WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE RAMOS BADILLO, *Applicant*

vs.

GENEVA STAFFING, INC. dba PRIORITY WORKFORCE, and WESCO INSURANCE COMPANY, administered by AMTRUST NORTH AMERICA, INC., *Defendants*

Adjudication Numbers: ADJ11286905, ADJ11287164
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Joint Findings of Fact & Awards (F&A), issued by the workers' compensation administrative law judge (WCJ) on June 11, 2021, wherein the WCJ found in pertinent part that in both cases applicant's injuries included injury to his teeth; that the medical treatment provided by Lien Claimant Mayer Schames, D.D.S. dba The Dental Trauma Center (DTC) was reasonable; that applicant was temporarily totally disabled during the period from April 30, 2018, through April 28, 2019; and that the lien of the Employment Development Department (EDD) was not barred by the Labor Code section 4903.5 limitations period. The WCJ awarded DTC $12,289.29 plus penalties and interest, and awarded the EDD $20,384.00 plus interest, for satisfaction of their respective liens.

Defendant contends there is no evidence that the treatment provided by DTC was reasonable and necessary treatment for an industrial injury, that Medical Concierge Services, LLC has been suspended by the California Franchise Tax Board so the testimony of Manuel Fuentes should be stricken from the record, that the EDD lien was not timely filed so it is barred by the statute of limitations, and that the EDD did not submit evidence indicating that applicant was temporarily or permanently disabled during the period that the EDD paid benefits to applicant.

We received an Amended Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We did not receive an Answer from DTC or from the EDD.

We have considered the allegations in the Petition for Reconsideration (Petition), and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Jose Ramos Badillo, applicant herein, claimed injury to his lumbar spine, right wrist, right hand, and his teeth, while employed by defendant as a sander, during the period from September 20, 2014, through April 18, 2018 (ADJ 11286905). Applicant also claimed injury to his knees and teeth while employed by defendant as a sander, on February 8, 2017 (ADJ11287164). Defendant accepted the orthopedic injury claims but denied both claims of injury to applicant's teeth. (Minutes of Hearing and Summary of Evidence (MOH/SOE), June 7, 2021, pp. 2 – 4, stipulations and issues.)

Applicant was treated by Bryan Aun, D.C., from May 11, 2018, to April 24, 2019. (See L.C. Exhs. 15 – 21, EDD Physician/Practitioner's Certificates.) Dr. Aun's August 22, 2018 progress report, indicated that applicant required an examination with Mayer Schames, D.D.S., to prove or disprove a contested claim of injury to his teeth. Dr. Aun stated:

> The patient indicates that he grinds his teeth at night due to the pain he has been experiencing along with the complaints of work-related stress. Dr. Schames, DDS for an evaluation.
> (L.C. Exh. 3, Dr. Aun, August 22, 2018, pp. 2 and 3; includes a Request for Authorization).

On August 7, 2018, applicant was evaluated by chiropractic qualified medical examiner (QME) Mark S. Johnson, D.C. (L.C. Exh. 10, Dr. Johnson, August 10, 2018.) Dr. Johnson found that applicant's condition was not permanent and stationary at that time. (L.C. Exh. 10, p. 16.)

Applicant was seen by Mayer Schames, D.D.S., on October 24, 2018. (L.C. Exh. 7, Dr. Schames, November 16, 2018.) Dr. Schames designated David Schames, D.M.D., as the evaluating physician. (L.C. Exh. 7, p. 2.) Dr. Schames conducted a facial/oral examination and conducted several diagnostic tests. The "Diagnosis of Industrial Related Conditions" was:

> Bruxism/Clenching and Grinding of the Teeth and Bracing of the Facial Muscles
> Myofascial Pain of the Facial Musculature
> Trigeminal Nerve Pain/ Central Sensitization
> Osteoarthrosis of the right and left TMJs
> Aggravated Periodontal Disease/ Gingival Inflammation
> (L.C. Exh. 7, p. 8.)

Dr. Schames concluded:

> Upon examination, and as indicated in the photographs provided herein, I found that Mr. Badillo presents with objective clinical findings of Bruxism where Mr. Badillo is clenching and bracing his facial musculature. The objective findings were teeth indentations/scalloping of the lateral borders of the tongue bilaterally. ¶ The scientific literature has documented that a person can have bruxism in response to pain and/or stress. Therefore, with reasonable medical probability, Mr. Badillo's myofascial pain of the facial musculature was caused and/or contributed to by Mr. Badillo's bruxism in response to his industrial pain and/or emotional stressors.
> (L.C. Exh. 7, p. 9.)

After reviewing additional medical records, QME Johnson submitted a supplemental report wherein he stated that, "Mr. Badillo's condition can be considered permanent and stationary." (L.C. Exh. 11, Dr. Johnson, May 6, 2019, p. 13.)

Dentistry QME, Jeffrey T. Miller, D.D.S., evaluated applicant on June 12, 2019. (L.C. Exh. 9, Dr. Miller, July 2, 2019.) Dr. Miller examined applicant, took a history and reviewed the medical/dental record. The diagnoses included myalgia (muscle pain) and bruxism. (L.C. Exh. 9, p. 6.) Regarding bruxism, Dr. Miller explained:

> Bruxism is the parafunctional habit of grinding and clenching one's teeth. … ¶ A normal response to pain is to clench one's teeth. Chronic pain, especially moderate to severe long-term, can cause one to regularly clench their teeth in response to the pain. Clenching is a normal response to tolerate and relieve one's pain, as well as distract oneself' from the primary pain. ¶ Evidence-based scientific literature has shown that emotional stressors can cause bruxism … ¶ Stress is the number one cause for the condition of bruxism. …
> (L.C. Exh. 9, p. 16.)

As to the cause of applicant's bruxism Dr. Miller stated:

> In my opinion, according to the applicant's interview and medical records, it is within reasonable medical probability that the injury was AOE/COE, and should be treated on an industrial basis. This is because there was primary orthopedic trauma and stress of' cumulative trauma … while at work performing his work duties, and secondary trauma of' bruxism, due to pain, stress and medication resulting from the primary industrial injury.
> (L.C. Exh. 9, p. 20.)

The injury claims were settled by Compromise and Release; the WCJ issued the Joint Order Approving Compromise & Release on December 11, 2019.[1]

On June 7, 2021, defendant and lien claimants, DTC and the EDD, proceeded to a lien trial. The witnesses were DTC's bill reviewer, Manuel Fuentes; defendant's bill reviewer, Tedy Baron Norohian; and defendant's claims administrator, Nancy Monarrez. (MOH/SOE, pp. 7 – 11.) The issues submitted for decision included parts of body injured (teeth), the DTC lien, and the EDD lien for benefits paid from April 30, 2018, through April 28, 2019. (MOH/SOE, pp. 3 – 4; L.C. Exh. 14.)

DISCUSSION

Absent stipulations regarding the alleged injury and the injured body parts, a lien claimant must prove that applicant sustained an injury arising out of and occurring in the course of employment (AOE/COE). "A lien claimant ... has the burden of proving by a preponderance of the evidence that the claim is industrial...." (*Hand Rehabilitation Center v. Workers' Comp. Appeals Bd. (Obernier)* (1995) 34 Cal.App.4th 1204, 1212-1213 [60 Cal.Comp.Cases 289, 291-292]; *Tito Torres v AJC Sandblasting and Zurich North America* (2012) 77 Cal.Comp.Cases 1113 (Appeals Board en banc).) Here, defendant denied both claims of injury to applicant's teeth so the lien claimants must first prove that applicant sustained an injury AOE/COE.

As noted above, treating physician Bryan Aun stated that applicant, "…grinds his teeth at night due to the pain he has been experiencing…" (L.C. Exh. 3, Dr. Aun, August 22, 2018, p. 2.) Dr. Schames indicated that applicant's bruxism was an industrial related condition and concluded:

> Mr. Badillo's myofascial pain of the facial musculature was caused and/or contributed to by Mr. Badillo's bruxism in response to his industrial pain and/or emotional stressors.
> (L.C. Exh. 7, p. 9.)

QME Dr. Miller stated that applicant's bruxism was due to the "pain, stress and medication resulting from the primary industrial injury." (L.C. Exh. 9, p. 20.)

An injury is a "compensable consequence" when the subsequent injury is the direct and natural consequence of an original industrial injury; the subsequent injury is considered to relate back to the original injury (*Southern California Rapid Transit District, Inc. v. Workers' Comp.*

[1] The settlement also included the January 20, 2017 bi-lateral knee injury claim (ADJ12806955).

Appeals Bd. (Weitzman) (1979) 23 Cal.3d 158 [44 Cal.Comp.Cases 107]; *Rodgers v. Workers' Comp. Appeals Bd.* (1985) 168 Cal.App.3d 567 [50 Cal.Comp.Cases 299].) The reports from Dr. Aun, Dr. Schames, and Dr. Miller, are substantial evidence that applicant's bruxism is a result of his industrial injury and constitutes an injury AOE/COE.

Defendant argues that, "Without a designation of the primary treating physician, a proper request for authorization from the primary treating physician … and definitive medical reporting from Dr. Miller and Dr. Johnson, injury to the teeth cannot be established." (Petition, p. 4.) First, we note again that the injury claims regarding applicant's teeth were denied. As such there is no legal requirement that the treating physician submit a request for authorization. Also, the trial record does include a request for authorization by treating physician Dr. Aun, for the referral to Dr. Schames. (L.C. Exh. 3, includes a Request for Authorization). There is no evidence in the record indicating that defendant objected to, or otherwise responded to the request for authorization, or the subsequent treatment by Dr. Schames. Additionally, as discussed earlier, the trial record does contain substantial evidence that applicant sustained injury to his teeth AOE/COE.

In the Report, the WCJ reviewed Dr. Schames' explanation as to why the treatment he provided applicant was reasonable and appropriate. (See Report pp. 5 – 7.) The relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence and the Appeals Board may rely on the medical opinion of a single physician unless it is "based on surmise, speculation, conjecture, or guess." (*Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; *Market Basket v. Workers' Comp. Appeals Bd*. (1978) 86 Cal.App.3d 137 [46 Cal.Comp.Cases 913.) Having reviewed the entire record, we agree with the WCJ that Dr. Schames explained why the treatment he provided applicant was reasonably required to cure or relieve applicant from the effects of his injury. ((Lab. Code, § 4600(a).) Thus, DTC met its burden of proof on that issue.

Regarding the argument that Manuel Fuentes was not an expert witness and his testimony should be stricken, we first note that defendant cites no legal authority, nor were we able to find such authority, for its contention that because his business has been suspended by the California Franchise Tax Board, Mr. Fuentes could not testify as an expert witness. More importantly, as explained by the WCJ:

> [A] WCJ's ruling regarding whether to accept a witness as an expert is discretionary and will not be disturbed absent a showing of clear abuse in determining that the witness had sufficient knowledge of the subject. [*Chadock*

> *v. Cohn* (1979) 96 Cal. App. 3d 205, 208] The test to be applied is whether the witness possesses the special knowledge, skill, experience, training, or education sufficient to qualify him or her as an expert capable of speaking with authority on the subject. [Evid. Code § 720(a)] This special knowledge, skill, experience, training, or education may be shown by any admissible evidence, including the testimony of the witness. [Evid. Code § 720(b)] Any questions regarding the witness's degree of knowledge goes to the weight of his or her opinions rather than his or her eligibility to testify. [*Chadock v. Cohn, supra*, 96 Cal. App. 3d at p. 208]
> (Report, p. 7.)

It is well established that a WCJ's opinions regarding witness credibility are entitled to great weight. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500, 505]; *Sheffield Medical Group v. Workers' Comp. Appeals Bd. (Perez)* (1999) 70 Cal.App.4th 868 [64 Cal.Comp.Cases 358].) We agree with the WCJ's analysis and we will not disturb his decision regarding Mr. Fuentes' testimony.

Labor Code section 4904 states in part:

> (a) If notice is given in writing to the insurer, or to the employer if uninsured, setting forth the nature and extent of any claim that is allowable as a lien in favor of the Employment Development Department, the claim is a lien against any amount thereafter payable as temporary or permanent disability compensation, subject to the determination of the amount and approval of the lien by the appeals board. …
> (e) The appeals board shall not be prohibited from approving a compromise and release agreement on all other issues and deferring to subsequent proceedings the determination of a lien claimant's entitlement to reimbursement if the defendant in any of these proceedings agrees to pay the amount subsequently determined to be due under the lien claim.
> (Lab. Code, § 4904.)

Pursuant to Labor Code section 4905:

> … [I]f it appears in any proceeding pending before the appeals board that a lien should be allowed if it had been duly requested by the party entitled thereto, the appeals board may, without any request for such lien having been made, order the payment of the claim to be made directly to the person entitled, in the same manner and with the same effect as though the lien had been regularly requested, and the award to such person shall constitute a lien against unpaid compensation due at the time of service of the award.
> (Lab. Code, § 4905.)

As the WCJ explained:

> [W]here the Defendant had notice that there is a lien against compensation by the Employment Development Department, it becomes a constructively filed lien as of the date of the Defendant's knowledge. …¶ In this case, the Employment Development Department served its request for workers' compensation information dated June 1, 2018, [Lien Claimant's Exhibit "13"] as well as its notice of lien claim dated June 22, 2018, [Lien Claimant's Exhibit "14"] notifying the Defendant that state disability insurance benefits were being paid to the Applicant. However, there was no evidence that the Defendant ever responded to the notification or took any action to investigate it. ¶ In addition, pursuant to the compromise and release agreement dated December 11, 2019, the Defendant agreed to hold the Applicant harmless with respect to the lien of the Employment Development Department (page nine) and addressed it in its attached lien affidavit, thereby having actual notice of the lien at that time as well. ¶ Accordingly, the lien of the Employment Development Department cannot be deemed to be time-barred pursuant to Labor Code § 4903.5(a).
> (Report, pp. 3 – 4.)

Based on our review of the record, it appears the WCJ is correct that defendant received timely notice of the EED lien, that it was aware of the period that the EDD paid benefits to applicant, and that it was aware of the total amount of benefits paid. Thus, we agree with the WCJ that the EDD lien is not barred by the provisions of Labor Code section 4903.5(a). Further, as noted by the WCJ, in the Compromise and Release (C&R), defendant agreed to hold applicant "harmless from EDD lien" and in its affidavit Re: Resolution of Liens (attached to the C&R) defendant identified the EDD lien in the amount of $20,834. The C&R was filed and submitted to the WCJ for approval on December 11, 2019, and the Joint Order Approving Compromise & Release was issued that day. Defendant did not explain how, under these circumstances, the Appeals Board does not have jurisdiction over the EDD lien. In turn, its argument has no merit.

Regarding defendant's arguments that there is no evidence regarding applicant's temporary disability status: we note that the Primary Treating Physician's Progress Report (PR-2) (L.C. Exh. 4) indicates that Dr. Aun was applicant's primary treating physician during the period in dispute. There is no evidence in the record to the contrary.

Although defendant is correct that Dr. Aun could not be the primary treating physician for more than 24 visits (Lab. Code, § 4604.5), there is no evidence in the trial record indicating that he exceeded the 24 visit maximum. Nor is there any evidence that defendant objected to or petitioned to have Dr. Aun removed as the primary treating physician.

Defendant is also correct that applicant's employment with defendant was terminated on March 9, 2018. An injured employee who is terminated from his or her employment for good cause

is not entitled to temporary disability benefits; however, the defendant has the burden of proving that the applicant was terminated for cause. (*Butterball Turkey Co. v. Workers' Comp. Appeals Bd.* (*Esquivel*) (1999) 65 Cal.Comp.Cases 61 (writ den.); *Peralta v. Party Concepts* (2016) 2016 Cal.Wrk.Comp. P.D. LEXIS 100 (Appeals Board panel decision).) Defendant submitted no evidence pertaining to the cause of applicant's employment being terminated.

The EDD paid benefits to applicant during the period from April 30, 2018, to April 24, 2019. (L.C. Exh. 12.) The exhibits indicating that applicant was temporarily disabled during that period are EDD Physician/Practitioner's Certificates prepared and submitted by Dr. Aun. (See L.C. Exhs. 15 – 21.) Each of the exhibits states that applicant was temporarily disabled at the time the Certificate was submitted. Also, QME Dr. Johnson stated that on August 7, 2018, applicant's condition was not permanent and stationary and that it had reached permanent and stationary status as of May 6, 2019. (See L.C. Exhs. 10 and 11.) The EDD's exhibits are substantial evidence that applicant was temporarily disabled during the period that it paid benefits.

Finally, the fact that QME Dr. Johnson apportioned 85% of applicant permanent disability to non-industrial factors is irrelevant as to applicant's temporary disability status, and the fact that the EDD did not have applicant testify at the trial does not mean it failed to meet its burden of proof.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Joint Findings of Fact & Awards issued by the WCJ on June 11, 2021, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 12, 2021

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

MEDICAL COST REVIEW
LAW OFFICE OF SAAM AHMADINIAR
EMPLOYMENT DEVELOPMENT DEPARTMENT

TLH/*pc*

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