WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MATTHEW BAKES, *Applicant*

vs.

KAISER FOUNDATION HOSPITAL, permissibly self-insured; administered by SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ11113127
Sacramento District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated below, we will grant reconsideration solely to amend the WCJ's decision to Order that applicant take nothing by way of his claim and otherwise affirm the WCJ's Finding of Fact, for the reasons stated in the WCJ's report, which we adopt and incorporate.

We are persuaded that the WCJ's dismissal of applicant's claim was in error. Rather, the proper disposition based on the WCJ's proper findings is to order that applicant take nothing. Therefore, we amend the Order accordingly. The Appeals Board may correct clerical errors at any time. (*Toccalino v. Worker's Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 558 [47 Cal.Comp.Cases 145].)

For the foregoing reasons,

IT IS ORDERED that reconsideration of the November 14, 2022 Findings of Fact and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the November 14, 2022 Findings of Fact and Order is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

ORDER

IT IS ORDERED that applicant take nothing by way of his claim.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 7, 2023

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

MATTHEW BAKES
CENTRAL VALLEY
ALBERT & MACKENZIE

PAG/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Applicant, who is represented, filed, in pro per, a timely and verified Petition for Reconsideration from the Findings of Fact and Order, issued on November 14, 2022, which found that applicant did not sustain an industrial injury to his right leg and right foot as part of a cumulative trauma through the last date of his employment in 2017. I further issued an order dismissing the case with prejudice.

Applicant alleges that I erred in finding the injury non-industrial because I acted with bias and/or prejudice toward applicant in finding his testimony not credible. Applicant further alleges that the reporting of the QME supports a finding of industrial injury. Lastly, applicant requests reconsideration be granted to allow additional material evidence into the record, which could not with reasonable diligence have been discovered prior to trial.

Having thoroughly reviewed the contents of the Board's file and the Petition for Reconsideration, I respectfully recommend that defendant's Petition for Reconsideration be **DENIED.**

FACTUAL AND PROCEDURAL BACKGROUND

This matter proceeded to trial wherein applicant alleged injury to his right leg and right foot via cumulative injury through his last date of employment on November 7, 2017. (Minutes of Hearing and Summary of Evidence (MOH/SOE), September 29, 2022, p. 2, lines 7-12.)[1] Applicant worked as a patient transport aide for Kaiser Permanente beginning in 2002. (*Id*. at p. 3, lines 11-12.)

The sole issue for trial was injury AOE/COE. (*Id*. at p. 2, line 28.)

On November 8, 2017, applicant was evaluated by Douglas Merrill, M.D., who noted the following history: "[W]hile at work on 11/07/2017 he began experiencing significant pain in his RIGHT foot and had also noticed some discoloration and swelling in his RIGHT forefoot." (Joint Exhibit 112, Report of Douglas Merrill, M.D., November 8, 2017, p. 1.) In the first report of injury, Dr. Merrill noted: "Per patient: I was simply going about my job duties and the pain gradually got worse to my right foot. I then removed my sock and my right foot was swollen and bruised." (Joint Exhibit 111, Report of Douglas Merrill, M.D., November 8, 2017, p. 1.) Applicant reported no specific mechanism of injury to Dr. Merrill. (*Ibid*.)

Dr. Merrill opined that applicant's alleged injury was not caused, exacerbated or aggravated by his employment. (Joint Exhibit 112, *supra* at p. 2.)

[1] This is applicant's second claim of cumulative injury. At trial, the court took judicial notice of applicant's prior claims, including a prior claim of cumulative injury in ADJ9139200. (MOH/SOE, *supra* at p. 2, lines 34-39.)

Applicant's private treater noted the following history of injury: "He worked for several years and then on November 8, 2017, without incident, he began to have right foot pain again." (Applicant's Exhibit 1, p. 1.)

Applicant described his injury at trial as follows:

> On the last day he worked, there was an embankment of 15 degrees. He had complained about pushing gurneys up the embankment previously. After stepping on the embankment and pushing a gurney he believes his foot (*sic*) suffered a trauma to the foot. His foot went straight onto the pavement, toe-down. His toes bent forward the wrong way. He thinks this was too much and caused the black and blue marks to his toe.

(MOH/SOE*,* at p. 6, line 40 through p. 7, line 1.)

Applicant was evaluated by QME Robert Ansel, M.D. who issued eight reports in evidence and was deposed twice. (Joint Exhibits 101 through 110.) Dr. Ansel took a history that applicant suffered a marked increase of pain in November 2017 absent any specific injury. (Joint Exhibit 101, p. 2.) Dr. Ansel initially opined that industrial aggravation occurred. (See generally, Joint Exhibits 101 and 102.) However, upon review of additional records, including applicant's prior claims of injury to the foot and the medical report of the QMEs in those prior claims, Dr. Ansel changed his opinion and found that applicant did not suffer any industrial injury. (Joint Exhibit 104, p. 50.) In part, Dr. Ansel based his opinion on applicant's credibility as a patient and noted "some degree of non-physiologic and exaggerated responses." (*Id*. at p. 4.)

DISCUSSION

When applicant claims a physical injury, applicant has the initial burden of proving industrial causation by showing the employment was a contributing cause. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302; § 5705.) Applicant must prove by a preponderance of the evidence that an injury occurred AOE/COE. (Lab. Code1, §§ 3202.5; 3600(a).)

> The requirement of Labor Code section 3600 is twofold. On the one hand, the injury must occur in the course of the employment. This concept ordinarily refers to the time, place, and circumstances under which the injury occurs. On the other hand, the statute requires that an injury arise out of the employment. It has long been settled that for an injury to arise out of the employment it must occur by reason of a condition or incident of the employment. That is, the employment and the injury must be linked in some causal fashion.
>
> * * *
>
> The statutory proximate cause language [of section 3600] has been held to be less restrictive than that used in tort law, because of the statutory policy set forth in the Labor Code favoring awards of employee benefits. In general, for the purposes of the causation requirement in workers'

> compensation, it is sufficient if the connection between work and the injury be a contributing cause of the injury.

(*Clark*, *supra* at 297-298 (internal citations and quotations omitted).)

The record submitted does not support a finding of industrial injury. It appears that applicant may be mistaken as to Dr. Ansel's findings. Applicant repeatedly refers to Dr. Ansel's opinion that it is 80% industrial and 20% non-industrial. Dr. Ansel's opinion is clear that he believes the injury is cause 80% prior industrial.

Dr. Ansel is clear that no new injury occurred:

> As noted, this gentleman's injury back in 2010 was accepted and provided him a 19% WPI.
>
> Subsequently as noted, he was involved in a motor vehicle accident and has had ongoing and progressive complaints as described by myself back in March and now in November of this year.
>
> The issue, of course, is whether or not Mr. Bakes is:
>
> A) Credible.
>
> B) Whether or not his increasing symptoms are as the result of ongoing, injurious injury, i.e., cumulative trauma which is now his claim.
>
> Clearly, I find some degree of objective impairment and clear evidence, as noted within the chart.
>
> On this examination, however, he does not have any objective evidence of CRPS, and clearly has non-physiologic, neurologic response.
>
> As such, based on my examination on two occasions, my extensive review of medical records, and now the issues that have been raised, I find no credible evidence that Mr. Bakes has sustained cumulative trauma up through his last date of employment.
>
> I do not dispute that he has some ongoing complaints and some degree of objective findings as described, but clearly he, as of this examination, has no evidence of new or further disability on an industrial basis above and beyond that from his settlement in 2010.

(Joint Exhibit 104, p. 50.)

The parties explicitly addressed the 80/20 causation opinion in deposition:

> Q. I'd like to go back to the November 8, 2018 report and on page 15 -- I'm sorry -- page 50 you had concluded and found "No credible evidence that the applicant had sustained a cumulative trauma through his last date of employment"; is that correct?
>
> A I said that, correct.

Q You had issued the report on October 13, 2019. You had commented on page two confirming that there was no CRPS but that Mr. Bakes did have permanent disability, 80 percent of which was industrial and 20 percent non-industrial, and you went on to say based on the medical record that there was no objective findings, no CRPS, and no cumulative trauma through the end of employment.

My question is about the permanent disability you found. Is this in reference to the applicant's prior 20 -- or prior injury of 2010 that you had referenced in your earlier reports?

A Yes.

(Joint Exhibit 110, p. 5, line 22, through p. 6, line 15.)

The medical evidence in this case is clear that no cumulative injury was found through the last date of employment. Dr. Ansel's discussion of causation of permanent disability is referring the reader back to a prior industrial injury of 2010. Applicant's arguments to the contrary appear to be inadvertent misstatements of the record.

Applicant next argues that I exhibited bias in noting that he was nervous. Such a discussion was not bias toward applicant. I understand that every person who testifies can experience nervousness. When I see that, I attempt to assist them in alleviating any nervousness, which also assists the court reporting in taking down an accurate record. Mr. Bakes appeared at trial to be a perfectly nice and polite person. The fact that he also appeared nervous did not factor into my judgement of his credibility. The primary credibility issue in this case is the substance of applicant's testimony and the changing story regarding the injury. Applicant's testimony was not corroborated by the contemporaneous medical record. The next issue regarding credibility were the opinions by Dr. Ansel regarding non-physiologic and exaggerated responses during the physical exam. My opinions as to the credibility of his testimony were based off the inconsistencies in the record and applicant's reported presentation at examination.

The last issue raised is applicant's request to address newly discovered evidence. Pursuant to Appeals Board Rule 10974:

> Where reconsideration is sought on the ground of newly discovered evidence that could not with reasonable diligence have been produced before submission of the case . . .
>
> (c) A description of any documentary evidence to be offered;
>
> (d) The effect that the evidence will have on the record and on the prior decision; and
>
> (e) As to newly discovered evidence, a full and accurate statement of the reasons why the testimony or exhibits could not reasonably have been discovered or produced before submission of the case.

(Cal. Code Regs, tit. 9, § 10974.)

I have reviewed the additional exhibits attached to the petition for reconsideration. None of the exhibits would appear to affect the prior decision in this matter. Applicant has not offered any new opinion addressing the issue of industrial causation. It would appear that Dr. Blake's 2010

report might bolster the conclusion of Dr. Ansel in this matter, which is that applicant's complaints arose from a 2010 injury, and not from a 2017 cumulative injury. Given that the new evidence does not appear to change the prior decision, I decline to address whether applicant could have produced the evidence at trial.

For all of the above reasons, I continue to find that applicant did not sustain an industrial injury via cumulative trauma. I respectfully recommend that the petition for reconsideration be denied.

Date: 12/12/2022

Eric Ledger

WORKERS'COMPENSATION
ADMINISTRATIVE LAW JUDGE