

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

CYNTHIA PIERCE, *Applicant*

vs.

**BOTTLING GROUP, LLC, dba PEPSICO; ACE AMERICAN INSURANCE COMPANY,
adjusted by SEDGWICK CMS, *Defendants***

**Adjudication Number: ADJ12212509
Sacramento District Office**

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant Bottling Group, LLC, dba PepsiCo, insured by ACE American Insurance, adjusted by Sedgwick CMS (defendant) seeks reconsideration of the December 22, 2020 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a truck driver on October 24, 2018, sustained industrial injury to her back and arms as stipulated by the parties and to her neck. The WCJ also made findings as to the mechanism of injury, that applicant had sustained injury to the neck "as alleged," and identified periods of temporary disability.

Defendant contends that the scope of the issues decided should have been limited to mechanism of injury, that the applicant is not credible, that her history to the evaluating medical-legal physicians renders the resulting reports inaccurate, that the record does not support the alleged mechanism of injury, and that the Award is unclear as to the meaning of "injury as alleged." Defendant further contends that the applicant's receipt of state disability benefits from the Employment Development Department (EDD) is not accounted for in the Award.

We have received an Answer from the applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition, the Answer, the contents of the Report, and the record in this case. Based on our review of the record, and for the reasons set forth in the Report, and for the reasons set forth below, we affirm the Findings of Fact and Award, except as to the award of temporary disability, which we amend to address the lien of the Employment Development Department.

FACTS

Applicant claimed injury to her back, arms, and neck while employed as a truck driver by defendant Bottling Group LLC, dba PepsiCo, on October 24, 2018. She alleged that she was injured after opening the door to a refrigerator, which then fell on her. Defendant admits injury to the back and arms, but disputes injury to the neck and disputes the exact mechanism of the injury.

Following the injury, applicant was released to modified duties, and defendant provided modified duties through approximately December, 2018, when applicant was released to full duty. Defendant terminated applicant's employment on February 12, 2019.

Applicant received medical treatment from treating physicians Mark Hambly, M.D. and from D. Michael Hembd, M.D. (Exs. 1-6, reports of Mark Hambly, M.D., various dates; Exhibits 7-11, reports of D. Michael Hembd, M.D., various dates.) Sloane Blair, M.D., acted as the orthopedic panel Qualified Medical Examiner (QME). (Exhibits AA-BB, QME reports of Sloane Blair, M.D. various dates.)

On March 5, 2020, applicant filed a Declaration of Readiness to Proceed (DOR), noting a dispute with regard to temporary disability, the need for future medical care, earnings, and an unfiled petition for penalties. Defendant filed timely objection to the DOR on March 13, 2020.

On April 30, 2020, the parties appeared for a mandatory settlement conference (MSC). The matter was set for trial without objection. The parties completed a pre-trial conference statement. Among the issues raised were parts of body (neck), earnings, periods of alleged temporary disability, occupational group, the need for further medical treatment, the lien of EDD, and attorney fees. Additional issues raised included the need for a determination of the mechanism of injury.

Following the MSC, an additional dispute arose regarding availability of witnesses, and the WCJ issued a Pre-Trial Order converting the upcoming trial date to an MSC with the parties ordered to meet and confer in an effort to resolve the dispute. (June 4, 2020 Pre-Trial Order.) The matter was set for an additional MSC on July 6, 2020, and again on July 27, 2020. The minutes from July 27, 2020 reflect the following:

Benefit printout will be served on AA. This matter to be set for trial with Judge Aldrich. No petition for removal was filed on the issue of “cause” for adjuster testimony. No additional exhibits or witnesses are allowed. Any further motions or issues shall be raised at trial.

The parties proceeded to trial on September 16, 2020 and on October 7, 2020. The issues framed for decision included parts of body (neck), earnings, temporary partial and temporary total disability, occupation and group number, the need for further medical treatment, attorney fees, the mechanism of injury, and the admissibility of various exhibits. The lien of EDD was deferred, as were various penalty and sanctions petitions. Applicant testified as in pertinent part as follows:

She went to the back of the trailer and there was an industrial cooler. She opened the door, and the door fell off on her and knocked her down. It took her 20 to 25 minutes to put the door back on. She held the door on her steel toe boot. She had the door in both arms and was trying to get the door back on the refrigerator so she could lock the latch. She was having difficulty getting the door back on the refrigerator. She was using her whole body weight because the door probably weighed more than her. She estimates the door weighed between 150 and 200 pounds. The refrigerator was very big. It is industrial and bigger than a household refrigerator...She opened the handle on the left to the refrigerator door to get the product and the cooler door fell off. There was supposed to be a hinge but there was no hinge. It had approximately three black straps on the side, but the door was still able to fall down. The door did not fall to the ground, but it still fell on her. There was no strap on the top of the cooler door. (September 16, 2020 MOH at 9:12-24.)

The WCJ issued the F&A on December 22, 2020. The WCJ ruled on admissibility of various exhibits, and made the following determination:

On October 24, 2018, the door of a large industrial cooler/refrigerator inside the tractor-trailer fell on Applicant, she tried to catch it, and struggled to put it back on causing injury. (Finding of Fact No. 4.)

The WCJ found that applicant sustained injury to her neck. She made additional findings as to average weekly wages, periods of temporary disability, occupational code and the need for further medical treatment.

In its Petition, defendant avers that the only issue appropriately submitted for decision was mechanism of injury. (Petition for Reconsideration at 6:9.) Defendant further asserts that the applicant's testimony is not credible, and is contradicted in the evidentiary record. It argues that to the extent that the determinations of the evaluating physicians are premised on the applicant's history, they are inaccurate and do not constitute substantial medical evidence. It submits that it was error for Exhibits 16-19 and 27-29 to be admitted into the record, as contradicting the discovery directive contained in the minutes of July 27, 2020. Finally, defendant asserts the Finding of Fact that applicant sustained injury "as alleged" is ambiguous and that it is unclear whether the temporary disability is being allowed net of reimbursement to the EDD, whose lien was deferred.

DISCUSSION

Defendant contends that the only issue that should have been submitted at trial was the "mechanism of injury" as requested by QME Dr. Blair. (Petition for Reconsideration at 7:6.) It asserts that "all other issues, including temporary disability, follow this pivotal issue." (*Id.* at 7:21.) However, applicant's March 5, 2020 DOR clearly raises issues of temporary disability, earnings and the need for medical treatment. In addition, the pre-trial conference statement completed on April 30, 2020 identifies, inter alia, issues of body parts, earnings, temporary disability and need for medical treatment. Additionally, the July 27, 2020 minutes reflect the determination that "[a]ny further motions or issues shall be raised at trial."

In *Hamilton v. Lockheed Corporation*, 66 Cal. Comp. Cases 473 (2001, Appeals Bd. en banc)¹ we observed:

[T]he Labor Code and the Board's rules contain explicit instructions concerning the contents of the record of a case. 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

¹ En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].)

form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence. (*Hamilton v. Lockheed Corp.*, 66 Cal. Comp. Cases 473, 477, 2001 Cal. Wrk. Comp. LEXIS 4947, 10.)

The record of proceedings includes the minutes of hearing and summary of evidence (MOH), which must accurately reflect the issues raised at trial. (Cal. Code Regs., tit. 8, former § 10750, now § 10803 (eff. Jan. 1, 2020).) If a party is concerned that issues raised at trial are not fully reflected in the MOH, it is incumbent upon that party to lodge a timely objection and/or petition for an amendment to the MOH.

Here, the September 16, 2020 MOH lists 11 issues, including injury to applicant's neck (Issue 1) and mechanism of injury (Issue 10) and reflects no motion to limit the issues solely to "mechanism of injury." Additionally, the record contains no objection to the MOH that were served on the parties, and no subsequent request for amendment to include additional arguments advanced at trial by the defendant or any objection to the issues as framed for decision. Moreover, the WCJ is empowered to make inquiry "which is best calculated to ascertain the substantial rights of the parties, and carry out justly the spirit and provisions" of California workers' compensation law. (Cal. Lab. Code § 5708.)² In furtherance of this mandate, the WCJ has "full power, jurisdiction and authority to hear and determine all issues of fact and law presented and to issue any interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case." (Cal. Code Regs., tit. 8, former § 10348, now § 10330 (eff. Jan. 1, 2020)). Accordingly, we find no indication that defendant sought to limit the issues at trial, or that the WCJ erred in addressing the additional issues raised by the parties and memorialized in the MOH.

Next, defendant contends that applicant's testimony is controverted by the evidentiary record. It identifies alleged discrepancies in applicant's description of the mechanism of injury, and the length of time it took the applicant to replace the dislodged cooler door. (Petition at pp.7-8.) However, the WCJ found applicant's testimony credible, and defendant offered no witnesses to testify and no other evidence to contradict applicant's description of the incident. (Opinion on Decision at p.6.) We have given the WCJ's credibility determination significant weight because the WCJ had the opportunity to listen to the witness' testimony and judge its veracity. (*See Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].)

² All further statutory references are to the Labor Code unless otherwise stated.

Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id.*)

Defendant further contends that it was error to admit Exhibits 16-19 and 27-29, based on the July 27, 2020 statement on the minutes that: “no additional witness or exhibits are allowed.” (July 27, 2020 Minutes of Hearing.)³ However, this statement is not framed as any more than a conclusion that the parties are to cease discovery at the present time and proceed to trial, and the minutes further clarify that “any further motions or issues shall be raised at trial.” More importantly, the scope of the trial proceedings are within the WCJ’s discretion. As noted above, the trial judge has the full power, jurisdiction and authority to hear and determine all issues of fact and law presented. (Cal. Code Regs., tit. 8, former § 10348, now § 10330 (eff. Jan. 1, 2020)). This discretion allows the trial judge the necessary latitude to address the scope of the issues to be decided and to make contemporaneous decisions as to the admitted evidence at the time of trial. Accordingly, we find no error in the WCJ’s decision to admit this evidence.

Defendant further contends ambiguity in the Findings of Fact. Finding of Fact No. 5 states that: “Applicant sustained injury arising out of and in the course of employment to the neck as alleged.” Defendant contends it is unclear what is meant by “as alleged.” However, the mechanism of injury is set forth in Findings of Fact No. 4, which describes how the injury occurred. Findings of Fact No. 5 reflects that applicant sustained injury to her neck, which is the legally operative finding, and the finding of injury to her neck arising out of and in the course of employment is supported by the record.

We observe that Finding of Fact No. 4 is merely a description of how the events occurred, and that the WCJ made that finding at the request of the parties so as to provide guidance to the medical evaluators. We note that any medical evaluator may of course question applicant as necessary to ascertain the pertinent facts so as to arrive at an opinion that is supported by substantial evidence. “[T]o be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, 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

³ Although the Petition for Reconsideration asserts Exhibit 16-19 were admitted over defense objection, we note that Exhibits 16 and 19 were marked for identification only, and Exhibits 17 and 18 admitted without objection. (September 16, 2020 MOH/SOE at 4:5.)

adequate examination and history, and it must set forth reasoning in support of its conclusions.” (*Escobedo v. Marshalls*, 70 Cal. Comp. Cases 604, 611 (Appeals Bd. en banc).)

Finally, defendant observes that the lien of EDD for benefits paid to the applicant as unemployment and/or disability insurance has been deferred, and that the award of temporary disability benefits does not account for the EDD lien. The lien of EDD is a lien against compensation and is generally payable for the same day or days an award of temporary or permanent disability is otherwise payable. (Lab. Code, §§ 4903, subds. (f)-(g), 4904, subds. (a)-(b); *State of California, Employment Development Dept. v. Workers' Compensation Appeals Bd.* (Garcia) 61 Cal.App. 3d 470 [41 Cal.Comp.Cases 489].) The legislative intent of section 4904(b)(1) is to provide for a lien if duplicate compensation is paid for the same days of unemployment. (*Garcia v. Industrial Accident Com.* (1953) 41 Cal.2d 689 [18 Cal.Comp.Cases 290]; *California Comp. Ins. Co. v. Ind. Acc. Com.* (Moore) (1954) 128 Cal.App.2d 797 [19 Cal.Comp.Cases 249]; *Department of Employment Dev. v. Workers' Comp. Appeals Bd.* (Garcia) (1976) 61 Cal.App.3d 470 [41 Cal.Comp.Cases 489].) Accordingly, although the lien of EDD was deferred at trial, we concur with defendant that the award of temporary disability should consider the periods during which applicant received EDD benefits.

Accordingly, we affirm the F&A, except that we amend the Award so that the award of temporary disability is subject to the issue of the EDD lien, and that as appropriate the lien shall be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of further dispute.

For the foregoing reasons,

IT IS ORDERED as the **DECISION AFTER RECONSIDERATION** of the Workers' Compensation Appeals Board that the December 22, 2020 Findings of Fact and Award is **AFFIRMED** except that it is **AMENDED** as follows:

AWARD

1. Temporary partial disability for the period of October 28, 2018 to and including December 1, 2018 for wage loss, and temporary total disability for the period of January 2, 2020 through the present and continuing, less attorney's fees but subject to the issue of the lien of the Employment Development Department. As appropriate, the lien shall be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of further dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 20, 2021

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

**CYNTHIA PIERCE
LAW OFFICE OF BRIAN A. HILL
STOCKWELL, HARRIS, WOOLVERTON & HELPHREY**

SAR/abs

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