WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BELINDA MARIN, *Applicant*

vs.

ROBERT HALF LEGAL, INC., and XL INSURANCE AMERICA, INC., administered by GALLAGHER BASSETT SERVICES, INC., *Defendants*

Adjudication Number: ADJ12380286
Long Beach District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case.[1] This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on February 16, 2021, wherein the WCJ found in pertinent part that applicant sustained a cumulative injury to her neck and hands, arising out of and occurring in the course of employment (AOE/COE).

Defendant contends that the reports from orthopedic qualified medical examiner (QME) George S. Watkin, M.D., and his deposition testimony, are not substantial evidence that applicant sustained injury AOE/COE; that if applicant did sustain an injury, it was the result of her subsequent employment, not her employment with defendant; and that applicant did not meet her burden of proof on the issues of injury to her lungs and psyche, so those issues should have been decided against applicant, not deferred.

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

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 affirm the

[1] We granted the Petition to allow further study of the factual and legal issues on May 7, 2021; Commissioner Dodd was a member of the panel. Commissioner Dodd is not presently available to review the matter; a new panel member has been assigned in her place.

F&O, except that we will amend the F&O to defer the issue of injury AOE/COE to applicant's lungs and psyche (Finding of Fact 1); and to find that the reports and testimony of QME Dr. Watkins are substantial evidence that applicant sustained injury AOE/COE to her neck and hands (Finding of Fact 5). We will amend the Order to defer the issue of injury AOE/COE to applicant's lungs and psyche, and to defer all other issues regarding applicant's injury to her neck and hands, including her entitlement to benefits based thereon; and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to her neck, hands, lungs, and psyche, while employed by defendant as a legal assistant during the period from May 6, 2015, through May 6, 2016.

QME Dr. Watkin evaluated applicant on December 12, 2019. Dr. Watkin examined applicant and took a history, but he was not provided medical records to review. (Joint Exh. X2, Dr. Watkin, December 12, 2019, pp 7 – 9, p. 15.) The diagnoses included cervical spine pain, bilateral hand pain, low back pain, and depression. Dr. Watkin concluded that applicant's condition had not reached maximum medical improvement (MMI). (Joint Exh. X2, p. 13.)

Dr. Watkin subsequently reviewed an electrodiagnostic evaluation of applicant's cervical spine and bilateral upper extremities. He stated that:

> The electrodiagnostic evaluation has revealed a moderate-to-severe carpal tunnel syndrome. ¶ With regard to the issue of Causation, it is medically reasonable that that her job duties would have caused a median neuropathy of both wrists. Ms. Marin performed heavy transcription duties which involved usage of her hands on a repetitive and prolonged basis. ¶ … Concerning her cervical spine, the electrodiagnostic evaluation has revealed a chronic active bilateral C7-C8 radiculopathy. I would consider her job duties as an aggravation of this underlying pathology given that Ms. Marin remained seated at a computer most of the day with prolonged positioning of her cervical spine in a downward flexion position with repetitive rotation movements. …
> (Joint Exh. X3, Dr. Watkin, April 14, 2020, p. 2.)

Applicant filed a declaration of readiness to proceed and at the June 8, 2020 expedited hearing the matter was continued for a priority conference. The parties proceeded to trial on September 1, 2020, and the trial was continued in order for the parties to depose Dr. Watkin. (see Minutes of Hearing, September 1, 2020.)

On September 9, 2020, Dr. Watkin's deposition was taken. His testimony as to the cause of applicant's condition included the following:

> Q. So if there are two competent causes that led to the applicant's symptomatology, transferring the hypothetical to the applicant's case, then how can you rule out industrial causation over a one-month period at Doherty & Catlow?
> A. It contributed to it, but medically most probably did not cause all of it.
>
> Q. Well, Doctor, we are conflating two things. I'm asking you - and Ms. Brown specifically asked you, "Could you find a cumulative trauma over a one-month period?" And you said, "No." Now you are telling me that it contributed to it. Which is it? Is it a competent cause of the applicant's symptomatology, whether contributing or not, or is it not a competent cause?
> A. My answer to her was assuming that there were no previous episodes to predispose her to that problem.
>
> Q. But your response also rules out the possibility of a one-month cumulative trauma.
> A. Without predisposing factors.
>
> Q. So you are telling me that if an applicant has predisposing factors, that the subsequent employment that took place over a month is not a cause of the current condition.
> A. It is part of the cause of the current condition.
> (Joint Exh. 4, Dr. Watkin, September 9, 2020, deposition transcript, pp. 43 – 44.)

After reviewing "786 pages" of records, Dr. Watkin submitted a supplemental report wherein he concluded that:

> After review of the submitted records it is within a reasonable medical probability that Ms. Marin sustained an industrial aggravation of her pre-existing injuries to her bilateral wrists as a result of her employment with Robert Half Legal. ¶ … Based on her described job duties it is within a reasonable medical probability that Ms. Marin did sustain an injury to her cervical spine with an aggravation to the underlying degenerative pathology seen on the MRI scan. The lumbar spine MRI scan revealed moderate to severe degenerative pathology throughout. It is medically most probable that Ms. Marin sustained an industrial aggravation of her lumbar spine on a continuous trauma basis.
> (Joint Exh. X5, Dr. Watkin, November 3, 2020, p. 13.)

The parties again proceeded to trial on December 7, 2020. The issues submitted for decision were injury AOE/COE, temporary disability, and attorney fees. (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 7, 2020, p. 2.)

DISCUSSION

It is well established that any 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]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) To be substantial evidence a medical opinion must be based on pertinent facts, on an adequate examination and an accurate history, and it must set forth reasoning in support of its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (Lab. Code, §§ 3202.5, 3600(a); *South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297–298 [80 Cal.Comp.Cases 489].) "Preponderance of the evidence" is defined by Labor Code section 3202.5 as the "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence." (Lab. Code, § 3202.5.)

Here, Dr. Watkin examined applicant, and was informed of her work history with defendant and the one month of work for her subsequent employer in 2018. He reviewed the extensive medical record including numerous diagnostics. Dr. Watkin repeatedly explained that the physical demands of applicant's work caused an aggravation of her pre-existing conditions. (see e.g. Joint Exh. X3, p. 2; Joint Exh. X4, pp. 43 – 44; Joint Exh. X5, p. 14.) The aggravation of a pre-existing condition, industrial injury or otherwise, is an industrial injury. (*Zemke v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358]; *City of Los Angeles v. Workers' Comp. Appeals Bd. (Clark)* (2017 W/D) 82 Cal.Comp.Cases 1404.) Notwithstanding defendant's argument, Dr. Watkins' opinions are not speculative or conjectural. They constitute substantial evidence as to the injury of applicant's neck and hands, and there is no evidence in the trial record to the contrary. Also, we note that in addition to addressing the injury to applicant's cervical spine and bilateral wrists, Dr. Watkin did state that the lumbar spine MRI showed degenerative changes to applicant's lumbar spine and that applicant sustained a cumulative injury to her lumbar spine. (Joint Exh. X5, p. 13.) Although applicant did not claim injury to her lumbar spine, the fact that Dr. Watkin described an injury to "unpled body parts" in addition to

those that had been pled, is not a legal basis for finding that the report is not substantial evidence regarding the pled body parts, as argued by defendant.

Further, defendant argues that if applicant sustained an injury AOE/COE, it was the result of her employment with Doherty & Catlow during the period from February 15, 2018, through March 15, 2018. As noted above, at his deposition, Dr. Watkin testified that applicant's one month of employment with Doherty & Catlow was, "… part of the cause of the current condition." (Joint Exh. 4, pp. 43 – 44.) Dr. Watkin's testimony would be relevant in regard to the issues of apportionment and/or contribution, but it has no effect regarding the issue of whether applicant sustained an injury AOE/COE while employed by defendant.

Finally, defendant argues that the issues of injury to applicant's lungs and psyche, should have been decided against applicant, and should not have been deferred.

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved, and a petition for reconsideration is the appropriate remedy to be sought. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Here, although the F&O, as discussed above resolves the threshold issue of injury AOE/COE to applicant's neck and hands, all issues regarding the claim of injury to her lungs and psyche were deferred. The deferral of the issues as to applicant's lungs and psyche was an interlocutory ruling. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal.Comp.Cases 650].) A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. Thus, we will address defendant's contention regarding the deferral of the issues as to applicant's lungs and psyche by utilizing the applicable removal standard. (Cal. Code Regs., tit. 8, § 10955; (*Cortez v. Workers' Comp. Appeals Bd*. (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].)

Pursuant to Labor Code section 5310, the Appeals Board, as it deems necessary, may remove to itself, "the proceedings in any claim." The power of removal is discretionary and is generally employed only as an extraordinary remedy which must be denied absent a showing of substantial prejudice or irreparable harm, or that reconsideration will not be an adequate remedy after issuance of a final order, decision or award. (Cal. Code Regs., tit. 8, § 10955(a); *Cortez v. Workers' Comp. Appeals Bd. supra; Kleemann v. Workers' Comp. Appeals Bd. supra; Castro v.*

Workers' Comp. Appeals Bd. (1996) 61 Cal.Comp.Cases 1460 (writ denied)*; Swedlow, Inc. v. Workers' Comp. Appeals Bd.* (*Smith*) (1985) 48 Cal.Comp.Cases 476 (writ denied).)

Our review of the Electronic Adjudication Management System (EAMS) ADJ file indicates that on May 13, 2020, applicant filed a declaration of readiness to proceed to expedited hearing. Defendant objected to the declaration because the injury claim had been denied. The July 9, 2020 expedited hearing was continued for a priority conference and the matter was set for trial. (see Pre-trial Conference Statement, July 9, 2020, p. 3.) As noted above, the September 1, 2020 trial was continued for additional discovery, the deposition of Dr. Watkin.

Regarding priority conferences, Labor Code section 5502 states in part:

> (c) … If the dispute cannot be resolved at the conference, a trial shall be set as expeditiously as possible, unless good cause is shown why discovery is not complete, in which case status conferences shall be held at regular intervals. The case shall be set for trial when discovery is complete, or when the workers' compensation administrative law judge determines that the parties have had sufficient time in which to complete reasonable discovery. …
> (Lab. Code, § 5502.)

The MOH/SOE indicate that injury AOE/COE was identified as an issue but the parties did not specify which body parts were at issue. The reports from Dr. Watkins and the transcript of his deposition testimony pertain to applicant's orthopedic injury and do not address the claim of injury to applicant's lungs or psyche. There was no medical evidence submitted at trial regarding the lungs and/or psychiatric injury claims. In that all other issues were deferred, it appears the WCJ determined that sufficient discovery had been completed for the parties to try the issue of injury AOE/COE as to the orthopedic injury claim only.

Further, in the Petition defendant does not refer to any factual situation or circumstances that indicate how or why deferral of the lung and psychiatric injury claims resulted in substantial prejudice or irreparable harm. Nor did defendant make any arguments or assertions that indicate reconsideration would not be an adequate remedy after the WCJ issues a final order, decision or award.

Finally, since the issues regarding the lung and psychiatric injury claims issues were deferred, the overall level of permanent partial disability caused by the injury cannot be determined so that issue must be deferred and in turn, the amount of permanent disability indemnity owed to applicant must be deferred.

Accordingly, we affirm the F&O except that we amend the F&O to defer the issue of injury AOE/COE to applicant's lungs and psyche (Finding of Fact 1), to find that the medical reports and deposition testimony of George Watkin M.D., constitute substantial medical evidence and are the basis for finding injury to applicant's neck and hands (Finding of Fact 5), and to defer all other issues regarding applicant's injury to her neck and hands, including her entitlement to benefits based thereon (Order (b)); and we will return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 16, 2021 Findings and Order is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant BELINDA MARIN, age 54, while employed during the period from May 6, 2015, through May 6, 2016, at Los Angeles, California, as a legal assistant (occupation group number 112), by ROBERT HALF LEGAL, sustained injury, arising out of and occurring in the course of employment, to her neck and hands; the issue of injury arising out of and occurring in the course of employment, to applicant's psyche and/or to her lungs is deferred.

* * *

5. The medical reports and deposition testimony of George Watkin M.D., constitute substantial medical evidence and are the basis for finding injury to applicant's neck and hands.

ORDER

* * *

b) All other issues including: applicant's entitlement to benefits based on injury to her neck and hands; additional body parts injured; periods of temporary total/partial disability; need for medical treatment; and attorney fees are deferred pending settlement of those issues or further proceedings.

* * *

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 3, 2021

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

BELINDA MARIN
OZUROVICH & SCHWARTZ
LAW OFFICE OF WAI & CONNOR

TLH/*pc*

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