WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SALVADOR MARTINEZ, ***Applicant***

vs.

HENRY RAMIREZ aka ENRIQUE CEJA RAMIREZ, an individual, dba EL TATA FAST FOOD, ***Defendants***

Adjudication Number: ADJ10401977
Pomona District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award (F&A) of September 21, 2023, wherein the workers' compensation administrative law judge found in relevant part that 1) applicant, while employed during the period January 1, 2015 through April 1, 2016, as a cook at Anaheim, California, by defendant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his neck, back, bilateral shoulders, bilateral hands, head, bilateral knees and bilateral feet; 2) at the time of injury the employer was illegally uninsured; and 3) employment of applicant by defendant was admitted by the pro per employer during cross-examination of applicant and therefore was established. Applicant was also awarded treatment on an industrial basis for his neck, back, bilateral, shoulders, bilateral hands, head, bilateral knees and bilateral feet.

Defendant contends that applicant did not file his claim until after he was fired; there was a lack of evidence that applicant sustained injury at work; and that he worked as a car mechanic and was injured in that capacity, and that applicant lied.

We have not received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the WCJ with respect thereto. Based on our review of the record, for the reasons discussed below, we will grant reconsideration, rescind the F&A, substitute a new F&A, and return this matter to the WCJ for further proceedings consistent with this decision.

FACTS

Applicant claimed industrial injury to his back, neck, head, bilateral shoulders, bilateral hands, bilateral knees, and bilateral feet while working as a cook for the defendant during the period from January 1, 2015, to April 1, 2016.

In the First report of Occupational Injury or Illness, Primary Treating Physician (PTP) Dr. Pourarbab reported that the injury was a repetitive injury to the shoulders, knees, neck, and upper back. (Ex. 2, Doctor's First Report of Injury dated 5/20/16, p. 2.)

Applicant testified that he worked for Tacos and Mariscos from August 2015 to August 2016, and was hired by Enrique, otherwise known as Henry Ramirez and was also supervised by Henry's wife Maria Ramirez. (2/8/22 Minutes of Hearing/Statement of Evidence (MOH/SOE), p. 3.) He worked as a cook approximately 30 or 40 hours per week both in the restaurant and for the banquets catered by the restaurant. (2/8/22 MOH/SOE, pp. 2, 5.) He cooked and also often lifted meat, big pots, and trays of food, including loading his truck to transport food to the banquets. (2/8/22 MOH/SOE, p. 2; 11/15/22 MOH/SOE, pp. 3-4.) He began feeling pain in his knee, shoulders, arms, hands, and feet about four months before he stopped working for defendant. (2/8/22 MOH/SOE, pp. 4, 6.) He often told his co-workers and possibly the defendant's daughter about his pain but did not tell Ramirez or his wife. (2/8/22 MOH/SOE, pp. 4-5; 11/15/22 MOH/SOE, p. 4.) He did not seek medical treatment then as he did not have health insurance. (2/8/22 MOH/SOE, p. 4.) He was fired in approximately April 2016, after he had trouble going to work due to car trouble. (2/8/22 MOH/SOE, pp. 4-5.) His next job was on-call painting. (2/8/22 MOH/SOE, p. 5.) He first sought medical treatment when he saw his attorney. (3/29/22 MOH/SOE, pp. 3-5)

Defendant Henry Ramirez testified that applicant began working for him at another restaurant in August 2014, and began his most recent job with him in June 2015. (11/15/23 MOH/SOE, p. 5.) Defendant stated that applicant's last day physically on the job was March 12, 2016, and he was fired on March 14, 2016, because he was a "no show" for two days. (11/15/23

MOH/SOE, pp. 6-7.) Applicant never told him about any injuries except when he cut his hand once. (11/15/23 MOH/SOE, p. 6.) Applicant worked approximately 25 to 30 hours at his restaurant and never worked at the banquets. (11/15/23 MOH/SOE, pp. 6-7.) The timecards provided were not timecards from his restaurant. (11/15/23 MOH/SOE, p. 7.) He believed applicant made this claim in retaliation. (11/15/23 MOH/SOE, p. 8.)

Another employee and supervisor, Mario Alvarez Ponce, testified that he and applicant got along well and he never had any problems with him. (3/7/23 MOH/SOE, p. 3.) Ponce further testified that applicant worked approximately 25 hours per week, cooking for both the restaurant and the banquets but that he did not deliver food for the banquets as far as he knew. (3/7/23 MOH/SOE, pp. 3-5.) Applicant told him he got hurt working as a mechanic but that working for defendant made his injury worse. (3/7/23 MOH/SOE, p. 3, 5.) Ponce saw applicant having issues with his shoulder lifting things and with his hands when chopping. (3/7/23 MOH/SOE, p. 5.) Both Ponce and applicant would lift food; the work was hard and repetitive. (3/7/23 MOH/SOE, p. 5.) Ponce saw applicant lifting pots of food and carrying them about two meters. (3/7/23 MOH/SOE, p. 6.) Applicant was fired after Ponce left the job. (3/7/23 MOH/SOE, pp. 5-6.)

Defendant's step-daughter testified that applicant once told her he was having problems performing his work due to pain and stated he hurt his arm fixing cars. (7/18/23 MOH/SOE, p. 5.) She saw him limit his work but applicant never requested any work restrictions. (7/18/23 MOH/SOE, p. 7.)

In the F&A of September 21, 2023, the WCJ found in relevant part that 1) applicant, while employed during the period January 1, 2015 through April 1, 2016, as a cook at Anaheim, California, by defendant sustained injury arising out of and occurring in the course of employment to his neck, back, bilateral shoulders, bilateral hands, head, bilateral knees and bilateral feet; 2) at the time of injury the employer was illegally uninsured; and 3) employment of applicant by defendant was admitted by the pro per employer during cross-examination of applicant and therefore was established. Applicant was also awarded treatment on an industrial basis for his neck, back, bilateral, shoulders, bilateral hands, head, bilateral knees and bilateral feet. In the Opinion on Decision (OOD), the WCJ noted that he based his finding of AOE/COE on the credible testimony of applicant and Ponce as well as Dr. Pourarbab's medical reports. (OOD, p. 3.)

DISCUSSION

Labor Code section 3600(a)[1] provides for liability for injuries sustained "arising out of and in the course of the employment." An employer is liable for workers' compensation benefits "without regard to negligence." (Lab. Code, § 3600(a).) An employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a), 3202.5.) Whether an employee's injury arose out of and in the course of employment is generally a question of fact to be determined in light of the particular circumstances of the case. (*Wright v. Beverly Fabrics* (2002) 95 Cal.App.4th 346, 353 [67 Cal.Comp.Cases 51].) Labor Code section 3600(a)(2) requires as a condition of compensation that "at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment."

For the purpose of meeting the causation requirement in a workers' compensation injury claim, it is sufficient if the work is a contributing cause of the injury. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (*Clark*), *supra*, 61 Cal.4th at pp. 298-299.) "The applicant in a workers' compensation proceeding has the burden of proving industrial causation by a 'reasonable probability.' (citation) That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700-1701 [58 Cal.Comp.Cases 313].) Medical evidence that industrial injury was reasonably probable, although not certain, constitutes substantial evidence for a finding of injury AOE/COE. (*McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 417 [33 Cal.Comp.Cases 660].) Although the factual issue of the occurrence of the alleged incident is a determination for the WCJ, the issue of injury is a medical determination, which requires expert medical opinion. As the Court of Appeal explained in *Peter Kiewit Sons v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 831, 838-839 [30 Cal.Comp.Cases 188]: "Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a [WCAB] finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence. Expert testimony is necessary where the truth is occult and can be found only by resorting to the sciences."

[1] All further statutory references are to the Labor Code unless otherwise noted.

A medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Bd. en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Here, applicant worked as a cook and also often lifted meat, big pots, and trays of food, including to load his truck to transport food to the banquets. (2/8/22 MOH/SOE, p. 2; 11/15/22 MOH/SOE, pp. 3-4.) He began feeling pain in his knee, shoulders, arms, hands, and feet about four months before he stopped working for defendant. (2/8/22 MOH/SOE, pp. 4, 6.) Ponce's testimony was consistent with applicant's. Ponce testified that applicant worked as a cook, which included lifting and carrying pots of food two meters. (3/7/23 MOH/SOE, pp. 3-6.) Ponce saw applicant having issues with his shoulder lifting things and with his hands when chopping. (3/7/23 MOH/SOE, p. 5.) Ponce stated that the work was hard and repetitive. (3/7/23 MOH/SOE, p. 5.)

Here, the WCJ found that applicant's testimony regarding his work for defendant, including whether the work was repetitive and arduous, was credible. The finding of injury AOE/COE was based on "applicant's credible testimony, the credible testimony of Mario Alvarez Ponce, and the medical report(s) of Peyman Pourabab, M.D., dated May 20, 2016 and June 30, 2016." (OOD, p. 3.) We have given the WCJ's credibility determination(s) great weight because the WCJ had the opportunity to observe the demeanor of the witness(es). (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination(s). (*Id*.)

The date of injury for cumulative trauma claims "is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (Lab. Code, § 5412.) "Pursuant to section 5412, the date of a cumulative injury is the date the employee *first*

suffers a 'disability' and has reason to know the disability is work related." (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 238 [58 Cal.Comp.Cases 323].) Disability has been defined as "an impairment of bodily functions which results in the impairment of earnings capacity." (*J.T. Thorp v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 327, 336 [49 Cal.Comp.Cases 224].) Disability can be either temporary or permanent. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 253 Cal.App.3d 463, 474 [56 Cal.Comp.Cases 631].) Whether there is temporary or permanent disability indicating the date of cumulative injury is a question of fact, which must be supported by substantial evidence. (*Austin*, *supra*, 16 Cal.App.4th at 233-235.) Here, when applicant was examined by Dr. Pourarbab, he learned that he had an industrial injury, and he was placed on total temporary disability. Thus, applicant's section 5412 date of injury is May 20, 2016.

Section 3600(a)(10) bars compensation for a claim of physical injuries filed after the employee received a notice of termination or layoff unless the employee demonstrates by a preponderance of the evidence at least one of the following circumstances: (1) the employer had notice of the injury prior to the notice of termination or layoff; (2) the employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury; (3) the date of the specific injury is subsequent to the date of notice or termination of layoff, but prior to the effective date of the termination or layoff; or (4) the injury is a cumulative trauma and the date of injury is subsequent to the date of notice of termination or layoff. If it is determined that applicant sustained a cumulative trauma injury, the WCJ must analyze whether the date of injury as described in section 5412 is subsequent to the date of notice of termination or layoff per section 3600(a)(10). Here, the WCJ determined that defendant employer had notice of applicant's injury prior to his termination, so that his claim was not barred as a post-termination claim. However, we observe that applicant's section 5412 date of injury is May 20, 2016, so that section 3600(a)(10)(4) also provides another basis to conclude that applicant's claim was not barred.

The WCJ found that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his neck, back, bilateral shoulders, bilateral hands, head, bilateral knees and bilateral feet. In the First report of Occupational Injury or Illness, Primary Treating Physician (PTP) Dr. Pourarbab only reported that the injury was a repetitive injury to the shoulders, knees, neck, and upper back. (Ex. 2, Doctor's First Report of Injury dated 5/20/16, p. 2.) There was no medical evidence regarding the hands, head, and feet.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on a threshold issue. (Lab. Code, §§ 5701, 5906; *Nunes* (*Grace*) *v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 752; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; *McDonald v. Workers' Comp. Appeals Bd., TLG Med. Prods.* (2005) 70 Cal.Comp.Cases 797, 802.) The Appeals Board has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403.)

Sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141-143 (Appeals Bd. en banc).) The Appeals Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd*., *supra*, 79 Cal.App.4th at p. 404.) Therefore, we will deny reconsideration as to the shoulders, knees, neck, and upper back and defer all other body parts. We make no changes to the Specific Finding Order Under Labor Code § 3722. Upon return to the WCJ, we recommend that the medical record be developed to cure the deficiencies in Dr. Pourarbab's report.

Accordingly, we grant defendant's Petition, rescind the F&A and substitute a new F&A, which finds that applicant sustained injury to his neck, back, bilateral shoulders, and bilateral knees, and defers the issue of injury to all other body parts.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the September 21, 2023 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Worker's Compensation Appeals Board that the September 21, 2023 Findings and Award are **RESCINDED,** the following F&A is **SUBSTITUTED** in its place, and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion:

FINDINGS OF FACT

1. SALVADOR MARTINEZ, while employed during the period January 1, 2015 through April 1, 2016, as a cook at Anaheim, California, by HENRY RAMIREZ AKA ENRIQUE CEJA RAMIREZ, an individual, DBA EL TATA FAST FOOD, sustained injury arising out of and occurring in the course of employment to his neck, back, bilateral shoulders, and bilateral knees.
2. The issue of injury to other body parts are deferred.
3. At the time of injury the employer was ILLEGALLY UNINSURED.
4. Employment of SALVADOR MARTINEZ by HENRY RAMIREZ AKA ENRIQUE CEJA RAMIREZ, an individual, DBA EL TATA FAST FOOD was admitted by defendant employer.

AWARD

IT IS FOUND that SALVADOR MARTINEZ's injuries arose out of employment and occurred during the course of employment while employed by HENRY RAMIREZ AKA ENRIQUE CEJA RAMIREZ, an individual, DBA EL TATA FAST FOOD, who was ILLEGALLY UNINSURED.

Applicant is entitled to treatment on an industrial basis for his neck, back, bilateral shoulders, and bilateral knees.

SPECIFIC FINDING ORDER UNDER LABOR CODE §3722

IT IS FOUND that HENRY RAMIREZ AKA ENRIQUE CEJA RAMIREZ, an individual, DBA EL TATA FAST FOOD, was ILLEGALLY UNINSURED at the time the time of the applicant's injuries. Pursuant to Labor Code §3722(d) & (e), Defendant is hereby Ordered to submit to the Director of Industrial Relations, on 1515 Clay St., 17th Floor, Oakland, CA 94612, within 10 days after service of these Findings, Awards, and Orders of the Workers' Compensation Appeals Board a verified statement of the number of employees in his employ on the date of injury.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 11, 2023

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

HENRY RAMIREZ DBA EL TATA FAST FOOD
SALVADOR MARTINEZ
BLOMBERG, BENSON& GARRETT, INC.
OD LEGAL – LEGAL UNIT

JMR/*ara*

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