WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

STEVE RENICK, ***Applicant***

vs.

CAST AND CREW ENTERTAINMENT SERVICES, LLC; AMERICAN ZURICH INSURANCE COMPANY, C/O SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., ***Defendants***

Adjudication Number: ADJ11802545
Marina del Rey 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.

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/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 1, 2021

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

STEVE RENICK
FORD & WALACH
LISTER, MARTIN & THOMPSON
MISA STEFEN KOLLER WARD
EMPLOYMENT DEVELOPMENT DEPARTMENT
MICHAEL SULLIVAN & ASSOCIATES
WAI & CONNOR

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

American Zurich Insurance Company, by and through their attorneys of record, has filed a timely Petition for Reconsideration challenging the Findings and Award of July 21, 2021.

II
FACTS

Steve Renick, . . . claimed to have sustained injury arising out of and in the course of his employment on January 1, 2015 to November 1, 2018 to his lumbar spine, cervical spine, left hip, right knee and hearing loss. Trial was held on April 20, 2021 and the undersigned issued the Findings & Award on July 21, 2021 finding the following;

> It was proper for WCJ Terry Smith to set the matter for trial and close discovery at the March 18, 2021 Mandatory Settlement Conference (MSC) and there was no denial of due process.
>
> Further, that the Applicant had sustained injury arising out of and in the course of his employment with Cast & Crew, on January 1, 2015 to November 1, 2018 to his lumbar spine, cervical spine, left hip, right knee and hearing loss, based on the substantial medical evidence in the medical reports of the Primary Treating Physician (PTP), Dr. Sam Tabibian and Panel Qualified Medical Examiner (PQME) Dr. Lorenzo Brown.
>
> Also, as a result of this injury the Applicant was entitled to; temporary disability beginning February 11, 2019 through June 3, 2020 at the rate of $1,215.27 (subject to credit to Employment Development Department for the benefits it paid by during that period); an apportioned award of 80% permanent disability payable at $290 per week for a total of $172,042.50 as well as a subsequent life pension and future medical care.
>
> Finally, a reasonable Attorney fee was awarded.

It is from this July 21, 2021 Findings & Award that the Defendant petitions for reconsideration.

III

DISCUSSION

Substantial Medical Evidence

Petitioner contends that it was error for this WCJ to rely on the June 4, 2020 report from the Primary Treating Physician (PTP), Dr. Sam Tabibian (Exhibit 18) because it is not substantial medical evidence. Petitioner claims that the doctor's opinions were based on a false / inaccurate history, that his opinions are internally inconsistent and ambiguous. Petitioner also claims that the report is not substantial because the doctor did not discuss LC§5412 and because the doctor did not directly review all of the Applicant's past medical records.

False and inaccurate history

Petitioner argues that because of an error regarding whether or not the Applicant had returned to work, the PTP's opinion that the Applicant had reached Maximum Medical Improvement (MMI) cannot be relied on. It is correct that there is an error in the June 4, 2020 report by Primary Treating Physician (PTP) Dr. Sam Tabibian (Exhibit 18). The report states both that the Applicant had returned to work (page 24) and that he had not returned to work (page 3).

Contrary to Petitioner's statement that this WCJ "glossed over" the error, in actuality, this WCJ carefully considered whether or not the error influenced the doctor, if his opinions were at all based on the error and whether the error was at all relevant to the doctor's opinions.

The PTP Dr. Tabibian had treated the Applicant since February 11, 2019 and provided multiple reports discussing the Applicant's treatment progress and disability status (Exhibits 18, 19, 20, 21, & 22). As the doctor who provided treatment and monitored the Applicant's medical progress, Dr. Tabibian was in the position to determine if the Applicant had reached MMI. Dr. Tabibian performed a final physical exam of Applicant on June 4, 2020 and found that the Applicant had reached MMI and could be discharged from care. Nothing in Dr. Tabibian's June 4, 2020 final report shows any connection or influence between the applicant's work status and his MMI status. Petitioner offers only speculation and conjecture that Dr. Tabibian's opinion was based upon or influenced by whether or not the Applicant had returned to work. Petitioner "supposes" that the error is relevant rather than providing any cogent argument or actual evidence of relevancy.

Petitioner also contends that the Applicant could not have reached MMI because of a ballpark estimate given by the orthopedic Panel Qualified Medical Examiner (PQME) Dr. Jacob (Hagop) Ishkanian in his November 21, 2019 (Exhibit EE, FF, GG). There, Dr. Ishkanian provided an estimate that the Applicant would reach MMI in one or two years. This WCJ found that the PQME's ballpark estimate from a single exam back in November 2019, was not persuasive or relevant to the Applicant's disability status in June 2020. Instead of the 2019 ballpark estimate from by Dr. Ishkanian, the undersigned relied on the MMI opinion of PTP Dr. Tabibian, who had actually treated the Applicant, monitored his disability status and had just physically examined the Applicant on June 4, 2020.

Further, Petitioner claims that there is internal inconsistency and ambiguity in Dr. Tabibian's opinions. However, the opinions in the report are internally consistent and unambiguous. Petitioner provides no example of any internal inconsistency or ambiguity in Dr. Tabibian's opinions. Petitioner simply speculates that the error "might" have influenced the doctor but does not provide actual evidence of the doctor basing his opinions on this error. The report contains sufficient other information to provide a clear basis for the doctor's opinion.

Because MMI means that the Applicant's medical condition is stable and unlikely to significantly change in the future it is the Applicant's treatment history and his physical exam that determine whether or not he has reached MMI. Whether or not an Applicant has returned to work or not is not at all dispositive of his medical status. Applicants who have never returned to work are frequently at MMI and Applicants who have returned to work are still under treatment and are not MMI.

There is no dispute that the PTP's June 4, 2020 report says both that the Applicant had returned to work and that he had not returned to work (Exhibit 18). However, this error has not been shown to be relevant. For this error to render Dr. Tabibian's medical opinions insubstantial, his opinions must have been actually influenced by the error. Petitioner has not demonstrated that this error was in any way relevant to the opinions expressed by Dr. Tabibian and thus, it does not render his opinions insubstantial.

The failure to address date of injury under LC§5412.

It appears that a dispute over the date of injury is being raised for the first time on Reconsideration. The issue is not found on either the Pre-Trial Conference Statement or in the Minutes of Hearing and Summary of Evidence. No trial brief was provided by the Petitioner.

The Petition for Reconsideration accurately states; "*Labor Code §5412 defines date of injury for occupational diseases or cumulative injuries as the date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.*"

Petitioner states only that Dr. Tabibian should have addressed date of injury under LC§5412 as the medical record may "potentially" speak to earlier dates of injury. That LC§5412 is a "potential" issue does not make it an actual issue. As LC§5412 relates to the statute of limitations for the filing of a claim and there is no further discussion by the Petitioner this WCJ can only speculate as to the relevance of LC§5412 to the issues in this case. Issues must be raised at the time of trial and on not for the first time on Reconsideration.

The review of Applicant's prior medical records.

Petitioner takes issue with the medical record review by PTP Dr. Sam Tabibian contending that because Dr. Tabibian did not directly review each medical record his opinions are not substantial.

Petitioner makes particular note of the exhaustive and meticulous record review done by the PQME Dr. Ishkanian in his November 21, 2019 report (Exhibit EE, FF, and GG). Petitioner states that Dr. Ishkanian was provided with 1656 pages of medical records to review. Dr. Ishkanian's 97 page report provides an excellent record review. This record review very thorough and is essentially a transcription of each relevant medical report. Petitioner is correct that Dr. Ishkanian provided comprehensive and in depth summary of all of the Applicant's relevant medical records. However, Petitioner fails to acknowledge that of those 1656 pages of records sent to Dr. Ishkanian not all of those records were relevant. Dr. Ishkanian himself stated that the preponderance of the 1656 pages of records for the years 2015, 2016, 2017 and 2018 were by medical providers outside the field of musculoskeletal medicine (Page 71, Exhibit GG). Thus, it is not clear how many of the 1656 pages of records were actually relevant to this. PTP Dr. Tabibian would not need to review irrelevant records from 2015, 2016, 2017 and 2018.

Petitioner is correct that Dr. Ishkanian's review of relevant medical records is excellent. PTP Dr. Tabibian reviewed Dr. Ishkanian's November 21, 2019 report with its outstanding record review. It is certainly not unprecedented for doctors rely on another physician's review of medical records rather than directly review a medical record themselves. Simple examples are when

Orthopedists rely on Radiologists to review MRIs or CT scans, Internists rely on Cardiologists to review EKGs, Primary Physicians rely on Secondary Physician's reports, etc.

The purpose of providing a doctor with an Applicant's records of his medical history is so the doctor has a full and accurate understanding of the Applicant's medical history. While Dr. Tabibian may not have directly reviewed each medical record, by reading the 97 page report from Dr. Ishkanian, Dr. Tabibian was well informed and had full and accurate understanding of the Applicant's medical history.

Petitioner offers no examples of any mistakes or deficit's in Dr. Tabibian's understanding of the Applicant's medical history. Dr. Ishkanian's record review was complete and in-depth. Petitioner cites no examples of how Dr. Ishkanian's review was not accurate, or was erroneous or incomplete. Thus, it is not the method by which Dr. Tabibian obtained a clear, complete and accurate understanding of the Applicant's medical history, it only matters that Dr. Tabibian did obtain that knowledge.

Petitioner has merely provided speculation and surmise that Dr. Tabibian's medical report(s) is not substantial medical evidence. Petitioner has failed to show any relevance for the error regarding applicant's work status, or any inconsistency or ambiguity in the doctor's opinions. Petitioner has failed to show any deficiency in Dr. Tabibian's understanding of the Applicant's medical history. Further there is no reasoning given as to why the incomplete reporting of Dr. Ishkanian is more persuasive than the complete opinions of Dr. Tabibian.

Due Process

Petitioner claims a denial of due process when, at the March 18, 2021 Mandatory Settlement Conference (MSC), discovery was closed and the case was set for trial by WCJ Terry Smith over the objection by the Petitioner. Petitioner claims they are entitled to reopen discovery.

Petitioner's inability to complete discovery and
Premature closure of discovery and trial setting

Petitioner may not have completed their discovery however, Petitioner had multiple opportunities to do so but did not avail themselves of those opportunities listed below:

In his March 8, 2020 supplemental report (Exhibit DD) PQME Dr. Ishkanian requested a "job duty report" so that he could finalize his opinions. The Petitioner never provided the requested report and thus, the PQME did not provide a final report.

The Applicant was found to be at MMI with permanent impairment by PTP Dr. Tabibian in his report of June 4, 2020 report (Exhibit 18) at which point Petitioner should have been aware of the need to complete their discovery.

On September 9, 2021 Applicant's Attorney wrote a letter to Petitioner discussing the Dr. Tabibian MMI report. This should have alerted the Petitioner of the need to finish their discovery (Exhibit 4).

On October 2, 2020 Applicant's Attorney sent a job description to the Petitioner (Exhibit AA, proof of service) and followed up on October 9, 2020 with a letter to Petitioner discussing the job description and the need for the Petitioner to send it to the PQME as the doctor had requested (Exhibit 3). Again, this should have prompted action by Petitioner.

On November 17, 2020 Applicant's Attorney wrote another letter to the Petitioner reminding them of the outstanding discovery and that they needed to send the job description to the PQME (Exhibit 2). Again, no action was taken by Petitioner.

On February 9, 2021 Applicant's Attorney wrote another letter to the Petitioner reminding them, yet again, about the job description (Exhibit 1).

It was not premature to close discovery and set the matter for trial. In addition to not performing timely discovery, Petitioner was aware of the potential closure of discovery and did not exercise their legal rights.

The aforementioned February 9, 2021 letter from Applicant's Attorney advised the Petitioner that nothing has been done with the job description and that they would be filing for a hearing/trial (Exhibit 1). Thus, Petitioner was advised of the pending closure of discovery.

On February 10, 2021 Petitioner contacted Applicant's Attorney with a letter advising Defendant would rely on the opinion of PQME Lorenzo Brown in regard to Applicant's hearing loss. There was no mention of any other discovery pending on the case. (Exhibit 7).

On February 18, 2021 Applicant's Attorney filed a Declaration of Readiness to proceed requesting an MSC. Petitioner could have objected to the Declaration of Readiness, but made no objection.

At the March 18, 2021 MSC Petitioner claims to have lodged a "vehement" oral objection to WCJ Smith's order setting the matter for trial over Petitioner's objection. Petitioner had the right to petition for removal but did not.

Petitioner also contends that they should have the right to reopen discovery and obtain a new orthopedic Panel Qualified Medical Examiner. Petitioner claims that through "no fault of their own", it was impossible to obtain a final report from Dr. Ishkanian because he is no longer acts as a PQME.

In the Petition for Reconsideration, Petitioner states that they attempted to schedule a re-evaluation with PQME Ishkanian on February 26, 2021. This was when they learned that Dr. Ishkanian was no longer acting as a PQME and a replacement panel was needed. Petitioner has provided no evidence of any earlier attempt to contact Dr. Ishkanian. Therefore the first attempt to schedule a re-evaluation with Dr. Ishkanian was made after the Declaration of Readiness to Proceed had been filed.

Had Petitioner taken advantage of the multiple opportunities complete their discovery, they would have obtained the final report from Dr. Ishkanian or in the alternative, and they would have

learned that Dr. Ishkanian was no longer a PQME and that a replacement panel was needed. They would have had the opportunity to request a replacement PQME well in advance of the filing of the Declaration of Readiness. When Petitioner claims that discovery was not completed through "no fault of their own" they are failing to take responsibility for the continued inaction in regard to discovery.

It is clear that Petitioner had multiple opportunities to complete their discovery and were even reminded to do so by their opponent. Their delay in discovery efforts resulted in the inability to complete discovery. Had they acted in a timely manner they would have either completed discovery or would have had a basis to request additional time. In addition, Petitioner did not avail themselves of the right to lodge an objection to the Declaration of Readiness or appeal the March 18, 2021 ruling. Petitioner most certainly has due process rights, they failed to exercise those rights. Therefore there was no denial of due process.

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

MARTHA GAINES
Workers' Compensation Judge

Date: 8/25/2021

OPINION ON DECISION

CLOSURE OF DISCOVERY

It was proper to close discovery at the time of the Mandatory Settlement Conference (MSC) on March 18, 2021 and set the matter for trial. Defendant is not entitled to reopen discovery after the MSC and obtain a new Panel Qualified Medical Examiner (PQME) to replace PQME Dr. Jacob (Hagop) M. Ishkanian.

Defendant contends that further discovery should be permitted because in Dr. Iskanian's first report of November 21, 2019 (Exhibits EE, FF, and GG) he did not find the Applicant to be at Maximum Medical Improvement (MMI). Applicant had had back surgery in October 2019 and Dr. Ishkanian recommended that the Applicant should be re-evaluated in one to two years.

Subsequently, Defendant provided additional records to Dr. Ishkanian and asked him to re-address causation as to the Applicant's back. The doctor provided a March 8, 2020 supplemental report (Exhibit DD) discussing the back and he found it necessary to defer his opinion regarding causation and asked to review an "employer's job report". Although the additional information was provided to the doctor and he issued this supplemental report, the Defendant did not request or schedule re-evaluation for the Applicant.

In a June 4, 2020 report (Exhibit 18), the Primary Treating Physician (PTP) Dr. Sam Tabibian found the Applicant to be at MMI. Despite this MMI finding by the PTP did not request or reschedule and evaluation of the Applicant with Dr. Ishkanian.

In a June 4, 2020 report (Exhibit 18), the Primary Treating Physician (PTP) Dr. Sam Tabibian found the Applicant to be at MMI. Despite this MMI finding by the PTP did not request or reschedule and evaluation of the Applicant with Dr. Ishkanian.

Approximately 7 ½ months later, on February 18, 2021 Applicant filed a Declaration of Readiness to Proceed (DOR). The Defendant did not object to the DOR.

Per the Defendant's trial brief (May 5, 2021), on February 26, 2021 the Defendant attempted to obtain a re-evaluation with Dr. Ishkanian at which time Defendant discovered that Dr. Ishkanian was no longer a PQME and would not be able to re-evaluate the Applicant. This attempt to schedule the re-evaluation took place after the DOR had been filed.

Defendant was not diligent in their discovery efforts and it was proper to terminate discovery at the mandatory settlement conference and to set the matter for trial. Defendant did not attempt to have Dr. Ishkanian re-examine the Applicant when the primary treating physician found the Applicant to be at MMI, an attempt was only made after a DOR had been filed. In addition, the Defendant did not object to the DOR.

INJURY AOE/COE

Based on the unrebutted findings of PTP Dr. Sam Tabibian (Exhibits 18, 19, 20, 21 & 22) and the reports of PQME Dr. Lorenzo Brown (Exhibits BB & CC) the Applicant sustained injury to his

lumbar spine, cervical spine, left hip, right knee, and hearing loss, arising out of and in the course of said employment during the period January 1, 2015 to and including August 11, 2018.

Defendant claims that the opinions of Dr. Tabibian are not substantial medical evidence because his conclusions in the June 04, 2020 report (Exhibit 18) were based on a false history. Specifically, Defendant argues that Dr. Tabibian gave the history that Applicant had returned to work when in fact he had not.

In this report the doctor reports both that "The patient states that he is currently not working and last worked in January 2019 and has held no subsequent employment" (page 3) and also "As of today's evaluation, the patient reports that he has been able to return back to work at full duties, self-modifying as necessary" And that his current position is not arduous" and that "he should be allowed to continue to work in this capacity, self-modifying as needed"(page 24).

Applicant testified at trial that he did not tell Dr. Tabibian that he had returned to work and that if the doctor stated so that this was an error.

There is inconsistency in this report in regard to Applicant's subsequent employment however, it does not render the doctor's opinions insubstantial. Nowhere does Dr. Tabibian state that Applicant's subsequent work history was considered when the doctor formed his opinions about industrial causation, temporary disability, permanent disability or apportionment. The Dr.'s opinions about causation and temporary disability are based on his physical examination of the Applicant and his medical history and work history during the continuous trauma period. Permanent disability is based on physical examinations, diagnostic testing and on the AMA Guides. Therefore, while there is inconsistency in the report regarding the Applicant's subsequent work history it is not relevant to the doctor's opinions because it was not a factor in the formation of those opinions.

Defendant also claims that the court cannot rely on the opinions of Dr. Tabibian because he did not review the Applicant's complete medical history and that only PQME Ishkanian had reviewed a complete history.

However, in the June 4, 2020 report (Exhibit 18), Dr. Tabibian provides a lengthy discussion regarding Applicant's medical history, he lists the numerous records that he reviewed, and provides a detailed review of the November 21, 2019 report (Exhibits EE, FF, GG) from Dr. Ishkanian. In his 97 page report, Dr. Ishkanian provides an exhaustive and meticulous summary of all of the documents that comprise Applicant's medical history. Having reviewed Dr. Ishkanian's report, Dr. Tabibian was sufficiently informed about the Applicant's complete medical history and Dr. Tabibian's opinions are therefore substantial medical evidence.

TEMPORARY DISABILITY & EMPLOYMENT DEVELOPMENT DEPARTMENT LIEN

Based on the unrebutted reporting of PTP Dr. Sam Tabibian the Applicant is entitled to temporary disability starting on February 11, 2019 and ending on June 3, 2020. The starting date is based on the February 11, 2019 medical report (Exhibit 22) from Dr. Sam Tabibian which is the first report finding Applicant to be temporarily disabled. The ending date is based on the June 4, 2020 final report from Dr. Tabibian (Exhibit 18) where he finds Applicant to be at Maximum Medical Improvement (MMI).

PERMANENT AND STATIONARY DATE

The Permanent and Stationary Date (Maximum Medical Improvement) June 4, 2020 based on the unrebutted report from Dr. Sam Tabibian (Exhibit 18).

APPORTIONMENT

The apportionment provided by Dr. Tabibian is both legal and logical and therefore it is found that 20% of Applicant's orthopedic permanent disability for the cervical spine, lumbar spine, left hip, and right knee is apportioned to non-industrial factors.

PERMANENT DISABILITY

The permanent disability findings of Doctor Sam Tabibian (Exhibit 18) and Doctor Lorenzo Brown (Exhibits BB & CC) are unrebutted. The parties stipulated that the following consultative ratings from the Disability Evaluation Unit represent the accurate ratings of the reports of Doctors Tabibian and Brown.

Dr. Lorenzo Brown * QME * 8/6/20, 12/30/20 *
Ear Hearing Impairment 3 WP
11.01.01.00 - 3 - [1.4]4 - 380G - 5 - 7 PD

Dr. Behnam Sam Tabibian * TX * 6/4/20 *
Cervical DRE III 18 WP
80% [15.01.01.00 - 18 - [1.4]25 - 380H - 30 - 38] 30 PD
Lumbar DRE III 13 WP
80% [15.03.01.00 - 13 - [1.4]18 - 380H - 22 - 29] 23 PD
Left Hip DBE Hip/Replacement (Fair Result) 20 WP
80% [17.03.10.01 - 20 - [1.4]28 - 380I - 36 - 45] 36 PD
Right Knee DBE Partial Replacement (Fair Result) 20 WP
80% [17.05.10.08 - 20 - [1.4]28 - 380I - 36 - 45] 36 PD

36 C 36 C 30 C 23 C 7 = 80% Final PD

The injury caused permanent disability of 80% equal to 593.25 weeks of indemnity payable at the rate of $290 per week in the total sum of $172,042.50 and a life pension payable at $154.61 per week thereafter, less credits for sums previously paid, reimbursement to EDD at the permanent disability rate for benefits paid June 4, 2020 and after, and less reasonable attorney fees awarded herein.

NEED FOR FUTURE MEDICAL CARE

Based on the opinion of Dr. Tabibian (Exhibit 18) and Dr. Brown (Exhibits BB & CC) Applicant is entitled to future medical care for the injuries listed above.

ATTORNEY FEES

A reasonable attorney fee of $25,806.37 is awarded from the permanent disability awarded herein, which shall be commuted from the far end of the permanent disability award. In addition, a 15% attorney fee is awarded from applicant's life pension and the parties are to obtain a commutation calculation for the attorney fees awarded herein with jurisdiction reserved to the WCAB in the event of a dispute.

MARTHA GAINES
Workers' Compensation Judge

Dated: July 21, 2021