WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE VALLARTA COVARRUBIAS, *Applicant*

vs.

BODAS CONSTRUCTION, INC.; NEW YORK MARINE AND GENERAL INSURANCE COMPANY, administered by LWP CLAIMS SOLUTIONS, INC.; WESCO INSURANCE COMPANY, administered by AMTRUST NORTH AMERICA, *Defendants*

Adjudication Numbers: ADJ11505778 ADJ11256912
Oxnard District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to further study the factual and legal issues. This is our Decision After Reconsideration.

Lien claimant Bell Community Medical Center seeks reconsideration of the December 12, 2021 Joint Findings and Order wherein the workers' compensation administrative law judge (WCJ) found that applicant did not sustain an industrial injury in December of 2012 or during the period January 1, 2000 through July 1, 2017. The WCJ also found that applicant did not require self-procured medical treatment on an industrial from lien claimant. The WCJ disallowed the lien of Bell Community Medical Center.

Lien claimant contends that, even if applicant did not sustain an industrial injury, it is entitled to recover medical-legal costs. Lien claimant also contends that the WCJ's finding that applicant did not sustain an industrial injury is based on a flawed panel qualified medical evaluator (PQME) report and that there is substantial medical evidence that applicant sustained an industrial injury.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the petition be denied. For the reasons discussed below, we will grant reconsideration, rescind the Findings and Order, and return the matter to the trial level for further proceedings and a new decision.

We will briefly review the relevant facts. Applicant's underlying workers' compensation case was settled by Compromise and Release. A lien trial was held on November 2, 2021. The

parties agreed to submit the issues of statute of limitations, injury arising out of and in the course of employment and the lien of Bell Medical Group. No testimony was taken and the matter was submitted based on the documentary evidence. The WCJ disallowed the lien based on the opinion of panel qualified medical evaluator (PQME) Steven M. Schwartz, M.D.

Dr. Shwartz offered the following opinion on causation:

> The patient's complaints are consistent with multiple scientific studies in the general population absent all injury. The symptoms are explained by common degenerative changes which occur with simple aging and routine physical activities in the atraumatic, general population. There is no other evidence in this case of specific, orthopaedic [sic.], industrial injury. If any actual injury were found on further investigation by the parties, the history of continued full work duty for an additional 4 ½ years after the date of putative injury would indicate that the injury itself was completely minor and trivial. (Exh. B, November 16, 2018, Steven M. Schwartz, M.D., Panel Qualified Medical Examination, p. 13.)

A lien claimant holds the burden of proof to establish all elements necessary to establish its claim. (See *Torres v. AJC Sandblasting* (2012) 77 Cal.Comp.Cases 1113, 1117 (Appeals Board en banc).) Thus, to recover for a medical treatment lien, a lien claimant must establish that applicant sustained an industrial injury.

Under the workers' compensation statutes, a compensable injury may either be a "specific" injury or a "cumulative" injury. Labor Code section 3208.1 defines injury as either: "(a) 'specific,' occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) 'cumulative,' occurring as 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." Whether an applicant has sustained a specific or a cumulative injury, or multiple injuries, is question of fact which must be determined by the WCJ. (Lab. Code, § 5952; § 5953; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 233–235 [58 Cal.Comp.Cases 323].) As with any decision by a WCJ, a decision on the number and nature of injuries must be supported by substantial evidence in light of the entire record. (Lab. Code, § 5952(d); *See 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].)

Applicant can establish that his job involved repetitive mentally or physically traumatic activities using lay evidence, including testimony from the applicant. However, the question of whether repetitive traumatic activities caused injury or a need for medical treatment can only be established with substantial medical evidence. To constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*Rosas v. Workers' Comp. Appeals Bd., supra*, 16 Cal.App.4th 1692, 1700-1702, 1705 [58 Cal.Comp.Cases 313].) "A medical report predicated upon an incorrect legal theory and devoid of relevant factual basis, as well as a medical opinion extended beyond the range of the physician's expertise, cannot rise to a higher level than its own inadequate premises." (*Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal Comp.Cases 358, 363].) A medical opinion is not substantial evidence if it is based on surmise, speculation. conjecture, or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93, 97.)

In this case, the PQME's opinion is based on an incorrect understanding of his role as a medical-legal evaluator. Dr. Schwartz solely addressed causation of the claimed specific injury and did not address applicant's job duties or whether he required medical treatment as a result of repetitive activities. Instead of addressing both claims of injury, the PQME made general statements about "multiple scientific studies in the general population absent all injury," and speculated about work-relatedness "if any actual injury was found." (Exh. B, p. 13.) Given the glaring deficiencies in the PQME's analysis, his reporting cannot be relied on to determine whether applicant sustained an industrial injury.

The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) Since, in accordance with that mandate, "it is well established that the WCJ or the Board may not leave undeveloped matters" within its specialized knowledge (*Id.* at p.404), pursuant to

Labor Code section 5906, we will return this matter to the trial level for development of the record and decision by the WCJ.

With respect to lien claimant's contention that it is entitled to payment on its lien for medical-legal reports, the WCJ may deal with this claim when reframing the issues for trial.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 12, 2021 Findings and Order is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings and a new decision consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I DISSENT,

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 25, 2022

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

BELL COMMUNITY MEDICAL GROUP
NEWHOUSE & CREAGER

MWH/oo

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

DISSENTING OPINION OF COMMISSIONER CRAIG SNELLINGS

I dissent. I would deny reconsideration for the reasons stated by the WCJ in the Report, which I adopt and incorporate by reference.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 25, 2022

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

BELL COMMUNITY MEDICAL GROUP
NEWHOUSE & CREAGER

MWH/oo

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

JOINT REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Applicant, JOSE VALLARTA COVARRUBIAS, while employed sometime in December 2012 (ADJ11505778) and during the period 01/01/2000 through 07/01/2017 (ADJ11256912) while employed by Bodas Construction as a construction worker in the state of California alleged injuries arising out of and occurring in the course of employment to his neck and back. On 12/10/2021 the undersigned found that applicant did not suffer the industrial injuries as alleged. Petitioner lien claimant Bell Community Medical Group seeks reconsideration of the disallowance of its lien.

II. CONTENTIONS

Petitioner contends that 1) it is entitled reimbursement of charges as medical legal, 2) that the panel qualified medical examiner report is not substantial medical evidence and 3) that medical records support a cumulative trauma industrial injury.

III. FACTS

Applicant alleged a specific and a cumulative trauma industrial injury.

On 03/23/2018 applicant served a DWC-1 Claim Form alleging the CT (EAMS Doc. ID No. 66632085 in ADJ11256912).

On 03/21/2018 applicant's attorney issued a referral to lien claimant to act as primary treating physician for the CT claim, with instruction to prepare a report "per Labor Code Section 9793 (c)" in the event the claim was denied.

On 06/22/2018 defendant denied the CT injury (Defendant's Exhibit C).

The specific injury alleged by Application for Adjudication (Defendant's Exhibit E) was alleged on 09/11/2018 and was denied (Defendant's Exhibit A).

Panel qualified medical examiner Steven M. Schwartz, M.D. in his reported on 11/16/2018 (Defendant's Exhibit B) having completed a physical examination and reviewed extensive records dating back to 2003 and extending through the time of the alleged specific and through the time of the alleged cumulative trauma. The records documented medical care for a variety of complaints

and conditions, but none of those related to his neck and back or any medical problem identified as related to employment.

The two industrial injury claims were resolved by joint compromise and release approved on 06/25/2019.

IV. DISCUSSION

Medical Legal Reimbursement

No specific issue was raised regarding medical legal reimbursement at trial. The claim is considered herein based on the facts shown by the record.

A primary treating physician may perform medical legal services to be reimbursed as same when reporting for the purpose of proving or disproving a contested claim at the request of a party (8 Cal. Code of Reg. Sec. 9793 (c) and (h)).

The claim must be contested at the time of the request and report.

Here, the request was made two days before serving notice on defendant that there was a cumulative trauma claim. The request is limited to the CT claim (the specific injury was not claimed until nearly six months later).

There is no basis to allow medical legal costs incurred in this manner.

Substantiality of the PQME Report

Petitioner contends that Dr. Schwartz did not discuss applicant's job duties or a cumulative trauma claim. The report describes the job as "residential construction laborer." This is a common – and scheduled (Occupation Group Number 480) – job that includes "heavy laboring work at construction sites of other work sites; very strenuous use of spine for lifting and exerting force." There is no reason to suspect that the PQME considered applicant's duties to be anything other than what is scheduled for the job he described.

The date of injury considered in the report was "January 1, 2000 – July 1, 2017." Dr. Schwartz noted that after the alleged December 2012 incident alleged, applicant worked his full work duty starting the next day and continued until he moved to a new residence in July 2017 thereafter commencing work as a house painter in September 2017.

Thus, there was consideration of applicant's years of construction work in concluding that applicant suffered neither a specific nor a cumulative trauma injury.

Dr. Schwartz issued an eighteen page report with a review of medical records from 2003 through May of 2018.

By contrast, the reporting of Michael Bazel, M.D. of 03/26/2019 is eight pages in length and that of secondary treating physician Hartyoun I. Yousif, M.D. of 11/21/2018 is seven pages long. Neither physician reviewed any medical records at all.

In short, Dr. Schwartz has produced substantial medical evidence. The same cannot be said for petitioner's work product.

Liberal construction of the law does not include re-assigning the relative weight of the evidence to award benefits.

Medical Records Supporting Injury Claims

Though this is contended in the petition, no such records are identified or discussed in the body of the pleading.

The extensive records relating to the case are reviewed and considered only by the PQME, and were not found to support the specific and CT claims.

V. RECOMMENDATION

Based on for foregoing, the undersigned WCALJ recommends that the petition for reconsideration be denied.

DATED AT OXNARD, CALIFORNIA

DATE: 01/12/2022

WILLIAM M. CARERO

WORKERS' COMPENSATION

ADMINISTRATIVE LAW JUDGE