WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

HAROLD REGIL, *Applicant*

vs.

AVDC, INC./BIG LOTS;
STARR INDEMNITY, administered by SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ17121403
San Bernardino District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order (F&O) of July 31, 2023, wherein the workers' compensation administrative law judge (WCJ) found that applicant did not sustain injury arising out of employment and during the course of employment (AOE/COE) and ordered that applicant take nothing. Applicant contends that the WCJ erred in not finding AOE/COE; that the trial proceeded over applicant's objection and request for a continuance to allow receipt of crucial medical evidence; and that applicant was not permitted to present essential witness testimony.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Reconsideration, rescind the WCJ's F&O, and return this matter to the WCJ for further proceedings.

FACTS

Applicant claimed industrial injury to his neck, wrist, hand, back, and multiple other parts while employed by defendant as a shipping clerk from the period of December 21, 2021, to December 21, 2022. Defendant denied the claim on January 10, 2023, and listed a lack of medical evidence as one reason for the denial. (Ex. X, Denial letter dated 1/10/23, p. 1.)

On April 4, 2023, defendant filed a Declaration of Readiness to Proceed (DOR) to a Mandatory Settlement Conference (MSC), concerning AOE/COE issues only, and again noted the lack of medical evidence. On May 11, 2023, applicant's attorney filed an Objection to Defendant's Declaration of Readiness to Proceed. One of the reasons for applicant's objection was that he was entitled to a comprehensive medical-legal evaluation with a qualified medical examiner in order to settle the current dispute with regards to compensability.

At the MSC on May 18, 2023, applicant objected to the setting of the hearing because he had not spoken to the applicant recently. The WCJ noted that applicant did not have any medicals in the file. The WCJ set the matter for trial over applicant's objection. The parties listed AOE/COE as the only issue in the Pre-Trial Conference Statement (PTCS); no medical evidence was listed as an exhibit for trial.

At the trial on June 8, 2023, applicant testified that he was hired as a shipping clerk by defendant on February 20, 2020, and that his job consisted of lifting and stacking boxes. (Minutes of Hearing/Statement of Evidence (MOH/SOE), p. 3.) He started feeling pain in February or March of 2021, and sought help at the Health R Us Clinic five or six times in 2021. (MOH/SOE, p. 3.) He did not report the injury to his employer. (MOH/SOE, p. 3.) His last day of work was December 22, 2022, and he did not visit Health R Us after that date. (MOH/SOE, p. 4.) He had been suspended and then fired by his employer. (MOH/SOE, p. 4.)

Defendant's witness, Nancy Quintero, testified that she was involved in investigating and eventually terminating applicant. (MOH/SOE, pp. 8-9.) Ms. Quintero described applicant's job duties as involving working from a conveyor removing merchandise that weighed up to 75 pounds and stacking the merchandise on pallets. (MOH/SOE, pp. 9-10.) At the conclusion of the trial, the WCJ found that applicant did not sustain injury AOE/COE and ordered that he take nothing. (F&O, pp. 1-2.) As part of the analysis, the WCJ found that applicant was not credible. (Opinion on Decision (OOD), pp. 2-3.)

DISCUSSION

The employee bears the burden of proving the injury arose out of and in the course of employment by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a), 3202.5.)[1] Whether an employee's injury arose out of and in the course of employment is generally a question of fact to be determined in light of the particular circumstances of the case. (*Wright v. Beverly Fabrics* (2002) 95 Cal.App.4th 346, 353 [67 Cal.Comp.Cases 51].) The phrase "in the course of employment" "'ordinarily refers to the time, place, and circumstances under which the injury occurs.'" (*Latourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 651 [63 Cal.Comp.Cases 253], citing *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 733.) An "employee is in the 'course of his employment' when he does those reasonable things which his contract with his employment expressly or impliedly permits him to do." (*Latourette, supra*, at p. 651.) For the injury to arise out of employment, it must "'occur by reason of a condition or incident of [the] employment.' [citation] That is, the employment and the injury must be linked in some causal fashion. [citation]" (*Id.* at p. 651.)

Further, an injury may be either "specific," occurring as the result of one incident or exposure which causes disability or need for medical treatment; or "cumulative," occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. (Lab Code § 3208.1.) The "date of injury" in specific injury cases is "that date during the employment on which occurred the alleged incident or exposure, for the consequences of which compensation is claimed." (Lab. Code, § 5411.) The "date of injury" in "cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (Lab. Code, § 5412.) Section 5412 requires both disability and knowledge that the disability was caused by the employment.

A WCJ's decision must be supported by substantial evidence in light of the entire record. (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

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

Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Medical evidence is required if there is an issue regarding the compensability of the claim. (Lab. Code, §§ 4060(c)(d), 4061(i), 4062.3(l).) A medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Bd. en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Medical evidence that industrial causation was reasonably probable, although not certain, constitutes substantial evidence for a finding of injury AOE/COE. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 417 [33 Cal.Comp.Cases 660].) "That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Worker's Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].)

Here, applicant claimed a cumulative injury but the WCJ found that he did not meet his burden of proof to support industrial causation and ordered that he take nothing. (F&O, pp. 1-2.) In coming to this conclusion, the WCJ found that testimony by the applicant not credible. (OOD, pp. 2-3.) Applicant objected to the DOR because he was entitled to a comprehensive medical-legal evaluation with a qualified medical examiner in order to settle the current dispute with regards to compensability. More significantly, there was no medical evidence presented at the trial, and with respect to the issue of whether applicant sustained a cumulative injury, medical evidence regarding causation is key.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on a threshold issue. (Lab. Code, §§ 5701, 5906; *Nunes (Grace) v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 752; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; *McDonald v. Workers' Comp. Appeals Bd., TLG Med. Prods.* (2005) 70 Cal.Comp.Cases 797, 802.) The Appeals Board has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403.)

Sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141-143 (Appeals Bd. en banc).) The Appeals Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd*., *supra*, 79 Cal.App.4th at p. 404.) Therefore, upon return to the WCJ, we recommend that the medical record be developed.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the July 31, 2023 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the July 31, 2023 Findings and Order is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 24, 2023

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

HAROLD REGIL
MVP TRIAL LAWYERS
PRINDLE, GOETZ, BARNES & REINHOLTZ LLP

JMR/*ara*

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