WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RICARDO ESPINOZA, ***Applicant***

vs.

HENKELS AND MCCOY; LIBERTY MUTUAL INSURANCE CORPORATION; administered by HELMSMAN MANAGEMENT SERVICES, LLC., ***Defendants***

Adjudication Number: ADJ11545203
Riverside District Office

OPINION AND DECISION AFTER RECONSIDERATION

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

Defendant seeks reconsideration of the Findings, Award and Orders (FA&O) issued by the workers' compensation administrative law judge (WCJ) on September 25, 2019, wherein the WCJ found, in relevant part, that applicant sustained injury arising out of and in the course of employment (AOE/COE) to his left knee, but not to his left leg, on July 25, 2018.

Defendant contends that the WCJ erroneously found applicant sustained injury AOE/COE, arguing that applicant presented insufficient evidence to establish his burden of proving causation. Defendant also contends that the WCJ erroneously failed to admit video footage into evidence.

Applicant did not file an answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report). The Report recommends that the petition be denied.

We have considered the allegations of the petition, and the contents of the Report. Based upon our review of the record, and for the reasons stated below, we will affirm the September 25, 2019 FA&O.

FACTS

The WCJ provides the following recitation of the facts in his Report:

> Ricardo Espinoza,[…], while employed on [July 25, 2018], by Henkels and McCoy (as identified in EAMS, but identified by Petitioner in the caption as

"Henkels & McCoy Group, Inc.") as a laborer, occupational group number deferred, at Spring Valley, California, claimed to have sustained injury to the left knee and left leg. […]

At the trial of [August 15, 2019], the defense witness Rocio Aguerrebere was called by applicant pursuant to Evidence Code 776. While Ms. Aguerrebere (who was the designated employer representative over applicant's attorney objection) was to be called to authenticate the DVD security video taken on the date of injury [July 25, 2018], she acknowledged that in her duties as the employer's claims manager she was not responsible for the actual video recording, but had come into subsequent possession of a copy of said video as contained in a flash drive. The video which was presented by defense counsel in DVD format was identified by this witness as having the same content of the flash drive itself. She also testified that she was able to verify the applicant's identity (whom she had not previously met) with the construction manager Herman De La Garza and the safety supervisor Frank Vehec, both of the Spring Valley/San Diego job site where the applicant worked at the time of injury.

On examination by defense counsel, the video taken on the day of injury [July 25, 2018] was shown. An individual wearing a hard hat (purported to be the applicant) is seen walking into a large work area at the time of the alleged work injury, and is observed to be walking with an uneven gait prior to the incident. At the time of the incident he is seen removing a barricade from the back of a work truck, and in the process of bringing it down is seen to fall to the ground, first on the right knee and then bringing his left knee to rest, although is not seen to fall backwards as previously represented by the applicant in his deposition. (Defendant represented this to be the same video seen by Dr. Gray of U.S. Healthworks and commented upon in her report [September 10, 2018] [Applicant's Exhibit "3"].

This witness was clear in her testimony that prior to the date of the hearing, she had actually never been in contact with the applicant, and the identification of the applicant was based on her discussion with Messrs. De La Garza and Vehec as set forth above, who were not produced to testify. The applicant would not stipulate to the identity of the individual depicted in the video, who was otherwise obscured by the hard hat which was being `worn. The applicant was called to testify, confirming the injury of [July 25, 2018]. He was also clear that he had some problems with the left knee that had led him to wear a "strap", but that this had not caused him to lose work. On cross-examination by the defendant, and when presented with his deposition testimony, he was unclear as to the exact mechanics of the injury to include whether he had actually fallen backwards as depicted by the individual in the video.

On motion by the defendant (and over the objection by the applicant's representative), the defendant was given until [August 29, 2019] for purposes of filing a Post-Trial Brief, and the applicant's representative given until

> [September 12, 2019] for purposes of filing a response. This matter otherwise stood submitted for decision as of [September 12, 2019.] […]
>
> The Findings, Award and Orders issued 9/25/2019, making specific findings as to the lack of proper authentication of the video evidence, admissibility of other exhibits, injury [AOE/COE], parts of body injury injured, earnings, temporary disability, liability for the lien of the Employment Development Department (EDD), and attorney fees.

(Report, pp. 2-4.)

Defendant seeks reconsideration of this FA&O.

DISCUSSION

Preliminarily, we address defendant's contention that defendant's Exhibit E, video evidence, dated July 25, 2018, was improperly excluded from evidence. In this case there is no record that the video was formally offered as an exhibit at trial thus the video was neither excluded nor admitted into evidence. (Opinion on Decision p. 4.).

> "[T]he court was not provided a copy of the video evidence dated 7/25/2018, and while it appears on the PTCS as a defense exhibit, it was not formally offered as an exhibit. On its own motion, the court will marked for identification only as Defendant's "E", with the defendant directed to maintain custody of both the DVD and flash drive formats referred to in the testimony.
> (Opinion on Decision, p. 7.)

The WCJ correctly provided that "[n]oting applicant's objection on identity, the weight given this evidence will be discussed below." (*Id.*) In determining whether to admit evidence, we are governed by the principles of section 5708, which states that the Appeals Board "shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division." (Lab. Code, § 5708.) Notably, there is no requirement of formal authentication in workers' compensation proceedings.

Defendant's witness, Rocio Aguerrebere, who was called to authenticate the video, upon cross-examination, testified that she had never had any contact with applicant prior to trial and that her identification of applicant was based on discussions with the construction manager and the

safety representative at the work site. (August 15, 2019 Trial Transcript (Trial Transcript), 34:19-36:7.) Furthermore the WCJ provided, "[a]pplicant would not stipulate to the identity of the individual depicted in the video, who was otherwise obscured by the hard hat which was being worn." (Opinion on Decision, p. 2.) Defendant's inability to conclusively establish that applicant was displayed in the video is more properly considered in determining the weight of the evidence, rather than the exclusion of the exhibit. Nevertheless, based on our review of the record, we find that any failure in requiring formal authentication of the video was harmless because the evidence is not persuasive due to the uncertainty regarding whether it was applicant in the video.

Next, we address defendant's contention that the WCJ erred in finding that applicant sustained industrial injury. Here we observe the fundamental principal that an employer is liable in the workers' compensation system for an injury to an employee, "…arising out of and in the course of the employment…" (Lab. Code, § 3600(a);[1] *Maher v. Workers' comp. Appeals Bd*. (1983) 33 Cal.3d 729, 732–733 [48 Cal.Comp.Cases 326] (*Maher*).) The concept of "in the course of the employment" generally, "…refers to the time, place, and circumstances under which the injury occurs." (*Maher*, supra, 33 Cal.3d at 733.) "Arising out of" employment generally refers to the causal connection between the employment and the injury. (*Id*.) In other words, the employee must be exposed to the "danger from which the injury results" as a result of his "particular employment." (*Maher*, *supra*, 33 Cal.3d at 734 n.3 (citing *Industrial Indem. Co. v. Ind. Acc. Com.* (1950) 95 Cal.App.2d 804, 809).)

The employment need only be a contributing cause of the injury. (*South Coast Framing, Inc., et al. v. Workers' Comp. Appeals Board* (*Clark*) (2015) 61 Cal.4th 291, 297–299 [80 Cal.Comp.Cases 849]; *Wickham v. North American Rockwell Corp*. (1970) 8 Cal.App.3d 467, 473 [35 Cal.Comp.Cases 751] (citing *Madin v. Industrial Acc. Com*. (1956) 46 Cal.2d 90, 92–93).) Moreover, "…industrial causation itself need not be certain, but only 'reasonably probable.'" (*McAllister v. Workmen's Comp. Appeals Board* (1968) 69 Cal.2d 408, 417 [33 Cal.Comp.Cases 660] (*McAllister*).)

Reasonable probability does not require applicant to prove in detail, "…the approximate number of hours of exposure, or as to the amount of exposure needed to increase materially the danger of injury." (*McAllister*, *supra*, 69 Cal.2d at 418 referring to *Industrial Indem. Exchange v. Industrial Acc. Com*. (1948) 87 Cal.App.2d 465 [13 Cal.Comp.Cases 220].) "Nor does an

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

employee have to prove scientifically…the source of contagion or the cause of the disease, but only that he establish by a preponderance of likelihood the fact that his disability arose out of and happened in the course of employment." (*McAllister*, *supra*, 69 Cal.2d at 417–418.)

"[T]he relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence." (*Power v. Workers' Comp. Appeals Bd*. (1986) 179 Cal.App.3d 775, 786 [51 Cal.Comp.Cases 114, 121] (citing *Place v. Workmen's Comp. Appeals. Bd*., *supra*, 35 Cal.Comp.Cases 525, 529).) A medical opinion based on incorrect facts, history or legal theory, or surmise, speculation, conjecture or guess is not substantial evidence. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525].)

As more fully discussed below, applicant established injury AOE/COE based on the medical reporting finding industrial injury along with the testimony provided by applicant.

Defendant argues that applicant failed to meet his burden of proving industrial causation because of inconsistencies between applicant's testimony and the injury described in initial treatment reports. Specifically, defendant argues:

> [The medical reports] note a description of the injury consisting of the applicant removing a sign from a truck when he fell but did not land on his knee. (9/10/18 Report U.S. Healthworks, p.5 [Applicant Ex. 3 admitted on 6/27/19]). This is in contrast to the description he gave in his deposition and at trial where he claimed to have slipped and fell. (SOE, 8/15/19, 5:40-41; 1/3/19 Deposition of Applicant, 29:12, 31:24 [Defendant Exhibit D admitted on 6/27/19]).

Upon review of the trial transcript, we do not find the inconsistencies described by defendant. When asked how injury to his left knee happened, applicant testified:

"Well, I was bringing down the barriers and then at the time—well I don't know. I'm a little confused. I slipped. I don't know. []" (Trial Transcript, 41:22-42:7.)

Applicant's deposition testimony provided:

Q: [] You said that you threw the barricades to the right side because you were losing balance while standing up, correct?

A: [applicant]: I had already lost my balance.

Q: Wait. You were standing up, correct?

A: (In English.) No.

Q: So you had already fallen as you were throwing the barricades?

A: I had already felt the pain.

(Deposition of Ricardo Espinoza, dated June 17, 2019, 31:11-19.).)

When questioned about which part of his body hit the floor first, his buttocks or his back, applicant responded: "I'm not 100 percent sure if it was my butt or if it was at the same time. I wouldn't be able to tell you. What I can tell you was I was on the floor." (*Id* at 32:13-16.)

Based on our review of the applicant's testimony, we find no evidence supporting defendant's argument that applicant's testimony failed to support the mechanism of injury discussed in the medical reports. Dr. Gray's medical assessment dated September 10, 2018, provides "[applicant] states he was standing removing a sign from a truck when he fell he did not land on knee but states [that he] twisted and developed medial knee pain." (Applicant's Exhibit 3, US Health Works Chronology of Medical Records by Kathleen Gray, M.D., (Exhibit 3) p. 3.) The medical report of Andrew Miles, D.C., includes a description that applicant suffered injury when "he was unloading materials from his vehicle when he experienced a pop to his left knee. He states that he fell back and he immediately experienced pain in his left knee." (Applicant's Exhibit 1, Primary Treating Physician's Initial Comprehensive Evaluation Report an Authorization of Treatment by Andrew Miles, D.C., dated October 11, 2018, (Exhibit 1) p. 2.)) We find no inconsistencies between applicant's testimony and the injury described in applicant's medical reports.

Defendant also argues that the reporting of Dr. Miles is not substantial evidence. Defendant's argument fails to cite any evidence that Dr. Miles' report relies upon incorrect facts, history, conjecture, or is otherwise defective. (*Place v. Workmen's Comp. Appeals. Bd*., *supra*, 35 Cal.Comp.Cases 525.)

To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

On the record before us, we are persuaded that Dr. Miles' report constitutes substantial medical evidence. Dr. Miles obtained a medical history from applicant, conducted a physical examination, and received a detailed description of applicant's job duties. (Exhibit 1, pp. 2-5.)

Next, defendant argues that the reporting of Dr. Gray contains doubts regarding the mechanism of injury. (Petition, 7:10-16.) Upon review of the record, we do not agree that Dr.

Gray's reporting is inconsistent with Dr. Miles conclusion that applicant suffered industrial injury. Dr. Gray's medical assessment dated September 10, 2018, references that a review of the injury depicted on video of a "slow gradual fall directly on the knee [] was not consistent with presentation as [applicant] had no swelling no abrasion no contusion visible as anticipated with direct trauma." (Applicant's Exhibit 3, US Health Works Chronology of Medical Records by Kathleen Gray, M.D., pg. 3.) Dr. Gray's determination that applicant's injury was not consistent with the injury depicted in the video is not persuasive to the extent that defendant has failed to establish conclusively that applicant was in fact displayed in the video. We will note, however, that it is significant that Dr. Gray's diagnoses includes the finding of a complex tear of the medial meniscus of the left knee. (*Id.*) We find these conclusions consistent with the WCJ's finding that applicant suffered industrial injury to his left knee.

Thus, in the absence of any evidence rebutting the underlying bases of Dr. Mile's opinion that applicant sustained injury to his left knee through his employment, we affirm the WCJ's finding that applicant established by a preponderance of the evidence that his injury arose AOE/COE.

Accordingly, it is our Decision After Reconsideration that the WCJ's September 25, 2019 FA&O is affirmed.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award and Orders issued by the WCJ on September 25, 2019 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 19, 2022

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

BRADFORD & BARTHEL
DOMINGUEZ LAW FIRM
RICARDO ESPINOZA

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