

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

YOLANDA MICHEL *Applicant*

vs.

**LISI AEROSPACE;
ZURICH INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ13225262
Santa Ana District Office**

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

Applicant seeks reconsideration of the May 20, 2022 Findings of Fact wherein the workers' compensation administrative law judge (WCJ) found that applicant sustained an injury arising out of and during the course of her employment during the period June 30, 2012 through April 24, 2020 to her neck, low back, bilateral shoulders and bilateral elbows. The WCJ found that applicant did not sustain an industrial injury during that period to her hands, fingers, left knee, psyche, neurological system, sleep, excretory system and respiratory system,

Applicant contends that the WCJ should also have found that she sustained an industrial injury to her hands, arguing that the panel qualified medical evaluator (PQME) Dr. Heron provided whole person impairment that he attributed to an industrial injury to applicant's hands.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied. We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level for further proceedings and a new decision.

In the Report, the WCJ quoted from the reports and depositions of the orthopedic PQME. We note that the PQME provided inconsistent opinions on whether applicant sustained an injury to her hands.

With respect to injury causation, Dr. Heron explained in his report that upon "[r]eviewing the compendium of medical records that almost succeeded 4000

injuries to the lumbar spine, cervical spine as well as both thumbs, both elbows... ” [Ex X, P29].

There was further discussion about Applicant’s injuries in Dr. Heron’s deposition:

Q. You did not diagnose wrists, and you did not diagnose hand injuries either. But what you did diagnose is bilateral upper extremity weakness; right?

A. Right. The elbow, lateral epicondylitis and bilateral shoulder rotator cuff tendinitis. [Ex. Y, P22, L7-12]

...

Q. Based on your examination of the applicant’s bilateral hands only, did you find that there was an injury to either the right or the left hand?

A. There’s —there wasn’t any—physical examination, there wasn’t any evidence of a scar. She had normal sensation in range of motion in the hands and fingers.

Q. So, if I can translate that, the answer is that you did not find injury to either of the hands; is that right?

A. I found that—no, that’s not right. I found that she had weakness in—in both hands. [Ex Z, P51, L13-24]

Q. ...you assigned impairment to the bilateral hands based on upper extremity impairment loss of strength, I believe; is that right?

A. Yes [Ex Z, P49, L22-25]. (Report, p. 2-3.)

The WCJ found that applicant did not meet her burden of showing injury to her hands. The WCJ reasoned that a finding of cumulative injury must be based on medical evidence and the assigning impairment to a particular body part is not equivalent to a finding of industrial injury to that body part.

As with any decision by a WCJ, a decision whether applicant sustained a cumulative injury 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].)

Labor Code section 3208.1¹ provides that a cumulative industrial injury occurs whenever the repetitive physically traumatic activities of an employee’s occupation cause any disability or a need for medical treatment. The question of whether repetitive traumatic activities caused injury can only be answered with substantial medical evidence. It has long been recognized that medical proof is required when issues of diagnosis, prognosis, and treatment are beyond the bounds of

ordinary knowledge. (*City & County of San Francisco v. Industrial Acc. Com. (Murdock)* (1953) 117 Cal.App.2d 455 [18 Cal.Comp.Cases 103]; *Bstandig v. Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988 [42 Cal.Comp.Cases 114].)

It is well established that all decisions by the WCAB must be supported by substantial evidence and all decisions requiring medical evidence must be supported by substantial medical evidence. Not all expert medical opinion constitutes substantial evidence. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93, 97]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].) To constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (en banc); *McAllister v. Workmen's Comp. Appeals Bd.*, *supra*, 69 Cal.2d 408, 413, 416-417; *Rosas v. Workers' Comp. Appeals Bd.* (1993) 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].) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture, or guess." (*Hegglin, supra*, 36 Cal.Comp.Cases at p. 97.) Whether a physician's opinion constitutes substantial evidence "must be determined by the material facts upon which his opinion was based and by the reasons given for his opinion." (*Ibid.*)

When opining on industrial causation, a medical evaluator must have a complete medical history including a history of applicant's job duties. A medical evaluator must know what applicant did at work to have a relevant factual basis to support a finding on whether an injury was caused by "repetitive mentally or physically traumatic activities extending over a period of time." (Lab. Code, §3208.1; *Hegglin, supra*, 36 Cal.Comp.Cases at p. 97.)

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56

Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].)

In this case, while we agree with the WCJ that finding impairment is not the same as finding injury, the PQME has not provided an analysis of the causation of applicant's hand impairment. Dr. Heron should be provided with an opportunity to comment on this issue. Therefore, we will return this matter to the trial level for further development of the medical record.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the May 22, 2022 Findings of Fact is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 22, 2022 Findings of Fact is **RESCINDED**, and the matter is returned to the trial level for further proceedings and a new decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 8, 2022

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

**FLOYD SKEREN MANKUIAN & LANGEVIN
MEHR & ASSOCIATES
YOLANDA MICHEL**

MWH/oo

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