WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TIMOTHY TALLANT, ***Applicant***

vs.

NATIONAL EXPRESS CORPORATION; OLD REPUBLIC INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ11226393
Bakersfield District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Ruling on Evidence, Findings of Fact and Order of April 26, 2021, wherein it was found that applicant did not sustain industrial injury to his neck, arms, upper extremities, back and shoulders while employed as a bus driver on September 5, 2017. The WCJ thus issued an order that applicant take nothing by way of his workers' compensation claim. In finding that applicant did not sustain compensable industrial injury, the WCJ found that applicant did not prove by a preponderance of the evidence that he sustained industrial injury, given that the WCJ did not find applicant's testimony or the history given to panel qualified medical evaluator physical medical specialist Katherine Robb-Ramirez, M.D. to be credible, and Dr. Robb-Ramirez opined that applicant did not sustain compensable industrial injury. Independently, the WCJ found that applicant's claim was barred by the post-termination provisions of Labor Code section 3600(a)(10), finding that applicant did not report his injury until after he was given notice of termination.

Applicant contends that the WCJ erred in finding that applicant did not sustain compensable industrial injury, arguing that applicant did bear his burden of proving industrial injury, and arguing that the post-termination defense is not applicable to this case because applicant resigned his employment, and was not terminated. We have received an Answer from defendant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report, the relevant portions quoted below, we will affirm the finding of no industrial injury and the take-nothing order because the applicant did not prove that he sustained industrial injury. However, we will grant reconsideration and delete the WCJ's findings that the claim was barred because it was filed after notice of termination. We find insufficient evidence in the record that applicant was given notice of termination.

Applicant was involved in a minor automobile accident on the morning of September 5, 2017. That afternoon, applicant took an unauthorized break, parked his bus in a small 7-Eleven parking lot, and was suspected of drinking beer during his break. According to an incident report filled out by Wesley Kelley, the 7-Eleven complained of the large bus taking up significant space in the small parking lot, and Mr. Kelley went to assess the situation. Upon arrival, Mr. Kelley noticed that applicant smelled of beer and was drinking a foamy beverage in a Big Gulp cup. Although applicant attempted to dispose of his Big Gulp cup, it was retrieved by Mr. Kelley and found by Mr. Kelley to contain beer. Applicant was taken back to the office by Mr. Kelley, where according to the Incident Report, Mr. Kelley was "planning to follow up the procedure with an alcohol test, however [applicant] said he was going home." The incident report does not state that applicant was terminated or given notice of termination. (See generally, September 5, 2017 Incident Report, Ex. A.)

Employer's sole witness at trial was road supervisor Shaylinda Manning. Ms. Manning testified that she was called to the 7-Eleven to take over applicant's route. However, Ms. Manning was not at the office after applicant was taken there after the incident at 7-Eleven. Ms. Manning was told by Mr. Kelley and another employee, Helen Davis, that "applicant's wife came to get him and that when he was asked to take an alcohol/drug test, he did not stay." While Ms. Manning testified that "It is the company's policy that refusal to take the test leads to termination," Ms. Manning did not testify that applicant was actually terminated, or that he was given notice of termination. (Minutes of Hearing and Summary of Evidence of March 12, 2021 trial at p. 7.)

Applicant testified that he resigned after he was told that he was going to be placed on administrative leave without pay pending investigation which could take a week or more. (Minutes of Hearing and Summary of Evidence of March 12, 2021 trial at pp. 4, 8.)

The only evidence standing for the proposition that applicant was terminated is the Resignation Letter dated September 8, 2017, which states, "I Tim Tallant have declined to dispute the allegations in regards to my termination with National Express Transit on the date of 9/6/2017,"

and is signed by applicant. However, while the statement uses the word "termination" the document is titled "Resignation Letter." (Ex. 4.) The document is thus ambiguous, and without further supporting evidence, we cannot find that applicant was given notice of termination.

Labor Code section 3600(a)(10) bars workers' compensation benefits when "the claim for compensation is filed after notice of termination or layoff…." The post-termination provisions of Labor Code section 3600(a)(10) apply only when a worker is terminated by the employer, and not when a worker resigns. (*CJS Co. v. Workers' Comp. Appeals Bd. (Fong)* (1999) 74 Cal.App.4th 294 [66 Cal.Comp.Cases 954].) This rule applies even if the resignation takes place during pending disciplinary proceedings with a likelihood of future termination. (*Kaiser Found. Hosps. v. Workers' Comp. Appeals Bd. (Ochs)* (2000) 65 Cal.Comp.Cases 933 [writ den.]; *North County Transit Dist. v. Workers' Comp. Appeals Bd. (Lerma)* (1996) 61 Cal.Comp.Cases 727 [writ den.].) Since there was insufficient evidence presented by defendant that applicant was terminated rather than resigned, the post-termination provisions do not apply. Accordingly, we will delete the findings that applicant's claim is barred by Labor Code section 3600(a)(10).

Nevertheless, we affirm the substance of the WCJ's decision because applicant did not present substantial medical evidence that the minor September 5, 2017 accident caused industrial injury, meaning disability or the need for medical treatment. (Lab. Code sec. 3208.1, subd. (a).) Although applicant is correct that an industrial incident need only be a contributing cause of the need for medical treatment or disability to constitute an industrial injury, there remains a requirement that it be probable that the industrial contribution, however small, actually exists. Here, for the reasons stated by the WCJ in the Report, the applicant did not introduce substantial medical evidence of industrial contribution to any need for medical treatment or disability. Additionally, as stated in the Report, the WCJ did not find the applicant credible. A WCJ's credibility determinations are "entitled to great weight because of the [WCJ's] 'opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand ….' [Citation.]" (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) As noted in the WCJ's Opinion on Decision, Dr. Robb-Ramirez testified at her deposition, "From the degree of the accident and the damage to the other car, the impact as I understand it, I would say that the most he could have had would have been a muscle strain, but he had so much underlying that and prior injuries which he did not disclose that I can't be more than 50 percent certain that the problems he reported were caused by this accident, and

that's where my difficulty comes." (Opinion at Decision at p. 3; July 27, 2020 Deposition of Dr. Robb-Ramirez at p. 47.) We therefore affirm the WCJ's finding that applicant did not prove industrial injury for the reasons stated in the Report, as quoted below:

> **APPLICANT DID NOT PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE INCIDENT OF SEPTEMBER 5, 2017 RESULTED IN AN INJURY ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT**
>
> Applicant was evaluated by Dr. Katherine Robb-Ramirez, M.D. as a Panel Qualified Medical Examiner for his claim of industrial injury on September 5, 2017. Applicant had a prior injury to his right upper extremity due to a slip and fall at a Taco Bell. Information regarding the prior injury was not initially given to Dr. Robb-Ramirez by Applicant. Applicant also failed to report this injury and related treatment to his treating physicians, Dr. Nicholas Vanderhyde, D.C. and Thomas Jacques, M.D.
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> Applicant's failure to provide his treating doctors with an accurate history regarding his right arm injuries and medical treatment resulted in a determination that they are not substantial medical opinions. Applicant's failure to reveal the prior injury to his right arm also detracted from his credibility as a witness.
>
> Dr. Robb-Ramirez's final expert opinion was determined to be substantial medical evidence because it is based on an accurate medical history combined with her examination of Applicant. Dr. Robb-Ramirez gave her expert opinion at her deposition that "There may be some industrial cause for strain. That is it. Q. Okay. Muscle strain to which body part, please? A. The cervical spine." (Joint Ex. 4 Page 47 Line 17 – Page 48 Line 3) The WCJ determined the PQME's expert opinion that there "may be some industrial cause" does not prove by a preponderance of the evidence that Applicant suffered an injury arising out of and in the course of his employment on September 5, 2017. (OOD Pages 4 & 5) The evidence does support Finding of Fact Number 3 which supports Order Number 1. Therefore, Labor Code §§ 5903(c) and (e) do not establish a basis for a Petition for Reconsideration of the issue on injury AOE/COE.

(Report at pp. 2-3.)

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings of Fact and Order of April 26, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order of April 26, 2021 is **AFFIRMED** except that it is **AMENDED** as follows:

RULING ON EVIDENCE

1. The transcript of Applicant's deposition dated May 7, 2018 is relevant and is admitted into evidence as Defendant's Exhibit C.

FINDINGS OF FACT

1. Timothy Tallant (Applicant) was fifty-one (51) and employed as a Bus Driver, Occupational Group Number 250, at Bakersfield, California by National Express Corporation (Employer) on September 5, 2017.

2. Employer was insured for workers' compensation by Old Republic Insurance Company (Defendant) on September 5, 2017.

3. Applicant was not shown to have sustained an injury arising out of and in the course of his employment with Employer on September 5, 2017.

4. All other issues are moot.

ORDER

1. Applicant, Timothy Tallant, shall take nothing further on account of his Application for Adjudication herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 20, 2021

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

TIMOTHY TALLANT
LEVITON, DIAZ & GINOCHHIO
GALE, SUTOW & ASSOCIATES

DW/oo

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