

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

<i>Applicant,</i>
vs.
BMC WEST; ACE AMERICAN INSURANCE COMPANY by ESIS CHATSWORTH;
<i>Defendants.</i>

Case No. ADJ[REDACTED]

**FINDING AND ORDER
(REPLACEMENT QME
PANEL)
(REPRESENTED)**

The above-entitled matter having been heard and regularly submitted, [REDACTED]
Workers' Compensation Judge, now makes her decision as follows:

FINDINGS OF FACT

- (1) [REDACTED], born [REDACTED], while employed from 3/28/13 through 3/28/14 as a warehouse worker/assembler by BMC West claims to have sustained injury arising out of and in the course of employment to his neck, right upper extremity (including shoulder and elbow), abdomen and hernia.
- (2) Applicant was evaluated by panel QME Edward Tapper, MD.
- (3) Applicant has shown good cause per Rule 41(g) for ordering a replacement panel.

ORDER

IT IS HEREBY ORDERED THAT a replacement QME panel to prior QME panel no.1875646 be provided; and


IT IS ORDERED THAT the Medical Director, Division of Workers' Compensation, issue within 30 days of the date of service hereof, a replacement to the QME panel in the specialty of orthopedic surgery, within a reasonable geographic area of applicant's residence, which is located within zip code 92201. Within 10 days of the panel assignment, the parties shall confer and attempt to agree on a medical evaluator from the panel. If the parties are unable to reach agreement by the 10th day, each may then strike one name from the panel and the remaining name shall serve as the QME. Upon the failure of one of the parties to strike a name from the panel within three working days of gaining the right to do so, the other party may select any physician who remains on the panel to serve as the QME.

DATE: 8/7/17




WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:

 US Mail
ESIS CHATSWORTH, US Mail
LEVITON DIAZ BAKERSFIELD, US Mail
PAUL DOUGHLIN, US Mail
Service made on 8/7/17
Address Record



ADJUDGE 

**STATE OF CALIFORNIA
WORKER'S COMPENSATION APPEALS BOARD
CASE NO. ADJ [REDACTED]**

**BMC WEST; ACE AMERICAN
INSURANCE COMPANY**

APPLICANT

vs.

DEFENDANTS

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE:

DATE: 8/4/17

OPINION ON DECISION
(Labor Code Section 5313)

After completion of trial on 7/27/17, this matter was submitted on the issue of applicant's petition to replace Edward Tapper, MD, as panel QME, as further set forth in the Minutes of Hearing ("MOH"). The stipulations of the parties in the MOH are accepted as fact herein, specifically, that:

[REDACTED], born [REDACTED], while employed from 3/28/13 through 3/28/14 as a warehouse worker/assembler by BMC West (insured by ACE American Insurance Company) claims to have sustained injury arising out of and in the course of employment to his neck, right upper extremity (including shoulder and elbow), abdomen and hernia.

FACTUAL SUMMARY

Panel QME Edward Tapper, MD, evaluated [REDACTED] on 1/13/16. Exhibit 1. The "Personal History" section of the report (page 4) includes that "He was born in Mexico, has a ninth-grade education in Mexico, and came to the United States in 2002. He is not in this country legally."

The section on "Activities of Daily Living" (page 5), states that "He drives without trouble, but does not have a driver's license."

Dr. Tapper concluded that his multiple complaints represented a somatoform pain disorder, not orthopedic problems. "There is no timely reporting of any specific or cumulative injuries. His basic problem does seem to be psychological. His physical examination is not valid. There are positive Waddell signs, giving way and blocking of motion..." Ibid, page 6.

In his deposition, Dr. Tapper said he did not think applicant was "a credible man." Exhibit 2, page 16, line 24. The physical exam was "totally unreliable," citing positive Waddell signs such as jumping when touched lightly. "And his hands were soiled and callused indicating he was doing something and, you know, doesn't have a driver's

license, but he drives. He's here illegally and just went on and on and on." Ibid., page 17, lines 9-24. Mr. ██████ would not move his arms in the exam but when the doctor tried to move them, he blocked. Ibid. page 18, lines 5-7. He noted that the records did not support complaints of industrial injury.

Dr. Tapper testified he asked the applicant if he was a citizen, and he is here illegally. Ibid., page 32, lines 18-19. He did not know why he asked, and said he did not normally ask that, though once in a while, he did. He had no reason why he asked. It was unrelated to his medical examination. Ibid., page 32, line 18, through page 33, line 6.

Dr. Tapper stated that the fact Mr. ██████ was here illegally did not influence his opinion. Ibid., page 36, lines 12-15.

On 7/27/17, Mr. ██████ testified that he felt the doctor discriminated against him. He thought so because of something about his behavior, the fact that he asked the question about being here illegally, and the way he did it. MOH page 4, line 36, through page 5, line 6.

DISCUSSION

Applicant seeks to replace Dr. Tapper, asserting that "The mere fact that the panel QME asked the question [about applicant's legal status] demonstrates his bias and prejudice against the injured worker based on his race, nationality or country of origin." Petition to Replace Panel QME, page 1, lines 25-26. As a result, applicant alleges bias influenced the opinion that no orthopedic industrial injury has occurred.

Defendant argues that Labor Code 31.5 does not include bias as grounds for a replacement.

Labor Code 31.5 provides 16 grounds upon which replacement shall be "provided upon request". While it is true that "bias or prejudice" is not found among the 16 stated grounds for replacement upon request, the discussion does not end there.

The California Legislature "finds and declares" that:

"For purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law." LC 1171.5(b); Hanna, Section 3.31.

Mr. ██████ immigration status is, by LC 1171.5(b), *irrelevant* to the issue of liability, which was the issue on which the panel QME's opinion was sought. The process of producing a medical-legal report is part of the discovery undertaken to enforce state labor laws, so *no enquiry is permitted* into Mr. ██████ immigration

status.

Even though Dr. Tapper did not believe he was influenced by applicant's status, he also testified that he did not find him credible. He described a number of factors for that conclusion, including the information he is here illegally. The use of immigration status to attack credibility has been rejected. *Hernandez v. Paicius* (2003) 109 Cal. App. 4th 452, 70 Cal. Comp. Cases 895, 901.

There is no evidence that applicant was advised by Dr. Tapper of his right to discontinue the evaluation for good cause. He did not waive his rights under LC 40(c). Was the fact he was asked about his immigration status "good cause"? Labor Code 40(a)(2) states that good cause includes the actions listed in (A) through (C), suggesting that "good cause" is not limited to (A) through (C). Even so, immigration status may be considered in (A), discriminatory conduct based on race or national origin. Subsection (C) prohibits a request to submit to an unnecessary exam. Immigration status is a portion of the report's history section which is legally irrelevant, prohibited and therefore unnecessary.

Labor Code 41 describes ethical requirements for all QME evaluations. Section (a)(3) prohibits unnecessary exams or procedures. All aspects of a medical-legal evaluation, including history, shall be directly related to contested medical issues. LC 41 (d). A violation of LC 41 (a) constitutes good cause.

It is found that good cause exists to grant the petition to replace the panel QME.

**WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE**

CEW

Service made on all parties as listed
on the Official Address Record.

Effective 8/7/2017

By J. Garcia