WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

GEORGE ZEBER, ***Applicant***

vs.

NEW YORK YANKEES; TRAVELERS INDEMNITY COMPANY, ***Defendants***

Adjudication Number: ADJ10857121
Santa Ana District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, except for the recommendation that we deny reconsideration, and for the reasons stated below, we will grant reconsideration, amend the WCJ's decision as recommended in the report to defer the issue of insurance coverage which is subject to mandatory arbitration. We also amend the decision to make a finding based on the parties' stipulation that Travelers Indemnity Company insured the employer from April 5, 1976 to April 5, 1977 (Minutes of Hearing and Summary of Evidence (MOH/SOE) 9/1/21, at p. 2:9-10) and amend the Award to clarify that it is against Travelers. We otherwise affirm the June 23, 2022 Findings and Award and Order.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the June 23, 2022 Findings and Award and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the June 23, 2022 Findings and Award and Order is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. The issue of insurance coverage is deferred and subject to mandatory arbitration.

* * *

7. The issue of insurance coverage is deferred and subject to mandatory arbitration.

AWARD

AWARD IS MADE in favor of **GEORGE ZEBER** and against **TRAVELERS INDEMNITY COMPANY** as follows:

a. Future medical treatment reasonably required to cure or relieve from the effects of the injury herein.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 13, 2022

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

GEORGE ZEBER
MIX & NAMANNY
GOLDBERG SEGALLA
DIMACULANGAN & ASSOCIATES

PAG/*pc*

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

REPORT & RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Defendant, Travelers Indemnity Company, successor in interest of United States Fidelity and Guaranty Company ("Travelers"), filed a timely and verified Petition for Reconsideration from the June 23, 2022 Findings and Award and Order finding subject matter and personal jurisdiction, that the claim is not barred by the statute of limitations, applicant's permanent and stationary date of September 1979, that applicant is in need of further medical treatment, and that the New York Yankees are not illegally uninsured, but rather insured by USF&G, now administered by Travelers. There is also a finding that permanent disability is deferred pending development of the medical record and parties were ordered to develop the medical record. There is no response from either Applicant's counsel or co-defendant New York Yankees. To date, neither New York Yankees nor applicant's attorney has filed an Answer to Defendant's Petition for Reconsideration.

Petitioner plead:

1. The Board acted without or in excess of its powers.
2. The evidence does not justify the findings of fact.
3. The findings do not support the order, decision or award

II. STATEMENT OF FACTS

Applicant, George Zeber, while employed during the period June 1, 1968 through September 1, 1978, as a professional baseball player, Occupational Group No. 590, by the New York Yankees, claims to have sustained injury arising out of and in the course of employment to head, neck, back, spine, elbows, shoulders, fingers, hands, wrists, legs, hips, ankles, knees, feet, internal in the form of hypertension and hypertensive heart disease, sleep disorder, psyche, hearing loss, and tinnitus. Procedural history includes the Mandatory Settlement Conference on February 24, 2021, wherein the matter was set for trial by Workers' Compensation Judge Richard Brennen who indicated in the Minutes of Hearing that trial would be bifurcated on the issue of coverage. On May 6, 2021, multiple parties appeared for trial, and this Workers' Compensation Judge indicated that the matter would continue to another date per request of the parties but remain set on the bifurcated issue of coverage. Defendant insurance carrier NYSIF had requested dismissal but not all parties would stipulate to the request and the issue was deferred. On May 27, 2022, following discussion with the parties, the trial was converted to a Mandatory Settlement Conference to address moving the matter forward. This included a revision of the Pre-Trial Conference Statement and reframing the stipulations

and issues to include trial on all issues as requested by applicant's attorney and agreed to by the parties. An Order Dismissing NYSIF would also issue following receipt of a joint stipulation by the parties, thus leaving the New York Yankees and Travelers as the remaining defendants. A joint stipulation to dismiss NYSIF was filed and the order issued thereafter. On September 1, 2021, the parties appeared and testimony began but did not conclude on that date. Following additional dates of trial, testimony concluded on April 6, 2022, with parties instructed to file a Memorandum of Points and Authorities by no later than May 6, 2022, wherein on that date, the matter was submitted. The undersigned issued her Findings and Order and Award, and the Opinion on Decision indicating, inter alia, that the Yankees were not uninsured per Travelers' claim and that the medical record must be developed in order to address other issues pertaining to applicant's benefits. It is from this finding that defendant Travelers has petitioned for reconsideration.

III.
CONTENTIONS

Petitioner specifically indicates that:

1. New York Yankees failed to prove the existence of workers' compensation coverage from the period of April 5, 1977 to September 1, 1978.
2. Submitted medical reports are not substantial medical evidence

IV.
DISCUSSION

The Workers' Compensation Judge first clarifies that as indicated, this matter was initially set on the bifurcated issue of coverage. In reviewing the litigation history, particularly as to the Application for Adjudication filed more than five years ago on May 9, 2017 (EAMS DOC ID21891977), the Workers' Compensation Judge sought to assist with expediently addressing the issues considering the long delay in moving the file forward. It was particularly disconcerting that following almost four years since the filing of the Application, defendants were engaging in a battle over the issue of insurance coverage documentation for the New York Yankees. Rather than delay the matter further via "piecemeal litigation", as is generally discouraged, the Workers' Compensation Judge included additional issues for decision. The Workers' Compensation Judge found this to be a reasonable request made by applicant's attorney, especially in light of multiple defendants failing to efficiently address whether or not the New York Yankees had such documentation from 1978 evidencing the existence of a workers' compensation policy.

Public policy and the directive in Labor Code §3202 provides that the workers' compensation statutes be "liberally construed by the courts with the

purpose of extending their benefits for the protection of persons injured in the course of their employment." Petitioner has admitted to having a policy for the New York Yankees for a portion of the cumulative trauma period at issue; therefore, there is a viable insurance carrier liable for benefits to the applicant. In response to the Petition for Reconsideration, the Workers' Compensation Judge will address the arguments regarding the New York Yankees as allegedly uninsured during a portion of the cumulative trauma period and the development of the medical record. However, upon further reflection and review, the Workers' Compensation Judge respectfully requests that the Appeals Board amend the Finding and Award and Order to indicate that the issue of whether the New York Yankees have a valid workers' compensation policy in effect during the cumulative trauma period ending on September 1, 1978, is deferred to arbitration pursuant to Labor Code §5275.

The Workers' Compensation Judge was charged with finding the existence of a policy for the New York Yankees for two particular time periods where policies were allegedly in place. First is the policy that Travelers admitted they issued under USF&G policy number 1-54-3900-259039 (Travelers Exhibit G, May 24, 2021, and H, April 3, 2020). This policy provides workers compensation coverage from April 5, 1976 through April 5, 1977. The Workers' Compensation Judge emphasized that even with a thorough search of their records, no such policy or underwriting file was found, only an acknowledgment of the policy's existence. Another search conducted by Travelers yielded no information regarding subsequent policies issued providing coverage for the date April 7, 1978. As discussed in the Opinion, Petitioner's request was for a finding that failure to provide documentary evidence of the policy for the period in question should lead to the conclusion that no policy existed following their policy period ending on April 5, 1977; however, only by their own admission can the Workers' Compensation Judge and the Appeals Board rely on the existence of the policy for those dates. The New York Yankees, then, were asked to produce documentation evidencing a policy beginning where the previous policy ended. The New York Yankees, following their own search for documentary evidence as to a policy beginning on April 6, 1977, did not produce the requested documentation. Instead, they pointed to normal business practices as indicated in their representative's affidavit as well as the reference to a different workers' compensation claim filed against the Yankees for a time period within the instant claim's cumulative trauma period. The Workers' Compensation Judge emphasizes that, in the opinion, a reference to another New York Yankees player's case, was solely to note the recognition of the Florida District Court's notation of the New York Yankees as a workers' compensation insurance policyholder, and that they were insured on April 7, 1978. The Workers' Compensation Judge found it reasonable to infer that the New York Yankees had a workers' compensation policy in place if the Florida District Court of Appeals issued a decision in 1980, identifying the Yankees's policy with USF&G. Whether the Florida District Court of Appeals correctly addressed the workers' compensation claim on the merits was not the issue, only that the

Workers' Compensation Judge could rely on that court's identification of the case participants in that case, including insurance carrier USF&G. The Workers' Compensation Judge has broad discretion to take in evidence and the Florida District Court of Appeals case referring to USF&G is additional indicia offered to prove the existence of the policy. It was no more unreasonable to rely on that identification than relying on petitioner's admission to the existence of a policy for the period April 5, 1976 through April 5, 1977, and there being no documentary evidence produced for that period either. The Workers' Compensation Judge referred to the Insurance Code and the requirement to provide notice of termination to the policyholder; petitioner's reference to use of that code for Automobile policies and the effective date of same is not instructive.

Regarding development of the medical record, the Workers' Compensation Judge is unclear as to petitioner's sweeping generalization and mischaracterization of the medical reports. The Workers' Compensation Judge noted in her opinion that one particular doctor in internal medicine did not appropriately address applicant's injurious exposure to Agent Orange while serving in Vietnam and his subsequent internal injuries, i.e., hypertensive heart disease and coronary artery disease. For example, Petitioner inaccurately asserts that Applicant's experience in Vietnam is not addressed by Drs. Berman and Greenzang, "Doctor's Berman and Greenzang did not take a complete history of Zeber's military service since both reports neglected to mention Zeber's combat and exposure to gunfire and explosions during the time he served in the Vietnam War." (Petition for Reconsideration, page 20, lines 18-20.)

This is demonstrably incorrect as to Dr. Berman's assessment on page three of his report dated June 6, 2019, which includes a very specific discussion section that refers to apportionment of "50% apportioned to noise exposure while in the military, for which he received an Award from VA for hearing loss and tinnitus, after reviewing the most recently received medical records, I find nothing that would cause me to amend my findings in this case. He still has the hearing loss and tinnitus secondary to exposure during his pro baseball career and during his time in the military." (Applicant's Exhibit 10). Petitioner misinforms the Appeals Board as to the contents of medical reports received into evidence. Petitioner then furthers their argument as to the inaccuracy of the medical reports, by referring to Mr. Zeber's testimony regarding his hearing issues and that he is not aware of any other cause of his hearing loss (Petition for Reconsideration, page 20, lines 22-23.) While the applicant is welcome to testify as to his thoughts and beliefs regarding his medical condition, they are not given great weight when considering the medical legal process, since he is a lay person. Further, his assessments are simply observations, and are not medical conclusions given greater consideration than that of multiple specialists, including a neurologist and otolaryngologist.

The Appeals Board has emphasized this Workers' Compensation Judge's affirmative duty to develop the record when necessary to achieve a fair and just result. It is well established that, pursuant to Labor Code §§5701 and 5906, there is authority to further develop the record at any time during the proceedings, including obtaining additional medical evidence concerning injury, to enable a complete adjudication of the issues, consistent with due process. (*Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389, 392; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1120-1121.) Permanent disability cannot be addressed without all body parts being addressed and the Workers' Compensation Judge must rely on a fully developed record to ascertain that.

IV.
RECOMMENDATION

For the reasons stated herein the Workers' Compensation Judge recommends that the Petition be denied on the issue regarding insurance coverage, and that the Appeals Board issue an Amended Findings to reflect insurance coverage is deferred to mandatory arbitration; further that the Order be affirmed as to development of the medical record.

Date: July 26, 2022
Jennifer Kaloper-Bersin
Workers' Compensation Judge
SANTA ANA DISTRICT OFFICE