WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GILBERTO MONDRAGON, ***Applicant***

vs.

PROVIDENCE INDUSTRIES, LLC, (MD2 INDUSTRIES, LLC); INSURANCE COMPANY OF THE WEST, ***Defendants***

Adjudication Number: ADJ10849936
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Order dated September 7, 2019, the Workers' Compensation Arbitrator ("Arbitrator") issued findings on the Petition for Contribution filed by the Insurance Company of the West ("ICW") against the Hartford Insurance Company ("Hartford"), for expenses incurred by ICW in a workers' compensation claim filed by an injured seamstress, Gilberto Mondragon ("applicant") against his employer, Providence Industries. The Arbitrator found that "there was a continuing trauma which had a date of injury of May 15, 2018, and an injurious period of May 15, 2017 to May 15, 2018," that Hartford has 100% of the liability because it had workers' compensation coverage for the employer during the entire injurious period, and that ICW is entitled to reimbursement expenses from Hartford in the amount of $18,447.71.

Hartford filed a timely petition for reconsideration of the Arbitrator's decision. Hartford contends that evidence of permanent disability can be determined by reference to evidence of medical treatment, and here the final medical report of Dr. Rostami shows there was permanent disability when applicant filed his case and when medical treatment was provided to him. Hartford further contends, in the alternative, that Dr. Rostami's medical report opinion is not substantial evidence, so it cannot be relied upon to determine the applicant's date of injury.

ICW filed an answer.

The Arbitrator submitted a Report and Recommendation ("Report").

We have considered the allegations of Hartford's Petition for Reconsideration and the contents of the Report of the Arbitrator with respect thereto. Based on our review of the record, and for the reasons stated below and in the Arbitrator's Report, which we adopt and incorporate, we will affirm the Findings and Order dated September 7, 2019.

In *State Compensation Insurance Fund v. Workers' Comp. Appeals Board* (*Rodarte*) (2004) 119 Cal.App.4th 998, 1005-1006 [69 Cal. Comp. Cases 579], the Court of Appeal concluded that the date of injury under Labor Code section 5500.5 requires compensable temporary disability or permanent disability, that medical treatment alone is not disability but may be evidence of compensable permanent disability, and that these are factual determinations which require expert medical opinion.

In this case, Hartford contends that the date of injury is May 19, 2017 because that is when applicant began treating with Dr. Rostami, and there was permanent disability from the outset because applicant's condition remained the same during the doctor's treatment for the year that followed. It was after that time, on May 15, 2018, that Dr. Rostami declared applicant permanent and stationary (P&S) and formally determined that he had sustained permanent disability. According to Hartford, May 15, 2018 is not the date of cumulative trauma because Dr. Rostami merely stated that there was permanent disability then, whereas the same disability allegedly had been present since May 19, 2017. (See Hartford's Petition for Reconsideration, p. 4:3-9.)

This contention is not persuasive because Dr. Rostami's May 15, 2018 report does not state that applicant had compensable temporary or permanent disability when she started treating him on May 19, 2017. Otherwise, Hartford refers to no medical opinion supporting the proposition that applicant had compensable disability at some point before May 15, 2018. It appears this is the state of affairs because when ICW's petition for contribution proceeded to trial before the Arbitrator, Hartford did not present any medical evidence in rebuttal to Dr. Rostami's May 15, 2018 report. Again, Hartford's contention that May 19, 2017 or some other date before May 15, 2018 is the date of cumulative trauma, is based not on any medical opinion, but on defense counsel's speculation or unqualified medical opinion, which is not substantial evidence. (See Petition for Reconsideration, pp. 4:17-6:9.)

In any event, the Arbitrator correctly points out that the notion applicant's medical condition did not change from May 2017 to May 2018 is inconsistent with the evidence of record,

including applicant's deposition testimony considered in conjunction with Dr. Rostami's May 15, 2018 report. We further note that Hartford emphasizes throughout its petition that applicant continued to work his regular duties throughout his course of treatment by Dr. Rostami from May 2017 to May 2018. This fact, combined with the fact that applicant's deposition shows he remained symptomatic during treatment, supports a reasonable inference that the period of injurious exposure continued through May 15, 2018, when Dr. Rostami declared applicant P&S and assessed him with Whole Person Impairment ("WPI") of 21%. (See *Guerra v. Workers' Comp. Appeals Bd.* (2016) 246 Cal.App.4th 1301, 1307-1308 (81 Cal.Comp.Cases 324) [The Board may properly rely upon circumstantial evidence, based upon the reasonable inferences that arise from the reasonable probabilities flowing from the evidence.].)

In the alternative, Hartford contends that Dr. Rostami's report is not substantial evidence to properly support May 15, 2018 as the date of cumulative trauma, asserting that because applicant continues to work his full duties, Dr. Rostami's assessment of Whole Person Impairment ("WPI") of 21% is unfounded. Specifically, Hartford asserts that "the finding of [21%] disability seems to lack substantial medical evidence, and therefore does not prove any particular injury date." (See Petition for Reconsideration, p. 6:22-23.) Yet again, the assertion is unpersuasive because Hartford procured no medical opinion in rebuttal to Dr. Rostami. Furthermore, Hartford never challenged Dr. Rostami's assessment of 21% WPI by taking the doctor's deposition.

At the end of its petition, Hartford finally contends that since applicant continues to work and Hartford continues to insure his employer, "Hartford should not be required to reimburse ICW for ICW's entrance into a settlement that the Hartford did not benefit from or agree to." No legal authority is cited in support of this contention. If applicant brings another workers' compensation claim against the same employer with Hartford as the insurer, Hartford presumably will have an opportunity to raise the issue of apportionment.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order dated September 7, 2019 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 6, 2022

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

GILBERTO MONDRAGON
LAW OFFICES OF MELODY Z. COX
DAVIDSON CZULEGER & BLALOCK
ROBERT E. DRAKULICH

JTL/ara

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

ARBITRATOR'S REPORT ON RECONSIDERATION

INTRODUCTION

The applicant started working for Providence Industries as a sewing machine operator in 2010. On May 12, 2017, he filed a continuing trauma claim alleging injury from April 1, 2014 through April 18, 2017. He continued to work and missed no time from work. Applicant was treated by Sherry Rostami, D.C., and on May 15, 2018 she declared applicant to be permanent and stationary. Up until that date, applicant missed no time from work due to his injuries, and continued working thereafter. ICW picked up the administration of the claim. ICW's coverage ended on April 13, 2017, and The Hartford coverage started the next day. The applicant's duties were the same under both coverages. When Dr. Rostami stated that applicant was permanent and stationary, on May 15, 2018 the applicant's attorney and ICW's attorney amended the application, alleging a new injurious period of April 1, 2014 to May 15, 2018. Hartford was joined on February 14, 2018. On October 4, 2018, ICW entered into a Compromise and Release with applicant in the amount of $15,000, which was approved on October 15, 2018. Hartford did not participate in the settlement and the agreement was signed only by ICW. In their petition, ICW asserted that after applying L.C. 5500.5, the injurious period was May 15, 2017 to May 15, 2018, all of which is covered by Hartford. Therefore, ICW requested 100% reimbursement from Hartford. Hartford replied, asserting that the original date alleged by applicant was correct and they have only 9% of the coverage, and ICW should receive only 9% reimbursement from Hartford. After reviewing all exhibits, the arbitrator rejected the Hartford position and found Hartford to be 100% liable except for some expenses that were not proven. Hartford then filed a timely, verified Petition for Reconsideration requesting that the Board grant their petition.

DISCUSSION

There is no dispute that applicant was injured by continuing trauma while working for the defendant since 2010. The issue before the arbitrator is the date of injury as defined by L.C 5500.5 or L.C. 5412. ICWs position is that the applicant never missed time from work, a fact Hartford admits throughout their petition. There was no temporary disability and there was no permanent and stationary date until May 15, 2018 according to the opinion of Dr. Rostami, the treating physician. This date would establish a "date of injury" under both L.C. 5500.5 and L.C. 5412. Hartford, however, asserts that the date of injury should be April 18, 2017, the date that applicant sought treatment from Dr. Rostami. This assertion is explained by Hartford by stating that applicant's condition was the same on the first day he had treatment as the last day when he was declared permanent and stationary.

In determining whether there was any credibility in their positions, the arbitrator reviewed the medical report of Dr. Rostami and the deposition transcript. The only report entered into evidence was the May 15, 2018 report of Dr. Rostami. We have applicant's testimony stating has "7" or "8" pain (deposition transcript p. 43) when he first went for treatment. In Dr. Rostami's report on year later, his pain levels were 0 to 6 in various parts of his body. Also, in his deposition, applicant stated that he did not mention cervical pain, or knee problems (page 47), however, a year later Dr. Rostami includes cervical and knee disability. Therefore, Hartford's attempt to show that nothing

changed in the year following reporting the injury in April of 2017 is clearly not supported by the facts in evidence.

The arbitrator has always stated that applicant had "knowledge" that his job duties were causing problems in April of 2017, however, there was no proof of "disability", as required in Rodarte. Applicant continued to work, without restriction, through May 15, 2018, when he was given a permanent disability rating by Dr. Rostami. Even at that point, applicant continued to work and may still be working for defendant. According to the deposition, Dr. Rostami was not treating applicant and would only examine him periodically. We have no record of the periodic examinations. Therefore, the basis for the Hartford petition (no change in condition for the year following reporting) is not based on any exhibit admitted into evidence, and therefore, is shear speculation.

The position of ICW is supported by the evidence and satisfies the elements of L.C. 5412 and LC. 5500.5, as defined in Rodarte. The arbitrator feels that nothing has changed because of any assertion made by Hartford in their petition and the first indication of permanent disability was the May 15, 2018 report of Dr. Rostami.

RECOMMENDATION

The petition should respectfully be denied.

October 14, 2019

Robert E. Drakulich
Arbitrator