WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ALBERTO RUBIO, *Applicant*

vs.

GENERAL MOTORS, Permissibly Self-Insured, Administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Numbers: ADJ10202584, ADJ8686996
Van Nuys 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 Joint Findings, Award and Order of April 3, 2019, the Workers' Compensation Judge (WCJ) found, in case number ADJ10202584, that applicant, while employed as a warehouseman during the period January 19, 1976 through November 19, 2012, sustained an industrial injury to his lumbar spine, neck, bilateral shoulders, thoracic spine, bilateral upper extremities, bilateral knees, bilateral hands, sleep disorder and psyche, causing temporary total disability from November 19, 2012 through November 18, 2014 (with no credit to defendant for payments made after November 18, 2014), permanent disability of 52%, and the need for further medical treatment of the orthopedic injury. In his Opinion on Decision (pp. 2-3), the WCJ also determined that applicant's claim of cumulative trauma injury is not barred by the Statute of Limitations. In case number ADJ8686996, the WCJ found that there was no injury.

Defendant filed a timely petition for reconsideration of the WCJ's decision. Defendant contends that the WCJ erred in finding applicant's cumulative trauma claim not barred by the Statute of Limitations, that "applicant has not substantiated a psychiatric injury due to the cumulative trauma injury," and that the WCJ's finding on the issue of temporary disability is not supported by the evidence or by the law.

Applicant filed an answer.

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

At the outset, we note that the applicant died on March 3, 2020, when this matter was still pending on reconsideration. Since then applicant's attorney filed an Amended Application for Adjudication of Claim for Death Benefits. However, the applicant's intervivos claim survives his death, with any accrued and unpaid compensation payable to his dependents or to his personal representative or to his heirs or other persons entitled thereto, without administration. (Lab. Code, § 4700.)

We proceed to address the issues raised by defendant's petition for reconsideration. As previously noted, defendant contends that applicant's claim of cumulative trauma injury is barred by the Statute of Limitations. On this issue, we have considered the allegations of defendant's petition for reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated in said Report, which we adopt and incorporate on this issue only (Report pp. 1-3, through "Discussion" paragraph (a) only), we will affirm the WCJ's rejection of the Statute of Limitations defense.

Regarding the issues of psyche injury, temporary disability, and permanent disability, we conclude that the record requires further development. Therefore, we will amend the WCJ's decision on these issues and return this matter to the trial level for further proceedings and new decision by the WCJ.

In reference to the WCJ's finding that applicant sustained an industrial injury to his psyche during the period January 19, 1976 through November 19, 2012, we note that under Labor Code section 3208.3(b)(1), applicant must "demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined [,]" which means that work-related cause(s) must be more than 50% of the entire set of causal factors. (*Department of Corrections/State of California v. Workers' Comp. Appeals Bd.* (*Garcia*) (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356].)

Here the WCJ used a "range of evidence" approach in concluding that applicant's claim of psychiatric injury meets the 51% causation threshold. Specifically, the WCJ states on page three of his Opinion on Decision that the range of evidence for industrial causation of the psychiatric injury is "the continuous trauma of stress on the job of 15% (*the inverse of Dr. Lamm's opinion*) and the balance due to the debilitating nature of the effects of [applicant's] liver cancer. […] This does not negate the perceived stress applicant felt at work according to the history provided to the

physicians, but on balance the effects of the liver cancer outweighed all else as noted in the reporting of Dr. Peng."[1] (Italics added.)

We conclude the WCJ erred in using a "range of evidence" approach to resolve the issue of industrial causation of the psychiatric injury. That is, it is unclear how the "range of evidence," which includes the medical opinions of Dr. Lamm and Dr. Peng, establishes that applicant's claimed injury surpasses the 51% causation threshold. Dr. Peng stated in his final report of May 8, 2018, "the reasonable medical evidence clearly demonstrates that [applicant's non-industrial] liver condition was the predominant cause of [his] psychiatric injury." (Exhibit B, p. 6.) Thus, Dr. Peng concluded that applicant's non-industrial liver cancer was at least 51% responsible for applicant's psychological condition. However, the doctor did not opine that up to 49% of the other causal factors were industrial. At the same time, it appears the WCJ assumed Dr. Lamm only found 15% industrial causation, an erroneous assumption that is further discussed below. Taking the medical opinions of Dr. Peng and Dr. Lamm together, with Dr. Lamm apparently only accounting for 15% of the industrial causation and Dr. Peng's percentage of industrial causation uncertain, the source of other industrial causal factors (which would need to surpass 36%) remains unclear under the WCJ's analysis.

In her report of August 7, 2018 (p. 34), Dr. Lamm apportioned 85% of applicant's psychological disability to industrial factors of causation and the remaining 15% to the psychological impact of applicant's non-industrial liver cancer. (Exhibit 2.) However, the WCJ apparently "inverted" Dr. Lamm's causation ratio of 85/15 percent industrial to 85/15 percent non-industrial. The WCJ erred in several respects. The WCJ stepped outside his judicial expertise by substituting his own (unqualified) medical opinion for that of Dr. Lamm. Then the WCJ used his own unqualified opinion (i.e., "inversion" of the doctor's industrial causation ratio) to determine the issue of psychiatric industrial injury. (See *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613 (Appeals Board en banc) [delineating the roles of WCJs and physicians in the adjudication process].) The WCJ also compounded this error by confusing the issues of industrial causation and apportionment of disability. In following Dr. Lamm's opinion on apportionment to determine industrial causation, the WCJ seems to have disregarded the settled legal principle that the percentage to which an applicant's injury is causally related to his or her

[1] Dr. Lamm was applicant's treating psychologist. Dr. Peng served as the panel Qualified Medical Evaluator (PQME) in psychiatry in this matter.

employment is not necessarily the same as the percentage to which an applicant's permanent disability is causally related to his or her injury. The analyses of these issues are different and the medical evidence for any percentage conclusions may be different. (*Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223 [Significant Panel Decision].) This analytical approach of distinguishing between causation of injury and causation of permanent disability applies to all claims of injury, whether physical or psychiatric. (See *Garcia v. Lyons Magnus* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 208.)

In addition, we note that Dr. Lamm's report of August 7, 2018 is internally inconsistent. On page 31, Dr. Lamm states that the predominant cause of applicant's psychiatric injury is "his continuous trauma injuries which occurred over the period of January 16, 1976 through November 19, 2012." If Dr. Lamm was opining that the predominant cause of the psyche injury was applicant's physical cumulative trauma injuries, the opinion is inconsistent with the *Rolda* analysis[2] found on page 33 of the doctor's report, wherein the physical injuries apparently only account for 20% of the causation pie. Also on page 33, Dr. Lamm states that there is no evidence to support a pre-existing or underlying non-industrial psychological condition or pathology, yet on the next page the doctor assigns 15% non-industrial causation to the psychological impact of applicant's liver disease.

For all the reasons stated above, we conclude that the WCJ erred in using a "range of evidence" framework to determine the issue of industrial causation of the alleged psychiatric injury. Therefore, we will rescind the WCJ's finding on this issue and return the matter to the trial level for further proceedings and new finding by the WCJ. We leave the process of further developing the medical record, including any supplementation of Dr. Lamm's opinion, to the discretion of the WCJ. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 [Appeals Board en banc].) Since the WCJ must revisit the issue of whether applicant's claim of psychiatric injury meets the 51% causation threshold, the WCJ will likewise need to revisit the permanent disability rating of 52%, which included a psychiatric component. We express no final opinion.

Turning to the issue of temporary disability, we are persuaded that the temporary disability awarded by the WCJ is not justified by the evidence. (Lab. Code, § 3202.5.) In his Report, the WCJ indicates that he relied on the August 25, 2017 medical report of Dr. Sohn, the Agreed

[2] *Rolda v. Pitney Bowes* (2001) 66 Cal.Comp.Cases 241 [Appeals Board en banc].

Medical Evaluator (AME) in orthopedics, to find applicant temporarily totally disabled from November 19, 2012 through November 18, 2014.[3] (Exhibit X3.) In his August 25, 2017 report, Dr. Sohn did find that applicant became permanent and stationary and had reached maximum medical improvement. (Exhibit X3, p. 32.) However, this finding by Dr. Sohn does not necessarily support the conclusion that applicant was temporarily totally disabled from November 19, 2012 through August 25, 2017, as suggested by the WCJ. To the contrary, Dr. Sohn's August 25, 2017 report does not specifically address the periods after November 19, 2012 during which applicant may have been temporarily totally disabled. The same is true of Dr. Sohn's supplemental report of November 30, 2017. (Exhibit X2.) We further note that since the issue of industrial psychiatric injury is now unresolved, the medical reports of Dr. Lamm do not support the two-year period of temporary total disability awarded by the WCJ.

Concerning the issue of credit for any temporary disability payments made by defendant, the WCJ suggests in his Report that there may be no issue of double recovery because defendant has not alleged that it paid any temporary disability benefits at all. We note, however, that applicant's trial testimony indicates he received "102 weeks of benefits" after November 19, 2012. (Summary of Evidence, 11/15/18, p. 13.) It appears this testimony may refer to temporary disability benefits paid pursuant to the 104-week benefit cap of Labor Code section 4656. If so, it appears that defendant may be entitled to credit for temporary disability payments for the period November 19, 2012 through November 18, 2014. As the WCJ must revisit the issue of whether there is medical evidence to support a finding on temporary total disability, we express no final opinion on credit for any temporary disability payments made by defendant. The WCJ should revisit the issue of credit as necessary or appropriate, in conjunction with revisiting and deciding the issue of temporary disability.

[3] According to defendant's petition for reconsideration, Dr. Sohn is deceased.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings, Award and Order of April 3, 2019 is **RESCINDED**, and the following Findings are **SUBSTITUTED** in its place:

FINDINGS

1. In ADJ10202584, applicant, while employed during the period January 19, 1976 through November 19, 2012 as a warehouseman by General Motors, permissibly self-insured and administered by Sedgwick Claims Management Services, sustained industrial injury to his lumbar spine, neck, bilateral shoulders, thoracic spine, bilateral upper extremities, bilateral knees, bilateral hands, and sleep disorder; said claim of injury is not barred by the Statute of Limitations. The issue of whether applicant sustained an industrial injury to his psyche is deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved.

2. Applicant's claim of injury in ADJ8686996 is denied.

3. Applicant's average weekly earnings at the time of injury were $1,761.60.

4. The issues of temporary disability, permanent disability, attorney's fees, and all liens are deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and determination of all outstanding issues by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 6, 2022

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

ALBERTO RUBIO
AJAYI LAW GROUP
LAW OFFICE OF DENNIS J. HERSHEWE
EDD

JTL/ara

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

The Workers Compensation Administrative Law Judge ("WCJ") issued a decision on 4/3/19. Defendant has filed a timely and verified request for Reconsideration on the following grounds pursuant to Labor Code§ 5903:

1. By order, decision, or award, the Board acted without or in excess of its powers;
2. The evidence does not justify the findings of fact;
3. The findings of fact do not support the order, decision or award.

CONTENTIONS

The issues are whether (a) the judge erred in not barring applicant from benefits pursuant to the statute of limitations; (b) whether defendant is entitled to a credit for overpayment of temporary disability; and (c) whether the Court erred in finding psychiatric disability as same is contrary to the PQME who found all psychiatric p.d. due to applicant's Stage IV liver cancer.

PERTINENT FACTS

Applicant sustained several prior specific injuries with the subject employer including injury to the knee, shoulders, abdomen, and groin, occurring on 6/10/02, 8/30/06, and 1/19/09, all resolving by stipulated Award on 12/5/12. Applicant also caused to be filed a claim for a specific injury occurring on 11/19/12 for undisputed injury to his lumbar spine, along with other denied parts of body, and also filed a claim alleging a continuous trauma for injury throughout the employment through the last day of work on 11/19/12 for injuries to the low back, neck, bilateral shoulders, thoracic spine, hernia, bilateral knees, bilateral hands, stomach, elbows, depression, sleep disorder, psyche, headaches, lungs, and liver cancer. The WCJ found in accordance with the AME that applicant did not suffer from a specific injury and that injury to the lumbar and thoracic spine, neck, bilateral upper extremities, bilateral knees, sleep disorder and psyche was as a result of a continuous trauma. The total permanent disability included impairment to the psyche. The WCJ also denied credit for overpayment of temporary total disability paid more than 104 weeks after said benefit commenced. It is from the finding of a continuous trauma, permanent disability to psyche, and denial of credit for overpayment, that defendant appeals.

DISCUSSION

(a) Defendant avers applicant's claim is barred by the statute of limitations as applicant knew, or should have known based on his prior injuries, that his back and other body parts were injured as a result of a continuous trauma and he failed to file a claim in a timely manner. Defendant refers to various medicals indicating "applicant was doing more repetitive motion with increased weight. He started to notice the onset of pain approximately one month ago" (Petition for Reconsideration, pp. 4-5, lines 28-2.) and that applicant began developing back pain which he attributed to heavy lifting and repetitive bending at work which had progressively worsened. (Petition for Reconsideration p. 4, lines 13-23.) However, applicant also filed a claim for injury occurring

11/19/12 to the back which was accepted. A continuous trauma is a very different mechanism of injury than that of a specific and there is no evidence that, while applicant had several prior specific injuries, he knew of the opportunity to make a claim for an injury occurring over a gradual period of time where nothing specific happened. In fact, referring to the medical report cited by defendant, Dr. Zapanta (5/8/13 report, Ex. E) takes a history at the outset of applicant developing back pain in September of 2012 which applicant attributed to heavy lifting and repetitive bending at work but that he *also experienced severe low back pain on 11/19/12* while lifting heavy boxes, after which he could not continue working. Under the Causation heading of the same report, Dr. Zapanta opines "[i]n reviewing this patients history, medical records, and examination today, it appears that this patient did sustain an injury arising out of and caused by the industrial exposure of 10/19/12." Thus, if the treating physician did not identify a continuous trauma after taking the very same history upon which defendant cites as triggering applicant's knowledge and duty to report the claim, applicant certainly cannot be held the higher standard of knowledge. Further, on 11/18/14 applicant is seen by PQME, Dr. Sofia, who also takes a history from applicant and reviews medical records and opines in his 11/28/14 reporting (Ex. D) that causation is attributed to the "subject injury," which is noted to be a specific of 10/19/12. Dr. Sofia apportions 70% to all the prior work injuries and 30% to the new injury, *with no mention of a continuous trauma*. Applicant can hardly be held to such standards of expert knowledge prior to the parties proceeding to AME, Dr. Sohn, on 8/25/17, who was the first to conclude, after further inquiry, that there was *no injury* involved in the 10/19/12 specific, but rather, all the injury was due to a continuous trauma. (Exhibit X-2.)