

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

BLANCA LOC, *Applicant*

vs.

**MONTEREY HEALTHCARE & WELLNESS CENTER and XL SPECIALTY
INSURANCE COMPANY/GREENWICH INSURANCE COMPANY administered by
INTERCARE HOLDINGS, INC.; COMPWEST INSURANCE COMPANY, Defendants**

**Adjudication Number: ADJ13319988
Marina del Rey District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant seeks reconsideration of the Finding of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on February 28, 2022, wherein the WCJ found that applicant did not sustain an injury arising out of and in the course of her employment with defendant.

Applicant contends that she was denied due process because the trial was conducted by way of a remote video conference; that the reports from orthopedic physician Edwin Haronian, M.D., and applicant's testimony are substantial evidence that she sustained the cumulative injury as claimed; and that the fact that applicant did not seek medical treatment for her injuries before leaving her job is not evidence that she did not sustain injury arising out of and occurring in the course of employment (AOE/COE).

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from defendant.

We have considered the allegations in the 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 neck, shoulder, back, psyche, nervous system, and circulatory system, while employed by defendant as a certified nursing aide during the period from November 11, 2004, through June 2, 2020. She first received treatment from Dr. Haronian on July 20, 2020. The Job Description section of Dr. Haronian's initial report included:

The precise activities required entailed prolonged standing and walking as well as continuous fine maneuvering of her hands and fingers, and repetitive bending, stooping, squatting, kneeling, twisting, turning, forceful pulling and pushing, forceful gripping and grasping, lifting and carrying 120+ pounds, torquing [sic], reaching to all levels, ascending and descending ladders.
(App. Exh. A, Dr. Haronian, July 20, 2020, p. 2.)

The parties proceeded to trial on June 30, 2021. The Stipulations and Issues were entered into the record and the trial was continued. (Minutes of Hearing and Summary of Evidence (MOH/SOE), June 30, 2021.) Applicant testified at the October 18, 2021 trial and in the summary of applicant's testimony, the WCJ noted that:

She has been honest and truthful with all the doctors in this case. She gave her primary treating physician a job description which was read to the applicant which she agreed with, which is on page 2 of Applicant's Exhibit 1. She agrees with that.
(MOH/SOE, October 18, 2021, p. 2.)

The trial was continued to February 7, 2022, for testimony by defendant's witnesses. The WCJ's summary of Veronica Acosta's testimony included:

She's been the direct supervisor of the applicant from 2005. The witness was an LVN, and the applicant was a CNA until 2014 when the witness became the staff developer. ... ¶ ... She doesn't believe there's any real physical demands of the job as all the residents are ambulatory, and it is not necessary to assist them or lift them. They do assist them with their showers. There's no real lifting or carrying of patients.
(MOH/SOE, February 7, 2022, pp. 2 - 3.)

The summary of Marina Recinos' testimony included:

Marina Recinos testified that she was a CNA at Monterey Healthcare for the past 15 years. Veronica Acosta has been her direct supervisor for approximately the entire time since she started working at Monterey Healthcare. ... ¶ ... The applicant never reported any physical difficulties doing her job to the witness. The applicant never asked her for assistance with a patient due to physical problems, and she testified that all the CNAs help out each other. (MOH/SOE, February 7, 2022, p. 4 - 5.)

The issues submitted for decision were injury AOE/COE and parts of body injured. (MOH/SOE, June 30, 2021, p. 2.)

DISCUSSION

We first note that the DWC's transition to remote hearings was a result of the COVID 19 global pandemic that has caused fundamental shifts in the behavior of most of the world's population. Executive Order N-63-20 represents the Governor's best judgment as to how to strike a fair balance between the due process rights of participants in hearings, the necessity of protecting the public from significant harm, and the state's responsibility to provide efficient, timely resolution of disputes in order to secure benefits for eligible injured workers. Thus, the fact that the trial was conducted by way of a remote video conference is not a denial of a party's due process rights.

Regarding the issue of injury AOE/COE, when deciding a medical issue, such as whether an applicant sustained a cumulative trauma injury, the WCJ must utilize expert medical opinion. (See *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) As the WCJ explained in the Opinion on Decision:

According to the credible testimony Ms. Acosta, the applicant's direct supervisor, there are no real physical demands of the applicant's job and that all the residence are ambulatory and it is not necessary to assist them or lift or carry the patients. (See MOH 2/7/2022 at page 3 lines 9 – 11). ... The court does not find that the medical reporting from the applicant's primary treating physician Dr. Haronian to be substantial medical evidence of injury AOE/COE. Dr. Haronian based his conclusion that the applicant's symptomology has arisen as a result of the work duties and erroneous job description she gave to the doctor. His conclusion re injury AOE/COE is based on false and inaccurate history and job description based on the credible testimony of the applicant's supervisor Ms. Acosta cited above.

(Opinion on Decision, pp. 2 and 3.)

Based on our review of the trial record, it appears that the record as it now stands does not contain substantial medical evidence addressing the issue of whether applicant sustained a cumulative injury. In general, a threshold issue is one that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070 [65 Cal.Comp. Cases 650-651, 655-656].) The issue of whether applicant sustained a cumulative injury AOE/COE is a threshold issue, and therefore the trial record is not an adequate basis for making a final determination.

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; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) Under the circumstances of this matter, we recommend that upon return, the parties have applicant evaluated by an agreed medical examiner or request that the Medical Director issue a QME panel. In the alternative, the parties could request that the WCJ appoint a regular physician. (Lab. Code § 5701.) Also, Ms. Acosta's testimony regarding the physical demands of applicant's work as a CNA is inconsistent with the job description applicant gave to Dr. Haronian. Therefore, it is important for the parties to agree on what is an accurate description of the physical demands of applicant's employment with defendant, and that the correct description of applicant's job duties is included in the information sent to the physician who will be performing the medical-legal examination.

Finally, we note that in the Petition, counsel repeatedly argues that the physical demands of applicant's employment were not at issue because the parties stipulated to the occupational group number. Labor Code section 3208.1 defines a cumulative injury as an injury that occurs as the result of, "repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. (Lab. Code, § 3208.1.) Clearly, by definition, a cumulative injury claim is based on the physical requirements of an injured worker's employment and the physical demands of an applicant's employment are fundamental to the issue a cumulative injury AOE/COE.

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 Finding of Fact and Order issued by the WCJ on February 28, 2022, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 28, 2022 Finding of Fact 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/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 16, 2022

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

**BLANCA LOC
GORDON & GORDON
LAW OFFICES OF JULIE N. GANAPOLSKY**

TLH/pc

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