WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CRISTINA MARTINEZ, *Applicant*

vs.

KERN RIDGE GROWERS, permissibly self-insured, *Defendants*

Adjudication Numbers: ADJ9227113, ADJ9638263
Bakersfield District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in order to further study the factual and legal issues in these cases. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on March 9, 2021. By the F&O, the WCJ found that applicant sustained injury arising out of and in the course of employment (AOE/COE) to her left middle finger in ADJ9227113, and to her right middle finger and right shoulder in ADJ9638263. The WCJ also found that the reports and deposition of the qualified medical evaluator (QME), Dr. Jay Jurkowitz, are substantial medical evidence.

Defendant contends that the opinions of Dr. Jurkowitz are not substantial evidence on the issue of whether applicant has complex regional pain syndrome (CRPS) and should be excluded. Defendant also requests that a replacement QME panel in neurology be issued.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that defendant's Petition be denied.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will affirm the F&O.

FACTUAL BACKGROUND

Applicant claims two injuries while employed as a packer by Kern Ridge Growers: 1) to the left middle finger, CRPS, left hand, left arm and left shoulder on July 11, 2012 (ADJ9227113) and 2) to the right middle finger, bilateral shoulders, CRPS, cervical spine, thoracic spine, both

lower extremities and both elbows through March 24, 2015 (ADJ9638263). Applicant's two claims have been consolidated. (Minutes of Hearing and Summary of Evidence and Order of Consolidation, November 25, 2020, p. 2.)

Dr. Jurkowitz evaluated applicant as the neurological QME. In his first report in 2019, he was unable to provide a diagnosis or comment on applicant's condition because he had not been provided with her medical records. (Defendant's Exhibit D, Report of Jay Jurkowitz, M.D., March 5, 2019, p. 5.) Medical records were subsequently provided to and reviewed by Dr. Jurkowitz. (Defendant's Exhibit C, Report of Jay Jurkowitz, M.D., April 11, 2019.) Dr. Jurkowitz initially concluded that "there is not any objective evidence that there is any work-related neurologic problem." (Defendant's Exhibit B, Report of Jay Jurkowitz, M.D., June 25, 2019, p. 3.)

Dr. Jurkowitz was cross-examined on December 13, 2019. He testified that applicant "probably" has CRPS. (Defendant's Exhibit E, Deposition transcript of Dr. Jay Jurkowitz, December 13, 2019, pp. 16-18.) He considered this condition to be work-related. (*Id.* at p. 20.)

Darren Bergey, M.D. evaluated applicant as the orthopedic QME. He opined that she sustained injury to her left long finger as a result of the specific incident on July 11, 2012 and a separate cumulative trauma injury to her cervical spine, bilateral shoulders, bilateral wrists and hands. (Defendant's Exhibit A, Report of Darren Bergey, M.D., February 25, 2020, p. 50.)

The matter proceeded to trial on November 25, 2020 with the issue identified as: "Whether the QME reporting and deposition testimony of Dr. Jay Jurkowitz amounts to substantial medical evidence." (Minutes of Hearing and Summary of Evidence and Order of Consolidation, November 25, 2020, p. 3.) Defendant also objected to the admissibility of applicant's exhibits, which solely included reports from her treating physician, Dr. Narinder Grewal. (*Id.*) The parties stipulated to injury AOE/COE to the left middle finger for the specific injury (ADJ9227113), and to the right middle finger and right shoulder for the cumulative trauma injury (ADJ9638263). (*Id.* at p. 2.) Whether applicant's claimed CRPS is industrially related was not identified as an issue at trial. Defendant offered the reports and deposition transcript of Dr. Jurkowitz as its exhibits B-E. (*Id.* at p. 3.)[1]

The WCJ issued the F&O as outlined above. Defendant in its Petition seeks exclusion of

[1] Defendant also offered a deposition transcript of applicant as its exhibit F, but the Minutes of Hearing state that this was "not found and unable to designate in EAMS at the time of production of" the Minutes. (Minutes of Hearing and Summary of Evidence and Order of Consolidation, November 25, 2020, p. 3.) We therefore do not consider applicant's deposition transcript to be part of the evidentiary record and did not consider it in reaching our decision.

Dr. Jurkowitz's reporting and further development of the record through a replacement neurology QME panel.

DISCUSSION

I.

Labor Code[2] section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of Labor Code section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.)

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Defendant's Petition was timely filed on March 25, 2021. Our failure to act was due to a procedural error and our time to act on defendant's Petition was tolled.

II.

Defendant is seeking a replacement QME panel in neurology. Preliminarily, the record does not indicate that defendant raised the issue of a replacement panel at trial. "It is improper to seek reconsideration on an issue not presented at the trial level." (*Cottrell v. Workers' Comp. Appeals Bd*. (1998) 63 Cal.Comp.Cases 760, 761 (writ den.).) It is also unclear why the substantiality of Dr. Jurkowitz's reporting was raised at this trial when the only condition he has opined on is applicant's claimed CRPS and causation for this condition was not identified as an issue to be adjudicated. To date, there has been no finding regarding whether applicant's claim of injury in the form of CRPS is industrially related.

It appears defendant is seeking a replacement QME panel in neurology based solely on the

[2] All further statutory references are to the Labor Code unless otherwise stated.

substantiality of Dr. Jurkowitz's opinions with respect to applicant's alleged CRPS.[3] Administrative Director (AD) Rule 31.5(a) enumerates 16 circumstances under which a party may request a replacement QME panel. (Cal. Code Regs., tit. 8, § 31.5(a).) Despite the evidentiary requirement that decisions by the Appeals Board be supported by substantial evidence, this is not one of the enumerated reasons for a replacement QME panel pursuant to Rule 31.5(a). (See Lab. Code, §§ 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. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Consequently, Rule 31.5(a) does not provide authority for a replacement QME panel on the grounds that the physician's opinions are not substantial evidence.

An aggrieved party may also seek another QME panel if the opposing party has engaged in ex parte communication with the QME. (Lab. Code, § 4062.3(g); see also *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803 (Appeals Board en banc).) There is no allegation or evidence in this matter of an improper ex parte communication with Dr. Jurkowitz.

In the absence of substantial evidence to support replacing Dr. Jurkowitz as the QME, we discern no basis to strike his reporting or issue a replacement QME panel. (See *Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) [decisions by the Appeals Board must be based on admitted evidence].)

Therefore, we will affirm the F&O.

[3] We concede some confusion that defendant itself offered Dr. Jurkowitz's reporting and deposition transcript as evidence at trial while simultaneously alleging that they are not substantial evidence.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Orders issued by the WCJ on March 9, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 22, 2021

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

CRISTINA MARTINEZ
LAW OFFICE OF GEORGE ALMODOVAR
LAW OFFICES OF YRULEGUI & ROBERTS

AI/*pc*

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