WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DESIREE JOHNSON, *Applicant*

vs.

CADLAC, INC., dba DEL TACO and TECHNOLOGY INSURANCE COMPANY, administered by AMTRUST FINANCIAL SERVICES, INC., *Defendants*

Adjudication Number: ADJ11336505
Marina del Rey 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 May 12, 2021, wherein the WCJ found that applicant did not sustain an injury arising out of and in the course of employment (AOE/COE).

Applicant contends that the reports from dermatology qualified medical examiner (QME) Stuart L. Shear, M.D., are not substantial evidence and cannot be the basis for the decision regarding 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) 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 her hands, fingers, and skin while employed by defendant as a fast food worker during the period from August 30, 2017, through December 1, 2017.

QME Dr. Shear evaluated applicant on January 2, 2019. Dr. Shear examined applicant, took a history, reviewed the medical records, and diagnosed applicant as having a history of dyshidrotic eczema and atopic dermatitis (two types of eczema). (Def. Exh. 2, Dr. Shear, January 5, 2019, p. 6.) The doctor concluded that:

> Ms. Johnson missed 2 months of work between October 2017 and December 2017 because of dyshidrotic eczema and for this I am allowing her 60 days of temporary disability. As noted in the physical examination section of this report, the skin of Ms. Johnson's hands is completely normal at this time. She had 1 bout of dyshidrotic eczema and at the present time she has no limitations in the performance of activities of daily living. However, exposure to certain chemical agents may temporarily increase her limitation. At the present time she requires no treatment. I am rating Ms. Johnson's permanent impairment due to her skin disorder at 0% impairment of the whole person. Ms. Johnson is permanent and stationary.
> (Def. Exh. B, p. 6.)

In his May 30, 2020 report, Dr. Shear stated:

> Ms. Johnson had a bout of dyshidrotic eczema in 2012, 5 years before she began work at Del Taco. She has had atopic dermatitis since early childhood. In considering causation for these [sic] two dermatitis, genetics plays the primary role. … As I mentioned in my initial report, 50% of patients with dyshidrotic eczema have atopic dermatitis. Therefore, absent her employment with Taco Bell, she would have experienced dyshidrotic eczema as evidenced by her experience in 2012. ¶ … Cumulative dermatitis is not linked to exposure to a potent irritant, but to exposure to weak irritants. Very often this exposure occurs not only at work but also in private life (i.e., dermatitis due to wet work, sometimes called 'housewives' hands). … ¶ After careful reconsideration of this case, I agree that this is indeed a cumulative injury. … Ms. Johnson's skin disorder is intermittently present; there are a few limitations to the activities of daily living; and exposure to certain chemicals or physical agents may temporarily increase limitation; the condition requires intermittent treatment. I have rated Ms. Johnson's impairment at 5% of the whole.
> (Def. Exh. A, Dr. Shear, May 30, 2020, pp. 2 – 3.)

On November 9, 2020, Dr. Shear's deposition was taken. (Def. Exh. C, Dr. Shear, November 9, 2020, deposition transcript.) His testimony included the following:

> A. Atopic dermatitis of which 50 percent of those people who have atopic dermatitis also have dyshidrotic eczema is never resolved. It's a lifetime problem that recurs from time to time and then remits.
> (Def. Exh. C, p. 6.)

Q. So are you testifying if you had recalled that the applicant was alleging cumulative trauma, you would have provided five percent whole person impairment at the time of your January 2019 evaluation?
A. Yes, I would have.
(Def. Exh. C, p. 10.)

Q. So my question, then, Doctor, is how do we know that her exposure at work is what caused the recurrence rather than just her being at home washing her hand?
A. That's a good question. I don't think I can give you an answer to that.
(Def. Exh. C, pp. 14 – 15.)

Q. So Ms. Johnson's outbreak specifically could have been caused by some type of exposure at work or could have just been caused by her regular activities of daily living, including washing her hands?
A. Yes, that's true.
(Def. Exh. C, p. 15.)

Q. Okay. And just to go back and it should be one of my final questions, Doctor, when we discussed the recurrence of her underlying conditions as to being caused by even just soap and water at home or potentially something at work, do you still find it medically probable that the recurrence that she suffered was a consequence of her work exposure as opposed to just activities of daily living?
A. I don't know. And because I don't know, you know, it's a difficult decision to make.
(Def. Exh. C, pp. 16 – 17.)

A. Yeah, she would have the disability for nine months. I don't know whether if we're giving her that -- well, it's okay. So she'll get permanent disability of five percent impairment and she'll get what are we talking about? Nine months?
Q. Yes. So just to recap, that's nine months of industrial TD and five percent of industrial permanent disability.
A. Right, right. That's acceptable.
Q. And when we say industrial, we're linking it to her work at Del Taco.
A. Right, right. You can't prove that it wasn't due to Del Taco. You can't prove that because she was doing the same things at Del Taco. She was probably getting her hands wet all the time, and so it could have been Del Taco.
(Def. Exh. C, pp. 24 – 25.)

Q. It's more likely than not that she developed this condition through her work exposure; is that correct?
A. Well, she certainly had a bad hand rash from work because she went in there and she worked for a while and then she couldn't work for a long period.
(Def. Exh. C, p. 26.)

A. Well, I don't know exactly. I don't think an honest expert knows whether the patient developed this exacerbation of her condition or put the recurrence due to washing her hands one night at home or wiping tables at work because this condition is a recurrent situation, but I think there's something in workers' compensation that you have to give the benefit of the doubt to the patient and still be objective, but I don't know. You know, I don't even know the law.
Q. So can you say with reasonable medical probability that her recurrence of her skin condition was caused by her employment at Del Taco?
A. Reasonable medical probability's sake, yeah, I can say that.
Q. Even though the same issue could have been brought about just by washing her hands at home.
A. And then there's a reasonable medical probability that she could have washed her hands at home and gotten the recurrence from that.
(Def. Exh. C, p. 27.)

A. Well, she wore gloves and she was bare-handed some of the shift. Then, again, we're left with the question of pinpointing whether it was her work or whether it was some other activities of daily living.
(Def. Exh. C, pp. 29 – 30.)

Q. … [C]an we conclude that based upon reasonable medical probability that the applicant had some type of temporary flare-up of her underlying condition and that flare-up had resolved at the time of your evaluation in January of 2019?
A. Yes. … Yes, it wasn't there when I saw her when I did the physical exam. But that's the nature of the beast. It goes away and then it comes back.
(Def. Exh. C, p. 30.)

The parties proceeded to trial on April 13, 2021, the issue submitted for decision was injury AOE/COE. (Minutes of Hearing and Summary of Evidence (MOH/SOE), April 13, 2021, p. 2.)

DISCUSSION

There appears to be no dispute that applicant had various forms of eczema prior to her employment with defendant and that she experienced symptoms of eczema while employed by defendant. Based thereon, underlying the issue of injury AOE/COE is the issue of whether applicant's symptoms during her employment with defendant were an aggravation or an exacerbation of her pre-existing eczema condition.

An aggravation is an increase in the severity of a pre-existing condition where the underlying pathology is permanently moved to a higher level. An 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. The industrial aggravation of a pre-existing condition constitutes an

injury for workers' compensation purposes. (*Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615, 617 [1935 Cal. LEXIS 590; *Zemke v. Workers' Comp. Appeals Bd*. (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358]; *Reynolds Electrical & Engineering Co. v. Workers' Comp. Appeals Bd. (Buckner*) (1966) 65 Cal.2d 438 [31 Cal.Comp.Cases 421].) The Appeals Board has previously held that the aggravation of a prior condition constitutes an injury when the aggravation causes a need for medical treatment and a period of temporary disability. (*City of Los Angeles v. Workers' Comp. Appeals Bd. (Clark)* (2017 W/D) 82 Cal.Comp.Cases 1404.)

It is well established that for the purpose of meeting the causation requirement in a workers' compensation injury claim, it is sufficient if the work is a contributing cause of the injury. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd*. (2015) 61 Cal.4th 291, [80 Cal.Comp.Cases 489].)

Here, in his January 2, 2019 report, Dr. Shear diagnosed two types of eczema and stated that applicant had a history of eczema, but he did not address the issue of whether applicant's work was a cause of the skin condition. (Def. Exh. B.) In his subsequent report, Dr. Shear stated:

> Cumulative dermatitis is not linked to exposure to a potent irritant, but to exposure to weak irritants. Very often this exposure occurs not only at work but also in private life (i.e., dermatitis due to wet work, sometimes called 'housewives' hands)
> (Def. Exh. A, p. 2.)

At his deposition, when asked, "… [H]ow do we know that her exposure at work is what caused the recurrence rather than just her being at home washing her hand?" Dr. Shear responded, "I don't think I can give you an answer to that." (Def. Exh. C, pp. 14 – 15.) He was later asked if he thought it was medically probable that the recurrence of her symptoms that applicant suffered was a consequence of her work exposure as opposed to just activities of daily living; he replied, "I don't know. And because I don't know, you know, it's a difficult decision to make." (Def. Exh. C, pp. 16 – 17.) Dr. Shear later testified that:

> You can't prove that it [the eczema] wasn't due to Del Taco. You can't prove that because she was doing the same things at Del Taco. She was probably getting her hands wet all the time, and so it could have been Del Taco.
> (Def. Exh. C, p. 25.)

He then testified that with reasonable medical probability applicant's recurrence of her skin condition was caused by her employment at Del Taco and that there was a reasonable medical

probability that applicant could have washed her hands at home and gotten the recurrence of her skin condition from that. (Def. Exh. C, p. 29.) Finally, Dr. Shear testified that applicant's symptoms were a temporary flare-up of her pre-existing condition, and he assigned 5% whole person impairment. (Def. Exh. C, p. 30.)

Dr. Shear's opinions, as stated in his reports and testimony, appear to be that applicant's condition was an exacerbation of her prior skin condition and that it was an aggravation of the prior condition. Also, his opinion appears to be that applicant's condition could be the result of her work and it could have been caused by her regular activities of daily living.

Any award, order, or decision of the Appeals Board, (which includes decisions by the WCJs), must be supported by substantial evidence. (Lab. Code, § 5952(d); Cal. Code Regs., tit. 8, § 10330; *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]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) We agree with the WCJ that Dr. Shear's reporting and deposition testimony is confusing and it appears that he may not understand the workers' compensation system. (F&O p. 3 Opinion on Decision.) Based on the doctor's inconsistent conclusions regarding the nature and extent of applicant's injury, as well as the inconsistencies regarding the cause or causes of applicant's condition, his reports and testimony do not constitute substantial evidence and thus, cannot be the basis for an order or decision of the Appeals Board.

The 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].) 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).) However, since Dr. Shear said that he could not answer the question of whether the recurrence of applicant's symptoms was a consequence of her work exposure as opposed to her activities of daily living, it would not be appropriate to have him submit a supplemental report or request that he re-evaluate applicant. Therefore under the circumstances of this matter, the parties will need to have applicant evaluated by an agreed medical

examiner, or request an additional QME panel, or in the alternative, to request that the WCJ appoint a regular physician. (Lab. Code § 5701.)

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 May 12, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 12, 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/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 30, 2021

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

DESIREE JOHNSON
CALIFORNIA WORKERS COMPENSATION LAWYERS
GILSON DAUB

TLH/*pc*

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