

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

FILEMON MORENO, *Applicant*

vs.

**IRVINE VIEJO PAINTING COMPANY and INSURANCE COMPANY OF THE WEST,
*Defendants***

**Adjudication Number: ADJ11986060
Santa Ana 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 and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on July 15, 2021, wherein the WCJ found in pertinent part that applicant did not sustain an injury arising out of and occurring in the course of employment (AOE/COE) to his back, neck, shoulders, arms, wrists, hands, fingers, and knees; and that all issues regarding applicant's internal injury claim were deferred.

Applicant contends that the records from Orange County Global Medical Center are evidence that applicant sustained the orthopedic injuries as claimed, and that the report from orthopedic qualified medical examiner (QME) Larry A Danzig, M.D., is not substantial evidence on 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 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 F&O and substitute a new Findings and Order deferring the issues of injury AOE/COE to applicant's back, neck, shoulders, arms, wrists, hands, fingers, knees, and internal system; we will Order that applicant attend an evaluation by an internal medicine QME; and we will 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 his back, neck, shoulders, arms, wrists, hands, fingers, knees, and to his internal system in the form of a hernia, while employed by defendant as a painter during the period from May 5, 2000, through January 30, 2019.

On October 15, 2019, Dr. Danzig evaluated applicant. (App. Exh. 2, Dr. Danzig, October 20, 2015.) Dr. Danzig examined applicant took a history, and reviewed medical records including diagnostics and treatment notes from January 31, 2019, to August 1, 2019. The diagnoses included: neck pain of the sprain/strain variety; right and left shoulder tendinitis with mild acromioclavicular osteoarthritis; chronic right and left hand and wrist sprain; chronic low back pain with a 3 mm disc bulge at L3-L4, L4-L5, and L5-S1; and chronic right and left knee sprain. (App. Exh. 2, p. 64.) Regarding the cause of applicant's orthopedic condition, Dr. Danzig explained:

The patient reported the physical demands of his job as a painter for the Irvine Viejo Painting Company.... The patient worked approximately twenty-four years for the Irvine Viejo Painting Company as a painter. ¶ However, there was no documentation in the available medical records that the patient complained of pain in his neck, right or left shoulders, right or left hands or wrists, low back, or right or left knees during the course of his employment with the Irvine Viejo Painting Company. (App. Exh. 2, p. 65.)

He then stated:

There are therefore two scenarios:

Scenario #1:

The history given to me by the patient today was accurate, e.g. that the patient had the onset of pain in his neck, right and left shoulders, right and left hands and wrists, low back and right and left knees during the course of his employment with the Irvine Viejo Painting Company. ¶ In this scenario, the patient's reporting of the physical demands of his usual and customary work were consistent with a cumulative trauma injury. ¶ If this scenario were accurate, then it was medically probable that the patient sustained a cumulative trauma injury to his neck, right and left shoulders, right and left hands and wrists, low back, and right and left knees during the course of his employment with Irvine Viejo Painting Company.

Scenario #2:

The medical records were accurate, e.g. there was no mention of any neck, right or left shoulder, right or left hand/wrist, low back, or right or left knee complaints while the patient was working for Irvine Viejo Painting Company. ¶ If this scenario were accurate, then it was medically probable that the patient's

neck, right and left shoulder, right and left hand/wrist, low back and right and left knee complaints were not secondary to the patient's employment with Irvine Viejo Painting Company. ¶ I respectfully defer to the Trier of Fact as to which of these two scenarios was accurate.
(App. Exh. 2, p. 66.)

The parties proceeded to trial on February 3, 2021. The issues identified by the parties included injury AOE/COE, parts of body injured, and the Labor Code section 3600(a)(10) post-termination defense. (Minutes of Hearing and Summary of Evidence (MOH/SOE), February 3, 2021, p. 2.) The matter was continued to April 14, 2021, at that trial applicant and two defense witnesses testified. (MOH/SOE, April 14, 2021.)

DISCUSSION

Labor Code 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. ...
(Lab. Code § 3208.1.)

The report from QME Dr. Danzig contains a detailed description of the physical demands of applicant’s work for defendant as a painter, and it notes that applicant started working for defendant in May 1995. (See App. Exh. 2, pp 2 – 4.) “Scenario #1” is premised on applicant having had, “... the onset of pain in his neck, right and left shoulders, right and left hands and wrists, low back and right and left knees during the course of his employment” and “Scenario #2” is premised on there being, “... no mention of any neck, right or left shoulder, right or left hand/wrist, low back, or right or left knee complaints...” while applicant was working for defendant. (App. Exh. 2, p. 66.) It appears that both scenarios could be accurate, i.e. applicant could have experienced pain during the course of his employment and not have sought treatment until he stopped working for defendant. It is important to note that the lack of prior records may be a factor to consider as to the issue of cumulative injury, but the lack of those records is not in and of itself a basis for concluding that there was no cumulative injury. Pursuant to Labor Code section 3208.1 (quoted above), a cumulative injury is the result of repetitive mentally or physically traumatic activities extending over a period of time. Dr. Danzig clearly described the physical demands of applicant’s

work as a painter and he discussed the symptoms of the various orthopedic conditions that he diagnosed. However, he did not give an opinion regarding whether the physical demands of applicant's employment with defendant would or would not be a cause of applicant's orthopedic condition.

An 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].) When deciding a medical issue, such as whether an applicant sustained a cumulative trauma injury, the WCJ must utilize expert medical opinion. (See *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687]; *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) As discussed earlier, Dr. Danzig did not address the issue of whether applicant's employment with defendant was a causative factor regarding applicant's orthopedic condition. Thus, his report is not substantial evidence upon which a decision may be based.

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].) When the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Upon return of this matter to the WCJ, we recommend that the parties request Dr. Danzig submit a supplemental report to clarify his opinion as to whether applicant's work as a painter was a contributing cause of his orthopedic condition.

Accordingly, we rescind the F&O and substitute a new Findings and Order deferring the issues of injury AOE/COE to applicant's back, neck, shoulders, arms, wrists, hands, fingers, knees, and internal system; we order that applicant attend an evaluation by an internal medicine QME; and we 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 July 15, 2021 Findings and Order, is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. FILEMON MORENO while employed during the period of May 5, 2000, through January 30, 2019, as a painter, Occupational Group Number 380 at Irvine, California, by IRVINE VIEJO PAINTING CO, whose workers' compensation insurance carrier was INSURANCE COMPANY OF THE WEST, claimed injury arising out of and occurring in the course of employment to his back, neck, shoulders, arms, wrists, hands, fingers, and knees; the issue of injury arising out of and occurring in the course of employment to these body parts is deferred.
2. Applicant's claim of internal injury requires development of the record as to industrial causation and all issues regarding the claim of internal injury are deferred.

ORDER

IT IS ORDERED that applicant attend an evaluation by an internal medicine qualified medical examiner.

IT IS FURTHER ORDERED that 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/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 16, 2021

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

**FILEMON MORENO
GOLDEN & TIMBOL
ALBERT AND MACKENZIE**

TLH/pc

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