

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

ANABELLE SHEPHEARD, *Applicant*

vs.

**LADDARAN MANAGEMENT CORPORATION;
EMPLOYERS PREFERRED INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ13173519
Marina del Rey District Office**

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

Applicant seeks reconsideration of the July 25, 2023 Findings and Order wherein the workers' compensation administrative law judge (WCJ) found that applicant did not sustain industrial injury while employed as a cook on December 15, 2019. We have considered the allegations of the Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated below, we will grant reconsideration, rescind the July 25, 2023 Findings and Order, and return this matter to the Presiding Judge for reassignment to a new WCJ for a trial de novo. This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

The WCJ's Report states as follow:

FACTS

Applicant has claimed that on [December 15, 2019] she suffered an injury arising out of and in the course of her employment. The mechanism of injury was that her coworker, Arthur, accidentally struck her in the back with a Tupperware container of lettuce. The alleged injury was reported the same day and contemporaneous with reporting the injury, she completed a handwritten incident report which stated that the incident took place at around 7:45.

The parties stipulated at trial that the in-house security cameras which filmed the location where the alleged incident took place did not show the applicant being struck in any manner by Arthur between the hours of 7 to 8 pm.

The Applicant was transported that same evening by ambulance to Palmdale Regional Medical Center after her husband called emergency services on her behalf. The Applicant was released from the emergency department after being examined.

The applicant continued to work for the defendant as well as another employer until approximately May of 2020.

The Defendant denied the claim based on their in-house investigation of the claim.

The Applicant was subsequently examined in May of 2020 by Dr. Rouzbeh Masrouh who, based on the history and mechanism of injury reported to him by the Applicant, found injury arising out of and in the course of employment (AOE/COE) (Exhibit 9). The applicant was also evaluated by Panel Qualified Medical Examiner Dr. Michael Tooke on [March 17, 2022] who also found injury AOE/COE based on the same mechanism of injury (Exhibit D).

The case went to trial on the issue of injury AOE/COE and the undersigned determined that the Applicant's testimony did not support the claimed mechanism of injury. It was determined that the Applicant was not a credible witness and that the medical evidence finding injury AOE/COE was not substantial medical evidence because the claimed mechanism of injury was not supported by the trial testimony.

DISCUSSION

Petitioner claims that there is sufficient evidence to find injury AOE/COE.

The Applicant claims that the medical examination on the day of the alleged accident documents findings which support her claim of injury.

The Applicant's trial testimony did not support the alleged mechanism of injury that was reported to the medical experts on this case. All of the medical reports in this case which find injury AOE/COE rely on a mechanism of injury where her coworker Arthur struck her in the back with a Tupperware container of lettuce. If that mechanism of injury is not supported by the evidence, then the medical conclusions based thereon are not substantial evidence of injury AOE/COE.

The medical records from the Emergency Department document this specific mechanism of injury (Exhibit C). The attending physician Amiram Shneiderman MD took a history of the injury of;

“She states 1 of her coworkers was carrying a plastic Tupperware container full of lettuce, he accidentally turned hitting her in the back causing the injury.”

Dr. Shneiderman also performed a physical examination and while the ultimate diagnosis was *“back pain, lumbar strain, contusion, muscle spasms”*, the physical examination of the applicant’s back documented; *“no erythema, no ecchymosis and no abrasion”* (no redness, no bruising, no wound).

Thus, while the emergency room physician may have diagnosed *“back pain, lumbar strain, contusion, muscle spasms”* this was in the absence of any redness, bruising or wound and was based solely on the Applicant’s claim that she had been struck in the back by her coworker.

Since the Applicant’s testimony was not credible regarding this alleged mechanism of injury any medical conclusions based on this mechanism of injury cannot be the basis for a finding of injury AOE/COE.

Petitioner claims that there was contradictory testimony from witnesses Arthur Balcorta and Lupita Chavez.

Petitioner contends that witness Mr. Balcorta testified that the Applicant complained of injury to Lupita but that Ms. Chavez testified that the Applicant denied being in pain. This characterization of the testimony is not accurate.

In fact, Ms. Chavez testified that when she first spoke with the Applicant about the alleged injury, she asked the Applicant if she was “okay” to which Ms. Shephard responded, “Oh, yeah”. Ms. Chavez asked if she could call someone for her, a doctor, her husband or the manager, and Ms. Shephard said “no.” Ms. Chavez also testified that subsequently, within their 40-minute interaction, they spoke again and Ms. Shephard told Ms. Chavez that she had been injured on her upper left shoulder. Therefore, the actual testimony is not as characterized by the Petitioner.

Therefore, contrary to Petitioner’s claim, both witnesses testified that the Applicant reported an injury to Ms. Chavez.

Petitioner claims that there is “murkiness” in the record because Defendant did not offer the Applicant a claim form.

The Petitioner claims that there was a delay in medical treatment and proper employer investigation. In fact, the employer witness Ms. Chavez testified

credibly that medical care was offered to the Applicant at the time she complained of injury, but this was declined. Then, the Applicant's husband called an ambulance on her behalf and the Applicant was examined immediately by an emergency room physician.

Petitioner claims that there was no proper employer investigation performed on this case but offers no evidence in support of this assertion. As the employer secured the kitchen surveillance video for the time and location for where and when the Applicant claim she was injured it appears that there was an employer level investigation done on this matter.

Further Discussion

If there is murkiness in the record it arises from the Applicant's trial testimony. When under oath, the Applicant is unable to provide credible testimony to support her claim of injury.

On the date of the alleged injury, in her own handwriting and supported by her trial testimony, Ms. Sheppard completed an incident report claiming that at about 7:45 pm, her coworker Arthur struck her with a Tupperware tray of lettuce (Incident Statement, Exhibit A.) However, as stipulated by the parties, the kitchen surveillance film from 7 to 8 pm does not show any such incident taking place.

Despite having specifically told the medical examiners that she had been struck in the back with a Tupperware tray, when she testified under oath at trial she testified that does not know where on her body she was allegedly struck. Further, she does not know if she was struck by anything in particular. She also testified that Arthur carried a plastic bag of lettuce, not a Tupperware tray. Finally, she testified that she felt "stabbing" pain yet, she did not turn around to see what had happened and instead just kept working until her next break.

The undersigned considered all evidence when reaching the conclusion that there was no injury AOE/COE. Great weight was given to Applicant's demeanor when testifying at trial along with her testimony that she did not actually know how she was injured or on what part of her body.

When under oath, she was unable to provide convincing testimony that she had been struck in the back by a Tupperware tray full of lettuce carried by her coworker Arthur, as she had reported to her employer and to all of the medical examiners on this matter.

Further, significant weight was also given to her handwritten and contemporaneous incident statement documenting the time of the alleged incident at 7:45 pm and the contradictory video surveillance.

All medical opinions finding injury AOE/COE were predicated on the mechanism of injury wherein the Applicant was allegedly struck in the back by a Tupperware tray carried by her coworker. This mechanism of injury was not found to be credible based on Ms. Shephard's own non-credible testimony and the other evidence offered. Thus, the medical opinions based on this mechanism of injury are insufficient evidence to support a finding injury AOE/COE.

(Report, at pp. 1-6, emphasis in original.)

The decisions of the Workers' Compensation Appeals Board must be supported by substantial evidence. (Lab. Code, § 5903; *LeVesque v. Worker's Comp. Appeals Bd.* (1970) 1 Cal.3d. 627, 635-637 [35 Cal.Comp.Cases 16].) Furthermore, while we accord great weight to WCJs' findings on the credibility of witnesses, if they are supported by "ample, credible evidence" or "substantial evidence," we exercise independent judgment as to whether the evidence satisfies the required elements of the applicable law and may reject findings of the WCJ upon our review of the record. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500].)

The Labor Code¹ provides that "all judicial powers" and original jurisdiction in workers' compensation matters are vested with the Appeals Board itself, (Lab. Code, §§ 111(a), 5300, 5301.) The WCJs conduct trials and make initial determinations pursuant to a delegation by the Appeals Board. (Lab. Code, §§ 5309, 5310; Cal. Code Regs., tit. 8, § 10348.) A decision of a WCJ only becomes the decision of the Appeals Board if reconsideration is not granted. (Lab. Code, § 5900 et seq.; Cal. Code Regs., tit. 8, § 10348.)

Moreover, section 5906 provides that "[u]pon the filing of a petition for reconsideration ... the appeals board may, with or without further proceedings and with or without notice affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers' compensation judge ..." (Lab. Code, § 5906.) Similarly, section 5908 provides that "[a]fter ... a consideration of all the facts the appeals board may affirm, rescind, alter, or amend the original order, decision, or award." (Lab. Code, § 5908.)

Based on these statutes, it is settled law that a grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc.*

¹ All further statutory references are to the Labor Code, unless otherwise noted.

Com. (George) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (*Ibid.*; e.g., also, *Tate v. Industrial Acc. Com.* (1953) 120 Cal.App.2d 657, 663 [18 Cal.Comp.Cases 246]; *Pacific Employers Ins. Co. v. Industrial Acc. Com. (Sowell)* (1943) 58 Cal.App.2d 262, 266-267 [8 Cal.Comp.Cases 79].)

(*Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 229 (Appeals Board en banc.)

Based on our review of the record in this matter, we do not agree with the WCJ's analysis and reject her credibility determination. The WCJ stated that: "while the emergency room physician may have diagnosed 'back pain, lumbar strain, contusion, muscle spasms' this was in the absence of any redness, bruising or wound and was based solely on the Applicant's claim that she had been struck in the back by her coworker." (Report, at p. 3.) However, a WCJ may not substitute her own opinion on matters of medical diagnosis. "Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a commission finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence. [Citation.] Expert testimony is necessary 'where the truth is occult and can be found only by resorting to the sciences.' [Citation.]" (*Peter Kiewit Sons v. Ind. Acc. Comm. (McLaughlin)* (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188].) Emergency Department records show that, applicant reported "a coworker accidentally turned into her while carrying a Tupperware container [hitting] in the back causing the injury." (Palmdale Regional Medical, Emergency Department records, at p. 13, applicant's Exhibit 10.) While a physical examination revealed "no abrasion, ecchymosis or erythema" as the WCJ notes, the examining physician, Amiram Shneiderman, M.D., diagnosed applicant with "[b]ack pain, lumbar strain, contusion [i.e., bruise], [and] muscle spasms." (Palmdale Regional Medical, Emergency Department records, at p. 13, applicant's Exhibit 10.) Moreover, ambulance records showed evidence of redness in the thoracic area stating: "PT CHIEF COMPLAINT WAS BACK PAIN X30 MINUTES. PT STATED THAT ANOTHER MCDONALDS EMPLOYEE HIT HER WITH

A PAN...+PAIN +REDNESS OF THORACIC SECTION...” (Ambulance Records, at p. 10, defendant’s Exhibit B.)

We acknowledge the WCJ’s reservations regarding applicant’s credibility. And while we accord great weight to WCJs’ findings on the credibility of witnesses, if they are supported by “ample, credible evidence” or “substantial evidence,” we exercise independent judgment as to whether the evidence satisfies the required elements of the applicable law and may reject findings of the WCJ upon our review of the record. (*Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500].) The Appeals Board is empowered on reconsideration to resolve conflicts in the evidence, to make its own credibility determinations, and to reject the findings of the WCJ and enter its own findings on the basis of its review of the record. (*Rubalcava v. Workers’ Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901, 908.) Applicant’s testimony at trial appears consistent with the reports of the ambulance personnel (defendant’s Exhibit B), the emergency department records (applicant’s Exhibit 10), and the statement written by applicant on the date of injury. (Defendant’s Exhibit A.) However, while we reject the WCJ’s credibility determination for the reasons stated above, we do not make our own credibility determination here but instead will send this back to the presiding judge for reassignment to a new WCJ for a trial de novo pursuant to our authority under section 5310².

Upon this matter’s return and reassignment to a new WCJ, the new WCJ should set this for an MSC to give the parties an opportunity to confirm or make changes to the stipulations and issues and evidence presented. We also direct the new WCJ to ensure that the issue of presumption of compensable injury pursuant to section 5402 is included and tried.

² Section 5310 states: “The appeals board may appoint one or more workers’ compensation administrative law judge in any proceeding, as it may deem necessary or advisable, and may refer, remove to itself, or transfer to a workers’ compensation administrative law judge the proceeding on any claim....”

For the foregoing reasons,

IT IS ORDERED that reconsideration of the July 25, 2023 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the July 25, 2023 Findings and Order is **RESCINDED** and that the matter is **RETURNED** to the presiding judge for reassignment to a new WCJ for further proceedings and decision by the new WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 13, 2023

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

**ANABELLE SHEPHEARD
LAW OFFICES OF EDWARD J. SINGER
TOBIN LUCKS**

PAG/abs

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