

9/6

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

SANDRA HERNANDEZ,
Applicant,
vs.
INN OF SPANISH GARDENS; ARCH
INSURANCE COMPANY, Administered By
LWP CLAIMS,
Defendants.

Case No. ADJ9072448
(Oxnard District Office)

OPINION AND DECISION
AFTER RECONSIDERATION

We previously granted the Petition for Reconsideration (Petition) filed by defendant to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration. Defendant sought reconsideration of the May 26, 2015 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a housekeeper from March 16, 2013 through April 15, 2013, sustained industrial injury to her left hand, left arm, left shoulder, and neck. The WCJ also found that applicant was entitled to temporary disability indemnity benefits for the period from April 13, 2013 and continuing.

Defendant contended that the WCJ erred in finding that applicant's injury was industrially caused. Defendant also contended that the WCJ erred in finding that applicant was entitled to temporary disability indemnity benefits for the period from April 13, 2013 and continuing.

We have reviewed applicant's Answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition for Reconsideration (Petition) be denied.

We have considered the Petition, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the WCJ's F&A and return this matter to the trial level for further proceedings and a new decision by the WCJ.

///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

FACTS

Applicant claimed that, while employed by defendant as a housekeeper from March 16, 2013 through April 15, 2013, she sustained an industrial injury to her left hand, left arm, left shoulder, and neck.

A. Medical Reporting

On June 26, 2013, applicant was evaluated by Stuart Hutchinson, M.D. (Orthopedic Consult Report, Applicant's Exhibit 5.) Dr. Hutchinson reviewed medical records and ordered an MRI study of applicant's cervical spine. (App. Exh. 5, p. 3.) After examining applicant, Dr. Hutchinson diagnosed her with cervicalgia, cervical disc displacement without myelopathy, and carpal tunnel syndrome. (*Ibid.*)

Next, applicant was evaluated at the offices of her primary treating physician, Richard D. Scheinberg, M.D., on August 26, 2013. (Primary Treating Physician Reports, Applicant's Exhibit 2, pp. 1-5.) Dr. Scheinberg was absent at this appointment, however, and applicant was instead seen on a walk-in basis by Mark Ashtiani, P.A.-C. (App. Exh. 2, p. 5.) Mr. Ashtiani confirmed that applicant's case was discussed in detail with Dr. Scheinberg before the report was composed, and that Dr. Scheinberg had provided the treatment plan and disability status. (*Ibid.*) Because applicant was seen on a walk-in basis, Mr. Ashtiani reviewed "minimal" records and no diagnostic studies. (*Id.* at pp. 3-4.) Based on applicant's history, however, the report indicates that applicant had "impingement/rotator cuff pathology, left shoulder, and upper extremity compression neuropathy" and that applicant was temporarily totally disabled "until further notice and further discussion." (*Id.* at p. 5.) The August 26, 2013 report does not appear to include a signature by either Dr. Scheinberg or Mr. Ashtiani.

Applicant next visited Dr. Scheinberg on September 17, 2013. (App. Exh. 2, pp. 6-7.) The September 17, 2013 report does not include a section on review of medical records and discusses an MRI study of applicant's cervical spine from July 24, 2013. (*Id.* at p. 6.) Dr. Scheinberg opined that applicant's "principal problem is her left shoulder and her upper extremities, not her cervical spine. She should be considered temporarily partially disabled avoiding repetitive at-or-above shoulder-level activities with her left upper extremity or forceful gripping or grasping with her left hand." (*Id.* at p. 7.) The September 17, 2013 report does not appear to include a signature by Dr. Scheinberg.

1 On October 14, 2013, applicant again visited Dr. Scheinberg. (App. Exh. 2, pp. 8-12.) Once
2 again, it appears that Dr. Scheinberg did not review any medical records or studies, and the October 14,
3 2013 report does not appear to include a signature by either Dr. Scheinberg or Mr. Ashtiani.

4 A month later, on November 14, 2013, applicant again visited Dr. Scheinberg. (App. Exh. 2, pp.
5 13-17.) Once again, it appears that Dr. Scheinberg did not review any medical records or studies, and the
6 November 14, 2013 report does not appear to include a signature by either Dr. Scheinberg or Mr.
7 Ashtiani.

8 Dr. Scheinberg issued a supplemental report on December 2, 2013. (App. Exh. 2, pp. 18-19.)
9 Noting that applicant's case had been denied on the issue of industrial causation, Dr. Scheinberg opined,

10 It is likely that [applicant] did have an underlying propensity to develop overuse,
11 such as left shoulder impingement or carpal tunnel syndrome. However, the
12 work for 6 weeks as a housekeeper at the Inn at the Spanish Garden, where she
13 was expected to clean rooms, vacuum, scrub, carry linens, make beds, prepare
14 rooms for beds, preparing as many as 11 rooms per day, 5 to 6 days per week, is
15 certainly sufficient to create [sic] a cumulative trauma to the upper extremities
16 resulting in these symptoms. Clearly she was diagnosed with left upper
17 extremity overuse [...] and the exposure at the Inn at the Spanish Garden is
18 sufficient to have created those symptoms. Six weeks of work under those
19 circumstances is certainly conducive to a cumulative trauma. (*Ibid.*)

20 The December 2, 2013 report does appear to contain an electronic signature by Dr. Scheinberg. (*Id.* at p.
21 19.)

22 On February 25, 2014, applicant was evaluated by Charles Schwarz, M.D., the Panel Qualified
23 Medical Evaluator (PQME) in orthopedics. (February 25, 2014 PQME Report, Defendant's Exhibit C.)
24 Dr. Schwarz examined applicant and reviewed extensive medical records. (Def. Exh. C, pp. 2-12.)
25 Based on this, he diagnosed applicant with cervical spine musculoligamentous sprain, carpal tunnel
26 syndrome in the left wrist, medial epicondylitis in the left elbow, biceps tendinitis in the left shoulder,
27 and left foot sprain. (*Id.* at pp. 12-13.) Dr. Schwarz also concluded that applicant "sustained an injury to
the cervical spine and left upper extremity as a result of her employment on a continuous trauma basis"
and that "the conditions for the cervical spine and left upper extremity are consistent with the industrial
injury." (*Id.* at p. 13.)

On May 13, 2014, applicant visited Dr. Scheinberg's office. (App. Exh. 2, pp. 25-26.)

1 Dr. Scheinberg reviewed applicant's left shoulder MRI study, and stated that the MRI indicated that
2 applicant had "high-grade partial undersurface tear, supraspinatus, as well as mild supraspinatus
3 myotendinous strain with moderate downsloping of the acromion [as well as] left greater than right
4 carpal tunnel syndrome." (*Id.* at p. 25.) Dr. Scheinberg diagnosed applicant with a left shoulder rotator
5 cuff tear and left upper extremity carpal tunnel syndrome and recommended that applicant undergo left
6 shoulder arthroscopic subacromial decompression and rotator cuff repair. (*Id.* at p. 26.)

7 On May 22, 2014, Dr. Schwarz issued a supplemental report, in which he reviewed additional
8 medical records. (May 22, 2014 Supplemental Report, Defendant's Exhibit B, p. 1.) Dr. Schwarz
9 reiterated his previous diagnoses – cervical spine musculoligamentous sprain, carpal tunnel syndrome in
10 the left wrist, medial epicondylitis in the left elbow, biceps tendinitis in the left shoulder, and left foot
11 sprain – as well as his opinions on industrial causation. (Def. Exh. B, p. 3.)

12 On October 18, 2014, Dr. Schwarz issued a second supplemental report, in which he reviewed
13 applicant's job description, applicant's deposition, his own deposition, applicant's employment records,
14 employee statements, and sub rosa videos. (October 18, 2014 Supplemental Report, Defendant's Exhibit
15 A, pp. 1-4.) Although he reiterated his previous diagnoses, Dr. Schwarz reversed his opinion on
16 industrial causation, finding that applicant's injury was unrelated to her employment with defendant.
17 (Def. Exh. A, pp. 5-6.) Dr. Schwarz stated:

18 I have now had the opportunity to review additional information as noted
19 above. It is noted that this patient worked for a period of approximately 6 weeks
20 for the Inn of the Spanish Gardens. The weight statements also indicated that she
21 worked between 3-6 hours per day. The job description [was] reviewed and
22 indicates that she performed occasional use of the upper extremities and that she
23 carried and lifted up to 10 pounds.

24 It is also noted in the statements from coworkers that in her first few days of
25 employment she had complaints of tingling in her arms, it was also noted that
26 one coworker had previously observed her wearing braces on her arms prior to
27 her employment with inn of the Spanish Gardens.

28 The surveillance videos show the application performing normal activities of
29 daily living including driving. She is also observed to perform extensive use of
30 the left upper extremity. In particular, she performs reaching activities and above
31 the shoulder level, which would be inconsistent with her complaints of pain or
32 injury for the left upper extremity.

33 Based upon the above-noted factors, it is concluded that left upper extremity
34 injury or complaints is unrelated to her employment with In the Spanish Gardens.

1 The length of time of employment and activities performed by the applicant on
2 the job is not consistent with a continuous trauma injury to the left upper
3 extremity. There is evidence for preexistent condition for the left upper
4 extremity based upon the statements from the coworkers. In addition, the
5 surveillance video demonstrates activities inconsistent with impingement
6 syndrome or any other painful condition for the left upper extremity.

7
8 In addition, my prior examination for the claimed left lower extremity injury
9 showed no evidence for impairment. There is also no evidence for injury to the
10 left lower extremity as noted in the statements from the coworkers. There is no
11 documentation for left lower extremity injury at work. Therefore, the lower
12 extremity complaints are not considered industrially related. (*Id.* at p. 6.)

13 B. Procedural History

14 The parties appeared for trial on March 26, 2015 on the issues of, as relevant here, industrial
15 causation and temporary disability.

16 On May 26, 2015 the WCJ issued his F&A, in which he found that applicant, while employed as
17 a housekeeper from March 16, 2013 through April 15, 2013, sustained industrial injury to her left hand,
18 left arm, left shoulder, and neck. The WCJ also found that applicant was entitled to temporary disability
19 indemnity benefits for the period from April 13, 2013 and continuing. In the accompanying Opinion on
20 Decision, the WCJ indicates that although the medical reporting could be interpreted to find that
21 applicant did not sustain industrial injury, Dr. Scheinberg's reports supported a finding of cumulative
22 trauma "on balance."

23 Defendant timely sought reconsideration, contending that the WCJ erred in finding that
24 applicant's injury was industrially caused. Defendant also contends that the WCJ erred in finding that
25 applicant was entitled to temporary disability indemnity benefits for the period from April 13, 2013 and
26 continuing.

27 DISCUSSION

A decision of the Workers' Compensation Appeals Board must be supported by substantial
evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-81
[39 Cal.Comp.Cases 310].) To be considered substantial evidence, a medical opinion "must be
predicated on reasonable medical probability." (*E.L. Yeager Construction v. Workers' Comp. Appeals
Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen's*

1 *Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-17, 419 [33 Cal.Comp.Cases 660].) An opinion is
2 not substantial evidence if it is based on “inadequate medical histories or examinations, on incorrect legal
3 theories, or on surmise, speculation, conjecture, or guess.” (*Escobedo v. Marshalls* (2005) 70
4 Cal.Comp.Cases 604, 620-21; see also *Gatten, supra*, 145 Cal.App.4th at p. 928 [an opinion “is not
5 substantial evidence if it is based on facts no longer germane, on inadequate medical histories or
6 examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. Further, a
7 medical report is not substantial evidence unless it sets forth the reasoning behind the physician’s
8 opinion, not merely his or her conclusions.” (citations omitted)].)

9 Moreover, the Appeals Board has the discretionary authority to develop the record so that it
10 includes substantial evidence, or when appropriate to provide due process or fully adjudicate the issues.
11 (Lab. Code, §§ 5701, 5906; *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392, 394
12 [62 Cal.Comp.Cases 924] [“The principle of allowing full development of the evidentiary record to
13 enable a complete adjudication of the issues is consistent with due process in connection with workers’
14 compensation claims.” (citations omitted).]”; see *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62
15 Cal.App.4th 1117, 1120-22 [63 Cal.Comp.Cases 261].) As set forth in our decision in *McDuffie v. Los*
16 *Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en
17 banc): “Sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence,
18 including medical evidence, at any time during the proceedings [but] [b]efore directing augmentation of
19 the medical record . . . the WCJ or the Board must establish as a threshold matter that specific medical
20 opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete.” (*McDuffie,*
21 *supra*, at p. 141 (citations omitted).)

22 The medical reporting in the record before us is inadequate, and does not constitute substantial
23 evidence. The WCJ has indicated that he relied on Dr. Scheinberg’s reports. However, these reports
24 reflect that Dr. Scheinberg never reviewed applicant’s medical records. Instead, Dr. Scheinberg relied on
25 the medical history provided by applicant, as well as applicant’s descriptions of her job duties, work
26 schedules, and the onset of her symptoms. Moreover, the first report from Dr. Scheinberg’s office was
27 not signed by Dr. Scheinberg, and indeed applicant was not examined by Dr. Scheinberg in preparation

1 for that report. Dr. Scheinberg did not sign any of his reports until his December 2, 2013 report. The
2 December 2, 2013 report does contain a discussion of industrial causation, but the discussion is brief and
3 cursory, setting forth only the conclusion without sufficiently explaining the reason behind Dr.
4 Scheinberg's opinion. Further, Dr. Scheinberg opined that applicant should undergo a shoulder
5 subacromial decompression and rotator cuff repair. This conflicts with the opinions of Dr. Hutchinson
6 and PQME Dr. Schwarz, both of whom have indicated that applicant's injury involves her cervical spine,
7 not her left shoulder.

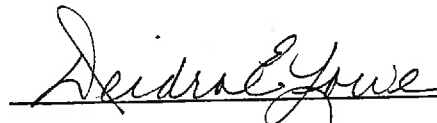
8 In light of the foregoing, we find that there is insufficient evidence to rule on industrial causation.
9 Further, as the WCJ based his finding on temporary disability on his finding of industrial causation, we
10 also find that there is insufficient evidence to rule on temporary disability. Accordingly, we will grant
11 defendant's Petition, rescind the WCJ's F&A, and return the matter to the WCJ. Upon return, the parties
12 should obtain medical reporting and/or deposition testimony from an Agreed Medical Evaluator (AME)
13 on the issue of industrial causation. In the alternative, the WCJ may appoint a treating physician on the
14 issue of industrial causation. In either event, this physician should be provided with an accurate
15 description of applicant's work duties, the hours and days that applicant worked, and an accurate history
16 of the onset of applicant's symptoms.

17 / / /
18 / / /
19 / / /
20 / / /
21 / / /
22 / / /
23 / / /
24 / / /
25 / / /
26 / / /
27 / / /

1 For the foregoing reasons,

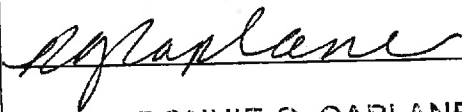
2 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation
3 Appeals Board, that the May 26, 2015 Findings and Award is **RESCINDED** and the matter is
4 **RETURNED** to the trial level for further proceedings and a new decision by the WCJ consistent with
5 this opinion.

6 **WORKERS' COMPENSATION APPEALS BOARD**

7 

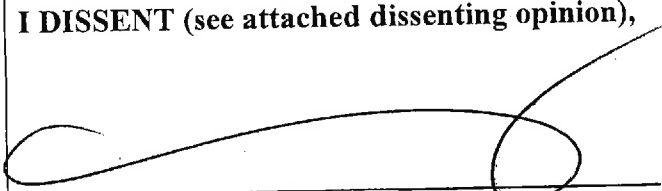
8
9 DEIDRA E. LOWE

10 **I CONCUR,**

11
12 

13 RONNIE G. CAPLANE

14
15 **I DISSENT (see attached dissenting opinion),**

16
17 

18 MARGUERITE SWEENEY



19
20 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

21 **SEP 02 2015**

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

24 **SANDRA HERNANDEZ
25 LAW OFFICES OF WILLIAM WOLFF
26 BRADFORD & BARTHEL**

27 **RB/bgr**

///

///



1 **DISSENTING OPINION OF COMMISSIONER MARGUERITE SWEENEY**

2 I dissent. As an initial matter, I disagree with the majority's interpretation of the medical
3 reporting in this record before us. Before she began treating with Dr. Scheinberg, applicant was also
4 examined by several doctors at walk-in clinics, all of whom found that applicant's shoulder pain and
5 carpal tunnel syndrome were consistent with industrial injury. (See March 28, 2013 Treatment Records,
6 Applicant's Exhibit 1; April 30, 2013 Primary Treating Physician's Progress Report, Applicant's Exhibit
7 6; May 7, 2013 Initial Evaluation, Applicant's Exhibit 7; June 26, 2013 Orthopedic Consult Report,
8 Applicant's Exhibit 5.) Further, while it is true that many of Dr. Scheinberg's reports are unsigned,
9 defendant has not objected to the reports on this ground. This issue is therefore not properly before us.

10 Further, I note that a WCJ's findings on credibility are entitled to great weight, "because of the
11 referee's opportunity to observe the demeanor of the witnesses and weigh their statements in connection
12 with their manner on the stand." (*Garza v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35
13 Cal.Comp.Cases 500, 505].) Here, the WCJ had the opportunity to observe applicant as she provided
14 both her initial testimony and rebuttal testimony refuting defendant's witness. The testimony provided
15 by applicant is consistent with the medical reports in the record. Applicant testified that her job involved
16 lifting heavy things, such as mattresses on beds, vacuum cleaners, and laundry weighing up to 40 pounds.
17 (March 26, 2015 Minutes of Hearing and Summary of Evidence [MOH/SOE], pp. 4:18-20, 10:20-22.)
18 She began experiencing pain in her wrists and tingling in her hand, fingers, shoulder, and arm during the
19 first few weeks of work, which developed into just pain. (March 26, 2015 MOH/SOE, p. 4: 21-23.) She
20 had never experienced problems with her left upper extremity before she worked for defendant. (*Id.* at
21 p. 5:18-19.) When she worked for defendant, she would clean for four or five hours a day, usually
22 between eight and ten rooms a day. (*Id.* at p. 6:17-19.) This credible testimony supports the WCJ's
23 finding of industrial causation.

24 / / /

25 / / /

26 / / /


27 / / /

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

For these reasons, I would affirm the WCJ's F&A.



WORKERS' COMPENSATION APPEALS BOARD



MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEP 02 2015

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

**SANDRA HERNANDEZ
LAW OFFICES OF WILLIAM WOLFF
BRADFORD & BARTHEL**



RB/bgr

BRADFORD & BARTHEL, LLP

SEP 04 2015