WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LISA HENRY, *Applicant*

vs.

ALLIED BARTON SECURITY SERVICES, and ARCH COMPANY administered by ESIS, INC., *Defendants*

Adjudication Number: ADJ8077330
Oxnard District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted The Dental Trauma Center's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

The Dental Trauma Center (lien claimant) seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on November 14, 2018, wherein the WCJ found in pertinent part that applicant did not sustain injury arising out of and occurring in the course of employment (AOE/COE) to her back, jaw, teeth, respiratory system, psyche, or in the form of sleep disorder; and the WCJ ordered that the lien be disallowed.

Lien claimant contends that the medical record is substantial evidence that Lisa Henry (applicant) sustained a specific injury AOE/COE to her lumbar spine and teeth, and that defendant waived the issue of injury AOE/COE.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will rescind the F&O and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to her psyche, back, jaw/teeth, respiratory and body systems, and in the form of stress and sleep disorder, while employed by defendant as a security supervisor during the period from January 1, 2010, through January 1, 2011. Defendant denied applicant's injury claim. The parties resolved the injury claim by Compromise and Release, an Order Approving Compromise and Release was issued on April 14, 2015.

Applicant's course of self-procured medical treatment, relevant to the issues raised in the Petition, is summarized as follows:

Applicant's orthopedic primary treating physician (PTP) Gil Tepper, M.D. referred applicant for a dental consultation by Joseph Schames, D.D.S. Dr. Schames initially noted:

> The above named patient was seen in my office, in my area of expertise in the field of dentistry, for evaluation of any industrial related dental traumas, facial pain, Temporomandibular Joint symptomatology, headaches, Bruxism, Oral Sleep Appliance, side effects of medications which can cause or aggravate dental decay, Periodontal Disease, and Bruxism/clenching and grinding of the teeth.
> (LC Exh. 8, Joseph Schames, D.D.S., July 12, 2012, p. 2.)

He later stated:

> Ms. Schusse-Henry developed sleep disturbances due to her industrially related pain and resultant emotional stressors. She also was taking medications on an industrial basis that have known side effects of causing sleep disturbances. … ¶ … It is with reasonable medical probability that the patient developed sleep disturbances as a result of the industrially caused pain and/or any resultant industrial related emotional stressors and/or due to the sleep disturbance side effect of medications taken on an industrial basis. The patient's Primary Treating Physician has, therefore, referred the patient to this office for treatment of their Sleep Disorder with an Oral Sleep Appliance.
> (LC Exh. 8, Joseph Schames, D.D.S., July 12, 2012, pp. 2 – 3.)

Applicant was referred to periodontist Moshe Benarroch, D.M.D. In his report Dr. Benarroch stated:

> Ms. Lisa Schusse-Henry (patient) was seen in my office … for a comprehensive dental evaluation on 01/07/2013. ¶ The Primary Treating Physician has already referred this patient to an evaluating dentist, Dr. Mayer Schames, whose report discusses medical causation, which with reasonable medical probability, shows industrial factors which have contributed to the patient's dental problems.
> (LC Exh. 13, Moshe Benarroch, D.M.D. January 7, 2013, p. 2.)

He later concluded:

> [I]t is with reasonable medical probability that the patient's industrially related bruxism has contributed [sic] to her [sic] facial pain, TMJ Disorder/ Inflammation, and has also resulted in fractures of the teeth. ¶ Additionally, the excessive pressures placed upon the teeth due to the industrially related bruxism, with reasonable medical probability, has caused micro-fractures in the teeth, which contributes to the abscesses of the teeth as documented on the x-rays.
> (LC Exh. 13, p. 10.)

On October 30, 2014, applicant was re-evaluated by Dr. Benarroch. The diagnoses were:

> Bruxism/Clenching and Grinding of the Teeth and Bracing of the Facial Muscles [and] Xerostomia [dry mouth] (*In response to orthopedic pain and/or any resultant industrial stressors; and/or due to side effect of the antidepressant medications; and/or due to a Sleep Disorder*)
> (LC Exh. 17, Moshe Benarroch, D.M.D., October 30, 2014, p. 2, italics in original.)

On January 16, 2014, applicant was evaluated by orthopedic qualified medical examiner (QME) David A. Lewis, M.D. The doctor examined applicant, took a history, and reviewed the medical records. Regarding the cause of applicant's orthopedic condition, he stated:

> The industrial injury causation for the lumbar strain to be a single event, it happened in January of 2011, I cannot find any facts to support a cumulative trauma claim based on the patient's history and records. I do not find any industrial causation for the degenerative disc disease of the cervical spine. I do not find any industrial causation to the left shoulder. I do not find any industrial causation to the left hip.
> (Def Exh. A, David A. Lewis, M.D., January 16, 2014, p. 9)

Dr. Lewis later stated:

> According to the AMA Guidelines Fifth Edition I would place her in DRE lumbar category 1 with 0% impairment of the whole person, from page 384 of the guides.
> (Def Exh. A, p. 9)[1]

[1] DRE Lumbar Category 1 criteria are: No significant clinical findings, no observed muscle guarding or spasm, no documentable neurologic impairment, no documented alteration in structural integrity, and no other indication of impairment related to injury or illness; no fractures. (American Medical Association Guides to the Evaluation of Permanent Impairment, (AMA Guides), p. 384, Table 15-3.)

Lien claimant and defendant proceeded to trial on September 5, 2018. The issue submitted for decision was lien claimant's lien, the "sub-issues" included injury AOE/COE and body parts injured. (Minutes of Hearing and Summary of Evidence (MOH/SOE), September 5, 2018, p. 2.)

DISCUSSION

We first note, lien claimant argues that defendant waived the issue of injury AOE/COE because, "Defendant's denial letter to applicant dated December 13, 2011 (Ex. B) fails refer to any supporting documentation Defendant relied upon when denying Applicant's claim." (Petition. p. 3.)

Pursuant to Labor Code section 5705, "The burden of proof rests upon the party or lien claimant holding the affirmative of the issue." (Lab. Code, § 5705.) It is the applicant's burden to establish that industrial causation is reasonably probable. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd*. (2015) 61 Cal.4th 291, 297 [80 Cal.Comp.Cases 489]; *Lantz v. Workers' Comp. Appeals Bd.* (2014) 226 Cal.App.4th 298 [79 Cal.Comp.Cases 488].) When a lien claimant (rather than the injured worker) is litigating the issue of entitlement to payment for industrially-related medical treatment, the lien claimant stands in the shoes of the injured employee and the lien claimant must prove by a preponderance of the evidence all of the elements necessary to the establishment of its lien. (Lab. Code, §§ 3202.5, 5705; *Kunz v. Patterson Floor Coverings, Inc*. (2002) 67 Cal.Comp.Cases 1588, 1592 (Appeals Board en banc*)* Lien claimant did not cite, nor did we find, any statutory or case law that supports its argument that defendant waived the issue of injury AOE/COE.

It is well established that any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399, [33 Cal.Comp.Cases 647]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, the reports from the Dr. Schames and Dr. Benarroch refer to applicant's orthopedic and psychiatric injuries as the cause (or a contributing cause) of applicant's various face/jaw/teeth conditions. The WCJ is correct that they refer to a cumulative injury (as plead) not the specific injury identified by Dr. Lewis. But in addition to Dr. Lewis saying there was no CT injury, he also said the degenerative disc disease of the cervical spine, the left shoulder condition, and the left hip condition, were not industrial. Dr. Lewis determined that the only industrial orthopedic injury was to applicant's lumbar spine, and that the injury caused no impairment. (Def Exh. A, p. 9) Dr. Schames and Dr. Benarroch refer to applicant's orthopedic injury as a contributing cause of her dental conditions but they do not state that the lumbar spine was the cause of applicant's stress, or other symptoms. For example, Dr. Benarroch indicated that applicant had neck pain, shoulder pain, back pain, "emotional stressors in response to the pain and injuries," and sleep disturbances. (LC Exh. 13, pp. 3 – 4.)

Also, as the WCJ noted, there is no evidence in the trial record of an industrial psychiatric injury. Further, as the WCJ noted, lien claimant and Dr. Benarroch appear to think that the injury claim to the various body parts was accepted, but it was denied. Additionally, in the record review section of his report, Dr. Lewis reviewed the transcript of applicant's deposition (not in evidence) and stated:

> Deposition of Lisa Henry from April 12, 2013. … Dentist before this industrial injury that she was seeing on a semi-regular basis. Had her jaw wired shut after the gunshot wound to the jaw in 1985.
> (Def Exh. A, p. 8, record review.)

Review of the record indicates that Dr. Lewis was the only doctor aware of the gunshot wounds to applicant's jaw and abdomen. (see (Def Exh. A, pp. 7 and 8.) There is no evidence in the trial record indicating that Dr. Schames or Dr. Benarroch knew that applicant had previously sustained a gunshot wound to her jaw. Clearly neither doctor had an accurate history as to the cause, nature, or extent of applicant's orthopedic injury, and in turn, her dental condition; and it appears that they incorrectly believed that applicant's injury claim, as plead, had been accepted.

Finally, as noted above Dr. Schames or Dr. Benarroch concluded that applicant's condition was a result of the industrially caused pain "and/or" any resultant industrial related emotional stressors "and/or" due to the sleep disturbance side effect of antidepressant taken on an industrial basis. (see LC Exh. 8, p. 2; LC Exh. 17, p. 2.) A conclusion that a condition was caused by one

factor “and/or” another factor “and/or” another factor is not substantial evidence regarding causation.

Thus, for the reasons discussed above, the reports from Dr. Schames and Dr. Benarroch are not substantial evidence regarding the issue of injury AOE/COE.

It is also important to note that lien claimant’s exhibit 1, the Account History, dated November 20, 2015, shows applicant received treatment during the period from January 7, 2013, through October 30, 2014, and that the amount billed was $6,548.53. (LC Exh. 1.) Lien claimant’s exhibit 2, the Patient Brief History dated March 30, 2016, shows treatment was provided from June 13, 2012, through April 25, 2014, and the amount owed by defendant was $34,003.91, including $6,800.78 interest. (LC Exh. 2.) Lien claimant’s “various bills” indicate that applicant received treatment on June 13, 2012. (LC Exh. 3, p. 10). However, the list of treatment provided on June 13, 2012 in lien claimant’s exhibit 2, is quite inconsistent with the June 13, 2012 treatment bill (LC Exh. 3, p. 10), i.e. the treatment bill identifies two procedures and the Patient Brief History includes eleven procedures. Due to these inconsistencies, lien claimant’s exhibits 1, 2, and 3 are not substantial evidence as to the treatment provided nor as to the billing submitted for that treatment.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or where there is insufficient evidence to determine an issue. (Lab. Code, §§ 5701, 5906; (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264]; *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) Our review of the entire trial record indicates that it contains no substantial evidence upon which findings regarding the issues of lien claimant’s lien can based. Under these circumstances, it is appropriate that we return the matter to the WCJ for further development of the record. It is important for the parties to note that because the period of the cumulative injury claimed by applicant ended January 1, 2011, and the treatment at issue was provided during the period between 2012, and 2014, it may be difficult to produce substantial medical evidence addressing the issues pertaining to the lien, including the issue of injury AOE/COE. Thus, it may be in the parties’ interest to resolve the matter by way of settlement, as opposed to further litigation.

Accordingly, we rescind the F&O and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 14, 2018 Findings and Order is **RESCINDED** and the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 9, 2021

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

LAW OFFICES OF SAAM AHMADINIA
LAW OFFICES OF WILSON & PESOTA LLP

TLH/*pc*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *o.o*