WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ZILVERIO RIVERA, *Applicant*

vs.

CITY OF PETALUMA, Permissibly Self-Insured; administered by KEENAN & ASSOCIATES, *Defendants*

Adjudication Number: ADJ10815565
Santa Rosa District Office

OPINION AND DECISION
AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Award of November 18, 2019, the workers' compensation judge (WCJ) found that applicant, while employed as a police officer on February 20, 2017, sustained injury arising out of and in the course of employment (industrial injury) to his circulatory system/stroke, and that the reporting of Dr. Benrazavi is substantial medical evidence. Pursuant to these findings, the WCJ awarded further medical treatment and temporary disability indemnity, to be adjusted by the parties.

Defendant filed a timely petition for reconsideration of the WCJ's decision. Defendant contends that applicant failed to meet his burden of proving that his injury is industrial, and that the WCJ's decision is not supported by substantial medical evidence.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

Based on our review of the record and applicable law, we conclude that it is reasonable for applicant to decline undergoing a "Digital Subtraction Angiography" (DSA) test to determine whether his diagnosis is "Bow Hunter's Syndrome" (BHS), and that even without the DSA test, Dr. Benrazavi, the Panel Qualified Medical Evaluator ("PQME") in internal medicine, must provide an opinion, based on reasonable medical probability, as to whether applicant's diagnosis

is BHS and whether his employment as a police officer contributed to his stroke on February 20, 2017. Therefore, we will rescind the WCJ's decision and return this matter to the trial level for a supplemental opinion from Dr. Benrazavi and for a new decision by the WCJ.

BACKGROUND

For a brief overview of the relevant facts, we adopt and incorporate the following portion of the WCJ's Report:

> The facts are not disputed. Zilverio Rivera was employed as a police officer by the City of Petaluma, when, on February 20, 2017, while sitting in his patrol car, he twisted his neck to relieve tension in his upper back and shoulders. (Minutes of Hearing and Summary of Evidence dated September 5, 2019 at page 3:22-24.) Almost immediately he felt light headed and felt a loss of balance. (Id.) He checked himself in the mirror because he thought he might be having a heart attack. (Id. at 24-26.) Eventually, the sensation subsided, and after one more brief call, he returned to the station. (Id. at 30-32.) He wasn't feeling one-hundred percent better, and on his drive home, his symptoms began to return. He called his spouse who met him and took him to Santa Rosa Memorial Hospital where he was diagnosed with a stroke. (Id. at 32-35. See also Joint Exhibit 4, July 20, 2017 report of Dr. Benrazavi at p. 2.)
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> He underwent extensive diagnostic testing while hospitalized including a CT scan, an MRI and an MRA (magnetic resonance angiogram). (Joint Exhibit 4 at p. 2.) These indicated that Officer Rivera had an obstructive event (i.e. a blockage of blood flow to the brain) without evidence of a blood clot and without hemorrhage. Notably, Officer Rivera is otherwise healthy without history of hypertension or high cholesterol.
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> Officer Rivera was seen by Dr. Benrazavi who acted as a panel Qualified Medical Evaluator. She concluded that Officer Rivera most likely suffered from a congenital vascular defect in the arteries of the neck, resulting in a condition known as Bow Hunters Syndrome (BHS). However, she qualified this stating that "The gold standard for establishing the BHS diagnosis is digital subtraction angiography, which is being requested." (Joint Exhibit 4, report of Dr. Benrazavi dated July 28, 2017 at page 24.) The digital subtraction angiography, or DSA, involves observing the arteries of the neck using fluoroscopy, and attempting to trigger an obstruction. In effect, the result is to bring about a stroke under conditions where its exact cause can be visualized. As stated by Dr. Benrazavi "this procedure is risky." (Id.) She estimated the risk of serious complication at 5%, based on consultation with a neuroradiologist at UCSF. (Joint Exhibit 1, deposition of Dr. Benrazavi at page 13:9.) Applicant has declined to undergo this diagnostic test.

DISCUSSION

Labor Code section 4056 states:

> No compensation is payable in case of the death or disability of an employee when his death is caused, or when and so far as his disability is caused, continued, or aggravated, by an unreasonable refusal to submit to medical treatment, or to any surgical treatment, if the risk of the treatment is, in the opinion of the appeals board, based upon expert medical or surgical advice, inconsiderable in view of the seriousness of the injury.

Under section 4056, an employee's unreasonable delay or refusal to accept or undergo medical treatment is supported when the employer makes a showing that (1) there is an unequivocal tender of adequate treatment by the employer; and (2) the risk of the treatment is inconsiderable in the light of the employee's medical condition. (1 *Cal. Workers' Comp. Law* (Rassp & Herlick, 6th ed. 2021) Employee's Refusal of Medical Treatment, § 4.17 [1], citing *Gallegos v. Workers' Comp. Appeals Bd.* (1969) 273 Cal.App.2d 569 [34 Cal.Comp.Cases 322] and *White v. Workers' Comp. Appeals Bd*. (1969) 270 Cal.App.2d 447 [34 Cal. Comp. Cases 168]. See also, *Coca-Cola Enterprises, Inc. v. Workers' Comp. Appeals Bd.* (*Bendanillo*) (2009) 74 Cal.Comp.Cases 1180 (writ den.).)

In this case, it appears there is no dispute defendant would provide the DSA test if applicant agreed to have it, which satisfies prong (1) above. As for prong (2), Dr. Benrazavi, the PQME, diagnosed applicant with BHS in her first report dated July 28, 2017 (p. 19) but deferred the issue of causation of injury. The doctor also explained that although the DSA is the "gold standard" for establishing a BHS diagnosis, the procedure is "risky" and the doctor was "comfortable" with her clinical diagnosis of BHS:

> The applicant's condition has not reached maximal medical improvement. The gold standard for establishing the BHS diagnosis is digital subtraction angiography, DSA, which is being requested. However this procedure is not without risk as it involves assessing the circulation with the neck in neutral position as far as on extremes of rotation and extension. For my diagnosis, I do not need this test to be done and I am comfortable with my clinical diagnosis. However it is important that the diagnosis be established for the applicant and his treating physicians. The same factors that contributed and caused his stroke of February 2017 are still present and clinically threatening until they are identified, treated or managed. BHS is potentially treatable. Therefore for all practical purposes, DSA should be performed. However, once again this procedure is risky.

(Benrazavi report dated July 28, 2017, Joint Exhibit 4, p. 24.)

In her final narrative report dated March 19, 2018, Dr. Benrazavi ruled out BHS after re-examining the applicant. However, the doctor again deferred the issue of causation of injury and repeated her opinion that the DSA test is the gold standard for diagnosing BHS. (Joint exhibit 2.)

In her deposition of January 11, 2019, Dr. Benrazavi testified that there is a "good chance" applicant has BHS. (Joint exhibit 1, p. 8.) On page 11, the doctor testified it is "most likely" applicant has BHS, but she "can't definitely diagnose it" without the DSA test and "can't determine" whether applicant's stroke was work-related, which is "a whole different question" than diagnosis. On page 12, Dr. Benrazavi repeated that she could not comment on work-relatedness, and that applicant has congenital, pre-existing syncope, which "may or may not be significant." On pages 13 and 14, the doctor testified that there is a 5% chance of applicant having another stroke during a DSA test, but without a "definitive" diagnosis, Dr. Benrazavi could not offer an opinion on causation of injury. Upon questioning by applicant's attorney at 18:8 through 18:19 of the deposition, Dr. Benrazavi testified that her clinical impression is that applicant "most likely" has BHS:

> Q. …[Y]ou cannot say for sure whether this was bow hunter's syndrome, not bow hunter's syndrome, at this point?
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> A. Like I said, clinically that's my clinical impression. As doctors, we formulate a differential diagnosis. On the top of my differential is bow hunter's syndrome. I can't see it any other way. I cannot say definitely that's what it is. I can only give a clinical impression. That's my clinical impression. I can say it based on my experience as a physician, but I cannot definitely establish the diagnosis. Most likely, this is what he has.

Based on Dr. Benrazavi's repeated statements that the DSA test is a risky procedure and her deposition testimony that the risk of applicant having another stroke with the procedure is as high as five percent, we conclude that the risk of this treatment is <u>not</u> inconsiderable in light of applicant's medical condition. Therefore, prong (2) of section 4056 is not satisfied, and applicant may proceed with his claim and recover compensation, if any, without undergoing the DSA test.

This is not the only conclusion we reach, however. We also conclude that without applicant undergoing the DSA test, Dr. Benrazavi must provide a supplemental opinion as to whether applicant's diagnosis is BHS, and she also must offer an opinion on industrial causation, but with a clear understanding of the correct principles of workers' compensation law concerning these issues. First, it is not required that Dr. Benrazavi opine on these issues with absolute medical

certainty. Rather, reasonable medical probability is the correct standard for medical evidence to be accepted as substantial evidence. (*McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) Secondly, the issue of industrial causation is properly addressed in the context of assessing whether or not applicant's employment as a police officer was part of the cause of the stroke he suffered on February 20, 2017. That is, applicant's employment need not have been the sole cause of his stroke in considering whether or not it was industrial in nature. (*South Coast Framing v. Workers' Comp. Appeals. Bd.* (2015) 61 Cal.4th 291 [80 Cal.Comp.Cases 489].) In sum, Dr. Benrazavi should use her best medical judgment in formulating an opinion on applicant's diagnosis and the issue of industrial causation.

In returning this matter to the trial level for supplementation of Dr. Benrazavi's medical opinion, we do not disregard the principle that applicant has the burden of proving, by a preponderance of the evidence, that he sustained an injury arising out of employment. (Lab. Code, § 3202.5.) At the same time, we note that this general principle carries with it several corollaries, which may be relevant here: (1) circumstantial evidence, and reasonable inferences that may be drawn from the evidence, are sufficient to meet the employee's burden of proof; (2) reasonable doubts about whether an injury is compensable are to be resolved in the employee's favor; and (3) an employee may not be denied compensation merely because his or her physical condition was such that the employee sustained a disability which a person of stronger constitution or in better health would not have suffered. (*Guerra v. Workers' Comp. Appeals Bd.* (2016) 246 Cal.App.4th 1301, 1307-1310 [81 Cal.Comp.Cases 324], citing *South Coast Framing, supra*.) In addition, we note that although the mere "exacerbation" of a pre-existing condition is not an industrial injury, the acceleration, aggravation or lighting-up of a preexisting condition by an applicant's employment may constitute an industrial injury. (See *City of Los Angeles v. Workers' Comp. Appeals Bd.* (*Clark*) (2017) 82 Cal.Comp.Cases 1404 [writ den.].)

In summary, we conclude that Dr. Benrazavi must be directed to provide a supplemental medical opinion on the issues discussed above, in light of the correct legal principles, and without applicant undergoing a DSA test. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 [Appeals Board en banc].) However, we express no final opinion on the issue of industrial causation. When the WCJ issues a new decision, any aggrieved party may seek reconsideration as provided by Labor Code sections 5900 *et seq*.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of November 18, 2019 is **RESCINDED**, and this matter is **RETURNED** to the trial level for further proceedings and a new decision by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 28, 2021

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

ZILVERIO RIVERA
BROWN DELZELL
MULLEN & FILIPPI

JTL/bea

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