

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARYLYN BAEZ, *Applicant*

vs.

**OA LOGISTICS SERVICES, INC., and REPUBLIC INDEMNITY COMPANY OF
CALIFORNIA, *Defendants***

**Adjudication Number: ADJ13518613
Redding District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Opinion and Decision After Reconsideration, issued by the Workers' Compensation Appeals Board on November 23, 2021, wherein we rescinded the April 13, 2021 Findings and Order and substituted a new Findings and Order, finding that on January 30, 2020, applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her low back including lumbar radiculopathy to her left leg, and deferring all other issues regarding the injury.

Defendant contends that the report from Perry J. Carpenter, D.C., is substantial evidence that applicant did not sustain the January 30, 2020 low back injury and that "treating doctor, Rigoberto Barba ... noted that Applicant complained of symptoms 3 months prior to her claim of industrial injury." (Petition, p. 2, underlining in original.)

We have considered the allegations in the Petition for Reconsideration (Petition). Based on our review of the record, for the reasons stated in the Opinion and Decision After Reconsideration, (Opinion) which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant claimed injury to her back, lower extremities, left leg, left foot and toes, while employed by defendant as a material handler on January 30, 2020.

On February 2, 2020, applicant was seen by Mark Palmeri, M.D., at the Sutter Health emergency department and the diagnoses was left sided sciatica. (App. Exh. 1, Mark Palmeri, M.D./Sutter Health, February 2, 2020, p. 5.)

Rigoberto Barba, M.D., became applicant's primary treating physician (PTP) on February 4, 2020. (App. Exh. 2, Rigoberto Barba, M.D., February 4, 2020.) Dr. Barba noted:

[Applicant] Had onset of pain about 2 wks. ... Has noticed this started after lifting bags at work and had to lift some boxes to unload a truck six days ago at work and that seems to have triggered pain markedly.

(App. Exh. 2, p. 1.)

On May 5, 2020, applicant was seen at the Woodland Clinic by Sammy J. Almashat, M.D. (App. Exh. 3, Sammy J. Almashat, M.D., May 5, 2020.) Dr. Almashat diagnosed applicant as having "Acute low back pain (S1 radiculopathy)" and stated:

45-year-old female warehouse worker with no history of acute or chronic low back pain presents for f/u of acute left--sided radicular low back pain due to broad-based disc bulge with compression of S1 nerve root L > R [left greater than right], with new-onset numbness in S1distribution. Initial onset after unloading heavy boxes from a truck during the previous 2 to 3 weeks. ... By far the more reasonable presumption in a case such as hers, with an acute, temporal link to heavy lifting/bending that was not her usual job task, is for causality or at the very least that her work is one of several factors.

(App. Exh. 3, pp. 1 - 2.)

On July 14, 2020, applicant was evaluated by chiropractic qualified medical examiner (QME) Perry J. Carpenter, D.C. (Joint Exh. ZZ, Perry J. Carpenter, D.C., July 17, 2020.) In his report Dr. Carpenter stated:

In addressing compensability under Labor Code 4060, it is my opinion that the current symptoms that Ms. Baez reports related to her lower back and left lower extremity are NOT the result of a specific incident of injury on 01/30/20. ... Ms. Baez denies prior injury to the lower back lumbar spine. However, recent imaging studies suggest a long standing chronic degenerative condition of the lumbar spine specific for prior injury to the L5/S1 disc. These are positive objective imaging findings that indicate, according to the Medical Research that I conducted, prior herniation of the L5/S1 disc.

(Joint Exh. ZZ, pp. 34 – 35 [EAMS pp. 45 – 46].)

The parties proceeded to trial on February 11, 2021. (Minutes of Hearing and Summary of Evidence (MOH/SOE), February 11, 2021). The WCJ's summary of the testimony of applicant's witness, Marisol Valdez, included:

Miss Baez first asked Miss Valdez what their conversation was on January the 30th; 2020. Miss Valdez said she was coming out of work and noticed Miss Baez holding her back. Miss Baez told her that she was working all day. Her back started hurting, but she kept working because they needed to make their time quota.

(MOH/SOE, p. 3.)¹

DISCUSSION

As noted in our Opinion, there appears to be no dispute as to whether applicant had a pre-existing degenerative lumbar spine condition. However, the acceleration, aggravation or 'lighting up' of a pre-existing condition "is an injury in the occupation causing the same." (*Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615, 617 [1935 Cal. LEXIS 590]; *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358]; *Reynolds Electrical & Engineering Co. v. Workers' Comp. Appeals Bd. (Buckner)* (1966) 65 Cal.2d 438 [31 Cal.Comp.Cases 421].) Further, as we explained, Dr. Carpenter did not explain why the increase in applicant's symptoms, and the ongoing medical treatment, subsequent to the January 30, 2020 incident, did not constitute an aggravation of the pre-existing lumbar spine condition. Nor did he explain why he disagreed with the conclusions of the treating physicians who repeatedly stated that applicant had sustained an industrial injury to her lumbar spine. Also, Dr. Carpenter noted that applicant was able to work for defendant for one year and two months prior to the January 30, 2020 incident (Joint Exh. ZZ, p.16 [EAMS p. 27]) and after that incident she could not work due to pain, but he did not explain why the pain was caused solely by the pre-existing condition and was not in any way related to applicant's work for defendant. (See Opinion, p. 6.)

Defendant makes various arguments in support of its contention that Dr. Carpenter's report is substantial evidence that applicant did not sustain an injury AOE/COE. However, a doctor's report wherein the doctor "delineated his reasoning for his opinion in detail" and that is "based on a thorough review of the medical records" (See Petition, p. 7), does not constitute substantial evidence if the report fails to address a threshold issue, such as whether the condition at issue was

¹ For a more detailed discussion of the factual background of this matter see Opinion pp. 2 – 4.

an aggravation of a pre-existing lumbar spine condition. (*Tanenbaum v. Industrial Acc. Com.*, *supra*; *Zemke v. Workmen's Comp. Appeals Bd.*, *supra*; *Reynolds Electrical & Engineering Co. v. Workers' Comp. Appeals Bd. (Buckner)*, *supra*.)

Defendant also argues that under the circumstances of this matter, “[T]he proper remedy would be to develop the record and request supplemental reporting from the PQME....” (Petition, p. 8.) Having again reviewed the trial record, as stated in our Opinion, the trial testimony of applicant and Marisol Valdez, in conjunction with the medical reports from Dr. Barba and Dr. Almashat constitute substantial evidence in light of the entire record. (Lab. Code § 5952; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635-637 [35 Cal.Comp.Cases 16].) As to defendant’s argument, although the Appeals Board does have the discretion to develop the record when it lacks substantial evidence on a threshold issue, if a party fails to meet its burden of proof by obtaining and introducing competent evidence, the Appeals Board is not required to rescue that party by ordering the record to be developed. (Lab. Code, § 5502; *San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Telles Transport Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159 [66 Cal.Comp.Cases 1290]; *Guzman v. Workers' Comp. Appeals Bd.* (2013 W/D) 78 Cal.Comp.Cases 893.) Here, the record contains substantial evidence that applicant sustained injury AOE/COE to her low back including lumbar radiculopathy to her left leg. Thus, there is no need to develop the record.

Finally, we must note that defendant repeatedly asserts that the trial record contains evidence that applicant complained of back pain three months prior to her date of injury. (See Petition, p. 3: lines 5-6, p. 6: lines 22-24, 7: lines 10-11.) The Review of Records section of Dr. Carpenter’s report states that the January 17, 2020 Report of Initial Evaluation from Dr. Barba indicated that applicant “Has had some generalized body aches over the past three months” and that “Taking statin but has been having generalized body aches, will hold the statin for two weeks to see if contributing to pain.” (Joint Exh. ZZ, p. 10 [EAMS p. 21], underlining added.) The February 2, 2020 report from Mark Palmeri, M.D., stated:

Marylyn Baez is a 45 year old female who presents with back pain that started 1 week ago. Patient says that the pain has been present for the past week but exacerbated earlier tonight which prompted her to come to the ED. Pain is

localized to the lumbar spine. ... Patient at her job is involved in physical exertion and lifts heavy objects. ...
(App. Exh. 1, p. 1.)

The February 10, 2020 Clinic Note from the Woodland Clinic stated:

45-year-old female warehouse worker presents for follow-up of acute left-sided radicular low back pain, with SI distribution numbness, onset after unloading heavy boxes from a truck during the previous 2 to 3 weeks. She has never experienced such pain before. She has no history of chronic back pain.... Pain is much worse today.

(Joint Exh. ZZ, p. 10 [EAMS p. 21].)

Clearly, the trial record does not contain evidence that applicant complained of back pain three months prior to the date of injury. To the contrary, the record contains substantial evidence that applicant started experiencing increased back pain on or about the date of her injury. Counsel is reminded that the Petition is “verified upon oath” and that misrepresentations of fact, including misrepresentation of the trial record, may be deemed sanctionable conduct. (Lab. Code, §§ 5902, 5813; Cal. Code Regs., tit. 8, § 10421 (b)(5).)

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Opinion and Decision After Reconsideration, issued by the Workers' Compensation Appeals Board on November 23, 2021, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 25, 2022

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

**MARYLYN BAEZ
HAWORTH, BRADSHAW, STALLKNECHT & BARBER**

TLH/*pc*

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