WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FRANCISCO SILES RIVAS, *Applicant*

vs.

BRAKE LAND, LLC; TOWER INSURANCE COMPANY, In Liquidation, Administered By INTERCARE On Behalf of CALIFORNIA INSURANCE GUARANTEE ASSOCIATION; STAR INSURANCE, Administered By ILLINOIS MIDWEST; UNINSURED EMPLOYERS BENEFITS TRUST FUND, *Defendants*

Adjudication Number: ADJ10045593
Van Nuys District Office

OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of a workers' compensation administrative law judge (WCJ) Findings and Order of July 6, 2021, wherein it was found that applicant did not sustain industrial injury to his trunk, hand, back, leg, upper extremity, lower extremity and psyche while employed as an automobile mechanic during a cumulative period ending on July 10, 2016.[1]

Applicant contends that the WCJ erred in not finding industrial injury, given that both reporting physicians primary treating physician internist Nagasamudra S. Ashok, M.D. and panel qualified medical evaluator orthopedist Christophe Lee, M.D. opined that applicant had sustained industrial injury. We have received an answer from employer Brake Land and defendant California Insurance Guarantee Association, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

We will grant reconsideration, rescind the WCJ's decision and return this matter for further proceedings, further development of the record, further analysis and further decision because multiple matters require clarification.

Applicant was seen by Dr. Ashok on July 22, 2015. Dr. Ashok reports that applicant gave him the following history regarding the mechanism of injury:

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[1] Although the Minutes of Hearing suggest an end date of applicant's industrial exposure in 2016, the Application for Adjudication alleged cumulative injury through July 10, 2015, and the evidence in this matter shows that applicant was employed at Brake Land only until 2015. Accordingly, the 2016 date appears to be a result of a clerical error.

> Mr. Siles Rivas reported having sustained cumulative trauma injuries to his hands, back and left leg on July 10, 2011 to July 10, 2015, during the course of his employment as an automobile mechanic for Brake Land, LLC.
>
> Specifically, Mr. Siles Rivas noticed that since approximately 2011 he developed pain in his hands, back, and left leg. He attributed the onset of his symptoms to performing the strenuous and repetitive physical demands of his job duties. He stated that he reported the onset of his symptoms to his boss and owner of the business Mr. Mohamed Shitzafaded [sic] on multiple occasions however he was never offered being sent to the company doctor.
>
> Mr. Siles Rivas stated that early in July of 2015 he self-procured treatment at Saint John Clinic in Los Angeles where he was evaluated and prescribed medications. He did not receive other treatment and continued to work through July 21, 2015 at which point he was terminated.

(July 22, 2015 report at p. 2.)

According to the history given to Dr. Ashok, applicant's job duties were as follows:

> His work duties entailed doing bumper-to-bumper mechanical work, repairing and servicing tires, removing and installing parts, changing fluids, using multiple handheld and power tools, tightening and loosening nuts and bolts, cleaning parts and his work area.
>
> Physically, the patient was required to be standing, walking, bending the neck and back, lifting up to 120 lbs., carrying, squatting, climbing, kneeling, crawling, twisting neck and back, repetitive use of hands, simple grasping, strong gripping, torquing, fine and gross function with both hands and reaching at all levels.

(July 22, 2015 report at p. 2.)

Applicant was also seen by panel qualified medical evaluator Dr. Lee, who apparently believed that he was evaluating applicant for a specific injury. In his October 24, 2016 report, Dr. Lee wrote the following as the history of the illness:

> Patient is a 33 year old male who is employed as a mechanic for Brake Land LLC. He tells me that on 7/10/15 he sustained industrial related injury to his low back while performing his usual and customary duties as a mechanic. At the end of the work day the patient noticed an onset of low back pain that radiated down to the left ankle level. Patient denies any direct trauma to low back or ankle.

(October 24, 2016 report at p. 4.)

Dr. Lee was told that applicant had "been working as a mechanic for Brake Land LLC since 2008. Patient's main duties involve manual labor as a mechanic that handles general maintenance of a vehicle as well as body work. Patient is required to lift heavy objects, use power tools as well as repetitive bending and stooping." (October 24, 2016 report at p. 4.)

Both Dr. Ashok and Dr. Lee concluded that applicant had sustained industrial injury. At the time of the sole report by Dr. Ashok in the evidentiary record, Dr. Ashok opined that applicant's condition was not yet permanent and stationary. (July 22, 2015 report at p. 6.) Dr. Lee eventually opined that applicant had a lumbar strain and opined that applicant's injury had caused 2% whole person impairment. (December 26, 2019 report at p. 5.)

The WCJ found that applicant did not sustain industrial injury based on a lack of credibility. However, many of the facts that the WCJ focuses on frankly do not appear to be material to the issue of whether applicant sustained industrial injury. The WCJ states that applicant claimed injury until July 2016 at trial, but all of the evidence in this matter, including the history given to both physicians was that he worked until only July of 2015. It is evident that the 2016 date was a clerical error, and the fact that applicant was not employed until 2016 does not negate the possibility he was injured in 2015 or before. The WCJ then discusses whether applicant was fired or quit, which is also not relevant to the issue of whether he sustained industrial injury. Then, the WCJ discusses whether applicant worked for another employer soon after leaving Brake Land, but applicant never denied that he was employed to Dr. Lee (who does not discuss applicant's employment history after July of 2015 in his initial report and then writes that applicant "has been working regular duty as a tow truck driver" [December 26, 2019 report at p. 3]) and Dr. Ashok's report dated July 22, 2015 was only days after he left Brake Land.

The WCJ writes in his Report, "If applicant were fired, his claim was not reported until afterwards and would be barred as a post-termination claim." (Report at p. 3.) However, defendants have never raised the post-termination defense, probably because, even if applicant weas terminated, multiple exception to the defense appear to apply. In any case, by not raising the defense, defendants have waived it. (*Sanders v. Dublin Buick* (2008) 2008 Wrk. Comp. P.D. LEXIS 263, *12 [Appeals Bd. panel].) The WCJ then discusses whether applicant was credible regarding the way he was paid, which is also not relevant to the question of whether he sustained industrial injury. (Report at p. 3.)

Although the WCJ apparently disbelieved applicant had sustained industrial injury because "no injury was reported to the employer until after leaving work," Dr. Lee's review of medical records evidences multiple medical visits for back pain from 2010 until July 2015. (October 24, 2016 report at pp. 12-14.) Additionally, the WCJ apparently found no injury because the "injuries alleged are… exaggerated" (Report at p. 3); however, it is unclear what the WCJ means since applicant complained to Dr. Lee of only "minimal to mild low back pain that radiates to the left ankle area exacerbated with prolonged standing, walking or sitting" (December 26, 2019 report at p. 4), applicant told Dr. Lee that "he no longer would like to pursue active treatment for the lumbar spine" (December 26, 2019 report at p. 5), and Dr. Lee assigned only 2% WPI to applicant's impairment.

These matters must be clarified in further proceedings. First, the WCJ should identify which specific testimony material to the issue of industrial injury that he found not credible. The reporting doctors should be informed of the WCJ's findings and base their conclusions on a history that adopts the WCJ's credibility determinations. If Dr. Lee issues supplemental reporting or testimony, he should discuss whether applicant sustained a *cumulative* injury. (Lab. Code, § 3208.1, subd. (b).) Dr. Lee, or any other reporting physician should discuss whether any cumulative injury led to the need for medical treatment as referenced in Dr. Lee's review of medical records or if these visits were caused by nonindustrial conditions. Additionally, to the extent that industrial injury is found on any modified history, there should be a full apportionment analysis, including the role of applicant's (apparently non-industrial) 2012 automobile accident. We note that Dr. Lee's review of medical records includes a PR-2 issued by "primary treating physician" Richard Hubbard dated March 16, 2014, over a year before the claim made in this case referencing back pain. (October 24, 2016 report at pp. 13-14), which raises the suspicion that applicant has alleged or sustained other industrial injuries. We note that Dr. Lee's review of medical records also references other reports by Dr. Hubbard noting "occupational injury" but those reports were not included in the evidentiary record. This discrepancy should be clarified in the further proceedings.

The WCJ and the Appeals Board have a duty to further develop the record when there is a complete absence of (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) medical evidence on an issue. The

WCAB has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) Since, in accordance with that mandate, "it is well established that the WCJ or the Board may not leave undeveloped matters" within its acquired specialized knowledge (*Id.* at p. 404), pursuant to Labor Code section 5906, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level for further development of the record and decision. We express no opinion on the ultimate resolution of any issue in this matter.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Order of July 6, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order of July 6, 2021 is **RESCINDED** and that this matter is **RETURNED** for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 28, 2021

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

FRANCISCO SILES RIVAS
TELLERIA, TELLERIA & LEVY
MICHAEL SABZEVAR
LAUGHLIN, FALBO, LEVY & MORESI
MSKW LAW, LLP
DIR, OFFICE OF THE DIRECTOR, LEGAL DEPARTMENT

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