

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

TERRY KIRKLAND, *Applicant*

vs.

UNITED PARCEL SERVICE and LIBERTY MUTUAL INSURANCE, *Defendants*

Adjudication Numbers: ADJ9345199 ADJ9343647

Fresno District Office

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant seeks reconsideration of the Findings of Fact and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on January 4, 2023, wherein the WCJ found in pertinent part that the July 30, 2019, report from Jeffrey Lundeen, M.D., constitutes substantial evidence and is admissible in case numbers ADJ9345199 and ADJ9343647; that based on the report from Dr. Lundeen, applicant sustained an industrial injury to his shoulders; that the October 7, 2015 Stipulations with Request for Award/Award "are inconsistent in and of themselves," and are inconsistent with the report from Dr. Lundeen (based thereon the WCJ vacated the October 7, 2015 Award); and that the March 19, 2015 report from Leo R. Van Dolson, M.D., is not substantial evidence.

Defendant contends that applicant's December 17, 2018 Petition to Reopen is invalid because the October 7, 2015 Stipulations with Request for Award indicate that based on the opinion of Dr. Van Dolson, the parties agreed that applicant's shoulder injury was non-industrial; that applicant did not submit any new evidence that provides a legal basis for the WCJ to rescind the original Award which found applicant's bilateral shoulder condition to be non-compensable; and that the July 30, 2019, report from Dr. Lundeen, the agreed medical examiner (AME) in case number ADJ11940642, is not admissible in case number ADJ9345199, nor in case number ADJ9343647.

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

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&O, and substitute a new Findings and Order finding that: the July 30th, 2019, Report of AME Dr. Lundeen in case number ADJ11940642, is admissible in both cases, ADJ9345199 and ADJ9343647; that the Stipulations with Request for Award/Award approved on October 7th, 2015 should be set aside; that QME Dr. Van Dolson's Reporting does not amount to substantial medical evidence; and that the issues of injury in ADJ9343647 and in ADJ9345199, and that the Petitions to Reopen for New and Further Disability in both cases, and the Petitions to Dismiss the Petitions to Reopen for New and Further Disability in both cases are both deferred; and we will 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.

BACKGROUND

Applicant claimed injury to his right shoulder while employed by defendant as a package driver on February 6, 2014 (ADJ9343647). Applicant also claimed injury to his right shoulder and left shoulder while employed by defendant as a package driver during the period from May 10, 2013, through January 31, 2014. (ADJ9345199). The parties submitted Stipulations with Request for Award (Stipulations) settling both cases; a WCJ issued a Joint Award, on October 7, 2015. The Stipulations state that applicant's shoulder injury claims did not cause any permanent disability and that, "This settlement is based on PQME Dr. Van Dolson's report dated March 19, 2015, finding the applicants shoulder injury is non-industrial." (Def. Exh. C, Stipulations p. 6, original in upper-case.) The Stipulations also state that there was "not a need for medical treatment" and that "applicant is to make demand on the defendant for future medical care prior to self-procuring the same except in an emergency." (Def. Exh. C, Stipulations pp. 6 and 7, original in uppercase.) On December 17, 2018, applicant filed a Petition to Reopen both injury claims, stating that, "Applicant has new and further disability to both his shoulders" (See Petition to Reopen, original in upper-case).

On February 8, 2019, applicant filed an Application for Adjudication of Claim in case number ADJ11940642, claiming injury to his neck, both shoulders, mid-back, low back, right arm, right wrist, both hips, and both knees, while employed by defendant during the period from January 1, 2017, through January 1, 2018. He was evaluated regarding that injury claim by orthopedic agreed medical examiner (AME) Jeffrey M. Lundeen, M.D. Based on the report from Dr. Lundeen, the injury claim was settled by Stipulations with Request for Award; a WCJ issued the Award on December 31, 2019.

DISCUSSION

Regarding the Order vacating the October 7, 2015 Award, as noted by the WCJ, the Stipulations are inconsistent in that they state applicant did not sustain an industrial injury to any body parts but they also state that applicant was entitled to future industrial medical care upon demand. (Report, pp. 2 – 3.)

Further, the Stipulations and the Award were based on the March 19, 2015, report from Dr. Van Dolson. When addressing the issue of applicant’s cumulative injury claim, Dr. Van Dolson stated, “The idea that due to activity at work joints and structures around the joints are typically injured, is, in general, a bogus concept. Basically, activity tends to be protective of joints and joint structures.” (Def. Exh. A Leo R. Van Dolson, M.D., March 19, 2015, p. 23.)

In his October 6, 2021, supplemental report Dr. Van Dolson reiterated his earlier opinion, stating that:

I understand that I am being asked as to whether or not I would conclude that there was a cumulative trauma injury over the period of time from 2013 through 2014. ¶ For the same reasons presented in my QME Report, I would conclude that Mr. Kirkland did not experience a cumulative trauma injury to his shoulders during that period of time. To the best [of] my understanding, cumulative trauma is a highly speculative concept. Also, to the best [of] my understanding, I am unaware of any reliable study/literature evidence that UPS drivers have higher incidence of shoulder, neck, back, knee, elbow, and hip problems. ... ¶ There is a generalized (speculative) assumption that when people work, if they do heavy work, this will cause injury to their bodies: Again, to the best [of] my knowledge, there is not definitive evidence to support that concept. In reality, the best information available tends to suggest that the situation might be just the opposite. ... (Joint Exh. AA, Leo R. Van Dolson, M.D., October 6, 2021, pp. 4 – 5.)

It is clear that Dr. Van Dolson does not believe in the legally mandated “cumulative injury” which has been an integral aspect of the California Workers’ Compensation system for decades. Pursuant to Labor Code section 3208.1:

An injury may be either: (a) “specific,” ... 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; enacted 1968.)

We agree with the WCJ, that since Dr. Van Dolson believes the existence of a cumulative injury “is a speculative concept” his reports do not constitute substantial evidence as to the issue of a cumulative injury AOE/COE; and in turn, cannot be the basis for the parties’ stipulations or an Appeals Board ruling/award. (See Report, pp. 3 – 4.) Therefore, because of the inconsistencies in the Stipulations and the fact that they were based on the report from Dr. Van Dolson, it was appropriate for the WCJ to vacate the Award. Also, upon return of this matter it will be appropriate that applicant be evaluated by an AME or in the alternative, by a regular physician appointed by the WCJ. (Lab. Code, § 5701.)

As to the report from AME Dr. Lundeen, the parties agreed to have Dr. Lundeen evaluate applicant in regard to his claim of injury during the period from January 1, 2017, through January 1, 2018 (case number ADJ11940642). After examining applicant, taking a history, and reviewing the medical record, Dr. Lundeen concluded that the cumulative injury “involved in this claim to 01/01/18” caused aggravation of pre-existing neck pain, right shoulder pain, left shoulder pain, low back pain, and caused injury to his bilateral elbows/forearms, bilateral hips, and bilateral knees. (App. Exh. 1, Jeffrey M. Lundeen, M.D., July 30, 2019, pp. 23 – 24.) Dr. Lundeen was not asked to, nor did he, address the issues of injury arising out of and occurring in the course of employment, or parts of body injured, in reference to the February 6, 2014 injury claim in case number ADJ9343647. Since Dr. Lundeen’s report is limited to issues involving the January 1, 2017, through January 1, 2018 cumulative injury claim, it is not substantial evidence at this time on the record before us, pertaining to any issues raised in case number ADJ9343647. Thus, although the July 30, 2019 report from Dr. Lundeen is admissible in both cases at issue herein, the report does not constitute substantial evidence as to the issue of injury AOE/COE in either case.

Accordingly, we grant reconsideration, rescind the F&O, and substitute a new Findings and Order finding that: the July 30th, 2019, Report of AME Dr. Lundeen in case number ADJ11940642, is admissible in both cases, ADJ9345199 and ADJ9343647; that the Stipulations with Request for Award/Award approved on October 7th, 2015 should be set aside; that QME Dr. Van Dolson's Reporting does not amount to substantial medical evidence; and that the issues of injury in ADJ9343647 and in ADJ9345199, and that the Petitions to Reopen for New and Further Disability in both cases, and the Petitions to Dismiss the Petitions to Reopen for New and Further Disability in both cases are both deferred; and we 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 that applicant's Petition for Reconsideration of the Findings of Fact and Orders issued by the WCJ on January 4, 2023, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the January 4, 2023, Findings of Fact and Orders is **RESCINDED**, and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Terry Kirkland while employed on February 6, 2014 (ADJ9343647) claims to have sustained an industrial injury to his right shoulder; and during the period of May 10th, 2013, to January 31st, 2014 (ADJ9345199) claims to have sustained an industrial injury to his right and left shoulders. During the specific injury and the cumulative trauma applicant was working as a package driver, Occupational Group Number 350, in Fresno California employed by United Parcel Service.
2. At the time of the injury, the employer's Workers' Compensation carrier was Liberty Mutual Insurance. The employer was insured.
3. The employer has furnished some medical treatment.
4. The July 30th, 2019, Report of AME Dr. Lundeen in case number ADJ11940642, is admissible in both cases, ADJ9345199 and ADJ9343647.

5. The Stipulations with Request for Award/Award approved on October 7th, 2015 (Stipulations) are not supported and should be set aside.
6. QME Dr. Van Dolson's Reporting does not amount to substantial medical evidence.
7. The issue of injury in ADJ9343647 and in ADJ9345199 is deferred pending completion of an exam by a regular Physician, a QME, or an AME, as well as further development of the record.
8. The Petitions to Reopen for New and Further Disability in both cases, and the Petitions to Dismiss the New and Further Disability in both cases are both deferred.
9. All other issues are deferred.

ORDERS

THIS COURT MAKES THE FOLLOWING ORDERS:

- (A) The Stipulations with Request for Award/Award approved on October 7th, 2015, are vacated.
- (B) QME Dr. Van Dolson's Reporting does not amount to substantial medical evidence. Dr. Van Dolson's Reports shall be excluded from this case.
- (C) These cases shall be set for a Status Conference to allow the Parties an opportunity to agree to an AME, or have this Court appoint a Regular Physician pursuant to Labor Code § 5701.

IT IS FURTHER ORDERED that the matter is **RETURNED** 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.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 3, 2023

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

**TERRY KIRKLAND
QUINLAN, KERSHAW & FANUCCHI, LLP
SAMUELSEN, GONZALEZ, VALENZUELA & BROWN, LLP**

TLH/mc

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