

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

SOLEDAD CARDENAS, *Applicant*

vs.

**STATE OF CALIFORNIA, DEPARTMENT OF SOCIAL SERVICES/IHSS, legally
uninsured; administered by YORK RISK SERVICES GROUP, INC., *Defendants***

**Adjudication Number: ADJ7750011
Van Nuys District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings of Fact (Findings), issued by the workers' compensation administrative law judge (WCJ) on March 23, 2020, wherein the WCJ found that applicant did not sustain injury arising out of and occurring in the course of employment (AOE/COE) and that applicant would take nothing by way of her injury claim.

Applicant contends that the August 19, 2014 report from orthopedic qualified medical examiner (QME) Charles Schwarz, M.D., is substantial evidence that applicant sustained injury AOE/COE, and that the reports from orthopedic QME Fayegh Vakili, M.D., are not substantial evidence regarding the issue of injury AOE/COE.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

We have considered the allegations in the Petition for Reconsideration (Petition) and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will rescind the Findings and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to her neck, bi-lateral wrists, thoracic spine, lumbar spine, right hip, bi-lateral knees, and left ankle, while employed by defendant as a home attendant/care giver, during the period from June 1, 2009, through June 1, 2010.

On August 19, 2014, applicant was evaluated by QME Dr. Schwarz. The doctor examined applicant, took a history, and reviewed the medical record. (App. Exh. 1, Dr. Schwarz, August 19, 2014.) Dr. Schwarz diagnosed applicant as having cervical and lumbar spine spondylosis, and bi-lateral carpal tunnel syndrome. (App. Exh. 1, p. 18.) Dr. Schwarz concluded that:

... [T]he patient sustained an injury to her cervical spine, lumbar spine, and, both wrists as result of her employment working as a Caregiver for State of California in the Department of Social Services. The patient performed repetitive work activities, which are consistent with the development of the conditions for the neck, back, and wrists.
(App. Exh. 1, p. 17.)

Defendant filed a Petition to Replace Panel QME, asserting that Dr. Schwarz did not make himself available to be deposed within 120 days of defendant's request to schedule the doctor's deposition. (Cal. Code Regs., tit. 8, § 35.5(f).) On June 22, 2016, a WCJ ordered the Medical Director to issue a Replacement QME Panel.

Dr. Vakili was subsequently designated to be the QME and on October 24, 2017, applicant was evaluated by Dr. Vakili. (Def. Exh. C, Dr. Vakili, November 20, 2017.) In the report, Dr. Vakili stated:

The report of injury/ies by patient's treating physicians through her attorney is contrary to patient's statement and patient's own handwritten notes and the question of our office regarding cause of her injuries is contradictory to reports by patient's treating physicians through her attorney and clarification is requested. (Def. Exh. C, p. 87.)

Dr. Vakili concluded:

After detail history and comprehensive orthopedic evaluation of the patient and review of patient's extensive medical records of 1500 pages it is my medical opinion patient's cervical spine, thoracic spine, lumbosacral spine as a result of above alleged work related incident of 07/10/2010 per patient statement and her own handwriting in regards to the specific date of incident of 07/10/2010 which

she has fallen on her buttock and her back as a result of sleeping on the floor and hurting her lower back should be considered to have reached maximum medical improvement and should be considered permanent and stationary for the purpose of rating utilizing AMA guide to evaluation of permanent impairment fifth edition.

(Def. Exh. C, p. 92.)

In his September 12, 2018 supplemental report Dr. Vakili stated that the issue of causation, "...should be deferred to the trier of the facts." (Def. Exh. D, Dr. Vakili, September 12, 2018, p. 21.)

The parties proceeded to trial May 7, 2019, and the issues submitted for decision included injury AOE/COE. (Minutes of Hearing and Summary of Evidence (MOH/SOE), May 7, 2019, p. 2.)

On May 17, 2019, the WCJ issued an Order Vacating Submission and Notice of Intention to Appoint Regular Physician wherein he stated:

Given the serious defects in the opinions of the present physicians, it would be futile to obtain supplemental reporting from any of them. As such, the parties shall have until **June 14, 2019** to notify the undersigned WCJ if they are agreeable to utilizing an Agreed Medical Evaluator to resolve the above disputed issue. Should the undersigned WCJ not receive notice of agreement between the parties at the conclusion of that time, the court will appoint a regular physician pursuant to Labor Code § 5701.

(see Order Vacating Submission, p. 3, emphasis in original.)

The parties requested a supplemental report from Dr. Vakili and in that report the doctor stated:

It is my medical opinion in the lack of any documented medical records from any medical facility in regards to evaluation and treatment of patient's alleged body parts prior specific date of injury of 7/10/2010, there is no basis for alleged cumulative trauma in this case, except information to the contrary becomes available for evaluation, which I reserve the right to change my medical opinion accordingly.

(Court Exh. ZZ, Dr. Vakili, September 9, 2019, p. 4.)

At the February 24, 2020 conference, the September 9, 2019 report from Dr. Vakili was accepted into evidence and the matter was submitted for decision. (Minutes of Conference, February 24, 2020.)

DISCUSSION

Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) Section 5315 provides the Appeals Board with 60 days within which to confirm, adopt, modify or set aside the findings, order, decision or award of a workers' compensation administrative law judge. (Lab. Code, § 5315.)

On June 5, 2020, the State of California's Governor, Gavin Newsom, issued Executive Order N-68-20, wherein he ordered that the deadlines in sections 5909 and 5315 shall be extended for a period of 60 days.¹ Pursuant to Executive Order N-68-20, the time within which the Appeals Board must act was extended by 60 days. Therefore, this decision is timely.

It is well established that any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess, and the medical opinion must set forth the reasoning behind the physician's opinion, not merely his or her conclusions; a mere legal conclusion does not furnish a basis for a finding. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399, [33 Cal.Comp.Cases 647]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, in his first two reports, Dr. Vakili repeatedly referred to the "7/10/2010 incident" as the basis for applicant's injury claim. (e.g. see Def. Exh. C, pp. 5, 87, 96, and 100; Def. Exh. D, pp. 3 – 5, and 13 – 15.) At no point did he address the cumulative injury claim.

Notwithstanding the WCJ's recommendation that the parties have applicant examined by an agreed medical examiner (AME), they requested a supplemental report from Dr. Vakili. In his

¹ Governor Newsom's Executive Order N-68-20 may be accessed here: <https://www.gov.ca.gov/wp-content/uploads/2020/06/6.5.20-EO-N-68-20.pdf>. (See Evid. Code, § 452(c).)

September 9, 2019 report Dr. Vakili concluded that due to the lack of evaluation and/or treatment records prior to the September 10, 2010 “specific date of injury,” “...there is no basis for alleged cumulative trauma in this case...” (Court Exh. ZZ, p. 4.) The doctor did not discuss the physical demands of applicant’s work during the course of her employment, nor whether the physical demands of applicant’s work could have been a contributing factor as to her various conditions. Also, he did not explain the basis for his conclusion that the lack of medical treatment prior to the end date of the cumulative injury claim, means there is no evidence of a cumulative injury. Absent an explanation of the doctor’s reasoning and analysis in reaching his conclusion, the report from Dr. Vakili is not substantial evidence. (*Hegglin v. Workmen’s Comp. Appeals Bd., supra; Escobedo v. Marshalls, supra.*)

In regard to applicant’s contention that the report from Dr. Schwarz is substantial evidence, all parties to a workers’ compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers’ Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) Dr. Schwarz was removed as the QME because he did not make himself available for defendant to take his deposition. A party’s right to examine and/or cross-examine a witness is a fundamental aspect of due process. (*Apte v. Regents of University of California* (1988) 198 Cal.App.3d 1084, 1098.) Whether Dr. Schwarz’ report is or not substantial evidence is irrelevant in light of the fact that a decision based on that report would constitute a denial of defendant’s due process rights.

For the reasons discussed above, the trial record does not contain substantial evidence pertaining to the issue of injury AOE/COE. The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or where there is insufficient evidence to determine an issue. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].)

Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) However, as noted by the WCJ in the Order Vacating Submission, given the serious defects in the opinions of the present physicians under the circumstances of this matter, it may be in the parties’

interest to have applicant evaluated by an agreed medical examiner or to have the WCJ appoint a regular physician. (Lab. Code § 5701.) Alternatively, in light of the extensive medical record and the 2010 date of the injury claim, it may be in the parties' interest to resolve this matter by settlement as opposed to ongoing litigation.

Accordingly, we rescind the Findings and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact issued by the WCJ on March 23, 2020, is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision, from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 16, 2021

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

**BROWN ASSOCIATES
COLEMAN CHAVEZ
SOLEDAD CARDENAS**

TLH/pc

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