WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

COLLEEN SASS, *Applicant*

vs.

ENCOMPASS COMMUNITY SERVICES; LWP CLAIMS; NEW YORK MARINE and GENERAL INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ11416708
Salinas District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration/removal of the November 17, 2020 Findings and Award issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant sustained admitted industrial injury to her back while employed as a case manager on June 29, 2018, causing temporary disability from October 17, 2019 to the present and continuing.

Defendant contends that the WCJ erred in awarding additional temporary disability arguing that it is not supported by substantial medical evidence and that the award is in excess of the 104-week limitation of Labor Code section 4656(c).

Applicant did not file an answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny the petition.

Based on our review of the record and for the reasons stated in the Report, which we adopt and incorporate as quoted below, and for the reasons discussed below, we will grant reconsideration and amend the award of temporary disability to reflect it is subject to the provisions of section 4656(c) and to provide for credit for temporary disability benefits already paid. We will otherwise affirm the WCJ's decision.

Preliminarily, we note that WCAB Rule 10955 provides that in seeking removal a petitioner must "demonstrate that reconsideration will not be an adequate remedy after the issuance of a final order, decision or award." (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656].) Here, the WCJ's decision makes findings as to employment, injury arising out of and occurring in the course of employment (AOE/COE), and temporary disability. These are all final findings subject to reconsideration rather than removal.

We adopt and incorporate the following quote from the Report:

> II
> BACKGROUND
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> Applicant, Colleen Sass, while employed as a case manager by Encompass Community Services, sustained an injury to her back on 6/29/18. Defendant, New York Marina and General Insurance Company, the employer's workers compensation insurer, accepted liability and paid temporary disability indemnity during the period 6/30/18 through 8/22/19.
>
> Randall Seago, M.D., is applicant's treating physician. On 10/11/20, Dr. Seago met with applicant and discussed the proposed low back surgery. Applicant advised Dr. Seago that she wanted to proceed with back surgery based on her poor quality of life with her current situation. (Report, 10/11/19; Exh. A-1.) Previously on 7/29/19, defendant's utilization review certified the request for anterior interbody fusion at L3-4, L4-5 and L5-5, levels and posterior decompressive laminectomy for the lumbar spine with fusion and semental instrumentation. (Defendant's petition for reconsideration, 11/5/20, p. 2: 21-23.)
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> On 10/17/19 Dr. Seago performed the surgical procedure set forth above. (Operative report, Dr. Seago, 10/17/19; Exh. A-2.) By 11/1/19, applicant reported that her lower back pain had decreased since the surgery and her lower extremity weakness had improved since surgery. (Report, Dr. Seago, 11/19/196, p. 1; Exh. A-3.) Dr. Seago prepared a report 12/18/19 which confirms that

applicant is not able to work as a result of the spinal surgery. (Report, supra, Dr. Seago; Exh. A-5.)

After the surgery defendant disputed liability for the surgery and periods of temporary disability. Mark Howard, M.D., was selected as the panel QME. Dr. Howard prepared an Initial Orthopedic Panel Qualified Medical Evaluation which confirms applicant's industrial injury when she slipped on a piece of fruit causing her to fall to the floor, landing on her left knee and right wrist, then falling backwards into a seated position. (Report, Dr. Howard, 7/1/19, p. 2; Exh. D-2.)

After initial treatment at Doctors on Duty, applicant transferred her treatment to Dr. Seago who has provided treatment in the form of 16 sessions of physical therapy from which she noted only temporary relief. Dr. Seago also referred her to Dr. Hsieh, a pain management specialist, who authorized medication and a lumbar steroid injection which provided pain relief for 4-6 weeks. (Report, Dr. Howard, Supra, p. 3; Exh. D-2.)

Dr. Howard noted applicant's history of a motor vehicle accident in 1975 which resulted in spinal fusion surgery without instrumentation in approximately 1977. Following that accident and surgery applicant described episodes of persistent back pain. This history was confirmed by records from Dominican Medical Group on 1/21/15. Dr. John Ratliff performed a neurosurgery consult on 12/20/17 which indicates the possibility for future surgery. Subsequently, applicant had a facet block on 1/31/18, repeated on 2/21/18 and a facet RFA on 2/28/18 and epidurals on 4/4/18 and 6/13/18.

Applicant describes a worsening in her low back condition since the industrial injury on 6/29/18. Although the pain is about the same as it was prior to work injury, applicant has noticed more weakness or a sense of instability especially with certain forward bending and/or lifting abilities. (Report, Dr. Howard, supra, p. 4; Exh. D-2.) In his 7/1/19 report Dr. Howard concludes that applicant is permanent and stationary and he provides a 20% whole person impairment. He apportions 75% to the prior injury. Dr. Howard concludes that provision should be made for future physician visits. Dr. Howard concludes that applicant has pathology potentially amenable to surgery at L3-L4 and L4-L5. Dr. Howard states that: "Based upon her presentation today, though provisions should be left open for same, I would not anticipate her choosing or requiring surgery any time in the near future." (Report, supra, p. 9; Exh. D-2.)

Dr. Howard prepared a supplemental report dated 9/26/19 in which he makes the following statement:

"The foregoing suggests to me that the physicians treating the applicant immediately after her June 29, 2018 injury were under the impression that her low back condition was pre-existing at the time. Considering the foregoing, it would appear that any injury directed to the lumbar spine would be associated

with applicant's condition antedating the June 29, 2018 injury. It would appear that she was progressing to the point where she would be a surgery candidate whether or not the June 29, 2018 incident occurred. She was essentially exhausting non-operative treatment options at the time of the June 29, 2018 incident." (Report, supra, p. 1; Exh. D-1.)

Dr. Howard was deposed on 2/3/20 and he was asked whether the June 29, 2018 slip and fall injury hastened her need for lumbar spine surgery. Dr. Howard's answer was: "Hard to say, but probably." (Deposition, supra, p. 8: 12-15; Exh. J-1.) Dr. Howard also agreed that there was some causal contribution from the industrial injury to the need for low back surgery:

Q. Then doctor, would it fall that the surgery she had on October 17, 2019, was an appropriate course of medical treatment for her industrial injury?

A. Are you saying there was some causal contribution from this injury to her surgery; is that what you're asking?

Q. Yes

A. Yes, there was some.
(Deposition, supra, p. 8: 16-23, Exh. J-1.)

Dr. Howard was asked a series of questions concerning whether the surgery was because of the June 29, 2018 injury. Dr. Howard answered as follows:

"A. No. I testified that I did think there was some causal contribution from that injury, and the answer is yes. I don't think that's the exclusive causal contributor. In fact, I stated I didn't think it was exclusive, or even a majority. I think it was a minority causal contribution." (Deposition supra, p. 10: 25, p. 11: 1-5.)

Dr. Howard indicates that he does not know what anatomic changes occurred as a result of the industrial injury, however, he testified that the industrial injury constitutes a "lightening up" on both episodes. (Deposition, supra, p. 11: 16-33; Exh. J-2.)

When asked to explain the causal relationship between the industrial injury and the back surgery, Dr. Howard stood by his earlier testimony that the industrial injury hastened the need for the back surgery:

"A. I think the question was, absent this question, in my mind, absent the June 29th episode, would she have had the surgery on that date: I can't say. It would only be speculation. It's my clinical impression, to some extent, that the

injury hastened the date at which she had that type of surgery." (Deposition, supra, p. 12: 12-17; Exh. J-1.)

Dr. Howard was then asked the following question:

"Q. What you're saying is you can't determine, with any degree of medical probability, that there was a contribution between the type of surgery she had, the date she had it, and the need for that surgery, because of the industrial fall; correct?

A. Correct.

(Deposition, supra, p. 12: 21-25; p. 13: 1; Exh. J-1.)

On cross-examination by applicant's attorney, Dr. Howard confirmed these facts:

(1) As a result of the industrial injury applicant had an increase in her low back symptoms;

(2) The low back surgery procedure was the type of treatment which would help

to cure or relieve the type of symptoms caused by the industrial injury;

(3) Prior to the industrial injury no surgery had been set for her lower back.

(Deposition, supra, p. 13: 6-20; Exh. J-1.)

Dr. Howard then testified that the causal contribution was somewhere between zero and 25%. When asked whether it would be more accurate to state that the industrial injury contributed somewhere between 1 and 25%, Dr. Howard answered as follows:

"A. It could be. But it would be pure speculation on my part. It's possible she could have had this exact surgery on this exact date, absent this injury by virtue of chronicity in the pathology." (Deposition, supra, p. 14: 20-25, p. 15: 1; Exh. J-1.)

Based on Dr. Howard's opinions, the WCJ determined that the industrial injury hastened the need for low back surgery and thereby resulted in temporary disability from 10/17/19 to date and continuing thereafter. It is from this determination that defendant has filed its petition for reconsideration.

III
DISCUSSION

1. The opinions of Mark Howard, M.D., constitute substantial evidence in support of the award of temporary disability.

Labor Code[1] Section 4600 (a) provides as follows:

(a) Medical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatuses, including orthotic and prosthetic devices and services that is reasonably required to cure or relieve the injured worker from the effects of [1] the worker's injury shall be provided by the employer. In this case of [2] the employers neglect or refusal reasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment."

Furthermore, if medical treatment is reasonably required to cure or relieve from the effects of the industrial injury, the employer is required to provide such treatment, including treatment for pre-existing or non-industrial conditions. (*Granado v. Workers' Comp. Appeals Bd.* (1968) 69 Cal. 2d 399, 33 Cal. Comp. Cases 647, 652.)

In this case Dr. Howard confirms that, as a result of the industrial injury, applicant had an increase in her low back symptoms. The low back surgery performed on 10/17/19 was the type of medical treatment which would help to cure or relieve from the effects of the industrial injury. Based on the increase in applicant's back complaints after the industrial injury, Dr. Howard concludes that there is a causal connection between the industrial injury when she fell at work and the need for her low back surgery. Dr. Howard also emphasized that the industrial injury hastened the date on which she had her back surgery.

The facts in *E&K Contractors and Argonaut Insurance Company v. Workers' Comp. Appeals Bd. (Minder)* (W/D-1975) 40 Cal. Comp. Cases 112 are remarkably similar to the instant case. In the *Minder* case applicant sustained his first neck injury in 1972. He received a 30% permanent disability rating and returned to work after being released by his doctor in July 1973. Approximately six months later he had a second neck injury on December 26, 1973. Dr. Thomasson examined applicant and he apportioned 75% of the need for the recent neck surgery to the February 1972 injury and 25% to the December 26, 1973 injury. Dr. Thomasson concluded that surgery was needed before the December 1973 injury but that the 1973 accident hastened the need for surgery. Based on Dr. Thomasson's opinions the WCJ awarded applicant temporary disability and medical treatment as a result of the 1973 injury. (*Minder, supra*, 40 Cal. Comp. Cases at 112.)

Substantial evidence is determined based on the evidence in the entire record:

"In reviewing the evidence our legislative mandate and sole obligation under section 5952 is to review the entire record to determine whether the

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

board's conclusion was supported by substantial evidence." (Levesque v. Workers' Comp. Appeals Bd. (1970) 1 Cal. 3d 627, 83 Cal. Rptr. 208, 35 Cal. Comp. Cases 16, 24-25.)

Dr. Howard has consistently opined that applicant's back surgery was caused in part by the industrial injury. In fact, in his report dated 7/1/19—which was written well before applicant's back surgery in October 2019—Dr. Howard noted that applicant's pathology is potentially amenable to back surgery and that this surgical option should be left open as appropriate medical treatment for the industrial injury. (Report, Dr. Howard, supra, p. 9; Exh. D-2.) Dr. Howard's opinion regarding applicant's need for the low back surgery which was performed on 10/17/19 constitutes substantial evidence in support of the WCJ's award.

Dr. Seago is the surgeon who operated on applicant's back and he confirms that applicant is unable to work as a result of her back surgery. (Report, Dr. Seago, 12/18/19; Exh. A-5.) Dr. Howard testified that applicant is not permanent and stationary and that applicant is either temporarily totally disabled (TTD) or temporarily partially disabled (TPD). (Deposition, Dr. Howard, supra, p. 9: 7-14; Exh. J-1.) The opinions of Dr. Howard and Dr. Seago constitute substantial evidence in support of the WCJ's award of temporary disability.

(Report, at pp. 1-7, emphasis in original.)

Finally, we note that section 4656(c)(2) states that "Aggregate disability payments *for a single injury* occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury." (Lab. Code, § 4656(c)(2), emphasis added.) There has been no finding of an exception to this provision. Therefore, we will amend the WCJ's decision to reflect that the award of temporary disability is subject to the 104-week limitation of section 4656(c)(2) as well as to give defendant credit for temporary disability benefits previously paid.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the November 17, 2020 Findings and Award is **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 17, 2020 Findings and Award is **AFFIRMED**, **EXCEPT** as **AMENDED** below:

FINDINGS OF FACT

*** * ***

4. The injury caused temporary disability from 10/17/19 to date and continuing thereafter, subject to the 104-week limitation of Labor Code section 4656(c)(2).

* * *

AWARD

AWARD IS MADE in favor or COLLEEN SASS and against NEW YORK MARINE and GENERAL INSURANCE COMPANY as follows:

(A) Temporary disability indemnity payable at the rate of $516.48 per week and continuing indefinitely thereafter, subject to the 104-week limitation of Labor Code section 4656(c)(2), less credit for any sums heretofore paid on account thereof, and less $4,338.00, which is awarded as reasonable attorney fees.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 2, 2021

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

COLLEEN SASS
ALPERS LAW GROUP
STANDER REUBENS THOMAS KINSEY

PAG/*pc*

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