WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FELIMON CADORNA, *Applicant*

vs.

MICREL SEMICONDUCTOR; TRAVELERS INDEMNITY COMPANY OF CONNECTICUT (TRAVELERS ST. PAUL); ZURICH AMERICAN INSURANCE, *Defendants*

Adjudication Number: ADJ6649353
San Jose District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings, Award and Order dated January 6, 2020, the Workers' Compensation Arbitrator ("Arbitrator") found that the evidentiary record does not support Dr. Newman's opinion that the injured employee sustained a new cumulative trauma injury starting in March or December 2008, that the injured employee's work duties during the period of cumulative trauma in 2009 were the same injurious work duties that caused cumulative trauma in 2006, that per stipulation the first date of disability was February 18, 2009, and that the last date of injurious exposure was February 17, 2009, which was the date when disability occurred and when the injured employee knew or should have known his injury was caused by his employment. Pursuant to these findings, the Arbitrator issued an award for Travelers Property Casualty Company of America ("Travelers") and against Zurich American Insurance Company ("Zurich"), for seventy-five percent of all benefits paid by Travelers to the injured employee.[2]

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[1] Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated March 4, 2020. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

[2] This percentage corresponds to the respective periods of coverage of the two insurers during the final year of injurious exposure; Zurich from February 18, 2008 through November 19, 2008 and Travelers from November 20, 2008 through February 17, 2009.

Zurich filed a timely Petition for Reconsideration of the Arbitrator's decision. Zurich contends that the Arbitrator's factual findings are not supported by the injured employee's deposition or by the medical opinion of Dr. Newman, which allegedly show that the injured employee did not suffer injurious exposure while working during the period of Zurich's coverage, February 18, 2008 through November 19, 2008.

Travelers filed an answer.

The Arbitrator submitted a Report and Recommendation ("Report").

We have considered the allegations of Zurich's Petition for Reconsideration and the contents of the Arbitrator's Report with respect thereto. Based on our review of the record, and for the reasons stated below and in the Arbitrator's Report as set forth herein, we will affirm the Findings, Award and Order dated January 6, 2020.

The issue of how many cumulative injuries an employee sustained is a question of fact for the workers' compensation administrative law judge, the Arbitrator, or the Board, as the case may be. (See *Aetna Casualty & Surety Co. v. Workmen's Comp. Appeals Bd.* (1973) 35 Cal.App.3d 329, 341 [38 Cal.Comp.Cases 720] ("*Coltharp*") [Applicant sustained two separate cumulative injuries, one before and one after the initial period of disability and need for treatment; to conclude otherwise would violate the anti-merger provisions of sections 3208.2 and 5303]; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 234-235 [58 Cal.Comp.Cases 323] ("*Austin*") [Applicant had one continuous compensable injury because, unlike *Coltharp*, his two periods of temporary disability were linked by the continued need for medical treatment and the two periods were not "distinct."].)

In this case, we are not persuaded the Arbitrator abused his fact-finding discretion in rejecting Zurich's assertion that the second cumulative trauma stipulated by the parties (through February 17, 2009) did not start until December 1, 2008. Specifically, Zurich alleges that Dr. Newman was consistent in opining that the injured employee sustained a first cumulative trauma injury through December 1, 2006 and a second cumulative trauma injury from December 1, 2008 through February 17, 2009. Zurich further asserts that the injured employee testified he started working with an engineer in January 2009 that required lifting and changing 50-pound equipment at head level, producing neck pain that radiated into his fingers, and that Dr. Newman testified in his December 8, 2015 deposition that the doctor's review of MRI scans supported a brief

cumulative trauma (i.e., two and one-half months) because the injured employee "would not be able to bear the pain." (Petition for Reconsideration, p. 6.)

We reject Zurich's contentions based on the following response by the Arbitrator in his Report and Recommendation:

> The difficulty with Zurich's position (as also noted in the Findings, Award, and Order) is that Dr. Newman's 5-19-13 report stated that the 2-17-09 injury caused overlap with the 12-01-06 injury, and that the 2-17-09 injury "aggravated" the 12-01-06 injury.[3] The variance in job duties, noted by Zurich for the second CT period, ignores the fact that Applicant testified that his job duties remained essentially the same during his entire period of employment. (See Exhibit HH, Cadorna Depo, 49:15, 50:14 and 52:24) Hence, the first cumulative trauma injury was caused by the same essential work duties that Dr. Newman believes caused the second cumulative trauma injury. (See Exhibit GG, Newman Depo, 9:25, 13:4 and 14:25)
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> Therefore, the present finding and award is based on (1) the overlap and aggravation of injury between the two CT period injuries, coupled with (2) the essential "sameness" of repetitive job duties causing both CT injuries that, in turn, renders (3) the injurious exposure that caused the second CT injury to be the same [type of] injurious exposure that caused the first CT injury. Per Labor Code Section 5500.5, liability for the cumulative trauma injury falls on the employer/insurer who employed/covered the applicant during the one year preceding the date of injury, or the last date of injurious exposure, whichever occurs first.

Further, we are not persuaded by Zurich's reliance upon *City of South San Francisco v. Workers' Comp. Appeals Bd. (Johnson)* (2018) 20 Cal.App.5th 881 [83 Cal.Comp.Cases 451]. In *Johnson*, the Court of Appeal acknowledged that employers may be held liable under Labor Code section 5500.5(a) only if their employment is causally linked to the employee's cumulative injury, and that the ordinary causation test is proximate causation, established by a preponderance of the evidence. (*Johnson, supra,* 20 Cal.App.5th at 893-894, citing *Scott Co. v. Workers' Comp. Appeals Bd.* (1983) 139 Cal.App.3d 98, 104–105; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 310; and Lab. Code, § 3202.5.)

In this case, Zurich contends the preponderance of evidence does not establish injurious exposure during its coverage from February 18, 2008 through November 19, 2008. Zurich relies

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[3] The mere exacerbation of a pre-existing condition is not an industrial injury, but the acceleration, aggravation or lighting-up of a pre-existing condition by the injured employee's job may constitute an industrial injury. (*City of Los Angeles v. Workers' Comp. Appeals Bd. (Clark)* (2017) 82 Cal.Comp.Cases 1404 (writ den.).)

upon the injured employee's statement to Dr. Newman that his pain noticeably increased around December 1, 2008, with Dr. Newman also testifying in his deposition that MRI scans showed significant cervical changes that would have occurred within a short time before February 2009.

We are not persuaded. The injured employee's 2019 deposition shows that his condition actually worsened around March 2008, even though he did not get much treatment that year. Further, and as noted before, the Arbitrator points out that the injured employee's physical work activities did not change significantly from 2007 through February 17, 2009, even though he had a new assignment working with an engineer beginning in November 2008. It also appears that there was no specific change in work requirements that can be identified as causing a separate cumulative trauma beginning December 1, 2008. (See Exhibit II.) Without something more than a nominal change in the injured employee's work assignment, such as a material change in the physical demands of his essential work functions, the preponderance of evidence does not support the existence of a separate cumulative trauma beginning December 1, 2008.

Finally, we note that Dr. Newman's apparent understanding of cumulative trauma, on these facts, is inconsistent with the statutory definition of cumulative trauma under Labor Code section 3208.1. The statute provides that a cumulative industrial injury occurs whenever the repetitive, physically traumatic activities of the employee's occupation cause any disability and/or need for medical treatment. Dr. Newman posited the existence of a brief, second cumulative trauma starting at the end of 2008 based upon the injured employee's narrative of a marked increase in symptoms, as opposed to the nature of the work he performed. As previously noted, however, there is no persuasive evidence that the injured employee's work duties changed significantly late in 2008. Dr. Newman evidently did not recognize that during a period of cumulative trauma, a time of injurious exposure may pre-date and give rise to the onset of severe symptoms. A medical opinion that is based upon an incorrect legal theory is properly rejected as insubstantial evidence. (*Hegglin v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings, Award and Order dated January 6, 2020 is **AFFIRMED**,

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 26, 2024

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

FELIMON CADORNA
LAW OFFICE OF THOMAS BURNS
LAW OFFICES OF LAURA CHAPMAN
RAYMOND E. FROST & ASSOCIATES

JTL/*ara*

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