WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VICKERS PHU DONG, *Applicant*

vs.

TAWA SUPERMARKET INC. and LIBERTY MUTUAL INSURANCE COMPANY/SAFETY NATIONAL CASUALTY CORPORATION, administered by MATRIX ABSENCE MANAGEMENT, INC., *Defendants*

Adjudication Numbers: ADJ10767199, ADJ10817399
Pomona District Office

OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION

Optimal Health Institute (Lien Claimant) seeks reconsideration of the Joint Findings and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on February 1, 2022, wherein the WCJ found in pertinent part that Lien Claimant did not meet its burden of proof under Labor Code section 3202.5 in case number ADJ1076719 and in case number ADJ10817399; and the WCJ ordered that Lien Claimant take nothing for its liens in both cases.

Lien Claimant contends that the reports from Andrew Shen, M.D., are evidence that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) as claimed, that defendant failed and refused to provide medical care for applicant, and that applicant was entitled to receive medical treatment for his August 7, 2008 injury after his condition had become permanent and stationary.

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 deny reconsideration.

BACKGROUND

Vickers Phu Dong, applicant, claimed injury to his back and lower extremity while employed by Tawa Supermarket Inc. (Tawa) as a seafood manager on August 7, 2008

(ADJ10817399). Tawa's workers' compensation insurance carrier at that time was Liberty Mutual Insurance Company. Applicant also claimed injury to his head, neck, shoulders, upper extremity, back, lower extremity, knees, and body systems, while employed by Tawa as a seafood manager during the period from November 5, 2000, through December 13, 2016 (ADJ10767199). Tawa's insurance carrier at that time was Safety Casualty Insurance Company and the claim was denied on February 1, 2017. Applicant filed the Application for Adjudication of Claim in case number ADJ10767199 on February 23, 2017, his employment with Tawa had been terminated for cause on December 17, 2016. Applicant received medical treatment from various providers at Lien Claimant's Monterey Park facility starting on January 18, 2017. Both injury claims were settled by Compromise and Release (C&R); a WCJ issued the Joint Order Approving Compromise and Release on July 11, 2017. Lien Claimant filed its lien in both cases on December 19, 2018.

Lien Claimant and defendant proceeded to trial on September 26, 2019. (Minutes of Hearing and Summary of Evidence (MOH/SOE), September 26, 2019.) The October 28, 2019 Findings and Order was vacated and the parties conducted further discovery. At the November 9, 2020 trial the matter was continued. Lien Claimant and defendant again proceeded to trial on December 13, 2021. (MOH/SOE, December 13, 2021.) The issues submitted for decision in case number ADJ10767199 included injury AOE/COE, and Lien Claimant's lien; the issues submitted in case number ADJ10817399 included Lien Claimant's lien, defendant's MPN, and lack of authorization for medical treatment. (See MOH/SOE, November 9, 2020.)

DISCUSSION

It has long been the law that in order to constitute substantial evidence, a medical opinion must be based on pertinent facts and on an adequate examination and history, and it 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. (*Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp. Cases 604 (Appeals Board en banc).)

In his initial report, Dr. Shen stated:

> Patient was injured on 8/7/2008. On that day he was unloading fish from a pallet when he felt pain in his lower back, but he continued to work. The next day he

> felt the pain even more so notified his supervisor. He was sent to the doctor who took an x-ray. He was given medication for the pain and physical therapy. He continued to work following the doctors visit.
> (L.C. Exh. 4, Dr. Shen, January 18, 2017, p. 1.)

In his next report, Dr. Shen stated:

> The patient's condition is clearly consistent with over 25 years of cumulative trauma from working as the supervisor for Tawa super market. His job requires frequent bending, kneeling, pulling, over the shoulder stacking, chopping, and lifting up to 70 lbs., repetitively and frequently.
> (L.C. Exh. 4, Dr. Shen, February 27, 2017, p. 5.)

That paragraph was repeated in each of Dr. Shen's four subsequent reports. (See L.C. Exh. 4, March 27, 2017 – June 23, 2017.)

Having reviewed each of Dr. Shen's reports, it is clear that although he repeated his conclusion that applicant's condition was "consistent with over 25 years of cumulative trauma," in none of his reports did he explain his reasoning or analysis for reaching his conclusion. It is also important to note that in none of his reports did Dr. Shen indicate that he had reviewed applicant's medical record and it appears that he was not aware that applicant had not worked for Tawa since December 17, 2016. Dr. Shen's opinions are not based on pertinent facts, nor are they based on an adequate medical history, and none of the reports set forth the reasoning behind his opinions. Thus, his reports are not substantial evidence upon which a finding of cumulative injury, AOE/COE can be based. Absent stipulations regarding the alleged injury and the injured body parts, a lien claimant must prove that applicant sustained an injury AOE/COE. "A lien claimant ... has the burden of proving by a preponderance of the evidence that the claim is industrial...." (*Hand Rehabilitation Center v. Workers' Comp. Appeals Bd. (Obernier)* (1995) 34 Cal.App.4th 1204, 1212-1213 [60 Cal.Comp.Cases 289, 291-292]).

Further, pursuant to Labor Code section 4600:

> (a) Medical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatuses, including orthotic and prosthetic devices and services, that is reasonably required to cure or relieve the injured worker from the effects of the worker's injury shall be provided by the employer. …
> (Lab. Code, § 4600.)

Since Lien Claimant did not meet its burden of proof on the issue of injury AOE/COE as to the cumulative injury claim, there is no legal basis for claiming the treatment at issue was reasonably required to cure or relieve applicant from the effects of the alleged cumulative injury.

Regarding treatment for applicant's August 7, 2008 injury, applicant received treatment from Emmett A. Berg, D.O., for his lumbosacral sprain/sciatica injury and he was released with no need for further treatment on September 3, 2008. (Def. Exh. A, Dr. Berg, September 3, 2008.) In his report Dr. Berg stated that applicant had no "factors of permanent disability" and that applicant could "return to work with no limitations." (Def. Exh. A, p. 2.)

AD rule 9785(b)(3) states in part:

> If the employee disputes a medical determination made by the primary treating physician, including a determination that the employee should be released from care, the dispute shall be resolved under the applicable procedures set forth at Labor Code sections 4060, 4061 4062, 4600.5, 4616.3, or 4616.4. …
> (Cal. Code Regs., tit. 8, §9785(b)(3).)

Here, the record contains no evidence that at any time applicant objected to Dr. Berg's determination that he needed no more medical treatment and was released from care. In the C&R applicant stipulated that he was working his usual and customary duties up to the termination of his employment and the trial record does not include any evidence that he sought medical treatment until he was seen by Dr. Shen on January 18, 2017. Absent a timely objection to Dr. Berg's determination that applicant needed no further medical treatment, and absent any evidence that applicant complied with the Labor Code sections referred to in AD rule 9785(b)(3), quoted above, applicant is not entitled to medical treatment for the August 7, 2008 injury. We also note that since applicant did not seek treatment for approximately eight years after his last treatment by Dr. Berg, there is no evidence that the treatment provided by Lien Claimant was actually for symptoms that were a result of the 2008 injury.

Accordingly, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that Lien Claimant's Petition for Reconsideration of the February 1, 2022 Joint Findings and Orders is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 18, 2022

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

LAW OFFICES OF JIE CI DING
MEDICAL COST REVIEW
OPTIMAL HEALTH INSTITUTE

TLH/*pc*

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