

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

JEFFREY WALL, *Applicant*

vs.

COUNTY OF SACRAMENTO, permissibly self-insured/self-administered, *Defendant,*

**Adjudication Number: ADJ10046347
Sacramento 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. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings of Fact (Findings), issued by the workers' compensation administrative law judge (WCJ) on November 13, 2020, wherein the WCJ found in pertinent part that applicant showed good cause to reopen the injury claim and applicant sustained new and further disability as a result of the April 11, 2015 injury.

Defendant contends that applicant was aware that he injured his right shoulder at the time that the parties submitted the Stipulations with Request for Award, so there is no good cause to reopen the injury claim.

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 Findings.

BACKGROUND

Applicant claimed injury to his right knee while employed by defendant as a deputy sheriff on April 11, 2015. The initial medical treatment notes stated:

During a foot pursuit of a felony suspect, the patient slipped in mud resulting in twisting his right knee and falling on the pavement. He landed on his right knee

and right shoulder. He was able to get walk with a limp.
(Joint Exh. 103, Anya Ren Myers D.O., April 15, 2015; see also Joint Exh. 107.)

In a subsequent Doctor's First Report of Occupational Injury, Dr. Michael Cohen diagnosed applicant as having a contusion of the right knee, a contusion of the right shoulder, and an abrasion of the right knee as a result of the April 11, 2015 slip and fall injury. (Joint Exh. 104, Dr. Cohen, April 20, 2015, p. 4.)

Applicant was evaluated by qualified medical examiner (QME) Patrick J. McGahan, M.D., regarding the April 11, 2015 injury. Dr. McGahan concluded that the right knee injury caused no permanent disability. (Joint Exh. 101, Dr. McGahan, December 12, 2015.) The injury claim was settled by Stipulations with Request for Award (Stipulations); the Award approving the Stipulations was issued on December 15, 2016. Applicant filed a Petition to Reopen and also filed an amended Application for Adjudication of Claim, claiming injury to his right shoulder on December 18, 2016.

On January 7, 2020, orthopedic agreed medical examiner (AME) Stephen P. Abelow, M.D., evaluated applicant. (Joint Exh. 102, Dr. Abelow, January 8 and 9, 2020.) Dr. Abelow examined applicant, took a history, and did an "[e]xtensive medical review" for treatment applicant received during the period from 2007 through 2019. (Joint Exh. 102, p. 2; pp. 32 - 48.) The diagnoses included:

Right shoulder impingement syndrome with infraspinatus tendinitis and interstitial tear, rim tear of supraspinatus, labral tear, and mild AC joint osteoarthritis.
(Joint Exh. 102, p. 20.)

Dr. Abelow later stated that:

Treatment for the right shoulder and right elbow is due to the industrial injury of 4/11/15... ¶ It is my opinion, with reasonable medical probability, that 100% of the permanent disability to the right shoulder is due to the industrial injury of 4/11/15. It is my opinion, with reasonable medical probability, that 0% is due to nonindustrial causes. (Joint Exh. 102, p. 26.)

The parties proceeded to trial on September 25, 2020. Applicant submitted an offer of proof stating: "Applicant would testify that at the time of the stipulations entered into in December 2016, he had no problems to his right shoulder." (Minutes of Hearing and Summary of Evidence

(MOH/SOE), September 25, 2020, p. 3.) The parties' Joint Exhibits were admitted into evidence and the issue submitted for decision was applicant's Petition to Reopen. (MOH/SOE, pp. 2 – 3.)

DISCUSSION

Pursuant to Labor Code section 5401:

(a) Within one working day of receiving notice or knowledge of injury under Section 5400 or 5402, which injury results in lost time beyond the employee's work shift at the time of injury or which results in medical treatment beyond first aid, the employer shall provide, ... a claim form and a notice of potential eligibility for benefits under this division to the injured employee,... As used in this subdivision, "first aid" means any one-time treatment, and any followup visit for the purpose of observation of minor scratches, cuts, burns, splinters, or other minor industrial injury, which do not ordinarily require medical care. This one-time treatment, and followup visit for the purpose of observation, is considered first aid even though provided by a physician or registered professional personnel.
(Lab. Code, § 5401.)¹

Section 3208.1 defines injury as follows:

An injury may be either: (a) "specific," occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) "cumulative"...
(Lab. Code, § 3208.1.)

It appears there is no dispute that on February 11, 2015, while chasing a suspect, applicant slipped and fell, landing on his right knee and shoulder. There is also no dispute that in addition to his right knee injury, applicant sustained an abrasion and/or contusion to his right shoulder.² Our review of the medical record indicates that at no time prior to the December 15, 2016 Stipulations did applicant receive medical treatment for his right shoulder. Nor is there any evidence that applicant had any right shoulder disability before the parties settled the right knee injury claim. Based on the code sections cited above, there is no evidence that applicant sustained a compensable "injury" to his right shoulder. In turn, applicant did not have "knowledge" of a right shoulder injury

¹ All further statutory references are to the Labor Code unless otherwise noted.

² An "abrasion" is a superficial injury of the skin resulting in a break in the continuity of tissue, in lay terms "a scratch." A "contusion" is an injury to tissues with skin discoloration and without breakage of skin, also known as a bruise. (See Merriam-Webster Medical Dictionary)

when entering into the December 15, 2016 Stipulations. Defendant's arguments to the contrary are inconsistent with the facts as discussed herein.

Section 5410 provides that:

Nothing in this chapter shall bar the right of any injured worker to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability.

(Lab. Code, § 5410.)

It has long been the law that section 5410, in conjunction with section 5803 defines the Appeals Board's continuing jurisdiction and authority, "to award compensation for a new disability resulting from the original injury or for an increase of the disability for which compensation has been awarded or paid voluntarily." (*Broadway-Locust Co. v. Industrial Accident Comm.*, (1949) 92 Cal. App. 2d 287, 290 [14 Cal.Comp.Cases 111]; see also *Nickelsberg v. Workers' Comp. Appeals Bd.*, (1991) 54 Cal. 3d 288, 297 [56 Cal.Comp.Cases 476].) Defendant makes various arguments to support its assertion that there was no good cause to reopen applicant's injury claim. However, the arguments are inconsistent with the cases cited and with the facts of this case. For example, defendant argues that, "In *Benavides* and *LeBoeuf*, applicant's injuries were not completely evaluated at the time Awards were issued. This is not the case in the instant matter." (Petition, p. 5.)³ Defendant's statement is incorrect. Dr. Abelow's review of medical records includes references to treatment reports pertaining to applicant's right shoulder. (See Joint Exh. 102, pp. 36, 38, and 39.) The first report of treatment for applicant's right shoulder was by Dr. Michael Cohen, dated February 13, 2018. (Joint Exh. 102, p. 36.) Clearly, applicant's right shoulder injury had not been "completely evaluated" at the time Award was issued. Defendant also cites *Nicky Blair's Restaurant v. Workers' Comp. Appeals Bd.*, (1980) 109 Cal. App. 3d 941, 45 Cal.Comp.Cases 876] (*Nicky Blair's*) as support for its argument that there was no good cause to reopen applicant's claim. In its decision the Second District Appellate Court stated:

The principle of reopening for "good cause" does not permit an attempt to simply relitigate the original award. A petition to reopen may not be used to litigate issues which should have been raised by a timely petition for reconsideration. "Good cause" to reopen does not consist of medical evidence obtained subsequent to the original decision which merely disagrees with the medical

³ *Benavides v. Workers' Comp. Appeals Bd.*, (2014) 227 Cal. App. 4th 1496 [76 Cal.Comp.Cases 483]; *LeBoeuf v. Workers' Comp. Appeals Bd.*, (1983) 34 Cal. 3d 234 [48 Cal.Comp.Cases 587]

opinion relied upon by the Board at the time of the original decision. ...¶ ... Through many court decisions it has become well settled that, in order to constitute 'good cause' for reopening, new evidence (a) must present some good ground, not previously known to the Appeals Board, which renders the original award inequitable, (b) must be more than merely cumulative or a restatement of the original evidence or contentions, and (c) must be accompanied by a showing that such evidence could not with reasonable diligence have been discovered and produced at the original hearing (*Ibid.* at 956, citations omitted.)

As noted above, the Award approving the Stipulations was issued on December 15, 2016; the first treatment report indicating that applicant sustained an injury to his right shoulder was dated February 13, 2018. Defendant provides no explanation as to how the February 13, 2018 report and the various treatment notes thereafter, could have been discovered and produced prior to the December 15, 2016 award. Nor does defendant refer to any evidence indicating that the February 13, 2018 report, and the subsequent right shoulder treatment reports, were merely cumulative or a restatement of the original evidence. Again, defendant's reliance on the *Nicky Blair's* decision is inconsistent with the evidence submitted in this matter.

AME Dr. Abelow clearly stated his opinion that the medical treatment for applicant's right shoulder, and the right shoulder disability, were the result of the February 11, 2015 industrial injury. (Joint Exh. 102, p. 26.) Dr. Abelow was presumably chosen by the parties to examine applicant in the capacity of an AME because of his expertise and neutrality. Therefore, his opinions should be followed unless there is a good reason to find the opinions unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114, 117].) We see no reason to find Dr. Abelow's opinions unpersuasive. His report constitutes substantial evidence regarding the cause of applicant's right shoulder disability.

Finally, we note defendant argues that the Finding "released" applicant from the previous Stipulations. (Petition, p. 4.) Defendant's argument is again inconsistent with the facts of this matter. By the Stipulations the parties agreed that applicant sustained injury AOE/COE to his right knee. The Stipulations do not include any reference to a right shoulder injury claim. Applicant is not disputing those Stipulations. Applicant filed a timely Petition to Reopen his injury claim and amended the claim to include injury his right shoulder. Neither applicant nor defendant are being "released" from the Stipulations.

Accordingly, we affirm the Findings.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 13, 2020 Findings of Fact is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 16, 2022

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

**JEFFREY WALL
MASTAGNI HOLSTEDT
CUNEO, BLACK, WARD & MISSLER**

TLH/pc

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