WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TAMYIA WOODS, *Applicant*

vs.

ALAMEDA-CONTRA COSTA TRANSIT DISTRICT, permissibly self-insured, administered by YORK RISK SERVICES GROUP, INC./ SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ11310005
Oakland 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.[1]

Applicant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on August 27, 2020, wherein the WCJ found in pertinent part that based on the reports of pain medicine qualified medical examiner (QME) James B. Shaw, M.D., applicant did not sustain injury arising out of and in the course of employment (AOE/COE), to her head, back, neck, and shoulder; and the WCJ ordered that applicant take nothing by way of her injury claim.

Applicant contends that the reports from QME Dr. Shaw do not constitute substantial medical evidence.

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 return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

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[1] As noted, we granted the Petition to allow further study of the factual and legal issues. Commissioner Sweeney, who was previously a panelist in this matter, no longer serves on the Appeals Board and another panel member has been assigned in her place.

BACKGROUND

Applicant claimed injury to her head, neck, shoulders, and lumbar spine, while employed by defendant as a bus driver during the period from January 11, 2017, through January 11, 2018.

Neurology QME Wayne E. Anderson, M.D., evaluated applicant on June 6, 2019. (Joint Exh. 102, Wayne E. Anderson, M.D., June 24, 2019.) Dr. Anderson examined applicant (including having applicant complete various pain scale questionnaires), took a history, and reviewed the medical record. In addressing the nature and the cause of applicant's headaches, Dr. Anderson explained:

> Now, if one goes back to the medical record and notes that it is the trapezius region that is involved, it is not unexpected than that there could be the experience of the headache on the basis of irritation or soreness within the trapezius muscle.[2] As such, the headaches now can be better classified.
> (Joint Exh. 102, Dr. Anderson, June 24, 2019, p. 36.)
> Ultimately, then, she has the two types of headaches, the migraine headache which is not related to the subject matter. ¶ The second headache is a sort of tension type headache that reasonably is associated with the irritation in the trapezius muscle.
> (Joint Exh. 102, p. 37.)
> Impressions: Migraine disorder, Trapezius strain, Tension-type headache associated with trapezius strain.
> (Joint Exh. 102, p. 38.)
> [T]he migraine headache disorder is not industrial. However, a tension-type headache disorder reasonably is on the basis of the trapezius muscle. If the pain medicine evaluator finds that the trapezius muscle is industrial in nature, then there would be industrial causation for the headache disorder that occurs on that basis. If the pain medicine evaluator does not find industrial causation for the trapezius disorder, then there would not be industrial causation for this headache disorder.
> (Joint Exh. 102, pp. 40 - 41.)

Applicant had initially been evaluated by pain medicine QME Dr. Shaw on October 30, 2018, (that report is not in evidence), and she was re-evaluated by Dr. Shaw on September 9, 2019. (Joint Exh, 101 James B. Shaw, M.D., October 7, 2019, p. 3.) Based on his re-examination of applicant, the interim history, and his review of additional medical records, Dr. Shaw's discussion of applicant's injury claim included the following:

[2] The trapezius region is a pair of large triangular muscles extending over the back of the neck and shoulders. (Merriam-Webster Medical Dictionary.)

> In the middle of treatment and during an interval of modified duty on 3/22/18, Sheila Jiang, M.D., Occupational Medicine, Physical Medicine Consultation. Further diagnoses: 1. Neck muscle strain. 2. Left trapezius strain. 3. Right trapezius strain. On 6/10/18, the patient underwent MRI of the cervical spine for persistent right shoulder and neck pain greater than 3 months. The imaging showed mild degenerative changes. ¶ … There was a report 5 days before the DOT [Department of Transportation] exam dated 8/14/18 from Llaya Sabsovich[,MD] diagnosing neck strain and right shoulder strain again appearing to use terminology incorrectly since there has been no specific injury. (Joint Exh. 101, October 7, 2019, p. 28.)
>
> Subsequent to returning to work there appears to be potentially important treatment records, and whether there are potentially relapsing/remitting symptoms – perhaps complaints consistent CT, and, or any primary pathology in this case. ¶ I will require the records of the treating physicians to accurately understand her alleged work injuries versus whether she is simply being treated for prior injuries.
> (Joint Exh. 101, October 7, 2019, p. 29.)
>
> Possible subsequent industrial CT etc. is beyond the scope of this QME. It should be acknowledged that the individual cannot have it both ways. Perhaps reporting MSK [musculoskeletal] to some doctors, not others etc./DOT assessments etc., or alternatively, I cannot reconcile absence of symptoms in contemporaneous reporting. It must be remembered that the presence of persistent symptoms with history of exposure does not necessarily equate to pathophysiologic effects resulting from that exposure.
> (Joint Exh. 101, October 7, 2019, p. 30.)
>
> As referenced in the addendum distinction between tension Headaches and Migraines is important and can be made by a Neurologist given her alleged industrial link.
> (Joint Exh. 101, October 7, 2019, p. 30.)

The report contains a "Summary of Qualified Medical Evaluation" which states that applicant sustained injury AOE/COE to her cervical spine, right shoulder, and left shoulder; that applicant did not sustain injury AOE/COE to her lumbar spine, and that the issue of injury to applicant's head was, "Beyond the course and scope of this Pain Medicine Qualified Medical Evaluation" so that issue was deferred to a "Neurology QME." (See Joint Exh. 101, October 7, 2019, p. 2)

Dr. Shaw was subsequently provided the June 24, 2019 report from neurology QME Dr. Anderson, and based on his review of that report, Dr. Shaw stated:

> I recommend the claim be settled based on the 3% impairment rating set forth by Dr. Anderson. Otherwise, review of his report causes no change in my opinion. Dr. Anderson has opined that the migraine headache disorder is

> nonindustrial, but that the tension headache is involved with the trapezius. However, there is no additional impairment rating for the trapezius in this case. (Joint Exh. 101, Dr. Shaw, December 26, 2019, p. 4.)

The parties proceeded to trial on July 1, 2020. The issues submitted for decision included injury AOE/COE, parts of body injured, and permanent disability/apportionment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), July 1, 2020, p. 2.)

DISCUSSION

It has long been established that a medical opinion does not constitute substantial evidence if it is based on inadequate medical histories or examinations, or on surmise, speculation, conjecture, or guess. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525]; *Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93].) Also, a physician's opinion that is predicated upon an incorrect legal theory is not substantial evidence. (*Zemke v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358, 363].)

Labor Code 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," 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. The date of a cumulative injury shall be the date determined under Section 5412.
> (Lab. Code § 3208.1)

As quoted above, in his October 7, 2019 report, Dr. Shaw stated, "I will require the records of the treating physicians to accurately understand her alleged work injuries versus whether she is simply being treated for prior injuries." (Joint Exh. 101, October 7, 2019, p. 29.) In his December 26, 2019 supplemental report, Dr. Shaw makes no reference to any "records of the treating physicians" nor is there any evidence that he was provided such reports for his review. Dr. Shaw clearly stated that he needed to review the treating physicians' medical records in order to "accurate understand" applicant's work injury claim. Therefore, absent his review of those records, his opinions are based on an inadequate medical history, and in turn are not substantial evidence. (*Place v. Workmen's Comp. Appeals Bd, supra*; *Hegglin v. Workmen'sComp. Appeals Bd, supra.*)

Also, in his December 26, 2019 supplemental report, Dr. Shaw states that, "Dr. Anderson has opined that the migraine headache disorder is nonindustrial, but that the tension headache is involved with the trapezius. However, there is no additional impairment rating for the trapezius in this case." (Joint Exh. 101, December 26, 2019, p. 4.) The doctor's opinion that there is no additional impairment rating for the trapezius in this case does not mean that applicant did not sustain an injury to her trapezius. (Lab. Code § 3208.1.)

Further, the "Summary" of Dr. Shaw's re-evaluation of applicant states that applicant sustained injury AOE/COE to her cervical spine, right shoulder, and left shoulder. (Joint Exh. 101, October 7, 2019, p. 2.) At no point in the October 7, 2019 report, nor the December 26, 2019 supplemental report, does the doctor provide any reasoning or explanation of what appear to be inconsistent and/or opposite opinions as to whether applicant sustained injury AOE/COE to her cervical spine, right shoulder, and left shoulder, i.e., her trapezius region (see footnote 2 above).

Finally, it appears that Dr. Shaw disregards the opinions of applicant's treating physicians because, "[t]he occupational medicine physicians appear to be using the terms sprain/strain incorrectly implying a specific injury as well as a mechanism of injury in this case." He later stated that there was a Department of Transportation "…exam dated 8/14/18 from Ilaya Sabsovich diagnosing neck strain and right shoulder strain again appearing to use terminology incorrectly since there has been no specific injury." (Joint Exh. 101, October 7, 2019, pp. 27 – 28.) However, our research indicates that a "strain" is an injury to muscles or tendons resulting from overuse or trauma; and a "sprain" is an injury to the ligaments and capsule at a joint in the body. (Merriam-Webster Medical Dictionary.) Again, Dr. Shaw provides no reasoning or explanation regarding his opinions as to the treating physicians' incorrect use of the terms sprain and/or strain.

For the reasons discussed herein, the reports from Dr. Shaw are not substantial evidence regarding the issue of injury AOE/COE and cannot be the basis for making a finding as to that issue. The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue. (Lab. Code §§ 5701, 5906; *Kuykendall v. Workers' Comp. Appeals Bd.,* (2000) 79 Cal.App.4th 396 [65 Cal.Comp.Cases 264]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924].) Although, when the medical record requires further development, the record should normally be supplemented by physicians who have already reported in the case (see *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), under the circumstances of this matter, it appears to be in the parties' interest, and we strongly

recommend, that they have applicant evaluated by an agreed medical examiner or in the alternative, that they request the WCJ appoint a regular physician. (Lab. Code § 5701.)

Accordingly, we rescind the F&O and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 27, 2020 Findings and Order is **RESCINDED,** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 20, 2023

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

TAMYIA WOODS
MANGOSING LAW
MICHAEL SULLIVAN & ASSOCIATES, LLP

TLH/mc

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