

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

SAMUEL CASTRUITA, *Applicant*

vs.

**CALIFORNIA STATE UNIVERSITY DOMINGUEZ HILLS, permissibly self-insured,
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Numbers: ADJ13056565, ADJ13056566
Marina del Rey District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant seeks reconsideration of the Findings of Fact and Orders (F&O), issued by the workers' compensation administrative law judge (WCJ) on August 3, 2021, 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) in case number ADJ13056565, and that applicant did not sustain injury AOE/COE in case number ADJ13056566; that based on a lack of due diligence, applicant's Petition for an additional qualified medical examiner (QME) panel in ophthalmology was denied; and the WCJ ordered that applicant take nothing by way of either injury claim.

Applicant contends that since neurologist Isaac Regev, M.D., and neurology QME Leon Barkodar, M.D., both recommended that he be evaluated by an ophthalmologist, the record needs to be further developed and his request to be evaluated by an ophthalmology QME should be granted.

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, and for the reasons discussed below, we will grant reconsideration, 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 his eyes and to his head (in the form of headaches) while employed by defendant as an administrative assistant on February 7, 2020 (ADJ13056566), and while employed by defendant on February 21, 2020 (ADJ13056565).

Applicant received treatment from neurologist Isaac Regev, M.D., on June 29, 2020. Dr. Regev diagnosed, “Headaches and visual changes in a patient with LED light exposure.” (App. Exh. 1, Isaac Regev, M.D., June 29, 2020, p. 4 (original in upper case).) He then explained:

I did perform a detailed neurological examination and could not find any focal central nervous system deficit. I explained to the patient that there is no evidence for active intracranial disorder. ¶ ... I told the patient that in my opinion, he should see an ophthalmologist (he has seen an optometrist). I also gave the patient a special diet for headache sufferers and encouraged him to try Excedrin. (App. Exh. 1, p. 4.)

On July 16, 2020, applicant was evaluated by QME Dr. Barkodar. After examining applicant, taking a history and reviewing the records he was provide, Dr. Barkodar concluded:

At this time, based on the available information I do not find evidence of an industrial neurological injury. If an industrially caused ophthalmological injury is found by the ophthalmologist, there may be some impairment with the applicant's neurological symptom of headaches. ¶ At this time I recommend evaluation by an Ophthalmology expert. (Joint Exh. Z, Dr. Barkodar, August 13, 2020, p. 16.)

Our review of the Electronic Adjudication Management System (EAMS) ADJ file indicates defendant filed a declaration of readiness to proceed on December 10, 2020. Applicant filed a verified objection to the declaration of readiness and requested that the WCJ order an additional QME in ophthalmology. The January 4, 2021 Mandatory Settlement Conference (MSC) Minutes of Hearing state “AA wants QME in ophthalmology” and the matter was set for trial on February 10, 2021. The trial was continued and the parties’ March 22, 2021 pre-trial conference statements (regarding both injury claims), include applicant’s objection to trial because, “LC 4061 has not been complied with.” On April 8, 2021, applicant’s counsel filed a verified Petition, Requesting an Additional Panel in Ophthalmology and defendant filed an Objection, on April 22, 2021.

The parties proceeded to trial on June 7, 2021. The cases were consolidated, the WCJ took judicial notice of applicant’s petition and defendant’s objection, and the matter was continued.

(Minutes of Hearing and Summary of Evidence (MOH/SOE), June 7, 2021.) Applicant testified at the July 19, 2021 trial. The issues submitted for decision included injury AOE/COE, and applicant's petition, requesting an additional panel in ophthalmology. (MOH/SOE, July 19, 2021.)

DISCUSSION

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].) When deciding a medical issue, the WCJ must utilize expert medical opinion. (See *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) A medical expert opinion that is beyond the physician's expertise is not substantial evidence. (*Genlyte Group v. Workers' Comp. Appeals Bd. (Zavala)* (2008) 158 Cal.App.4th 705 [73 Cal.Comp.Cases 6]; see *Rosas v. Worker's Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692 [58 Cal.Comp.Cases 313].)

Here, Dr. Regev and Dr. Barkodar both recommended that applicant be examined by an ophthalmologist because the issue of injury to his eyes was beyond their area of expertise. The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Appeals Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on a threshold issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) The Appeals Board may direct the augmentation of the medical record where there are material deficiencies in specific medical records or reports. (*Id.* at 1121-1122.) Again, both doctors stated that they found no evidence of an industrial neurological injury, but as to the issue of an ophthalmological injury, applicant would need to be evaluated by an ophthalmologist. Thus, although the WCJ noted that that applicant testified credibly regarding the light exposure, and that there is corroboration for that exposure (Report, p. 6), there is no medical evidence in the trial record that addresses the issue of injury AOE/COE and the record must be further developed.

Pursuant to Labor Code section 4060:

(a) This section shall apply to disputes over the compensability of any injury. This section shall not apply where injury to any part or parts of the body is accepted as compensable by the employer. ...

(c) If a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2.

(Lab. Code, § 4060.)

Labor Code section 4062.2 states in part:

(a) Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section. ... (f) The parties may agree to, an agreed medical evaluator at any time ...

(Lab. Code, § 4062.2.)

We agree with the WCJ that:

From the receipt of Dr. Barkodar's PQME report in August 2020 and Dr. Regev's report in November 2020, to the time when defendants filed a DOR on December 10, 2020, applicant had almost four months to request and/or petition for an additional Panel in ophthalmology.

(Report, p. 4.)

Clearly, it can be argued that applicant's attorney could have acted in a more timely manner, however, there is no indication that the delay, as discussed by the WCJ, had a negative consequence or caused any harm to defendant. Also, there is no indication as to why applicant's repeated request for an ophthalmology QME was not granted. We see no factual or legal basis for determining that the delay constitutes a failure "to perform due diligence" (Report, p. 5), nor does it constitute a basis for denying applicant's injury claim.

As discussed above, the record does not contain substantial evidence on the issue of injury AOE/COE, and upon return to this matter to the WCJ, the record must be further developed. Under the circumstances of this matter it would be appropriate for the parties to have applicant evaluated by an ophthalmology AME, or in the alternative, the parties may request that the WCJ submit an Order to the Medical Director to issue an additional QME panel in the specialty of ophthalmology. (Cal. Code Regs., tit. 8, § 31.7.)

Finally, it is important to note that decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (2001) (Appeals Board en

banc) 66 Cal.Comp.Cases 473, 478.) Information reviewed at the American International Medical University's website is not evidence submitted at trial and may not be considered by the Appeals Board or the WCJ when addressing an issue submitted for decision.

Accordingly, we grant reconsideration, 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 that applicant's Petition for Reconsideration of the Findings of Fact and Orders issued by the WCJ in case number ADJ13056565, and in case number ADJ13056566, on August 3, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 3, 2021 Findings of Fact and Orders issued in case number ADJ13056565, and in case number ADJ13056566, are **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct 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/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 14, 2021

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

**SAMUEL CASTRUITA
LAW OFFICES OF FRED L. FONG,
LLARENA, MURDOCK, LOPEZ & AZIZAD**

TLH/pc

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