

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

CASSIDY BOHANNON, *Applicant*

vs.

**ESCALON CONSOLIDATED FIRE PROTECTION DISTRICT, permissibly self-insured,
administered by ATHENS ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ10358078
Stockton 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 August 21, 2019, wherein the WCJ found in pertinent part that applicant sustained a specific non-industrial injury to his lower back on July 26, 2015; that as a result of the July 26, 2015 injury applicant underwent surgery which resulted in a non-industrial urological/bladder injury; that the record needs further development to determine whether applicant sustained a cumulative low back injury during the period ending November 18, 2018; and that orthopedic qualified medical examiner (QME) Aubrey A. Swartz, M.D., was biased and was stricken as the QME in this matter.

Applicant contends that there is no evidence that QME Dr. Swartz was biased, that the reports from Dr. Swartz are substantial evidence that applicant sustained a cumulative injury as claimed, and that there is no medical evidence to support the finding that applicant sustained a specific non-industrial back injury on July 26, 2015.

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 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 low back and bladder while employed by defendant as firefighter during the period ending November 18, 2015. Applicant received medical treatment from various providers at the Sutter Health Foundation, including Dan Davidson, M.D., and Curtis A. Rogers, M.D, from January 15, 2014, through November 27 2015. (See Joint Exhs. E – J.) On December 15, 2015, applicant underwent a spinal laminectomy/discectomy fusion surgery at the L5-S1 level. (Joint Exh. L, Alexander Sparkuhl, M.D, October 11, 2016, p. 9, record review.)

On October 11, 2016, applicant was evaluated by urology QME Dr. Sparkuhl. After examining applicant, taking a history, and reviewing the medical record, Dr. Sparkuhl stated:

... [A]fter hospital discharge the claimant noticed that his urinary stream was intermittent and weak. His urinary condition did not change until February 2016 when he visited a urologist and was told to start intermittent self-catheterization. According to the available medical record the urologist, Dr. Garber, found that the claimant did not empty his bladder completely. Unfortunately there is no record of Dr. Garber's evaluation or treatment in the available record. ...¶ ... With reasonable medical probability the claimant's urological disorders of urinary and sexual dysfunction are related to his 12/17/15 spine surgery. Since the spine surgery is industrially related the claimant's urinary and sexual dysfunction are also industrially related.
(Joint Exh. L, p. 13.)

He concluded that applicant's condition had not reached maximum medical improvement (MMI) status. (Joint Exh. L, p. 14.)

Orthopedic QME Dr. Swartz evaluated applicant on August 17, 2017. Dr. Swartz examined applicant, took a history, and reviewed the medical record. He stated that, "The issue of cumulative trauma appears to be reasonable in view of all of the physical requirements of his job as a firefighter over many years." (Joint Exh. A, Dr. Swartz, August 17, 2017, p. 9.) Dr. Swartz determined that applicant's condition had reached permanent and stationary (P&S) status as of the date of the evaluation (Joint Exh. A, p. 10) and that applicant had 20% lumbar spine whole person impairment (WPI). (Joint Exh. A, p. 12.) He then noted that:

With respect to apportionment, it would be reasonable to apportion 75% to his work activities, over his period of cumulative trauma as a firefighter and apportion 25% to his activities of daily living.
(Joint Exh. A, p. 13.)

Dr. Sparkuhl was given additional medical records to review and in his supplemental report

he concluded:

With reasonable medical probability the claimant's urological disorders are industrially related. From a urological standpoint apportionment was entirely to his industrial injury since he had no bladder or sexual dysfunction before the workplace injury. Absent his industrial injury the claimant would likely have no urological disorder at this time.

(Joint Exh. K, Dr. Sparkuhl, September 26, 2017, p. 5.)

On November 9, 2017, QME Dr. Swartz's deposition was taken.¹ (Joint Exh. C, Dr. Swartz, November 9, 2017, deposition transcript.) Applicant was re-evaluated by Dr. Swartz on September 14, 2018. After examining applicant, taking an interim history, and reviewing the interim medical record Dr. Swartz stated, "I am recommending advancing Mr. Bohannon's MMI/P&S status to the date of this evaluation, September 14, 2018." (Joint Exh. B, Dr. Swartz, September 14, 2018, p. 10.) The doctor again found that applicant had 20% lumbar spine WPI, but he changed his opinion on apportionment to find that 50% of the impairment was industrial, 25% was due to applicant's routine "conditioning exercises," and 25% was caused by the November 2015 weight lifting incident. (Joint Exh. B, pp. 10 – 11.)

The parties proceeded to trial on August 19, 2019. The issues submitted for decision included injury arising out of and occurring in the course of employment (AOE/COE), permanent disability, and whether QME Dr. Swartz was biased in favor of firefighters. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 19, 2019, p. 2.)

DISCUSSION

To be substantial evidence a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative or based on incorrect legal theories, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Dr. Swartz's deposition testimony included:

Q. Well, let me be blunt about it. Is it more reasonably medically probable that the disc herniation occurred because of the squatting-at-the-gym incident or cumulative trauma over time with the job duties that he had?

¹ Dr. Swartz's deposition testimony will be discussed below.

A. One more than the other? In this case here, we don't have enough real hard data to help us along with that. And the question is, can cumulative trauma affect the disc, a degenerated disc, bulging, protruding, herniating, extruding? Yes, it can. It can. ¶ Can that horrific episode of 30 times squatting and then getting up again with a 100-pound load on your shoulders? I mean, that was really over -- that was over the edge. I mean, I don't know why he did that. I don't think you get anything out of that except injured, you know.

Q. Which is what I'm basically saying. That was the cause of the need for surgery, correct, the lifting incident?

A. I think there's a word called precipitation when it comes to issues of causation. Precipitation is a sudden event happening which can push things along at a faster rate than they were moving with -- with repetitive strain or cumulative trauma, and both mean exactly the same thing. ¶ A cumulative trauma is a California -- unique to California. The rest of the country uses repetitive strain. It doesn't make California wrong. They both mean the same, and that's okay. ... I think the stage is set with all of the cumulative trauma, and I think -- and I think the -- the horrific loads placed on his body by him probably precipitated it. It just pushed it over the -- it was on the edge of the cliff anyway, and it just pushed it over. ...

(Joint Exh. C, pp. 48 – 49)

A. We're narrowing it down now, but I'm looking at multifactorial, which is a safe zone to be in if you're not really sure, and you don't -- there isn't that MRI that was taken a few weeks before this 'thing, and we got it nailed down as the proof we need, but we don't have it. That would have been great -- or a few months before. We don't have it.

(Joint Exh. C, p. 50.)

A. That whole spinal area -- it's not the cord, but it's still the cauda equine [nerve roots]. When you start narrowing it, you get it on both sides. So then he -- then he gets a sudden low back and left leg, so I guess he could push the -- I guess he could push some more disc material which would go left, more to the left than the right, maybe just completely to the left. Maybe the disc can sort of -- it moves around in there sometimes, and it could move around and twist. They can veer off to one side or the other. ¶ It's kind of dynamic. It's not just fixed. And so I would sort of go for -- it was there anyway. It was developing, and he pushed it along. He precipitated it with this ridiculous exercise program he was in, severe weightlifting program.

(Joint Exh. C, pp. 54 – 55.)

A. Well, if you're lifting with your arms and shoulders and bracing your body carefully when you're lifting and carrying, which you need to do, doing it carefully, it's often using your knees to lift them, your back and your knees in combination, frankly, learning how to do that. ¶ It's different than -- your arms -- your arms, shoulders, they're -- and lifting in front of you, they're really capable of this more so than putting 100 pounds on your shoulders and moving your hips

and knees and feet and straining all of the -- and putting a strain on your spine as well. That's more of a -- these are axial forces coming down from your shoulders, down your spine, and it's a little different than the -- than the biomechanics that you could -- that you can alter by altering your posture and position when you're holding things with your arms. It makes a big difference. ¶ I don't think -- it doesn't sound like he was used to this, but I don't know that he wasn't doing this before. I don't know if that wasn't a regular part of his routine. As I said, people who work out usually will do ten reps of that maybe. You know, I mean, they'll just go to their limit, but there are big muscular people who are on the covers of these magazines that are competition lifters who do that kind anyway. As you say, he's not that big. ¶ But if you're doing what he did and he did -- you know, and he might have been doing this before. This might have been one of his routines, but this certainly appeared to get to him. I mean, he would know it because he decided not to be industrial, not to go industrial. So he must have felt that he did it, and it was his responsibility and that he was going to handle it in most -- in a most honest and ethical fashion. ¶ As I said, that's what's really influencing me the most, that he didn't bother taking the easy route through work comp, which would have been easier on his finances in the short run and the long run and -- ¶ ... Yeah. So these factors, I think, are kind of important that I brought up.
(Joint Exh. C, pp. 70 – 72.)

The above quoted testimony are examples of Swartz's testimony that clearly show his opinions are not based on facts, but are based on speculation and/or guess. The deposition transcript contains other examples of this nature and includes testimony indicating the doctor's opinions are also based on an incorrect legal theory. (See e.g. pp. 58 – 60, pp. 60 – 62, and p. 74.) When viewed as a whole, (including both reports and the deposition testimony) we do not see evidence that Dr. Swartz was biased in favor of applicant as a fire fighter, but as discussed above, his reports and deposition testimony do not constitute substantial evidence.

Finally, having reviewed the entire record, it is clear that there is no substantial medical evidence that addresses the issue of whether the July 26, 2015 incident, in and of itself, constitutes an injury. (Lab. Code, § 3208.1.)

For these reasons, we agree with the WCJ that the record in this matter needs to be further developed. Normally, 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).) However, if the parties choose, and under the circumstances discussed herein, it is appropriate that the parties have applicant evaluated by an agreed medical examiner or in the alternative, for the WCJ to appoint a regular physician. (Lab. Code § 5701.)

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 August 21, 2019 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.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 2, 2022

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

**CASSIDY BOHANNON
LAW OFFICES OF GARY NELSON
LAUGHLIN, FALBO, LEVY & MORESI**

TLH/pc

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