WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LESLIE SUMMERS, *Applicant*

vs.

SAN JOAQUIN COUNTY SHERIFF'S DEPARTMENT, permissibly self-insured, administered by TRISTAR RISK MANAGEMENT, INC., *Defendants*

Adjudication Number: ADJ11621404
Stockton District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on April 5, 2021, wherein the WCJ found that applicant did not sustain an injury arising out of and occurring in the course of employment (AOE/COE) to her cervical spine or to her bilateral knees.

Applicant contends that the report and deposition testimony of orthopedic qualified medical examiner (QME) Timothy Brox, M.D., are not substantial evidence and should not have been admitted into evidence.

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 for Reconsideration (Petition) and the Answer, 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

Applicant claimed injury to her cervical spine and bi-lateral knees while employed by defendant as a correctional officer during the period from February 15, 1999, through August 31, 2018. Defendant denied the injury claim. (Joint Exh. AA, Notice of Denial, October 26, 2018.) QME Dr. Brox evaluated applicant on February 14, 2019. Dr. Brox performed an orthopedic physical examination of applicant's cervical spine, shoulders, elbows, wrists/hands, lumbar spine,

hips, knees, ankles and feet. (Joint Exh. BB, Dr. Brox, February 14, 2019, pp. 8 – 17.) The doctor took a history, reviewed the medical record, and concluded that applicant had not sustained an "occupational injury" to her cervical spine or to her bi-lateral knees. (Joint Exh. BB, p. 20.)

Dr. Brox's deposition was taken on September 3, 2019. (Joint Exc. C, Dr. Brox, September 3, 2019, deposition transcript.) The testimony included the following:

> Q. Does there have to be prior treatment reports? Is that the legal standard for determining an injury for a workers' compensation case, in your understanding?
> A. The standard would include a diagnosis and an occupational tie to it.
>
> Q. Okay. One of the reasons you just said you came to the conclusion is because there were no prior treatment records.
> A. Well, prior treatment records provide information about the pathology.
>
> Q. There can be -- there wouldn't be any prior industrial treatment records if there's no prior reporting of an industrial injury. Wouldn't that be correct?
> A. Well, there are no treatment records whatsoever.
>
> Q. That's because this injury was first reported in 2018. It was denied, and she's seeing you for the first time as a QME to determine causation. And you're saying no because there's no treatment records and there's no indication that she --
> A. She also has a normal physical examination.
> (Joint Exc. C, pp. 15 – 16.)
>
> Q. Okay. Let's go back to your understanding of the legal standard for causation of an industrial injury.
> A. Pathology that is caused by or aggravated or accelerated by -- by work.
>
> Q. Is it required to be a substantial cause?
> A. Anything that aggravates, accelerates or causes, it would be occupational.
> (Joint Exc. C, pp. 19 – 20.)
>
> Q. Dr. Brox, just based on your report and your testimony today, you don't find any objective evidence upon your physical examination that you took of any kind of injury or conditions of the cervical spine or bilateral knees other than subjective pain. Is that correct?
> A. Correct.
>
> Q. And within reasonable medical probability, you don't find any basis for cumulative industrial trauma to the cervical spine or bilateral knees as a result of her work as a correctiona1 officer?
> A. I don't.
> (Joint Exc. C, pp. 20 – 21.)

The parties proceeded to trial on October 29, 2020, no testimony was taken and the issue submitted for decision was injury AOE/COE, with all other issues deferred. (Minutes of Hearing and Summary of Evidence (MOH/SOE), October 29, 2020, p. 2.) On December 1, 2020, the WCJ issued a Findings of Fact and Order. Applicant field a Petition for Reconsideration and on February 16, 2020, we issued our Opinion and Order Granting Reconsideration, whereby we rescinded the Findings of Fact and Order, and returned the matter to the WCJ.[1]

On March 17, 2021, the parties again proceeded to trial, and again, no testimony was taken. Joint Exhibits AA, BB, and CC were admitted into evidence, and the Stipulations and Issues identified at the October 29, 2020 trial were incorporated into the record. (MOH/SOE, March 17, 2021.)[2]

DISCUSSION

Appeals Board Rule 10945 provides, in relevant part that, "Every petition and answer *shall support its evidentiary statements by specific references to the record*." (Cal. Code Regs., tit. 8, § 10945(b) (emphasis added).) It is a violation of our rules to reference evidence, in a petition for reconsideration, that is not part of the evidentiary record created at trial unless it is also shown in the petition that the evidence is newly discovered and could not with reasonable diligence have been produced before the case was submitted for decision. (Cal. Code Regs., tit.8, §§ 10670, 10945, 10974.)

Here, in the Petition counsel states that:

> The report is also full of range of motion measurements for every joint in Ms. Summers' body, which Ms. Summers asserts did not happen. … Additionally, the report references palpation to various parts of the body which Ms. Summers disputes occurring.
> (Petition, p. 3.)

[1] It must be noted that our February 16, 2020 Opinion and Order Granting Reconsideration was incorrectly titled Opinion and Order Denying Petition for Reconsideration. However, this appears to have been a clerical error and the Decision properly granted reconsideration, rescinded the December 1, 2020 Findings of Fact and Order, and returned the matter to the WCJ for further proceedings.

[2] We also note that the MOH/SOE state that "judicial notice of the entire EAMS files are admitted into evidence." Documents not properly identified and admitted into the trial record as exhibits are not evidence, and there is no legal basis upon which judicial notice of all documents contained in the EAMs ADJ file may be taken. (Cal. Code Regs., tit. 8, §§ 10670 and 10803.)

Based on our review of the trial record, it is clear that there is no testimony or documentary evidence in support of, or even pertaining to these arguments. Nor were these issues raised at trial. (MOH/SOE, October 29, 2020; MOH/SOE, March 17, 2021.) A party's argument which refers to evidence that is not part of the record does not constitute evidence. Also, it has long been the law that an issue not raised at trial level is waived and cannot be raised for the first time on reconsideration. (*Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1265 [54 Cal.Comp.Cases 145, 148]; see also *New United Motors Mfg., Inc. v. Workers' Comp. Appeals Bd*. (*Gallegos*) (2006) 141 Cal.App.4th 1533, 1540 & fn. 4 [71 Cal.Comp.Cases 1037, 1042 & fn. 4].)

> Applicant argues that:
> Dr. Brox appears to be relying on a Second Edition of an AMA Guides book for evaluation of disease and injury causation, not the 5th Edition of the AMA Guides To The Evaluation of Permanent Impairment.
> (Petition, p. 3.)

The AMA Guides to Evaluation of Disease and Injury Causation, Second Edition, published in 2013, addresses the issue of causation of the symptoms being evaluated. The AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, published in 2000, addresses factors of permanent impairment (Whole Person Impairment) as a result of the symptoms being evaluated. It is not clear what applicant is actually arguing but it does not appear that Dr. Brox having considered the AMA Guides to Evaluation of Disease and Injury Causation, to help him determine whether applicant's symptoms were the result of a cumulative injury, was in any way inappropriate. Also, as the WCJ states in the Report:

> The reliance upon a peer-reviewed treatise to help determine whether or not there was an occupational injury would only go to the weight of the evidence …. It should be noted, that this issue is being raised for the first time on reconsideration …
> (Report, p. 9.)

Applicant also argues that the report from Dr. Brox indicates that he did not take an adequate history, so the report is not substantial evidence and is not admissible per Labor Code section 4628. As noted by the WCJ, the report from Dr. Brox complies with the requirements stated in Appeals Board rule 10682. (Cal. Code Regs., tit. 8, § 10682(b); see Report, pp. 7 – 8.) Also, at his deposition Dr. Brox explained that the History of Injury/Work History sections of his

report were in effect a summary of the information provided to him by applicant at the evaluation. (see Joint Exc. C, pp. 9 – 12.)

Labor Code section 4628 states in part:

> (a) Except as provided in subdivision (c), no person, other than the physician who signs the medical-legal report, except a nurse performing those functions routinely performed by a nurse, such as taking blood pressure, shall examine the injured employee or participate in the nonclerical preparation of the report, including all of the following:
> (1) Taking a complete history.
> (2) Reviewing and summarizing prior medical records.
> (3) Composing and drafting the conclusions of the report. …
>
> (e) Failure to comply with the requirements of this section shall make the report inadmissible as evidence …
> (Lab. Code, § 4628(a) and (e).)

Having reviewed Dr. Brox's report and his deposition testimony, we see no evidence in support of applicant's argument that the doctor did not comply with the provisions of Labor Code section 4628. Thus, we agree with the WCJ that the issue of whether the report is substantial evidence is a determination regarding the weight of the evidence, not its admissibility. (Cal. Code Regs., tit. 8, § 10682(c).)

Further, applicant contends that Dr. Brox "did not have an understanding of the day-to-day job duties of a Correctional Officer and the physical abuse their bodies must endure" and "[b]ecause of his apparent lack of understanding cumulative trauma industrial injuries" his opinions are not substantial evidence. Notwithstanding the fact that there is no evidence in support of applicant's contention, it is more important to note that after examining applicant's cervical spine, shoulders, elbows, wrists/hands, lumbar spine, hips, knees, ankles and feet, and reviewing the medical record, including x-rays and MRIs (Joint Exh. BB, pp. 17-19), Dr. Brox concluded that applicant had "a normal physical examination" and that there was no objective evidence of an injury. (Joint Exc. C, pp. 20 – 21.) Thus, for the sake of argument, even if applicant was correct that Dr. Brox was not aware of the physical demands of applicant's employment, the fact that he found applicant had a normal examination and that there was no objective evidence of injury is substantial evidence that applicant did not sustain the cumulative injury as claimed.

Finally, it is well established that the burden of proof rests upon the party holding the affirmative of the issue. (Lab. Code, § 5705; *Lantz v. Workers' Comp. Appeals Bd.* (2014) 226

Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd.* (*Obernier*) (1995) 34 Cal.App.4th 1204, 1212-1213 [60 Cal.Comp.Cases 289]; *Bolanos v. Workers' Comp. Appeals Bd.* (2014 W/D) 79 Cal.Comp.Cases 1531.) The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297–298 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3202.5, 3600(a).) In this matter the issue submitted for decision was injury AOE/COE. The evidence submitted was defendant's denial of applicant's claim, Dr. Brox's report and the transcript of his deposition. (Exhs. AA, BB, and CC.) Applicant submitted no testimony or medical evidence that was inconsistent with the opinions stated by Dr. Brox. Nor did applicant object to proceeding to trial on the issue of injury AOE/COE. (MOH/SOE, October 29, 2020; MOH/SOE, March 17, 2021.) It was not defendant's burden to prove that applicant did not sustain an injury AOE/COE, it was applicant's burden to prove that she did. Applicant did not meet her burden of proof.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Order issued by the WCJ on April 5, 2021, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 18, 2021

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

LESLIE SUMMERS
GROVE LAW
LENAHAN LEE SLATER PEARSE & MAJERNIK

TLH/*pc*

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