WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARISA SINGERMAN, *Applicant*

vs.

NIKE, INC.; OLD REPUBLIC INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ11337498
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by applicant Marisa Singerman. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the October 15, 2020 Findings of Fact and Orders, wherein the workers' compensation administrative law judge (WCJ) found that (1) the September 30, 2019 medical report of Domenick J. Sisto, M.D., is inadmissible and (2) applicant did not meet the requirements for a Supplemental Job Displacement Benefit (SJDB) voucher.

Applicant contends that (1) Dr. Sisto's report establishes her entitlement to a SJDB voucher, (2) the finding that applicant is not entitled to a SJDB voucher is premature because a maximum medical improvement report from either applicant's primary treating physician (PTP), Agreed Medical Evaluator (AME), or Qualified Medical Evaluator (QME) has not yet issued, (3) the WCJ should have ordered development of the record if Dr. Sisto's report is deficient, (4) defendant had a full opportunity to cross examine Dr. Sisto and conduct further discovery yet chose not to do that and should now not be rewarded with an order that does not allow the record to be developed, and (5) without an order to develop the record, applicant's right to a SJDB voucher will be abrogated.

We received an answer from defendant Nike Inc./Old Republic Insurance Company. Defendant contends that (1) we do not have jurisdiction to determine the existence of permanent disability because the parties settled permanent disability by Compromise and Release, (2) Dr.

Sisto's report is inadmissible because it does not contain a Labor Code[1] section 139.3 disclosure and does not contain a statement under penalty of perjury that the report is true and correct to the best of the physician's knowledge in violation of section 5703, subdivision (a)(2), (3) Dr. Sisto's report is not a report by a QME, AME or PTP as required by sections 4061 and 4062.2, (4) Dr. Sisto's report is not a comprehensive report because it failed to follow the requirements of section 4628, (5) the MRI report of Maurice Hale, M.D., is inadmissible for the same reasons that Dr. Sisto's report is inadmissible, (6) applicant did not meet her burden to prove entitlement to a SJDB voucher, and (7) the petition for reconsideration was improperly served. Defendant further requests sanctions against applicant for proceeding to trial without meeting her burden of proof.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we rescind the October 15, 2020 Findings of Fact and Orders and return this matter to the trial level for further development of the record consistent with this Opinion.

FACTS

As the WCJ stated:

> Marisa Singerman, age 24, while employed on March 4, 2018, as a store associate, at Valencia, California, by Nike, Inc., sustained injury arising out of and in the course of employment to her thoracic and lumbar spine. The parties entered into a compromise and release on March 21, 2019 which included settlement of the issues of permanent disability and future medical treatment. The compromise and release included language in paragraph nine that:
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> "The parties are not done with discovery but wish to settle now. The applicant knows that she has the right to a panel QME but wishes to forgo that right and settle all issues at this point."
>
> Dr. Sisto, a member of defendant's MPN, was applicant's primary treating physician prior to the issuance of the Order Approving Compromise and Release. He had not published a maximum medical improvement report at the time of the settlement. Subsequently, applicant obtained a report from Dr. Sisto dated

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

> September 30, 2019. This report was procured after the issues of permanent disability and medical treatment were settled by way of compromise and release. There is no indication in the record that Dr. Sisto acted in the capacity of a PQME or AME. Dr. Sisto does not identify himself in the September 30, 2019 report as applicant's primary treating physician. The report itself indicates that Dr. Sisto is seeing the applicant "in consultation". (Applicant's Exhibit 2, page 1). The report does not contain a statement or declaration under penalty of perjury that there has not been a violation of Section 139.3 and that the contents of the report are true and correct to the best knowledge of the physician. (Report, pp. 1-2.)

DISCUSSION

Jurisdiction

Preliminarily, we address the issue of jurisdiction. Defendant contends that we lack jurisdiction to determine the existence of permanent disability because the parties settled permanent disability by Compromise and Release. In *Dennis v. State of California—Department of Corrections and Rehabilitation Inmate Claims* (2020) 85 Cal.Comp.Cases 389, 396 (Appeals Board en banc), we held that the Workers' Compensation Appeals Board has exclusive jurisdiction to adjudicate the recovery of compensation, including SJDB vouchers, that arise out of industrial injuries. The issue here is applicant's entitlement to a SJDB voucher, not entitlement to an award of permanent disability indemnity. While entitlement to a SJDB voucher requires a determination of permanent partial disability, this determination is for purposes of eligibility to a SJDB voucher. Furthermore, settlement does not divest our jurisdiction to hear any issues that may arise from it. We, therefore, conclude that we have jurisdiction here to hear and resolve applicant's claim to a SJDB voucher.

Service of Petition

We next address defendant's contention that the petition was not properly served. Defendant contends that applicant mailed her petition to an old address despite being notified several times that defendant had moved. Section 5905 requires that a petition for reconsideration be served on all adverse parties. (§ 5905.) WCAB Rule 10625 provides the manner in which a party must serve documents. (Cal. Code of Regs., tit. 8, § 10625.) WCAB Rule 10940, subdivision (c), requires a proof of service be attached to the petition, the failure of which may be ground for dismissal. (Cal. Code of Regs. tit. 8, § 10940, subd. (c).)

Here, we note that the error was defendant's address. Applicant included a proof of service in her petition and mailed her petition to defendant, albeit to the wrong address. While we acknowledge that the error may amount to a finding of no service, we conclude that there was no prejudice here. Defendant received the petition via email three days later and was able to timely file an answer to the petition.

SJDB Voucher Eligibility Requirements

Section 4658.7 provides that an injured worker is entitled to a SJDB voucher if the industrial injury causes permanent partial disability and the employer fails to make an offer of regular, modified, or alternative work within a specified amount of time. (§ 4658.7.) Rule 10133.31, subdivision (b), specifies that an offer for regular, modified, or alternative work must be provided no later than 60 days after receipt of the Physician's Return to Work & Voucher Report (Form DWC-AD 10133.36). (Cal. Code of Regs. tit. 8, § 10133.31, subd. (b).)

Dr. Sisto's Report

The only evidence offered at trial that suggests that applicant is permanently partially disabled is Dr. Sisto's September 30, 2019 report. The WCJ did not admit this report into evidence because: (1) the report was procured after the issues of permanent disability and medical treatment were settled, (2) there is nothing in the report that suggests Dr. Sisto was treating applicant post-settlement, (3) Dr. Sisto does not identify himself as applicant's primary treating physician, and (4) the report does not contain a statement under penalty of perjury that there has not been a violation of section 139.3 and a statement that the contents of the report are true and correct to the best knowledge of the physician in accordance with section 5703. (Report, pp. 2-3.) The WCJ declined to develop the record because applicant settled her case prior to completion of discovery and procured a medical report post-settlement addressing permanent disability when permanent disability was settled. (Report, p. 5.)

Section 4658.7, subdivision (g), prohibits the settlement or commutation of a SJDB voucher.[2] Although the parties are not claiming that applicant settled her entitlement to a SJDB voucher, defendant claims that discovery on the issue of permanent disability is prohibited because permanent disability was settled. This in effect prohibits applicant from conducting the necessary

[2] We note that a panel previously held in *Beltran v. Structural Steel Fabricators* (2016) 81 Cal.Comp.Cases 1224 [2016 Cal. Wrk. Comp. P.D. LEXIS 366] that settlement of a SJDB voucher is allowed under limited circumstances. Those limited circumstances do not exist here.

discovery to prove her entitlement to a SJDB voucher. The WCJ suggests that applicant should not have settled prior to obtaining a maximum medically improved report addressing permanent disability.

We disagree. Section 5000 states that "nothing in this division shall: (a) [i]mpair the right of the parties interested to compromise, subject to the provisions herein contained, any liability which is claimed to exist under this division on account of injury or death." (§ 5000, subd. (a).) Forcing applicant to wait until a maximum medically improved medical report issues before she can settle her claim, lest she forego her right to a SJDB voucher, impairs her right to compromise her claim in violation of section 5000. Furthermore, prohibiting her from engaging in discovery post-settlement to prove her entitlement to a SJDB voucher in effect abrogates her right to this benefit. Applicant is not claiming permanent disability indemnity, which has been settled, but she should be allowed to conduct discovery to prove permanent partial disability for purposes of establishing her entitlement to a SJDB voucher.

Having established applicant's right to post-settlement discovery to establish her entitlement to a SJDB voucher, we agree that Dr. Sisto's report is deficient for the reasons stated in the WCJ's report; in particular, the report lacks the statements that section 5703, subdivision (a)(2) requires, Dr. Sisto fails to specify he is applicant's primary treating physician,[3] and the report does not comply with section 4628. For that reason, we rescind the Findings of Fact and Orders and return this matter to the trial level to further develop the record and cure the defects in Dr. Sisto's report. The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1120-1122 [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, 141 (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

[3] We note that Dr. Sisto stated that applicant reached maximum medical improvement and is permanent and stationary as of March 14, 2019, seven days before the parties entered into a Compromise and Release. Presumably then, at the time of applicant's permanent and stationary status, Dr. Sisto was still applicant's primary treating physician.

must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete. (Citations.)" (*McDuffie*, *supra*, 67 Cal.Comp.Cases at 141.)

We note that the record does not contain a Physician's Return to Work & Voucher Report form and we remind the parties that this form is necessary to trigger the employer's deadline to offer regular, modified, or alternative work, which is turn will trigger the timeline for the employer to issue a SJDB voucher. (Cal. Code of Regs. tit. 8, § 10133.31, subds. (b) and (d).)

Sanctions

Defendant contends that applicant acted unreasonably and in bad faith for proceeding to trial without meeting her burden of proof or with evidence incapable of establishing a claim.

Section 5813 authorizes the WCJ or the Appeals Board to award reasonable attorney's fees for "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Lab. Code, § 5813.) In addition, "a workers' compensation referee or the appeals board, in its sole discretion, may order additional sanctions not to exceed two thousand five hundred dollars ($2,500) to be transmitted to the General Fund." (Lab. Code, § 5813.)

Specifically, bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay shall include but are not limited to the following:

> . . .
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> (6) Bringing a claim, conducting a defense, or asserting a position:
>
> (A) that is: (i) indisputably without merit, (ii) done solely or primarily for the purpose of harassing or maliciously injuring any person, and/or (iii) done solely or primarily for the purpose of causing unnecessary delay or a needless increase in the cost of litigation; and
>
> (B) where a reasonable excuse is not offered or where the offending party has demonstrated a pattern of such conduct.
>
> (7) Presenting a claim or a defense, or raising an issue or argument, that is not warranted under existing law - unless it can be supported by a nonfrivolous argument for an extension, modification, or reversal of the existing law or for the establishment of new law - and where a reasonable excuse is not offered or where the offending party has demonstrated a pattern of such conduct. In determining whether a claim, defense, issue, or argument is warranted under

> existing law, or if there is a reasonable excuse for it, consideration shall be given to:
>
> (A) whether there are reasonable ambiguities or conflicts in the existing statutory, regulatory, or case law, taking into consideration the extent to which a litigant has researched the issues and found some support for its theories; and
>
> (B) whether the claim, defense, issue, or argument is reasonably being asserted to preserve it for reconsideration or appellate review.
>
> This subdivision is specifically intended not to have a "chilling effect" on a party or lien claimant's ability to raise and pursue legal arguments that reasonably can be regarded as not settled.
>
> (8) Asserting a position that misstates or substantially misstates the law, and where a reasonable excuse is not offered or where the offending party has demonstrated a pattern of such conduct.
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> . . .
>
> (Cal. Code Regs., tit. 8, § 10561, subd. (b)(6)-(8).)

Here, we do not believe that applicant's conduct amounts to a bad faith action or tactic that is frivolous or solely intended to cause unnecessary delay. Failing her burden of proof at trial in and of itself is not a ground for sanctions.

Accordingly, we rescind the October 15, 2020 Findings of Fact and Orders and return this matter to the trial level for further development of the record consistent with this Opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the October 15, 2020 Findings of Fact and Orders is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 9, 2021

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

MARISA SINGERMAN
MICHAEL BURGIS & ASSOCIATES, P.C.
BARRAGAN & SATZMAN LLP

LSM/bea

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