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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

AMERICAN MEDICAL RESPONSE et al., Petitioners, v. WORKERS' COMPENSATION APPEALS BOARD and RONALD WESTERMAN, Respondents.	B235468 (W.C.A.B. No. ADJ6970415)

PROCEEDINGS to review a decision of the Workers' Compensation Appeals Board. Affirmed.

Sedgwick LLP, Christina J. Imre, Michael M. Walsh, Armstrong & Sigel and Brigitte K. Lockner for Petitioners.

Glauber Bereson and Michael Burgis for Respondent Ronald Westerman.

The workers' compensation administrative law judge (WCJ) found that respondent Ronald Westerman sustained a stroke arising out of and in the course of employment. Petitioners American Medical Response and Ace American Insurance Company sought reconsideration, principally on the basis that Westerman did not undergo a critical diagnostic test. The Workers' Compensation Appeals Board (WCAB) denied the petition and affirmed the award. We granted the resulting petition for a writ of review. We conclude that petitioners have not supported their theory of the case with evidence and that the WCAB's decision is supported by substantial evidence. Accordingly, we affirm the WCAB's decision.

FACTS

Respondent Westerman was employed as a paramedic by petitioner American Medical Response. His job was stressful and he worked long hours, including shifts of up to 36 hours.[1] His tasks included lifting heavy weights, such as medical equipment and patients. He testified that he was sedentary for long periods of time. According to his wife, Westerman gained weight while employed by American Medical Response. His treating physician reported that Westerman had gained approximately 70 pounds in the two years before the stroke. While there is a difference of opinion between the treating physician and the panel-qualified medical examiner about Westerman's weight, he appears to have been overweight at the time of the stroke.

Westerman's stroke occurred in March 2009, after he had returned home following a 36-hour shift. He was 50 years old at the time. He suffered an acute loss of consciousness and was taken to Antelope Valley Hospital, where he underwent emergency brain surgery. He remained hospitalized for over two months. He has not returned to work and requires home care assistance.

Westerman began treating with Arthur E. Lipper, M.D. in the fall of 2009. Dr. Lipper became his primary treating physician. He concluded that Westerman's stroke

[1] According to the report of his treating physician, Westerman worked more than 70 hours per week and his drive to work in Moorpark took 2 and 1/2 hours each way.

had an "industrial component." According to Dr. Lipper, "stroke may be causally affected by processes such as hypertension, diabetes, hyperlipidemia and various other stressors."[2] Dr. Lipper noted that upon his emergency admission to Antelope Valley Hospital, Westerman was found to have hypertension and diabetes.

Petitioners objected to Dr. Lipper's report. Accordingly, the matter was submitted to the panel qualified medical examiner, Paul J. Grodan, M.D.

Although Dr. Grodan conditionally agreed with Dr. Lipper that Westerman is totally and permanently disabled, he rejected Dr. Lipper's findings. In substance, Dr. Grodan theorized that the stroke was caused by a blood clot that traveled through a hole in the heart to the brain. The theory was that Westerman's work required that he sit for long periods of time which would "predispose him to in-situ thrombosis in his lower extremities or even pelvis." That is, a blood clot would form in the lower extremities or pelvis, travel to the heart and due to a hole in the heart, arrive in the brain. Dr. Grodan rejected Dr. Lipper's theory that hypertension, diabetes, stress and weight gain caused the stroke. Dr. Grodan thought that Dr. Lipper was speculating.

According to Dr. Grodan, the condition that brought about the stroke was a "paradoxical embolus." But Dr. Grodan's conclusion was conditional; it depended on the existence of a hole in the heart, i.e., a hole in the atrial septum.[3] "I strongly suspect that he had a paradoxical embolus and that can obviously be documented by shunt study with an echocardiogram. That could be done at a facility such as Cedars-Sinai Echo Lab should I be authorized and should he be transported for that study with the appropriate appointment." The diagnostic test is an "echocardiographic shunt study to document [the] presence or absence of [an] intracardiac shunt that would make him subject to paradoxical embolization from the venous system."

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[2] Hyperlipidemia is the term for excess fats or lipids in the blood. (Webster's 10th Collegiate Dict. (1995) p. 570.)

[3] The atrial septum is the fleshy partition which separates the right atrium of the heart from the left. The atria of the heart are the two upper chambers. (Attorneys' Dictionary of Medicine (2009), p. A-12266, Matthew Bender & Co., Inc.)

In addition to his medical report, Dr. Grodan also was deposed. After explaining how a hole in the atrial septum is closed, Dr. Grodan went on to state: "And this is why I indicated in my report he should have a shunt study to document that's what he has. Because A, if he doesn't, then it would be a nonindustrial event, because then we have no explanation." Shortly thereafter he was asked: "Q You mentioned having that test done would be absolutely mandatory in your report to determine whether or not he has that defect in the atrial septum. [¶] A [Dr. Grogan] Well, it's mandatory in the sense that it must be ruled out for medical reasons obviously. [¶] Q Whether or not he has the defect at all? [¶] A Right. And for med-legal reasons, if he doesn't have the defect, *then my entire explanations* [*sic*] *is out the window*." (Emphasis added.)

However, Dr. Grodan also testified that, to a reasonable medical probability, the injury was industrial. After being asked by Westerman's counsel whether he came to the conclusion that, to a reasonable medical probability, the stroke had an industrial component, Dr. Grodan answered: "Yes. It's based on the assumption that he does have a shunt, intracardiac shunt." This was followed by two questions that were generally phrased: "And based on your review of all the medical evidence and your expertise, you did conclude that to a reasonable medical certainty that that's what the problem was? [[¶]] A Well, it's a reasonable medical probability. I wouldn't say certainty, because until we have the tests which show that the test is normal, then, you know - - [[¶]] MS. LOCKNER [petitioners' counsel]: Then the theory may be. [[¶]] THE WITNESS: Yeah. [[¶]] BY MR. BURGIS: Q Sure. I understand that completely, I'm not asking for a certainty. But based on all the records you reviewed, to your reasonable medical expertise, you believe that he suffered this on an industrial component based on reasonable medical probability; correct? [[¶]] A That is correct, yes." There were no further questions on this topic.

PROCEDURAL HISTORY

A. The WCJ's ruling

The WCJ found that the stroke arose out of and in the course of employment and that Westerman was entitled to temporary disability. The WCJ also found that Westerman is permanently totally disabled. As far as the cause of the stroke was concerned, the WCJ concluded that "Dr. Grodan ruled out all non-industrial causes of applicant's stroke and with reasonable medical probability found that it was due to a paradoxical embolus."

B. The Petition for Reconsideration and Westerman's Response

Petitioners' petition for reconsideration contended that Dr. Grodan's opinion and conclusion were not substantial evidence without the diagnostic test. Another formulation of the same contention is that Westerman "has not met his burden of proof, and applicant's refusal to undergo the diagnostic test recommended by PQME Dr. Grodan has unreasonably shifted the burden of proof on the defendants to disprove an industrial injury." Without citing to any evidence, the petition averred that petitioners "authorized and agreed to pay for the echocardiogram shunt test. In response, applicant's attorney advised that the Guardian Ad Litem[4] refused to allow applicant to undergo the recommended diagnostic test, due to his alleged fragile health condition, without citing any medical evidence to support his refusal."

In response to the petition, Westerman's counsel wrote, without citing to any evidence: "The defendant will not be satisfied until every test is done and proves to a medical certainty there is industrial causation. However, that is not the law. An applicant does not and should not have to subject themselves [*sic*] to a barrage of intrusive tests until the defendant is satisfied." "Defendant's contention that the burden was unreasonable [*sic*] shifted by the Applicant's refusal to undergo additional tests is

[4] Westerman's wife is his guardian ad litem.

absurd. The burden of proof does not rest in 100 [percent] certainty and the Applicant has in no way refused to undergo any proper testing."

C. The Report on the Petition for Reconsideration

In recommending a denial of petitioners' request for reconsideration, the WCJ rejected the argument that Dr. Grogan's diagnosis had to be supported by the echocardiographic shunt study. The WCJ stated that Dr. Grodan had concluded that in reasonable medical probability Westerman's "condition was due to a paradoxical embolus." The WCJ went on to opine that the indicated diagnostic test is an invasive procedure and that Westerman's wife was justified in not wishing to subject her husband to this procedure. The WCJ's report stated: "In addition, the medical reporting itself does not require reasonable medical certainty as the defendant states here." Only reasonable medical probability was required.

The WCAB adopted the WCJ's report and denied the petition for reconsideration; it did not issue an opinion of its own.

D. Westerman's Answer to the Petition for a Writ of Review

In the answer, Westerman's counsel states: "Furthermore, Applicant has in [*sic*] not refused to undergo any mandatory or needed testing. . . . [[¶]] The Applicant is not required to jump through any hurdle a defendant wishes; they [*sic*] certainly do not have to subject themselves [*sic*] to unwarranted, intrusive medical exams that risk discomfort and further medical complications."

DISCUSSION

A. There is No Evidence that Petitioners Demanded that Westerman Subject Himself to the Diagnostic Test

The only *mention* of an *implied* request by petitioners that Westerman subject himself to the diagnostic test is in the petition for reconsideration. In its entirety, the

relevant passage states: "Following the deposition of Dr. Grodan, defendants authorized and agreed to pay for the echocardiogram shunt test. In response, applicant's attorney advised that the Guardian Ad Litem refused to allow applicant to undergo the recommended diagnostic test, due to his alleged fragile health condition, without citing any medical evidence to support this refusal." Westerman's counsel also argues that the claim that he unreasonably refused this test was not made until discovery was closed and this matter was set for trial on the merits. Petitioners do not contest that claim.

Although during oral argument petitioners' counsel stated that a demand to take the diagnostic test was made in a letter, no such letter is contained in the record. Thus, the record before us is limited to the unsupported *representation* that petitioners authorized and agreed to pay for the diagnostic test and that Westerman refused to take the test; this representation is not evidence.

B. There is No Evidence that Westerman Refused to Subject Himself to the Diagnostic Test

In the passage from the petition for reconsideration just quoted, we have petitioners' counsel stating what he was told by Westerman's attorney based on what, petitioner claims, Westerman's counsel was told byWesterman's guardian, that is, we have hearsay on hearsay for the "fact" that is pivotal to petitioners' argument. That "fact" is, of course, that Westerman, by himself or through his guardian, refused to take the diagnostic test.

In his answer to the petition, Westerman contradicts the hearsay. He states, "[f]urthermore, Applicant has in no way refused to undergo any proper testing." In the answer to the petition for a writ of review, Westerman's counsel wrote that "Applicant has in [*sic*] not refused to undergo any mandatory or needed testing." In view of these statements, it appears to be uncertain exactly what Westerman's (or his guardian's) actual position is with respect to the diagnostic test. At oral argument Westerman's counsel stated that Westerman did not refuse to take the test. While it is evident that Westerman

has not taken the diagnostic test, there is no evidence that he, or his guardian acting on his behalf, *refused* to take it.

C. The Decisions of the WCAB Must Be Based on Substantial Evidence

It is axiomatic that the decisions of the WCAB must be based on substantial evidence. (Lab. Code, § 5952, subd. (d); *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164; see generally Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d ed.) § 24.16[1], pp. 34–20, 34–23.)

Petitioners sought to persuade the WCAB that they had demanded that Westerman take the diagnostic test and that Westerman had refused to take the test. This argument necessarily failed in that petitioners failed to support it with any evidence. To put the same point somewhat differently, if the WCAB had entered findings that petitioners demanded that Westerman undergo the diagnostic test but he refused, we would have to set that finding aside as not supported by any evidence, much less substantial evidence.

It is true that it is possible to contend that Dr. Grodan's testimony was not substantial evidence without also contending that petitioners demanded the diagnostic test but Westerman refused it. While logic does not preclude such an argument (in fact, we address it in the next section), it runs into trouble when it comes to prudential considerations such as forfeiture and invited error. That is, if petitioners believed that the diagnostic test was essential, they were under an obligation to raise its absence as error in the proceedings below, and they could have sought an order that Westerman take the test or demonstrate a sound reason for not doing so. No such request was made. Thus, petitioners simply took the unsupported position before the WCAB and this court that they demanded the diagnostic test but that it was refused. But this effort fails because it is not supported by any evidence.

D. The WCAB's Decision is Based on Substantial Evidence

Two points emerge from Dr. Grodan's deposition testimony quoted in our summary of the facts.

First, Dr. Grodan concluded that, in reasonable medical probability, the stroke had an industrial component. Second, if the diagnostic test revealed a shunt or hole, it would be *certain* that the stroke had an industrial component. Certainty, however, is not required; reasonable probability suffices. (*McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 416–417.)

Dr. Grodan's deposition testimony is supported by his medical report. In that report, Dr. Grodan excluded a number of other possible causes for the stroke. Thus, he excluded an ischemic stroke which is most often caused by an embolic occlusion of a large cerebral vessel. He also excluded a thrombosis causation. Dr. Grodan parted company with Dr. Lipper when it came to hypertension as a cause of the stroke, concluding that none of Westerman's blood pressure levels were in the range that can result in a stroke. Dr. Grodan also found it unlikely that Westerman had a hematologic disorder producing blood clotting. Dr. Grodan also disagreed with Dr. Lipper on the question of Westerman's weight, finding that Westerman did not weigh 240 lbs., as Dr. Lipper stated.

In short, when Dr. Grodan's deposition testimony is placed alongside his medical report, the picture that emerges is that other causes of the stroke having been excluded, it was reasonably probable that the cause was a paradoxical embolus. Indeed, that is what the medical report itself states.[5]

If it had been shown that petitioners had clearly and unequivocally demanded that Westerman undergo the diagnostic test and he nonetheless refused it, we would have been presented with a difficult question, the answer to which lies in the jurisprudence that

[5] "In summary, there is a significant medical probability that the stroke in Mr. Westerman was occupational based on the presumed occurrence of a paradoxical embolus."

has developed around Labor Code section 4056.[6] But since there is no evidence that a demand to take the diagnostic test was ever made, and no evidence that it was refused, we need not resolve the question when a diagnostic test can be refused reasonably and what the consequences are if the refusal is unreasonable.

Our legislative mandate and sole obligation is to review the entire record to determine whether the WCAB's conclusion is supported by substantial evidence. (*Hegglin v. Workmen's Comp. App. Bd.* (1971) 4 Cal.3d 162, 169.) Applying that standard, we find Dr. Grodan's testimony and medical report is such substantial evidence. We must draw inferences in favor of the WCAB findings, even if the evidence is susceptible of opposing inferences. (*Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 664.) It is reasonable to infer that, given that other causes for the stroke were eliminated, Dr. Grodan concluded that it was reasonably probable that there was in fact a defect in Westerman's atrial septum. While there is no question that Dr. Grodan would have preferred that the diagnostic test had been administered, reasonable probability is all that is required. (*McAllister v. Workmen's Comp. App. Bd., supra*, 69 Cal.2d 408, 416–417.)

E. Sanctions

We turn now to Westerman's motion for sanctions, principally because of alleged misrepresentations of the record. We find that sanctions are not warranted in this case.

While some statements, such as the claim that Dr. Grodan was guessing about industrial causation, are hyperbolic and perhaps somewhat excessive, they do not evince the "bad faith actions or tactics" that call for sanctions under Labor Code section 5813. "Bad faith" requires more than exaggerations and careless phrases. The claim that this

[6] "No compensation is payable in case of the death or disability of an employee when his death is caused, or when and so far as his disability is caused, continued, or aggravated, by an unreasonable refusal to submit to medical treatment, or to any surgical treatment, if the risk of the treatment is, in the opinion of the appeals board, based upon expert medical or surgical advice, inconsiderable in view of the seriousness of the injury." (Lab. Code, § 4056.)

was one of first impression came close to being true, since had there been a demand and refusal, we would have been called upon to decide whether a diagnostic test can be *unreasonably* refused, which appears to be an open question.

Without citing Labor Code section 5801, Westerman also seeks attorney fees of $17,500. That section provides that if the reviewing court finds there was no reasonable basis for the petition, the court shall remand the case to the appeals board for the purpose of making a supplemental award for attorney fees for services rendered in connection with the petition for a writ of review.

It is not unreasonable to construe Dr. Grodan's report and testimony as requiring the diagnostic test as a necessary condition of Dr. Grodan's conclusion that the injury was industrial, which was the thrust of the petition. While we find there is no evidence in the record that a demand for the diagnostic test was timely made and refused, it was not unreasonable to contend that Dr. Grodan's conclusion without the diagnostic test was not substantial evidence. Accordingly, we deny the request for attorney fees.

The order and award of the WCAB are supported by substantial evidence.

DISPOSITION

The order and award of the Workers' Compensation Appeals Board are affirmed. The motion for sanctions is denied.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.