

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

**BYRON DIAZ, *Applicant***

**vs.**

**SOUTHBAY LOGISTICS INTERNATIONAL, LLC and STARSTONE NATIONAL  
INSURANCE COMPANY formerly TORUS NATIONAL INSURANCE COMPANY  
administered by ENSTAR, INC., dba ENSTAR ADMINISTRATOR; INSURANCE  
COMPANY OF THE WEST, *Defendants***

**Adjudication Number: ADJ11978261  
Marina del Rey District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION  
AND DECISION AFTER  
RECONSIDERATION**

Applicant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on March 4, 2022, wherein the WCJ found in pertinent part that defendant's denial of applicant's injury claim was untimely under Labor Code section 5402, that defendant successfully rebutted the Labor Code section 5402(b) presumption of compensability, and that applicant did not sustain injury arising out of and occurring in the course of employment (AOE/COE) to his neck, bilateral shoulders, bilateral elbows, lumbar spine, and left leg, while employed by defendant; the WCJ ordered that applicant take nothing by way of his injury claim.

Applicant contends that the November 17, 2018 pre-employment medical evaluation (Def. Exh. I) does not rebut the Labor Code section 5402(b) presumption, and that the reports from orthopedic qualified medical examiner (QME) Ronald J Gowey, M.D., and secondary physician Edwin Haronian, M.D., are substantial evidence that applicant sustained injury AOE/COE.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from Insurance Company of the West, and from StarStone National Insurance Company.

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 grant reconsideration, rescind the F&O, and substitute a new Findings and Order, finding that applicant sustained injury AOE/COE to his low back, left shoulder, and left elbow while employed by defendant during the period from September 1, 2017, through October 17, 2018, and deferring all other issues regarding said injury; we will return the matter to the trial level for further proceedings as appropriate.

## **BACKGROUND**

Applicant claimed injury to his neck, bilateral shoulders, bilateral elbows, lumbar spine, and left leg, while employed by defendant as a truck driver, during the period from September 1, 2017, through October 17, 2018.

Applicant last worked for defendant “...sometime around October of 2018. He stopped working there because his last three paychecks had bounced ...” (Minutes of Hearing and Summary of Evidence (MOH/SOE), June 3, 2021, p. 3.) He then worked as a driver for Channel Island for approximately two months. On November 17, 2018, applicant underwent a U.S. Department of Transportation commercial driver certification medical examination. (Def. Exh. I.) He left Channel Island and then worked as a driver for Hub Group, who was his “current employer” at the time of the trial. (MOH/SOE, June 3, 2021, pp. 3 – 4.)

On January 6, 2020, QME Dr. Gowey evaluated applicant. Dr. Gowey examined applicant, took a history and reviewed the medical record. The diagnoses were: lumbar sprain, non-verifiable radiculitis left lower extremity, cervical sprain-subsided, rotator cuff tendinitis left shoulder, and medial epicondylitis left elbow. (Joint Exh. TT, Dr. Gowey, January 6, 2020, p. 6.) Dr. Gowey concluded that applicant had reached maximum medical improvement/permanent and stationary status, and that the primary cause of applicant’s lumbar spine, left shoulder, and left elbow conditions was his employment as a truck driver for defendant. (Joint Exh. TT, p. 11.)

After reviewing additional medical records, including various diagnostics, Dr. Gowey diagnosed applicant as having: a herniated lumbar disc at the L5-S1 level, left lower extremity radiculitis and radiculopathy, a resolved cervical sprain, left shoulder rotator cuff tendinitis, and left elbow medial epicondylitis. (Joint Exh. SS, Dr. Gowey, March 29, 2020, p. 2.) Regarding the cause of applicant’s condition, Dr. Gowey stated that although applicant had previous lumbar spine and left shoulder injuries, “cumulative trauma from June 2017 to 10/17/18” was the primary cause

of applicant's injury. (Joint Exh. SS, p. 3.)

On August 10, 2020, Dr. Gowey's deposition was taken. The doctor's deposition testimony indicates that he found applicant to be credible as to when his low back, left shoulder, and left elbow symptoms started. (Joint Exh. RR, Dr. Gowey, August 10, 2020, deposition transcript, pp. 8 - 9.) Also, there were no changes to his previously stated opinions as to the issue of the cumulative injury and/or the cause of applicant's orthopedic injury. (See e.g. Joint Exh. RR, pp. 18 and 20.)

The parties proceeded to trial on September 24, 2020. The matter was continued and at the June 3, 2021 trial it was submitted for decision. The WCJ amended the June 3, 2021 MOH/SOE on July 21, 2021, and the matter was again submitted for decision. The WCJ issued a Findings and Order on August 26, 2021, and on September 24 2021, she issued an Order Rescinding Findings and Order. On December 27, 2021, the parties again proceeded to trial and the MOH state: "... [T]he parties have stipulated to the admission of Defense Exhibit I, Subpoenaed Records of Hub Group" and Defendant's Exhibit I was admitted into evidence. (MOH, December 27, 2021, p. 2.) The issues submitted for decision included injury AOE/COE and whether defendant's denial of applicant's injury claim was timely. (MOH, September 24, 2020, p.2.)

## DISCUSSION

An award, order or decision by the Appeals Board must be supported by substantial evidence in light of the entire record. (Lab. Code § 5952; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635-637 [35 Cal.Comp.Cases 16].) When a physician's report is well-reasoned, is not speculative, is based on an adequate history and examination, and sets forth the reasoning behind the physician's opinion, not merely his or her conclusions; the report constitutes substantial evidence. (*Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, as noted above, Dr. Gowey examined applicant, took a history, reviewed the medical record (approximately 300 pages), and concluded that applicant had sustained a cumulative injury to his lumbar spine, left shoulder, and left elbow. (Joint Exh. TT, p. 11.) Dr. Gowey's review of

additional medical records including MRIs, EMG/NCVs (electromyography/nerve conduction studies), and the transcript of applicant's deposition, did not change his opinion as to applicant's cumulative injury. (Joint Exh. SS, p. 3.) Also, during his deposition, Dr. Gowey repeatedly explained his reasoning for concluding that applicant had sustained an industrial injury to his lumbar spine, left shoulder, and left elbow. (Joint Exh. RR, e.g. pp. 8 – 9, 12 -13, 17 – 19, 25 – 26, and 28.)

It is well settled that the Appeals Board may rely on the medical opinion of a single physician unless it is “based on surmise, speculation, conjecture, or guess.” (*Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; *Market Basket v. Workers' Comp. Appeals Bd.* (1978) 86 Cal.App.3d 137 [46 Cal.Comp.Cases 913.]) Having reviewed the entire trial record, we see no evidence indicating that Dr. Gowey's opinions are based on “surmise, speculation, conjecture, or guess.” (*Place v. Workmen's Comp. App. Bd.*, *supra.*) Therefore, his reports and deposition testimony constitute substantial evidence.

Regarding the driver certification medical examination/pre-employment medical exam: We first note that the Medical Examination Report Form (Def. Exh. I) does not comply with the requirements of a treating physician's report (Cal. Code Regs., tit. 8, § 10682), nor does it comply with the requirements of a medical-legal report. (Lab. Code, § 4628.)

Further, in his initial report, Dr. Gowey noted:

Using an interpreter to communicate with the examinee, *due to a language barrier*, significantly slowed down the process of the QME examination, I had to slow the natural pace of communication and pause while every question, answer and instruction was repeated in the language the other party could understand. Patricia Cortes Cert# 101368.  
(Joint Exh. TT, p. 1, emphasis added.)

Also, at trial applicant testified with the assistance of Claudia Moenaert, a certified Spanish interpreter. (MOH/SOE, June 3, 2021, p. 2.) However, the driver certification medical examination was conducted by a physician assistant (Def. Exh. I, pp. 102 – 103 [EAMS pp. 7 - 8) and there is no evidence in the trial record indicating that the test form or the examination were properly translated or interpreted for applicant.

Thus, the Medical Examination Report Form (Def. Exh. I) does not constitute substantial evidence and cannot be the basis for a decision of the Appeals Board. (*Garza v. Workmen's Comp. App. Bd.*, *supra.*; *LeVesque v. Workmen's Comp. Appeals Bd.*, *supra.*)

Accordingly, we grant reconsideration, rescind the F&O and substitute a new Findings and Order, finding that applicant sustained injury AOE/COE to his low back, left shoulder, and left elbow while employed by defendant during the period from September 1, 2017, through October 17, 2018, and deferring all other issues regarding said injury; we will return the matter to the trial level for further proceedings as appropriate. Upon return of this matter, we recommend that a Status Conference be scheduled so the WCJ and the parties can determine how best to proceed.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Findings and Order issued by the WCJ on March 4, 2022, is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 4, 2022 Findings and Order is **RESCINDED** and the following is **SUBSTITUTED** therefor:

#### **FINDINGS OF FACT**

Applicant, Byron A. Diaz, while employed as a truck driver at Wilmington, California by Southbay Logistics International during the period from September 1, 2017, through October 17, 2018, sustained injury arising out of and occurring in the course of employment to his lumbar spine, left shoulder, and left elbow; all remaining issues regarding said injury are deferred.

**IT IS FURTHER ORDERED** that the matter is **RETURNED** to the trial level for further proceedings as appropriate.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**MAY 9, 2022**

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

**BYRON DIAZ  
WACHTEL LAW  
WAI & CONNOR  
LOWER & KESNER**

**TLH/pc**

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