WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WAYNE ESP, *Applicant*

vs.

CAMBRON ROOFING AND WATERPROOFING, INC.;
STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Numbers: ADJ11179850
Santa Barbara District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.[1]

Defendant seeks reconsideration of the "Findings of Fact and Order" (F&O) issued on February 19, 2020, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant sustained industrial injury and that the injury as not barred by the intoxication defense pursuant to Labor Code[2] section 3600(a)(4). The WCJ further ordered an evaluation with a regular physician pursuant to section 5701.

Defendant argues that the WCJ erred because substantial medical evidence proved that applicant was intoxicated at the time of injury and that such intoxication proximately caused applicant's injuries. Defendant further argues that the WCJ erred in appointing a regular physician and should have first ordered development of the record with the physicians who have already reported in the case.

We have received an answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

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[1] Commissioners Sweeney and Lowe, who were on the panel that issued the Opinion and Order Granting Reconsideration, no longer serve on the Appeals Board. Other panelists were appointed in their place.

[2] All future references are to the Labor Code, unless noted.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration we will rescind the WCJ's February 19, 2020 F&O and issue an amended Findings of Fact and Order, which finds that applicant's claim is not barred by sections 3600(a)(4) or 4053, defers all other issues, and returns the matter to the trial level for further development of the record.

FACTS

Applicant claims to have sustained injury to his back, chest, lung, respiratory system, right shoulder, head, right scapula, right hand, right finger, clavicle, and psyche from a specific injury on September 28, 2017. (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 9, 2020, p. 2, lines 12-15.) Defendant denied benefits, in part, alleging that applicant's injury was caused by intoxication.

This matter was previously tried after which we granted reconsideration to allow defendant the opportunity for further discovery, including a toxicology evaluation. (Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, March 14, 2019.)

Applicant was thereafter evaluated by internal medicine QME Prakash Jay, M.D., who took the following history of injury:

> Mr. Esp stated that he went to work at 7:00 am on September 28, 2017. He related that he had to start work at 7:00 am. He related that the prior night, he drank alcohol all night, quite a bit of hard liquor, as well as beer and he believed the last drink he may have had was around 4:00 am and was at work by 7:00 am. He related that he had hardly slept.
>
> Mr. Esp stated that he worked from 7:00 am until approximately 11:30 am. He related that he went to lunch by himself and had a large beer, approximately 24 ounces at lunch. He stated that he came back to work around 12:30 pm and was working. He related that after lunch, he had been at work for about 10 to 15 minutes and there were two co-workers working on the roof. He explained that he was holding a heavy skylight weighing approximately 300 pounds. He stated that it slipped and pushed him down. He believed he fell down about 10 feet and the skylight fell on him. He believed he lost consciousness and he was bleeding from the scalp. He stated that he was taken to Cottage Hospital in Santa Barbara and was hospitalized overnight. Mr. Esp stated that he had multiple lacerations and had stitches into his scalp, several rib fractures, fracture of right scapula and fractured three vertebrae. He believed his blood pressure was elevated during his hospitalization. He stated that he had never been diagnosed

> with hypertension and never took any medication for hypertension. He stated that he was discharged the following day and was only started on blood pressure medication about six months ago. He takes one medication for blood pressure presently. Mr. Esp stated that he is being treated at Sansum Medical Clinic in Santa Barbara.

(Defendant's Exhibit F, Report of Prakash Jay, M.D., October 24, 2019, p. 2.)

Dr. Jay commented upon intoxication as follows:

> A careful and thorough review of medical records revealed that his blood alcohol level was noted as 172 mg%. This blood sample was drawn at 15:16 hours on September 26, 2017. The fall had occurred just before 12:30 pm according to Mr. Esp. Therefore, there was a time gap from 12;30 pm to 15:16 hours~ approximately three hours since the time he fell and the time the blood was drawn for blood alcohol level. Legal limit for alcohol intoxication is 0.08% or 80 mg%. Mr. Esp's blood alcohol level was more than twice the legal intoxication level and that it was drawn approximately three hours after he had fallen which means that it was much higher at the time he fell. The blood alcohol level was much higher at the time he fell because in those-there hours, significant amount of alcohol had also been metabolized. It is very difficult to guess or estimate what the blood alcohol level was at the time of the fall. Given these circumstances, it appears that Mr. Esp was intoxicated and his significant alcohol intoxication may have contributed to his fall. Whether or not it was a proximate cause or whether or not there was some other surroundings while he was working, such as unsafe workplace contributed to his fall is unclear.

(*Id*. at p. 12.)

In deposition, Dr. Jay explained that he was unable to conclude as to causation of the fall because he was not provided with enough information, such as information about the worksite and statements from coworkers. (See Defendant's Exhibit G, Deposition of Prakash Jay, M.D., December 18, 2019, pp. 13-14, 16-17.) The parties established that additional information about the fall existed, such as a coworker who was present on the roof at the time. (*Id*. at p. 15, lines 6-25.) Dr. Jay testified that if no other information was available to review, he would opine that intoxication was a proximate cause. (*Id*. at p. 18, lines 16-21.)

The WCJ's Report does not explain the basis for the appointment of a regular physician. (See generally, Report.) It appears that the WCJ appointed a regular physician in response to applicant's request for an additional panel QME.

DISCUSSION

1. Intoxication Defense

An applicant's right to recover workers' compensation benefits is subject to the conditions set forth in section 3600. Among these is that "the injury is not caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee." (§ 3600(a)(4).) Intoxication is an affirmative defense, and the burden of proof rests on the employer, as the defendant, to establish that affirmative defense. (§ 5705(b).) To carry its burden of proof, a defendant is required to prove each fact supporting its claim by a preponderance of the evidence. (§ 3202.5.)

> "Preponderance of the evidence" means that evidence that when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence.

(§ 3202.5.)

When a defendant asserts the intoxication defense, it must prove not only that the injured employee was intoxicated at the time of the injury, but also that the employee's intoxication was a proximate or substantial cause of the injury. (*Smith v. Workers' Comp. Appeals Bd*. (*Smith*) (1981) 123 Cal.App.3d 763, 774 [176 Cal. Rptr. 843, 46 Cal.Comp.Cases 1053]; *Douglas Aircraft, Inc. v. Industrial Acc. Com*. (1957) 47 Cal.2d 903 [22 Cal.Comp.Cases 24], disapproved on another ground in *LeVesque v. Workers' Comp. Appeals Bd*. (1970) 1 Cal.3d 627, 636 [35 Cal.Comp.Cases 16].)

Here, defendant failed to establish that intoxication was a proximate or substantial cause of the injury. Accordingly, we will affirm the F&O as to the intoxication defense and the finding of industrial injury.

To constitute substantial evidence ". . . 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 adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Here, the QME specifically requested additional information about the layout of the jobsite, the roof, and coworker statements. Defendant then asked the QME to opine on causation

absent any of this information, which was readily obtainable. Thus, the QME's conclusion based on a partial record is not substantial evidence.

Next, the parties must carefully analyze their burden of proof and obtain an appropriate expert in the appropriate field. While the evaluation by a QME appeared necessary to establish intoxication, we question whether the causation of applicant's fall from the roof is a medical question within the expertise of the QME.[3] While the QME can provide relevant medical information about the approximate amount of alcohol in applicant's system at the time of injury, and what effects that level of alcohol would be expected in a person of high alcohol tolerance, this information by itself does not establish causation of a fall. The QME stated this quite succinctly at deposition: "Because the other guy didn't fall doesn't mean that this guy fell because of alcohol." (Exhibit G, *supra* at p. 16, lines 22-23.)

There are many ways someone can fall. Some may be caused or substantially contributed by intoxication; others may not. Whether an expert is needed depends on the facts of each case. For example, if a coworker picked applicant up and threw him off the roof, applicant's level of intoxication does not matter, and we do not need an expert to tell us how applicant fell. Here, applicant slipped and fell off the roof while holding a skylight. This is not a case where common sense can tell us whether intoxication contributed to the slip and fall. In this case, defendant needed to establish the causation of applicant's fall with expert evidence.

As the party asserting the affirmative defense of intoxication, defendant was required to prove that applicant was intoxicated at the time of the accident and that such intoxication proximately caused the accident. (Lab. Code, § 3600(a)(4).) While defendant established intoxication at the time of the accident, defendant failed to establish proximate or substantial causation. Accordingly, the F&O is affirmed in that regard.

2. Appointment of a Regular Physician

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner is challenging an interlocutory issue within a hybrid decision, then the Appeals Board

[3] Perhaps there may be cases where medical evidence alone can address the proximate cause of an accident, but generally, in non-obvious cases the expertise of an accident reconstruction specialist may be better suited to establish causation.

will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, defendant challenges the WCJ's appointment of a regular physician under section 5701, which is an interlocutory order. (§ 5701.) Therefore, the removal standard applies to our review.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd*. (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10843(a); see also *Cortez, supra; Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10843(a).)

In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (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 must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie*, *supra*, at 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Ibid*.) "Only if the supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record, should other physicians be considered." (*Id*. at 142.)

Here, the WCJ appointed a regular physician in response to applicant's request for an additional panel QME. We agree with defendant that the WCJ's appointment of a regular physician was not appropriate at this time and that substantial prejudice will result to the parties. The use of a regular physician cannot be used to supplant the ordinary process of obtaining an additional panel QME. Where parties require an additional panel QME, the process is outlined in Rule 31.7. (Cal. Code Regs., tit. 8, § 31.7.) Accordingly, if the parties require additional panels, they may either agree to such panels, or they may submit the matter to the WCJ who may order additional panels if good cause is presented.

We are rescinding Finding of Fact #1 because the WCJ failed to include the body parts injured in the Finding of Fact. Failure to include at least one of the body parts injured in the finding of injury can lead to anomalous results and it is a practice that should be avoided. Accordingly, and although we agree with the WCJ that applicant's injury is otherwise industrial, we will rescind Finding of Fact #1 and return that issue to the trial level so that the parties may either stipulate to body parts injured or set that issue for hearing.

Accordingly, as our Decision After Reconsideration we will rescind the WCJ's February 19, 2020 F&O and issue an amended Findings of Fact and Order, which finds that applicant's claim is not barred by sections 3600(a)(4) or 4053, defers all other issues, and returns the matter to the trial level for further development of the record.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order issued on February 19, 2020 is **RESCINDED with the following SUBSTITUTED therefor:**

FINDINGS OF FACT

1. Applicant's claim is not barred by Labor Code section 3600(a)(4).
2. Applicant's claim is not barred by Labor Code section 4053.
3. All other issues are deferred.

ORDER

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 23, 2024

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

LAW OFFICES OF DANIEL SIMON
STATE COMPENSATION INSURANCE FUND
WAYNE ESP
GRAY AND PROUTY

EDL/oo

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