

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

KEVIN HERNANDEZ, *Applicant*

vs.

**FRONTIER COMMUNICATIONS CORPORATION and
ZURICH AMERICAN INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ12531807
Riverside District Office**

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

Defendant seeks reconsideration of the Findings of Fact (Findings) issued by the workers' compensation administrative law judge (WCJ) on May 31, 2022, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and in the course of employment (AOE/COE) to his respiratory system, and that the reports from internal medicine qualified medical evaluator (QME) Sameer Gupta, M.D., constitute substantial medical evidence upon which the finding of injury AOE/COE was based.

Defendant contends that the opinions of Dr. Gupta regarding the issue of injury AOE/COE are based on an inaccurate history and are not substantial evidence, that Dr. Gupta's opinion that applicant had respiratory Valley Fever is inconsistent with other physicians' opinions that applicant had cutaneous Valley Fever.¹

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 applicant.²

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

¹ Defendant also contends that it was denied due process because it did not receive "the Minutes of Hearing from the Trial on May 19, 2022." (Petition, p. 2.) That assertion is not discussed in the Petition and there is no evidence offered or received pertaining to that issue. Thus, it will not be addressed herein.

² It appears that some of the arguments in the Answer are based on counsel's internet research which is not evidence in the trial record and therefore is not an appropriate factual basis for making an argument. Those arguments will not be considered.

reconsideration, rescind the Findings, 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 his respiratory system in the form of coccidioidomycosis (Valley Fever), to his psyche, skin, nervous system, and other body systems not specified, while employed by defendant during the period from December 1, 2018, through March 5, 2019. Applicant underwent a course of treatment from various providers including Shubha J. Kerkar, M.D., and Bachir K. Younes, M.D. (Joint Exh. 1, Sameer Gupta, M.D., June 27, 2020, pp. 35 – 94, review of medical records.)

Internal medicine QME, Dr. Gupta, evaluated applicant on June 27, 2020. Dr. Gupta examined applicant, took history, and reviewed the medical record. He stated that:

[Applicant] reports that he would be on the field site and would typically inspect newly dug trenches to confirm code standard... These job duties were done until the beginning of November 2018 per his recollection.
(Joint Exh. 1, p. 4.)

The diagnoses included:

Development of coccidioidomycosis shortly after finishing up work as a field surveyor on a new construction site in Indio, with significant exposure to construction sites and newly dug trenches as a representative of Frontier. Likely industrial in nature. ¶ Right anterior neck scarring from the disseminated coccidioidomycosis, likely subsequent sequelae of the cocci infection detailed in #1, outside of my expertise, if needed by the parties can consider QME plastic surgery to determine industrial issues.
(Joint Exh. 1, p. 9.)

Regarding the cause of applicant's coccidioidomycosis Dr. Gupta stated:

It is within a reasonable degree of medical probability that workplace exposure caused the claimant's condition. ... It is clear from the history that he had significant exposure to construction sites and had as part of his work duties to review and evaluated freshly trenched previous undisturbed land in the endemic area which is one of the highest risk factors for developing Valley fever.
(Joint Exh. 1, p. 10.)

By correspondence from defense counsel (Def. Exh. D), Dr. Gupta was asked several questions, and in his supplemental report he responded to "Question #1" as follows:

I can state with a reasonable medical probability that the applicant contracted Valley fever while in the course and scope of his employment without speculation given the following facts available to me - the objective medical records demonstrating the development of flu-like symptoms to the extent that the patient sought medical attention in a short time period after exposure to the construction site during the course of employment and subsequent medical records demonstrating a diagnosis of valley fever around the first quarter of 2019.

(Joint Exh. 2, Dr. Gupta, January 28, 2021, p. 2.)

The parties proceeded to trial on June 30, 2021. The WCJ's summary of applicant's testimony included:

When he went to Dr. Gupta for the first time, he does not remember a discussion as to possible areas where he might have been exposed. He did not tell Dr. Gupta he primarily did the digging of trenches. There was only one incident where he was near an open trench to test the level of the slurry, using his boots and a tape measure.

(Minutes of Hearing and Summary of Evidence (MOH/SOE), June 30, 2021, p. 8.)

The issues submitted for decision included injury AOE/COE and parts of body injured. (MOH/SOE, June 30, 2021, p. 2.) On August 10, 2021 the WCJ issued an Order Vacating Submission and ordered further development of the record. Dr. Gupta was provided the June 30, 2021 MOH/SOE, and he submitted a supplemental report. At the February 3, 2022 trial the September 20, 2021 supplemental report from Dr. Gupta was admitted into evidence (Joint Exh. 4) and the matter was submitted for decision as of March 4, 2022. (MOH/SOE, February 3, 2022.) The WCJ issued an Order Vacating Submission on March 15, 2022. At the April 26, 2022 Status Conference the matter was set for trial and the May 19, 2022 Minutes of Hearing state that:

[A]s a result of said Status Conference, the parties have advised that they are unable to reach an agreement as to an Agreed Medical Examiner. Further, the parties agree that the Court should proceed with appointment of a physician under Labor Code Section 5701. ¶ This case is submitted for decision as of May 19, 2022.

(MOH, May 19, 2022, p. 2.)

DISCUSSION

Before addressing the allegations in the Petition and the Answer, it must be noted that coccidioidomycosis is an airborne illness caused by the fungus *Coccidioides immitis*. When the infection is in the lungs, it's known as Valley Fever. When it spreads from the lungs to other tissues,

it's known as disseminated coccidioidomycosis. If a condition is cutaneous it is related to/affecting the skin; if a condition is subcutaneous it is under the skin. (See Merriam-Webster Medical Dictionary; Oxford Languages Dictionary.)

Here, as noted above, the WCJ found that applicant sustained an injury to his respiratory system. (Finding #1, Findings p. 1.) In her May 20, 2019 treatment report Shubha Kerkar, M.D., diagnosed applicant as having, “1) Disseminated coccidioidomycosis [and] 2) Subcutaneous coccidioidomycosis.” (Joint Exh. 1, pp. 72 – 73, review of medical records.) Subsequently, in several treatment reports, during the period from June 18, 2019, through December 19, 2019, Bachir Younes, M.D., diagnosed, “1) Cutaneous coccidioidomycosis 2) Disseminated coccidioidomycosis ... [and] 6) skin lesions.” (Joint Exh. 1, pp. 73 – 74 to 93 – 94.) Both doctors diagnosed disseminated coccidioidomycosis (infection in tissues other than the lungs) and subcutaneous/cutaneous coccidioidomycosis (on or under the skin) but neither doctor indicated that applicant had Valley Fever (infection in the lungs). The diagnoses made by Dr. Kerkar and Dr. Younes appear to differ from Dr. Gupta’s diagnoses of Valley Fever as well as disseminated coccidioidomycosis. As a result, we are unable to determine whether the evidence indicates that applicant sustained a cutaneous injury, a respiratory injury, or both.

Further, in his June 27, 2020 report, QME Dr. Gupta said that applicant developed coccidioidomycosis after he worked, “as a field surveyor on a new construction site in Indio, with significant exposure to construction sites and newly dug trenches ... ¶ ... It is clear from the history that he had significant exposure to construction sites and had as part of his work duties to review and evaluate freshly trenched previous undisturbed land.” (Joint Exh. 1, pp. 9 - 10.) Earlier in his report Dr. Gupta had said, “These job duties were done until the beginning of November 2018.” (Joint Exh. 1, p. 4.) However, applicant testified that, “[T]here was only one incident where he was near an open trench to test the level of the slurry ...” (MOH/SOE, June 30, 2021, p. 8.) Clearly, Dr. Gupta’s statements about the extent of applicant’s work whereby he was exposed to “newly dug trenches” is inconsistent with applicant’s testimony that he went to the trench site on one occasion. Prior to submitting his September 20, 2021 report (Joint Exh. 4) Dr. Gupta was provided the June 30, 2021 MOH/SOE that included applicant’s testimony as to the actual amount of time he spent near an open trench. Unfortunately, Dr. Gupta did not acknowledge or otherwise address what appears to be a significant error in the history of applicant’s employment, as stated in his medical-legal reports.

It is well established that an award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *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].) For the reasons discussed above, Dr. Gupta's reports do not constitute substantial evidence upon which a finding of respiratory injury AOE/COE may be based.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or where there is insufficient evidence to determine an issue. (Lab. Code, §5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) However, based on our review of the record, under the circumstances of this matter, it is appropriate for the parties to have applicant evaluated by an agreed medical examiner or in the alternative, for the WCJ to appoint a regular physician. (Lab. Code § 5701.)

Accordingly, we grant reconsideration, rescind the Findings of Fact, 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 defendant's Petition for Reconsideration of the Findings of Fact issued by the WCJ on May 31, 2022, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 31, 2022 Findings of Fact 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/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 12, 2022

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

**KEVIN HERNANDEZ
LAGORIO LAW GROUP
FLOYD, SKEREN, MANUKIAN & LANGEVIN**

TLH/pc

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