WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ALEX SOLIS, *Applicant*

vs.

COUNTY OF LOS ANGELES, permissibly self-insured; administered by SEDGWICK CLAIMS MANAGEMENT, INC., *Defendants*

Adjudication Number: ADJ12048035
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

Defendant did not raise the issue of the applicability of a Dispute Resolution Agreement (DRA) at trial. That issue is therefore waived. Issues not raised at the first opportunity that they may properly be raised are waived. (Lab. Code, § 5502(e)(3), see also *Gould v. Workers' Comp. Appeals Bd*. (1992) 4 Cal.App.4th 1059 [57 Cal.Comp.Cases 157], *Griffith v. Workers' Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260 [54 Cal.Comp.Cases 145].) We further note that the DRA is not in evidence.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 13, 2021

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

ALEX SOLIS
STRAUSSNER SHERMAN
LOS ANGELES COUNTY COUNSEL'S OFFICE

PAG/abs

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

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE ON PETITION FOR RECONSIDERATION

INTRODUCTION:

On June 14, 2021, the Defendant filed a timely and verified petition for reconsideration dated June 14, 2021, alleging that the undersigned WCJ erred in his Findings of Fact & Award dated May 24, 2021. The Defendant contends that the independent medical review reports and deposition testimony of Jeffrey A. Hirsch, M.D., finding that the Applicant did not sustain industrial injury, should be binding on the parties notwithstanding Dr. Hirsch's failure to rebut the presumption of compensation pursuant to Labor Code § 3212.1. In addition, the Defendant contends that Dr. Hirsch's opinion that the Applicant is permanently totally disabled is not substantial medical evidence because his cancer is not in remission.

STATEMENT OF FACTS:

The Applicant, while employed during the period August 2, 1985 to February 28, 2019, as a firefighter for the County of Los Angeles, claimed to have sustained industrial injury to his parotid gland (in the form of a parotid tumor).

The Applicant was evaluated by Dr. Hirsch, who acted as the independent medical examiner, and issued several reports and testified in a deposition regarding this case. Dr. Hirsch concluded that the Applicant's parotid tumor was non-industrial, but resulted in 100% permanent disability.

On May 11, 2021, the parties appeared before the undersigned WCJ for trial requesting adjudication of, among other issues, injury arising out of and in the course of employment and permanent disability.

On May 24, 2021, the undersigned WCJ issued his Findings of Fact & Award that the Applicant sustained an industrial injury resulting in 100% permanent disability.

It is from this decision that the Defendant claims to be aggrieved.

DISCUSSION:

INJURY AOE/COE (CANCER PRESUMPTION)

Pursuant to Labor Code § 3212.1, a police officer who is exposed to a known carcinogen and develops or manifests cancer is entitled to a presumption that the cancer is industrially caused. The presumption may be rebutted (1) by evidence that the primary site of the cancer has been established and (2) by evidence that exposure to the recognized carcinogen is not reasonably linked to the disabling cancer.

Labor Code § 3212.1, as amended in 2010[1], provides, in relevant part:

> (a) This section applies to all of the following:
>
> * * *
>
> (1) Active firefighting members, whether volunteers, partly paid, or fully paid, of all of the following fire departments:
>
> (A) A fire department of a city, county, city and county, district, or other public or municipal corporation or political subdivision.
>
> * * *
>
> (b) The term 'injury,' as used in this division, includes cancer, including leukemia, that develops or manifests itself during a period in which any member described in subdivision (a) is in the service of the department or unit, if the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director.
>
> * * *
>
> **(**d) The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption.
>
> This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 120 months in any circumstance, commencing with the last date actually worked in the specified capacity.**"**

Manifestation occurs when an applicant first has symptoms, even if the applicant has not yet been diagnosed. [City of Los Angeles County v. Workers' Comp. Appeals Bd. (Darling) (2000) 70 Cal. Comp. Cases 1147 (writ denied); County of El Dorado v. Workers' Comp. Appeals Bd (Klatt) (2000) 65 Cal. Comp. Cases 1437 (writ denied)]

[1] The William Dallas Jones Cancer Presumption Act of 2010 amended Labor Code § 3212.1(d) to extend the maximum post-employment time period within which the "developing or manifesting of a cancer" must occur in order for the presumption to apply from 60 months to 120 months and that the longer period now applies in all pending cases regarding of the dates of employment or date of the "developing or manifesting of the cancer." [Lozano v. Workers' Comp. Appeals Bd. (2015) 80 Cal. Comp. Cases 407, 411-412]

In Faust v. City of San Diego (2003) 68 Cal. Comp. Cases 1822 (Appeals Board en banc), the WCAB addressed the respective burdens placed on the parties by the 1999 amendments to Labor Code § 3212.1.

In Faust, the WCAB set forth the applicant's burden as follows:

> "Before the presumption may be applied, [§] 3212.1(b) requires that applicant demonstrate that he or she was exposed to an identified known carcinogen. The applicant must establish that the exposure was to a 'known carcinogen' with evidence, generally documentary, that the carcinogen is defined as such by the International Agency for Research on Cancer, or otherwise so 'defined by the director.' The carcinogens 'defined by the director' are those regulated by the director of the Department of Industrial Relations.
>
> The applicant must also demonstrate actual exposure to the established known carcinogen during the period of employment as a firefighter. This may be shown by the applicant's testimony or other credible evidence that may include expert testimony. The applicant is not required to show that the exposure is the proximate cause of the injury.
>
> No specific level of actual exposure needs to be shown; a minimal exposure is enough to satisfy the applicant's burden.
>
> The applicant must also show the development or manifestation of the cancer, during the statutory time period, by medical evidence that must include the date of development or manifestation.
>
> * * *
>
> The burden of proving these initial elements lies with the applicant. When the applicant has shown: (1) that he or she was employed in an included capacity; (2) that he or she has been exposed to a known carcinogen during the employment; and (3) that he or she has developed or manifested cancer within the statutory time frames, then he or she has made a prima facie showing that the cancer is presumptively compensable." (Citations omitted.)

In this case, the Applicant worked as a firefighter for the County of Los Angeles during the period August 2, 1985 to February 28, 2019, [MOH/SOE, 05/11/2021, 2:9-10, 4:24-25] and, in his job description by Jeffrey Hirsch, M.D., in his independent medical evaluation report dated August 22, 2014, [Joint Exhibit "A"] on page two, the Applicant, as a firefighter "ha[d] breathed smoke, fumes, particulates, and superheated gases . . . [as well as] diesel exhaust, particulates, and fumes in the fire stations in which he lived . . . [and] ha[d] been exposed to ultraviolet radiation throughout his career."

The Applicant testified that he "first noticed that he had a lump on his neck in July 2018 . . . [and a]fter consulting with a physician, he was informed that it was cancerous." [MOH/SOE, 05/11/2021, 5:2-4]

Dr. Hirsch, in his report dated May 30, 2019, [Joint Exhibit "C"] on page two, wrote that the Applicant "noted an enlarging lump on the left side of his neck . . . [diagnosed as a] small cell carcinoid tumor of the parotid gland . . . [requiring] a very large neck dissection in January 2019 with extensive surgical intervention . . . [and] radiation therapy in February 2019." On page eight, Dr. Hirsch opined that the Applicant "ha[d] been exposed to carcinogens linked with increased incidence of neuroendocrine tumors . . . [and] to multiple carcinogens listed by the International Agency for Research on Cancer (IARC) as human carcinogens."

Having demonstrated actual exposure based on the above discussion, the burden then shifted to the Defendant to rebut the presumption. To rebut the presumption, the Defendant must establish: (1) that the primary site of the cancer has been identified; and (2) that the carcinogen is not reasonably linked to the disabling cancer.

It is clear from the medical evidence that the primary site of the cancer was identified as the parotid gland.

However, as set forth in Faust:

> "[T]he defendant has the burden of showing that the carcinogen to which the applicant has demonstrated exposure is not reasonably linked to the disabling cancer, i.e., the defendant must provide evidence to establish that there is no reasonable link. Medical or similar expert scientific evidence is necessary to show that there is no reasonable link between the exposure and the cancer.
>
> A defendant may establish that there is no reasonable link between the applicant's exposure and his or her illness by establishing the absence of a link between the exposure and the cancer, including establishing that the latency period of the manifestation of the specific cancer excludes the exposure as the cause of the applicant's cancer.
>
> The defendant's burden is to prove by medical probability that there is no reasonable link between the applicant's demonstrated exposure to known carcinogens during the employment and the development of cancer. It is not enough for the defendant to show that no evidence has established a reasonable link between the known carcinogen and the cancer. Instead, the defendant must establish by evidence of reasonable medical probability that a reasonable link does not exist.
>
> Accordingly, evidence showing that no reasonable link has been demonstrated to exist between the carcinogen or carcinogens to which the firefighter has been exposed and the development of the cancer, is not adequate to rebut the presumption of industrial causation. ***To rebut the presumption, the evidence must explicitly demonstrate that medical or scientific research has shown that there is no reasonable inference that exposure to the specific known carcinogen or carcinogens is related to or causes the development of the cancer.*** [Faust, *supra*, 68 Cal. Cases at p. 1831-1832. Citations omitted. Emphasis added.]

In City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia) (2005) 70 Cal. Comp. Cases 109, the Court of Appeal endorsed the WCAB's holding in Faust and discussed how a defendant might rebut the Labor Code § 3212.1 presumption:

> "Thus, under the current version of [§] 3212.1, an employer demonstrates the absence of a reasonable link if it shows no connection exists between the carcinogenic exposure, or that any such possible connection is so unlikely as to be absurd or illogical. Contrary to the City's argument, the statute does not require the employer to prove 'the absence of any possible link.' The statute requires proof no reasonable link exists. A link that is merely remote, hypothetical, statistically improbable, or the like, is not a reasonable link. ***The employer need not prove the absence of a link to a scientific certainty; instead, it must simply show no such connection is reasonable, i.e., can be logically inferred.***" [Garcia, *supra*, 70 Cal. Comp. Cases at p. 119. Emphasis added.]

Here, Dr. Hirsch wrote in his report dated May 30, 2019, on page eight, that "neuroendocrine tumors are rare." In addition, in his report dated August 5, 2019, [Joint Exhibit "D"] on page five, he further wrote that "the extreme rarity of this tumor renders search of the medical literature fairly fruitless" and that "[e]ven considering th[is] type of cancer, very little information is available." For those reasons, Dr. Hirsch, on page six, concluded that he "does not have sufficient information to determine whether the presumption of industrial causation applied. . . [and that] none of th[e] carcinogens [the Applicant was exposed to] can be 'reasonably linked' with the [A]pplicant's primary parotid gland neuroendocrine tumor."

In addition, in Dr. Hirsch's deposition dated April 23, 2021, [Defendant's Exhibit "A"] he testified that, contrary to the law and facts, the presumption was not properly invoked. Instead, he incorrectly believed that the burden of proof rested on the Applicant to demonstrate that some aspect of his career caused, or hastened, or contributed to his tumor [25:7-10] and that, since Dr. Hirsch's research showed that he didn't know where those tumors came from, [25:15-16] the Applicant did not meet his burden of proof that it was work-related. [25:17-20]

However, Dr. Hirsch's opinion regarding "no reasonable link" appeared to be based on his claim that there was a lack of medical literature suggesting any causal relationship. This alone cannot form a proper basis to determine that his opinion is substantial medical evidence given that a presumption cannot be rebutted by showing that there are no studies linking exposure to a carcinogen and the development of the type of cancer at issue. [County of Ventura v. Workers' Comp. Appeals Bd. (Bastian) 75 Cal. Comp. Cases 513, 516; City of Compton v. Workers' Comp. Appeals Bd. (Branscomb) 76 Cal. Comp. Cases 991, 995 (writ denied)]

Therefore, Dr. Hirsch's claim that the absence of medical literature supported his conclusion cannot sustain his determination that the Defendant met its burden to establish that there was no reasonable link. Thus, it failed to rebut the application of the cancer presumption to this disputed injury.

Notwithstanding the undersigned WCJ's thorough legal and factual analysis of the case, the Defendant, in its petition for reconsideration, attacks it by claiming that the "[p]arties are bound to the opinions of the internal IME, Dr. Hirsch, specifically causation, as the applicant is subject to the terms and provisions outlined in the Dispute Resolution Agreement." (2:13-15) However, given that Dr. Hirsch failed to rebut the presumption of compensability, his opinion on causation cannot be deemed binding substantial medical evidence and cannot support a finding as such.

Therefore, for the reasons set forth above, the undersigned WCJ did not err in finding that the Applicant sustained an industrial injury to his parotid tumor.

PERMANENT DISABILITY

The AMA Guides are not strict texts to be literally and mechanically applied. Instead, an evaluating physician may use his or her experience and expertise to interpret and apply any portion of the entire AMA Guides. The new standard for calculating whole person impairment (WPI) is determining the most accurate reflection of impairment as measured by any chart, table, or methodology contained within the entire AMA Guides. Pursuant to Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District (2009) 74 Cal. Comp. Cases 1084 (Appeals Board en banc) (Almaraz/Guzman II), the WCAB held that:

> "[W]hile the AMA Guides often sets forth an analytical framework and methods for a physician in assessing WPI, the Guides do not relegate a physician to the role of taking a few objective measurements and then mechanically and uncritically assigning a WPI that is based on a rigid and standardized protocol and that is devoid of any clinical judgment. Instead, the AMA Guides expressly contemplates that a physician will use his or her judgment, experience, training, and skill in assessing WPI." [Almaraz/Guzman II (2009) 74 Cal. Comp. Cases at pp. 1103-1104; affirmed by Milpitas Unified School District v. Workers' Comp. Appeals Bd. (2010) 75 Cal. Comp. Cases 837 (Guzman III)]

The overarching goal of rating permanent impairment is to achieve accuracy. [Guzman III, 75 Cal. Comp. Cases at p. 848] To properly rate using Almaraz/Guzman, a physician is expected to (1) provide a strict rating per the AMA Guides, (2) explain why the strict rating does not accurately reflect the applicant's disability, (3) provide an alternative rating using the four corners of the AMA Guides, and (4) explain why that alternative rating most accurately reflects an applicant's level of disability. [Id., at p. 853-854; Dawson v. County of Los Angeles (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 28, *7-8 (Appeals Board noteworthy panel decision); Zulalyan v. California Department of Social Services (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 474, *7-8 (Appeals Board noteworthy panel decision)]

Finally, a WCJ is the ultimate finder of fact and is entitled to make his or her own credibility determinations. [Garza v. Workmen's Comp. Appeals Bd. (1970) 35 Cal. Comp. Cases 500, 505] While the WCAB may reject the findings of a WCJ and enter its own findings on the basis of its review of the record, [Labor Code § 5907] when a WCJ's findings are supported by solid, credible evidence, they are to be accorded great weight and should be rejected only on the basis of contrary evidence of considerable substantiality. [Lamb v. Workers' Comp. Appeals Bd. (1974) 39 Cal. Comp. Cases 310, 314]

In this case, Dr. Hirsch, in his independent medical evaluation report dated July 7, 2020, on page 10, opined that, because of the Applicant's extensive neck dissection to remove his parotid tumor, he has strict whole person impairment with respect to his loss of sense of smell, bilateral upper extremity neuropathy and dysphagia.

However, in his supplemental report dated December 7, 2020, on page nine, Dr. Hirsch wrote that he did not believe that the impairment adequately captured the Applicant's terminal cancer. Dr. Hirsch opined that, "[c]onsidering the *Almaraz-Guzman* ruling and the manner by which this non-industrial process has affected almost all areas of . . . [the Applicant's] physical body and health," he has 75% WPI in accordance with Table 6-4 of the AMA Guides, page 128.

Notwithstanding the Defendant's attempts to undermine Dr. Hirsch's opinion in his deposition dated April 23, 2021, contending that 75% WPI was speculative and inaccurate due to lack of some record review, [23:14-25 to 24:1-19; 51:10-25 to 53:1-16] he denied that it was and his opinion nonetheless was based on reasonable medical probability and a reasonable review of the medical records. The Defendant's apparent dissatisfaction with his opinion does not render it not substantial medical evidence. [See Ramirez v. Royal Roof Company (2009) 2009 Cal. Wrk. Comp. P.D. LEXIS 599, *7-8 ("The use of the word 'speculative' to describe the general process of issuing apportionment determinations does not invalidate the AME's apportionment determination in this case . . . [given that they] are not an exact science.")]

Accordingly, based on Dr. Hirsch's medical report dated December 7, 2020, on page nine, found to be credible and substantial medical evidence, notwithstanding the contention by the Defendant to be otherwise, the Applicant's permanent disability is rated as follows:

Colonic and Rectal Disorders
100% (06.02.00.00 - 75 - 100 - 490H - 100 - 100%) 100%

Finally, notwithstanding the Defendant's critical characterization that the Applicant is not in remission and that, for that reason, Dr. Hirsch's opinion on permanent disability cannot be reliable, he neither speculated nor guessed in providing his medical opinion on permanent disability. He was given an adequate medical history and conducted adequate examinations, relying on the Applicant's objective findings in concluding that the Applicant was permanently totally disabled. Since Dr. Hirsch's opinion was based on germane facts and reasonable medical probability, his opinion was substantial medical evidence. As such, in matters that require scientific medical knowledge, a WCJ may not reject them merely because an aggrieved party is dissatisfied with them. [E.L. Yeager Construction v. Workers' Comp. Appeals Bd (Gatten) (1968) 71 Cal. Comp. Cases 1687, 1693]

Therefore, the undersigned WCJ did not err in finding that the Applicant sustained 100% permanent disability.

RECOMMENDATION:

The undersigned WCJ respectfully recommends that the Defendant's petition for reconsideration dated June 14, 2021 be denied.

Date: June 5, 2021

DAVID L. POLLAK
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE