WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BRENDA CHAVEZ, *Applicant*

vs.

NOR-CAL CHICKEN, INC., dba EL POLLO LOCO and CALIFORNIA RESTAURANT MUTUAL BENEFIT CORPORATION, administered by AMERICAN CLAIMS MANAGEMENT, *Defendants*

Adjudication Number: ADJ11187899
Stockton District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact and Orders (F&O), issued by the workers' compensation administrative law judge (WCJ) on December 22, 2020, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) on February 28, 2017.

Defendant contends that the reports and deposition testimony of orthopedic qualified medical examiner (QME) Michael D. Ciepiela, M.D., are substantial evidence that applicant did not sustain injury AOE/COE.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We did not receive an Answer from applicant.

We have considered the allegations in the Petition for Reconsideration (Petition), and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, 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.

BACKGROUND

Applicant claimed injury to her upper extremities/left arm, right shoulder, and right elbow, while employed by defendant as a prep cook on February 28, 2017. She initially received a course

of treatment from physicians at US HealthWorks Medical Group. (see Joint Exhs. 108 – 119, 121 – 124.) The April 21, 2017 Doctor's First Report of Injury included the following:

> …There was a specific event of an injury or illness. While working a month ago bumped her elbow on a door. Felt fine did not report this for 2 weeks. And when she reported it she declined medical care. Recently she admitted to her employer that she was paying for messages for her pain. She admits that her elbow did not hurt her for weeks. Now she is having 9/10 pain - severe right lateral elbow. … ¶ …The findings on exam and diagnosis are not consistent with the injury reported by patient … ¶ … Admits had been fine for "a long time" just recently started to hurt.…
> (Joint Exh 108, Diana Johns, M.D./US HealthWorks, April 21, 2017, Doctor's First Report of Injury, pp. 1, 4, and 5 [EAMS pp. 5, 8, and 9].)

QME Dr. Ciepiela evaluated applicant on October 10, 2018. Dr. Ciepiela examined applicant, took a history, and reviewed the medical record. The diagnoses were:

> 1. Status post right elbow release.
> 2. Rule out rotator cuff tear, impingement, or labral tear, right shoulder.
> 3. Extreme symptom magnification.
> (Joint Exh. 100, Dr. Ciepiela, October 10, 2018, p. 9.)

Dr. Ciepiela requested a Magnetic Resonance arthrogram of applicant's right shoulder and deferred commenting on various issues, including impairment and causation, pending the arthrogram. (Joint Exh. 100, pp. 9 – 10.) In his supplemental report Dr. Ciepiela stated:

> This supplement is generated after being provided the MR arthrogram of her right shoulder that was allowed and performed on October 26, 2018. This does in fact show evidence of calcific tendinitis as well as loose bodies within the shoulder. ¶ This is unfortunate due to her presentation, which again is somewhat magnified.
> (Joint Exh. 101, Dr. Ciepiela, November 5, 2018, p. 2.)

Dr. Ciepiela received applicant's deposition transcript and additional medical records. Based on his review of the deposition transcript and the medical records, Dr. Ciepiela concluded that applicant was not credible and that he "would not believe anything she said…" (Joint Exh. 103, Dr. Ciepiela, March 22, 2019, p. 2.)

On January 17, 2020, Dr. Ciepiela's deposition was taken. The doctor testified that he would submit a supplemental report if the parties sent him the records he had previously reviewed, and he stated:

> It is my professional opinion that I don't believe I want to see her back again, and that if she was to need a QME again, it should be by somebody who is going to see her fresh whose opinion would not be tainted.
> (Joint Exh. 106, Dr. Ciepiela, January 17, 2020, p. 13.)

He was then asked,

> … [D]o you feel that you can take a step back and review this in terms of being open to a belief of certain things she says if there is not a specific reason to disbelieve a certain contention or account?" [he replied]
>
> So I think I can -- I can do this objectively and more effectively and efficiently than I did with the first go around. I think I was just kind of caught off guard.
> (Joint Exh. 106, p. 14.)

Dr. Ciepiela was provided the records he had previously reviewed, as discussed at the deposition, and in his supplemental report, he stated:

> The delay in receiving all of this information, which was extensive and then the ability to lay all of the information in a timeline has allowed me to step back and be more objective with my final opinion. As I reviewed the original mechanism of injury, where the freezer door banged her elbow and she continued to work, it does not correspond to any diagnosis other than a contusion. ¶ Without question, she has an MR [sic] arthrogram of the shoulder, which shows degenerative changes, which take many years to develop; however, the mechanism of the injury would not have caused any of the findings noted on objective studies. ¶ Her diagnosis on an industrial basis should have been contusion with symptom magnification perhaps secondary gain. All the treatment provided for someone who is not going to improve to include surgical release of her extensor tendon do not correspond to any industrial causation.
> (Joint Exh. 104, Dr. Ciepiela, April 3, 2020, p. 2.)

The parties proceeded to trial on October 27, 2020. The WCJ's summary of applicant's testimony included:

> She was injured on 2/28/17. She was hit by a heavy door in the right elbow. She believes it's the heaviest door as it was the freezer door. She reported the injury at 11 p.m. to Jose, the manager, and it was reported on the spot. He told her to finish her work. She told him she had a lot of pain. ¶ Her first doctor's appointment was April 20, 2017. She took time from the employer to see if it was going to get better or go away. She asked for medical treatment, but she didn't get her first appointment until April 20, 2017. She was released to regular duty, but after that, gave her restrictions of no heavy lifting. She was provided lighter duty. Her right shoulder hurt after the injury. She believes for compensating for her elbow.
> (Minutes of Hearing and Summary of Evidence (MOH/SOE), pp. 6 – 7.)

The issues submitted for decision included injury AOE/COE. (MOH/SOE, p. 2.)

DISCUSSION

Preliminarily we note that defendant's Petition is timely. Defendant filed the Petition on January 8, 2021. However, the Petition did not come to the attention of the Appeals Board until April 23, 2021. Defendant's Petition was not timely acted upon by the Appeals Board, which has 60 days from the filing of a petition for reconsideration to act on that petition. (Lab. Code, § 5909.) Here, however, through no fault of defendant, the timely-filed Petition did not come to the attention of the Appeals Board until after the expiration of the statutory time period. Consistent with fundamental principles of due process, and in keeping with common sensibilities, we are persuaded, under these circumstances, that the running of the 60-day statutory period for reviewing and acting upon a petition for reconsideration begins no earlier than the Appeals Board's actual notice of the petition, which occurred on April 23, 2021. (see *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1107-1108 [57 Cal.Comp.Cases 493]; *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd*. (*Felis*) (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622, 624].)

Review of the record indicates that defendant does not dispute applicant's claim that while at work on February 28, 2017, her right elbow was hit by a freezer door that was pushed open by a co-worker. It appears the actual issue is whether the February 28, 2017 incident constitutes an industrial injury. A specific injury is an incident that causes disability or need for medical treatment. (Lab. Code, § 3208.1(a).)

Applicant first received treatment for the claimed injury on April 21, 2017. The Doctor's First Report of Injury indicates applicant told the doctor that a month earlier she bumped her elbow on a door but she felt fine so she did not report it for two weeks; that when she reported it she declined medical care; that her elbow did not hurt her for weeks; that she was having severe right lateral elbow pain at the time of the medical appointment; and that her elbow had been fine for "a long time" but just recently started to hurt. (Joint Exh 108, pp. 1, 4, and 5 [EAMS pp. 5, 8, and 9].)

At trial, applicant testified that she reported her right elbow injury to her manager on the day it occurred, and that at that time she had a lot of pain. (MOH/SOE, p. 6.) Applicant's trial testimony is inconsistent with the statements attributed to applicant in the Doctor's First Report of Injury and there is no explanation in the record regarding those inconsistencies.

As noted above, after reviewing the Magnetic Resonance arthrogram of applicant's right shoulder, Dr. Ciepiela stated that the arthrogram showed evidence of calcific tendinitis as well as loose bodies within the shoulder. (Joint Exh. 101, p. 2.)[1]

In his April 3, 2020 supplemental report, Dr. Ciepiela diagnosed a "contusion"[2] caused by the freezer door hitting applicant's elbow. He stated that the MR arthrogram of applicant's shoulder showed "degenerative changes, which take many years to develop" and are inconsistent with the mechanism of the injury. (Joint Exh. 104, p. 2.)

The aggravation of a pre-existing condition is an industrial injury. (*Argonaut Ins. Co. v. Industrial Acc. Comm. (Harries)* (1964) 231 Cal.App.2d 211 [29 Cal.Comp.Cases 279].) Here, Dr. Ciepiela did not discuss whether the February 28, 2017 incident aggravated applicant's pre-existing degenerative shoulder condition. Also, he did not discuss whether the February 28, 2017 incident was a causative factor as to the "loose bodies" in applicant's shoulder. Further, although Dr. Ciepiela indicated he believed the treatment applicant received did not "correspond to any industrial causation" he did not address the issue of whether the incident was or was not a "minor industrial injury" that would only require first aid treatment. (Lab. Code, § 5401(a).)

For these reasons, Dr. Ciepiela's opinions are not substantial evidence regarding the issue of injury AOE/COE.

As discussed above, applicant's trial testimony about her symptoms, including pain in her elbow and shoulder, was inconsistent with the information contained in the Doctor's First Report of Injury. (Joint Exh 108.) Our review of the trial record, including the reports from treating physician Tariq Mirza, M.D., (App. Exhs. 1 – 8), indicates that the record contains no medical evidence that constitutes substantial evidence regarding injury AOE/COE. It has long been recognized that evidence from a lay witness on an issue requiring expert opinion is not substantial evidence, and medical proof is required when issues of diagnosis, prognosis, and treatment are beyond the bounds of ordinary knowledge. (*City & County of San Francisco v. Industrial Acc. Com. (Murdock)* (1953) 117 Cal.App.2d 455 [18 Cal.Comp.Cases 103]; *Bstandig v. Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988 [42 Cal.Comp.Cases 114].) Medical proof is

[1] Calcific tendonitis of the shoulder occurs when calcium deposits form on the tendons and there are two different types of calcific tendonitis of the shoulder: degenerative calcification and reactive calcification. (Merriam-Webster Medical Dictionary; Oxford Medical Dictionary)

[2] A contusion (bruise) is an injury to tissue usually without laceration - an injury involving rupture of small blood vessels and discoloration without a break in the overlying skin. (Merriam-Webster Dictionary, Dorland's Medical Dictionary.)

required when addressing issues of diagnosis, prognosis, and treatment that are beyond the bounds of ordinary knowledge. (see *Peter Kiewit Sons v. Industrial Acc. Com., (Mc Laughlin)* (1965) 234 Cal.App.2d 831, 838, 44 Cal. Rptr. 813, [30 Cal.Comp.Cases 188]; *Bstandig v. Workers' Comp. Appeals Bd*. *supra*.)

Again, defendant does not argue that the February 28, 2017 incident did not occur, the issue is whether that incident constitutes an injury AOE/COE. As explained herein, the trial record does not contain substantial evidence addressing that issue. The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd. (1998)* 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) Clearly, injury AOE/COE is a threshold issue (see *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122]), and therefore it is necessary that the parties further develop the record.

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 above, Dr. Ciepiela specifically stated that he did not want to re-examine applicant and if she needed to be re-evaluated, it should be done by a different doctor "whose opinion would not be tainted." (Joint Exh. 106, p. 13.) Under the circumstances of this matter, it is appropriate that the parties have applicant evaluated by an agreed medical examiner or in the alternative, that the WCJ appoint a regular physician. (Lab. Code § 5701.)

Accordingly, we grant reconsideration, 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 that defendant's Petition for Reconsideration of the Findings of Fact and Orders issued by the WCJ on December 22, 2020, is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Orders issued by the WCJ on December 22, 2020 is **RESCINDED**, and the matter is returned 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.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 21, 2021

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

BRENDA CHAVEZ
BRILES LAW GROUP
WINTERSTEEN CASAREZ, PLC

TLH/*pc*

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