/2013 and 8/17/2020.

WCAB EXHIBIT XX:
(*Admitted into evidence without objection*)
EDD Notice to employer of disability insurance claim filed 10/18/18.

APPLICANT'S EXHIBIT 1:
(*Admitted into evidence without objection*)
Deposition of former QME Dr. Shipp, dated 7/16/2020.

APPLICANT'S EXHIBIT 2:
(*Admitted into evidence without objection*)
Report from former QME Dr. Shipp, dated 6/19/19.

Additional exhibits were listed in the PTCS. The attorneys agreed to limit the exhibits as listed above.

Claimed injury

Applicant, Kuane Washington, born [1974], while employed on 9/19/2018 as a bus/coach operator, Occupational Group No. 250 at San Jose, California by Santa Clara VTA, claims to have sustained injury arising out of and in the course of employment to the respiratory system and acquired odor disorder.

Applicant was deposed on 1/31/19 and testified she suddenly could not breath with air not going up through her nose. WCAB X-App Depo 1/31/13 page 10 lines 15- 25.

Applicant called into dispatch and reported her respiratory issues and was told she would be met at the end of her line/route. When Applicant got to the end of the line, she walked to a fire station nearby. Applicant explained her respiratory problems and her vitals were taken. Her blood pressure was high, but oxygen was normal. She was told to alert her employer if she thinks she inhaled carbon monoxide. WCAB X page 11 lines 10-21 and MOH/SOE 9/13/22 page 2 lines 20-24.

Applicant testified when she returned the bus a mechanic told her the exhaust system on the bus failed. This mechanic remains not identified. WCAB X page 12 lines 1-9. Applicant did not testify to smelling a noxious fume on the bus.

Initially Applicant was evaluated by Dr. Shipp as the QME rpt 8-1-19 (Apps-2). Dr. Shipp's history was Applicant smelled a bad odor on the bus and then began having symptoms Apps-2 pg. 3 "History of Injury" Dr. Shipp opined the Applicant had sustained odor sensitivity driving her bus on 9/19/18 due to this history in part at pg. 12 "Causation".

Dr. Shipp was deposed and was questioned about this on 7/16/20, Apps-1. Dr. Shipp responded to questions about his opinion that Applicant did sustain injury AOE/COE odor sensitivity driving her bus on 9/19/18, pages 18-19 Apps-1. More specifically questions regarding Applicant's statements to QME Dr. Yip that she did not smell noxious fumes on her bus on 9/19/18. Def-A pg. 6 last

paragraph. This questioning is repeated, and Dr. Shipp testified it could change h[er] opinion on AOE/COE. Apps-1 pg.19 line 25 and pg. 20 lines 1-7.

As stated above Dr. Shipp after this did not do QME exams anymore and Dr. Yip became the new QME. This is not disputed.

After this deposition Dr. Yip issued 3 supplemental reports Def-B 7 /11/20: Def-C 9/4/20 and Def-D 11/22/20.

Also, Applicant was deposed on 8/17/20 and Applicant testified in Court on 9/13/22. Prior QME Dr. Shipp never reviewed these exhibits.

Applicant testified in her deposition of 8/17/20 "No. The scary part is I didn't smell anything, and I just couldn't breathe all of a sudden. I actually smelled the exhaust when I got – remember - I actually remember smelling the exhaust fumes when I got off the bus." WCAB-X pg. 65 lines 24-25 and pg. 66 lines 1-3.

At trial Applicant testified the same. MOH/SOE 9/13/22 pg. 2 lines 11-16.

Dr. Yip responded to the testimony of Applicant in deposition of 8/17/20 WCAB-X and that of Dr. Shipp Apps -A, that because she did not smell anything on the bus or see smoke. This injury claim did not arise out of or occur in the course of Applicant's work. See Def-A pages 16-19· Def-B review of medical no change in opinions· Def-C rpt. 9/4/20 pages 1 last paragraph and pages 2-3 responses to Apps Attorney interrogatories no change in causation and Def-D.

Prior QME Dr. Shipp opinion was that this was an industrial injury but may change if in fact Applicant did not smell noxious orders on the bus. Current QME Dr Yip's opinion is this is not an industrial injury because Applicant reported to him and testified in deposition, she did not smell noxious orders on the bus. WCAB-X pg. 65 lines 24-25 and pg. 66 lines 1-3.

Injury AOE/COE was denied based on the opinions of current QME Dr. Yip Def-A-D and Applicant s testimony in Deposition WCAB X depo date 8/17/20 and at trial on 9/13/22 that she did not smell noxious odors on the bus on 9/19/18.

ANALYSIS

I will only address the issue submitted for decision.

The issue submitted for decision was injury arising out of and in the course of employment to the respiratory injury/acquired odor disorder.

It is noted more issues were listed in the PTCS but the Attorneys at trial agreed to submit only the one issue listed above.

I did not see any attachments to Applicant's reconsideration. If there are attachments not previously admitted into evidence they cannot be considered. Nothing is presented to allow this.

Applicant was … represented by counsel including but not limited to the two days of trial on 5/27/21 and 9/13/22.

Substantial evidence

Substantial Evidence is both codified and developed in case law. See LC5952, 5953, 4628 and 8 CCR 10682.

Its definition has been said to be evidence which, if true and correct, is sufficient to support a reasonable mind to accept and support a conclusion on a given issue. Reasonable in nature credible and of solid value. Braewood Hospital v. WCAB (Bolton) (1983) 48 CCC 566, 568.

In practice, when reviewing medical opinions, the Court confirms that a complete and thorough examination of Applicant has occurred, a complete review of all relevant medical and nonmedical records was done, an accurate and complete history was obtained and finally the opinions are explained.

The opinions of QME Dr. Yip were found to be substantial evidence.

Before QME Dr. Yip the QME was Dr. Shipp. Dr. Shipp after reporting and having been deposed was no longer doing QME exams. Dr. Shipp's report of 6/19/19 is Apps-1 and Dr. Shipp's Depo of7/16/20 is Apps-2.

Dr. Shipp never reviewed Applicant's deposition of 8/17/20 where Applicant testified, she did not smell noxious fumes on the bus on this date of injury 9/19/18. Also Dr. Shipp did not review Dr. Yip's last three supplemental reports Def-B-D.

Dr. Yip was able to complete a thorough exam see Def-A pg. 14 "Causation" and pg. 16.

A complete review of all medical and non-medical evidence was done by Dr. Yip. This includes the two depositions of Applicant WCAB X and Deposition and report of prior QME Dr. Shipp Apps-1 and 2. See Def-A rpt. 4/30/21 pgs. 2-6· Def-B pgs. 2-4· Def-D pg. 1 paragraph 1.

Dr. Yip was able to get an accurate history from Applicant when compared to the other exhibits. Specifically, Applicant's deposition testimony on 8/17/20 Apps-2 and trial testimony of 9/13/22 MOH/SOE pg. 2 lines 10-24 and PG. 3 lines 1&2.

Dr. Yip was able to render opinions based on reasonable medical probability and explain them.

The whole record including testimony must be looked at. Dr. Yip's last report Def-exhibit D and Dr. Shipp's deposition Apps-1 frame the question. Was Applicants testimony and history to QME Dr. Yip that the noxious order was not smelled on the bus enough to support no industrial injury. I answered yes. Dr. Yip's rpt. Of 11/22/20 Def-Dis quoted below at pgs. 1-3.

"This supplemental report is being submitted in response to additional information that was supplied to me by Sharon Horn, Esq., of the Witkop Law Group in a letter dated October 5, 2020. In that letter, Ms. Hom has included the deposition transcripts of Dr. Miriam Shipp dated July 16, 2020 as well as that of the patient Kuane Washington dated August 17, 2020. There was also an operator's inspection/defect report that was dated September 19, 2018 for my review. Ms. Hom has asked if this information would change my opinions as previously stated in my original Q_ME report of March 30, 2020.

In response to this additional information and Ms. Hom's inquiry, I will note that in Dr. Shipp's deposition transcription on page 15, she states that the patient apparently reported that she smelled a noxious odor while driving her bus. Dr. Shipp was also informed by Ms. Washington of another passenger on the bus who smelled a noxious odor. Dr. Shipp explained that Ms. Washington had developed a problem with breathing through her nose, which Dr. Shipp interpreted as air hunger which is one of the primary classic symptoms acquired odor sensitivity. The patient apparently gave the history that site could not breathe through her nose but was able to breathe normally through her mouth. Dr. Shipp felt that this would be due to the nasal membrane irritation from toxic exposure similar to that of a sinus or nasal infection blocking the nasal passages, but not interfering with breathing through the mouth.

In direct contrast to Dr. Shipp's testimony, Ms. Washington reported to me that site did not smell any noxious odor while site was driving the bus from the point that site initially developed nasal blockage symptoms to the time that site reached the central hub. Therefore, Ms. Washington reported to me that site never detected any odor while site was on the bus. This is corroborated by Ms. Washington's deposition transcripts dated August 17, 2020 where she stated on pages 65 and 66 of her transcript that she did not smell any odors or exhausts on the bus until she actually got off the bus at the end of the line, which was well after her symptoms had begun.

When asked specifically whether or not the development of odor hypersensitivity could be precipitated without inhalation of noxious odor, Dr. Shipp very correctly noted that the medical literature defines the syndrome of

acquired odor hypersensitivity as one that is precipitated by a single overexposure to the significant odor of a respiratory tract irritant. Typically, during a significant exposure to toxic or noxious fumes the entire upper respiratory tract is affected such that one would expect inflammatory and irritant type symptoms in the nose, throat, and lungs such as sore throat, coughing or shortness of breath. Ms. Washington only reported nasal blockage but denied any throat or lung irritant type symptoms, specifically denying any shortness of breath, i.e. air hunger. Therefore, since Ms. Washington reported that she did not smell any odor while site was on the bus and since she did not have any irritant symptoms involving her throat or lungs, I did not have evidence that site had sustained an overexposure to a work-related respiratory irritant and therefore did not have work-related acquired odor hypersensitivity syndrome.

Ms. Washington stated that site felt that she had had exposure to carbon monoxide. Dr. Shipp is very accurate in stating that diesel exhaust is composed of well over 40 different chemicals, one of which being carbon monoxide. Since Ms. Washington did not detect the odor of diesel exhaust while driving her bus, she would not have had a significant exposure to carbon monoxide. Additionally, there was no objective evidence that Ms. Washington had an elevated carbon monoxide level in the medical records provided to me.

Finally, the operator's inspection/defect report/or coach #4407 dated September 19, 2018 was apparently completed by each operator as they assumed control of the coach. Of the three operators who completed this form, two noted body defects in terms of scratches of the body of the bus, one noted that the driver's seat was high and another one noted that the wrong size mirror was on the driver's side. There were no notations on the first page by any of the three operators of any exhaust problem or odor problem.

On the second page of this form, descriptions of the defects, numbered 1, 2, and 3, as noted above are written in. One operator added #4 and had written "exhaust in coach". There was no documentation of which operator noted this, and there was no other corroborative information.

In summary, Ms. Washington has clearly stated in her deposition that she did not smell any noxious odor on the bus and only smelled exhaust when she got off the bus at the end of the line. Therefore, there is no history of a noxious fume exposure while she was on the bus, which would be the most important precipitating factor in the development of acquired odor hypersensitivity as noted in the medical literature. There is no evidence of a noxious fume exposure at work that could have caused Ms. Washington to develop a work-related acquired odor hypersensitivity disorder. Therefore, my opinion remains unchanged that Ms. Washington's symptoms of acquired odor hypersensitivity are non-industrial in causation."

I found Dr. Yip's opinion substantial evidence that there had been no industrial injury.

CONCLUSION

The whole record including testimony was considered. There is no evidence that Applicant sustained the exposure needed to develop respiratory injury/acquired odor disorder. See Dr. Yip supra. Dr. Yip's opinions are substantial evidence.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact, Award and Orders of October 26, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 17, 2023

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

KUANE WASHINGTON
WITKOP LAW

DW/ara

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