WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LEOBARDO SANTOS LORA, *Applicant*

vs.

RUBIO'S VINEYARD MANAGEMENT, LLC and PREFERRED EMPLOYERS INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ11364195

Santa Rosa District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Defendant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on February 25, 2021, wherein the WCJ found in pertinent part that "Applicant was injured in the course and scope of his employment" and that the employer did not give applicant notice of termination or layoff prior to being informed of applicant's injury.

Defendant contends that applicant did not submit substantial evidence that he sustained an injury on March 13, 2018, as claimed; and that the WCJ's conclusion that applicant is in need of medical treatment was not "legally appropriate."[2]

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We did not receive an Answer from applicant.

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[1] Commissioner Sweeney, who was previously a panelist in this matter, no longer serves on the Appeals Board. Another panel member has been assigned in her place.

[2] There is no Finding in the F&O regarding the need for medical treatment. Statements in an Opinion on Decision are not findings of fact (see Lab. Code § 5313; *Twentieth Century-Fox Film Corp. v. Workers' Comp. Appeals Bd.*, (1983) 41 Cal.App.3d 778 [48 Cal.Comp.Cases 275]), and the WCJ agrees with defendant that the statement in the Opinion on Decision that "applicant is in need of medical treatment" was "included in error." (Report, pp 3 – 4.) There is no Finding that applicant is in need of medical treatment, so that issue is moot and will not be further addressed.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will 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 low back while employed by defendant on March 13, 2018, as a vineyard worker. On May 3, 2018, applicant received treatment at the Queen of the Valley Medical Center Emergency Department. Applicant underwent a low back MRI; the diagnoses were acute sciatica and L4-5/L5-S1 disc protrusions with spinal canal stenosis. (Def. Exh. B, Timothy S. Smith D.O., May 4, 2018, pp. 3–4.) Applicant subsequently received treatment from other providers at Queen of the Valley Medical Center. (See Def. Exh. E, Queen of the Valley Medical Center, July 6, 2018/Oct. 29, 2018.)

The parties proceeded to trial on December 1, 2020. The parties stipulated that applicant claimed injury arising out of and occurring in the course of employment (AOE/COE) to his low back. (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 1, 2020, p. 2.) The WCJ's summary of applicant's testimony indicates applicant testified that he injured his back on "March 13, 2018 at 11:56 a.m. He was injured while working a fence, swinging a bar which hit a rock and cracked his back." (MOH/SOE, p. 4.) The issue submitted for decision was, "Application of the post-termination affirmative defense under labor code 3600(a)(10)." (MOH/SOE, p. 2.)

DISCUSSION

Pursuant to Labor Code section 3600:

> Liability for the compensation provided by this division, … shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment …
> (Lab. Code, § 3600(a).)

Having reviewed the record it is clear that defendant denied applicant's injury claim. As noted above, at the trial the parties stipulated that applicant <u>claimed</u> injury AOE/COE to his low back. (MOH/SOE, p. 2; see also App. Exh. 1, Notice Regarding Denial, June 28, 2018.) However, the only issue submitted for decision was the post-termination defense. (MOH/SOE, p. 2.) The issue of injury AOE/COE was not submitted for decision and F&O does not contain a Finding

determining the issue of whether applicant sustained an injury AOE/COE to his low back.[3] Absent a finding (or stipulation by the parties) that applicant sustained an injury AOE/COE, the provisions of Labor Code section 3600(a)(10) are not applicable and cannot be addressed. Thus, we will rescind the F&O.

It is well known that the employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297–298 (80 Cal.Comp.Cases 489]; Lab. Code, §§ 3202.5, 3600(a).) 'Preponderance of the evidence' is defined by section 3202.5 as the "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence." (Lab. Code, § 3202.5.) For the purpose of meeting the causation requirement in a workers' compensation injury claim, it is sufficient if the work is a contributing cause of the injury. (*South Coast Framing, supra,* at 298-299.) It is applicant's burden to establish that industrial causation is reasonably probable. For an injury to "arise out of" the employment, "… it must 'occur by reason of a condition or incident of [the] employment.' …" [Citation.] That is, the employment and the injury must be linked in some causal fashion. (Citations.)" (*South Coast Framing, supra,* at 297.)

Where an issue is a matter of medical knowledge, expert evidence is essential to sustain a finding of injury; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence. The occurrence of an injury during the course of an employment does not mean that it arose out of or because of that employment. (*City & County of San Francisco v. Industrial Acc. Com*., *(Murdock)* (1953) 117 Cal.App.2d 455, 459 [18 Cal.Comp.Cases 103].)

Here, the only medical evidence pertaining to applicant's injury claim is the May 4, 2018, emergency department report from Dr. Smith wherein he stated, "The patient had a work-related injury approximate 1 month ago when he was swinging a tool and he was hitting a stone using a sledgehammer and pulsed hole digger building a fence." (Def. Exh. B, p. 1.) Clearly, Dr. Smith's statement was based solely on what he had been told by applicant.

[3] The Finding that "Applicant was injured in the course and scope of his employment" does not constitute a finding of injury AOE/COE and the F&O includes a Finding that applicant claimed a low back injury AOE/COE.

To be substantial evidence, an expert's medical opinion must be based on an accurate history and an examination, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) "[A] medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (citations) Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (citations)" (*Gatten*, *supra,* at p. 928.)

Dr. Smith diagnosed acute sciatica and L4-5/L5-S1 disc protrusions with spinal canal stenosis (Def. Exh. B, p. 4) but he did not have the opportunity to review any of applicant's prior medical history, and he did not express an opinion as to whether applicant's symptoms were consistent with the mechanism of injury claimed by applicant. Again, the trial record contains no other medical evidence pertaining to the cause of applicant's lumbar spine condition. Nor is there any evidence or testimony corroborating applicant's assertion that he sustained an injury while working on March 13, 2018.

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue. (Lab. Code §§ 5701, 5906; *Kuykendall v. Workers' Comp. Appeals Bd.,* (2000) 79 Cal.App.4th 396 [65 Cal.Comp.Cases 264] *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924].) As discussed above, the trial record does contain evidence that applicant has significant symptoms of injury to his low back, but the record does not contain substantial evidence as to whether his low back condition is or is not due to an industrial injury. Under these circumstances it is appropriate that we return the matter to the WCJ for further development of the record. We recommend that the WCJ schedule a status conference in order to help the parties undertake an efficient and equitable means of developing the record on the issue of injury AOE/COE.

Accordingly, we 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 as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 25, 2021, Findings and Order is **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/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 8, 2023

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

THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

LEOBALDO SANTOS
LORA KNOPP PISTIOLAS, ESQ.
MULLEN & FILIPPI, LLP

TLH/mc

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