

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

INEZ MARTINEZ, *Applicant*

vs.

**KAISER FOUNDATION HEALTH PLAN, permissibly self-insured and
self-administered, *Defendant***

**Adjudication Numbers: ADJ2203864 (LAO 0884543), ADJ7014519
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.¹

Defendant seeks reconsideration of the Findings and Award and Order (F&A) issued by the workers' compensation administrative law judge (WCJ) on March 18, 2020, wherein the WCJ found in pertinent part that during the period from October 29, 2006, through October 29, 2007 (ADJ2203864), and on October 1, 2009 (ADJ7014519) applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her cervical spine, right shoulder, left shoulder, arms, wrists, hands, lumbar spine, right knee, left knee, gastrointestinal system [gastritis], and psyche, and in the form of chronic pain, sleep disorder, and headaches; that applicant did not sustain injury AOE/COE to her "head (other than headaches)," to her respiratory system, internal system, temporomandibular joint (TMJ), or in the form of carpal tunnel syndrome and/or sexual dysfunction; that the injury in case number ADJ7014519 was a compensable consequence of the injury in case number ADJ2203864; and that the injuries caused temporary total disability "from on or about September 12, 2010 and continuing until at least July 13, 2011."

Defendant contends that applicant was not employed by defendant on October 1, 2009, and could not have sustained an injury AOE/COE on that date (ADJ7014519); that the period for which temporary disability indemnity was awarded was not an issue submitted for decision; and that the trial record does not contain substantial evidence to support the finding of injury to applicant's

¹ We granted the Petition to allow further study of the factual and legal issues; Commissioner Deidra E. Lowe was a member of the panel. Commissioner Lowe has since retired and a new panel member has been assigned in her place.

arms, hands, and gastrointestinal system, and in the form of chronic pain, sleep disorder, and headaches.

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

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 affirm the F&A except that we will amend the F&A to find that applicant sustained injury to her cervical spine, right shoulder, left shoulder, arms, wrists, hands, lumbar spine, right knee, left knee, gastrointestinal system/gastritis, and psyche, and in the form of chronic pain, and headaches (Finding of Fact #1); that applicant did not sustain injury AOE/COE to her head, temporomandibular joint (TMJ), to her internal system, or respiratory system, and she did not sustain injury in the form of carpal tunnel syndrome, sexual dysfunction, or sleep disorder (Finding of Fact #2); and that the October 1, 2009 injury is a compensable consequence of the October 29, 2006, through October 29, 2007 cumulative injury and because it arose from the cumulative injury (Finding of Fact #4).

BACKGROUND

Applicant claimed injury to her cervical spine, lumbar spine, right shoulder, left shoulder, left wrist, right knee, left knee, and psyche, and in the form of gastritis while employed by defendant as a Business Services Representative during the period from October 29, 2006, through October 29, 2007 (ADJ2203864). On October 1, 2009, applicant received physical therapy for her industrial injury, and after leaving the physical therapy facility she was hit by a car while walking in the parking lot. Based thereon applicant claimed a compensable consequence injury to her head, temporomandibular joint (TMJ), neck, shoulders, arm, wrist, hand, psyche, respiratory system, gastrointestinal system, internal system, and in the form of chronic pain, carpal tunnel syndrome, sexual dysfunction, and sleep disorder. (ADJ7014519).

Orthopedic agreed medical examiner (AME) Laura Wertheimer Hatch, M.D., evaluated applicant on March 3, 2010. (Def. Exh. J, Dr. Hatch, March 3, 2010.) Dr. Hatch examined applicant, took a history, and reviewed the medical record. She concluded that applicant's cervical spine, bilateral shoulder, bilateral hand conditions, and disability, were the result of applicant's cumulative injury; and that applicant's lumbar spine/low back, bilateral knee, and feet conditions and disability were caused by the October 1, 2009 injury. (Def Exh. J, p. 43.)

On August 18, 2010, internal medicine AME Maria Nellie Betancourt, M.D., evaluated applicant. After examining applicant, taking a history, and reviewing the medical records she was provided, Dr. Betancourt stated that, “Unfortunately, from an Internal Medicine standpoint, the information obtained from the orthopedic medical record review is only helpful in a limited way.” (Def. Exh. I, Dr. Betancourt, September 13, 2010, p. 60.) She then explained that in order to address the “causation and other medical compensability issues” raised by the parties, she would need to review additional medical records and diagnostics that she requested. (Def. Exh. I, p. 1 and pp. 60 – 61.)

Dr. Betancourt received the medical records and diagnostics she had requested, and in her 2nd Supplemental report, the diagnoses included, “Cervical Myofascial Syndrome and Headaches; pre-existing. Probably secondary to sinusitis as well as myofascial pain.” (Def. Exh. F, Dr. Betancourt, March 9, 2011, p. 30.) Dr. Betancourt later stated that applicant’s obstructive sleep apnea was “non-occupational” and that:

With a positive helicobacter pylori infection and regular use of ibuprofen in high doses, gastritis is likely present. ¶ ... [T]he gastritis is compensable and should be treated on an industrial basis. ¶ ... [T]he headaches can be rated in terms of her chronic pain, based on the chronic cervical myofasciitis; which is the orthopedic component. ... apportionment to occupational contribution should be 50% (Def. Exh. F, pp. 33 - 34.)

Applicant was re-evaluated by orthopedic AME, Dr. Hatch on May 12, 2014. (Def. Exh. D, Dr. Hatch. May 12, 2014.) Based on her re-examination of applicant, the interim history, and review of the additional medical records, Dr. Hatch concluded that applicant’s orthopedic condition had reached permanent and stationary status. (Def. Exh. D, p. 51.)

The parties proceeded to trial on May 15, 2019. They stipulated in case number ADJ2203864, that applicant sustained injury AOE/COE to her lumbar spine, cervical spine, right shoulder, left shoulder, left wrist, right knee, left knee, psyche, and her gastrointestinal system [gastritis]. The issues included parts of body injured (wrists/bilateral carpal tunnel syndrome, internal system, and in the form of headaches, sexual dysfunction, chronic pain, and sleep disorder); temporary disability, “the employee claiming the following periods: March 17, 2008 to August 17, 2009” and the WCJ noted, “There may be additional periods of temporary disability but these are the periods of temporary disability which are in dispute at this time.” (Minutes of Hearing and Summary of Evidence (MOH/SOE), May 15, 2019, p. 2.) The parties also stipulated

that in case number ADJ7014519, applicant claimed injury to her, "... hand, shoulders, carpal tunnel, psyche, sleep, respiratory, gastrointestinal, internal, sexual dysfunction, chronic pain, TMJ, head, neck, arm, and wrist..." (MOH/SOE p. 3) The issues to be submitted regarding case number ADJ7014519 were not identified or included in the MOH/SOE.

The matter was continued and at the July 29, 2019 trial the issues for case number ADJ7014519 were identified and included injury AOE/COE, temporary disability, and that applicant's claim was for a compensable consequence injury. (MOH/SOE, July 29, 2019, p. 2.)

The matter was again continued and at the September 4, 2019, October 14, 2019, December 9, 2019, and February 10, 2020 trials applicant testified and additional exhibits were taken into evidence. The matter was submitted for decision at the February 10, 2020 trial.

DISCUSSION

To be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, §§ 10605(a)(1), 10615(b), 10940(a).) A petition for reconsideration of a final decision by a workers' compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, § 10940(a).)

The Division of Workers' Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19).² In light of the district offices' closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (*In re: COVID-19 State of Emergency En Banc* (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020.³ Therefore, the filing deadline for a petition for reconsideration that would have occurred during the district offices' closure was tolled until April 13, 2020.

Petitions for reconsideration filed during this period may not have been processed until after April 13, 2020, and consequently, the date this petition was deemed "received" may erroneously appear untimely. However, "it is a fundamental principle of due process that a party

² The March 16, 2020 DWC Newslines may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-18.html>.

³ The April 3, 2020 DWC Newslines regarding reopening the district offices for filing may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-29.html>.

may not be deprived of a substantial right without notice....” (*Shipley v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) Like the Court in *Shipley*, we are not convinced that petitioner’s right to due process should be denied through no fault its own or circumstances outside of its control. We will therefore treat the petition as timely filed.

Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) Section 5315 provides the Appeals Board with 60 days within which to confirm, adopt, modify or set aside the findings, order, decision or award of a workers’ compensation administrative law judge. (Lab. Code, § 5315.) On June 5, 2020, the State of California’s Governor, Gavin Newsom, issued Executive Order N-68-20, wherein he ordered that the deadlines in sections 5909 and 5315 be extended for a period of 60 days. Pursuant to Executive Order N-68-20, the time within which the Appeals Board must act was extended by 60 days. Therefore, our July 8, 2020 decision was timely.

We first note that the Appeals Board has long followed a principle commonly known as the “compensable consequences” doctrine. An injury is a “compensable consequence” when the subsequent injury is a direct consequence of an original industrial injury. The subsequent injury is considered to relate back to the original injury and it is not treated as a new or independent injury for the purposes of AOE/COE. (*Southern California Rapid Transit District, Inc. v. Workers’ Comp. Appeals Bd. (Weitzman)* (1979) 23 Cal.3d 158 [44 Cal.Comp.Cases 107]; *Rodgers v. Workers’ Comp. Appeals Bd.* (1985) 168 Cal.App.3d 567 [50 Cal.Comp.Cases 299]; *Beaty v. Workers’ Comp. Appeals Bd.* (1978) 80 Cal.App.3d 397 [43 Cal.Comp.Cases 444]; *State Compensation Insurance Fund v. I.A.C. (Wallin)* (1959) 176 Cal.App.2d 10 [24 Cal.Comp.Cases 302].)

Further, an employee’s injury that occurs going to or leaving a medical appointment for a compensable industrial injury will be found to be arising out of and in the course of employment as of the time of the original industrial injury. (*Laines v. Workmen’s Comp. Appeals Bd.* (1975) 48 Cal.App.3d 872, 880 [50 Cal.Comp.Cases 365].)

Here, there is no dispute that on October 1, 2009, after receiving physical therapy treatment for her injury in case number ADJ2203864, applicant was hit by a car when she was leaving the physical therapy appointment. AME Dr. Hatch stated that applicant sustained injury to her lumbar spine/low back, bilateral knees, and feet as a result of the October 1, 2009 motor vehicle accident.

(Def Exh. J, p. 43.) Clearly, applicant sustained an injury while leaving a medical appointment. Thus, that injury is a compensable consequence of the injury in case number ADJ2203864 and does not constitute a new and/or separate injury AOE/COE.

Defendant argues that applicant did not sustain injury to her arms and hands, or in the form of gastritis, chronic pain, headaches or sleep disorder. Dr. Hatch noted throughout her initial report that applicant had a history of hand and upper extremity complaints as a result of her work. (See e.g. Def. Exh. J, p. 3; p. 8; pp. 35 – 36; pp. 38 – 39; pp. 40 - 41.) Dr. Hatch was presumably chosen by the parties to examine applicant in the capacity of an AME, because of her expertise and neutrality. Therefore, her opinions should be followed unless there was a good reason to find her opinions unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775 [51 Cal.Comp.Cases 114, 117].) There is no evidence in the trial record that is inconsistent with Dr. Hatch's reports, and we see no reason to find her opinions unpersuasive. (*Id.* at 782.)

Also, in her March 9, 2011 report, AME Dr. Betancourt stated that applicant's "gastritis is compensable and should be treated on an industrial basis." She then stated that applicant's "headaches can be rated in terms of her chronic pain, based on the chronic cervical myofasciitis; which is the orthopedic component." (Def. Exh. F, pp. 33 - 34.) However, as noted above, Dr. Betancourt stated that applicant's obstructive sleep apnea was "non-occupational." (Def. Exh. F, p. 33.) Again, having reviewed the entire record we see no reason to find Dr. Betancourt's opinions unpersuasive, so we find that applicant's sleep disorder is not work related.

Finally, regarding defendant's argument that the period of temporary disability "from on or about September 12, 2010 and continuing until at least July 13, 2011" was not an issue submitted for decision, we note the May 15, 2019 MOH/SOE indicate that in case number ADJ2203864, applicant claimed she was temporarily totally disabled for the period from March 17, 2008, through August 17, 2009. But it must also be noted that the July 29, 2019 MOH/SOE indicate the issues to be submitted for decision in case number ADJ7014519 included injury AOE/COE, and "temporary disability." (MOH/SOE, July 29, 2019, p. 2.) As explained above, the October 1, 2009 injury was a compensable consequence of the cumulative injury in case number ADJ2203864, and was in turn, an injury AOE/COE. (*Laines v. Workmen's Comp. Appeals Bd.*, *supra*; *Southern California Rapid Transit District, Inc. v. Workers' Comp. Appeals Bd. (Weitzman)*, *supra*.) Since injury AOE/COE and temporary disability (with no specific period identified) were issues submitted for decision in case number ADJ7014519, the March 17, 2008, through August 17,

2009, period at issue in case number ADJ2203864, does not limit or otherwise apply to the issue of temporary disability in case number ADJ7014519.

Accordingly, we amend the F&A to find that applicant sustained injury to her cervical spine, right shoulder, left shoulder, arms, wrists, hands, lumbar spine, right knee, left knee, gastrointestinal system/gastritis, and psyche, and in the form of chronic pain, and headaches; that applicant did not sustain injury to her head, temporomandibular joint (TMJ), to her internal system, or respiratory system, and she did not sustain injury in the form of carpal tunnel syndrome, sexual dysfunction, or sleep disorder; and that the October 1, 2009 injury is a compensable consequence of the October 29, 2006, through October 29, 2007 cumulative injury and is AOE/COE because it arose from the cumulative injury.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 18, 2020 Findings and Award and Order is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

1. Applicant, Inez Martinez, while employed as a business services representative during the period from October 29, 2006, through October 29, 2007, at Baldwin Park, California, by Kaiser Foundation Health Plan sustained injury arising out of and occurring in the course of employment, to her cervical spine, right shoulder, left shoulder, arms, wrists, hands, lumbar spine, right knee, left knee, gastrointestinal system/gastritis, and psyche, and in the form of chronic pain, and headaches.
2. Applicant did not sustain injury to her head, temporomandibular joint (TMJ), to her internal system, or respiratory system, and she did not sustain injury in the form of carpal tunnel syndrome, sexual dysfunction, or sleep disorder.
3. At the time of the injury the employer was permissibly self-insured and self-administered.

4. The October 1, 2009 injury is a compensable consequence of the October 29, 2006, through October 29, 2007 cumulative injury and is AOE/COE under Labor Code section 3600(a) because it arose from the October 29, 2006, through October 29, 2007 cumulative injury.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 11, 2022

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

**INEZ MARTINEZ
MOORE ASSOCIATES
RUSSELL LEGAL GROUP**

TLH/pc

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