WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DAVID FURMANSKI, *Applicant*

vs.

COUNTY OF LOS ANGELES; permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ15912467

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 and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on March 27, 2023, wherein the WCJ found in pertinent part that applicant failed to meet his burden of proving he sustained a separate and new industrial injury to his left hip arising out of and in the course of his employment (AOE/COE) on January 11, 2022; that applicant's injury claim was barred by Labor Code section 5410; and that Labor Code section 5412 is not applicable.[1] The WCJ ordered that applicant take nothing by way of his injury claim.

Applicant contends that the trial record supports his left hip cumulative injury claim; that the section 5412 date of injury is January 2022; and that the left hip injury is not a compensable consequence of his prior industrial knee injury.

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 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

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

the F&O 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 a cumulative injury to his left hip while employed by defendant as a deputy sheriff with an injury date of January 11, 2022; applicant last worked for the County of Los Angeles on March 30, 2009.[2]

Orthopedic agreed medical examiner (AME) David Heskiaoff, M.D., evaluated applicant on July 26, 2022. Dr. Heskiaoff examined applicant, took a history, and reviewed the January 4, 2022, treatment report from Fariborz Daniel Kharrazi, M.D. (Joint Exh. 1, David Heskiaoff, M.D., July 26, 2022; see Joint Exh. 3.) Dr. Heskiaoff diagnosed "Osteoarthritis, right and left knees," and "Osteoarthritis, right and left hips." (Joint Exh. 1, p. 10.) Regarding the cause of applicant's hip symptoms, Dr. Heskiaoff stated:

> It is my opinion, within reasonable medical probability, that the type of work the patient did contributed [sic] to the condition of the hips, and the injuries that he had to the knees have accelerated the deterioration of both hips. It is my opinion that he has had left hip problems, with referred pain to the left knee, which were not addressed. ¶ Therefore, it is my opinion that the bilateral hip problems that he has should be accepted on an industrial basis. ¶ … Within reasonable medical probability, the type of work the patient has been performing has contributed to the condition of the left hip. There is industrial causation from the continuous trauma of work to the left hip within reasonable medical probability.
> (Joint Exh. 1, pp. 11 - 12.)

In his supplemental report, AME Dr. Heskiaoff explained that:

> David Furmanski was seen on July 26, 2022, with regard to the injury of January 11, 2022. ¶ After evaluating this patient, it was my opinion that based on my knowledge of the type of work the patient had been performing, his hip condition within reasonable medical probability was related to his work activity, and I believed that his work, which is arduous, contributed to the condition of the left hip until the last day that he worked as a deputy sheriff.
> (Joint Exh. 2, David Heskiaoff, M.D., October 12, 2022, p. 1.)

The parties proceeded to trial on March 2, 2023. They stipulated that applicant claimed an injury to his left hip while employed by defendant on January 11, 2022.The issues submitted for

[2] The March 7, 2022, Application for Adjudication of Claim (Application) states that applicant sustained a "specific injury on January 11, 2022" [see Application, p. 2], but it later states that applicant sustained "injury to left hip due to injurious exposure from 6/1/1974 through 3/30/2009" [see Application, p. 3, original in upper case].

decision included employment, injury AOE/COE, and whether the provisions of Labor Code sections 5410, 5412, and/or 5500.5 were applicable. (Minutes of Hearing Summary of Evidence (MOH/SOE), March 2, 2023, pp. 2 – 3.)

DISCUSSION

We note that we first received notice of the Petition on or about August 8, 2023, thus the Opinion and Order Granting Petition for Reconsideration was timely. (Lab. Code, § 5909; *Shipley v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 1104 [57 Cal.Comp.Cases 493.)

Section 3208.1 defines injury as follows:

> An injury may be either: (a) "specific," occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) "cumulative," occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. The date of a cumulative injury shall be the date determined under Section 5412.
> (Lab. Code § 3208.1.)

Section 5412 states that:

> The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.
> (Lab. Code, § 5412.)

There are factual scenarios where an injured worker's last date of exposure, resulting in a cumulative injury, is before the date the worker first suffered disability and knew that the disability was caused by his or her employment, under section 5412, so the last date of employment with the liable employer (based on section 5500.5) would not be the same date as the date of injury under section 5412.

The concept of "in the course of employment" ordinarily refers to the time, place, and circumstances under which the injury occurs. For an injury to "arise out of employment" it must occur by reason of a condition or incident of the employment. Otherwise stated, the employment and the injury must be linked in some causal fashion. All that is required is that the employment be one of the contributing causes without which the injury would not have occurred. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd*. (2015) 61 Cal.4th 291, [80 Cal.Comp.Cases 489];

State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (1982) 133 Cal.App.3d 643, 655 [47 Cal.Comp.Cases 729].)

As noted above, AME Dr. Heskiaoff specifically stated: "Within reasonable medical probability, the type of work the patient has been performing has contributed to the condition of the left hip. There is industrial causation from the continuous trauma of work to the left hip within reasonable medical probability." (Joint Exh. 1, p. 12.) He subsequently stated: "After evaluating this patient, it was my opinion that based on my knowledge of the type of work the patient had been performing, his hip condition within reasonable medical probability was related to his work activity …." (Joint Exh. 2, p. 1.) An AME is presumably chosen by the parties because of his or her expertise and neutrality. Therefore, the AME's opinion should ordinarily be followed unless there is a good reason to find that opinion unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114, 117].) Having reviewed the trial record, we see no reason to find Dr. Heskiaoff's opinions unpersuasive; nor does the trial record contain any evidence contrary to or inconsistent with Dr. Heskiaoff's opinions.

Regarding defendant's argument that applicant's hip injury claim had previously been settled by the December 18, 2013, Stipulations with Request for Award, (Stipulations); having reviewed the Stipulations it is clear that none of the injury claims resolved by that settlement identified or otherwise included a claim of injury to applicant's hips/left hip (see Joint Exh. 4). As to whether applicant's left hip symptoms were a consequence of his prior knee injuries; again, there is no evidence contrary to Dr. Heskiaoff's conclusion that applicant's work, "… which is arduous, contributed to the condition of the left hip until the last day that he worked as a deputy sheriff." (Joint Exh. 2, p. 1.)

Further, we find no statutory or case law that limits a cumulative injury to an occupational disease, latent disease, or an insidious, progressive disease. Actually, section 3208.1 describes a cumulative injury claim as being the result of "repetitive mentally or physically traumatic activities." (Lab. Code, § 3208.1.)

Finally, as noted above the Application states that applicant sustained a "specific injury on January 11, 2022" but it later states that applicant sustained "injury to left hip due to injurious exposure from 6/1/1974 through 3/30/2009; and the parties stipulated that applicant claimed injury to his left hip on January 11, 2022. (See footnote 1 above; MOH/SOE, p. 2.) However, workers' compensation pleadings may be amended by the Appeals Board to conform to proof, based on

evidence submitted at trial. (Cal. Code Regs., tit. 8, § 10517; *Rubio v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196, 199-200 [50 Cal.Comp.Cases 160].) The parties' stipulations are not binding on the Appeals Board or the WCJ and the Appeals Board or the WCJ may reject or amend a stipulation and base the decision on the evidence presented at the hearing. (Lab. Code, § 5702; Cal. Code Regs., tit. 8, § 10517; *Rubio v. Workers' Comp. Appeals Bd., supra*; *Draper v. Workers' Comp. Appeals Bd.* (1983) 147 Cal. App. 3d 502 [48 Cal.Comp.Cases 748]; *Turner Gas Co. v. Workmen's Comp. Appeals Bd.,* (1975) 47 Cal.App.3d 286 [40 Cal.Comp.Cases 253].) Under the circumstances of this matter, it appears appropriate for the WCJ to give the parties notice that, based on the evidence submitted at trial, findings may be made that are inconsistent with their prior stipulation as to the actual nature of applicant's injury claim (i.e., whether it is a specific or cumulative injury claim).

Accordingly, we rescind the F&O 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 March 27, 2023, Findings of Fact and Order 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.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 28, 2023

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

DAVID FURMANSKI
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE
OFFICE OF COUNTY COUNSEL TEMPLE LOS ANGELES

TLH/mc

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