WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARTHA ORTEGA, ***Applicant***

vs.

GIB 10, INC. dba JIM'S BURGERS; STAR INSURANCE COMPANY and BENCHMARK INSURANCE COMPANY are administered by ILLINOIS MIDWEST AGENCY, LLC, ***Defendants***

Adjudication Number: ADJ8827235
Los Angeles 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 except as to applicant's personal identifying information, we will deny reconsideration.

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 WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 11, 2022

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

BRADFORD & BARTHEL
LAUGHLIN FALBO LEVY MORESI
MARTHA ORTEGA
YOUNESSI LAW

AH/oo

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

The Applicant, aged [] at injury, was employed by GIB 10 INC. dba JIM'S BURGERS, as a DISHWASHER/CLEANER during the period 3-17-09 to 3-17-10 when she sustained injury to her lumbar spine, right knee, left knee, psyche and internal system leading to gastrointestinal reflux disorder, hypertension and diabetes admitted prior to trial, and sustained injury to her cervical spine, the subject of the instant case.

The Petitioner is Defendant BENCHMARK INSURANCE COMPANY for ILLINOIS MIDWEST INSURANCE COMPANY who timely filed the Verified Petition for Reconsideration on 5-23-22, the 25th day after the Findings and Award issued on 4-28-22. As of this date, no Answer has been filed.

The current record follows a vacated submission to develop the record. The undersigned found the original record deficient in that the opinions of QME Dr. Lee Silver and PTP Dr. Mark Spoonamore were not substantial evidence regarding causation and apportionment. The parties were ordered to return to both doctors for supplemental reports and cross-examinations at their discretion, they did so, filed further exhibits, and the matter was resubmitted. The present Petition was filed regarding the Findings and Award issued after resubmission.

The Petitioner's Contentions are:

1. The WCJ erred in finding the reports of Dr. Spoonamore were not substantial medical evidence regarding causation of injury of the cervical spine, and

2. The WCJ erred in finding Dr. Silver's reports were not substantial medical evidence regarding causation of the injury to the cervical spine.

II.

FACTS

Two cases were set for trial. ADJ7507465 was dismissed at the outset of trial on the request of the parties as duplicative. The Petition cites a third case filed by the applicant which is not part of the record and was not raised at trial. It will not be considered herein. The applicant did not testify at trial, defendants offered no witnesses.

The central issue before the undersigned was whether there was an industrial injury to the cervical spine, and if so, was there permanent disability and apportionment.

QME Lee Silver deferred the final determination of causation of the cervical spine to the trier of fact, Ex. J Report of Dr. Silver 2-16-17 p.7.

The applicant's last day of work was 3-17-10. Injury to the cervical spine was denied, while several other parts of the body were admitted. The applicant treated with several orthopedic doctors who examined her cervical spine before she nominated Mark Spoonamore, M.D. her primary treating physician. Lee Silver, M.D. acted as the PQME. The applicant had anterior cervical discectomy and fusion 1-20-2015.

III.

DISCUSSION

1. The Petition Is Properly Filed as a Petition for Reconsideration.

A Petition for reconsideration may only be taken from a final order, decision or award, Labor Code Sections 5900(a), 5902 and 5903. A final order is one that "determines any substantive right or liability of those involved in the case", *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 45 Cal.Comp.Cases 410; *Hansen v. Workers' Comp. Appeals Bd.*(1988) 53 Cal.Comp.Cases 193 (Writ Den.): *Jablonski v. Workers' Comp. Appeals Bd.* (1987) 52 Cal.Comp.Cases 399 (Writ Den.). Accordingly, the instant Petition which focuses on the final adjudication of AOE/COE regarding one part of the body, together with the determination of the extent of permanent disability and future medical care must be considered a final order suitable for reconsideration.

2. Petitioner Contends the WCJ Erred in Finding Dr. Silver's Reports were not Substantial Evidence and Persuasive over the Reports of Dr. Spoonamore

A decision must be supported by substantial evidence.

> **"**In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 413, 416–417, 419, 33 Cal. Comp. Cases 660.) Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Hegglin v. Workmen's Comp. App. Bd.* (1971) 4 Cal.3d 162, 169, 36 Cal. Comp. Cases 93.) Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Granado v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 399, 407, 33 Cal. Comp. Cases 647.)"
>
> *E. L. Yeager Constr. v. Workers' Compensation Appeals Bd.*, 71 Cal. Comp. Cases 1687, 1691 (2006).

Upon very close scrutiny of the complex and voluminous complete medical record submitted before and after development of the record, with the trial briefs submitted, the undersigned found the reports of Dr. Mark Spoonamore, read with his deposition transcript, are the better reasoned and more persuasive.

The reports of PTP Dr. Spoonamore and QME Dr. Silver are widely divergent. The undersigned made a detailed and careful review of the 13 reports by Dr. Silver comprised of 10 record reviews, 3 examination reports and a cross-examination transcript. It appears Dr. Silver based his initial opinion on the clinical findings of his first examination, which was all he was given, but did not later adequately or persuasively explain why he did not consider any of the large body of contradictory evidence subsequently received to be material.

Dr. Silver examined the applicant for the first time in October of 2011, finding no industrial injury. The applicant at that time reported constant pain in the cervical spine since 2010 and currently Dr. Silver found diffuse tenderness but no spasm, guarding or asymmetric loss of range of motion. Estimated normal ranges of motion are not reported. He reviewed records reporting neck spasm on 6-2-10, cervical neuropathy on 7-13-10 and a Claim Form including the neck dated 8-13-10. The report in 18 pages includes only one sentence discussing causation regarding the cervical spine, noting that he did not detect consistent findings of any industrially caused derangement involving the neck, without further comment. He does not comment on the history of neck pain and treatment or current complaints of constant neck pain. He offers no cervical spine diagnosis. Exhibit A, 10-10-11 Report of Dr. Silver.

The re-examination of 2014 again includes no estimated normal for cervical spine range of motion, but finds no spasm or other findings. When Dr. Silver is finally served with the reports of the other 6 doctors who previously examined the applicant with different clinical findings, and the cervical MRI's, he notes that his clinical findings are inconsistent with the MRI so he determines the MRI findings are not clinically significant. Ex. G, 3-27-14, Dr. Silver p.2.

The QME makes no effort to explain the inconsistencies in clinical findings between his exams and all the others. For example, PQME Silver in the original record finds full "grade V" strength on manual muscle testing and "near complete jamar grip loss with global numbness in all four extremities" on 10-10-11, Ex. A. Dr. Silver. He does not discuss the ramifications of these findings in general or any significance this may have for the cervical spine. Dr. Silver again notes the applicant complained of constant neck pain at his second exam in his 7-11-14 report but did not find this merited any discussion or a diagnosis. Ultimately he defers to the trier of fact in his report of 8-14-17, Ex. K 8-14-17, Dr. Silver p.4-5.

The PQME did not order any further testing to the cervical spine or do a detailed examination of the cervical spine in the three times he examined the applicant in 2011, 2014 and 2017. The PQME did not offer any explanation for the complaints of pain or the findings by other doctors of injury to the cervical spine, or mention the deterioration shown in the repeated MRI results over time. The QME does not adequately or persuasively explain why he considers the MRI's are not significant. The QME does not rebut the findings or reasoning of Dr. Spoonamore finding industrial injury to the cervical spine. Dr. Silver offers no arguments, facts, medical records or evidence to explain the pre-surgery condition of the applicant's cervical spine and the constant pain at that time.

The parties repeatedly attempted to clarify the situation in 10 supplemental reports and a cross-examination without success. It is found that Dr. Silver's determinations are not supported by

persuasive and credible medical reasoning, or a complete and accurate medical record and history, and is therefore not substantial evidence.

3. Petitioner's Contention that the WCJ Erred in Finding the Reports of Dr. Spoonamore Substantial Evidence.

Dr. Spoonamore makes a credible and persuasive case for cervical spine injury during the course of the continuous trauma period with the more complete and accurate medical record, and a well-reasoned causation determination based on the applicant's accurate history of the strenuous duties of employment over time. Taken together, his reports and the cross-examination transcript are the better reasoned opinions and substantial evidence.

Dr. Spoonamore as the primary treating physician was in a position to repeatedly confirm his own clinical findings supporting injury. He also considered the more complete medical record in his decision, reviewing all the MRI's. In addition, PTP Dr. Spoonamore considered the following findings from treaters in the years immediately after the applicant stopped working, and before surgery: the findings of cervical spine sprain and strain confirmed by Chiropractor John Caamano in medicals reports dated 8-13-10, 9-8-10, 10-20-10 and 11-29-10, a diagnosis of neck pain with radicular symptoms by Dr. Hooman Rastegar, 12-23-10, a diagnosis of cervical musculoligamentus strain and sprain with radiculitis by Dr. Gabriel Rubanenko who examined the applicant then ordered physical therapy to the neck in a report of 9-19-12, with similar findings in reports of 10-31-12 and 12-21-12, a finding of injury to the cervical spine by Chiropractors Carissa Hand and Maciej Majzel, and finally continuous radiating pain in the neck due to cumulative trauma by Dr. Ali Sabbaghi who found the need for epidural steroid injections to the cervical spine, Ex. 5, 8-20-21 Report of Dr. Spoonamore. The PQME does eventually note receipt and review of these reports over time, but does not offer any comment on their significance or explain his diagnosis in the face of these contradictory reports.

Dr. Spoonamore also considered the applicant's job duties in detail. The [] female, aged [] at the end of employment, gave physicians an unrebutted and consistent history of working for seven years, six days a week, lifting and carrying up to 50 pounds, washing dishes, stocking merchandise, cleaning the kitchen and restrooms of a restaurant, washing walls, sweeping the parking lot and emptying the trash, Ex. 3 Dr. Spoonamore 8-13-17, Ex. 5 Dr. Spoonamore 8-20-21. In his reports and at his cross-examination, the doctor credibly found industrial causation based on that record of the job duties, and the nature and extent of injury based on the complete and accurate medical record. Dr. Spoonamore notes the basic job duties, but again does not discuss what impact those duties may have had on the applicant.

Based on the entire complex record, the undersigned found the opinions of Dr. Spoonamore are substantial evidence, with the more complete, persuasive, and better reasoned reports.

IV.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Dated: June 2, 2022

Jerilyn Cohen
WORKERS' COMPENSATION JUDGE