WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOHNNIE GRAY, *Applicant*

vs.

7-ELEVEN, INC.; ACE AMERICAN INSURANCE COMPANY; CITY OF SANTA CRUZ, Permissibly Self-Insured, *Defendants*

Adjudication Numbers: ADJ13001359; ADJ13224343
Salinas District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant 7-Eleven seeks reconsideration[1] of a workers' compensation administrative law judge's (WCJ) Joint Findings of Fact and Joint Order to Develop the Record of March 7, 2022, wherein, as applicable to the instant Petition, the WCJ found that, while employed as a sales associate on February 10, 2020, applicant sustained industrial injury to his back in case ADJ13224343. It was found that this injury, in combination with another industrial injury in case ADJ13001359, sustained while employed by a separate employer, caused temporary disability from February 10, 2020 to September 11, 2020.

Defendant contends that the WCJ erred in finding industrial injury. Defendant also states that there are typographical errors in the Minutes of Hearing, in that medical reports are identified by incorrect dates. We have not received an answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report in the portion quoted below, we will deny the defendant's Petition. We do not incorporate the section of the Report responding to defendant's request for removal, since as noted *ante* (see note 1), removal is not apposite. Additionally, since a petition for reconsideration is only from a final decision, we do not address any clerical errors in the Minutes of Hearing. The WCJ may address this issue in further proceedings.

---

[1] Defendant has captioned its Petition as one for Reconsideration/Removal. Since the findings of industrial injury and liability for temporary disability are final orders, the Petition is properly one for reconsideration, and we treat the Petition as one for reconsideration only.

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION/REMOVAL

I
INTRODUCTION

Defendant has filed a timely, verified Petition for Reconsideration/Removal and Request to Correct the Record (EAMS DOC ID: 40746899, rec'd 3/28/22) of the undersigned's 3/7/22 Findings of Fact and Joint Order to Develop the Record. (EAMS Doc ID: 75253766.)

II
FACTS

This matter went to trial, along with Applicant's case against the City of Santa Cruz (ADJ13001359MF). Applicant's 11/22/19 claim against the City of Santa Cruz is accepted as to his face, left kidney, and lower back. (Findings of Fact, 3/7/22, ADJ13001359, p. 2, Finding 1.) The City of Santa Cruz is a lien claimant in Petitioner's case.

The cases were consolidated for receipt of evidence and ADJ13001359 was designated the master file for receipt of evidence, with the exception of the parties' respective evaluators. Dr. Jeffrey Holmes acted as the QME in ADJ13224343 (7-Eleven), and Dr. Mark Anderson acted as the parties' AME in ADJ13001359 (City of Santa Cruz.) (EAMS Doc ID: 75253716, Trial, 11/4/21, Minutes of Hearing, Order of Consolidation, and Summary of Evidence, p. 4, "Exhibits.")

The main issues for trial in the 7-Eleven case (ADJ13224343) were injury AOE/COE and liability for temporary disability. In that case, the court found that Applicant, while employed on or about 2/10/20, as a Sales Associate at Santa Cruz, California, by 7-Eleven, Inc., then insured by Ace American Insurance Company, sustained injury AOE/COE to his back. (Findings of Fact, 3/7/22, ADJ13224343, p. 1, Finding 1.)

The court also found that Applicant's injury at 7-Eleven, on or about 2/10/20, caused Applicant to become temporarily totally disabled, in conjunction with the injury with the City of Santa Cruz (Id., p. 2, Finding 6) and that Defendant, Ace American Insurance Company, is jointly liable with Defendant, City of Santa Cruz, PSI, for temporary disability from 2/10/20 through 9/11/20, less credit for any wages paid by either Defendant during that period. (Id., p. 2, Finding 7.) Defendant insurer for 7-Eleven appeals these findings.

III
DISCUSSION

A. Reconsideration

A WCJ's report "cures any technical or alleged defect in satisfying the requirements of Labor Code section 5313." (*City of San Diego v. W.C.A.B. (Rutherford)* (1989) 54 Cal.Comp.Cases 57 (writ den.); *Smales v. W.C.A.B.* (1980) 45 Cal.Comp.Cases 1026 (writ den.).) To the extent that the undersigned failed to elaborate on her conclusions, they will be discussed below.

On 11/22/19, Applicant suffered a serious injury while working for the City of Santa Cruz. Applicant was taken off work for about two months before he asked to return to work on a part-time basis. His PTP, Dr. Kevin Yoo, returned him to part-time work, with no lifting over 25 pounds. Dr. Yoo wrote, "A/P: It has now been 2 months since his date of injury. He is telling me he's ready to go back to work but only part time and not quite ready to lift heavy objects. Therefore I have filled out a return back [sic] to work form for part-time with lifting restrictions of less than 25 pounds. At this time he is partially temporarily disabled because of his traumatic brain injury and should return back [sic] to work with restrictions. I will see him 1 month from now to see how much progress he has made and to reevaluate him for work status to see if he can return back [sic] to work without any restrictions." (L.C.'S EX. L-10: Report, Kevin Yoo, M.D., 1/27/20, p. 1, and L.C.'S EX. L-11: Work Restriction Report, Kevin Yoo, M.D., 1/27/20.)

Sometime thereafter, Applicant returned to work for 7-Eleven; and, on the night of 2/10/20, he aggravated his back when he was pushing a heavy cart, trying to maneuver it through the door, without assistance. (SOE, p. 7, lines 8.5-10.) As a result of the strain to his back that occurred at 7-Eleven, Dr. Yoo took him off work completely on 2/24/20. Dr. Yoo wrote, "[…] when I saw him and [sic] at end of January he wanted to try to go back to work part time. He does for 2 days but in the process of moving heavy objects aggravated his lower back pain and has not worked since then." Dr. Yoo placed him off work through the end of March 2020. (L.C.'S EX. L-12: Work Restriction Report, Kevin Yoo, M.D., 2/4/20 [corr. 2/24/20].)

Thereafter, Applicant saw Dr. Amy Maher on 2/28/20, 3/2/20, 4/2/20, and 6/4/20. Dr. Maher placed Applicant on modified duty. (JOINT EX. J-2: QME Report, Jeffrey Holmes, M.D., 11/17/20, pp. 10-11, Record Review.) Applicant testified that he was off work from both jobs from 2/11/20 until July of 2020. (SOE, p. 8, lines 23-24.) However, per the wage summary provided by 7-Eleven, Applicant was off work until October 1, 2020. After the payment on 2/27/20, Applicant was not paid again until 10/8/20, for the pay period ending 10/1/2020. (DEFT'S EX. D-3: Wages from 7-Eleven, 5/11/21.) It appears that Applicant may have missed more time than he recalled after the 7-Eleven

incident. The City of Santa Cruz paid temporary disability at the rate of $593.90 per week from 11/23/19 through 9/11/20. (MOH, supra, p. 3, Admitted Fact 4.)

On 4/2/20, The City of Santa Cruz' administrator asked Dr. Yoo to answer the question, "In your report, you note that Mr. Gray had returned to work on a modified basis; however, due to an event in which he was moving heavy objects, he aggravated his lower back and you thusly took him off work. In your professional medical opinion, if not for this event, would Mr. Gray have been able to continue to work under the restrictions previously provided?" Dr. Yoo answered, "Yes" on the same letter, signing and dating it 4/17/20. (L.C.'S EX. L-13: Medical Notes, Kevin Yoo, M.D., 4/17/20.)

On 4/27/20, Dr. Yoo issued a more complete response to the City's question. Dr. Yoo wrote, "To whomever this may concern:

> Johnny Gray is a patient at Natividad Medical Center Neurosurgery service for head injury and lumbar spine injury that he sustained on 11/22/19. I saw him on February 24, 2020 after we sent him back to work in January of 2020 with restrictions of part-time and no lifting greater than 25 pounds. We all felt, including the patient, that he was ready to do so. Unfortunately, within two days of starting work, he was moving a heavy object and reinjured his lower back, suffering enough pain that he could no longer go back to work. I have been asked to provide my professional medical opinion whether if not for the event of reinjury if Johnny Gray would have been able to continue work under the restrictions that I had previously provided. It is my professional medical opinion that if not for the reinjury of his lower back, Johnnie Gray would have been able to continue to work on there at the restrictions that I had previously provided." (L.C.'S EX. L-14: Letter, Kevin Yoo, M.D., 4/27/20.)

On 8/6/20, Dr. Amy Maher gave Applicant work restrictions of part-time work, four days a week, five hours per day, with no lifting greater than 15 pounds, no carrying, pushing, or pulling greater than 15 pounds. (L.C.'S EX. L-15: Report, Amy Maher, M.D., 8/6/20, last page.)

The parties took Dr. Jeffrey Holmes' deposition on 3/26/21. Dr. Holmes acted as the panel QME in the 7-Eleven case. In its Petition, Defendant contends that Dr. Holmes could not determine whether the incident at 7-Eleven was an injury or not. "In deposition, particularly, Dr. Holmes stated that he cannot be sure that it was an injury, causing a permanent worsening, until his condition had stabilized." (Deft's Pet. for Recon/Rem., p. 2.) Defendant further contends, "In deposition, Dr. Holmes testified, at page 34 of the transcript, that it would be speculative to find that the incident at 7-Eleven is an injury or that it would have caused temporary disability at all. He reiterated that he will be able to make that determination when the Applicant's condition stabilizes." (Id., p. 3.)

Counsel for Petitioner, Ms. Kathleen Roberts, asked Dr. Holmes whether he could tell right now if the incident at 7-Eleven was an "aggravation" or an "exacerbation." Dr. Holmes replied, "It is indeterminate at this stage, and will be opined upon in the final opinion when he achieves maximum life [sic] improvement. Having said that, it's clear that he had a big, old injury at City of Santa Cruz in that fall. And the incident at 7-Eleven was of lesser order of magnitude." (JOINT EX. J-3: Deposition, Jeffrey Holmes, M.D., 3/26/21, p. 14, lines 11-20.) The question and answer are both vague, because the terms "aggravation" and "exacerbation" were not defined. Ms. Roberts could have been asking about causation of injury, while Dr. Holmes was talking about permanent impairment. This possibility is further supported by later questioning by Ms. Roberts set forth below.

> Q But as you're sitting now, it's really hard for you to know whether this is going to lead to a *permanent worsening* or if it was just an exacerbation, right?
>
> A It is very hard to know. I think it cannot at this time be known. I think we will know when he achieves MMI. The magnitude of the impact that the 7-Eleven incident had on him in the overall perspective of it, [sic] previous very severe injury." (JOINT EX. J-3: Deposition Transcript, Jeffrey Holmes, M.D., 3/26/21, p. 34, lines 22-25; p. 35, lines 1-5 (emphases added).)

Dr. Holmes responded in a manner very similar to his response to Ms. Robert's earlier questioning about "aggravation" versus "exacerbation." Here, Ms. Roberts asked about whether there will be a permanent worsening as a result of the 7-Eleven event, not about whether an injury occurred at all.

At page 34, Ms. Roberts, counsel for Petitioner, asked Dr. Holmes whether the 7-Eleven incident would have caused temporary disability and a need for increased work restrictions, if Applicant had not had a pre-existing back injury. The interaction is set forth below:

> "Q But for the injury working for the City of Santa Cruz in November of 2019, would moving -- would the action of moving this cart have caused temporary disability and a need for increased work restrictions?
>
> A *If Gray had a pristine spine at 7-Eleven on February 10 when he was pushing a heavy cart with stuff on it*, the result of the incident would likely have been of lesser magnitude, and more likely would have resulted in being placed on a period of modified work, rather than off work completely. *But we're kind of getting into speculation here.* So I think I've got to keep my mouth a little bit

more shut. It's theoretical. (JOINT EX. J-3: Depo of Dr. Holmes, supra, Jeffrey Holmes, M.D., 3/26/21, p. 34, lines 9-21.)

As Dr. Holmes indicated, Ms. Roberts' question would have required him to speculate, because Applicant did have a prior injury to his back. Defendant leaves that last part out of its argument, thus misstating Dr. Holmes' testimony.

Upon questioning by Mr. Douglas Matheson, counsel for lien claimant, City of Santa Cruz, Dr. Holmes' opinions on causation became clearer. Mr. Matheson read the aforementioned 4/27/20 letter by Dr. Yoo to Dr. Holmes. When asked if he agreed with Dr. Yoo's opinion, he stated, "I think that he is correct and his assessment is spot on." (Joint Ex. J-3, Depo of Dr. Holmes, p. 24, lines 4-25; Page 25, lines 1-6.)

Then, Mr. Matheson pointed out to Dr. Holmes that, before the injury at 7-Eleven, Dr. Yoo gave Applicant a lifting restriction of 25 pounds, and after the incident at 7-Eleven, a different provider gave Applicant a 15-pound lifting restriction. When asked if, based on that history, he believes a distinct injury occurred, Dr. Holmes replied that, in his opinion, something occurred at 7-Eleven that caused Applicant pain in his previously injured spine. (Joint Ex. J-3, supra, Depo of Dr. Holmes, p. 27, lines 18-25; p. 28, lines 1-5.)

Mr. Matheson then asked, "Would you agree that the event at 7-Eleven resulted in Mr. Gray not being able to work?" Dr. Holmes responded, "Yes, that's true." (Joint Ex. J-3, supra, Depo of Dr. Holmes, p. 28, lines 6-8.) Dr. Holmes also agreed that the event at 7-Eleven resulted in an increase in work restrictions. (Id., lines 9-12.) With respect to the issue of temporary disability and whether 7-Eleven should be partially responsible for the temporary disability, Dr. Holmes responded, "Because an incident occurred to his spine at 7-Eleven when he was working modified work from a previous injury, and that incident led to him not being able to work at all, off work, TTD, it appears to me that the 7-Eleven carrier would have some liability for that worsening of his condition and his inability to continue modified work." (Joint Ex. J-3: Depo of Dr. Holmes, p. 28, lines 17-25.)

A specific injury is defined as, "occurring as the result of one incident or exposure which causes disability or need for medical treatment…" (Lab. Code § 3208.1.) "The acceleration, aggravation, or "lighting up" of a preexisting condition 'is an injury in the occupation causing the same.' (*Citations*.) An aggravation of a pre-existing condition is an industrial injury. (*Citations*.)" (*City of Los Angeles v. W.C.A.B.* (2017) 82 Cal. Comp. Cases 1404, 1405-1406 (writ den.).)

Although, Dr. Holmes seems hesitant to label the 7-Eleven incident an "injury," his answers at deposition support an injury occurred AOE/COE at 7-Eleven. Dr. Holmes agreed with Dr. Yoo's assessment of the incident, and

agreed that the incident caused Applicant to miss work and to have increased work restrictions. Prior to that event, Applicant was returned to modified work; thereafter, he was taken off work completely by Dr. Yoo. Based upon Dr. Yoo's reporting, and Dr. Holmes' deposition statements regarding temporary disability and increased work restrictions that support Dr. Yoo's opinion, the history obtained through the records reviewed, and the Applicant's credible testimony, Applicant has established by a preponderance of evidence that he sustained injury AOE/COE while working for 7-Eleven on or about 2/10/20.

Moreover, Applicant's misapprehension of what constitutes an "injury" is not dispositive of the issue. Despite disclaiming "injury" to his manager at 7-Eleven, at trial, Applicant repeatedly described an incident leading to temporary disability and the need for treatment. The following are relevant excerpts of his testimony:

- He told his manager that he did not want to file a claim, because he did not injure his back at 7-Eleven. (SOE, p. 7, lines 11-12.5.)

- Mr. Matheson pointed out that at page 25, Line 9, of his 6/12/20 deposition, Applicant testified that he strained his back on his second day back to work at 7-Eleven. (Id., p. 8, lines 12.5-14.5.)

- Following that incident, he was unable to work the next day and was unable to return to 7-Eleven until many months later. His back was strained at 7- Eleven. He went to see Dr. Yoo, who took him off work completely. He was off work from 2/11/20 until July of 2020. (Id., p. 8, lines 20.5- 22.)

- After the 7-Eleven incident, he went to Natividad Hospital about a week or two later because he was unable to expedite his previously scheduled appointment with Dr. Yoo. After that, he was off work through July of 2020. (Id., p. 10, lines 11-12.5.)

- He told the supervisor at the 7-Eleven that he could not work because of his back. After his 2/10/20 back strain, he is not sure if he was off work until 10/1/20. He was off for about eight or nine months, but he is not exactly sure how long. Dr. Yoo is the physician who took him off work. He switched treaters to Dr. Maher in August of 2020. He explained to her that he went back to work and was required to push a very heavy cart, which hurt his back. At that point, he was on temporary disability. (Id., p. 10, lines 18-23.5.)

- He told 7-Eleven he had not hurt himself there when his bosses offered to send him to Doctors on Duty. He thought he was being sent to Doctors on Duty because they wanted to see if he had actually hurt

his back or just re-injured it. On 2/10/20, he told his manager that he had aggravated his back. (Id., p. 10, lines 24.5-25; p. 11, lines 1-2.5.)

- He told his manager at 7-Eleven that he did not hurt his back there but that he aggravated it. His understanding of an "initial" injury would be if he reached over and tried picking up a 50-pound box, straight up, injuring his back. What happened to him at 7-Eleven was that he twisted his body in order to keep a heavy cart at an angle in order to get it into the store. Nobody else had come to help him close that night. He had not fully recovered from the prior injury, so he just aggravated his back. (Id., p. 11, lines 9-13.)

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Joint Findings of Fact and Joint Order to Develop the Record of March 7, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSE H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ DEIDRA LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 27, 2022

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

JOHNNIE GRAY
RUCKA, O'BOYLE, LOMBARDO & McKENNA
STANDER, REUBENS, THOMAS, KINSEY
WITZIG, HANNAH, SANDERS & REAGAN

DW/oo

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