WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANDREW KAMILCHU, *Applicant*

vs.

MARK ROBERTS, dba AUTOMOTIVE REPAIR; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, *Defendants*

Adjudication Number: ADJ11580516
Sacramento District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and the Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinion on Decision, both of which we adopt and incorporate except as noted below, and the reasons stated below, we will deny reconsideration.

We do not adopt or incorporate the report to the extent that it refers to Stephen Abelow, M.D., as a "PQME" (panel qualified medical examiner). In fact, Dr. Abelow was selected by the parties as an agreed medical examiner (AME). The WCJ properly relied upon the opinion of the AME, who the parties presumably chose because of the AME's expertise and neutrality. The WCJ was presented with no good reason to find the AME's opinion unpersuasive, and we also find none. (See *Power v. Workers' Comp. Appeals Bd*. (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

Further, we note that, although defendant requested a certified trial transcript asserting that the WCJ's summary of evidence was inaccurate, defendant did not subsequently request permission to file a supplemental pleading identifying any alleged discrepancies. Rather, based on our review, we note that the transcript supports the WCJ's summary of evidence that, prior to the July 26, 2018 termination, the employer received a phone call from The General Insurance during which he was informed that applicant was claiming an injury. (Minutes of Hearing and

Summary of Evidence (MOH/SOE), 12/10/20, at pp. 10:20-24; 11:21-12:2; Reporter's Transcript of Proceedings, 12/10/20, at p. 65:16 - 66:6; 73:18-21; 74:10-15; 74:24 - 75:2.)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DEIDRA E. LOWE, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 25, 2021

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

ANDREW KAMILCHU
WALTERS & ZINN
LAURA G. CHAPMAN & ASSOCIATES

PAG/*pc*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Date of Injury:	June 27, 2018
Age on DOI:	37
Occupation:	Neck, mid back, and low back
Identity of Petitioners:	Defendant
Timeliness:	The petition was timely
Verification:	The petition was verified.
Date of Order:	March 30, 2021
Petitioners Contentions:	Defendant asserts that it was incorrect to find that the employer had knowledge of injury prior to the date of applicant's termination, which was the basis of rejecting the affirmative defense of Labor Code section 3600(a)(10), Defendant further asserts that it was erroneous to fail to address the credibility of the applicant. Defendant further states that the PQME report of Dr. Stephen Abelow should not have been followed because the doctor had an incorrect history.

II

FACTS

While employed as an automotive detailer for Mark Roberts dba Automotive Repair and Consulting, on June 27, 2018, applicant was involved in a motor vehicle accident. He reported the accident to his employer and was able to continue his work day.

Applicant continued to work for the employer until he was terminated on July 26, 2018. On that date, the employer had received a phone call from the insurance company for the driver of the vehicle which had struck applicant. In that phone call, the insurance company informed the employer that applicant had made a claim of injury resulting from the accident. The employer testified that when he asked applicant whether he was making claim of injury, the applicant denied it. At that point the employer terminated applicant. (Minutes of Hearing, Summary of Evidence, page 10, lines 20 to 24, and page 12, lines 13 to 19.)

Applicant first sought treatment for the injury at Kaiser Hospital on August 13, 2018. (Exhibit 5; Exhibit I.) His last date of treatment at Kaiser was November 19, 2018. He was noted to have sustained a whiplash injury of his neck, a thoracic spine strain, lumbar muscle strain, lumbar radiculitis, and cervical radiculitis, (Exhibit 1, page 3.)

The claim was denied on September 6, 2018. (Exhibit A.) Applicant was evaluated on March 6, 2019, by PQME, Dr. Stephen Abelow. Dr. Abelow found that applicant had sustained injury AOE/COE to his Lumbar, cervical, and thoracic spine, that he had been temporarily disabled from July 11, 2018, through March 6, 2019, and that there was permanent impairment according to the AMA guides. He found a need for further medical treatment. (Exhibit A, pages 11 through 15.)

The matter went to trial on December 10, 2020. Findings and Award were issued on March 30, 2021, finding injury AOE/COE, permanent disability, temporary disability, and future medical care pursuant to the opinion of Dr. Abelow. The post-termination defense was denied because the employer had knowledge of injury prior to the termination.

It is to this Findings and Award that defendant seeks reconsideration.

III

DISCUSSION

1. The employer testified that he had been notified of a claim of injury prior to the date of termination

Mark Roberts, the employer, testified that he received a phone call from The General Insurance informing him that applicant had made a claim of injury resulting from the accident. He stated that the reason he terminated applicant was because he considered applicant untrustworthy as a result of this conversation. It is remarkable that the employer is claiming that he had no knowledge of injury when this information was the very reason he terminated the employee.

Defendant's reliance on the case of *Honeywell v. Workers' Comp. App. Bd.* (2005) 35 Cal.4th 24 is misplaced. In Honeywell, the Supreme Court rejected the creation of a "reasonable certainty" standard for purposes of invoking the rebuttable presumption of Labor Code section 5402. The Supreme Court stated that the date of provision of a claim form could not be imputed to be the date of "reasonable certainty" of injury because the plain language of Labor Code section 5402 states that an actual claim form must be provided.

In this case, although it was stated in the opinion that a claim form should have been provided on July 26, 2018, when the employer knew of the injury, no Finding was contingent on that statement. There was no claim form provided or returned on that date, and no presumptions were invoked. Nonetheless, it was on that date that employer learned of the claim of injury, and that information preceded the termination.

2. None of the Findings were contingent on applicant's credibility

Defendant asserts that the Findings are deficient because they do not comment on applicant's credibility.

It is true that on several occasions defendant showed that applicant was not forthright. For example, in deposition he stated he was married, when in fact he is not. He stated that he had slept in his truck for only a couple of months, when in fact it had been several months. He stated that he had done dispatching work beginning in December 2019 when in fact he had done that beginning on July 2019.

Because applicant's testimony was unreliable, the Findings were based on other elements of the record. This is the reason that there was no reference to applicant's credibility. Otherwise applicant's testimony that he informed the employer of symptoms in his hands prior to termination would have been the basis of a Finding.

Applicant's incorrect statements regarding facts not material to his claim do not negate the claim. It was the employer's testimony which was the basis of the finding that there was notice of injury prior to termination.

Defendant further questions applicant's testimony that he had not worked during the period of time Dr. Abelow found that he was temporarily disabled. However, defendant provided no evidence of employment in this period. It is defendant's burden to show that there was employment negating a finding of temporary disability. The inconsistent statement regarding employment which was elicited showed that he was working in July 2019 (4 months after the end of the TD period) rather than December 2019. This inconsistent statement is not sufficient to impute that he was working in the interval of July 2018 through March 2019.

3. While there is some incorrect history described by Dr. Abelow, there has been no showing that there are material errors

Dr. Abelow took a history that applicant went to the doctor on July 11, 2018, and was laid off that same day. (Exhibit A, page 3.) However, Dr. Abelow reviewed records showing the first date of treatment of August 13, 2018. He did not discuss the period of time from the date of injury to the first record of

treatment in any manner. There is no reason to believe that Dr. Abelow's opinion is contingent on the first date of treatment being July 11, 2018.

If defendant believed that there was an implied finding by Dr. Abelow that treatment commenced on July 11, 2018, it could have asked Dr. Abelow to explicitly state so. If it felt that there was a material difference between a first date of treatment of July 11, 2018, (2 weeks after the injury) or August 13, 2018, (6 weeks after the injury), it could have asked him. Absent such reporting, there is no reason to believe that the opinion is contingent on the statement in the "present complaints" section of treatment on July 11, 2018.

Defendant also has shown that there may be inconsistencies in the amount of weight required to be lifted in the job versus that stated by Dr. Abelow. There was no testimony whatsoever regarding lifting of heavy objects, from applicant or his employer, nor did Dr. Abelow address the lifting requirements. The injury was a specific injury involving a motor vehicle accident. If there was anything incorrect in the lifting requirements, these were not elicited in any testimony and there was no showing that it was material.

Dr. Abelow found a period of temporary disability ending in March 2019. Prior to that time, applicant had been treating at Kaiser. Although there is a gap between the last treatment at Kaiser and the permanent and stationary date found by Dr. Abelow, it is inferred that Dr. Abelow found that applicant was undergoing the healing process from the injury. It is noted that defendant's denial of the claim precluded any treatment on an industrial basis in that period.

Defendant did nothing to attempt to clarify Dr. Abelow's opinions. These unchallenged opinions were sufficient to make the findings noted above.

IV

RECOMMENDATION

It is respectfully recommended that defendant's Petition for Reconsideration be denied.

Date: May 12, 2021
Michael Geller
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

Post-termination issue

Defendant has contended that the claim should be denied pursuant to Labor Code section 3600(a)(10) because it was filed after the applicant was terminated.

Applicant filed his Application for Adjudication of Claim over two months after he was terminated. However, it is clear that the employer had notice of the injury prior to the termination. There is no question that the employer knew that there had been a motor vehicle accident. Even if it can be held that notice of an incident is not equivalent to notice of injury, by the time the employer spoke with The General Insurance, he had notice that there was a claim of injury. This was prior to the termination date of July 26, 2018. (Minutes of Hearing, Summary of Evidence, page 10, lines 20 to 24.)

Labor Code section 5402(a) provides that "[k]nowledge of an injury, **obtained from any source**, on the part of an employer, his or her managing agent, superintendent, foreman, or other person in authority, or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts, is equivalent to service under Section 5400." (Emphasis added.)

The employer had knowledge that applicant had made a claim of injury. At that point he was required to provide a claim form to applicant. His failure to do so defeats the post-termination defense.

Occupational Group

Applicant's testimony makes it clear that he was an automotive detailer, which is assigned occupational group 340. According to his testimony, he did a couple of oil changes during the period of employment. This very occasional light mechanical work is considered incidental and not integral to his job, and he is not entitled to the higher occupational group assigned to mechanics.

AOE/COE

Dr. Stephen Abelow served as AME in the case. In his opinion, the need for treatment and the permanent disability to the neck, mid back, and low back were caused by the motor vehicle accident of June 27, 2018.

Permanent disability

Dr. Abelow placed applicant in DRE Category II with respect to his neck, and assigned a WPI of 8%, which rates:

15.01.01.00-8 -[1.4] 11 -340G-13 -13.

Dr. Abelow placed applicant in DRE Category II with respect to his back, and assigned a WPI of 5%, which rates:

15.03.01.00 -6 -[1.4] 8 -340 G-9-9.

The permanent disability is combined using the CVC as follows:

13 C 9 = 21%.

Temporary disability

Dr. Abelow found that applicant was totally temporarily disabled from July 11, 2018, through March 6, 2019. There was no concurrent employment demonstrated by defendant which would offset this period.

5811 costs

Applicant took the deposition of the employer Mark Roberts. This deposition was necessary in order to confront the post-termination defense presented by the carrier. It was necessary to ascertain the details of the termination and the evidence of employer knowledge which was central to the defense.

As such, the cost was reasonably incurred. Labor Code section 5811 allows costs as between the parties to be assigned by the appeals board. The $990.35 cost of the deposition was necessitated by defendant's denial of the claim and is properly reimbursed to the applicant attorney.

DATE: March 30, 2021

Michael Geller
WORKERS' ADMINISTRATIVE LAW COMPENSATION JUDGE