

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

SANDRA GIRON, *Applicant*

vs.

**LOS FELIZ HEALTHCARE WELLNESS CENTRE LP and XL SPECIALTY
INSURANCE COMPANY, administered by INTERCARE INSURANCE SERVICES,
*Defendants***

**Adjudication Number: ADJ12401537
Marina del Rey District Office**

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

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on December 1, 2021, wherein the WCJ found that applicant did not sustain an injury arising out of and occurring in the course of employment (AOE/COE), during the period from December 22, 2018, through July 11, 2019.

Applicant contends that applicant's trial testimony and the reports from John Boyko, D.C., are substantial evidence that applicant sustained an orthopedic injury AOE/COE.

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

We have considered the allegations in the Petition for Reconsideration (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, back, psyche, and in the form of headaches, while employed by defendant as a certified nurse assistant (CNA), during the period from December 22,

2018, through July 11, 2019.

On July 2, 2019, the employer referred applicant to the ProHealth Occupational Medical Group, Glendale Clinic¹, and applicant was treated by Daniel Paveloff, M.D. (App. Exh. 3, Dr. Paveloff, July 2, 2019, EAMS pp. 18 – 25.) In the Doctor's First Report of Occupational Injury, Dr. Paveloff diagnosed applicant as having “generalized anxiety disorder.” (App. Exh. 3, EAMS p. 19.) In his July 8, 2019, progress report (PR-2) Dr. Paveloff indicated that applicant could return to modified work. (App. Exh. 3, Dr. Paveloff, July 8, 2019, EAMS p. 38.) The report later states:

Called to discuss work status with employer and see if pt. can be switched to a different department or shift to avoid coworkers, but no one was available to speak to.
(App. Exh. 3, EAMS p. 45.)

In her July 9, 2019 statement, Claudia Castella stated that, “[I]n the presence of the Union Steward [Estela Sanchez] I called Sandra Giron to discuss the Modified Work Offer letter. (Def. Exh. J, Claudia Castella, July 9, 2019.)

Applicant’s employment with defendant was terminated as of July 16, 2019. (Def. Exh. B, Notice of Discharge, July 16, 2019.)

The parties proceeded to trial on May 5, 2021. (Minutes of Hearing and Summary of Evidence (MOH/SOE), May 5, 2021.) The issues identified by the parties included injury AOE/COE, and whether the psychiatric injury claim was barred by the applicable provisions of Labor Code sections 3208.3 and 3600(a).² (MOH/SOE, May 5, 2021, pp. 2 - 3.) The matter was continued for further testimony, and at the October 4, 2021 trial it was submitted for decision. (MOH/SOE, October 4, 2021.)

DISCUSSION

Decisions of the Appeals Board must be based on substantial evidence that was admitted into the trial record. (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].) As required by section 5313 and as the Appeals Board previously explained, “[T]he WCJ is charged with the responsibility of referring to the evidence

¹ See Def. Exh. I, Claudia Castella, July 2, 2019: “... Administrator and I gave her the paper for the clinic.”

² All further statutory references are to the Labor Code unless otherwise noted.

in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 475 (Appeals Board en banc).) In *Hamilton*, we held that the record of proceeding must contain, at a minimum, "the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence." (*Id* at p. 477.) Here, Finding of Fact 1 is, "The Applicant did not sustain an injury arising out of and in the course of employment during the period 12/22/2018 through 7/11/2019." (F&O p. 1.) In the Opinion on Decision (Opinion) the WCJ stated:

The issue being determined is whether or not the Applicant sustained an injury arising out of and in the course of employment with the Defendant. ¶ The Defendant showed that the Applicant was terminated for good cause. Further, the Defendant showed the Applicant did not notify the Defendant of a claim for injury until after she was terminated.
(F&O p. 2, Opinion.)

The Opinion does not refer to or discuss the evidence upon which it is based.³ Also, the Opinion appears to address the section 3600 post termination defense but the Finding states that applicant did not sustain an injury AOE/COE. Further, counsel for both parties specifically state that at the October 4, 2021 trial, applicant dismissed the psychiatric injury claim and tried only the orthopedic injury claim. (See Petition p. 3; Answer p. 2.) However, as noted above, the issues were identified at the May 5, 2021 trial and the October 4, 2021 MOH/SOE does not indicate that the psychiatric injury claim was dismissed, nor does it make any reference to a change in the issues to be submitted for decision. The trial record, including the F&O, does not comply with the requirements stated in *Hamilton* and our review of this matter was hampered by the lack of a proper record. Finally, in order for a "post termination defense" (section 3600(a)(10)) to be applicable there must be a finding of injury including the date of injury; and if a "good faith personnel action" defense (section 3208.3(h)) is at issue, a WCJ must perform the four-step analysis we described in the *Rolda* decision. (*Rolda v. Pitney Bowes* (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc).)

For the reasons discussed herein, it is appropriate that we return this matter to the WCJ for further development of the record.

³ We note that the record contains evidence that prior to the notice of termination, the employer had notice of the injury, and that there were medical records of the injury existing prior to the notice of termination. (See App. Exh. 3 and Def. Exhs. I and J.)

Regarding applicant's contention, as noted above, 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.*, *supra*; *Garza v. Workmen's Comp. Appeals Bd.*, *supra*.) A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378–379 [35 Cal.Comp.Cases 525]; *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358].) Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Granado v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 399, 407 [33 Cal.Comp.Cases 647]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

In his August 15, 2019 Initial Evaluation, Dr. Boyko stated that, "At the time of this examination, there were no medical records available for my review." (App. Exh. 2, Dr. Boyko, August 15, 2019, p. 9.)

After the examination, Dr. Boyko concluded:

Based on the history as provided by the patient and the results of examination, it is fair to say with reasonable medical probability that the cervical spine, lumbar spine, abdomen, psyche, brain, sleep problems and headaches injuries sustained by the patient, which resulted in disability and the need for medical treatment, arose out of and occurred during the course of the employment, and were the direct result and sole contributing factor of the industrial injury referenced above.
(App. Exh. 2, p. 13.)

Dr. Boyko did not review any x-rays, MRIs, or other diagnostics before stating his opinions as to the cause of applicant's subjective complaints. (App. Exh. 2, p. 5.) Absent any diagnostics in support of applicant's complaints, it appears that Dr. Boyko's opinions were based on "the history as provided by the patient." The subsequent PR-2s do not address the issue of causation. (See App. Exh. 1.) Also, as a chiropractor, the issues of "abdomen, psyche, brain, sleep problems and headaches injuries" are outside the scope of his practice. Dr. Boyko's conclusion appears to be based on an inadequate medical history, specifically the lack of review of diagnostics or other medical records, and in turn, it appears to be based on speculation, or guess. Thus, his report does

not constitute substantial evidence. (*Heggin v. Workmen's Comp. Appeals Bd. supra*; *Place v. Workmen's Comp. Appeals Bd. supra.*)

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 Findings and Order issued by the WCJ on December 1, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 1, 2021 Findings 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/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 3, 2022

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

**SANDRA GIRON
HINDEN & BRESLAVSKY
ALVES LAW OFFICE**

TLH/pc

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