WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FAUSTINO AGUILAR ARIAS, *Applicant*

vs.

AGR CONTRACTING; STAR INSURANCE COMPANY, administered by MEADOWBROOK INSURANCE GROUP, *Defendants*

Adjudication Number: ADJ9916195
Fresno 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.[1]

In the Findings of Fact and Order of July 9, 2020, the workers' compensation judge ("WCJ") found, in relevant part, that applicant failed to meet his burden of proving he sustained injury arising out of and occurring in the course of employment while working for AGR Contracting during the period June 1, 2012 through June 13, 2013, and that applicant failed to present evidence he timely commenced his claim for workers' compensation benefits within one year of the date of the alleged injury.

Applicant filed a timely Petition for Reconsideration of the WCJ's decision. Applicant contends that the facts do not support the WCJ's finding that applicant failed to timely commence his claim, and that the medical evidence justifies a finding that applicant sustained a cumulative trauma injury and/or a specific injury.

Defendant filed an answer.

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

[1] Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated August 25, 2020. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

We have considered the allegations of the applicant's 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 and in the WCJ's Report, which we adopt and incorporate only to the extent set forth in the attachment to this opinion,[2] we will affirm, in part, the Findings of Fact and Order of July 9, 2020. We will affirm the WCJ's denial of applicant's claim of cumulative trauma injury, but otherwise we will amend the WCJ's decision by rescinding and replacing Finding 3 and by amending the WCJ's Order. The amended decision will reflect that the Statute of Limitations is moot as to the cumulative trauma claim, and that the issue of specific injury is deferred pending further proceedings and determination by the WCJ.

We further note that in denying applicant's claim of cumulative trauma injury, the WCJ properly relied upon the medical opinion of Dr. Bhatia, Panel Qualified Medical Evaluator ("PQME") in neurology, which the WCJ found more persuasive than the opinion of Dr. Dureza. It is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

At the same time, we also note that it was unnecessary for the WCJ to make a finding on the Statute of Limitations concerning applicant's claim of cumulative trauma. Since the WCJ found no cumulative trauma injury, the question of whether any such injury was barred by the Statute of Limitations is moot. In fact, the WCJ's analysis concerning the Statute of Limitations seems to imply that applicant has the burden of proving his claim is not barred by the Statute of Limitations. To the extent the WCJ does imply this, we disagree.

The Statute of Limitations is an affirmative defense, upon which defendant bears the burden of proof. (Lab. Code, § 5409.) For instance, defendant would have the burden of establishing when applicant knew he had a claim of work-related injury and when applicant gave defendant notice of the claim. Defendant would also have the burden of establishing that applicant failed to pursue his claim within one year after the alleged injury. Although we conclude the Statute of Limitations is moot as to applicant's claim of cumulative trauma injury, we note in passing that the evidentiary record is lacking on the elements of the defense listed above.

[2] We do not adopt or incorporate the WCJ's discussion of the Statute of Limitations, found on pages four and five of the WCJ's Report.

Finally, although we affirm the WCJ's denial of applicant's claim of cumulative trauma injury, we find an unresolved issue concerning whether applicant may have sustained a specific injury. In her Report, the WCJ notes that Dr. Bhatia, whose medical opinion the WCJ followed, stated that applicant allegedly sustained a specific industrial injury to his back, neck and shoulders in March 2012 – apparently as a result of lifting a trailer. It also appears from Dr. Bhatia's report that this alleged injury is supported not only by applicant's narrative, but also by the doctor's statement that applicant evidently received medical treatment for it. (Joint exhibit 103, Bhatia report dated May 16, 2019, p. 7.) Although we express no final opinion on the existence, nature or extent of this alleged specific injury, we are persuaded the issue warrants further development of the record and determination by the WCJ.[3] (See *Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1164 (66 Cal.Comp.Cases 1290) [Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence].) In further proceedings, defendant must be afforded an opportunity to assert any defenses it may wish to raise against the alleged specific injury.

It should be noted that we express no final opinion on any substantive issue concerning the alleged specific injury discussed herein. When the WCJ issues a new decision, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq*.

[3] Under WCAB Rule 10517, "[p]leadings may be amended by the Workers' Compensation Appeals Board to conform to proof." (Cal. Code Regs., tit. 8, § 10517.) However, we do not invoke the rule here because amending applicant's claim of cumulative trauma injury to find a specific injury is so different from the original claim that it raises due process concerns about defendant's right to assert potential defenses to the specific injury claim. Moreover, the specific injury claim apparently involves new and additional body parts – the neck and shoulders - that were not alleged in the cumulative trauma claim.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Order of July 9, 2020 is **AFFIRMED**, except that said decision is **AMENDED** to **RESCIND** and **DELETE** Finding 3, to **SUBSTITUTE** a new Finding 3 therefor, and to amend the Order as follows:

FINDINGS OF FACT

3. The Statute of Limitations concerning applicant's claim of cumulative trauma injury is moot. The issue of whether applicant sustained a specific industrial injury, and any defense or defenses defendant may wish to raise, is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.

ORDER

IT IS ORDERED THAT applicant take nothing on his claim of cumulative trauma injury, and that the issue of whether applicant sustained a specific industrial injury, and any defense or defenses defendant may wish to raise, is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ concerning the alleged specific injury, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 28, 2023

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

FAUSTINO AGUILAR ARIAS
TAFOYA &ASSOCIATES
BRADFORD & BARTHEL

JTL/*ara*

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. Date of Injury: 6/1/2012 to 6/23/2013
   Applicant's Occupation: seasonal truck driver
   Parts of Body: head, mouth, wrist, nervous system, and back
2. Date of Issuance of Award/Order: 7/9/2020
3. Identity of Petitioner: Applicant
   Petition Dated: 7/23/2020
   Petition Filed: 7/23/2020
   Timeliness: The Petition is timely.
   Verification: The Petition is verified.
4. Answer: No Answer was filed.
5. Applicant contends the findings of fact do not support the Order, Decision or Award.
6. It is recommended the Petition be denied.

II
BACKGROUND

On July 9, 2020, the undersigned issued a Findings of Fact, Order, and Opinion On Decision (hereinafter Findings and Order), finding Applicant failed to meet his burden of proving he sustained an injury arising out and occurring in the course of employment working for AGR Contracting during the period of June 1, 2012, through June 23, 2013, and failed to present evidence to demonstrate he timely commenced his claim for workers' compensation benefits, within one year of his date of injury. It is from this Findings and Order that Petitioner seeks reconsideration.

As of the writing of this Report, no answer to the petition has been filed by Defendants.

III
DISCUSSION

Arising out of, and Occurring in the Couse of Employment

Petitioner alleges to have sustained an industrial injury to the head (headaches), mouth, wrist, nervous system (anxiety/depression), and back, while employed during the cumulative period of period of June 1, 2012, through June 13, 2013, as a seasonal truck driver for AGR Contracting. *[Reporter's Minutes of Hearing, 5/3/2020, page 2, lines 8 – 11]* All parties are charged with exercising reasonable diligence in presenting their case. (Lab. Code, § 5903(d); Cal. Code Regs., Title 8, § 10856(e)). The moving party must prove all elements necessary to establish the validity

of their claim or defense by a preponderance of the evidence. (Labor Code §§ 3202.5 and 5705) All parties shall meet their evidentiary burden of proof on all issues by a preponderance of the evidence. "Preponderance of the evidence" means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. The burden of proof rests upon the party holding the affirmative of the issue. Unless that is provided, the burden of proof will not shift to the opposing party.

Petitioner had the burden to prove he sustained an industrial injury. Petitioner avers that the undersigned substituted her judgment for that of the medical providers in finding Petitioner failed to meet his burden of proving he sustained an injury arising out and occurring in the course of employment working for AGR Contracting during the period of June 1, 2012, through June 23, 2013. In support of the alleged injury, Petitioner introduced the medical report of Catalino Dureza, M.D., dated December 2, 2014, which Petitioner erroneously contends is not being challenged, opposed, or contradicted in any way. [*Applicant's Exhibit 6, Catalino Durezo, M.D., 12/2/2014*] Dr. Dureza documents Petitioner claims to have sustained an injury to his *low back* during the cumulative period of period of June 1, 2012, through June 23, 2013. Dr. Dureza then lists a myriad of other subjective complaints and symptomology to various body parts in addition to the low back, none of which Dr. Dureza describes as being related to Applicant's employment. Dr. Dureza then concludes Applicant's symptomology is a result of his specific work-related injuries that occurred on "CT 6/1/2012 - 6/23/2013". The undersigned found Dr. Dureza's opinion to be conclusory, and also lacking clarity as to what and/or which complaints(s) or symptoms(s) he determined to be industrially caused June 1, 2012, through June 23, 2013, and how Applicant's injuries were caused by his employment. However, Perminder Bhatia, M.D., conducted a neurological evaluation of Applicant serving as the panel qualified medical evaluator. *[Joint Exhibits 101, 102 & 103, Perminder Bhatia, 11/7/19, 7/1/19, 5/16/19]* In his initial report, Dr. Bhatia documented Applicant was injured 6 years prior with a claim of cumulative trauma but that Applicant was [actually] injured March 2012. *[Joint Exhibit 103, Bhatia, 5/16/19, page 7]* Applicant informed Dr. Bhatia he injured his back, neck and shoulder on a specific day connecting a trailer to a truck. *[Joint Exhibit 103, Bhatia, 5/16/19, page 7]* Dr. Bhatia reviewed a myriad of Applicant's medical records, including numerous treatment records for the period between 2013 through 2015, which Dr. Bhatia summarized documenting Applicant's complaints and treatment for generalized weakness with functional dysphagia, arthralgia, chronic inflammatory demyelinating polyneuropathy, and myasthenia gravis, as well as other medical records both preceding and subsequent to the alleged industrial injury. *[Joint Exhibit 103, Bhatia, 5/16/19, pages 8 - 19]* […] Dr. Bhatia further opined that there was no evidence Applicant sustained a cumulative trauma injury as alleged June 1, 2012, through June 23, 2013.[1] [*Joint Exhibit 103, Bhatia, 5/16/19, page 20]* Therefore, contrary to Petitioner's averment, that Dr. Dureza opinion is not challenged, opposed, or contradicted in any way, Dr. Bhatia's medical opinion findings and opinion contradict those of Dr. Dureza. The undersigned found Dr. Bhatia's medical opinion to be both explanatory and comprehensive, and therefore more persuasive than that of Dr. Dureza. As such, by way of the medical opinion of Dr. Bhatia, the evidentiary record supports the

[1] Dr. Bhatia opined that within a reasonable medical probability, going through Applicant's *history*, [not Applicant's medical records] that Applicant sustained an industrial injury one day when lifting a trailer, which Dr. Bhatia did not find to be a cumulative trauma, sustained injury to the low back, and possibly mid back to upper neck, and *may* have suffered anxiety and depression due to that. [*Joint Exhibit 103, Bhatia, 5/16/19, page 20*] However, the current claim alleges a cumulative trauma injury through, and not a specific injury in 2012.

undersigned's finding that Petitioner failed to meet his burden of proving he sustained a cumulative trauma injury while employed by Defendant between June 1, 2012, and June 23, 2013. […]