WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

KRISTEN SAHLI, *Applicant*

vs.

NORDSTROM, Permissibly Self-Insured, *Defendants*

Adjudication Numbers: ADJ13666588; ADJ15209241
Van Nuys 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(es). (*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/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 27, 2023

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

KRISTEN SAHLI
WILLIAM J.TOPPI, ESQ.
LAW OFFICE OF JENNIFER DRUMMOND

AS/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

1.	Minutes of Hearing	January 31, 2023
2.	Findings and Order	May 18, 2023
2.	Identity of Petitioner	Defendant
3.	Verification	Yes
4.	Timeliness	Petition is timely
5.	Petition for Reconsideration	June 12, 2023
6.	Proof of Service	Yes

PROCEDURAL HISTORY

Applicant, a now 45-year-old female, claims to have sustained a cumulative trauma injury to her lumbar spine and lower extremities during her employment for Nordstrom Stores during the period October 21, 20212 to June 20, 2019. She also claims a specific injury to the same body parts occurring on November 27, 2017. On February 26, 2020 the applicant underwent lumbar spinal fusion of the L3, L4, L5 and had 2 spinal rods implanted.

Applicant filed the cumulative trauma injury claim on September 30, 2020. The parties utilized the services of a Panel Qualified Medical Evaluator (PQME), Dr. Arash Aminian. PQME. Dr. Aminian examined the applicant on March 31, 2021. (Joint Ex. 1, pg. 1) Initially, PQME Dr. Aminian found industrial cumulative trauma injury to her lumbar spine. (Joint Ex. 1, pg. 17). On September 14, 2021, PQME Aminian was deposed and changed his opinion entirely regarding causation. (Joint Ex. 3)

On September 24, 2021, Applicant filed a subsequent claim for a November 27, 2017 specific injury. The parties utilized the services of a Panel Qualified Medical Evaluator (PQME), Dr. Stephen Suzuki, M.D. Dr. Suzuki examined the applicant on February 26, 2022 based upon the newly filed application for adjudication for the specific injury. PQME Dr. Suzuki initially found industrial specific injury to her lumbar spine. (App. Ex. 1, pg. 9) On July 6, 2022, PQME Suzuki issued another report finding no industrial specific injury but left open the possibility of an industrial cumulative trauma injury (App. Ex. 2, pg 28). Dr. Suzuki was deposed on July 11, 2022 where he stated that the period of employment at Nordstrom during the cumulative trauma period resulted in at least 1% industrial apportionment of the lumbar spine injury. (App. Ex. 3 pg. 38 ll. 1-4; pg.40 ll. 19-25; pg. 41 ll. 1-6; pg. 45 11. 1-5)

On January 31, 2023, the Parties appeared before the undersigned on the issues of (1) AOE/COE and (2) whether reporting of Dr. Suzuki is admissible or was improperly obtained. The other issues raised at trial were not the subject of Defendant's petition and therefore reconsideration is waived as to any other issues. The undersigned issued Findings and Orders and an Opinion on Decision on May 18, 2023, finding in favor of the Applicant on the issue of AOE/COE as the cumulative injury claim to the lumbar spine, finding against the Applicant on the issue of AOE/COE as to the cumulative injury to the lower extremities, finding against the Applicant as to any specific injury, and against Defendant on its claim that PQME Suzuki

was inadmissible and improperly obtained. Thereafter, Defendants filed the instant Petition for Reconsideration on June 12, 2023.

Defendant's Petition for Reconsideration is based on the following grounds:

1. That by the Order, Decision and Award made and filed by the WCJ, he acted without or in excess of his powers;
2. The evidence does not justify the findings of fact; and
3. The findings of fact do not support the order, decision, or award.

Essentially, Defendant petitioner argues that (1) the reporting of PQME, Dr. Suzuki, should be stricken because it was obtained as a result of impermissible doctor shopping, and (2) the findings of fact do not lead to a finding of industrial injury since the initial PQME, Dr. Aminian, opined that applicant's injuries were non-industrial and Dr. Suzuki's reporting should be stricken from the record.

III.
DISCUSSION

A.
The Reporting of Dr. Suzuki Should Not Be Stricken As the Panel Was Not Impermissibly Obtained

Defendants claim that the undersigned WCJ erred in determining that Applicant was entitled to a second Panel based on a subsequently filed application and DWC-1 form. However, "if the parties use a QME for one claim, and the applicant files new claims with overlapping body parts, neither party is compelled to use the same QME." (*Sullivan On Comp*, SOC §14.52).

In the instant case, applicant has an injury, files a claim, and gets a QME. Later, a new claim was filed, and the parties dispute whether the same QME must be used again. This issue has been decided by the appeals board *en banc* in *Navarro v. City of Montebello*. (*Navarro v. City of Montebello* (2014) 79 CCC 328 (appeals board en banc)). Even before Navarro, the appeals board regularly ignored CCR 35.5(e) and allowed the parties, applicants in particular, to obtain new evaluators for different injuries. (See *Gormley v. Sacramento Metropolitan Fire District*, 2010 Cal. Wrk. Comp. P.D. LEXIS 359; *Denys-Peck v. Sonora Surgery Center*, 2011 Cal. Wrk. Comp. P.D. LEXIS 315; *Franco v. Clougherty Packing, LLC dba Farmer John*, 2011 Cal. Wrk. Comp. P.D. LEXIS 317; *Awadallah v. Lahlouh, Inc.*, 2012 Cal. Wrk. Comp.

P.D. LEXIS 110; *Garcia v. San Mateo Medical Center, County of San Mateo*, 2012 Cal. Wrk. Comp. P.D. LEXIS 468; *Perry v. City and County of San Francisco, San Francisco Municipal Transport Agency*, 2013 Cal. Wrk. Comp. P.D. LEXIS 226; P*ham v. Hawaiian Garden Casino*, 2012 Cal. Wrk. Comp. P.D. LEXIS 39; *Orellana v. Ameripride Services, Inc.*, 2013 Cal. Wrk. Comp. P.D. LEXIS 569.)

In Navarro, the appeals board held that: (1) the Labor Code does not require an employee to return to the same panel QME for an evaluation of a subsequent claim of injury; and (2) the requirement in CCR 35.5 that an employee return to the same evaluator when a new injury or illness is claimed involving the same parties and the same type of body parts is inconsistent with the Labor Code and therefore invalid. (*Navarro* at 420).

In Navarro, the applicant had been evaluated by a panel QME while represented by an attorney for a CT injury. Subsequently, he reported two specific injuries. The appeals board found that even though his three claimed injuries involved the same body parts and the same parties, his two specific injuries were reported after the original evaluation. So the applicant was entitled to be evaluated by a new evaluator for his two subsequent injuries. Likewise, in the instant case, applicant had been evaluated by panel QME Dr. Aminian while represented by an attorney for a CT injury. Subsequently, she reported a specific injury. Therefore, as in *Navarro*, the applicant is entitled to be evaluated by a new evaluator for her subsequent injury.

Defendant's claim that applicant in this case is not entitled to be evaluated by a new panel QME, even though they concede that the DWC-1 claim form was filed after the initial evaluation, also fails. In *Navarro,* the appeals board held that the filing of a claim form determines whether a new QME may be obtained. Navarro explained, "Under section 5401, an employer must provide a claim form and an injured worker must file a claim form with an employer. Hence, the reported date under sections 4062.3(j) and 4064(a) must be the filing date as defined by section 5401 because only section 5401 refers to filing a claim form." It added, "Because the date the claim form is filed with employer is the operative act, the date of filing of the claim form determines which evaluator must consider which injury claim(s). This is significant in that the date a claim of injury is reported is often not the same as the date that an injury is claimed to have occurred. Consequently, it is foreseeable that a claim might be reported after an original evaluation but be for a claim of injury on a date before the original

evaluation, and even in those circumstances, the result would be that the date the claim is reported is still the operative date." (*Navarro* at 423-424).

Defendant impugns the motive of counsel for Applicant by accusing that counsel for Applicant engaged in impermissible "doctor-shopping." The appeals board recognized that in a particular case, it might be beneficial to one side to seek a new evaluator and a subsequent claim of injury could be filed by an employee or an employer with the goal of "doctor-shopping." But because the provisions of the Labor Code apply equally to both employees and employers, it did not believe that either side gained an overall advantage. (*Navarro* at 428). It would be impossible here for counsel for Defendant to know what Applicant's counsel was thinking and the undersigned agrees with the board's holding in *Navarro.*

B.

The Findings of Fact Lead to a Finding of Industrial Injury

It has been well established under California workers' compensation law that an award for benefits must be supported by substantial evidence. (*LeVesque v. WCAB* (1970) 35 CCC 16). Labor Code section 5952(d) requires an award of the appeals board to be "supported by substantial evidence." Furthermore, Labor Code section 5953 provides in part: "The findings and conclusions of the appeals board on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the appeals board." Together, LC 5952 and LC 5953 have been interpreted as establishing that "[t]he findings and conclusions of the appeals board on questions of fact are conclusive and final" as long as, "based upon the entire record," they are "supported by substantial evidence." (*LeVesque* at 25 fn. 19) So if the appeals board's findings are supported by inferences that may fairly be drawn from evidence even though the evidence is susceptible to opposing inferences, the reviewing court will not disturb the award. (*Crown Appliance v. WCAB* (Wong) (2004) 69 CCC 55 (writ denied)).

The test of substantiality is measured on the basis of the entire record. The appeals board may not isolate a fragment of a doctor's report or testimony and disregard other portions that contradict or nullify it; it must give fair consideration to all of the doctor's findings. (*Gaytan v. WCAB* (2003) 68 CCC 693, 706). In evaluating the evidentiary value of medical evidence, the physician's report and testimony must be considered as a whole, not

segregated parts. So the entire report and testimony must demonstrate that the physician's opinion is based on reasonable medical probability. (Bracken v. WCAB (1989) 54 CCC 349, 355).

In the instant case, the undersigned WCJ carefully and judiciously evaluated the testimony of the applicant, all of the medical reports admitted into evidence, the deposition testimony of the various PQMEs, and the thoughtful briefing on the issues filed by counsel for both parties. The undersigned WCJ did not isolate any fragment of a doctor's report nor testimony and did not disregard other portions that contradict or nullify it; indeed, the undersigned gave fair consideration to all of the doctor's findings. In this case, those findings are in favor of the applicant.

IV.
RECOMMENDATION

For the reasons stated above, it is respectfully requested that applicant's Petition for Reconsideration be denied.

DATE: **June 26, 2023**

HON. TROY SLATEN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE