

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

STEPHANIE TROYAN, *Applicant*

vs.

**MARIN COUNTY PARKS, permissibly self-insured, administered by
ATHENS ADMINISTRATORS, *Defendants***

Adjudication Number: ADJ14647678

Santa Rosa 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 April 25, 2023, wherein the WCJ found in pertinent part that applicant did not suffer any compensable consequence injuries as a result of her industrial salmonella infection; that applicant did not suffer any permanent partial disability as a result of her injury; that applicant's condition became permanent and stationary on December 12, 2019; and that the reports from internal medicine qualified medical examiner (QME) Philip Nakashima, M.D., are substantial evidence so there is not good cause to replace Dr. Nakashima as the QME.

Applicant contends that the reports from Dr. Nakashima are not substantial evidence, that applicant's trial testimony constitutes substantial evidence that she sustained permanent disability as a result of her industrial salmonella infection and that her condition was not permanent and stationary in November 2021, and that good cause exists to have Dr. Nakashima replaced as the QME in this matter.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petition, 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 her gastrointestinal system in the form of sepsis (the body's overactive/extreme reaction to an infection), and in the form of urticaria (skin rash) as a consequence of Salmonella enteritidis (bacterial infection) while employed by defendant as a landscape architect on June 17, 2019.

On September 20, 2019, QME Dr. Nakashima evaluated applicant. Dr. Nakashima examined applicant, took a history, and reviewed the medical record. He concluded that applicant's Salmonella enteritidis, dehydration, heart palpitations, anxiety, and sleep pattern alteration were industrially related; and that her iron deficiency anemia and SIBO (Small Intestine Bacterial Overgrowth) were pre-existing and not industrially related. (App. Exh. 1, Philip Nakashima, M.D., September 20, 2019, p. 16.) Dr. Nakashima then stated:

The claimant's Salmonella enteritis resulted in severe diarrhea, dehydration, bowel inflammation, abdominal pain and cramping, and electrolyte abnormalities, which resulted in the need for hospitalization. The Salmonella infection also caused a loss of fluid and electrolytes that resulted in hypotension, fatigue, dizziness, palpitations, nausea and food intolerance, resulting in an 18-pound weight loss.
(App. Exh. 1, p. 17.)

After reviewing additional medical records, in his supplemental report, Dr. Nakashima stated:

... [B]ased on the above facts, it is medically probable that Ms. Troyan was exposed to the Salmonella that caused her injury, while working at the Marin Fairgrounds on 6/17/19. ¶ ... The subsequent medical conditions of persistent diarrhea, dehydration, heart palpitations, anxiety, and sleep disturbance, were derivatives of the 6/17/19 injury.
(App. Exh. 2, Philip Nakashima, M.D., December 2, 2019, p. 3.)

Dr. Nakashima re-evaluated applicant on November 18, 2021. The re-evaluation was done remotely via Zoom. The doctor concluded that applicant had reached maximum medical

improvement (MMI) on December 12, 2019, and that, “Because the patient recovered from her Salmonella enteritidis, no permanent disability exists and whole person impairment is a moot issue.” (App. Exh. 3, Philip Nakashima, M.D., November 18, 2021, pp. 21 – 22.)

Dr. Nakashima’s deposition was taken on May 27, 2022. (App. Exh. 4, Philip Nakashima, M.D., May 27, 2022, deposition transcript.) His testimony included the following:

A. The evaluation I did in 2021, ... was virtual, it was through Zoom, so unfortunately it prevented me from checking a complete motor exam and sort of seeing whether or not she still had any restrictions. However, based on her discussion - - based on our discussion and interaction at the second QME, I did not see any - - it was not conclusive to me that she necessarily needed new restrictions.

(App. Exh. 4, p. 17.)

A. ... Salmonella Non - Typhus is not a chronic condition. It usually resolves. In her case it took longer because she had an abnormal GI [gastrointestinal] tract. She was affected more adversely than the average person with Salmonella, but a Non - Typhus Salmonella is not really a disease that causes a chronic long-term condition.

(App. Exh. 4, p. 18.)

A. Salmonella infection can aggravate in the short term, but it's actually more correct to say that her underlying condition aggravated the Salmonella. Most people with Salmonella, it's a very short benign course, a few days, you get food poisoning, most people don't need antibiotics, but in her case because of her underlying conditions, she had a more severe course and required more time to recover. ... ¶

A. So I would say - - I would not say that it's a conclusion that the Salmonella aggravated any underlying condition.

(App. Exh. 4, p. 19.)

A. I think the Salmonella temporarily aggravated the SIBO, but I don't think the Salmonella had a permanent effect on the SIBO.

Q. And when you say temporarily, are we talking about a week, two weeks, a month?

A. A month, in this case, yeah. She had a severe reaction. She was sick.

(App. Exh. 4, p. 29.)

Dr. Nakashima was shown a recent medical report from treating physician Kimberly Keller, M.D., and he read the following portion of the report into the record:

“Ms. Troyan has seen me for general medical care since 2014. Her medical history includes migraine, SIBO, and iron deficiency. Most of these conditions were treated and she was [sic] able to work and was very high functioning, as you know. She was hospitalized in June 2019 with sepsis due to Salmonella with

effects to multiple organ systems which resulted in along recovery. Since that time she has had worsening of previous conditions, including SIBO and GI distress, migraines, and tachycardia as well as new medical conditions such as chronic urticaria and hypogammaglobulinemia [low serum immunoglobulin or antibody levels] that were not present prior to her sepsis.” (App. Exh. 4, pp. 31 – 32.)

Dr. Nakashima then testified that:

Now, there may have been a change since 2021 when I interviewed Ms. Troyan ..., so if there is new medical information, if there is new medical records, then I would be happy to re-evaluate that, but I think we can look at that if you want me to do a supplemental, you can forward all of those to me and I would be happy to re-eval that, but this letter itself is not accurate. (App. Exh. 4, p. 34.)

Dr. Nakashima was given additional medical records to review and, in his August 30, 2022, supplemental report, he stated:

While the patient did have a transient hypogammaglobulinemia as a result of her Salmonella sepsis, the patient recovered from this as documented by Dr Pham, and addressed in my previous QME report at the time I addressed MMI. ¶ Dr. Keller's assertions that the patient's SIBO, GI distress, migraine headaches, and tachycardia had worsened are not supported by any new medical records; each of these conditions were previously addressed in my 11/18/21 QME re-evaluation of Ms. Troyan and were not found to be industrially related on a permanent basis. (Def. Exh. J, Philip Nakashima, M.D., August 30, 2022, p. 9.)

The parties proceeded to trial on January 31, 2023. The issues submitted for decision included temporary disability, permanent disability/apportionment, whether the reports from QME Dr. Nakashima are substantial evidence, and whether Dr. Nakashima should be replaced as the QME. (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 31, 2023, pp. 2–3.)

DISCUSSION

It has long been established that any 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 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].) A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Place v. Workmen's Comp. Appeals Bd.* (1970)

3 Cal.3d 372 [35 Cal.Comp.Cases 525]; *Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal. App. 3d 246 [54 Cal.Comp.Cases 349; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Having reviewed Dr. Nakashima's reports and deposition testimony, there appear to be discrepancies and/or issues that need clarification. For example, Dr. Nakashima stated that, "The subsequent medical conditions of persistent diarrhea, dehydration, heart palpitations, anxiety, and sleep disturbance, were derivatives of the 6/17/19 injury." (App. Exh. 2, p. 3.) But he later stated, "Because the patient recovered from her Salmonella enteritidis, no permanent disability exists and whole person impairment is a moot issue." (App. Exh. 3, pp. 21 – 22.) Although the doctor said applicant had recovered from the Salmonella enteritidis, he did not address the subsequent medical conditions.

At his deposition, Dr. Nakashima testified that the evaluation he did in 2021, was virtual, and "... unfortunately it prevented me from checking a complete motor exam and sort of seeing whether or not she still had any restrictions." (App. Exh. 4, p. 17.) He later testified that, "Now, there may have been a change since 2021 when I interviewed Ms. Troyan ... so if there is new medical information, if there is new medical records, then I would be happy to re-evaluate that ... I would be happy to re-eval that, but this letter itself is not accurate." (App. Exh. 4, p. 34.) Dr. Nakashima's testimony indicates that the November 18, 2021 was not an "adequate" examination, and that due to changes in applicant's condition since that examination, it would be appropriate to re-evaluate applicant.

In his most recent report Dr. Nakashima said, "Dr. Keller's assertions that the patient's SIBO, GI distress, migraine headaches, and tachycardia had worsened are not supported by any new medical records; each of these conditions were previously addressed in my 11/18/21 QME re-evaluation of Ms. Troyan and were not found to be industrially related on a permanent basis." (Def. Exh. J, p. 9.) However, it appears the doctor was not given "any new medical records" to review, and he did not explain the basis for his opinion that applicant's condition had not worsened during the period of time since the November 2021 re-evaluation.

Finally, at his deposition Dr. Nakashima stated, "Salmonella infection can aggravate in the short term, but it's actually more correct to say that her underlying condition aggravated the Salmonella. ... I would not say that it's a conclusion that the Salmonella aggravated any underlying

condition.” (App. Exh. 4, p. 19.) He later stated, “I think the Salmonella temporarily aggravated the SIBO, but I don't think the Salmonella had a permanent effect on the SIBO.” (App. Exh. 4, p. 29.) The Appeals Board has explained the difference between an “exacerbation” and an “aggravation.” Aggravation is an increase in the severity of a pre-existing condition where the underlying pathology is permanently moved to a higher level. Exacerbation is a temporary increase in the symptoms of a pre-existing condition that returns to its prior level within a reasonable period of time. (*Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615, 617 [1935 Cal. LEXIS 590]; *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.*, (2015) 61 Cal. 4th 291 [80 Cal. Comp.Cases 489].) As noted, Dr. Nakashima said the salmonella aggravated applicant's condition but that the aggravation was temporary. His statement is inconsistent with the definition of an “aggravation” as a permanent increase in the pre-existing condition. It is also important to note that an injury is a “compensable consequence” when the subsequent injury is the direct and natural consequence of an original industrial injury; the subsequent injury is considered to relate back to the original injury (*Southern California Rapid Transit District, Inc. v. Workers' Comp. Appeals Bd. (Weitzman)* (1979) 23 Cal.3d 158 [44 Cal.Comp.Cases 107]; *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [1249 [82 Cal.Comp.Cases 679].)

For the reasons discussed herein, Dr. Nakashima's reports and deposition testimony are not substantial evidence. The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Kuykendall v. Workers' Comp. Appeals Bd.*, (2000) 79 Cal.App.4th 396 [65 Cal.Comp.Cases 264] *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924].) Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) We agree with the WCJ that Dr. Nakashima's “inadvertent and very slight delay” in submitting his August 30, 2022 supplemental report does not constitute good cause to replace Dr. Nakashima as the QME in this matter. (See Report, p. 5.) Under these circumstances, we recommend that upon return of this matter to the WCJ, the parties provide Dr. Nakashima an updated medical record and request that he re-evaluate applicant in order to determine whether her Salmonella enteritidis injury has caused permanent disability and/or the need for further medical treatment.

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 and Order issued by the WCJ on April 25, 2023, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 25, 2023 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/ NATALIE PALUGYAI, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 21, 2023

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

**STEPHANIE TROYAN
FARNSWORTH LAW GROUP
LAW OFFICES OF MICHAEL SULLIVAN**

TLH/mc



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