WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

vs.

JUDGE

Case No.

San Bernardino District Office

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

A timely, verified Petition for Reconsideration, filed 11/12/2019, Petitioner, by and through their representative of record, and seeks reconsideration of the Order issued here on 10/11/2019 and served on 10/15/2019.

As of the date of the report, there was no response filed by Defendant.

PETITIONER'S CONTENTIONS

1. Petitioner, hereafter Petitioner contends the Board acted without or in excess of its powers, and that the evidence does not justify the findings of fact and the findings of fact do not support the Finding and Award.

INTRODUCTION

Petitioner seeks reconsideration of WCJ finding of the appropriate occupation code as 350 as well as WCJ determination regarding the alleged two subsequent events as compensable consequences of applicant's initial accepted injury. Petitioner is also seeking determination that the applicant has not reached MMI status.

DISCUSSION

Applicant sustained injury to his feet on 1/29/2016 while employed as a truck driver for The applicant spilled acid on the top of his feet and suffered burns. Applicant sought medical care and treated at wound unit until 10/26/2016. Applicant transferred care to Dr. who initially evaluated the applicant on 12/20/2016 and considered him permanent and stationary. Applicant was also evaluated by PQME, Dr. who considered the applicant MMI when his wounds healed, noted to be 10/26/2016.

The applicant suffered two subsequent events where medical treatment was provided on a non-industrial basis. Applicant contends these two events are compensable consequences and should be considered industrial. Petitioner further contends that the applicant is not yet MMI.

APPLICANT'S APPROPRIATE OCCUPATION RATING CODE IS 350

Petitioner asserts that the occupation code utilized (350) was incorrect as the applicant's job duties were "significantly more than driving a truck". Furthermore, Petitioner contends that the applicant's job duties falls under several occupation codes and that the applicant is entitled to the use of the occupation code that provides for the highest disability. Although Petitioner may be correct as to his theory, his conclusions are incorrect.

A general driver, including bus, public transportation, light delivery driver is assigned occupation group 250. This occupation code does not consider any loading or unloading. Then referring to the schedule describing occupational grouping referencing group 350, this code includes truck drivers with activities described as follows:

> "operates heavy vehicle over public thoroughfares; may do some loading of materials, may tie down loads, may hook up hoses, etc., and performs related duties..."

Included in this 350 group are truck drivers for concrete mixing, dump truck, logging, garbage, tank trucks (petroleum), etc." This code and description contemplates additional activities along with truck driving and separates it from the 250 code. Whereas, occupation group 460, which is what Petitioner is seeking, includes occupations with more physical activities such as a washing machine loader, lumber handler/stacker, dough mixer, etc. and is defined as follows:

> "strenuous demands on spine and legs for lifting and carrying heavy objects"

At trial, the applicant testified that he was employed as a truck driver. Included in his responsibilities was testing the liquid of the load which he was to transport. Applicant would take a liquid sample from a valve for testing for PH level. If necessary, the applicant would carry a 3 gallon bucket weighing about 10-12 pounds of liquid (SOE PM pg 3, ln 25) up to the top of the tank. He would stand on a ladder and pour the bucket contents into the tank (SOE PM pg 4, ln 5). This activity varied, although averaged once per day but the most he would perform this activity is twice a day (SOE PM ln 4, pg 13), with an estimate of 5-7 times per week (SOE PM pg 5, ln 5).

In addition, the applicant also transported vegetables and salt (SOE PM pg 4, ln 16). The majority of his work activities were that of a truck driver. The applicant testified that he would add acid while the tank was being loaded with water (SOE PM pg 4, ln 9) and that he was not required to load or unload (SOE PM pg 4, ln 16).

Petitioner seems to focus on the task of testing PH levels and adding chemicals. However, considering the occupation of a swimming pool servicer, who clean pools, check PH levels and add chemicals throughout the entire day, the schedule places them in occupation group 340. It is clear this was an additional responsibility, which occurred at most, twice a day

with the average of once a day. Based on the applicant's testimony, and his description of his job duties, this did not include "strenuous" activity. The applicant testified that he did not lift or carry heavy objects, nor did he load or unload which is the definition of group 460. Therefore, his occupation does not fall under the definition of group 460, which contemplates a more strenuous activity.

Although the description of truck driver in occupational group 350 contemplates these additional activities, if one takes into consideration, the potential for a dual occupation, the applicant would be entitled to the occupation code, which carries the highest factor in the computation of disability. The case law does not provide a threshold time requirement in order for the applicant to be entitled to the higher occupational group number *(Dalen v. WCAB (1972) 37 Cal. Comp. Case 393).* Taking into consideration these additional activities, and applying group 340, which seems to best match the additional duties, this does not alter his disability as the variant does not change. Accordingly, it is found that applicant is entitled to the occupational group of 350, where the record showed that his activities in the performance of duties of a truck driver provided him the highest rating.

APPLICANT DID NOT SUSTAIN A COMPENSABLE CONSEQUENCE INJURY ON 12/27/2017

Petitioner alleges he suffered a laceration of a finger while operating a table saw at home. He further alleges that this was a compensable consequence of his initial foot injury as he lost his footing. At trial, the applicant testified that he suffered a laceration while feeding a piece of wood into the table saw and a piece a wood broke off striking him in the left hand. There was no evidence that the shifting of his foot, if that did occur, caused the piece of wood to "kick back" causing his finger laceration. Furthermore, there is no reference to any balance issues as a result of his industrial injury mentioned in the Records (Def Ex B pg 13, bate#96).

However, what is noted is that the applicant had complained of significant pain in both knees just days prior.

Petitioner argues that the doctors who provided the initial treatment would not concern themselves with what caused the kickback nor was the medical information taken down by a court reporter and therefore their records are less accurate. In reviewing medical reporting prior to and subsequent to the 12/27/2017 event, multiple providers fail to mention applicant's claim of how the incident occurred. However, medical reports a week prior to the 12/27/2017 incident reflect the applicant complained of "significant pain in both knees" (non-industrial), and does not reference any instability or balance issues. It appears all of applicant's treatment for the 12/27/2017 incident was through his private health plan, including his recheck on 2/14/2018. There is no comment on any issues with instability or balance nor that the incident was considered part of his workers' compensation claim. However, the report does discuss other issues such as his knee and a prior MVA (Def Ex B, pg 11-13). The applicant continued to treat with Dr. PTP, who made no mention of the finger being work related in his 2/8/2018 report (Jnt Y-5).

In review of the records, the applicant did not receive or attempt to receive any treatment for this 12/27/2017 incident on an industrial basis. In fact, the applicant did not claim the injury as industrial until 6/14/2018 when he filed an Amended Application, approximately six months after the incident. There are no medical reports reflecting this incident was industrial.

Although applicant's attorney believes the applicant testified credibly, this WCJ did not reach the same conclusion. True, the applicant provided significant details while describing his job duties and his initial accepted injury, he did not provide the same level of detail while describing the compensable consequences. Nor was his testimony compelling that a mere "shifting" of his right foot caused the wood to kick back from the table saw. Petitioner argues

that the medical reports should be ignored and that the WCJ should rely solely on the applicant's testimony. The applicant testified that the piece of wood struck his left hand which was positioned over his abdomen (SOE PM pg 6, ln 17). Considering applicant's testimony, one would question why his left hand was positioned on his abdomen and not securing the wood while feeding it into the table saw. Additionally, if his right foot slipped it is unclear why his left hand remained positioned on his abdomen instead of using it to steady his balance. In addition, applicant's wife testified that she does not recall what he said regarding how he cut his hand (SOE AM pg 6, ln 11).

After careful consideration of applicant's testimony at trial, and in review of the medical treatment reports on an non-industrial basis, his continued treatment by his PTP which he did not report the injury to and the conclusions by the PQME, this WCJ does not find that the medical evidence supports, nor that applicant testified credibly, that the incident was a compensable consequence of his initial injury.

APPLICANT DID NOT SUSTAIN
A COMPENSABLE CONSEQUENCE INJURY ON 6/8/2018

Petitioner contends, based on applicant's and applicant's wife's testimony at trial, that a second incident on 6/8/2018 is a compensable consequence of the applicant's initial injury. Applicant testified at trial that he stepped off a curb and his right foot went out from under him and he fell (SOE PM pg 6, ln 20).

Records reflect the applicant was admitted on 6/8/2018 to Hospital with stated complaint of syncope, orbitial fracture and "chief complaint of chest pain" (Def Ex C, pg 22). Records further notes that "patient became lightheaded and dizzy then had a syncopal episode..." (Def Ex C, pg 25, bate#138). There is no reference in the records of Hospital to the applicant tripping or losing his footing. The applicant received

treatment through his personal health insurance for the 6/8/2018 incident. A follow up report on 8/2/2018 reflect that the applicant had a syncopal episode and fell on 6/8/2018. Again, there is no reference to tripping or stumbling in this report (pg 34).

In reviewing applicant's records from his primary care physician, which reflects the applicant had a syncopal episode, as well as, records surrounding the incident, the same reflect that the applicant incorrectly stopped all his medication in preparation for a colonoscopy, which may have contributed to his syncopal condition (Def Ex B, pg 10). Low blood pressure was noted at admission (Def Ex C, bate#143). Additional records from another personal care physician, Dr. reflect that the applicant had a syncopal episode and fell (Def Ex D, pg 7). Records also reflect the applicant suffered a prior syncopal episode in 2012 (Def Ex B, pg 14 & Def Ex C. pg 9, 13, 16). Nothing in the medical records support applicant's delayed claim of this incident being a compensable consequence.

Following this incident, Dr. did note that the applicant had an episode of dizziness, which sent him to the Emergency Department and referenced his fractured orbit (Jnt Ex Y-4, pg 1). Again, there is no reference to the fall being work related or due to imbalance issues as a result of the work related injury Dr. is treating him for. Here again, it was not until approximately five months later after which he treated on a non-industrial basis and without advising the emergency room doctors, personal care doctors or his primary treating doctor did the applicant claim the incident was a compensable consequence due to a fall.

Additionally, PQME reviewed records in his report dated 5/21/2019 and concluded that applicant's compensable consequence injuries was not due to his industrial injury (Jnt Ex X-1, pg 2, para 1). Applicant's wife testified at trial that she was not present at the time of the 6/8/2018 incident but had returned home after running errands (SOE AM pg 5, 12). She

further testified that the applicant told her only that he had fallen. She further testified that at the time, she had no idea what had caused him to fall (SOE AM pg 5, ln 19).

Therefore, once again noting, the applicant continued treatment with Dr. PTP, and was seen on 7/10/2018 and 8/31/2018, whose reports lacked reference of the 6/8/2018 incident as industrial. Coupled with the conclusions by the PQME, as well as lack of reporting to the contrary, the medical evidence does not support the applicant sustain an injury on 6/8/2018 as a result of a compensable consequence. Furthermore, considering the applicant's testimony lacked any details connecting industrial causation, this WCJ does not find that the medical evidence supports, nor that applicant testified credibly, that the 6/8/2018 incident was a compensable consequence of his initial injury.

APPLICANT'S CONDITION IS MMI

Petitioner argues that he is not MMI due to the compensable consequence. However, Petitioner offered no medical evidence that the applicant was not MMI, even considering the two compensable consequences.

RECOMMENDATION

I recommend the Petition for Reconsideration, filed by Applicant on 11/12/2019 be **DENIED** on the merits.

DATE: 11/27/2019

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:

DIETZ GILMOR ONTARIO, US Mail

US Mail

US Mail

US Mail

US Mail

On: X all parties as shown on Official Address Record
ON: November 27, 2019
BY:

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

11-27-2019

PROOF OF SERVICE

Case Number:

Law Firm,

DIETZ GILMOR
ONTARIO

Law Firm, 3333 CONCOURS ST BLDG 7 FL 2 ONTARIO CA 91764

Employer,

Claims Administrator,

Injured Worker,

Law Firm,

Law Firm,

"REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION DATED 11/27/2019"

Served on all parties listed above:

On: November 27, 2019
By: