

**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 DECISION
AFTER RECONSIDERATION**

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

Applicant, in pro per, seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on April 13, 2021, wherein the WCJ found that applicant did not sustain an injury arising out of and occurring in the course of employment (AOE/COE).

Applicant contends the evidence does not justify the findings of fact, and that she has discovered new evidence material to her claim, which she could not with reasonable diligence have discovered and produced at the hearing.

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 and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will rescind the F&O and substitute a new Findings and Order, finding that on January 30, 2020, applicant sustained injury AOE/COE to her low back including lumbar radiculopathy to her left leg, and deferring all other issues regarding the January 30, 2020 injury; and we will return the matter to the WCJ for further proceedings as appropriate.

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. Applicant underwent a course of treatment and the treatment notes are summarized as follows:

On February 2, 2020, applicant was seen by Mark Palmeri, M.D., at the Sutter Health emergency department. (App. Exh. 1, Mark Palmeri, M.D./Sutter Health, February 2, 2020.) Dr. Palmeri 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 diagnoses was left sided sciatica. (App. Exh. 1, p. 5.) Rigoberto Barba, M.D., treated applicant on February 4, 2020. (App. Exh. 2, Rigoberto Barba, M.D., February 4, 2020.) The treatment note states:

Pt is here for f/u [follow-up] on recent ER visit for lumbar pain. Has been taking Norco not helping. Had onset of pain about 2 wks. Has some radiation to left lower ext. and has the last 3 toes affected to left foot. ... 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.)

The diagnoses included left lumbar radiculopathy. (App. Exh. 2, p. 4.) In the February 17, 2020 treatment notes, the diagnoses included left lumbar radiculopathy and Dr. Barba stated, “She needs at very least consideration for epidural steroid injection and may need evaluation by a neurosurgeon [sic]. (App. Exh. 2, Rigoberto Barba, M.D., February 17, 2020, p. 17 [EAMS p. 21].) In the March 17, 2020 treatment notes the diagnoses again included left lumbar radiculopathy and DR. Barba said applicant, “Will follow up with work comp. She would benefit from ongoing PT and epidural steroid injection...” (App. Exh. 2, Rigoberto Barba, M.D., March 17, 2020, p. 14 [EAMS p. 18].)

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 S1 distribution. Initial onset after unloading heavy boxes from a truck during the previous 2 to 3 weeks. Past medical history is contributory for hypertension and type 2 diabetes. ¶ Pain is worse in low back with persistent radicular pain down the back of the left leg and foot along with numbness. ... ¶ ... Unfortunately, the patient's claim was provisionally denied as the insurer wants a QME who will agree that this injury is work-related. I reviewed the note from the ER where the patient presented initially with severe radicular pain. It is clear from the note that the patient gave them and me the same history, with pain beginning the week prior to her ER visit and after she had begun her more intense work duties requiring heavy lifting and bending/twisting. I still am not sure why the claim was denied. One possible reason is that she did not report the pain first to her HR department. However, as I explained today to Denise Jones, the workers' comp adjustor, this is entirely within the norm for low back pain and really with any musculoskeletal injury stemming from work as these injuries are commonly only mild at the beginning and workers try to work through the pain initially, often not even realizing at first that the injury is work-related. In addition, acute radiculopathies can become severe quite suddenly, which is what happened in her case, necessitating immediate pain control. ... 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, Sammy J. Almashat, M.D., May 5, 2020, pp. 1 - 2.)

In his May 18, 2020 treatment note, Dr. Barba diagnosed chronic left lumbar radiculopathy and stated, "This is from work but apparently being contested by insurance." (App. Exh. 2, Rigoberto Barba, M.D., May 18, 2020, p. 10 [EAMS p.14].)

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 [note that page 1 of the report is EAMS p. 12, the end of the report, p. 37 is EAMS p. 48, with attachments through EAMS p. 67].) Dr. Carpenter examined applicant, took a history, and reviewed the medical record.¹ He diagnosed applicant as having "Lumbar Spine Degenerative Disc Disease" and regarding the cause of applicant's condition 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. (Joint Exh. ZZ, p. 34 [EAMS p. 45], italics in original.)

¹ The Occupational History portion of the report includes a "Description of Employees' Job Duties." (Joint Exh. ZZ, p.16 [EAMS p. 27].)

The “Reasons” for Dr. Carpenter’s conclusion included:

[T]he medical records indicate that, prior to 01/30/20, Ms. Baez was experiencing symptoms to the left lower extremity. ... Thus, prior to the alleged industrial injury of 01/30/20, Ms. Baez was already experiencing symptoms with the left lower extremity. ¶ ... Imaging Contradictions: 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 July 22, 2020 treatment note from Dr. Barba states:

Pt is here for f/u on her lumbar radiculopathy ... The MRI in February has broad disk protrusion at L5-S1. It clearly shows encroachment of the nerve root worse on the left. ... The pain does radiate to the left lower extremity. She still has pain with walking or standing for prolonged periods or sitting for prolonged period. (App. Exh. 2, Rigoberto Barba, M.D., July 22, 2020, p. 1 [EAMS p. 5].)

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.)

The summary of applicant’s testimony included:

She said that she was working regularly on January 30th. She was alone because her co-workers had not come in to help her unload the truck. She has to unload and put product on a conveyor belt. She was doing it really quickly. One of the times her back started hurting; however, she had to continue and finish the workday. ¶ After the workday she saw Miss Valdez and told her about the injury but said that she would just take some pills. She would rest, and she would be fine. ¶ ... The next day on Friday she went to work in pain. She thought she would recuperate by Saturday, but by Saturday she woke up with a very sharp pain. Saturday night she went to the hospital.

(MOH/SOE, p. 5.)

The issues submitted for decision were injury AOE/COE and applicant's request for a new medical-legal evaluator. (MOH/SOE, p. 2.)

DISCUSSION

We first note that Labor Code section 5903 states in part:

At any time within 20 days after the service of any final order, decision, or award made and filed by the appeals board or a workers' compensation judge granting or denying compensation, or arising out of or incidental thereto, any person aggrieved thereby may petition for reconsideration upon one or more of the following grounds and no other:

(d) That the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing.
(Lab. Code, § 5903)

Pursuant to Appeals Board Rule 10974:

Where reconsideration is sought on the ground of newly discovered evidence that could not with reasonable diligence have been produced before submission of the case or on the ground that the decision had been procured by fraud, the petition must contain an offer of proof, specific and detailed, providing: ...

(c) A description of any documentary evidence to be offered;
(d) The effect that the evidence will have on the record and on the prior decision;
and
(e) As to newly discovered evidence, a full and accurate statement of the reasons why the testimony or exhibits could not reasonably have been discovered or produced before submission of the case.

One of the grounds by which applicant seeks reconsideration is that she has newly discovered evidence. (Petition, p. 1.) Attached to the Petition is a letter from Rigoberto Barba, M.D, dated May 4, 2021, and a treatment report from Dr. Barba dated February 4, 2020. As noted above, the treatment report was included in App. Exh. 1. Clearly that report is not newly discovered evidence and should not have been attached to the Petition. (Cal. Code Regs., tit. 8, §10945(c).) As to the May 4, 2021 letter, it appears that applicant requested the letter from Dr. Barba after the April 13, 2021 F&O had been issued. A report that is requested by a party after a final order, decision, or award has been issued is not newly discovered evidence within the meaning of Labor Code section 5903(d). (*Michon v. Workmen's Comp. Appeals Bd.* (1971) 15 Cal.App.3d 917, 924 [36 Cal.Comp.Cases 157].) Thus, the May 4, 2021 letter from Dr. Barba is not newly discovered

evidence and will not be considered.

Regarding the issue of whether the evidence justifies the finding that applicant did not sustain injury AOE/COE: It appears that Dr. Carpenter's opinion that applicant did not sustain an injury as claimed, is based on his conclusion that the diagnostics he reviewed show that applicant had a "long standing chronic degenerative condition of the lumbar spine." (Joint Exh. ZZ, p. 35 [EAMS p. 46].)

There is no evidence in the record indicating that defendant contends the January 30, 2020 incident alleged by applicant did not occur. The actual dispute is whether the incident constitutes an injury AOE/COE; i.e. whether the incident caused disability or the need for medical treatment. (Lab. Code, § 3208.1.) There also 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].) For the purpose of meeting the causation requirement in a workers' compensation injury claim, it is sufficient if the work is a contributing cause of the injury. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291, [80 Cal.Comp.Cases 489].)

Here, although Dr. Carpenter explained the basis for his opinion that applicant had a pre-existing degenerative lumbar spine condition, he did not explain why the January 30, 2020 incident, the increase in applicant's symptoms, and the ongoing medical treatment, would not be considered an aggravation of the pre-existing lumbar spine condition. Nor did he explain why he disagreed with the treating physicians who repeatedly stated that applicant had sustained an industrial injury to her lumbar spine. Further, 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 due to the pre-existing condition and unrelated to applicant's work for defendant.

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; and to be substantial evidence the medical opinion must set forth

the reasoning behind the physician's opinion, not merely his or her conclusions; a mere legal conclusion does not furnish a basis for a finding. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) It is not clear whether Dr. Carpenter was unaware that the aggravation of a pre-existing condition may constitute an industrial injury, or whether he simply chose not address the issue. Also, he provided no explanation or analysis as to why Dr. Barba and Dr. Almashat were incorrect regarding their opinions that applicant had sustained an industrial injury. Thus, for the reasons discussed herein, Dr. Carpenter's report is not substantial evidence and cannot be the basis for a decision regarding the issue of injury AOE/COE.

It has long been settled law that once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level. (Lab. Code, § 5906; *State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98]; see also *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 229, fn. 7 (Appeals Board en banc).)

As noted above, witness Marisol Valdez testified that on January 30, 2020, when she was leaving work she saw applicant and noticed that applicant was holding her back. Applicant told Ms. Valdez that she had been working all day and that her back hurt. (MOH/SOE, p. 3.) Applicant testified that on Thursday, January 30, 2020, she was unloading a truck and her back started hurting. She went to work "in pain" the next day and thought her back would "recuperate by Saturday" but she woke up "with a very sharp pain" and went to the hospital Saturday night. (MOH/SOE, p. 5.) Each of the treatment notes subsequent to the January 30, 2020 incident, state that applicant had low back/lumbar spine pain and Dr. Barba noted that applicant's pain "started after lifting bags at work and had to lift some boxes to unload a truck..." (App. Exh. 2, p. 1.) Also, in his May 5, 2020 report, (as quoted above) Dr. Almashat stated that he had reviewed the note from the Sutter Health emergency department where applicant complained of severe radicular pain, and:

It is clear from the note that the patient gave them and me the same history, with pain beginning the week prior to her ER visit and after she had begun her more intense work duties requiring heavy lifting and bending/twisting. (App. Exh. 3, p. 2.)

Dr. Almashat explained that the symptoms from injuries causing low back pain or any musculoskeletal injury “stemming from work” are commonly mild at the beginning and “workers try to work through the pain initially, often not even realizing at first that the injury is work-related.” He then explained that acute radiculopathies, as experienced by applicant, “can become severe quite suddenly... necessitating immediate pain control.” (App. Exh. 3, p. 2.) Finally, Dr. Almashat stated it was his opinion that, “by far the more reasonable presumption” in a case such as applicant’s, “with an acute, temporal link to heavy lifting/bending that was not her usual job task,” was that her work was the cause, or at the very least “one of several factors” causing her lumbar spine condition. (App. Exh. 3, p. 2.)

Based on our review of the record, we find that the trial testimony of applicant and Marisol Valdez, in conjunction with the medical reports discussed above, constitutes substantial evidence that applicant sustained injury AOE/COE to her lumbar spine, including lumbar radiculopathy to her left leg.

Accordingly, we rescind the F&O and substitute a new Findings and Order, finding that on January 30, 2020, applicant sustained injury AOE/COE to her low back including lumbar radiculopathy to her left leg, and deferring all other issues regarding the January 30, 2020 injury; and we will return the matter to the WCJ for further proceedings as appropriate.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board, that the April 13, 2021 Findings and Order, is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Marylyn Baez, while employed on January 30, 2020, as a material handler at Woodland, California, by OA Logistic Services, Inc., insured by Republic Indemnity Company of California, sustained injury arising out of and occurring in the course of employment, to her low back including lumbar radiculopathy to her left leg; all other issues regarding the January 30, 2020 injury are deferred.

ORDER

It is hereby **ORDERED** that all remaining issues regarding applicant’s January 30, 2020 injury are deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings as appropriate.

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

November 23, 2021

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, INC.**

TLH/pc

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