WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RYAN BOXALL, *Applicant*

vs.

FLYERS ENERGY TRANSPORTATION;
MIDWEST EMPLOYERS CASUALTY COMPANY;
administered by GALLAGHER BASSETT SERVICES, INC. *Defendants*

Adjudication Numbers: ADJ11522221
San Bernardino District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the "Findings of Fact and Order" (F&O) issued on March 10, 2021, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant was intoxicated or otherwise impaired when he sustained injury via a motor vehicle accident and barred applicant's claim pursuant to Labor Code[2], section 3600(a)(4).

Applicant argues that the WCJ erred because defendant failed to prove intoxication and that even if intoxication were proven, defendant failed to prove that intoxication proximately caused applicant's injury.

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

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[1] Commissioner Marguerite Sweeney, who was previously on the panel in this matter, no longer serves on the Board. Another panelist was appointed in her place.

[2] All future references are to the Labor Code, unless noted.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration we will rescind the WCJ's March 10, 2021 F&O and return the matter to the trial level for further development of the record.

FACTS

The WCJ's Opinion on Decision thoroughly and accurately recites the facts of this case as follows:

> Ryan Boxall . . . while employed as a driver, at Auburn, California, by Flyers Energy Transportation, then insured as to workers' compensation liability by Mid-West Employers Casualty Company administered by Gallagher Bassett Services claims to have sustained injury arising out of and occurring in the course of his employment to his brain, head, neck, back, shoulders, knee, psyche and miscellaneous body parts on 2-14-2018.
>
> Applicant asserts that while operating a company truck during the performance of his job duties he suffered injuries as a result of a motor vehicle accident. Defendant does not dispute the motor vehicle accident occurred. However, defendant asserts that although the applicant was involved in the motor vehicle accident, his benefits should be disallowed as the applicant was intoxicated at the time causing impairment based on the facts surrounding the accident and the results of a urine test reflecting positive for cocaine.
>
> Subsequently, defendant delayed and then denied the claim based on intoxication defense. Applicant now seeks a finding of bad faith denial.

ISSUES
AOE/COE

> It is undisputed that the applicant was involved in a motor vehicle accident while driving a company truck during normal business hours during the course of his employment. At trial, the applicant testified that he began his shift at 4 a.m. After loading his vehicle, the applicant drove to Crestline for his first delivery. After unloading his first delivery, the applicant returned to the Colton facility to reload at about 8:15 a.m. After loading his second load and having lunch, the applicant left the Colton facility heading to Sunny Slope. The applicant believes the accident occurred at around 10:45 to 11:00 a.m. (SOE pg 6, ln 13). The last memory the applicant has leading up to the accident was exiting the freeway at California Street and heading south. The applicant's next memory is waking up and being treated by paramedics.

Evidence offered reflect that emergency vehicles responded to the motor vehicle accident and a report was filed by Redlands Police Department. The report identifies the applicant as "Party 1" and the accident occurred on Tennessee Street between State St and Park Ave. According to the traffic accident report, witness Bickel observed the applicant's truck and trailer pass his vehicle on the left. Witness Bickel looked away and when he looked back observed the applicant's truck was airborne and flipping over in the #2 lane and a silver car was under the truck and trailer (App Ex 3, pg 6). The investigating officer concluded that the applicant made an unsafe turning movement, causing his vehicle to collide with a parked car resulting in the truck and trailer coming to rest over a fence and landing on two unoccupied parked vehicles (App Ex 3, pg 7). The applicant was considered the cause of the collision. The incident occurred on Tennessee St in front of the LaZboy store. A review of the surveillance video from LaZboy shows the accident occurred at approximately 10:58 am and does not show any fleeing silver sedan just prior to or after impact of the applicant's truck with the unoccupied parked vehicles (Def Ex C). However, one of the parked unoccupied vehicles which the truck collided with appears to be a silver sedan.

The Redlands Police Department traffic accident report reflects the only driver was the applicant, all other vehicles involved were parked and unoccupied (App Ex 3, pg 6). There is no reference in the report to a fleeing silver vehicle. Due to his injuries, the applicant was transported to Loma Linda University Emergency Department for medical care.

The report further states that Officer Parent responded to Loma Linda University Hospital emergency room and spoke to the applicant who provided a statement. The applicant in his hospital statement that he was supposed to exit California St., but missed the exit and continued eastbound on the 10. He does not recall exiting the freeway but recalls he woke up in the back of an ambulance (App Ex 3, pg 9). The report further states that when provided the opportunity, the applicant refused to submit to a voluntary blood test.

During his initial treatment in the emergency room, a urine sample was taken which was sent to the lab for screening. The lab results indicate a positive finding for cocaine. Loma Linda records reflect the applicant denied substance abuse and/or use of cocaine. As a result of this finding, defendant's issued a Notice of delay of determination of workers compensation benefits dated 3-2-18 (App Ex 5, pg 4). The claim was denied on 5-7-18 citing additional medical information was needed and a PQME evaluation is scheduled for 6-22-18. (App Ex 4).

Defendant also scheduled the applicant to be seen by Dr. Edward O'Neill on 9-30-19 for a consultation under Labor Code 4050 (App Ex 6). Although the appointment notice was submitted, no report was offered.

INTOXICATION DEFENSE

Defendant asserts an intoxication defense pursuant to Labor Code 5705(b), which provides that an applicant's intoxication is a defense to workers' compensation benefits when the employer can prove the employee's intoxication was the proximate cause of the injury. The "intoxication defense" has been interpreted by the courts to mean that "…the California employer is required to establish that intoxication is a proximate cause or substantial factor in bringing about an accident…" (Smith v. WCAB (1981) 123 Cal. App. 3d 763, 773).

Defendant offers the medical records from Loma Linda reflecting an arrival date of 2-14-18 11:30 and discharge on 2-17-2018 at 1724. Final diagnosis notes epidural hemorrhage without loss of consciousness, compression of brain, fracture of vault of skull-closed fracture, and Cocaine abuse, uncomplicated among other diagnosis (Def Ex A, pg 1). The encounter notes reflect urine drug screen was positive for cocaine (pg 2). Also noted in Assessment/Plan is "Cocaine use" (pg 3). The records further note that a social worker discussed with the applicant that UDS was positive for cocaine on 2-14-18 although applicant denies use of cocaine (pg 4).

Applicant contends that the urine lab results reflect "cocaine – positive – unconfirmed" and therefore cannot be relied on. Applicant further questions the integrity of the testing. Parties sought clarification and deposed multiple employers involved in the testing.

The deposition of the person most knowledgeable at Loma Linda University Medical Center Clinical Laboratory was taken. Craig Austin testified in his position as a technical supervisor for the chemistry section at Loma Linda University Medical Center which oversees the urine drug screening, blood samples and other diagnostic testing. Mr. Austin testified that he was unaware of when testing for cocaine that a false positive occurs (Jnt X pg 23, ln 17). Mr. Austin provided a packet of the applicant's records which was explained at the deposition which also contained procedures as well as identification of other hospital staff which performed some type of activity in relation to the urine drug screen.

Emily Chou Barrett was deposed on two occasions. At the first deposition, she testified to her completion of medical school and residency and her specialty is emergency medicine. Dr. Chou Barrett has been employed at Loma Linda University Hospital as a physician since June/July of 2014. As she had not reviewed the necessary documents, additional time was provided (Def Ex F). In volume II of her deposition, Dr. Chou Barrett confirmed she was the emergency room treating physician when the applicant arrived at Loma Linda University Hospital when care was transferred from Emergency Medical Services ambulance. The applicant was considered a level C trauma and therefore underwent a full trauma panel which included a variety of tests which included

a urine drug screen. Dr. Chou Barrett further testified that urine sample collections are normally done by nursing staff who transfers it to the laboratory. The results of the test returned noting positive – unconfirmed for cocaine. It is her understanding that "unconfirmed" simply means one test was done and not a second one (Def Ex E, pg 13, ln17).

At his deposition, Dennis Van Fossen, a registered nurse at Loma Linda University Medical Center testified as to the collection of a urine sample and his practice of labeling the sample in the presence of the patient (Def Ex K, pg 9). After obtaining a sample, the sample is sent to the lab.

Parties also took the deposition of Eduard "Eddie" Gheorghita, a medical lab assistant at Loma Linda University Medical Center where he has been employed for 13 years. Based on review of the records, Mr. Gheorghita indicated he received the urine sample in question, followed procedure and the sample was then handed to the next technician identified as Norma Menesis (Def Ex G, pg 10, ln 19).

In her deposition, Ms. Menesis confirmed that she is a clinical laboratory scientist employed at Loma Linda University Medical Center for the last three years. Ms. Menesis indicated that the urine samples are provided to her from Specimen Processing. After verifying patient identification, the sample is loaded into the instrument perform the requested analysis. A sample will not be run without the proper patient identification (Def Ex H, pg 11, ln 15).

Leh Chang, a technical supervisor, who has been employed by Loma Linda University Medical Center Clinical Lab for thirty years provided her deposition testimony. Leh Chang confirmed per the records she stored the applicant's urine sample (Def Ex I) as well as discussing her knowledge of procedures in her department.

Based on the positive finding, defendant denied the claim and the applicant was scheduled to see a Panel Qualified Medical Examiner. The applicant was evaluated by PQME, Dr. Pedram Navab, neurologist, who issued a report dated 6-22-18 (App Ex 2). Dr. Navab report reflects the applicant offered that another driver was involved in the accident although fled the scene (pg 3). Dr. Navab further notes that the applicant does not recall the accident and his last memory is exiting the freeway nor does he recall how long he was unconscious. At Loma Linda Medical Center the applicant underwent an evacuation of a hematoma in his skull and remained in the hospital for approximately three days. The applicant was not considered MMI at the time of the report. Dr. Navab noted in his deposition, that the applicant did not recall the actual incident (Def Ex B, pg 7, ln 9). In his record review, Dr. Navab noted that records reflect the applicant was found sitting upright, he was confused, had blood-shot eyes and covered with fuel. The applicant does not remember the incident (App Ex 2, pg 8).

Consistently through the review of records Dr. Navab notes the applicant does not recall the accident and only recalls being in the ambulance.

Parties also utilized Dr. Ghan Lohiya, toxicology PQME who issued a report dated 6-12-20 (Def Ex D). There are some conflicting references in his report, such as applicant worked 12-14 hour days 7 days a week (Def Ex D, pg 8), then on the next page the applicant worked from 3:30 to 1, five days a week (pg 9). Dr. Lohiya notes "upon a cursory review, the evidence favoring cocaine abuse by the applicant seems quite convincing" (pg 27) and notes the cutoff for a positive cocaine radioimmunoassay test is 300 ng/ml while applicant's urine tested positive at 1655 ng/ml, which is five times the cutoff level. However, most of Dr. Lohiya report was review of records and legal research. Dr. Lohiya's report is lacking a detailed analysis of the urine test results and any discussion as to impairment, instead he focuses on representation by the applicant, his opinion on legal issues instead of providing a medical opinion. Dr. Lohiya based his opinion on the applicant's self-reporting and not on credible medical evidence and he discusses interpretation of legal theories clearly outside of his realm of expertise. There is little if any probative value to his reporting and thus his report is deemed not substantial medical evidence.
(WCJ's Opinion on Decision, March 10, 2021, pp. 1-6.)

DISCUSSION

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) 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 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

An applicant's right to recover workers' compensation benefits is subject to the conditions set forth in section 3600. Among these is that "the injury is not caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee." (§ 3600(a)(4).) Intoxication is an affirmative defense, and the burden of proof rests on the employer, as the defendant, to establish that affirmative defense. (§ 5705(b).) To carry its burden of proof, a

defendant is required to prove each fact supporting its claim by a preponderance of the evidence. (§ 3202.5.)

> "Preponderance of the evidence" means that evidence that when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence.

(§ 3202.5.)

When a defendant asserts the intoxication defense, it must prove not only that the injured employee was intoxicated at the time of the injury, but also that the employee's intoxication was a proximate or substantial cause of the injury. (*Smith v. Workers' Comp. Appeals Bd*. (*Smith*) (1981) 123 Cal.App.3d 763, 774 [176 Cal. Rptr. 843, 46 Cal.Comp.Cases 1053]; *Douglas Aircraft, Inc. v. Industrial Acc. Com*. (1957) 47 Cal.2d 903 [22 Cal.Comp.Cases 24], disapproved on another ground in *LeVesque v. Workers' Comp. Appeals Bd*. (1970) 1 Cal.3d 627, 636 [35 Cal.Comp.Cases 16].)

In this case, as discussed below, the evidence does not establish that (1) applicant was intoxicated at the time of his injury or (2) that intoxication was a proximate or substantial cause of his injury. As noted by the WCJ, the toxicology reporting in this matter is not substantial medical evidence. We agree with the WCJ's analysis on this point. Accordingly, defendant failed its burden of proof to establish intoxication.

The fact that applicant tested positive for cocaine use following the accident does not, by itself, establish intoxication at the time of the accident. Expert medical testimony is required to establish this, which generally requires a toxicology opinion. We must determine what level of cocaine could have reasonably been in applicant's system at the time of the accident. Next, we must determine whether such a level of cocaine produced an intoxicating effect. Next, even if intoxication is established, defendant must prove that such intoxication proximately caused the accident. Again, this requires expert evidence and may not simply be inferred.

The WCJ relies upon an 'adverse inference' to support the finding that applicant was intoxicated and that such intoxication proximately caused the injury. No such inferences were established in this case. The first inference comes from applicant's refusal to submit to *voluntary* blood testing after the accident. This action does not establish intoxication; if anything, it indicates that the police officer did not have reasonable suspicion that applicant was intoxicated as the police

officer could have obtained a warrant to test applicant's blood but did not. The fact that applicant refused a voluntary procedure does not prove that applicant was intoxicated and does not prove that intoxication caused the accident.

Next, in deposition, applicant asserted his Fifth Amendment right not to answer questions about prior criminal drug use. In the Opinion on Decision, the WCJ took an adverse inference from applicant's assertion of his Fifth Amendment right. No adverse inference may be drawn from the exercise of one's Fifth Amendment right in California. (U.S. Const., 5th Amend.; Cal. Evid., § 913.) Although the WCJ may not draw inferences upon the assertion of privilege itself, the WCJ may draw conclusions from any evidence left unrebutted. (Cal. Evid., § 413.) However, again, the unrebutted evidence in this case did not establish defendant's burden of proof.

As the party asserting the affirmative defense of intoxication, defendant was required to prove that applicant was intoxicated at the time of the accident and that such intoxication proximately caused the accident. (Lab. Code, § 3600(a)(4).) Both of these prongs required expert testimony, which defendant failed to provide.

Accordingly, as our Decision After Reconsideration we will rescind the WCJ's March 10, 2021 F&O and return the matter to the trial level for further proceedings and development of the record.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order issued on March 10, 2021 is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings and development of the record in accordance with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 18, 2024

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

RYAN BOXALL
LAW OFFICES OF UN CHONG LIM
HANNA BROPHY MACLEAN MCALEER & JENSEN

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