WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GERARDO ZUL, ***Applicant***

vs.

ADAMS BROS FARMING, INC.; INSURANCE COMPANY OF THE WEST, ***Defendants***

Adjudication Number: ADJ10074517
San Luis Obispo District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of August 25, 2023, wherein it was found that applicant's November 20, 2014 injury caused new and further lower back permanent disability of 9%. It was also found that "Applicant's stipulated dismissal of all body parts other than the back, shoulder and knees was efficacious and valid in dismissing applicant's claim of cervical spine injury as the cervical spine was a disputed body part at the time of the stipulated dismissal and good and valuable consideration was paid by defendant for such dismissal. Accordingly, the cervical spine was not subject to reopening." Previously, in a stipulated Award of September 18, 2017, it was found that while employed on November 20, 2014, applicant sustained injury to the "back, shoulder, [and] knee" causing permanent disability of 30%. It appears that the original Award did not include any back permanent disability, so, in the instant proceedings, the WCJ combined the prior 30% shoulder and knee permanent disability with the 9% new and further lower back permanent disability to find applicant's current permanent disability level of 37%.

Applicant contends that the WCJ erred in (1) not finding industrial injury to the neck and in (2) finding permanent disability of only 37%, arguing that the entire 20% permanent disability found by panel qualified medical evaluator Elana Harway, M.D. should have been utilized in calculating applicant's overall permanent disability. We have received an Answer from defendant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

As explained below, we will grant reconsideration, rescind the WCJ's findings, and return this matter to the trial level for reanalysis of the calculation of applicant's overall permanent disability.

The stipulated Award of September 18, 2017 did not specify the calculation of permanent disability. However, applicant states in its Trial Brief and Petition on Reconsideration, and defendant does not appear to dispute that, at the time of settlement, the only permanent disability evidence that was the basis for settlement was the reporting of prior primary treating physician orthopedist Christopher Proctor, M.D. and prior qualified medical evaluator orthopedist Kenneth Baldwin, M.D. Although the stipulated Award found injury to the back, neither Dr. Proctor nor Dr. Baldwin included any back impairment in their permanent and stationary reports. Therefore, it appears that the stipulation to 30% permanent disability in the original Award did not contemplate any back permanent disability. The stipulated Award included only the shoulder, "knee" (despite Dr. Proctor finding permanent disability in both knees), and back. As part of the settlement, applicant stipulated "that the only parts of the body injured are those listed in Paragraph 1 [the shoulder, back and knee] and all other body parts are dismissed without prejudice."

With regard to the cervical spine injury, while we reject the notion that the cervical spine was not subject to reopening because any cervical spine claim was dismissed without prejudice, applicant has not produced sufficient evidence of either good cause to reopen (Lab. Code, § 5803) or new and further disability (Lab. Code section 5410) with regard to the cervical spine. With regard to the issue of new and further disability, orthopedist Elana Harway, M.D., who was the panel qualified medical evaluator in the reopening proceedings, did not find any cervical spine new and further disability. With regard to good cause to reopen, both Dr. Proctor's and Dr. Baldwin's reporting prior to the stipulated Award noted neck complaints (although Dr. Baldwin appears to say that these were related to the accepted shoulder injury), but neither found compensable cervical spine injury. Indeed, applicant admits in his Petition that "there was not medical evidence supporting a finding of industrial injury to the cervical spine arising out of the 11-20-14 injury specific injury at the time the Stipulations were made." (Petition for Reconsideration at p. 7.) The only evidence that applicant points to in his Petition is the 2021 deposition testimony of new primary treating physician orthopedist Allan Moelleken, M.D. who opined at deposition that the neck should have been accepted as industrial, but that he had not evaluated the neck. (June 14, 2021 deposition at p. 9-11.)

As the Court of Appeal wrote in *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687], "In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. [Citation.] Also, 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. [Citation.] Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citation.]"

Dr. Moelleken did not evaluate the applicant's neck condition and did not adequately explain how applicant sustained an industrial neck injury. In any case, a new medical opinion that merely disagrees with the conclusions of prior medical opinions based on the same existing evidence is not a basis for reopening for good cause. (*Nicky Blair's Restaurant v. Workers' Comp. Appeals Bd. (Macias)* 109 Cal.App.3d 941, 958 [45 Cal.Comp.Cases 876].)

However, we grant reconsideration, rescind the decision, and return this matter to the trial level for reanalysis of the calculation of overall permanent disability. In the reopening proceedings, Dr. Harway found lumbar spine permanent impairment of 13% WPI (May 21, 2020 report at p. 4), which adjusted to 20% permanent disability. The WCJ found that, despite the fact that it appears that low back disability was not a basis for the stipulated Award, applicant had 7% whole person impairment at the time of the stipulated Award. Just a week prior to the stipulated Award, on September 11, 2017 applicant was evaluated by his new primary treating physician orthopedist Allan Moelleken, M.D., who found low back injury. However, in the verified Petition for Reconsideration, applicant writes that this report "was not received until 10-4-17, weeks after the Stipulation had been approved." (Petition for Reconsideration at p. 4.) While the WCJ is correct that "new and further" disability must be "new," meaning having arisen after the issuance of an Award (*Macias*, *supra*, 109 Cal.App.3d at pp. 954-955), Dr. Moelleken's September 11, 2017 report did not find applicant permanent and stationary with regard to the lower spine, nor did Dr. Moelleken ascribe any permanent impairment to the lower back. Permanent disability is not compensable until it is ratable. Except in the case of insidious, progressive diseases, a disability is not ratable until it is permanent and stationary. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473 [56 Cal.Comp.Cases 631].)

Thus, we grant reconsideration and return this matter to the trial level for the WCJ to consider whether the totality of applicant's low back permanent disability was "new and further" disability given the fact that applicant's condition was not yet permanent and stationary. Additionally, if still relevant, the WCJ and the parties may also consider if there was good cause under Labor Code section 5803 to include applicant's entire low back disability in the calculation of overall permanent disability given the fact that Dr. Moelleken's report appears to have not been received by the parties until after the issuance of the stipulated Award. In *Benavides v. Workers' Comp. Appeals Bd.* (2014) 227 Cal.App.4th 1496 [79 Cal.Comp.Cases 483], section 5803 was invoked to set aside a stipulated Award. As the *Benavides* court explained, "Section 5803 accords the [WCAB] continuing jurisdiction to rescind or revise its awards, 'upon good cause shown.' Such cause may consist of newly discovered evidence previously unavailable, a change in the law, or 'any factor or circumstance unknown at the time the original award or order was made which renders the previous findings and award "inequitable."' [Citation.] More specifically, an award based upon a stipulation may be reopened or rescinded if the 'stipulation has been "entered into through inadvertence, excusable neglect, fraud, mistake of fact or law … or where special circumstances exist rendering it unjust to enforce the stipulation …."' [Citation.]"

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Award of August 25, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of August 25, 2023 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ _NATALIE PALUGYAI, COMMISSIONER________

I CONCUR,

/s/ _ANNE SCHMITZ, DEPUTY COMMISSIONER_______

/s/ _JOSEPH V. CAPURRO, COMMISSIONER___________

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 30, 2023

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

GERARDO ZUL
GHITTERMAN, GHITTERMAN & FELD
ALBERT AND MACKENZIE

DW/oo

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