WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BENITO DE HARO, *Applicant*

vs.

LEGACY FRAMERS, INCORPORATED; FEDERAL INSURANCE COMPANY, administered by GALLAGHER BASSETT SERVICES, INCORPORATED, *Defendants*

Adjudication Number: ADJ12473312; ADJ15812360
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Workers' Compensation Appeals Board (Appeals Board) issued an Opinion and Order Granting Petition for Reconsideration in these matters on June 27, 2022 to provide an opportunity to study further the legal and factual issues raised by the petition.[1] The parties then participated in voluntary mediation with an Appeals Board staff workers' compensation administrative law judge (WCJ) on August 19, 2022, but were unable to settle the case. This is our Opinion and Decision after Reconsideration.

Applicant sought reconsideration from the Findings and Order (F&O) issued by a WCJ on April 25, 2022 wherein the WCJ found that applicant sustained an injury arising out of in the course of his employment (AOE/COE) to his right knee in case number ADJ158123600, but did not sustain an injury AOE/COE in that case to his back or that lead to paralysis; that applicant did not sustain a cumulative injury AOE/COE during the period of employment ending August 9, 2019 in case number ADJ12473312; that the compensable knee injury did not cause permanent disability; and, that there is no need for medical treatment to cure or relieve from the effects of the compensable knee injury. The WCJ ordered that no compensation is payable in these cases.

[1] Commissioner Sweeney was on the panel that issued the prior decision in this matter but no longer serves on the Appeals Board. Another panelist has been assigned in her place. Commissioner Dodd was on the panel that issue the prior decision in this matter but is unavailable to serve on the panel at this time. Another panelist has been assigned in her place.

Applicant contends that there is substantial medical evidence in the record to find injury AOE/COE to his back and that lead to paralysis in both cases because in workers' compensation cases, any reasonable doubt as to the determination of compensation in workers' compensation must be resolved in favor of the employee (citing among cases, *McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660] ("*McAllister*"); *Pacific Employers Ins. Co. v. Industrial Acci. Com. (Ehrhardt)* (1942) 19 Cal.2d 622 [1942 Cal. LEXIS 398]; *Pacific Employers Ins. Group v. Workers' Comp. Appeals Bd. (Farris)* (1966) 247 Cal.App.2d 102 [31 Cal.Comp.Cases 409]; *Singer v. Industrial Acci. Com.* (1930) 105 Cal. App. 374); that applicant testified he worked for the same employer as a carpenter for seven years without back pain limitation, but within five days of twisting his back when a piece of wood slipped from his grasp and he fell and sustained the compensable right knee injury, a pre-existing but asymptomatic spinal cyst ruptured causing spinal cord hemorrhage and paralysis; that the neurologic agreed medical evaluator (AME) Wayne Anderson, M.D., testified that although he retained a reasonable doubt about the mechanism that caused the spinal cord hemorrhage, he would find some industrial causation if the WCJ determined that reasonable doubt were to be resolved in applicant's favor; that no substantial evidence was presented to establish an alternative mechanism of the spinal cord hemorrhage; and, that the WCJ erred when determining compensability by placing a mistaken burden on applicant to establish "precise causation" of the mechanism of the spinal cord hemorrhage.

Defendant filed an Answer to Applicant's Petition for Reconsideration (Answer) contending that applicant's initial reporting of the incident did not include a twisting back injury; that Dr. Anderson testified he did not believe a twisting or bouncing action would have caused the spinal cord hemorrhage; that regardless of the various hypotheticals posed to Dr. Anderson or his answers to the hypotheticals, it remained Dr. Anderson's opinion that there was no causal link between applicant's work and the spinal cord hemorrhage; that both AMEs, Drs. Anderson and Joel Renbaum, M.D., spent extensive time trying to determine whether there was a causal link within a degree of reasonable probability – which is the standard that must be met to establish compensability (citing *McAllister, supra,* 69 Cal.2d 408); and, that it is the WCJ's role to assess credibility and the WCJ issued the well-reasoned F&O with Opinion on Decision after assessing the testimony and the uncontroverted reports of both AMEs.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition for Reconsideration be denied because despite Dr. Anderson's unease with the coincidence of applicant's paralysis just days after the work-related injury to his right knee, and despite extensive examination of medical causation using his medical expertise, Dr. Anderson was unable to say that it was more likely than not that applicant's paralysis was connected to his work. The opinions of agreed medical evaluators (such as Drs. Anderson and Renbaum) are entitled to substantial weight absent a showing that they are based on an incorrect factual history or legal theory, or are otherwise unpersuasive (citing *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775 [51 Cal.Comp.Cases 114]; *Siqueiros v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 150 (writ den.)).

We have conducted our own extensive review of the record in these cases, have read and considered the allegations in the Petition for Reconsideration and the Answer, and have considered the contents of the Report. After considerable deliberation and based on the Report which we adopt and incorporate herein, it is our decision after reconsideration to affirm the decision of the WCJ.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by a workers' compensation administrative law judge on April 25, 2022 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 19, 2024

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

BENITO DE HARO
LAW OFFICES OF RYAN D. SUTHERLAND
COLANTONI, COLLINS, MARREN, PHILLIPS & TULK, LLP
GALLAGHER BASSETT
HYNDMAN LAW
LIENING EDGE
MED LEGAL PHOTOCOPY
MEDICAL LIEN MANAGEMENT

AJF/abs

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

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board
JUDGE CHRISTOPHER MILLER

Benito De Haro v. Legacy Framers
WCAB Nos. ADJ15812360, ADJ12473312

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

By timely, verified petition filed on May 6, 2022, applicant seeks reconsideration of the decision filed herein on April 25, 2022, in this case, which arises out of an admitted injury, on August 8 or August 9, 2019, to the right knee of a carpenter who has claimed, as well, to have injured other body parts – importantly, his back – and has also filed a claim of cumulative trauma. Petitioner, hereinafter applicant or Mr. De Haro, contends in substance that it was error not to have determined that his back injury was compensable. Defendant has filed an answer. I will recommend that reconsideration be denied.

FACTS

As summarized in the opinion:

> The background begins with applicant's specific injury in 2019. He was holding a piece of wood and it slipped from his grasp and fell, striking his right knee. (This is from Mr. De Haro's trial testimony. Other versions appear in reporting over the years, including a joist dropped by coworkers. In any event, his knee was struck by falling wood.) Applicant reported the injury, either including the onset of mid-back pain or not, but was not immediately directed to a medical facility. He finished his shift and reported to work the following day, and the day after that.[1] Eventually, on August 13, 2019, he was taken to an industrial clinic, where an x-ray of the right knee was negative; the report of that visit, if accurately summarized later,[2] makes no mention of back pain.

[1] August 8, 2019, was a Thursday; August 9 was a Friday. On many counts, applicant's memory of specifics was sketchy after 32 months. He testified that he did not work that weekend.

[2] Report of Dr. Wayne Anderson, June 9, 2020, pg. 22.

Two days later, Mr. De Haro was taken to the emergency department at Kaiser in Vallejo, reporting urinary retention and numbness in the right lower extremity and was admitted. There, he underwent MRIs of the brain, cervical, thoracic (times two, it appears) and lumbar spine, CT scan of the lumbar spine, and various x-rays. In the thoracic spine, the MRI revealed a cystic lesion at T7, with adjacent edema of the spinal cord. He was transferred to Kaiser in Vacaville for consideration of neurosurgery. (That was not undertaken.) Applicant's paralysis soon progressed to his left lower extremity and has not since abated.

Certain of the treatment reports submitted by applicant ascribe the paralysis to Mr. De Haro's work injury, by way of history.

The parties engaged two agreed medical evaluators (AMEs), Dr. Joel Renbaum in orthopedics and Dr. Wayne Anderson in neurology. Of course, by the time he saw Dr. Renbaum, on December 18, 2019, applicant was unable to walk or, for that matter, to feel his right knee, so that AME found no residual impairment involving the knee. Dr. Anderson, in his several reports, describes considerable impairment, owing to the paralysis, but arguably no industrial causation of that condition. That being the crux of the matter, this AME's conclusions will be examined a bit more closely.

In his report of June 9, 2020, Dr. Anderson records the history, as provided by Mr. De Haro, as including sudden pain in the neck as he lifted the heavy wood from his knee. (I have not found another source of this information.) However, it is the thoracic spine where the paralyzing lesion occurred, and the cause of that rupture is where the AME spends his attention. The confluence of acute symptoms and a work-related injury being the starting point, Dr. Anderson understandably hunts for a connection supported by science. He first rules out the possibility that the knee injury itself somehow caused the vascular malformation that hemorrhaged to damage applicant's spinal cord. The AME then explores the possibility that Mr. De Haro had spinal stenosis such that the discs or other structures rubbed against the soon-to rupture blood vessel and a sudden movement, at the time of the injury, caused that rupture. (Applicant did testify that he twisted his back somewhat when it occurred, though this history is not reported contemporaneously.) Dr. Anderson considers the possibility that a neck strain accompanied the knee injury, but the imaging on August 15, 2019, did not show spinal damage, as distinct from damage to the spinal cord (though in the thoracic region). Acknowledging the connection drawn by treating physicians seeing Mr. De Haro in the emergency room and around that time between the work injury and the development of paralysis, the AME hunts for

that connection. He posits various other possible causes, including a relationship to preëxisting (*sic*) trauma at an adjacent level of the spine (perhaps lit up by the work injury), a sudden increase in blood pressure, a sudden movement of the spine at the time of the injury, that there was strenuous (injurious) lifting involved in the injury, that he was jostled on his way to the doctor for his injury, that applicant bruised easily and was thus vulnerable to hemorrhage or was taking blood-thinning anti-inflammatories such as ibuprofen that increased such vulnerability. Following an exhaustive analysis of a wide variety of potential links between applicant's work-related injury and the development of his paralysis, the doctor "is not able to find industrial causation for the spinal cord hemorrhage."

One of the possibilities raised in Dr. Anderson's deposition testimony on December 7, 2020, was that a repeat MRI might show, when compared with the imaging performed shortly after the symptoms arose, a change that might point to a cause, and particularly a causal connection to Mr. De Haro's knee injury. In response to a series of hypothetical questions, the AME acknowledged in that testimony that he had reasonable doubt about how the cyst or lesion in applicant's spine came to rupture. He also agreed that cumulative trauma in the course of his work in construction may have played a part in the hemorrhage, depending on the result of additional research, although he had no evidence pointing to such an injury or contribution.

In a supplemental report dated January 17, 2021, Dr. Anderson provides specific information and questions for the benefit of the radiologist charged with assessing the follow-up thoracic-spine MRI and comparing it with the first such study.

In his report of October 11, 2021, the AME reviews the MRI results. Going back over his previous discussions of possible causes of applicant's spinal hemorrhage, he eliminates each theory linking it to the original knee injury, adding to that analysis his own assessment of whether there are signs of cumulative (work) trauma, which he finds lacking. "But," he writes, "I am still troubled by the timing." Later, "I am struggling to find that link, and I believe it should be there." And, "I am left with a gut impression with no support." His final paragraph: "At present, then, I am not able to make the affirmative industrial connection, despite my suspicions. And I find this unsettling."

Finally, Dr. Anderson was deposed a second time, on January 18, 2022. There, he was taken through the same hypothetical sequences as in his earlier

testimony, all based on applicant's interpretation of section 3202[3] and court decisions that will be addressed below. The doctor acknowledged that, while the cause of applicant's paralysis was clear – it was the rupture – and the fact of his injury had been established, Dr. Anderson had reasonable doubt as to the cause of that rupture. Further, he could not conclude that that cause was wholly spontaneous – that is, that it was entirely unrelated to employment, although he stated that medical literature supports that most such ruptures generally do occur ideopathically. Nonetheless, he had not been able to draw a connection between work and hemorrhage, and could not state that such connection was more likely than not.

After trial, I concluded, chiefly relying on Dr. Anderson's reports and testimony, that applicant had not sustained his burden of proving that his thoracic spine was injured, whether at the time of his knee injury but independently of the knee, as a direct or indirect result of the knee injury, or cumulatively.

DISCUSSION

At trial, applicant cited three cases in support of his claim. These were *McAllister v. Wkrs. Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660] (*McAllister*), *Reeves v. Diamond Match Co.* (1918) 5 I.A.C. 236 (*Reeves*), and *Allied Signal, Inc. v. Wkrs. Comp. Appeals Bd. (Briggs)* (2001) 66 Cal.Comp.Cases 1333 (writ denied) (*Briggs*). Taken together, I summarized their central holdings as follows:

> First, if an employee is unable to establish which among several work-related factors caused her injury, that is not fatal to her claim. She must only prove that *some* work-related cause is more likely than not responsible. Thus, the precise element or elements of smoke in *McAllister*, or which of the harmful exposures in *Reeves*, need not be demonstrated, as they all stem from work.
>
> Second, if an injury definitely took place on the job, as in *Briggs*, that satisfies applicant's initial burden. It then falls to the defendant to show that its cause was entirely unrelated to work – that is, that it arose "wholly spontaneously" from an "inherent defect" in the employee.

[3] "This division and Division 5 (commencing with Section 6300) shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." All statutory references not otherwise identified are to the Labor Code.

In his petition, Mr. De Haro cites several other cases. As defendant argues, most have little utility in addressing the issues presented here. Some (*Clemmens v. Workmen's Comp. Appeals Bd.* (1968) 261 Cal.App.2d 1 [33 Cal.Comp.Cases 186], *Lundberg v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal. 2d 436 [33 Cal.Comp.Cases 656], *Employers Mut. Liab. Ins. Co. v. Indust. Accid. Commn. (Gideon)* 41 Cal. 2d 676 [18 Cal.Comp.Cases 286]) involve injuries that clearly took place at work and involved the body part(s) at issue. Some (*Truck Ins. Exch. V. [sic] Indust. Accid. Commn. (Dollarhide)* (1946) 27 Cal.2d 813 [11 Cal.Comp.Cases 94] (going and coming), *Kiewit Sons v. Indust. Accid. Commn. (McLaughlin)* (1965) 234 Cal.App.2d 831 [30 Cal.Comp.Cases 188] (responsibility of one employer among several, pre-enactment of § 5500.5), *McCarty v. Wkrs. Comp. Appeals Bd.* (1974) 12 Cal.3d 677 [39 Cal.Comp.Cases 712] (drinking on job caused auto accident), *Hardware Mut. Ins. Co. v. Wkrs. Comp. Appeals Bd. (Hargrove)* (1967) 253 Cal.App.2d 62 [32 Cal.Comp.Cases 291] (whether temporary disability caused by work injury), *State Comp. Ins. Fund v. Indust. Accid. Commn.* (1924) 195 Cal. 174 (admissibility of hearsay evidence to prove injury) raise disputes quite different from the medical-causation dispute present here.

Three cases appear to me to have some applicability. Two (*Singer v. Indust. Accid. Commn.* (1930) 105 Cal.App. 374, *Gamberg v. Indust. Accid. Commn.* (1934) 138 Cal.App. 424) involve hernias whose causes were not clearly established. The third (*Pacific Employers Ins. Co. v. Workmen's Comp. Appeals Bd. (Farris)* (1966) 247 Cal.App.2d 102 [31 Cal.Comp.Cases 409] also arose from a medical condition with a challenge as to causation, but where the medical evidence appeared rather less ambiguous to me than it did to that court, which availed itself of a "reasonable inference" to resolve the perceived ambiguity. Applicant contends that these cases support a determination in this matter that the medical expert's "reasonable doubt" be resolved in his favor. However, as I concluded in the opinion,

> I share Dr. Anderson's unease with the coincidence of applicant's paralysis occurring just days after his work-related injury. I agree that it makes sense that there should be a way to connect those events. Of course, I do not share his expertise. I do believe that expertise has been fully plumbed and the result does not support industrial causation.

The abiding fact in this case, as defendant argues, is that the parties have employed an agreed medical evaluator, whose opinions are entitled to substantial weight absent a showing that they are based on an incorrect factual history or legal theory, or are otherwise unpersuasive in light of the entire record. (See, e.g., *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775

[51 Cal.Comp.Cases 114]; *Siqueiros v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 150 (writ denied).) Try as he might, this AME was unable, to his scientific satisfaction, to draw a convincing connection between applicant's work-related injury and his unfortunate spinal paralysis.

RECOMMENDATION

I recommend that reconsideration be denied.

Dated: May 23, 2022

Respectfully Submitted,

Christopher Miller
Workers' Compensation Judge