WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE MANUEL RAMIREZ SANTOS, *Applicant*

vs.

SUNNY DISTRIBUTORS, INC. / SUNNY HEALTH & FITNESS, and PREFERRED EMPLOYERS INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ12990177
Santa Ana District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on February 16, 2021, wherein the WCJ found that applicant did not sustain an injury arising out of and in the course of employment (AOE/COE) to his neck, bilateral shoulders, back, and left knee. In the Opinion on Decision, the WCJ stated that absent a finding of injury AOE/COE, the post termination defense issue was moot. (F&O, p. 7.)

Applicant contends that the reports from primary treating physician (PTP) Arlen Green D.O., and secondary treating physician Edward Komberg, D.C., in addition to applicant's testimony, are evidence that applicant sustained injury AOE/COE as claimed; or in the alternative that the record should be further developed.

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, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to his neck, bilateral shoulders, back, and left knee, while employed by defendant as a forklift driver during the period from August 5, 2019, through January 29, 2020. Defendant denied the injury claim on April 22, 2020. (Def. Exh. A, Denial Notice, April 22, 2020.) Applicant received treatment for his cervical spine, shoulders, lumbar spine, and left knee, from Arlen Green D.O., and Edward Komberg, D.C. (See App. Exhs. 1 – 6.)

The parties proceeded to trial on July 27, 2020. (Minutes of Hearing and Summary of Evidence (MOH/SOE), July 27, 2020.) The matter was continued to October 1, 2020. Applicant testified about his various neck, back, shoulder, and left knee symptoms, and he testified that he told his supervisors about those symptoms prior to January 29, 2020, the day his employment was terminated. (MOH/SOE, October 1, 2020, pp. 2 - 9.) The October 1, 2020 trial was continued to December 10, 2020, for further testimony and the matter was submitted at that time. (MOH/SOE, December 10, 2020.) The issue submitted for decision was injury AOE/COE, with defendant asserting the post-termination defense. (MOH/SOE, July 27, 2020.)

DISCUSSION

An 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].) To be substantial evidence a medical opinion must be based on pertinent facts, on an adequate examination and an accurate history, and it must set forth reasoning in support of its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) Review of the trial record indicates that PTP Dr. Green did not address the cause of applicant's orthopedic symptoms in any of his reports admitted into evidence. (See App. Exhs. 1, 2, and 3.) In his initial report Dr. Komberg stated:

> From August 5, 2019 to January 29, 2020, during the course of employment as a Forklift Operator/Warehouse Worker he sustained injury to his neck, low back, bilateral shoulders and left knee. ¶ The patient elaborates to the best of his knowledge that he sustained a cumulative trauma injury while working eight hours a day, and five days per week since July 1, 2018.
> (App. Exh 6. Dr. Komberg, March 11, 2020.)

The reports from Dr. Green and Dr. Komberg do not comply with the requirements as described in *Escobedo v. Marshalls, supra,* and do not constitute substantial evidence. Also, a finding that an applicant sustained a cumulative injury must be based on an expert medical opinion. (See *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) Where issues exist regarding diagnosis, prognosis or treatment that is beyond the bounds of ordinary knowledge, medical proof is required. (See *Bstandig v. Worker's Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988, 996 [42 Cal.Comp.Cases 114].) Thus, applicant's trial testimony is not substantial evidence as to the issue of whether applicant sustained a cumulative injury AOE/COE.

We note that portions of the record relevant to the issues discussed herein are contained in the Electronic Adjudication Management System (EAMS) ADJ file. (Cal. Code Regs., tit. 8, §§ 10300 et seq, 10803 and 10807(c).) Review of the EAMS ADJ file indicates that defendant filed a Declaration of Readiness to Proceed on May 7, 2020, wherein it stated that "applicant's claim is denied based on a post termination defense." On July 7, 2020, defendant filed a Petition to Stay Panel QME Evaluation. In the petition counsel stated:

> The parties are set for an AOE/COE trial on July 27, 2020. After the matter was set for trial, applicant attorney set an evaluation with Panel QME Dr. Anderson for July 31, 2020. Defendant will be irreparably harmed if this evaluation takes place, as defendant will be responsible for the costs associated with this evaluation. ¶ The sole issue at trial is AOE/COE based on a post termination defense pursuant to Labor Code § 3600(a)(10) and other legal defenses. ¶ Whether a claim is barred by a post termination defense is a decision by a WCJ, not a Med Legal physician.
> (Petition for Stay of Proceedings, July 7, 2020.)

Labor Code section 4060 states in part:

> (a) This section shall apply to disputes over the compensability of any injury. …
>
> (c) If a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2.
> (Lab. Code, § 4060.)

Defendant is correct that the issue of injury "AOE/COE based on a post termination defense" is a decision to be made "by a WCJ, not a Med Legal physician." However, in order to

determine that a claim is or is not barred by the post termination defense, an initial finding of injury AOE/COE must be made. In turn, it is appropriate when there is a disputed injury claim, to have applicant undergo a medical-legal evaluation. Otherwise stated, if the injury claim is promptly accepted, there is no necessity for a medical-legal report, but if the claim is denied it is appropriate that a medical-legal report be obtained. (*Del Rio* v. *Quality Hardware* (1993) 58 Cal.Comp.Cases 147 (Appeals Board en banc).) Here, without a medical-legal examination/report, there is insufficient evidence in the record upon which the issue of injury AOE/COE may be determined.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on a threshold issue. (Lab. Code, §§ 5701, 5906; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924].) The Appeals Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 404 [65 Cal.Comp.Cases 264].) Under the circumstances of this case, in order to properly litigate the issue of injury AOE/COE, the parties should have applicant undergo a medical-legal evaluation and have the examining physician provide an opinion as to the cause of applicant's orthopedic condition.

Accordingly, we grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration. It is important to note that this decision does not address the merits of the parties' arguments regarding the issues of injury AOE/COE, and the post-termination defense.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued by the WCJ on February 16, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 16, 2021 Findings and Order is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 5, 2021

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

JOSE MANUEL RAMIREZ SANTOS
KAENI LAW GROUP
MICHAEL SULLIVAN & ASSOCIATES

TLH/*pc*

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