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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

Case Nos. ADJ10084731
ADJ10084732
(Stockton District Office)

OPINION AND DECISION AFTER
RECONSIDERATION

Applicant,

vs.

TRANSPORTATION SERVICES,
LLC, Permissibly Self-Insured, Administered
By [REDACTED],
Defendants.

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 October 6, 2016 Findings of Facts and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) found that the medical reporting of Panel Qualified Medical Evaluator (PQME) [REDACTED], M.D. contained references that could be construed to indicate that [REDACTED] findings in this case may have been influenced by racial or ethnic bias. The WCJ also found that [REDACTED] reporting did not constitute substantial evidence, struck [REDACTED] report, and ordered a new panel in the specialty of neurology for applicant.

Defendant contended that the WCJ erred in finding that [REDACTED] report may have been influenced by racial or ethnic bias and in striking Dr. Hsia's report.

We have received an Answer from applicant. 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 and the contents of the Report, and we have reviewed the record in this matter. For the reasons expressed by the WCJ in his Report, which we adopt and incorporate, and for the reasons discussed below, we will affirm the decision of the WCJ.

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FACTS

This case involves two claims of industrial injury. In ADJ100[REDACTED], applicant claimed that, while employed by defendant as a driver/loader/unloader on June 29, 2015, he sustained an industrial injury to his low back. In ADJ100[REDACTED], applicant claimed that, while employed by defendant as a driver/loader/unloader from June 29, 2014 through June 29, 2015, he sustained a cumulative industrial injury to his low back.

On February 4, 2016, applicant was examined and evaluated by Dr. [REDACTED] the PQME in neurology. (February 4, 2016 PQME Report, Joint Exhibit 1.) Dr. [REDACTED] described applicant as "well developed and nourished ... slightly overweight and clearly de-conditioned." (Joint Exh. 1, p. 5.) Dr. [REDACTED] diagnosed applicant with lumbar spine stenosis strain and opined that this condition was industrially caused. (*Id.* at p. 16.) She concluded that applicant had a whole person impairment of 5% as a result of the lumbar spine stenosis. (*Id.* at p. 21.) She stated that apportionment "[was] all to non-industrial factors." (*Ibid.*)

On June 9, 2016, applicant's attorney took Dr. [REDACTED] deposition. (Transcript of June 9, 2016 Deposition of [REDACTED] M.D., Joint Exhibit 2.) As relevant to the instant Petition, applicant's attorney asked Dr. [REDACTED] to describe her independent recollection of applicant, without looking at her report. (Joint Exh. 2, p. 17:15-17.) Dr. [REDACTED] responded,

"I believe that he was a person of color. He was of medium height, not much taller than me. I should say he was short for a male individual. He was slightly overweight. And because I presumed him to have -- I'm going to use a term that dates me -- Negro blood, I felt that he ~~was~~ ^{his} muscle definition, tone, and strength were abnormally low, especially considering the fact that he had not that long ago stopped working and was still engaged in physical activity." (*Id.* at pp. 17:18-18:1.)

On June 27, 2016, applicant filed a Petition to Strike Report from Dr. [REDACTED] and asked that a new PQME in neurology be assigned. Citing her deposition testimony, applicant requested that Dr. [REDACTED] be removed as PQME for bias.

On October 6, 2016, the WCJ issued his F&O, finding that Dr. [REDACTED] medical reporting reflected impermissible racial or ethnic bias, and therefore did not constitute substantial evidence. The WCJ struck Dr. Hsia's report and ordered a new panel in the specialty of neurology for applicant.

1 Defendant timely sought reconsideration, contending that the WCJ erred in finding that Dr. [REDACTED]
2 report may have been influenced by racial or ethnic bias and in striking Dr. [REDACTED] report.

3 **DISCUSSION**

4 We agree entirely with the WCJ, and – as stated above – we will adopt and incorporate his
5 Report. We write separately to address the following. In its Petition, defendant asserts that Dr. [REDACTED] did
6 not testify “that she based some sort of medical conclusion, with regards to the applicant’s diagnoses, on
7 the description of the Applicant.” (Petition, p. 6:13-15.) This argument is not well taken. Based on her
8 testimony, Dr. [REDACTED] appears to have based her assessment of applicant’s physical condition on his ethnic
9 or racial makeup. By her own words, Dr. [REDACTED] presumed that applicant “ha[d] ... Negro blood,” and
10 based on that, she felt that his muscle definition, tone, and strength were abnormally low. The
11 unavoidable implication here is that Dr. [REDACTED] felt that these markers were abnormally low *for a person*
12 *with “Negro blood.”* It was inappropriate for Dr. [REDACTED] to draw medical conclusions based on comparing
13 applicant’s muscle definition to the general population of individuals who share his ethnic or racial
14 makeup; it indicates that Dr. [REDACTED] relied on stereotypes regarding members of applicant’s ethnic or racial
15 group in evaluating and diagnosing applicant. We will therefore affirm the WCJ’s decision striking Dr.
16 [REDACTED] report and ordering a new panel in neurology.

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