WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SANTIAGO GUAJARDO, ***Applicant***

vs.

KELLY SERVICES, INC.;
ACE AMERICAN INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ11854966
Stockton District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously 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.

Applicant seeks reconsideration of the April 21, 2020 Findings of Fact and Award and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) found, in pertinent part, that applicant was not an employee of Kelly Services on August 18, 2018, and dismissed the corresponding application for adjudication. (F&O, dated April 21, 2020, Finding of Fact No.5.)

Applicant contends that at the time of injury, applicant was "an employee of Kelly Services, Inc. under a contract of hire, and an appointment to the administration of Ace Insurance Co." (Petition for Reconsideration (Petition), dated April 27, 2020, at 6:18.)

We have not received an answer from any party. 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, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the F&O, and return this matter to trial level for further proceedings consistent with this opinion.

FACTS

In Case No. ADJ11854966, applicant alleged injury on August 18, 2018 to the back, ankle and lower extremities "while receiving [a] back injection from [a] workers' compensation doctor." (Application for Adjudication, dated January 16, 2019.) Defendant has denied liability for the claim.

As relevant to these proceedings, applicant has a prior work-related injury. In Case No. ADJ599430, applicant sustained injury to his back (lumbar and thoracic), while employed on April 17, 2007 by Kelly Services, Inc. Findings and Award issued on August 13, 2010 for 34 percent disability. Applicant field a petition to reopen on March 18, 2012, which resolved on January 16, 2015 by Stipulated Award for 40 percent disability.

On August 26, 2019, the parties proceeded to trial on both cases, and framed the issue of "whether or not there is WCAB jurisdiction in ADJ118544966." (Minutes of Hearing, dated August 29, 2019, at 2:19.) The parties submitted the matter based on trial briefs, without testimony or trial exhibits. The WCJ issued his decision on September 26, 2019, finding in pertinent part that applicant was not an employee of the defendant on August 18, 2018, and that the WCAB was without jurisdiction as to "potential New & Further disability for applicant's prior claim (ADJ599430) with the Findings, Award and Order on January 7, 2015." (Findings of Fact, Orders and Opinion on Decision, dated September 26, 2019, Findings of Fact Nos. 2 and 3.) Consequently, the WCJ ordered that applicant take nothing in ADJ11854966. (*Id*., Order No. 1.) Applicant petitioned for reconsideration, arguing that the issue of employment with Kelly Services was not framed for decision, and consequently the parties had not submitted evidence responsive to this issue. (Petition for Reconsideration, dated October 9, 2019, at 4:14.) The WCJ issued an Amended Findings of Fact, Order and Opinion on Decision on October 21, 2019, rescinding the September 26, 2019 order to the extent it applied to ADJ11854966. (Amended Findings of Fact, Order and Opinion on Decision, dated October 21, 2019, Order "A".) Neither party appealed the amended decision.

The parties returned to trial on March 5, 2020, and stipulated that "[a]t the time of purported injury, applicant was receiving medical for his prior workers' compensation claim, which had been authorized by the insurance company responsible pursuant to the prior award in ADJ599430." (Minutes of Hearing (Minutes), dated March 5, 2020, at 2:9.) The sole issue framed for decision was "employment." (*Id*. at 2:14.)

The WCJ issued the F&O on April 21, 2020. Therein, the WCJ found applicant was not an employee of Kelly Services on August 18, 2018, and ordered the corresponding application for adjudication dismissed. (F&O, dated April 21, 2020, Finding of Fact No. 5; Order No. 1.)

Applicant's Petition contends the trial issue was solely employment pursuant to Labor Code section 3351, and that the decision exceeds the issues framed by addressing 'whether applicant was in an employment relationship…pursuant to Labor Code 3600."[1] (Petition, at 3:18.) Applicant submits that case law authority found in *Laines v. Workmen's Comp. Appeals Bd.* (1975) 48 Cal.App.3d 872 [40 Cal.Comp.Cases 365], and in *Southern California Rapid Transit Dist., Inc. v. Workers' Comp. Appeals Bd. (Weitzman)* (1979) 23 Cal.3d 158 [44 Cal. Comp. Cases 107] supports a finding that at the time of injury applicant was "an employee of Kelly Services, Inc. under a contract of hire, and an appointment to the administration of Ace Insurance Co." (Petition, at 6:18.)

The WCJ's Report observes that the sole issue decided was that of employment, and reiterates that under section 3351, applicant was not an employee of Kelly Services on the claimed date of injury of August 18, 2018. (Report, at p.4.)

DISCUSSION

In *Laines v. Workmen's Comp. Appeals Bd.*, applicant was injured on July 23, 1973 while driving to a medical appointment occasioned by an industrial injury sustained on June 14, 1973 and June 30, 1973. (*Laines v. Workmen's Comp. Appeals Bd., supra,* 48 Cal.App.3d 872.) The trial court deemed the injury to be a "compensable consequence" of applicant's earlier industrial injury, but the WCAB reversed, finding the motorcycle injury not proximately caused by the underlying industrial injury. The court of appeal considered the question of whether an employee is entitled to receive workers' compensation benefits for injuries sustained while en route to receive medical treatment for an industrial injury where (a) the industrial injury, in itself, was not a factor contributing to the second injury, and (b) where the journey did not commence at the worker's place of employment. Noting the compensability requirements of Labor Code section 3600, the court additionally framed the questions of whether applicant was performing a service growing out of, and incidental to, his employment and acting in the course of his employment, and whether applicant's injury was proximately caused by his employment.

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[1] All further statutory references are to the Labor Code unless otherwise stated.

Noting scant California appellate authority on the topic, the *Laines* court turned to out-of-state authorities. The 1963 Kansas case of *Taylor v. Centex Construction Co.* (1963) 191 Kan. 130 [379 P.2d 217] held that "the liability of an employer to an employee arises out of a contract between them and the terms of the Act are embodied in the contract…It would be folly to say that the claimant's trip going to and from the doctor's office did not 'arise out of' the nature, conditions, obligations, or incidents of his employment." The 1967 Virginia case of *Immer and Company v. Brosnahan* (1967) 207 Va. 720 [152 S.E.2d 254] held that "when the employer directs or authorizes the employee to seek medical attention for a work-connected injury and the employee follows such direction or authorization, they are but fulfilling the reciprocal obligations of the Act and their contract. To say that an additional injury, suffered by an employee while fulfilling such an obligation, is not also work-connected has little support in modern legal authority and even less in logic."

The *Laines* decision also cited with approval the Larson workers' compensation treatise, which observed:

> When an employee suffers additional injuries because of an accident in the course of a journey to a doctor's office occasioned by a compensable injury, the additional injuries are generally held compensable. If the journey takes place immediately after the first injury occurs, the chain of causation is most readily visible, as when an employee was being rushed to a hospital following a compensable injury and sustained further injury when the ambulance was involved in a collision. But, quite apart from the element of immediacy, a fall or automobile accident during a trip to a doctor's office has usually been considered sufficiently causally related to the *employment by the mere fact that a work-connected injury was the cause of the journey, without any necessity for showing that the first injury in some way contributed to the fall or accident*. Of course, if the prior injury in any way contributes to the second accident, the case is that much stronger, as when pain or drugs or a weakened member may have played a part. (1 Larson, The Law of Workmen's Compensation (1972) § 13.13, ch. 3, *emphasis added*.)

In discussing the Kansas decision in *Taylor*, the Larson treatise, as quoted with approval by the court in *Laines,* further observed:

> The [*Taylor*] court noted that the employer is under a statutory duty to furnish medical care, and that the employee is similarly under a duty to submit to reasonable medical treatment under the act. The provisions of the act, in turn, become by implication part of the employment contract. This being so, the better

> view appears to be that accidental injuries during a trip made pursuant to this statutory and contractual obligation are work related." (*Id*., at 877.)

Finding this reasoning to be strongly persuasive, the court of appeal held that an injured worker, traveling to the examining physician's office, was engaged in "an activity which arose out of and in the course of his employment as of the time when the industrial injury was received." (*Laines, supra*, at 880.)

Similarly, in *Southern California Rapid Transit Dist., Inc. v. Workers' Comp. Appeals Bd. (Weitzman)*, the California Supreme Court considered the issue of whether applicant, who sustained injury on the way home from delivering a doctor's note to his employer, had sustained a compensable consequence injury. Reasoning that the injury occurring during a trip to a doctor mandated by the statutory and contractual obligations related to the workers' compensation laws, the Supreme Court characterized the trip as one that "partook of the nature of a compensable 'quasi-course of employment' injury." (*Southern California Rapid Transit Dist., Inc. v. Workers' Comp. Appeals Bd. (Weitzman), supra,* at 165.) The court also cited the Larson workers' compensation treatise with approval:

> [It] is not surprising that the question whether claimants' subsequent conduct is an independent intervening cause in these cases cannot be fairly determined by reference to conventional causation principles alone; it too must be determined by a test which is a combination of 'course' and 'arising out of' elements. Since, in a strict sense, none of the consequential injuries we are concerned with are in the course of employment, it becomes necessary to contrive a new concept, which we may for convenience call 'quasi-course of employment.' By this expression is meant activities undertaken by the employee following upon his injury which, although they take place outside the time and space limits of the employment, and would not be considered employment activities for usual purposes, are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable [first] injury. (*Southern California Rapid Transit Dist., Inc. v. Workers' Comp. Appeals Bd. (Weitzman), supra,* at 165, quoting 1 Larson, Workmen's Compensation Law (1978) § 13.11.)

The Supreme Court concluded, "a second injury may be found compensable where as a consequence of a prior compensable injury an employee is required by his employer to present to the employer a doctor's release prior to returning to work and the employee, after going to his place of employment to present the release, is injured in an automobile accident as he drives homeward." (*Id*., at 165-166.)

Pursuant to the holding in *Laines*, as confirmed by the Supreme Court in *Weitzman*, an injury sustained as a result of medical treatment occasioned by a prior industrial injury will be deemed a compensable consequence injury. It is not a separate or distinct injury, but arises out of the prior industrial injury, and occurs within the "quasi-course of employment." A compensable consequence injury thus arises out of, and in the course of applicant's employment *as of the time when the industrial injury was received*. (*Laines v. Workmen's Comp. Appeals Bd., supra*, 48 Cal.App.3d 872, 880.)

Here, the parties have litigated the issue of employment, submitting for decision the question of whether applicant was employed by Kelly Services at the time of his 2018 injury, which in turn was allegedly sustained pursuant to the award of medical treatment for an underlying 2007 back injury. However, we believe the more salient question is not applicant's employment status in 2018, but rather whether the alleged injury is a *compensable consequence* of the April 17, 2007 injury.

The application asserts that the injury occurred while applicant was obtaining medical treatment pursuant to a prior Award. However, aside from the application, the record reflects no medical reports or treatment records, and no other substantive evidence addressing the nature and circumstances of the claimed injury. The Appeals Board has a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) Here, the record will need to be developed to establish whether applicant has sustained a new injury, and whether that injury is related to the prior award for medical treatment arising out of the April 17, 2007 injury. To the extent that applicant asserts the 2018 injury to be a compensable consequence of the 2007 injury, the parties will need to return applicant's original 2007 injury case to calendar (Case No. ADJ599430). We further note that the defendant is raising various affirmative defenses to the claim, and that these issues may be taken up by the trial court in subsequent proceedings. (Defendant's Trial Brief, dated March 20, 2020, at 2:3.)

Accordingly, we will rescind the April 21, 2020 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 April 21, 2020 Findings of Fact, Orders and Opinion on Decision is **RESCINDED** and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 12, 2022

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

SANTIAGO GUAJARDO
WILLIAM MORRIS
BRADFORD & BARTHEL

SAR/abs

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