

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

MARIA HERNANDEZ, *Applicant*

vs.

HELPING HANDS and EMPLOYERS ASSURANCE COMPANY, *Defendants*

**Adjudication Number: ADJ13150222
Oxnard District Office**

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

Applicant seeks reconsideration of the Findings of Fact and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on July 27, 2021, wherein the WCJ found that applicant did not sustain an injury arising out of and occurring in the course of employment (AOE/COE).

Applicant contends that she required medical treatment as a result of the February 22, 2020 incident, so that incident constitutes an injury AOE/COE.

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

We have considered the allegations in the Petition for Reconsideration (Petition) and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration and affirm the F&A, except that we will amend the F&A to find that applicant sustained injury AOE/COE to her neck, left shoulder, and low back, and to defer the issues of injury to applicant's left arm and hips (Finding of Fact 1). Based thereon, we will amend the Award and return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to her neck, back, left shoulder, left arm, and hips, while

employed by defendant as a caregiver on February 22, 2020.¹ Applicant received treatment from various providers at MedCenter between February 22, 2020, and March 14, 2020. (See App. Exhs. 1 – 4 and 6 – 8.) The diagnoses in the treatment reports included cervical strain, lumbar spine strain, and left shoulder strain. (See e.g. Apps. Exhs. 6 and 9.)

Orthopedic qualified medical examiner (QME) Elana C. Harway, M.D., evaluated applicant on September 17, 2020. (Def. Exh. A, Elana C. Harway, M.D., September 17, 2020.) Dr. Harway examined applicant, took a history, and reviewed medical records regarding treatment applicant received during the period from January 31, 2002, through March 14, 2020. (Def. Exh. A, pp. 5 – 10.) As to the issue of whether applicant sustained an injury on February 22, 2020, Dr. Harway concluded:

In determining causation, it is important to answer whether or not the work injury caused a pre-existing condition to permanently worsen. Looking at the cervical spine and the preinjury impairment, Ms. Hernandez was given the identical impairment for her previous injury of 8 percent. As the impairment is the same, there is no medical evidence that a new injury has occurred. ... ¶ For the right shoulder, if we calculate her whole person impairment, at this time' it is 3 percent which has substantially improved - from her previous WPI of 7 percent. Therefore, with this calculation, this would be an exacerbation of the preexisting left shoulder condition with an impairment rating actually being improved from her previous injury. This is clearly an exacerbation of her pre-existing condition, and there is no new injury. ¶ For the low back ... this episode did not cause a pre-existing condition to permanently worsen and can be considered to be an exacerbation of a pre-existing lumbar spine condition as her subjective symptoms worsened without any change in objective findings. ¶ In conclusion for these multiple body parts, there is either no medical evidence of impairment, or there is an abnormal physical examination when evaluated for impairment which does not provide any medical evidence that these are new injuries. These are clearly exacerbations of pre-existing medical conditions. (Def. Exh. A, pp. 15 - 16.)

The parties proceeded to trial on March 17, 2021, and the matter was continued for further testimony. (Minutes of Hearing and Summary of Evidence (MOH/SOE), March 17, 2021.) On May 5, 2021, after additional testimony was taken, the matter was submitted for decision. The issue submitted for decision was injury AOE/COE. (MOH/SOE, May 5, 2021.)

¹Applicant had previously sustained an injury to her low back on December 29, 2001 (ADJ966609), and a cumulative injury to her cervical spine, right shoulder, and right wrist, during the period from March 3, 2015, through April 22, 2016 (ADJ11231574). (Def. Exh. F; Def. Exh. G; see also Def. Exh. A, p. 4.)

DISCUSSION

Labor Code section 3208.1 defines injury as follows:

An injury may be either: (a) “specific,” occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) “cumulative,” occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. ...
(Lab. Code, § 3208.1.)

It has long been the law that an employment activity whether specific or cumulative, that causes temporary or permanent disability, or causes the need for medical treatment, constitutes an industrial injury. (Lab. Code, § 3208.1; *Aetna Casualty and Surety Co. v. Workers’ Comp. Appeals Bd. (Coltharp)* (1972) 35 Cal.App.3d 329, 342 [38 Cal.Comp.Cases 720, 729 - 730]; *Ferguson v. City of Oxnard*, (1970) 35 Cal.Comp.Cases 452 (Appeals Board en banc).

Here, applicant reported her injury to her supervisor and was sent to MedCenter for treatment. (MOH/SOE, March 17, 2021, p. 5.) As noted above, applicant received treatment for her cervical spine, lumbar spine, and left shoulder injury between February 22, 2020, and March 14, 2020. The need for medical treatment applicant received was the February 22, 2020 incident, and the treatment applicant received was well beyond “first aide” as defined by DIR Rule 14300.7(b)(5)(B). Cal. Code Regs. tit. 8, § 14300.7(b)(5)(B); see App. Exhs. 1 – 4 and 6 – 8.) Dr. Harway concluded that applicant did not sustain an injury because, in her opinion, applicant had not incurred any impairment beyond that caused by her prior injuries. (Def. Exh. A, p. 16.) However, pursuant to Labor Code section 3208.1, an incident that causes the need for medical treatment constitutes an injury. (Lab. Code, § 3208.1.) A medical opinion is not substantial evidence if it is based on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Hegglin v. Workmen’s Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Place v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378–379 [35 Cal.Comp.Cases 525]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) Dr. Harway’s conclusion that applicant did not sustain an industrial injury appears to be based on an incorrect legal theory. Thus, it does not constitute substantial evidence and cannot be the basis for an Appeals Board decision. Any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3

Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) Review of the record indicates there is no dispute that the February 22, 2020 incident occurred, that applicant told her supervisor of the incident, and she was sent to MedCenter to receive treatment. As noted above, applicant received medical treatment, not first aid. Based on the definition of injury in Labor Code section 3208.1, applicant sustained injury AOE/COE to her neck, left shoulder, and low back. (Lab. Code, § 3208.1.) Applicant also claimed injury to her left arm and hips. It is not clear whether applicant did or did not receive treatment for those body parts. The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to 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].) Based thereon, it is appropriate that we defer the issues of injury to applicant's left arm and hips and return the matter to the WCJ for the parties to further develop the record. Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) However, under the circumstances of this matter, it may be in the parties' interest to have applicant evaluated by an agreed medical examiner or in the alternative, for the WCJ to appoint a regular physician. (Lab. Code § 5701.)

Finally, DIR Rule 10205.12 contains requirements regarding the formatting of various pleadings, including petitions for reconsideration. For example, DIR Rule 10205.12(a)(5) and (11) identifies the font size and spacing required for those documents. (Cal. Code Regs., tit. 8, § 10205.12(a)(5) and (11).) Applicant's attorney is admonished for failure to comply with requirements of these rules.

Accordingly, we grant reconsideration and affirm the F&A, except that we amend the F&A to find that applicant sustained injury AOE/COE to her neck, left shoulder, and low back and to defer the issues of injury to applicant's left arm and hips (Finding of Fact 1). Based thereon, we amend the Award and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Award issued by the WCJ on July 27, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 27, 2021 Findings of Fact and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Maria Hernandez, while employed on February 22, 2020, as a caregiver, at Santa Barbara, California by Helping Hands, sustained injury arising out of and in the course of employment to her neck, left shoulder, and low back; the issues of whether applicant sustained injury arising out of and in the course of employment to her left arm and hips is deferred, jurisdiction reserved.

* * *

AWARD

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All issues regarding an award of benefits are deferred pending further development of the record, jurisdiction reserved.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 4, 2021

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

**MARIA HERNANDEZ
GHITTERMAN, GHITTERMAN & FELD
TOBIN LUCKS**

TLH/pc

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