WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SHAWNEEA PATTEE, *Applicant*

vs.

VITALIA NATUROPATHIC MEDICINE DBA VITALIA NATURAL MEDICINE; HARTFORD INSURANCE GROUP; EMPLOYERS PREFERRED INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ10801387
San Diego District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to allow time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Employers Preferred Insurance Company (EPIC) seeks reconsideration of the July 9, 2019 Findings, Award and Order issued wherein the workers' compensation arbitrator found that applicant sustained an injury arising out of and in the course of her employment in the form of overuse syndrome from November 18, 2005 through November 18, 2016. The arbitrator found that EPIC and Hartford insured applicant's employer during the cumulative trauma period and found that liability for contribution should be proportional to the insurance coverage provided by defendants.

EPIC contends that the arbitrator's finding that applicant sustained an industrial injury is not supported by substantial medical evidence, arguing that (1) applicant was never evaluated by an appropriate specialist; (2) the panel qualified medical evaluator (PQME) never opined with a reasonable degree of medical probability that applicant sustained an industrial injury; and (3) the arbitrator impermissibly relied on medical reports that were not in evidence.

We have received an answer from Hartford. The arbitrator prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied. We have considered the pleadings and the record in this matter. For the reasons discussed below, as our decision after reconsideration, we will find that Hartford did not meet its burden of

showing that applicant sustained an injury AOE/COE and issue a new order denying Hartford's Petition for Contribution.

FACTS

We will briefly review the relevant facts. Applicant claimed that she sustained a cumulative injury through November 18, 2016, to her neck, arms, wrist and shoulders while employed as a patient care coordinator. Both EPIC and Hartford insured applicant's employer during the cumulative trauma period. Applicant elected against Hartford pursuant to Labor Code section 5500.5.

Applicant and Hartford selected Majid Taghizadeh D.C., as a PQME. Dr. Taghizadeh issued reports on February 19, 2018 and September 20, 2018. In the initial report, Dr. Taghizadeh stated:

> It is my considered opinion to some degree that there is a causal relationship between the history of injury and the injury she sustained while performing her usual and customary work activities." (Exh. 1, February 19, 2018 Majid Taghizadeh D.C., Panel Qualified Medical Evaluator Report, p. 26 (based on January 20, 2018 examination) [Emphasis in original].)

Dr. Taghizadeh later states:

> In consideration of her occupation and job duties and inadequate work station as per her statement, it is medically possible to assume exposure to repetitive work and developmental of tendinitis like condition in her case." (Exh. 1, at p. 26 [Emphasis added].)

With respect to potential fibromyalgia, Dr. Taghizadeh stated:

> In consideration of circumstances surrounding this case, widespread, long-term pain reported by this patient despite modification, not working and conservative care, and today's exam findings[,] fibromyalgia condition is most plausible. Since there is no appropriate medical justification for the continued worsening of her condition despite not working[.] However, for the appropriate and accurate determination and the etiology of her condition it is appropriate that she be referred to [a] rheumatologist or internist to further elaborate and comment on this issue[.] (Id. at p. 27.)

On July 26, 2018, Hartford settled applicant's claim by Compromise and Release.

On August 22, 2018, Hartford petitioned for contribution from EPIC for a pro rata share of benefits.

On September 10, 2018, EPIC filed a response to Hartford's petition for contribution, arguing in relevant part that there was no substantial medical evidence of a compensable industrial injury during a period which EPIC had coverage.

On September 21, 2018, Dr. Taghizadeh issued a supplemental report that did not address the issue of industrial causation. (Exh. 6, September 21, 2018, Majid Taghizadeh D.C., Panel Qualified Medical Evaluator Supplemental Report, p. 2.). Dr. Taghizadeh opined as follows:

> In summary, it seems that November 2014, is the date that [applicant] had knowledge of her symptoms that are possibly work related but not disabling. Therefore, in my opinion, medically probable and appropriate date of knowledge and disability pursuant to cumulative trauma industrial exposure would be 11/18/2015 - 11/182016, which has been identified appropriately. (Exh. 6, p. 2.)

On January 9, 2019, Hartford filed a declaration of readiness to proceed (DOR) on the issue of contribution.

On February 28, 2019, the parties agreed to proceed to arbitration. (Minutes, February 28, 2019, p. 1.)

On May 7, 2019, the parties proceeded to arbitration on the following issues: 1) Compensability of the alleged cumulative trauma injury (AOE/COE) and, if found compensable, 2) Date of the cumulative trauma injury per LC 5500.5 (i.e., ending date of the cumulative trauma), 3) The extent to which Hartford's expenditures are subject to contribution recovery. (F&O, July 9, 2019, p. 1.)

On July 9, 2019, the arbitrator issued the Findings, Award, and Order that is the subject of EPIC's Petition for Reconsideration.

In the July 9, 2019 Opinion on Decision, the arbitrator explained that he relied on the PQME's reports, including the supplemental report that Hartford filed after it filed the Petition for Contribution, to find that applicant sustained an industrial injury.

> Dr. Taghizadeh's September 20, 2018 report, solely offered on the contribution phase of the case, opines that the cumulative trauma date of injury is November 2015 to November 18, 2016 (a legal conclusion, not a medical opinion). However, the Arbitrator notes that Dr. Taghizadeh did not, in this supplemental report, make any statement that would suggest that a compensable cumulative trauma was not a cause of Applicant's condition/injury. (F&O, pp. 4-5.)

In the Report, the arbitrator reiterated his opinion that the PQME's supplemental report is persuasive on the issue of causation:

> …it remains the Arbitrator's interpretation of the facts and the overall medical reporting that applicant sustained a compensable cumulative trauma injury. Again, it is noteworthy that PQME Dr. Taghizadeh did not, in his supplemental report, make any statement that would suggest that a compensable cumulative trauma was not a cause of applicant's injury/condition. (Report, p. 4.)

ANALYSIS

Under the workers' compensation statutes, a compensable injury may either be a "specific" injury or a "cumulative" injury. Labor Code section 3208.1[1] defines injury as either: "(a) 'specific,' occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) 'cumulative,' occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment." (Lab. Code, 3208.1.) When an employee sustains a cumulative trauma injury, the employee may pursue their claim for benefits against any one or more of successive employers that employed the employee during the cumulative trauma. (Lab. Code, § 5500.5) If there are multiple employers during the 5500.5 liability period, the employers are jointly and severally liable for the entire award and may seek contribution from each other during separate proceedings. (Lab. Code, § 5500.5(e); *Denny's Inc. v. Workers' Comp. Appeals Bd. (Bachman)* (2003) 104 Cal. App. 4th1433 [68 Cal.Comp.Cases 1].)

Section 5500.5 was enacted in 1951 to codify the holding in *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79 [11 Cal.Comp.Cases 226]) that an employee who sustains an injury as a result of a progressive occupational disease may obtain an award for the entire amount of permanent disability from any one employer or insurer and the defendant held liable will have the burden of seeking apportionment. "Section 5500.5 is long and complex, but its design is reasonably clear. It is intended to allow an employee to recover for his entire cumulative injury from one or more employers of his choosing for whom he worked within the preceding five years[2] even though

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

[2] Prior to 1978, liability for occupational disease or cumulative injury claims were limited to those employers who employed the employee during a period of five years immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first. Commencing January 1, 1978, on the first day of January 1978, 1979, 1980, and 1981, the liability period for occupational disease or cumulative injury decreased by one year. As relevant here, liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1981, shall be limited to those employers who employed the employee during a period of one year immediately preceding either the date of injury or the last date on which the employee was employed in

a portion of his injury was incurred in prior employments. The employer or employers against whom compensation is awarded are in turn authorized to seek contribution from other employers in the five-year period." (*Flesher v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 322, 325-326 [44 Cal.Comp.Cases 212].) "The purpose of the limitation contained in subdivision (a) of section 5500.5 was to 'alleviate the difficulties encountered by the parties in complying with the requirements of former section 5500.5 whereby employees and their attorneys were frequently compelled to expend much time, effort and money in tracing the applicant's employment history over the entire course of his adult life.' [citation omitted.]" (*County of Riverside v. Workers' Comp. Appeals Bd. (Sylves)* (2017) 10 Cal. App. 5th 119, 126-127 [82 Cal.Comp.Cases 301].)

An applicant may elect against any defendant who has liability for injury occurring within the Section 5500.5 period. An applicant may also choose not to elect against a particular defendant and proceed against all insurers or employers. (*Industrial Indemnity Co. v. Workers' Comp. Appeals Bd. (Garcia)* (1997) 60 Cal.App.4th 548, 554-556 [62 Cal.Comp.Cases 1661].) If an applicant elects to proceed against a single insurer, the insurer is entitled under Labor Code section 5500.5 to seek contribution for awarded benefits from the remaining insurers in subsequent proceedings. (See *Schrimpf v. Consolidated Film Industries, Inc*. (1977) 42 Cal.Comp.Cases 602 (Appeals Bd. en banc).) This procedure is intended to promote a prompt determination of an injured worker's entitlement to workers' compensation benefits. (*Rex Club v. Workers' Comp. Appeals Bd. (Oakley-Clyburn*) (1997) 53 Cal.App.4th 1465 [62 Cal.Comp.Cases 441].)

The liability of non-elected defendants shall be determined in supplemental proceedings. (Lab. Code, § 5500.5(c).) Since the applicant need only prove his case against the elected defendant, a decision or settlement in the case in chief between the applicant and the elected against insurer is not res judicata, and issues of liability among the defendants are decided de novo. (*Greenwald v. Carey Dist. Co.* (1981) 46 Cal.Comp.Cases 703, 708 (Appeals Bd. en banc).)

Section 5500.5 must be construed together with Section 3208.1, which requires that the injury be caused by an occupational disease or cumulative injury to be a compensable cumulative trauma injury. An employer is not liable under section 5500.5(a) absent evidence that its period of employment or coverage was a contributing cause of the disease or injury. (*City of South San Francisco v. Workers' Comp. Appeals Bd. (Johnson)* (2018) 20 Cal.App.5th 881, 892 [83 Cal.

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an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first. (Lab. Code, § § 5500.5(a).)

Comp. Cases 451]; *Greenwald, supra*, at 708.) Where apportionment of liability between defendants is contested, contribution requires evidence of liability. (Lab. Code, §§ 3600(c); *Flesher, supra*, at 327; *Johnson, supra*, at 892; *Stanley, supra, at* 104; *Garcia, supra*, at 554-555.)

In this case, Hartford settled applicant's claim by Compromise and Release. As discussed in *Greenwald, supra,* Hartford must prove that applicant sustained an industrial injury before EPIC can be held liable for a portion of the injury.

A party can establish that applicant's job involved repetitive mentally or physically traumatic activities using lay evidence, including testimony from the applicant. However, the question of whether repetitive traumatic activities caused injury or a need for medical treatment can only be established with substantial medical evidence. (*Peter Kiewit Sons v. Ind. Acc. Comm. (McLaughlin)* (1965) 234 Cal.App.2d 831, 838-839 [30 Cal.Comp.Cases 188]; See also *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905, 911 [46 Cal.Comp.Cases 913]. To constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Bd. en banc); see also *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417; *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700-1702, 1705 [58 Cal.Comp.Cases 313].) "A medical report predicated upon an incorrect legal theory and devoid of relevant factual basis, as well as a medical opinion extended beyond the range of the physician's expertise, cannot rise to a higher level than its own inadequate premises." (*Zemke v. Workers' Comp. Appeals Bd*. (1968) 68 Cal.2d 794, 801 [33 Cal.Comp.Cases 358] (distinguished on other grounds); *County of Sacramento v. Workers' Comp. Appeals Bd. (Brooks*) (2013) 215 Cal.App.4th 785, 797 [78 Cal.Comp.Cases 379].) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture, or guess." (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) Whether a physician's opinion constitutes substantial evidence "must be determined by the material facts upon which his opinion was based and by the reasons given for his opinion." (*Ibid.*)

In this case, the PQME's reports do not clearly articulate an opinion that applicant sustained an industrial injury and are not substantial medical evidence. In addition to speculating on what "it is medically possible to assume" and "the most plausible" diagnosis, Dr. Taghizadeh stated that "for the appropriate and accurate determination on causation, it would be appropriate to refer applicant to another specialty." (Exh. 1, p. 27.) To the extent the PQME opines that applicant sustained an industrial injury, that opinion is not supported and is beyond the range of his expertise. (*Zemke, supra*, at 801.)

Here, multiple doctors, including the PQME examined applicant and documented her medical history. Applicant described repetitive job activities, including keyboarding, as part of her medical history. (Exh. 1, at p. 4; Hartford's Exh. 7, First Report of Injury, Dr. Danny Krygsman dated November 22, 2016 (exam November 18, 2016), at p. 1.) However, the PQME's opinion that those repetitive traumatic activities caused (or may have caused) an industrial injury is based on speculation, conjecture, and guess work. (*Hegglin*, *supra*, at 169; *Zemke, supra*, at 798; *Escobedo, supra*, at 620.) It is Dr. Taghizadeh's "considered opinion [that] to some degree that there is a causal relationship between the history of injury and the injury she sustained while performing her usual and customary work activities." (Exh. 1, at p. 26 [Emphasis in original].) Moreover, Dr. Taghizadeh's opinion is not framed in terms of reasonable medical probability, as probable requires more than a mere possibility. According to Dr. Taghizadeh, "in consideration of [applicant's] occupation and job duties and inadequate work satiation as per her statement, it is medically possible to assume exposure to repetitive work and developmental [sic.] of tendinitis like condition in her case." (Exh. 1, at p. 26 [Emphasis added].) (*McAllister, supra*, at 416-417, 419; *Gatten, supra*, at 928; *Escobedo, supra*, at 620.) In addition, with respect to the PQME's assessment that fibromyalgia is "most plausible" diagnosis (Exh. 1, at p. 27), Dr. Taghizadeh does not offer reasoning or facts to support the potential diagnosis and it is not framed in terms of reasonable medical probability. (*McAllister, supra*, at 416-417, 419; *Gatten, supra*, at 928; *Escobedo, supra*, at 620.)

As discussed above, to recover in a contribution proceeding, a defendant must prove that another defendant has liability for some portion of the applicant's claim. Here, Hartford settled applicant's underlying workers' compensation case before the medical record was fully developed on the issue of whether applicant sustained an injury AOE/COE. Hartford filed a timely Petition for Contribution and conducted additional discovery in the contribution proceedings, including

soliciting a supplemental report from the PQME. However, Dr. Taghizadeh's supplemental report did not address or clarify whether applicant sustained an industrial injury or provide a basis for finding that applicant sustained an industrial injury. (Exh. 6, p. 2.). Moreover, Hartford did not seek a supplemental report from a medical-legal evaluator in another specialty as recommended by the PQME.

In accordance with the constitutional mandate, under article XIV, section 4 of the California Constitution, to accomplish substantial justice, the Appeals Board has discretionary authority to develop the record. However, the Appeals Board also has the discretion to decide the employer has had an adequate opportunity to meet its burden of proof and may therefore enter an order based on the record before it. (Lab. Code §§5701, 5906; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389, 393 [62 Cal.Comp.Cases 924]; *King v. Workers' Comp. Appeals Bd*. (1991) 231 Cal.App.3d 1640, 1649 [56 Cal.Comp.Cases 408].) If a party fails to meet its burden of proof by obtaining and introducing competent evidence, it does not accomplish substantial justice to rescue the party by ordering the record to be developed. (*San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Telles Transport Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159 [66 Cal.Comp.Cases 1290].)

Here, Hartford had an adequate opportunity to obtain and introduce competent evidence, but it did not meet its burden of proof that EPIC had partial liability for an industrial injury. Therefore, the arbitrator has the discretion to enter an order denying the Petition for Contribution. (*Tyler, supra*, at 393; *King, supra*, at 1649.) Accordingly, as our Decision After Reconsideration, we find that Hartford did not meet their burden of proof and we issue a new order denying Hartford's Petition for Contribution.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the July 9, 2019 Findings, Award and Order is **RESCINDED**, and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Hartford did not meet its burden of showing that applicant sustained a cumulative trauma injury.
2. Hartford is not entitled to contribution.

ORDER

IT IS HEREBY ORDERED that the Petition for Contribution filed by Hartford is denied.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 24, 2022

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

EMPLOYERS PREFERRED INSURANCE COMPANY
MELODY COX
PHILLIPS ALPERT, ARBITRATOR
TOBIN LUCKS

MWH/oo

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