WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SEBASTIAN GARCIA, ***Applicant***

vs.

REX SIGNATURE SERVICES; OLD REPUBLIC adjusted by ESIS, ***Defendants***

Adjudication Number: ADJ11636909
Fresno District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate herein, except as noted below, we will grant reconsideration, amend the WCJ's decision to issue proper Findings of Fact that affirm that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) and that defendant failed to establish the affirmative defense of intoxication.

We do not adopt or incorporate the WCJ's recommendation that we deny reconsideration. Rather, we find it necessary to grant reconsideration for the sole purpose of issuing proper Findings of Fact. Pursuant to Labor Code[1] section 5313, "the workers' compensation judge shall, within 30 days after the case is submitted, make and file ***findings*** upon all facts involved in the controversy …" (Lab. Code, § 5313, emphasis added.) Those ***findings*** must subsequently support any an order, decision, or award that is issued. (Lab. Code, § 5903(e).) Therefore, we will rescind the WCJ's March 19, 2021 Order and substitute it with Findings of Fact that also incorporate the stipulations the parties made at trial. While the WCJ did not make a finding of injury to any of the alleged body parts, we are persuaded that the record supports a finding of industrial causation for the left foot, left ankle, and right knee based on the opinion of orthopedic surgeon panel qualified

[1] All further statutory references are to the Labor Code, unless otherwise noted.

medical examiner (PQME) Marshall S. Lewis, M.D. (Dr. Lewis' 8/27/19 report at p. 78 – 79; 87-91, Joint Exhibit 2; and 2/12/20 report, at p. 3-4, Joint Exhibit 1.) The issue of industrial causation for all other alleged body parts is deferred.

We now turn to defendant's assertion that applicant's claim is barred pursuant to section 3600(a)(4). An injured worker's right to recover workers' compensation benefits is subject to the conditions set forth in section 3600. Among these is that "the injury is not caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee." (Lab. Code, § 3600(a)(4).) Defendant holds the burden of proof to establish the affirmative defense of intoxication. (Lab. Code, § 5705(a).) To carry its burden of proof, a defendant is required to prove each fact supporting its claim by a preponderance of the evidence.[2] (Lab. Code, § 3202.5.) Moreover, when a defendant asserts intoxication as an affirmative defense, it must prove not only that the injured worker was intoxicated, it must also show that the worker's intoxication was a proximate and substantial cause of the injury. (*Douglas Aircraft Co. v. Industrial Acc. Com.* (*McDowell*) (1957) 42 Cal.2d 903 [22 Cal.Comp.Cases 24] (disapproved on another ground in *LeVesque v. Workmens' Comp. Appeals Bd*. (1970) 1 Cal.3d 627, 636 [35 Cal.Comp.Cases 16]); *Smith v. Workers' Comp. Appeals Bd*. (1981) 123 Cal.App.3d 763 [46 Cal.Comp.Cases 1053]; *Calko Transportation v. Workers' Comp. Appeals Bd.* (*Wright*) (2000) 65 Cal.Comp.Cases 917 (writ den.).) A positive post-injury drug test by itself is not sufficient to establish intoxication at the time of the injury. (See *Southern Ins. Co. v. Workers' Comp. Appeals Bd.* (*Hindawi*) (2020) 85 Cal. Comp. Cases 631, 633–634 (writ den.).)

Additionally, decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 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]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) 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

[2] "'Preponderance of the evidence' means that evidence that when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence." (Lab. Code, § 3202.5.)

banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].)

It was defendant's burden to prove that applicant was intoxicated and that the intoxication was a proximate and substantial cause of the injury. We note, as did the WCJ in the Report, that defendant did not submit any toxicology report into evidence and that the opinion of Dr. Lewis, an orthopedic surgeon, on any toxicology report that he may have reviewed was not substantial medical evidence. During his deposition, Dr. Lewis testified that he had no degree with respect to toxicology (Dr. Lewis' 1/22/20 depo, at p. 6:6, Joint Exhibit 6); that he was not certified in toxicology (*id.*, at 8:15-16); that he had not taken any classes concerning marijuana intoxication (*id*. at p. 16:1-4); and that he did not review any statements of witnesses to the injury or to applicant's behavior prior to the injury (*id*., at p. 9:2-8). Moreover, Dr. Lewis applied the wrong legal standard in his analysis focusing much of his discussion on irrelevant factors. He summarized several articles, made general references to the possible effects of marijuana use, made repeated references to applicant working outside permanent work restrictions attributable to a prior injury, and noted that applicant tested positive for THC, that the employer had an anti-drug policy, and that applicant had not notified his employer of his marijuana use. (Dr. Lewis' 1/12/20 report, at pp. 3-4, 10, 11-12, 15-16, 17, Joint Exhibit 1.) However, Dr. Lewis did not opine on whether the alleged intoxication was a proximate and substantial cause of applicant's injury. During his deposition, Dr. Lewis again demonstrated a lack of understanding as to the correct legal standard:

> I did research, the literature on that, and I did research that the way it stands now -- because an industrial injury -- an alleged industrial injury, the burden of proof is on the applicant to prove that industrial injury; correct? Correct. So when someone is working outside of his work restrictions and has marijuana on board in a company that has an antidrug policy and it hasn't been disclosed, to the best of my knowledge, to the company, then the burden's on the patient, not on the employer.
>
> (Dr. Lewis' 1/22/20 depo, at p. 15:9-18, Joint Exhibit 6.)

Therefore, based on our review, we agree with the WCJ that Dr. Lewis' opinion was not substantial medical evidence on the issue of intoxication.

The WCJ relied on applicant's credible testimony that he had smoked marijuana approximately four days before the injury and was not intoxicated on the day of his injury. (Minutes of Hearing and Summary of Evidence (MOH/SOE) DATE, at p. 4:10-11.) We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id*.)

For the foregoing reasons,

IT IS ORDERED that reconsideration of the March 19, 2021 Findings of Fact, Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the March 19, 2021 Findings of Fact and Order is **RESCINDED** and **SUBSTITUTED** with new Findings of Fact, as provided below:

FINDINGS OF FACT

1. Sebastian Garcia, while employed on October 10, 2018, as a Telecom Trainee/Technician at Sacramento, California by Rex Signature Services, sustained injury arising out of and occurring in the course of employment (AOE/COE) to his left foot, left ankle and right knee and claims to have sustained industrial injury to his head, back, right hip, left hip and injury in the form of headaches, depression, and hypertension.

2. At the time of the injury the employer's workers' compensation carrier was Old Republic General Insurance Corporation adjusted by ESIS.

3. Defendant did not meet its burden to prove the affirmative defense of intoxication.

4. All other issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 26, 2021

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

SEBASTIAN GARCIA
LAW AT YOUR SIDE
KARLIN HIURA & LASOTA

PAG/bea

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Applicant's Occupation:	Telecom Trainee/Technician
Age at Injury:	47
Date of Injury:	19/10/2018
Parts of Body Alleged Injured:	Hand, Left foot, Left Ankle, Back, Right Knee, Right Hip, Left Hip, Headaches, Depression and Hypertension.
Manner in which Injury Allegedly Occurred:	Fell from a ladder, landing on his feet, then his side and back.
Petition filed by:	Defendant
Timeliness:	The Petition was filed timely on 4/7/2021
Verification:	The Petition was Verified
Response filed by:	None filed
Date of the Award:	3/19/2021
Petitioner contends:	a. The evidence does not justify the Findings of fact, and b. The Workers' Compensation Appeals Board or Workers Compensation Judge acted beyond or in excess of its powers, c. The Findings of Fact do not support the Decision or Award.

In short, Petitioner contends that the finding that the Applicant, Sebastian Garcia, sustained injury AOE/COE while working on 10/10/2018 as a Telecom Trainee/Technician for REX SIGNATURE SERVICES was not supported by the facts and the finding that Defendant did not sustain their burden of proof to prove intoxication as a defense to injury AOE/COE was also not supported by the facts.

II
FACTS

The Applicant, Sebastian Garcia, born 6/23/71, alleged an injury occurring 10/10/18 while working as a Telecom Trainee/Technician while employed by Rex Signature Services. The Applicant has alleged injury to his head, left foot, left ankle, back, right knee, right hip, left hip, headaches, depression, and hypertension.

The Applicant, Mr. Garcia, while working at Rex Signature Services as a low-voltage technician doing installations on 10/10/2018, testified at Trial that he had worked for the employer for about 3 1/2 months through the date of injury. On that date, the Applicant was up on a 10 - foot ladder installing cable for a motion sensor. The cable broke and the Applicant fell to the ground sustaining various different injuries.

Applicant further testified that after the fall, he was assisted by a general foreman. Applicant also testified that he was subsequently drug tested about 2 1/2 hours after the injury, which included a breathalyzer test and a urine test (MOH 12130120 at page 3). The Applicant further testified that his urine sample was placed with approximately four or five other unknown vials of urine and the first time the Applicant heard about the results of his drug test was when he saw the QME for the first time in March 2019. Applicant testified that on the day when he first saw the QME, the Applicant went to shake the QME's hand but the QME would not return the handshake and instead lectured Applicant on the problems with ingesting marijuana.

Applicant further testified that prior to the afore-referenced injury occurring on the job, that he had smoked medical marijuana on the Saturday prior to this injury, approximately four days before the injury. Applicant further testified that he was not intoxicated on the date of injury. Applicant testified that his co-workers and his foreman would testify to the fact that he was not intoxicated. The Applicant testified that he could not recall signing any paperwork on the date of injury because he was in pain and was traumatized. (MOH 12130120 at page 5)

The Applicant was subsequently seen and evaluated by Dr. Marshall Lewis as a Panel QME and Dr. Marshall Lewis issued five reports (Exhibit #1-5) and

ultimately the PQME had his deposition taken by the parties on or about 1/22120 (Exhibit #6).

This matter proceeded to Trial on 12130120. The only issue at the time of Trial was injury AOEICOE - intoxication. The undersigned issued a Findings of Fact, Order and Opinion on Decision dated March 19, 2021. It is from this Decision that Defendant seeks reconsideration.

III
DISCUSSION

Defendant disputes the Findings and Order and Opinion on Decision dated 311912021 and contends that they have demonstrated that the intoxication defense under Labor Code Section 3600 (A) (4) applies in this matter. Defendant contends that they proved the elements of intoxication as established by case law.

Per Labor Code Section 3600 an injury is not compensable when it is "caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee". The intoxication defense requires a three-part burden of proof. One, the employer must demonstrate that the employee ingested one or more intoxicants. Two, the employer must prove that the employee was intoxicated.

Three, the employer must establish a cause and effect relationship between the employees intoxication and the resulting injury.

In order to meet the intoxication defense referenced above, the employer must demonstrate that the employee ingested alcohol or unlawfully used a controlled substance. In this case the QME did reference an alleged laboratory test (Med Tox Lab Report - no date indicated, See Report dated 311912019, pg. 14 - Exhibit #3) indicating or alleging to indicate the Applicant had a certain level of marijuana in his system. However no such test or laboratory test was introduced at the time of Trial by Defendants. The Applicant did testify that he did recall being drug tested on the date of injury; however, he testified that he saw his urine sample placed with approximately four or five other unknown vials of urine. Defendant did not introduce any testimony regarding chain of custody nor did they introduce said drug test at the time of Trial.

After establishing the precise identity of the intoxicant, then the employer must prove that the employee was intoxicated when the injury occurred. Pursuant to case law, it is not sufficient that the employer simply show that the employee tested positive for the substance, the employer must also demonstrate that the employee was actually intoxicated at the time of the injury.

The term "intoxication" is not specifically defined by the Labor Code but the Court has suggested that intoxication includes impaired judgment, impaired sensory perception and slowed reaction time.

In looking to Applicant's testimony in this matter, he indicated that he had smoked marijuana on the Saturday preceding the injury which was approximately four days before the accident. The Applicant testified that he was not intoxicated on the date of injury and that his co-workers and his foreman could testify to the fact that he was not intoxicated. This is contrary to what the QME is attempting to implicate in his reports. However, if you look at the QME's deposition (Exhibit #6) at Pages 14 - 17, the doctor states that with respect to reporting on intoxication regarding marijuana he indicates that he may 1).ave [sic] reported on one or two other workers' compensation cases possibly. The QME stated that he may have testified in a personal injury matter once or twice in the last five years in regard to marijuana intoxication as well. The QME stated that with respect to marijuana intoxication, he has not taken any classes concerning that subject. The QME also admitted that he had not written any papers concerning marijuana intoxication. The doctor also conceded that there are possibly false positives as well as false negatives when someone is tested for marijuana intoxication. Upon further questioning regarding a hypothetical situation regarding someone driving with a 3 - plus THC positive reading, the QME finally stated that, "you're asking me to make an opinion. I am not a toxicologist. "

The Applicant testified at Trial that he had previously seen a toxicologist, Dr. Marvin Pietruszka; however, for unknown reasons, that report was not introduced at the time of Trial.

After establishing the precise identity of the intoxicant the employee used or consumed, the employer must prove that the employee was intoxicated when the

injury occurred. Herein, there is conflicting evidence that Applicant's direct testimony was more compelling and credible as compared to the reporting from the Panel QME based on Applicant's credibility in testifying.

A blood test is ordinarily a key piece of evidence in an intoxication case; however, that was not placed into evidence in our case. We can only go by what the Panel QME stated that he saw. I find that the Applicant's testimony on both direct and cross-examination was credible. I found that the QME was not an expert in toxicology based upon his testimony at deposition. He also had very limited experience with intoxication cases as referenced in his deposition testimony. Applicant testified that he was not intoxicated and that his co-workers and foreman would testify to the same. Defendant presented no testimony whatsoever to show that Applicant acted in such a manner prior to the accident that an observer would conclude that the Applicant was impaired, intoxicated and/or under the influence. It appears that the accident was attributed to the cable that Applicant was working and broke during this process. It appears to have been a workplace accident that occurred when the Applicant went up on the IO-foot ladder and the cable broke which caused the Applicant to fall. There was no other contrary testimony to prove otherwise. There was no evidence tying the exact mechanism of Applicant's accident to his alleged intoxication.

As to the issue of causation, case Law indicates that this is a question of fact. When there is conflict in the evidence on the issue of causation, the Appeals Boards finding will be upheld.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

DATE: April 21, 2021.

Brian D. Lee
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE