

1 **WORKERS' COMPENSATION APPEALS BOARD**
2 **STATE OF CALIFORNIA**

3
4 **TIMOTHY BEECHAM,**

5 *Applicant,*

6 **vs.**

7 **SWIFT TRANSPORTATION SERVICES,**
8 **LLC, Permissibly Self-Insured, Administered**
9 **By GALLAGHER BASSETT,**

10 *Defendants.*

Case Nos. **ADJ10084731**
 ADJ10084732
 (Stockton District Office)

**OPINION AND DECISION AFTER
RECONSIDERATION**

11
12 We previously granted the Petition for Reconsideration (Petition) filed by defendant to further
13 study the factual and legal issues in this case. This is our Opinion and Decision after Reconsideration.
14 Defendant sought reconsideration of the October 6, 2016 Findings of Facts and Orders (F&O), wherein
15 the workers' compensation administrative law judge (WCJ) found that the medical reporting of Panel
16 Qualified Medical Evaluator (PQME) Rosalind Hsia, M.D. contained references that could be construed
17 to indicate that Dr. Hsia's findings in this case may have been influenced by racial or ethnic bias. The
18 WCJ also found that Dr. Hsia's reporting did not constitute substantial evidence, struck Dr. Hsia's report,
19 and ordered a new panel in the specialty of neurology for applicant.

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

22 We have received an Answer from applicant. The WCJ prepared a Report and Recommendation
23 on Petition for Reconsideration (Report), recommending that the Petition for Reconsideration (Petition)
24 be denied.

25 We have considered the Petition and the contents of the Report, and we have reviewed the record
26 in this matter. For the reasons expressed by the WCJ in his Report, which we adopt and incorporate, and
27 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 ADJ10084731, 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 ADJ10084732, 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. Hsia, the PQME in neurology. (February 4, 2016 PQME Report, Joint Exhibit 1.) Dr. Hsia described applicant as "well developed and nourished ... slightly overweight and clearly de-conditioned." (Joint Exh. 1, p. 5.) Dr. Hsia 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. Hsia's deposition. (Transcript of June 9, 2016 Deposition of Rosalind Hsia, M.D., Joint Exhibit 2.) As relevant to the instant Petition, applicant's attorney asked Dr. Hsia to describe her independent recollection of applicant, without looking at her report. (Joint Exh. 2, p. 17:15-17.) Dr. Hsia 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 -- 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. Hsia and asked that a new PQME in neurology be assigned. Citing her deposition testimony, applicant requested that Dr. Hsia be removed as PQME for bias.

On October 6, 2016, the WCJ issued his F&O, finding that Dr. Hsia's 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. Hsia's
2 report may have been influenced by racial or ethnic bias and in striking Dr. Hsia's 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. Hsia 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. Hsia appears to have based her assessment of applicant’s physical condition on his ethnic
9 or racial makeup. By her own words, Dr. Hsia 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. Hsia felt that these markers were abnormally low *for a person*
12 *with “Negro blood.”* It was inappropriate for Dr. Hsia 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. Hsia 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 Hsia’s report and ordering a new panel in neurology.

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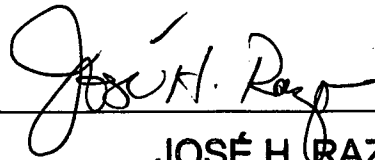
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1 For the foregoing reasons,

2 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation
3 Appeals Board, that the October 6, 2016 Findings of Facts and Orders is **AFFIRMED**.

4 **WORKERS' COMPENSATION APPEALS BOARD**

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7 **JOSÉ H. RAZO**

8 **I CONCUR,**

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12 **FRANK M. BRASS**

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15 **CHAIR**

16 **KATHERINE ZALEWSKI**



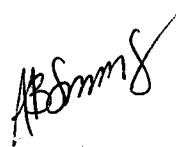
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18 **NOV 27 2017**

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

22 **TIMOTHY BEECHAM**
23 **CENTRAL VALLEY INJURED WORKER LEGAL CLINIC, INC., ATTN: GUADALUPE**
24 **TONG**
25 **GODFREY, GODFREY, LAMB & ORTEGA, LLP**

26 **REB/pc**

27 

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **TIMOTHY A. BEECHAM,**

5 *Applicant,*

6 **vs.**

7 **SWIFT TRANSPORTATION; GALLAGHER**
8 **BASSETT SERVICES, INC.,**

9 *Defendants.*

Case Nos. **ADJ10084731**
ADJ10084732
(Stockton District Office)

OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION

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11 Reconsideration has been sought by Defendants with regard to the decision filed on October 6,
12 2016.

13 Taking into account the statutory time constraints for acting on the petition, and based upon our
14 initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to
15 further study the factual and legal issues in this case. We believe that this action is necessary to give us a
16 complete understanding of the record and to enable us to issue a just and reasoned decision.
17 Reconsideration will be granted for this purpose and for such further proceedings as we may hereafter
18 determine to be appropriate.

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1 For the foregoing reasons,

2 **IT IS ORDERED** that Reconsideration is **GRANTED**.

3 **IT IS FURTHER ORDERED** that pending the issuance of a Decision After Reconsideration in
4 the above case, all further correspondence, objections, motions, requests and communications *relating to*
5 *the petition* shall be filed only with the Office of the Commissioners of the Workers' Compensation
6 Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA
7 94102) or its Post Office Box address (P.O. Box 429459, San Francisco, CA 94142-9459), and shall not
8 be submitted to the district office from which the WCJ's decision issued or to any other district office of
9 the Workers' Compensation Appeals Board, and shall not be e-filed in the Electronic Adjudication
10 Management System (EAMS). Any documents relating to the petition for reconsideration lodged in
11 violation of this order shall neither be accepted for filing nor deemed filed.

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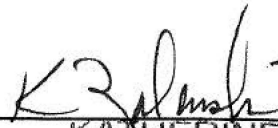
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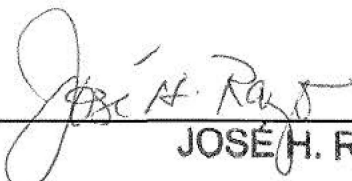
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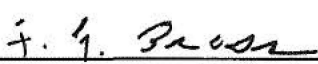
1 All trial level documents not related to the petition for reconsideration shall continue to be e-filed
2 through EAMS or, to the extent permitted by the Rules of the Administrative Director, filed in paper
3 form.¹ If, however, a proposed settlement is being filed, the petitioner(s) for reconsideration should
4 promptly notify the Appeals Board because a WCJ cannot act on a settlement while a case is pending
5 before the Appeals Board on a grant of reconsideration. (Cal. Code Regs., tit. 8, § 10859.)

6 **WORKERS' COMPENSATION APPEALS BOARD**

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9 **KATHERINE ZALEWSKI**

10 **I CONCUR,**

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12 **JOSÉ H. RAZO**

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14 
15 **FRANK M. BRASS**



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18 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

19 **DEC 16 2016**

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

22 **CENTRAL VALLEY INJURED WORKER LEGAL CLINIC, INC.**
23 **GODFREY, GODFREY, LAMB & ORTEGA, LLP**
24 **TIMOTHY A. BEECHAM**

25 *pc*

26 ¹ Such trial level documents include, but are not limited to, declarations of readiness, lien claims, trial level petitions (e.g.,
27 petitions for penalties, deposition attorney's fees), stipulations with request for award, compromise and release agreements,
etc.)

**WORKERS' COMPENSATION APPEALS BOARD
OF THE
STATE OF CALIFORNIA**

WCAB Case No.: ADJ10084731; ADJ10084732

TIMOTHY BEECHAM

v.

SWIFT TRANSPORTATION, L.L.C.

**Presiding Workers' Compensation
Administrative Law Judge:**

JOHN E. DURR

**REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION**

**I
INTRODUCTION**

SWIFT TRANSPORTATION L.L.C., by and through their attorneys of record, has filed a timely Petition for Reconsideration challenging the Findings and Order of October 6, 2006.

**II
FACTS**

Timothy Beecham born [REDACTED], sustained an injury arising out of and in the course of his employment on June 29, 2015 to his low back. (ADJ10084731)

Timothy Beecham born January 5, 1963, claims to have sustained an injury arising out of and in the course of his employment during the period June 29, 2014 through June 29, 2015, to his back and spine. (ADJ10084732)

This matter came on for trial on the limited issue of the applicant's petition for a replacement QME in the specialty of neurology based on a claim of alleged bias on the part of the existing panel QME Dr. Hsia. The applicant had presented for a QME evaluation which had been performed without incident.

A report issued from the QME evaluator Dr. Hsia dated February 4, 2016. (Joint Exhibit 1) In that report, on page 5 of under physical examination, the doctor stated that; "The claimant was well-developed and nourished. He was slightly overweight and clearly deconditioned." The applicant took the deposition of Dr. Hsia in response to that QME report, however the exact reason for scheduling the doctor's cross-examination is not known.

During the applicants examination of Dr. Hsia the following testimony, in part, was elicited in response to the question regarding the doctor's independent recollection of Mr. Beecham:

"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 — 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". (Joint Exhibit 2, Page 17:18)

On October 6, 2016 a Findings of Fact, Orders, and Decision issued finding that the reporting of Dr. Rosalind Hsia, in the capacity of panel Qualified Medical Examiner, included references that could be construed to indicate that the findings in this particular case may have been influenced by bias based on race or ethnic group identification.

There was also a finding that the reporting of Dr. Rosalind Hsia, in the capacity of panel Qualified Medical Examiner was determined not to be substantial evidence.

Finally there was a finding that a new panel of Qualified Medical Examiners needed to be issued in the specialty of neurology (MPN).

The Petitioner, Swift Transportation filed a timely Petition for Reconsideration on October 19, 2016.

III **DISCUSSION**

In the Petitioner's Petition for Reconsideration they raised two arguments the first being that the court erred in placing the burden of proof upon the defendants and then finding that the defendants did not meet that evidentiary burden of proof.

The applicant was the moving party and the Petitioner correctly identifies that the burden of proof pursuant to Labor Code 5705 did rest with the moving party. The wording of the of the doctor in the February 4, 2016 report; that the applicant was "clearly deconditioned" when combined with the statements of the doctor during cross-examination indicating that; his [the applicants] "Negro blood" was the basis of the [doctors] determination that the muscle tone and strength were abnormally low, especially considering the fact that he had not that long ago stopped working. At this point I felt that the applicant had met their burden showing that the use of a stereotype by doctor indicated impermissible bias invalidating the totality of her reporting.

The portions from my Opinion on Decision cited by Petitioner were my fleshing out of how I had examined the record for evidence to try to identify and give credence to other possible explanations for the characterization made by the doctor. This was to see if there was evidence, after finding the applicant had met their burden showing bias, of a medical basis to rebut the doctor's use of an apparent stereotype to determine that the applicant did not have the appropriate muscle tone and strength based on his race.

Petitioner also indicated that I found that there was no evidence of bias during the examination. This is a separate issue that was raised at the time of trial. This referred the actual examination not the reporting of that examination, my comment was a resuscitation of the information presented at time of trial indicating that there had been no overt indication of biased treatment of Mr. Beecham made by the examining physician during the evaluation. It did not state that the opinions contained in the doctor's report of that examination did not contain bias.

Having found that there had been impermissible bias by the doctor in the opinions contained the report; said report was found not to be substantial medical evidence.

The second argument raised by the Petitioner indicates, in part, that the initial report of Dr. Hsia should be admitted into evidence because everyone was unaware of the bias until the cross-examination of the doctor. It wasn't until the time of the cross-examination that it became clear that opinions contained in the original report appear to have been based on a stereotype of someone with "Negro blood" which is an improper bias. Upon finding that there had been improper bias, all of the reporting from this doctor in this case became tainted. This is especially true as the cross-examination of Dr. Hsia the first time it was brought to light that the basis of her finding: the muscle tone and strength were abnormally low, especially considering the fact that he had not that long ago stopped working.

Finally, I disagree with the assertion that this was merely the use of a politically incorrect term. I believe that testimony given during the cross-examination indicates that the doctor did have an independent recollection of the applicant associated with a stereotype from the one time that she had seen the applicant in conjunction with the initial evaluation. Therefore, that stereotype was in place at the time she formulated her written opinion.

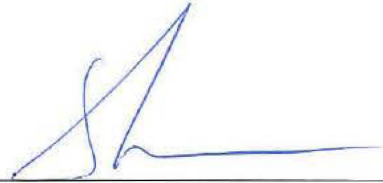
Regarding the final conclusions of the Petitioner, I do not believe that the effect of determining that the recollection of an evaluating physician of the injured worker is based upon a racial stereotype will have cascading negative effects and lower the evidentiary bar, producing constant petitions for replacement panels due to bias.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

10/28/2014

DATE



JOHN E. DURR

Worker's Compensation Judge

Served by mail on all parties listed on the
Official Address record on the above date.

BY: cm

CENTRAL VALLEY MODESTO, US Mail
SWIFT TRANSPORTATION, US Mail
GALLAGHER BASSETT 255397 SACRAMENTO, Email
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