WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ALEJANDRO BARRAZA, ***Applicant***

vs.

PERFORMANCE CONTRACTING; as adjusted by GALLAGHER BASSETT, LIBERTY MUTUAL NORTHERN CALIFORNIA, ***Defendants***

Adjudication Number: ADJ10644429
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings & Order (FA&O) of August 1, 2023, wherein the workers' compensation administrative law judge (WCJ) found that while employed by defendant during the period from December 3, 1990 through December 3, 2013, as a drywall installer, sustained injuries arising out of and in the course of his employment to his low back and in the form of hypertension; at the time of applicant's injury, the employer's workers' compensation carrier was Arch Insurance Company; and that applicant is "neither estopped nor barred from making this claim."

Defendant contends that based on the evidence provided at deposition by Agreed Medical Evaluator (AME) Laura Hatch, M.D., applicant sustained one cumulative injury through his last day of work in 2017 as a drywall installer. Defendant admits that the issue of whether applicant sustained a cumulative injury from 2013 to 2017 was not set for trial.

We have received an Answer from applicant.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ, recommending that the Petition be denied.

We have considered the allegations in Petition for Reconsideration and the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons

discussed below, we will grant the Petition for Reconsideration, rescind the F&O, and return the matter to the trial level for further proceedings consistent with this opinion.

FACTS

On November 14, 2016, applicant filed an Application for Adjudication and claimed a cumulative injury to his back while employed as a drywall installer by Performance Contracting during the period from December 3, 1990 through December 3, 2013. In Case No. ADJ9196612, applicant sustained injury on October 7, 2013, while employed by defendant Performance Contracting as a drywall installer. Applicant's specific injury was resolved by way of a Compromise & Release (CR), and an Order Approving issued on July 28, 2016.

In applicant's specific injury case, the parties agreed to Dr. Hatch as an AME.

On March 30, 2016, Dr. Hatch issued a supplemental report. (Exhibit X6, Report of Laura Hatch, M.D., March 30, 2016.) She concluded that:

> It is my understanding that Mr. Barraza began working for Performance Contracting, Inc., in early 2012. His specific injury occurred on October 7, 2013. He last worked on December 3, 2013. Therefore, it appears that he worked approximately a year and a half to less than two years for this employer as a "drywall finisher and taper." These job duties were relatively physically heavy.
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> Overall, it is medically reasonably probable that 25% of the previously enumerated factors of permanent disability of his lumbar spine condition can be considered due to the underlying degenerative changes that are non industrial in nature; 25% can be considered due to the 23 years of heavy work exposure for various employers as a "drywall finisher and taper," and its contribution to the development of the degenerative changes; and 50% can be considered due to the specific injury of October 2, 2013.
> (Exhibit X6, pp. 1; 2.)

On November 12, 2018, applicant was re-examined by Dr. Hatch. (Exhibit X4, Report of Laura Hatch, M.D., November 12, 2018.) By way of history, applicant reported that:

> Sometime in approximately 2016, the patient began working for Acme Construction as a drywall finisher. He worked there for approximately six months in 2016, and an additional five to six months in 2017. He notes that he performed the same duties he had performed at Performance Contracting, Inc., as a drywall finisher. He was performing his usual and customary job duties, without restrictions.
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> * * *

Following his last evaluation in this office, Mr, Barraza remained off work until sometime in 2016, when he began working for Acme Construction as a drywall finisher. He worked there for approximately six months in 2016, and an additional five to six months in 2017. The patient states that sometime in approximately 2017, he worked as a drywall finisher for Oltmans, for approximately six weeks. He then went to work for Standard Brown, also as a drywall finisher, for approximately three months. He last worked prior to his lumbar spine surgery on October 24, 2017, and has not worked in any capacity since that time.
(Exhibit X4, pp. 2, 4-5.)

With respect to apportionment, Dr. Hatch opined as follows:

Apportionment regarding his lumbar spine has been addressed multiple times. I have been asked on page three of the Agreed Medical Evaluation Joint Letter if his lumbar spine condition is a result of one long continuous trauma from December 3, 1990 to October 2017 that is due to his lengthy years of heavy work exposure as a drywall finisher up until his last day worked October 2017, or if Mr. Barraza suffered from two separate continuous trauma, i.e., one ending on September 3 2013, when he discontinued working for Performance Construction, and the second ending in October 2017, after he stopped working prior to his laminectomy procedure on October 25, 2017.

He did not work for approximately slightly greater than three years after the October 7, 2013 specific injury. It is my understanding that he had been scheduled to proceed with lumbar spine surgery in January of 2016, but did not. He then returned to his usual and customary job duties for other employers (despite the fact that he felt unable to return to those duties). Subsequent to this work exposure in 2016 and 2017, he proceeded with lumbar spine surgical interventions. I could not obtain a clear answer from him as to whether or not the subsequent work duties permanently aggravated his lumbar spine condition prior to proceeding with surgical interventions.

I previously opined that it was medically reasonable probable that 25% of the enumerated factors of permanent disability as it pertained to his lumbar spine condition was due to the underlying degenerative changes that were not industrial in nature; 25% could be considered due to the 23 years of heavy work exposure for various employers as a drywall finisher and taper, and its contribution to the development of the degenerative changes and the symptoms associated with the degenerative changes; and 50% could be considered due to the specific injury of October 7, 2013.

However, he has since received a "Compromise and Release" on July 28, 2016, for the October 7, 2013 specific injury. He subsequently worked for various employers as a drywall finisher. The 25% that was apportioned to a continuous trauma injury should end in October of 2017, when he discontinued working to proceed with the lumbar spine surgery. Essentially, the 25% of the previously enumerated factors of permanent disability, which, was attributed to the 23 years of heavy work exposure

with the various employers as a drywall finisher and taper, and its contribution to the development of degenerative changes, should be divided on a pro rata basis up through October 2017.
(Exhibit X4, pp. 54-55.)

On May 26, 2021, Dr. Hatch was cross-examined by way of deposition. (Exhibit Z1, Deposition of Laura Hatch, M.D., May 26, 2021.) She testified in relevant part as follows:

Q. And would you agree that the portion of his injury that you previously attributed to a cumulative trauma would extend to his last day of work in 2017?

A. Yes.

Q. So it's your opinion that there are three factors that have contributed to the applicant's current orthopedic symptoms. There is the specific date of injury of October 7, 2013, there's the pre-existing degenerative changes which are due to the natural progression of that disease and which are nonindustrial and there is a cumulative trauma which encompasses his entire work history ending on his last day of work in 2017.

A. Yes.

Q. And those last two factors that contributed to the degenerative changes and the continuous trauma are 25 percent of the overall apportionment of his end impairment; is that correct?

A. Yes.

Q. 50 percent was to make 50; 25 percent to the nonindustrial process and 25 percent to the C.T. ending in October of 2017?

A. Correct.

* * *

Q. So is it your testimony today there is only one continuous trauma starting 23 years before and then continuing all the way to 2017 or there's two continuous traumas?

A. Well, his entire work exposure as a drywall finisher and taper contributed to his condition. There was a three-year period in which he was not exposed to those work duties, so as I believe I addressed in my supplemental reports, on a medical basis it's those years of work duties that contributed to his condition. How that legally is divided is a legal determination.

* * *

Q. Okay. Doctor, it's your testimony today that there is only one C.T. ending in 2017 or are there are two C.T.s?

A. Well, depends on the legal definition. I mean he had three years where he was not exposed to work so that's the definition of a break in the C.T. then there is two C.T. periods. However, he performed the same duties for the entire time that he was working. So in that respect as I stated in my supplementals, it could be divided on a pro rata basis, it's -- that's more of a legal determination.

* * *

A. I do have answer today. Medically it is one long C.T. period because his last day of work prior to the spine surgery was in 2017; however, legally that may not be the case because there is a three-year period in which he was not working.

Q. Assume that the law requires you to break it if there is an intervening event?

A. Then I would have stated in my supplemental two reports it would be on a pro rata basis.

Q. So there was aggravation between 2016 and 2017, in your opinion?

A. Yes. Assuming he declined surgery in January of 2016 and returned back to work and then decided to proceed, yes.

Q. And in what percentage was aggravated? What was the contribution of that small period versus the prior? How much disability did it cause? What is the additional disability?

A. I do know that when I evaluated him in December 22 of 2015, his impairment for his lumbar spine was 26 percent. When I evaluated him in 2018, his impairment was 27 percent.

Q. So it was a 1 percent aggravation?

A. If that's the criteria used.

Q. Do you have an idea of the impairment caused to the bilateral shoulders or to the right shoulder aggravation or new problems on the right shoulder and whether there is changes in the left shoulder either by range of motion or pathology or ruptured tendons or whatever, and the cubital symptoms and the carpal tunnel problems, do you have an idea of his disability at this time or would you need to reevaluate him?

A. I would need to reevaluate him.

* * *

Q. And you also indicated that it's your opinion that it's the cumulative impact that this man's entire work history that has resulted in his current symptoms, at least contributed to his current symptoms in the portions that you have described; is that correct?

A. Yes.

Q. And you have also made mention of the fact and I think it's very significant that the applicant was off for surgery, surgery was scheduled and he voluntarily declined that surgery to return to work in the same job that contributed to his underlying injury for a prolonged period of time before he decided he was incapable of performing that job; is that correct?

A. It's my understanding now.

Q. And that is a significant factor in your conclusion that this is one long C.T. when he had the surgery in October of 2017; is that correct?

A. Yes.
(Exhibit Z1, pp. 34-35; 37; 43; 44-45; 46-47.)

On July 12, 2023, the parties proceeded to hearing. Applicant was not present and no testimony was taken. The only defendant appearing was Performance Contracting, adjusted by Gallagher Bassett and insured by Arch Insurance Company. The parties stipulated in relevant part as follows: applicant, while employed during the period December 3, 1990 through December 3, 2013, as a drywall installer, by Performance Contracting, claims to have sustained injuries arising out of and occurring in the course of employment of his employment to his back and circulatory system; at the time of the claimed injury, the employer's workers' compensation carrier was Arch Insurance Company; and applicant elects against Arch Insurance under Labor Code Section 5500.5. (Minutes of Hearing/ Summary of Evidence (MOH/SOE), p. 2.) The parties raised the following issues: Injury arising out of and in the course of employment (AOE/COE); body parts; and "applicant claims Estoppel to Deny claim based on ADJ9196612." (MOH/SOE, p. 2.)

On August 1, 2023, the WCJ issued the F&O finding that applicant sustained injury through December 3, 2013. In his Opinion, he stated in relevant part that:

> This opinion in no way rejects the notion that a claim for 2017 may not exist. However, any envisioned claim against subsequent employment is not the issue being posed. The fact is that according to Dr. Hatch a cumulative trauma existed in 2013 that caused a need for treatment and disability. That is the definition of an injury under Cal. Lab. Code sec. 3208.1.

DISCUSSION

I.

Labor Code section 3208.1[1] provides that an injury may be either cumulative or specific. No cumulative injury can occur without disability. (*Van Voorhis v. Workmen's Comp. Appeals Bd.* (1974) 37 Cal.App.3d 81, 86-87 [39 Cal.Comp.Cases 137]; *Aetna Cas. & Surety Co. v. Workmen's Comp. Appeals Bd.* (*Coltharp*) (1973) 35 Cal.App.3d 329, 342-343 [38 Cal.Comp.Cases 720].) A cumulative injury is one that occurs as "repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment." (Lab. Code, § 3208.1.)

"The number and nature of the injuries suffered are questions of fact for the WCJ or the WCAB." (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323].) "[I]f an employee becomes disabled, is off work and then returns to work only to again become disabled, there is a question of fact as to whether the new disability is due to the old injury or whether it is due to a new and separate injury." (*Id.,* p. 234.) However, "[t]he general rule is that where an employee suffers contemporaneous injury to different body parts over an extended period of employment, the employee has suffered one cumulative injury." (G*ravlin v. City of Vista* (Sept. 22, 2017, ADJ513626) 2017 Cal. Wrk. Comp. P.D. LEXIS 413, *16.)[2] "If, however, the employee's occupational activities after returning to work from a period of industrially-caused disability are *not* injurious—i.e., if any new period of temporary disability,

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[1] All further statutory references are to the Labor Code unless otherwise noted.

[2] Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) While not binding, the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc).) We find the reasoning in *Gravlin* persuasive given that the case currently before us involves similar legal issues.

new or increased level of permanent disability, or new or increased need for medical treatment result solely from an *exacerbation* of the *original* injury-then there is only a *single* cumulative injury." (*Id.*at p. *24.)

Section 5500.5 states in pertinent part that liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1981, shall be limited to those employers who employed the injured worker during a period of one year immediately preceding either the date of injury, as determined pursuant to section 5412, or the last date on which the employee was employed in an occupation exposing them to the hazards of the occupational disease or cumulative injury, whichever occurs first. (Lab. Code, § 5500.5(a).)

In this case, pursuant to section 3208.1, AME Dr. Hatch determined that applicant sustained industrial industry, however her testimony is equivocal as to the date of injury and whether one or more periods of cumulative trauma exist. Therefore, while there is substantial evidence to support the conclusion that applicant's injury was AOE/COE, we cannot determine based on the record before whether applicant sustained one or two cumulative injuries.

It is well established that 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.) The parties presumably choose an AME because of the AME's expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) We will follow the opinions of the AME unless good cause exists to find their opinion unpersuasive. (*Ibid.*)

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en

banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture, or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].)

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie*, *supra*, at p. 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Id*.)

Having reviewed the medical reporting, we are persuaded that the record requires further development as to whether there were two periods of cumulative trauma. We also note that Dr. Hatch testified that a re-evaluation would be appropriate to determine which body parts were injured as a result of applicant's industrial injuries. Thus, we will rescind the F&A and return the matter to the trial level.

II.

"The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (Lab. Code, § 5412.) Whether an employee knew or should have known their disability was industrially caused is a question of fact. (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53] (*Johnson*); *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 927 [50 Cal.Comp.Cases 104]; *Chambers v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556, 559 [33 Cal.Comp.Cases 722].)

The employer has the burden of proving that the employee knew or should have known their disability was industrially caused. (*Johnson*, *supra*, at p. 471, citing *Chambers v. Workers' Comp. Appeals Bd.*, *supra*, 69 Cal. 2d at p. 559.) That burden is not sustained merely by a showing that the employee knew they had some symptoms. (*Johnson*, *supra*, at p. 471, citing *Chambers*, *supra*, at p. 559.) In general, an employee is not charged with knowledge that their disability is job-related without medical advice to that effect. (*Johnson*, *supra*, at p. 473; *Newton v. Workers' Comp. Appeals Bd.* (1993) 17 Cal.App.4th 147, 156, fn. 16 [58 Cal.Comp.Cases 395].)

Here, Dr. Hatch opined on March 16, 2016, that applicant had sustained cumulative injury. Thus, based on our review of the record the date of injury is March 16, 2016, the date when applicant first became aware that his disability was industrial. Accordingly, applicant's Application was timely filed on November 14, 2016.

We observe that in cases involving cumulative trauma injuries, the date of injury pursuant to section 5412 "also sets the date for the measurement of compensation payable, and all other incidents of the [worker's] right[s]." (*Argonaut Mining Co. v. Ind. Acc. Com.* (1951) 104 Cal.App.2d 27, 31.)

III.

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id*. at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]).)

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v.*

Workers' Comp. Appeals Bd. (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd*. (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker*, *supra*, at pp. 157-158 citing *Kaiser Co. v. Industrial Acci. Com.* (*Baskin*) (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

Here, as defendant admits, the issue of cumulative injury up to 2017 was not submitted for trial. However, all decisions must be based on substantial evidence. We also observe that the other potential defendants were not present at trial. Even if we could determine the appropriate period(s) of cumulative trauma, the other potential defendants must be accorded due process and the opportunity to participate.

Thus, we grant defendant's petition, rescind the F&O, and return the matter to the trial level for further proceedings consistent with this opinion. When the WCJ issues a decision, any aggrieved party may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the F&O issued by the WCJ on August 1, 2023 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the F&O issued by the WCJ on August 1, 2023 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 20, 2023

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

ALEJANDRO BARRAZA
ANHALT LAW OFFICES
ARMSTRONG LAW GROUP, APC

AS/mc

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