WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARCO MAGANA, *Applicant*

vs.

YOUNG'S COMMERCIAL TRANSFER and NATIONAL INTERSTATE INSURANCE COMPANY, Defendants

Adjudication Numbers: ADJ11110715, ADJ9703521
Bakersfield District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact and Orders (F&O), issued by the workers' compensation administrative law judge (WCJ) on June 21, 2021, wherein the WCJ found in pertinent part that applicant did not sustain an injury arising out of and occurring in the course of employment (AOE/COE), as claimed.

Applicant contends that the reports from orthopedic qualified medical examiner (QME) Steven A Schopler, M.D., are not substantial evidence for the issue of 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)[1] 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 back while employed by defendant as a truck driver during the period from July 1, 2011, through July 8, 2014.

[1] Although case number ADJ9703521 is included in the caption of the Petition, that case was dismissed without prejudice, is not at issue herein, and will not be addressed.

Applicant was evaluated by QME Dr. Schopler on March 26, 2018. (Joint Exh. 6, Dr. Schopler, March 26, 2018.) Dr. Schopler examined applicant and took a history. The doctor reviewed cervical spine x-rays and a lumbar spine MRI, but he was not provided medical treatment records to review. (Joint Exh. 6, p. 5.) The diagnoses included multilevel lumbar disc protrusions and lumbar strain. (Joint Exh. 6, p. 5.) Dr. Schopler concluded:

> There is evidence for a back strain to have occurred in an industrial injury July 8th 2014. The cause of the lumbar disc pathology cannot be ascribed to industrial injury. ¶ I would apportion the patients disability 15% to injury of July 8th 2014 and 85% to non-industrial factors.
> (Joint Exh. 6, p. 5.)

Dr. Schopler's deposition was taken on March 18, 2019. (App. Exh. 1, Dr. Schopler, March 18, 2019, deposition transcript.) His testimony included the following:

> Q. So my question is, have you made the determination at this point, with the information that you have, that July 18, 2014, is the date of the injury, or is this a cumulative trauma leading up to that date, or did you not make a determination?
> A. I did not make a determination of that.
> Q. Okay. So if we needed to know whether or not it was a specific or cumulative trauma, you would need that additional information, the medical records, leading up to this as well as a job analysis, correct?
> A. Mostly the medical records, any preexisting medical records, primary care office visits, chiropractor, any of those kinds of things would be helpful to me.
> (App. Exh. 1, pp. 9 – 10.)

> Q. Do you recall seeing the reports from going to his doctor on the morning of July the 8th and whether or not that discussed the injury of any kind?
> A. I think one of my problems with this case is I don't believe we had a full documentation of his medical records. I don't think I had his full medical records. Usually, when I do a qualified medical evaluation, there is a medical record review. I don't see one in my report here.
> (App. Exh. 1, p. 15.)

On May 23, 2019, Dr. Schopler re-evaluated applicant. (Joint Exh. 7, Dr. Schopler, May 23, 2019.) The doctor re-examined applicant and reviewed the medical records he was provided. He diagnosed: "1. Multilevel Degenerative Lumbar Disc Disease. 2. Lumbar Disc Extrusion L5-S1 on the Right. 3. Cervical Spondylosis, mild. [and] 4. Obesity." (Joint Exh. 7, p. 5.) Dr. Schopler concluded that applicant had "0% whole body impairment" and "The Patient's disability is 90%

apportioned to nonindustrial factors and 10% apportioned to injury of July 8, 2014." (Joint Exh. 7, p. 5.)

On July 17, 2020, Dr. Schopler issued a supplemental report wherein he stated:

> With regard to your question of continuous trauma, I do not believe that the degenerative changes identified in the radiograph findings would be attributable to 3 years of work as a truck driver. If his employment had been for 20 years, this might be considered, but I do not believe that 3 years of intermittent lifting, carrying, bending, etc., would accrue continuous trauma to achieve x-ray changes identified.
> (Joint Exh. 8, Dr. Schopler, July 17, 2020, p. 1.)

Dr. Schopler then reiterated his previous opinion that applicant had, "…0% whole body impairment on an industrial basis." (Joint Exh. 8, p. 2.)

The parties proceeded to trial on April 16, 2021. (Minutes of Hearing and Summary of Evidence (MOH/SOE), April 16, 2021.) The WCJ's summary of applicant's testimony included:

> He worked for Young's Commercial Transfer, and he started in June of 2011. He worked as a driver during the tomato season, which was June 30th through October 12th annually, and he did not work in the off season. The applicant would work 12-hour shifts. (MOH/SOE, p. 5.)

> Applicant testified that his last year at Young's Commercial Transfer ended in July of 2014, and he testified that he stopped working because he hurt his back and had back pain. He testified that he saw a doctor for his back pain and that he reported it to his employer. When asked what caused his back pain, he testified that he was on a roadway, and the truck went into a ditch that was not visible. When the truck went into the ditch, he hurt his back. The pain in his back started slowly. … He testified that he has radiating pain into his left hand and left leg. … He did not have pain prior to that incident. Before the incident where the truck went into a ditch in July of 2014, he did not have back pain.
> (MOH/SOE, p. 7)

> The incident where the applicant drove into the ditch was the last day he worked for Young's Commercial Transfer.
> (MOH/SOE, p. 8.)

DISCUSSION

As noted above, in his first report, Dr. Schopler stated that on July 8, 2014, applicant sustained a work related back strain injury and 15% of his disability was due to the July 8, 2014 injury. (Joint Exh. 6, p. 5.) At his deposition, when asked if July 18, 2014, was the date of the injury or the end date of a cumulative trauma injury, Dr. Schopler replied that he had not made

that determination. (App. Exh. 1, pp. 9 – 10.) After re-examining applicant, Dr. Schopler said applicant had "0% whole body impairment" and "The Patient's disability is 90% apportioned to nonindustrial factors and 10% apportioned to injury of July 8, 2014." (Joint Exh. 7, p. 5.) In his supplemental report, Dr. Schopler stated he did, "not believe that 3 years of intermittent lifting, carrying, bending, etc., would accrue continuous trauma to achieve x-ray changes identified" and that applicant had "…0% whole body impairment on an industrial basis." (Joint Exh. 8, pp. 1 and 2.)

Applicant has the burden of establishing the percentage of permanent disability caused by the industrial injury and defendant has the burden of establishing the percentage of disability caused by other factors, but causation of permanent disability is different than causation of injury. (Lab. Code, § 4663; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 607, 611 (Appeals Board *en banc*).) Having reviewed the reports from Dr. Schopler, it is clear that he does not believe applicant incurred any impairment and/or disability as a result of an industrial injury. However, he repeatedly "apportioned" a small amount of applicant's "disability" to his industrial injury. Thus, it is not clear whether he determined that applicant sustained a specific injury, a cumulative injury, neither, or both, with no resulting disability. This is an important issue to be resolved because 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, § 32018.1; *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).) Otherwise stated, a work incident or work activity over a period of time, that causes temporary disability or the need for medical treatment, is an industrial injury, even if it did not cause permanent disability.[2]

Having reviewed the trial record, including the reports from Dr. Schopler discussed above, it appears that the record does not contain substantial evidence upon which a finding on the issue of injury AOE/COE can be made. An award, order or decision by the Appeals Board must be supported by substantial evidence in light of the entire record. (Lab. Code §§ 5903, 5952; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635-637 [35 Cal.Comp.Cases 16].) The

[2] The issues submitted for decision included injury AOE/COE and "Need for further medical treatment." (MOH/SOE, p. 3.)

Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or where there is insufficient evidence to determine an issue. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) In our *en banc* decision, *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated, "Where the medical record requires further development either after trial or submission of the case for decision," the medical record should first be supplemented by physicians who have already reported in the case. "Only if the supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record, should other physicians be considered." (*Id.*, at pp. 139, 142.)

Upon return to the WCJ, it would be appropriate for the parties to request that Dr. Schopler submit a supplemental report to clarify his opinion as to whether applicant did or did not sustain a cumulative injury as claimed, and to explain his analysis and reasoning for his conclusion. We note applicant is alleging that he has sustained a cumulative injury from his many years of work as a truck driver, including the years prior to his work with the employer named herein. Under Labor Code section 5500.5, the employer in the last year of injurious exposure may be held liable for a cumulative injury that includes many years of employment, including those involving different employers. Also, a party may request that a previous employer be joined as a defendant if that employer may be held liable for a portion of benefits owed to the injured worker. (Lab. Code, § 5500.5.) In the further proceedings, the parties should clarify with Dr. Schopler whether applicant has sustained a cumulative injury, and if so, the applicable period of injurious exposure for the injury. We take no position as to the issue of injury AOE/COE but, as noted, under the circumstances of this matter further development of the record is appropriate.

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.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Orders issued by the WCJ on June 21, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 21, 2021 Findings of Fact and Orders 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/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCUR NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 30, 2021

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

MARCO MAGANA
LAW OFFICE OF GHITTERMAN GHITTERMAN
LAW OFFICE OF MICHAEL SULLIVAN

TLH/*pc*

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