

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

NANCY BURIAN, *Applicant*

vs.

**ZOOLOGICAL SOCIETY OF SAN DIEGO and FEDERAL INSURANCE COMPANY;
THE SALVATION ARMY, permissibly self-insured; administered by SEDGWICK CMS,
INC.; RECREATIONAL WORLD, INC.; and CIGA, by its servicing facility, SEDGWICK
CMS, INC., for RELIANCE INSURANCE COMPANY, in liquidation, *Defendants***

**Adjudication Numbers: ADJ8309831, ADJ1242017 (SDO 0305069),
ADJ1419435 (SDO 0306766)
San Diego District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case.¹ This is our Opinion and Decision After Reconsideration.

Defendant, California Insurance Guarantee Association (CIGA), seeks reconsideration of the Joint Findings, Award and Order (F&A), issued by the workers' compensation administrative law judge (WCJ) on July 24, 2020, wherein the WCJ found in pertinent part that while employed by Recreational World, Inc., on September 19, 1995, applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her right knee, and the injury caused 42% permanent disability (ADJ1419435); that while employed by Recreational World, Inc., on January 21, 1998, applicant sustained injury AOE/COE to her left knee, and the injury caused 39% permanent disability (ADJ1242017); and that in case number ADJ8309831 CIGA did not meet the burden of proof as to injury AOE/COE, based thereon the WCJ found that applicant did not sustain the cumulative injury as claimed.

CIGA contends that the reports and deposition testimony of Beth Bathgate, M.D., Richard Greenfield, M.D., and Albert Simpkins, Jr., M.D., are substantial evidence that applicant sustained

¹We granted the Petition to allow further study of the factual and legal issues on September 15, 2020; Commissioner Dodd was a member of the panel. Commissioner Dodd is not presently available to review the matter; a new panel member has been assigned in her place.

a cumulative injury during the period from December 2000, through December 18, 2004, in case number ADJ8309831.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received Answers from co-defendants The Zoological Society of San Diego/Federal Insurance Co., and the Salvation Army.

We have considered the allegations in the Petition and the Answers, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will rescind the F&A 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

Nancy Burian (applicant) claimed injury to her right knee while employed as an ice skating instructor by Recreational World, Inc. on September 19, 1995 (ADJ1419435), and she claimed injury to her left knee while employed as an ice skating instructor by Recreational World, Inc., on January 21, 1998 (ADJ1242017). On April 30, 2012, CIGA filed an Application for Adjudication of Claim, claiming that applicant sustained injury to her bilateral knees while employed as a ticket booth operator by the Zoological Society of San Diego (Wild Animal Park) and as an ice skating instructor for the Salvation Army, during the period from March 1, 2001, through December 31, 2005; the Salvation Army (Joan Kroc Ice Skating Arena) was joined as a party defendant on June 9, 2015. (ADJ8309831).²

The trial/medical record, relevant to the issues addressed herein, is summarized as follows: Applicant was first seen by Richard Greenfield, M.D., on November 14, 2002. (Joint Exh. 21, Dr. Greenfield, November 14, 2002.) Dr. Greenfield examined applicant, diagnosed bilateral degenerative osteoarthritis of the knees, and requested bilateral knee MRIs. (Joint Exh. 21, pp. 2 - 3.) In his August 29, 2003 report Dr. Greenfield stated:

I do believe that Ms. Burian's current knee symptomatology and need for medical treatment are causally related to the three dates of injury. I would apportion 25% of her current disability and limitations to the specific injury of

² It is important to note that in her Report the WCJ stated, "As to fourth date of injury, [cumulative injury during the period ending April 2000] which is referenced as ADJ3955860, this case according to the representations made by the parties to this Court, was another cumulative trauma pled and resolved via Compromise and Release." (Report, p. 3.)

9/19/95, 25% to the specific injury of 1/21/98 and the remainder to her period of continuing trauma dated 4/00.
(Joint Exh. 22, Dr. Greenfield, August 29, 2003, p. 1.)

In a subsequent report pertaining to the April 2000 cumulative injury claim (not at issue herein) Dr. Greenfield stated:

I believe the fact that Ms. Burian has a history of bilateral knee injuries sustained while ice skating, combined with the fact that she has continued to skate and putting significant stress on her knees while skating, has produced a continuing trauma injury.
(Joint Exh. 6, Dr. Greenfield, August 27, 2004, p. 1.)

In his March 24, 2011 report, regarding the September 19, 1995 (ADJ1419435), and January 21, 1998 (ADJ1242017) injuries, Dr. Greenfield stated:

I believe with reasonable medical probability that in the patient's last year of work that her knees did worsen, and therefore 10% of her overall disability and limitations would be due to the period of continuing trauma, 10% would be due to her exogenous obesity which was non industrial, and 80% of the disability to either knee would be related to the specific injuries to the right and left knees.
(Joint Exh. 12, Dr. Greenfield, March 24, 2011, p. 3.)

Dr. Greenfield later determined that applicant's condition had become permanent and stationary and he noted that "Causation and apportionment" had been discussed in the March 24, 2011 report. (Joint Exh. 13, Dr. Greenfield, September 2, 2011, p. 3.) Dr. Greenfield reviewed the transcript of applicant's August 23, 2011 deposition and based thereon he concluded that 70% of applicant's permanent disability was due to her employment with Ice Chalet, 15% was caused by her employment outside of California, and 15% was the result of cumulative trauma while she was employed at the Wild Animal Park. (Joint Exh. 14, Dr. Greenfield, February 10, 2012, p. 3.)

Dr. Greenfield's deposition was taken on October 6, 2014. His testimony included:

Q. ... So to what extent, if any, do you believe that her employment at the wild Animal Park contributed to the need for the total knees replacement?

A. I think it was a small contribution.

Q. Was it any contribution?

A. I think it was.

Q. Because of micro trauma?

A. Correct.

(Def. Exh. 8, Dr. Greenfield, October 6, 2014, deposition transcript, pp. 14 – 15.)

He later testified that:

A. I've already given my opinion that there was cumulative trauma, and I've reduced it from 15 to 5 percent [Wild Animal Park] and 10 percent Kroc [Salvation Army] based on the hours and time increased and stress upon the knees there. (Def. Exh. 8, p. 19.)

On November 19, 2013, on behalf of defendant, the Zoological Society of San Diego, orthopedic qualified medical examiner (QME) Beth Bathgate, M.D., evaluated applicant regarding the cumulative trauma injury claim in case number ADJ8309831. Dr. Bathgate noted:

Ms. Burian had a prior workers' compensation case at Ice Chalet for both knees that has been settled. The purpose of this evaluation is in regard to a new cumulative trauma injury claim related to her work at the Zoological Society of San Diego at Wild Animal Park and whether there was an aggravation or further injury while she was employed at Salvation Army Kroc Center. (Joint Exh. 1, Dr. Bathgate, November 19, 2013, p. 1.)

Dr. Bathgate examined applicant, took a history, and reviewed the medical record. The medical records the doctor reviewed spanned the period from September 20, 1995, through June 7, 2013. (Joint Exh. 1, pp. 2 – 13.) The diagnosis was, “Bilateral severe knee osteoarthritis, status post total knee replacements.” (Joint Exh. 1, p. 24.) Dr. Bathgate concluded:

In my opinion, there is a basis for apportionment of a very small portion of her disability to her work on a cumulative trauma basis for the San Diego Zoological Society at the Wild Animal Park. This is reasonably estimated at 7.5%. There is also apportionment to the Salvation Army/Kroc Center where she worked as an ice skating instructor of 7.5% due to the demands on her knees of skating. ... [A]pproximately 85% of her impairment is due to the prior injuries and degenerative changes about both knees, with 15% considered causally related to her work with the Wild Animal Park and the Kroc Center. (Joint Exh. 1, p. 26.)

Dr. Bathgate was provided transcripts of applicant's October 14, 2003, and August 18, 2005 depositions. After reviewing the transcripts she stated:

Based on this contemporaneous information, there is a change in my opinion with regard to causation from the November 19, 2013, evaluation regarding her work at the Wild Animal Park. Ms. Burian indicated in the deposition of October 2003 that her job at the Wild Animal Park involved sitting and she could get up and stand as needed while she was selling tickets. She had handicapped parking. She only had to walk two minutes to get to her job. ... There is nothing in the

2003 deposition regarding having to climb steep hills as part of her job for the Wild Animal Park. ... Based on this, in my opinion there is no cumulative trauma or injurious exposure to her knees due to her work for the Zoological Society of San Diego at the Wild Animal Park. Also, her work at the Wild Animal Park did not have any causative effect on the timing of her total knee replacements. ... In my opinion, her work at the Wild Animal Park did not cause her to need any future medical care of any nature. ¶ It was also asked that I comment on Ms. Burian's work at Kroc Ice Skating Arena in La Mesa. It continues to be my opinion that there was injurious exposure related to her work as an ice skating instructor for Kroc Ice Skating Arena. There was no medical evidence in the records received before or after her work on the east coast for a few months or her work at Kroc Ice Skating Center that this caused an increase in her knee symptoms. However, ice skating intrinsically puts a great deal of pressure across the knees. Ms. Burian already had injured knees and arthritis and this pressure is expected to have been increased due to the physical requirements of ice skating.

(Joint Exh. 2, Dr. Bathgate, September 8, 2014, p. 5.)

Dr. Bathgate later stated that 89.5% of applicant's disability was caused by her work at the Ice Chalet, 3% was due to her work outside the state of California, and 7.5% was due to her work for the Salvation Army/Kroc Center:

This is based on her reported one year of exposure in her work back east and her two years of exposure at Joan Kroc. Again, the exact details are not completely available. ¶ If further detailed data become available regarding her work exposure for Kroc Center and her work back east, this could be further addressed.

(Joint Exh. 2, p. 5.)

On behalf of defendant, the Salvation Army, orthopedic QME Albert Simpkins, Jr., M.D., evaluated applicant on July 25, 2016.³ Dr. Simpkins, examined applicant and took a history, but he was not provided medical records to review. He noted that "obviously" it was important that he receive job descriptions and timeline records for the Wild Animal Park and the Salvation Army. (Joint Exh. 18, p. 7.) The doctor then stated, "It is my opinion that this injury appears to have occurred in the course and scope of her employment. However, this could be amended with additional information." (Joint Exh. 18, p. 8.) In his supplemental report, after reviewing the medical record, Dr. Simpkins concluded:

³ Page one of the report indicates that Dr. Simpkins evaluated applicant in regard to all four injury claims: ADJ1419435, ADJ1242017, ADJ3955860, and ADJ8309831. (Joint Exh. 18, Dr. Simpkins, July 25, 2016, p. 1.)

Based on the patient's condition as it existed prior to her employment at The Salvation Army, there is no doubt that there would be increased pain as long as she was weight bearing. This was a temporary exacerbation and there was no permanent aggravation of her condition as a result of her employment at the Salvation Army.

(Joint Exh. 16, Dr. Simpkins, December 13, 2016, p. 40.)

He stated that 15% of applicant's disability was non-industrial, 75% was caused by her work at the Ice Chalet, and 10% was due to her work at the Wild Animal Park. (Joint Exh. 16, p. 42.) Dr. Simpkins' deposition was taken on July 24, 2017. (Joint Exh. 17, Dr. Simpkins, July 24, 2017, deposition transcript.) His testimony included:

Q. Assuming as [sic] a hypothetical, Doctor, that Ms. Burian did not feel she got hurt at the Wild Animal Park; that the Wild Animal Park accommodated the work restrictions placed upon Ms. Burian for her knees that she may have had some temporary aggravation of pain that is expected from her knee pathology. Would that change your opinion about the apportionment of the Wild Animal Park? ...

THE WITNESS: What I would like to know because we never really established. You mentioned about the shuttle because [she stated that she was walking] up and down the hill, but obviously if it were shown to me or made apparent to me that the shuttle was indeed available and that is what she used, and I would be in agreement.

Q. Right.

A. But I have not.

Q. Of course, and that is a matter really for the trier of fact with testimony that would come out from the Wild Animal Park, so assuming we can establish that, your apportionment as to the Wild Animal Park would change?

A. Yes.

Q. What would it be?

A. Well, I mean obviously, as you can see, I only apportioned the small percentage to begin with which would be the 10 percent, so then I would, obviously, if the records reflect that there was no industrial aggravation to her preexisting condition, then in my mind there would be no apportionment to the Wild Animal Park.

(Joint Exh. 17, pp. 25 – 27.)

Q. So doctor, if applicant did have some walking from the parking lot to her job position rather than using a cart, would that support your prior opinion that there was some apportionment to the Wild Animal Park?

A. It could. Obviously, we need to be more specific, you know, what distance are we talking? Is there indeed more than one would anticipate with normal activities of daily living and that type of scenario.

(Joint Exh. 17, pp. 27 – 28.)

The parties proceeded to trial on September 11, 2019, and the matter was continued. (Minutes of Hearing and Summary of Evidence (MOH/SOE), September 11, 2019, p. 10) At the November 14, 2019 trial applicant testified and the parties stipulated that:

... [I]f Dami An Phillips were called to testify, she would state that as of November 2002 when Dr. Greenfield issued a restriction of the applicant to semi-sedentary work, the applicant was provided handicapped parking in the public parking lot.
(MOH/SOE, November 14, 2019, p. 19.)

The matter was submitted for decision; the issues in case number ADJ8309831 included injury AOE/COE and permanent disability/apportionment; in case number ADJ1242017, and case number ADJ1419435 the issues included permanent disability/apportionment. (MOH/SOE, September 11, 2019, pp. 2 – 5.)

DISCUSSION

The aggravation of a pre-existing condition is an increase in the severity of the pre-existing condition where the underlying pathology is permanently moved to a higher level. An aggravation of a pre-existing condition is an industrial injury. (*Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615, 617 [1935 Cal. LEXIS 590]; *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358].) Exacerbation of a pre-existing condition is a temporary increase in the symptoms that returns to its prior level within a reasonable period of time, and is not an industrial injury.

Here, there is no dispute that applicant had prior injuries to her knees; the actual issue is whether her work for the Zoological Society of San Diego and/or for the Salvation Army, caused an aggravation of her pre-existing condition. Although applicant may have had an aggravation of her earlier symptoms, the opinions of the reporting physicians, as noted above, are inconsistent, they are not based on adequate information, and it appears that they may be the result of the physicians' speculation, conjecture, or guess. (See for example: Joint Exh. 14, p. 3, Def. Exh. 8, p. 19; Joint Exh. 2, p. 5; Joint Exh. 17, pp. 25 – 28.) Also, our review of the record indicates that applicant was deposed several times, that her trial testimony was inconsistent with her deposition testimony, and the WCJ found applicant's trial testimony to be credible. (F&A, p. 12, Joint

Opinion on Decision.) The doctors were provided some of applicant's deposition testimony to review, but of course they did not have access to her trial testimony.

It is well established that any award, order, or decision of the Appeals Board must be supported by substantial evidence in light of the entire record. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess, and to be substantial evidence the medical opinion must set forth the reasoning behind the physician's opinion, not merely his or her conclusions; a mere legal conclusion does not furnish a basis for a finding. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525]; *Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workmen's Comp. Appeals Bd.* (1970) 69 Cal.2d 399 [33 Cal.Comp.Cases 647].)

The medical reports in the trial record are contradictory and confusing. As explained above, the doctors' opinions are not based on adequate information, and they appear to be the result of the physicians' speculation, conjecture, or guess. Again, based on our review of the trial record, it is clear that the record does not contain substantial evidence upon which the issue of injury AOE/COE can be made.⁴

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) 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, because of the complexities in this matter and the inconsistencies in the doctors' reports, under these

⁴ We also note that CIGA's argument regarding Labor Code section 3202, is inapposite because there is no showing in the Petition and no evidence in the record that a finding in CIGA's favor would extend further benefits to applicant.

circumstances it would be appropriate for the WCJ to appoint a regular physician to examine applicant, review the extensive medical record, and submit a medical-legal report addressing the issues submitted at trial. (Lab. Code § 5701.)

Finally, as noted above, applicant had claimed a cumulative injury during the period ending April 2000 in case number ADJ3955860 (see footnote #2). In the Report, the WCJ states:

As to fourth date of injury, which is referenced as ADJ3955860, this case according to the representations made by the parties to this Court, was another cumulative trauma pled and resolved via Compromise and Release ... ¶ The reason the fourth case may be relevant now that there is a petition for reconsideration is because CIGA failed to acknowledge and consider the existence of the fourth case; one potentially already settling an alleged cumulative trauma which may or may not overlap the alleged periods in ADJ8309831. Without further documentation provided, this WCJ cannot adequately address the allegations in the Petition for Reconsideration. (Report, p. 3.)

The injury claim in case number ADJ3955860 is not before us and we cannot comment on how review of that case may change the analysis of the cases at issue herein. However, we agree with the WCJ that since that issue has been raised, it may be necessary to obtain supplemental reporting on that issue in order to have an accurate history to be considered by the regular physician and ultimately by the WCJ.

Accordingly, we rescind the F&A 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 July 24, 2020 Findings, Award, 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

NOVEMBER 23, 2021

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

**BREDFELDT, ODUKOYA & HAN
ENGLAND, PONTICELLO & ST. CLAIR
LAW OFFICES OF THOMAS M. DEBENEDETTO
PATRICO, HERMANSON & GUZMAN
NANCY BURIAN**

TLH/pc

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