WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LYLE COOPER, *Applicant*

vs.

ACE INSULATION;
INSURANCE COMPANY OF THE WEST, *Defendants*

Adjudication Number: ADJ12584448
Santa Rosa District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Insurance Company of the West seeks reconsideration of the January 26, 2022 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant may have sustained a cumulative injury ending on April 19, 2019, applicant met his burden in establishing a work-related injury, applicant's claim is not barred by Labor Code[1] sections 5400 and 5405, the injury was not "intentionally self-inflicted," and there is insufficient evidence to determine whether applicant's claim is barred by section 3600, subdivision (a)(10). The WCJ then ordered the parties to develop the record with respect to the existence of medical records prior to May 3, 2019, the date the WCJ deemed applicant terminated from employment with defendant, showing treatment of the right pinky toe that ended up being amputated.

Defendant contends that (1) the order to develop the record significantly prejudices and irreparably harms it by denying it of due process; (2) applicant has not met his burden to prove that his injury arose out of the employment or occurred in the course of employment (AOE/COE); and (3) applicant's claim is barred by the post-termination defense found in section 3600, subdivision (a)(10).

We received an answer from applicant Lyle Cooper. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be

[1] All subsequent statutory references are to the Labor Code unless otherwise indicated.

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. For the reasons discussed below, we grant reconsideration, rescind the January 26, 2022 Findings and Order, and return this matter to the trial level for further proceedings consistent with this Opinion.

FACTS

The WCJ stated:

> Applicant Lyle Cooper alleges industrial injury to his right foot in the course of his employment as an insulation and HVAC installer. His case was denied and remains denied at this time.
>
> Applicant suffers from pre-existing non-industrial diabetes. Medical evidence establishes that on February 5, 2014, prior to working for the employer, he suffered a lesion on his right foot and osteomyelitis, resulting in an amputation of his right big toe. (See Defense Exhibit Z). Applicant has a history of diabetes since the age of 13. (Defendant's Exhibit D at page 2, Defendant's Exhibit E at pg. 48:2).
>
> Applicant was hired by Ace Insulation in December of 2018 and worked for several months. At some point during the course of his employment he developed a blister on his right pinky toe. He attributed this to the new work boots he was required by his employer to purchase. (See Defense Exhibit E at pg. 42:24 - 25). He was apparently treated for a lesion arising out of that blister during his employment, however, at trial, no medical report evidencing this was submitted. In fact, the applicant did not appear at his own trial, and the parties agreed to submit the applicant's deposition testimony in lieu of testimony. In the deposition, the applicant testified:
>
> 9 Q. Five weeks into your employment at Ace
> 10 Insulation, or 5 weeks after you developed the blister?
> 11 **A. Five weeks after I developed the blister.**
> 12 Q. Over the course of those 5 weeks, did the
> 13 blister get worse, or stayed about the same?
> 14 **A. It got a little worse.**
> 15 Q. During those 5 weeks, as you continued having
> 16 the blister, potentially getting a little worse, did you
> 17 discuss the blister with any of your coworkers or any of
> 18 your supervisors?
> 19 **A. No.**
> 20 Q. After 5 weeks, when you first went to get it
> 21 evaluated or treated, where did you initially go?
> 22 **A. It was -- I believe it was a primary -- the**

23 **primary physician.**
24 Q. Was that at Sutter?
25 **A. Correct.**

Defense Exhibit E at pg 46.

Applicant was evaluated by Dr. McGahan who acted as a Panel Qualified Medical Evaluator in the specialty of orthopedics. After review of all of the available evidence Dr. McGahan concluded as follows:

> The question has arisen as to causation regarding Mr. Cooper's right foot surgery in May of 2019. I have thoroughly reviewed the medical records. It is clear from his medical records that he has a history of diabetic neuropathy. He has uncontrolled diabetes with a hemoglobin A1c of 10.4. He also has vascular abnormalities. He has been diagnosed with a left Charcot foot while in jail. In 2014, he had a right great toe partial amputation. This clearly documents factors, which would predispose Mr. Cooper to blisters as well as amputation.
>
> However, l have thoroughly reviewed the medical records. The last medical record that I have from his time being incarcerated is October 9, 2018. At that point, it is documented that he has no open wounds of his right foot. Mr. Cooper then reports that he went to work for Ace Insulation of December of 2018 where he subsequently developed a right fifth toe blister. I did review the notes from Step Up Podiatry. He was first seen in consultation at Step Up Podiatry by Dr. Joba on May 28, 20 l9. She reports that he has a three-month history of a full thickness ulceration of his right fifth toe. She also reports that his previous podiatrist while in prison was treating this ulceration. However, I do not have corroboration that he actually had a fifth toe ulceration while in prison.

Following the trial, the court issued a Findings and Order finding that the applicant had sustained his burden of industrial injury. However, there is no dispute that the applicant did not report the injury until after notice of termination. The court concluded that secondary evidence regarding the question of whether applicant's medical record contained evidence of the injury prior to notice of termination was suggestive but inadequate and so ordered the parties to develop the record as to that issue. (See Findings and Order and Opinion on Decision dated January 26, 2022 at pg. 2)

(Report, pp. 2-4; emphasis in original.)

DISCUSSION

A. Reconsideration or Removal

In the Report, the WCJ states that defendant seeks removal and/or reconsideration of the January 26, 2022 Findings and Order and that applicant seeks removal of the same Findings and Order. (Report, p. 1.) We will preliminarily address whether defendant's petition is a petition for reconsideration or a petition for removal, and whether applicant's answer should be deemed a petition for removal.

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian*, *supra*, 81 Cal.App.4th at p. 1075 [65 Cal.Comp.Cases at p. 655] ("interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"); *Rymer*, *supra*, 211 Cal.App.3d at p. 1180 ("[t]he term ['final'] does not include intermediate procedural orders or discovery orders"); *Kaiser Foundation Hospitals* (*Kramer*), *supra*, 82 Cal.App.3d at p. 45 [43 Cal.Comp.Cases at p. 665] ("[t]he term ['final'] does not include intermediate procedural orders").) Such interlocutory decisions include pre-trial orders regarding evidence, discovery, trial setting, venue, and similar issues.

A party may petition for removal of an interim order if the order causes petitioner "significant prejudice," and/or "irreparable harm." (Cal. Code Regs., tit. 8, § 10843.)

Here, defendant's petition is a petition for reconsideration because the January 26, 2022 Findings and Order is a final order as it makes findings on whether applicant met his burden of proof and whether statute of limitations bar applicant's claim. (Findings and Order dated January 26, 2022, Findings nos. 4-7.) These findings determine threshold issues. As such, defendant's petition is a petition for reconsideration.

Applicant's answer, although it seeks a discovery order from the court, is not timely as a petition for removal. Petitions for removal must be filed within 20 days after the Findings and Order. (Cal. Code Regs., tit. 8, § 10955.) Twenty days from the January 26, 2022 Findings and Order is February 15, 2022. Applicant's answer was filed on March 1, 2022. It is untimely even if you add an extra five days for service. (Cal. Code Regs., tit. 8, § 10605.) Thus, we will treat applicant's pleading as an answer to defendant's petition for reconsideration.

B. Defendant's Petition for Reconsideration

Section 5313 requires the WCJ to,

> . . . make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made. (§ 5313.)

Section 5313 requires the WCJ to state the "reasons or grounds upon which the [court's] determination was made." (See also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-22 [2010 Cal. Wrk. Comp. LEXIA 74].) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton,* at p. 478), and must be supported by substantial evidence. (§§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd*. (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.)

Furthermore, the WCJ is charged with preparing the minutes of hearing and a summary of evidence at the conclusion of each hearing. (Cal. Code Regs., tit. 8, § 10566; *Hamilton, supra,* at p. 476.) The minutes of hearing and summary of evidence must include all interlocutory orders, admissions and stipulations, the issues and matters in controversy, a descriptive listing of all

exhibits received for identification or in evidence, the disposition of the matter, and a fair and unbiased summary of the testimony given by each witness. (Cal. Code Regs., tit. 8, § 10566; *Hamilton, supra,* at p. 476.)

Here, the January 26, 2022 Findings and Order is inadequate. The first finding states that applicant "may" have sustained a cumulative trauma injury ending on April 19, 2019. (Findings and Order dated January 26, 2002, Finding no. 1.) This is not a definitive finding of injury. Furthermore, there is no explanation in the Opinion on Decision or the Report supporting a finding of a cumulative trauma injury.

Applicant's DWC-1 form and the reports of Patrick J. McGahan, M.D., identify a specific injury dated January 2, 2019. (DWC-1 dated September 22, 2019; Exhibits A, C, and D, Dr. McGahan's reports dated October 17, 2020, October 27, 2020, and January 29, 2021.) Yet the first Application for Adjudication dated September 28, 2019 identifies a cumulative trauma injury from January 2, 2018 to January 2, 2019 and the second Application for Adjudication dated September 4, 2020 identifies a cumulative trauma injury from December 21, 2018 to April 19, 2019. (Applications for Adjudication dated September 28, 2019 and September 4, 2020.) The Pretrial Conference Statement suggests that applicant is claiming both a specific injury and a cumulative trauma injury. (PreTrial Conference Statement dated June 24, 2021 with an filed date of June 28, 2021, p. 2.) The November 1, 2021 Minutes of Hearing and Summary of Evidence also suggest that the issue of whether applicant suffered a cumulative trauma injury or a specific injury is at issue. (Minutes of Hearing/Summary of Evidence (MOH/SOE) dated November 1, 2021, p. 2:4-7.) However, there is no discussion anywhere regarding whether applicant suffered a specific injury or a cumulative trauma injury.

Moreover, the burden of proof pursuant to sections 3202.5[2] and 3600, subdivision (a) (Findings nos. 4 and 5) differ depending on whether the injury is a cumulative trauma or a specific injury. Likewise, an analysis of the statute of limitations (Findings nos. 6 and 7) is different between a cumulative trauma injury and a specific injury. Statute of limitations depend on the date of injury and the definition of date of injury between a cumulative trauma injury and a specific injury differ. (§§ 5400, 5405, 5411 and 5412.)

The post-termination defense found in section 3600, subdivision (a)(10), also depends on

[2] We presume the WCJ meant section 3202.5 (preponderance of evidence standard), not 3205.5 (definition of Appeals board).

the date of injury, which is not clear here. (§ 3600 subdv. (a)(10).) The WCJ ordered development of the record with respect to the existence of medical records prior to May 3, 2019, the date the WCJ deemed applicant terminated from employment. We note that Dr. McGahan summarized a progress report by Bejamin Mill, M.D. dated March 20, 2019, approximately one and a half months before the date the WCJ deemed applicant terminated from employment, which notes a blister on the tip of applicant's right fifth toe for four weeks that developed into an ulcer. (Exhibit A, Dr. McGahan's report dated January 29, 2021, p. 43.) We make no findings as to the sufficiency of this medical record but simply note the existence of it.

Defendant contends that an order to develop the record after extensive discovery was conducted and closed at the Mandatory Settlement Conference prejudices defendant and violates due process. "[I]n order to ensure reliance on substantial evidence, and a complete adjudication of the issues consistent with due process," the WCJ and the Appeals Board both have a duty to further develop the record where there is an absence of, or insufficient evidence to determine the issues raised for trial. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal. App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see §§ 5701 and 5906 and *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc).) Indeed, the Appeals Board has a constitutional mandate to "ensure substantial justice in all cases," and is therefore "clearly permitted" to admit evidence even after the discovery cut-off under Labor Code section 5502, subdivision (d)(3). (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403-405 [65 Cal.Comp.Cases 264]; Cal. Const., art. XIV, § 4 ["The system of workers' compensation "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State . . . ."])

> Based on sections 5701 and 5906, it is well established that the WCJ or the Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence. (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal. 3d 312, 318 [90 Cal. Rptr. 355, 475 P.2d 451] [Board should have obtained medical evidence of causation]; *Lundberg v. Workmen's Comp. App. Bd.* (1968) 69 Cal. 2d 436, 440 [71 Cal. Rptr. 684, 445 P.2d 300] [Board should have obtained medical evidence of causation]; *W. M. Lyles Co. v. Workmen's Comp. App. Bd.* (1969) 3 Cal. App. 3d 132, 138 [82 Cal. Rptr. 891] [Board should have explored employee's willingness to work, opportunities for

> employment and skill level to determine earnings].) (*Kuykendall, supra,* 79 Cal.App.4th at p. 404.)

With respect to Dr. McGahan's report, we note that he concludes that the applicant's injury is work related without any explanation. He states that applicant developed a blister on his right pinky toe after he began working for defendant. (Exhibit D, Dr. McGahan report dated October 17, 2020, p. 4.) However, he does not explain how applicant's injury is work related. In fact, Dr. McGahan does not mention that applicant testified during his deposition that he was required to buy work boots and that applicant believed that the boots caused a blister on his right pinky toe, which eventually led to three amputated toes. (Exhibit E, Deposition of Application, pp. 41:23-42:10.) Although Dr. McGahan notes in his report that he has reviewed applicant's deposition, he does not provide a basis for his conclusion.

Finally, there is no discussion in any of the pleadings regarding an "intentionally self-inflicted" injury as stated in Finding no. 8, which we conclude also lacks support.

For the foregoing reasons,

IT IS ORDERED that defendant Insurance of the West's Petition for Reconsideration of the January 26, 2022 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the January 26, 2022 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 25, 2022

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

LYLE COOPER
LAW OFFICES OF RONALD G. MAHURIN
D'ANDRE LAW LLP

LSM/*pc*

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