WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DOLORES EDUARDO GOMEZ SANCHEZ, ***Applicant***

vs.

CONCO COMPANIES; SWINTERTON, INC.;
ZURICH AMERICAN INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ11167250
Stockton District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the August 24, 2022 Findings of Fact and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a laborer on March 18, 2014, sustained industrial injury to cervical spine, thoracic spine, lumbar spine, left elbow, rib cage and abdomen. The WCJ found that applicant further sustained injury to the left shoulder, but not the left wrist. The WCJ further determined that applicant sustained no permanent disability as a result of the injury, and that there was no basis for apportionment or the award of future medical treatment.

Applicant contends that the evidence does not justify the findings of fact, that the QME Summary Form is at variance with the F&O, that he is entitled to reimbursement of medical expense, and that there is good cause to reopen his case.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on our review of the record, we will

grant the Petition for Reconsideration, rescind the F&O, and return this matter to the trial level for further proceedings.

FACTS

As relevant to this discussion, applicant claimed he sustained two separate injuries, the first on January 15, 2014, and the second on March 18, 2014.

Applicant claimed injury on January 15, 2014 to his arm, abdomen, back and chest while employed as a laborer by defendant Conco Companies. Applicant alleged the injury occurred while he was lifting a concrete hose. (Ex. 2, Report of Concentra Occupational Medical Centers, dated March 18, 2014, at p. 2.)

Applicant reported the injury, and received medical treatment from Jagdish Patel, M.D. Applicant also sought ongoing chiropractic care with Thomas C. Oliver, D.C., at Stockton Family Chiropractic. (Jt. Ex. 1, Records of Stockton Family Chiropractic, dated January 31, 2014, at p. 5.)

On March 10, 2014, Dr. Patel released applicant to return modified duties of no lifting or carrying greater than 10 pounds. (Ex. 5, Work Status Report by Jagdish Patel, M.D., dated March 10, 2014.) Notwithstanding the work restrictions described, Dr. Patel also opined that applicant had reached maximum medical improvement (MMI), and indicated applicant could return to work without permanent work restrictions. (*Ibid.*)

Applicant returned to work on March 18, 2014, and claimed he sustained injury that same day to the upper back, low back, left shoulder blade, left shoulder, rib cage, and left wrist while employed as a laborer by defendant Conco Companies. Applicant alleged he was injured while working on the roof of a building, when he attempted to stop a bar from falling from the roof. (Minutes of Hearing and Summary of Evidence, dated December 18, 2019, at 8:7.)

Applicant reported the injury, and on March 18, 2014, applicant was evaluated at the Concentra Occupational Medical Center by Stephen Chen, M.D. (Ex. 2, Report of Concentra Occupational Medical Centers, dated March 18, 2014, at p. 2.) Dr. Chen issued a "Doctor's First Report" which describes the service date of March 18, 2014, but makes no mention of an injury on that date. The report refers only to the January 15, 2014 injury, wherein applicant experienced the sudden onset of left neck, mid back, low back pain, and some left elbow pain while lifting a concrete hose. (*Ibid.*) Dr. Chen returned applicant to modified duties and instituted a treatment

plan. (*Id*. at p. 5.) Applicant continued to seek treatment with the Stockton Family Chiropractic clinic. (Jt. Ex. 1, Records of Stockton Family Chiropractic, dated January 31, 2014, at p. 16.)

On April 18, 2015, applicant was evaluated by Agreed Medical Evaluator (AME) John Warbritton, M.D., with respect to the January 15, 2014 date of injury. The AME noted applicant's return to work on March 16, 2014 [sic], and opined that, "[a]lthough [applicant] may have sustained some sort of minor injury to his left elbow, and although his left ribcage 'cracked' once again, in fact, there is little evidence that the six hours of returning to work represents a separate injury, or even an exacerbation." (Ex. 6, AME Report of John Warbritton, M.D., dated April 18, 2015, at p. 11.)

On November 11, 2015, applicant was evaluated by Matthew Johnson, D.O., of the IPM Medical Group, who noted both the January 15, 2014 and also the March 18, 2014 dates of injury. (Ex. 8, Records of IPM Medical Group, authored by Matthew Johnson, D.O., dated November 11, 2015, at p. 3.) Dr. Johnson instituted a treatment plan, and provided for a return to work with various work restrictions. (*Ibid.*)

On May 23, 2017, the parties filed a Compromise and Release resolving the January 15, 2014 injury claim. On November 9, 2017, a WCJ approved the Compromise and Release. (First Amended Findings and Orders (ADJ9294374), dated November 9, 2017.)

On January 17, 2018, applicant filed the instant Application for Adjudication, alleging injury on March 18, 2014 to the upper and lower back, shoulder blade, rib cage, wrist, and other unspecified body parts.

On September 7, 2018, Wayne Anderson, D.O., issued his report as the Qualified Medical Evaluator with respect to the claimed March 18, 2014 injury. Following his review of the medical history, as well as a clinical examination of applicant, Dr. Anderson deemed the March 18, 2014 incident to be an exacerbation of the January 15, 2014 injury. (Ex. 7, Report of Wayne Anderson, D.O., dated September 7, 2018, at p. 22.)

On December 18, 2019, the parties proceeded to trial with respect to the March 18, 2014 injury claim. Applicant testified to the mechanism of injury, and that after reporting the injury, he was told he needed to go to a different Concentra clinic, and that "[w]hen the applicant was seen by the Concentra doctor, the safety person met with the doctor first, then the applicant met with the doctor with an uncertified interpreter." (Minutes of Hearing (Minutes), dated December 18, 2019, at 8:14.)

On February 3, 2020, the WCJ issued her Findings of Fact and Order, determining in relevant part that the evidentiary record was inadequate to support a decision on the submitted issues, including causation of injury. (Findings of Fact No. 5.) In her Opinion on Decision, the WCJ explained that the reporting of QME Dr. Anderson was internally inconsistent with regard to the issue of causation. (Opinion on Decision, p. 2.) The WCJ ordered development of the record. (Order No. 1.)

On April 27, 2020, QME Dr. Anderson issued a supplemental report at the request of the parties, further addressing the issue of causation. Dr. Anderson opined:

> Once you [sic] return to work, he provided a mechanism of injury for a separate Injury of March 18, 2014, and to a medical probability, the applicant did in fact have a new specific injury. He reports the injury in a manner wherein a specific set of events occurred, suddenly, causing active symptomatology. (Ex. 11, Report of Wayne E. Anderson, D.O., dated April 27, 2020, p. 4).

On December 1, 2020, the WCJ issued a Findings of Fact and Order, determining in relevant part that applicant sustained industrial injury arising out of and in the course of employment on March 18, 2014, and that as a result of the industrial injury, the applicant suffered injury to his cervical spine, thoracic spine, lumbar spine, left elbow, rib cage, and abdomen. (Findings of Fact No. 4 and 5.) The WCJ deferred issues of nature and extent, permanent disability, apportionment, temporary disability, liability for self-procured medical treatment, the need for future medical, penalties, and the lien of EDD pending development of the record. (Findings of Fact No. 6.)

On May 22, 2021, QME Dr. Anderson issued a supplemental report, observing at the outset that following the issuance of his prior report of April 27, 2020, "it was declare [sic] that the applicant did have a new injury but it was not clear as to whether it was an exacerbation, aggravation, or separate and distinct new injury." (Ex. 12, Report of Wayne Anderson, D.O., dated May 22, 2021, p. 3.) The report revisited the issue of causation, and observed that applicant's reports regarding the mechanism of injury varied in the record. Dr. Anderson concluded:

> I still believe something happened on March 18, 2014 but to a medical probability, I am not able to endorse the specific mechanism of injury delineated by the applicant now, given that it was not mentioned in medical records until November 2015 and given that some of the salient details (working inside and working on the roof are not likely to be confused) appear to differ from legal

> documents. Thus, I do not know exactly what happened March 18, 2014, and the events that transpired must be left to a trier of fact. (*Id*. at p. 77.)

Dr. Anderson further opined that "[b]y March 24, 2014, all body parts actively symptomatic were better than they were on March 17, 2014, establishing a return to better than the preinjury baseline," and, "[w]hatever happened on March 18, 2014, the medical records (with additional reliance on the self procured medical care to eliminate any concern the applicant may have regarding a bias of a workers compensation physician) support that there was at most an exacerbation." (*Id*. at p. 78.) Dr. Anderson concluded, "[t]here is no ongoing residual disability based on March 18, 2014." (*Ibid.*)

On June 22, 2022, Dr. Anderson issued a record review and supplemental report, wherein he opined that applicant "clearly had symptomatology from before and after that injury, and he recalls that it did fully resolve before the subsequent injury of March 18, 2014." (Ex. 12, Report of Wayne Anderson, D.O., dated June 22, 2021, p. 22.) However, Dr. Anderson was "unable to find support in the medical record indicating resolution of symptomatology," and as a result, concluded that the March 18, 2014 injury was not an "aggravation but rather exacerbation." (*Id*. at p. 23.)

On August 24, 2022, the WCJ issued her Findings of Fact and Order (F&O), determining in relevant part that "as of the additional reporting by the Panel Qualified Medical Evaluator, [the] left shoulder is part of the nature and extent of the industrial injury, but the left wrist is not," and that "[t]here is no permanent disability to award since all of the injured body parts returned to baseline after being lit up by the instant injury." (Findings of Fact Nos. 4 and 5.) The WCJ further determined that there was no basis to award future medical treatment. (Findings of Fact No. 7.)

On September 9, 2022, applicant filed his Petition for Reconsideration (Petition), contending the Qualified Medical Evaluator's Finding Summary Form reflected determinations that applicant sustained injury with permanent impairment/disability, requiring current or future medical care. (Petition, at p. 1.) Applicant also requested reimbursement of various expenses, and asserted that his case should be reopened for good cause. (*Id*. at p. 2.)

On September 19, 2022, the WCJ filed her Report, indicating that the nature of applicant's requested relief was unclear, and that the issue of expense reimbursement had been deferred. (Report, at p. 1.) The WCJ recommended denial of the Petition as one seeking reconsideration, but

insofar as the petition sought to Reopen the case, the WCJ recommended no action be taken "so that a Declaration of Readiness can be filed to activate the issue." *(Ibid.)*

On September 25, 2022, defendant filed its Answer, contending the WCJ's findings were supported in the record. (Answer, dated September 25, 2022, p. 2.)

DISCUSSION

To constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (en banc); *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417 [33 Cal.Comp.Cases 660]; *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700-1702, 1705 [58 Cal.Comp.Cases 313].) "A medical report predicated upon an incorrect legal theory and devoid of relevant factual basis, as well as a medical opinion extended beyond the range of the physician's expertise, cannot rise to a higher level than its own inadequate premises." (*Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358, 363].) A medical opinion may not be based on surmise, speculation, conjecture, or guess, and it is not substantial evidence if it is based on facts no longer germane, based on an incorrect legal theory, or based on an inadequate medical history and examination (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 (36 Cal.Comp.Cases 93, 97); *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378 (35 Cal.Comp.Cases 525, 529).) On the other hand, there must be some solid basis in the medical report for the doctor's ultimate opinion; the Board may not blindly accept a medical opinion which lacks a solid underlying basis, and must carefully judge its weight and credibility; the evidence must have some degree of probative force. (*National Convenience Stores v. Workers' Comp. Appeals Bd. (Kesser)* (1981) 121 Cal.App.3d 420, 426 (46 Cal.Comp.Cases 783).) In other words, the Board must look to the underlying facts of a medical opinion to determine whether or not that opinion constitutes substantial evidence, and accordingly, the expert's opinion is no better than the facts on which it is based. (*Turner v. Workers' Comp. Appeals Bd.* (1974) 42 Cal.App.3d 1036, 1044 [39 Cal.Comp.Cases 780].)

Here, Dr. Anderson opined in his April 27, 2020 report that, "to a medical probability, the applicant did in fact have a new specific injury." (Ex. 11, Report of Wayne E. Anderson, D.O., dated April 27, 2020, p. 4).

On December 1, 2020, the WCJ issued her Findings of Fact, determining in relevant part that applicant sustained an industrial injury arising out of and in the course of employment on March 18, 2014, and that as a result of the industrial injury, the applicant suffered injury to his cervical spine, thoracic spine, lumbar spine, left elbow, rib cage, and abdomen. (Findings of Fact Nos. 4 and 5.) No party sought reconsideration of that decision, which is now final. (*Los Angeles County Fire Dept. v. Workers' Comp. Appeals Bd.* (2010) 184 Cal.App.4th 1287, 1296 [109 Cal. Rptr. 3d 466, 75 Cal.Comp.Cases 421]; *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App. 4th 906, 916 [30 Cal. Rptr. 3d 598, 70 Cal.Comp.Cases 787].)

Thus, the existence of a distinct injury sustained on March 18, 2014, to the to the cervical spine, thoracic spine, lumbar spine, left elbow, rib cage, and abdomen was a *legally operative fact* at the time of Dr. Anderson's subsequent evaluations on May 22, 2021 and June 22, 2022. It is unclear whether the QME was provided with the WCJ's December 1, 2020 Findings of Fact, or understood its import, but the failure of the report to incorporate legally operative facts germane to the issues submitted for evaluation materially impairs the reliability of that report. (*Hegglin, supra*, 4 Cal.3d 162, 169; *Zemke, supra*, 68 Cal.2d 794.)

Additionally, Dr. Anderson has further opined that "something happened on March 18, 2014," but that it "was at most an exacerbation." (Ex. 12, Report of Wayne Anderson, D.O., dated May 22, 2021, pp. 77-78.)

An exacerbation is a temporary increase in the symptoms of a pre-existing condition that returns to its prior level within a reasonable period of time. An aggravation is an increase in the severity of a pre-existing condition where the underlying pathology is permanently moved to a higher level. The industrial aggravation of a pre-existing condition constitutes an injury for workers' compensation purposes. (*Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615, 617 [1935 Cal. LEXIS 590; *Zemke v. Workers' Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358]; *Reynolds Electrical & Engineering Co. v. Workers' Comp. Appeals Bd.* (Buckner) (1966) 65 Cal.2d 438 [31 Cal.Comp.Cases 421]; see also Hanna, California Workers' Compensation Law & Practice, § 4:41.) Thus, the December 1, 2020 determination by the WCJ that applicant sustained a separate and distinct injury precludes any subsequent determination by the QME that the event was merely a temporary increase in the symptoms of a pre-existing condition that return to its prior level within a reasonable period of time.

We further note that the QME appears to engage in speculation as to the significance of applicant's settlement in the companion case arising out of the January 15, 2014 injury. Dr. Anderson writes, "[i]f the applicant had an injury in January 2014 and it was 100% cured by March 2014, it seems unusual that in the year 2017 there would be such a large financial settlement; [c]onditions that are fully cured with no problems associated with them, no aftereffect, tend not to have large settlements." (Ex. 12, Report of Wayne Anderson, D.O., dated May 22, 2021, p. 64.) However, the QME may not premise his medical conclusions on speculation as to the significance of the size and timing of applicant's settlement of the companion case. Nor are we persuaded that the QME's reliance on applicant's chiropractic chart notes from March, 2014 was an appropriate basis for the determination of a "baseline" of symptoms when the records in question do not reflect a substantive physical examination. In both instances, we observe that "an opinion which is based on guess, surmise or conjecture has little, if any, evidentiary value." (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [90 Cal. Rptr. 424; 35 Cal.Comp.Cases 525].)

Accordingly, we conclude that May 22, 2021 and June 22, 2022 reports of Dr. Anderson failed to properly account for the WCJ's December 1, 2020 determination that applicant sustained injury on March 18, 2014, arising out of and in the course of employment. We also observe that the reporting of Dr. Anderson appears to impermissibly engage in speculation, conjecture or surmise as to the import of applicant's settlement of his companion claim, and as to applicant's "baseline" symptoms in 2014.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or 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].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record…the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie, supra*, at p. 141.) The preferred procedure is to allow

supplementation of the medical record by the physicians who have already reported in the case. (*Ibid*.)

Here, the record requires further development because the reporting of Dr. Anderson failed to account for all of the legally operative facts in this matter, and engages in speculation, guess or surmise. If, following development of the record, the QME is unable to appropriately address the necessary issues including the nature and extent of the injury, the WCJ may wish to consider augmenting the record with a new QME. Although the preferred procedure to develop the record is to return applicant to the physicians that have already reported, per *McDuffie*, if the existing physicians cannot cure the need for development of the record, the selection of an AME should be considered by the parties. However, since applicant is now unrepresented, the WCJ may instead appoint a physician pursuant to section 5701 to evaluate him in order to develop the record.

We will rescind the August 24, 2022 F&O, accordingly, and return the matter to the trial level for further development of the record. When the WCJ issues her new decision, any party aggrieved thereby may seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Order of August 24, 2022 is **GRANTED.**

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order, dated August 24, 2022, is **RESCINDED** and the matter **RETURNED** to the trial level for further proceedings consistent with this opinion**.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 8, 2022

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

DOLORES EDUARDO GOMEZ SANCHEZ, IN PRO PER
STANDER, REUBENS, THOMAS & KINSEY

SAR/abs

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