WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ARMANDO GATEWOOD, SR., *Applicant*

vs.

CITY OF LOS ANGELES, permissibly self-insured, *Defendant*

Adjudication Number: ADJ9933107
Long Beach 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.

In the Findings and Award dated November 4, 2020, the Workers' Compensation Arbitrator ("Arbitrator") found that applicant is "100% permanently totally disabled pursuant to Labor Code section 4662(a)(4)[1] total mental incapacity; and/or *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234," and that "all of applicant's current disability is apportioned to his March 6, 2015 industrial traumatic brain injury per the AMEs and QME in neurology, neuropsychology, urology, orthopedic and ophthalmology."

Applicant's employer, the City of Los Angeles ("City"), filed a timely petition for reconsideration of the Arbitrator's decision. The City contends that the Arbitrator "neglected his duty to develop the record in this case," alleging that the Arbitrator ignored eyewitness testimony regarding the issues of causation and apportionment, and that the opinions of the medical evaluators are not substantial evidence because they did not consider this eyewitness testimony. The City further alleges that the Arbitrator failed to consider a surveillance video showing that applicant is "substantially functional," and this evidence should have been reviewed and considered by the medical evaluators and by Mr. Enrique Vega, applicant's vocational expert.

Applicant filed an answer.

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

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[1] Section 4662 provides in relevant part: "(a) Any of the following permanent disabilities shall be conclusively presumed to be total in character: […] (4) An injury to the brain resulting in permanent mental incapacity."

At the outset, we note that the Appeals Board has 60 days within which to act on a petition for reconsideration. (Lab. Code, § 5909.) Here, through no fault of the City, its petition for reconsideration did not come to the attention of the Appeals Board until after the expiration of the statutory time period. Consistent with fundamental principles of due process and common sensibilities, we conclude that the running of the 60-day statutory period for reviewing and acting upon the City's petition for reconsideration was tolled for a reasonable period of time after the Board received actual notice of it. (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1107-1108 [57 Cal. Comp. Cases 493]; *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd.* (*Felts*) (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622, 624].)

Turning to the merits, we have considered the allegations of the City's Petition for Reconsideration and the contents of the Arbitrator's Report with respect thereto. Based on our review of the record, and for the reasons stated below and in the Arbitrator's report, which we adopt and incorporate, we will affirm the Findings and Award dated November 4, 2020. The Arbitrator's Report, moreover, cures any technical or alleged defect in satisfying the requirements of Labor Code section 5313. (*City of San Diego v. Workers' Comp. Appeals Bd.* (*Rutherford*) (1989) 54 Cal.Comp.Cases 57 (writ den.); *Smales v. Workers' Comp. Appeals Bd*. (1980) 45 Cal.Comp.Cases 1026 (writ den.).)

Regarding the City's contention that there is eyewitness testimony of applicant's injury relevant to causation and apportionment, the Arbitrator's Report correctly notes that the City's petition for reconsideration makes no showing why the City did not provide this evidence to the medical evaluators and vocational experts, even though the City knew or should have known of this evidence from the time of applicant's injury. The Board may not use its power to develop the record to "bail out" a party who did not adequately prepare its case. (*San Bernardino Comm. Hosp. v. Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986, 991].)

We further note the City stipulated at trial that on March 6, 2015, applicant sustained industrial injury to his head, brain, eyes, ears, nervous system, excretory system, knees, and sexual dysfunction. (Trial transcript, arbitration hearing of 8/4/20, p. 3.) The City's belated allegation that eyewitness testimony shows a different cause of injury is not good cause to disregard its trial stipulation that applicant sustained an industrial injury to multiple body parts and systems. (*Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784 [52 Cal.Comp.Cases 419];

Brannen v. Workers' Comp. Appeals Bd. (1996) 46 Cal.App.4th 377 (61 Cal.Comp.Cases 554) [party not permitted to withdraw from stipulation merely because new expert had different medical opinion].) Moreover, the City does not explain how the eyewitness testimony is relevant to the issue of apportionment, which involves causation of permanent disability, not causation of injury. (*Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223 [Significant Panel Decision].)

Finally, in reference to the City's allegation that the Arbitrator failed to consider surveillance videos showing that applicant is "substantially functional," the premise of the allegation is unfounded because the transcript of the final arbitration hearing of September 11, 2020 demonstrates that the Arbitrator did consider the surveillance videos. Indeed, the transcript shows that the Arbitrator considered them at some length. (Transcript, 9/11/20, pp. 52-62.) The transcript also shows that the City made no clear objection to submission of this case for decision without the surveillance videos being shown to the medical and vocational evaluators. Therefore, we reject the City's contention that the record should be reopened now.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award dated November 4, 2020 is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 10, 2022

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

ARMANDO GATEWOOD
LAW OFFICES OF ARASH KHORSANDI
LOS ANGELES CITY ATTORNEY
SEMIAL TREADWELL

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. **Applicants Occupation:** Wastewater Collection Worker
2. **Applicant's age at dates of injury:** 55
3. **Dates of injury:** March 16, 2015
4. **Parts of body injured:** Head including brain, ears, eyes, excretory system, nervous system, knees and sexual dysfunction
5. **Identity of petitioner:** Defendant
6. **Timeliness:** Timely
7. **Verified:** Yes
8. **Answer Filed:** No
9. **Date of Action:** November 24, 2020
10. **The petitioner's contentions:** The record needs, further development on the issues of causation and apportionment based upon a witness statement and surveillance video that was admitted into evidence at trial and not commented upon in the Opinion on Decision.

Further the evidence supports its vocational experts' opinion on applicant's ability to compete on the open labor market and feasibility for vocational rehabilitation.

II.
FACTS

Applicant began working for the defendant in 1987 as a wastewater collection worker cleaning and maintaining city sewer systems and storm drains.

On March 16, 2015 applicant drove with a different co-employee than defendant's witness to the jobsite for that day. Upon exiting his vehicle, he opened the door of his truck and stood on the top step while smoking a cigarette; suddenly and unexpectedly he fell to the ground, striking his head, rendering him unconscious.

He was taken by paramedics to Los Angeles County IUSC Medical Center where he underwent a surgical craniectomy for evacuation and decompression of the brain.

He then began post-operative rehabilitation at Loma Linda University health system where he developed infections and was having post-surgical seizures.

In September 2015 he had a cranioplasty and follow up EEG's which demonstrated seizure activity and he was told that he suffered a stroke as a result of the injury and now had significant left sided hemiparesis.

In October 2015 the bone flap covering his brain had to be removed due to recurrent infections. After the infections were stabilized in February 2016, he underwent a surgery involving a cranioplasty with titanium mesh to cover the brain area where the bone flap had been removed.

He also developed a neurogenic bladder; meniscal tear in his knee; balance problems and visual problems. His severe cognitive problems resulted in neurologic and neuropsychologic findings of total mental incapacity under Labor Code Section 4662(a)4 by both agreed medical examiners Dr. Robert Short and Dr. Michele Conover in these specialties. He also had previously been found to be 100% totally disabled by the prior QME neurologist Dr. Kreil. Both AME's and the QME felt that he was totally mentally incapacitated and that he was medically incapable of participating in the open labor market.

Applicant had a prior head injury in 1985 for which he received treatment, surgery, and a three-week hospitalization. He then had rehabilitation for approximately two and a half to three months without evidence of any further treatment or any other residual impairment for that injury.

After starting work for the defendant herein in the succeeding 28-year period until this date of injury, he had no documented treatment or incidents related to that injury while performing all his occupational duties without evidence of any restrictions or impairments in doing so.

After trial applicant was found to be 100% permanently and totally disabled pursuant to Labor Code Section 4662(a)4 total mental incapacity and alternatively pursuant to *LeBoeuf v. Worker's Comp Appeals Bd. 34 Cal.3d 234*.

III.
DISCUSSION

WITNESS TESTIMONY:

Defendant's assertion that the record needs further development on the issue of causation of injury is without merit as it stipulated to injury and all its attendant body parts at the time of trial. In addition, its witness testimony is irrelevant on the issue of apportionment as it consists of mere speculation unrelated to any medical evidence which could contribute to the agreed medical examiners findings on apportionment to his prior head injury or to any non-industrial causation or contribution.

Every medical doctor who evaluated the applicant in this matter and commented on causation of injury found that all of applicant's current symptoms and disability were entirely due to this injury with full knowledge and consideration of applicant's prior head injury. They also found that none of his current symptoms or disability was as a result of any other nonindustrial causation or contribution. The doctors cited as evidence that applicant worked for 28 years for defendant after his prior head injury performing all his usual and customary duties without any restrictions or

impairments with no medical evidence of any treatment for any residual symptoms from that injury. There was also no evidence submitted of any non-industrial treatment during that same period for any of his current symptoms and disabilities. There is no dispute in the medical evidence on this issue.

Besides having admitted injury if defendant felt that its witness observations were relevant to the issue of causation and apportionment why did it not provide it to any of the physicians evaluating the applicant? Defendant was in possession of this information from the date of injury and have the burden of proof on the issue of apportionment. It is believed that defendant under the guise of developing the record wishes to be able to reopen and conduct additional discovery which was cut off under Labor Code Section 5502d(3) when the matter was set for arbitration and stipulations and issues were prepared. This evidence does not qualify as newly discovered evidence or even relevant medical evidence.

SURVEILLANCE VIDEO:

The video evidence which defendant touts as being significant and inconsistent with applicants' vocational experts' opinion and consistent with its' vocational experts' opinion of applicants increased functional ability is a misrepresentation of the evidence. The video lasts approximately two minutes and nineteen seconds on both days. On the first day it shows applicant walk from his garage to the front of his house twice. On the second trip he carried a newspaper. On the second day the video shows applicant walk from his driveway to a truck parked in the street in front of his house. Applicant spoke to a man standing at the rear of the truck for approximately three minutes before walking back into a side gate with no further activity observed.

This video evidence was deemed entirely insignificant and would add nothing to the evidentiary record. If one looks at the report of the AME in neurology Dr. Short (Exhibit LL12) dated 1-8-2020 on pg. 4 under activities of daily living there is greater physical activity stated that applicant can perform including walking without difficulty longer distances than what is depicted in this surveillance video. These same observations in the AME neuropsychological report of Dr. Conover dated 1-11-2020 (Exhibit MM13) on pg. 5 under number two, behavioral concerns second paragraph, that applicant likes to go on walks and sometimes his wife joins him. Also on pg. 9 of that same report under the heading of a typical day states that he performs additional chores such as sweeping and yardwork like mowing and weed whacking. Under mobility he only reported difficulty in walking long distances. Clearly this activity attributes greater physical functionality to applicant than that depicted in the surveillance video.

VOCATIONAL EXPERT REPORTS:

Defendants vocational experts' report is entirely non-credible and non-substantial as he conducted no vocational testing of applicants cognitive and physical ability to perform relevant tasks. He relied on applicants statements as to what the applicant thought he was capable of performing which ignored the AME in neuropsychology Dr. Conover's diagnosis of Anosognosia found on pg. 4 of the 1-11-2020 report regarding applicant's lack of endorsement of ongoing symptoms due to his severe cognitive issues (Exhibit MM13). Finally, he relied on his subjective training and experience to conclude that applicant could compete in the open labor market and was a feasible

candidate for vocational rehabilitation. Both agreed medical examiners in neurology and neuropsychology reviewed defendant's vocational experts' conclusions and disagreed with his findings.

Applicant's vocational expert performed vocational testing of the applicant. He also reviewed all the medical reporting in this matter. The results of his vocational testing produced results which were consistent with the severe cognitive and physical limitations of the applicant that were found in the agreed medical evaluators reports in neurology and neuropsychology Dr. Shorr and Dr. Conover respectively as well as those found in Qualified Medical Examiners Dr. Martin Kreil's final report of 9-26-18 (Exhibit FF6). This confirmed his earlier findings as stated in his 9-8-20 vocational report contrary to defendant's contention that applicant's condition had improved (Exhibit VV22).

After Applying these findings to the objective criteria found in the universally accepted criteria for evaluating applicants suitability for vocational rehabilitation and employability including the Work Field Code, Department of Transportation Codes, and the Materials Products Subject Matter and Services Code the applicant's vocational expert concluded that applicant was not a feasible candidate for vocational rehabilitation and unable to compete in the open labor market with a total loss of earning capacity due to these limitations.

RECOMMENDATION

Based upon the foregoing it is respectfully recommended that defendants petition for reconsideration be denied.

Dated: December 7, 2020

Arbitrator Semial Treadwell