WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VERONICA ALVAREZ MARTINEZ, *Applicant*

vs.

MARIAN REGIONAL MEDICAL CENTER (DIGNITY HEALTH), permissibly self-insured, *Defendants*

Adjudication Number: ADJ12240147 ADJ13962113
Santa Barbara District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendants seeks reconsideration of the April 4, 2023 Joint Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found in Case No. ADJ12240147 that applicant, while employed as a cook on April 12, 2018, sustained industrial injury to the cervical spine, right shoulder and left shoulder. The WCJ determined that the apportionment analysis of the Agreed Medical Evaluator (AME) was not substantial evidence, and entered an award of permanent disability without apportionment, accordingly. The WCJ further appears to have determined[1] in Case No. ADJ13962113 that applicant, while employed as a cook from July 23, 2008 to July 23, 2018, did not meet the burden of proof to establish injury arising out of and in the course of employment (AOE/COE) to the bilateral shoulders.

Defendant contends that the WCJ erred in finding injury to the left shoulder, when the AME had determined the left shoulder to be nonindustrial, and that with respect to the specific injury, the AME's apportionment analysis constituted substantial evidence.

[1] Findings of Fact No. 1 in Case No. ADJ143962113 appears to inadvertently refer to the specific date of injury in Case No. ADJ12240147, rather than the claimed cumulative injury of July 23, 2008 to July 23, 2018.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations in the Petition, 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.

FACTS

In the cases before us, applicant claims both a specific and a cumulative injury. In ADJ12240147, applicant, while employed by defendant as a cook on April 12, 2018, claimed injury to the right shoulder, cervical spine, and left shoulder. Defendant admits injury to the right shoulder and cervical spine, but denies injury to the left shoulder.

In ADJ13962113, applicant, while employed by defendant as a cook from July 23, 2008 to July 23, 2018, claimed injury to the bilateral shoulders. Defendant denies liability, asserting the injury did not arise out of and in the course of employment.

The parties have selected Steven N. Brourman, M.D., to act as the AME in orthopedic medicine. Dr. Brourman's initial report observed that applicant started working for defendant as a cook in approximately October, 2006. Dr. Brourman diagnosed applicant as status-post right shoulder arthroscopy with subacromial decompression, distal clavicle resection and rotator cuff repair on July 26, 2018, and further identified a cervical spine strain, rule out cervical radiculopathy, and left shoulder impingement syndrome. Dr. Brourman deferred final determinations pending the receipt diagnostic testing. (*Id.* at pp. 15-16.)

In a follow-up report of June 24, 2020, Dr. Brourman reviewed the results of the diagnostic testing and additional medical records, and concluded that applicant had sustained an industrial specific injury to the neck and right shoulder, but had not sustained industrial injury to the left shoulder. (Ex. 2, Report of Steven N. Brourman, M.D., June 24, 2020, at p. 16.) With respect to the alleged left shoulder injury, Dr. Brourman opined:

> The first onset of left shoulder complaints in the medical records appears to be on March 12, 2019, this was almost one year after the industrial injury. Following the industrial injury she stopped working in June 2018, therefore she was not putting any increased physical demands on the left shoulder during her

> routine activities of daily living. There is insufficient medical evidence to indicate that the left shoulder was injured as a result of industrial exposure.
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> (Ex. 2, Report of Steven N. Brourman, M.D., June 24, 2020, at p. 16.)

Dr. Brourman identified the whole person impairment arising out of the cervical spine and right shoulder, and further opined to 15% nonindustrial apportionment based on "degenerative underlying processes of the neck and right shoulder." (*Id.* at p. 21.)

On September 3, 2020, applicant underwent a left shoulder subacromial decompression surgery, which defendant had authorized through "clerical inadvertence." (Petition for Reconsideration (Petition), at p. 2:5.)

On April 7, 2021, Dr. Brourman issued a supplemental report, reaffirming his opinion that applicant's left shoulder was nonindustrial, and further determining that applicant had not sustained any cumulative injury with defendant.

On August 8, 2022, the parties deposed Dr. Brourman, who testified in relevant part:

> I last examined [applicant] February 2021, which was five months from her left shoulder surgery in September of 2020. At that time her condition was about close to the same as it had been when I declared her permanent and stationary when I originally saw her the year before in 2020. The problem is that I don't know how she's doing now. She could be better or she could be worse. The measurements of the shoulder, I compared the range of motions between February 2021, when I first saw her in April 2020, and the measurements were so close that they're within, you know, about the same, no significant difference, a few degrees more in one range of motion finding and a few degrees less in another. Subjectively, her pain was constant on the first evaluation, intermittent on the second evaluation, but the intensity wasn't really defined clearly on those two dates. The only other point to be made is that five months post-operatively, there could also still be further improvement. So I would think by this time, I could -- if I were to re-evaluate her, I could clearly determine whether there's an improvement or worsening compared to what was noted before the surgery.
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> (Ex. 7, Transcript of the Deposition of Steven N. Brourman, M.D., at p. 6:11.)

On January 24, 2023, the parties proceeded to trial, and submitted the matter for decision on the documentary record only.

On April 4, 2023, the WCJ issued the F&A, determining in relevant part that applicant sustained injury to her cervical spine, right shoulder and left shoulder. (F&A (ADJ12240147), Finding of Fact No. 1.) The F&A awarded permanent disability without apportionment. Relying

on the opinions of AME Dr. Brourman, the WCJ further determined that applicant had not sustained the burden of proving injury AOE/COE as a result of the claimed cumulative injury. (F&A (ADJ13962113), Finding of Fact No. 1.) With respect to the disputed body part of the left shoulder, the WCJ explained that, "while Dr. Brourman ultimately concluded the left shoulder was not injured on an industrial basis, due to the fact that the carrier authorized and provided left shoulder surgery on September 3, 2020, which resulted in permanent disability results in the left shoulder to be found to have been injured on an industrial basis." (F&A, Opinion on Decision, p. 1.)

Defendant's Petition avers that because the AME identified the whole person impairment arising out of applicant's left shoulder injury, the WCJ interpreted this as the AME's endorsement of industrial causation. (Petition, at 2:23.) The Petition further avers that the apportionment described by the AME constitutes substantial evidence. (*Id.* at 3:23.)

Applicant's Answer avers that because the carrier authorized and provided the left shoulder surgery on an industrial basis, any permanent disability resulting from the surgery is also industrial. (Answer, at 2:12.)

DISCUSSION

Defendant admits injury to the cervical spine and right shoulder, but challenges the WCJ's determination that applicant sustained injury to the left shoulder as a result of a mistakenly authorized surgery. (Petition, at 2:23.) Defendant's Petition states that WCJ "appears to find that because impairment was provided by Dr. Brourman for the left shoulder pursuant to the AMA guidelines, the left shoulder is determined to be industrial." (Petition, at 2:23.) However, the WCJ's Report makes clear that the determination of industrial causation with respect to the left shoulder was based on defendant's authorization and provision of the left shoulder surgery. The Report observes, "once defendant authorized surgery and applicant underwent surgery to the left shoulder, the left shoulder became an industrially related part of body entitled to benefits." (Report, at p. 3.)

We first address the issue of whether applicant's left shoulder injury arose out of and occurred in the course of employment. Labor Code section 3600(a) provides that "[l]iability for the compensation provided by this division … shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment …." (Lab. Code, § 3600(a).) "Generally, the phrase 'in the course of employment'

refers to the time and place of the injury … [h]owever, the phrase 'arising out of the employment' refers to the origin or cause of the injury. (*Argonaut Ins. Co. v. Workmen's Comp. Appeals Bd. (Helm)* (1967) 247 Cal.App. 2d 669, 676-677 [32 Cal.Comp.Cases 14, 19].) A leading California workers' compensation treatise observes:

> Causation, in the sense of arising out of the employment, is now interpreted in the broadest possible manner as including the risks to which an employee is exposed because the employment requires the employee's presence at what turns out to be a place of danger, without regard to the source of harm. This means that all injuries from risks reasonably encompassed within the compensation bargain are viewed as causally related to the employment. Focusing on the risks within the scope of the employment bargain rather than on risks the employer could reasonably anticipate or hazards created by the workplace preserves the premise of the workers' compensation system, which strikes a balance between quick and certain, though limited, compensation payments to the employee without regard to the employer's fault and protection of the employer from liability at law. In this connection, an injury arising from the medical treatment received as a result of the original injury may itself be an industrial injury.
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> (Hanna, 1 CA Law of Employee Injuries & Workers' Comp § 4.02 (2023).)

Injury sustained as the result of authorized industrial medical treatment is itself industrial, because it arises out of the original workplace injury. As our Supreme Court has observed, "…it has become settled, as already indicated, that an employee is entitled to compensation for a new or aggravated injury which results from the medical or surgical treatment of an industrial injury, whether the doctor was furnished by the employer, his insurance carrier, or was selected by the employee. (*Fitzpatrick v. Fidelity & Casualty Co.* (1936) 7 Cal.2d 230, 233-234 [60 P.2d 276]; see also *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 737-738 [48 Cal.Comp.Cases 326]; *Ballard v. Workmen's Comp. Appeals Bd.* (1971) 3 Cal.3d 832, 837 [36 Cal.Comp.Cases 34].)

Accordingly, where authorized medical treatment results in additional injury and disability, the employer is liable for any compensable consequence arising therefrom.

The salient question then becomes whether applicant sustained injury as a result of the mistakenly authorized left shoulder surgery. Following our review of the evidence occasioned by defendant's Petition, we are persuaded that the question is not adequately addressed in the current evidentiary record.

AME Dr. Brourman has opined that applicant's injuries to the left shoulder are nonindustrial. (Ex. 4, Report of Steven N. Brourman, M.D., April 7, 2021, at p. 4.) Following the determination that the left shoulder surgery of September 3, 2020 was mistakenly authorized, the parties and Dr. Brourman appropriately turned their attention to whether applicant had sustained *injury or disability as a result of the surgery*. In his deposition testimony, however, Dr. Brourman made it clear that his analysis of the question was not yet complete. Dr. Brourman observed that "[t]he problem is that I don't know how she's doing now. She could be better or she could be worse . . . if I were to re-evaluate her, I could clearly determine whether there's an improvement or worsening compared to what was noted before the surgery." (Ex. 7, Transcript of the Deposition of Steven N. Brourman, M.D., at p. 6:17.) The evidentiary record does not include the contemplated reevaluation by Dr. Brourman.

Accordingly, the record must be developed to address the issue of whether applicant sustained injury as a result of the mistaken surgery. If it is determined that applicant has sustained injury as a result of the left shoulder surgery, the defendant will be liable for any resulting disability or need for medical treatment arising therefrom. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291 [80 Cal.Comp.Cases 489].)

In addition, we observe that medical reporting in evidence does not adequately address the issue of whether applicant sustained an industrial injury to the bilateral shoulders as a result of the claimed cumulative injury. In his initial report, Dr. Brourman described applicant's job duties during her ten year cumulative injury claim as follows:

> Her job responsibilities entailed initially washing dishes, pots and pans, scrubbing the floors and kitchen for about 4 years. She was then assigned to work as a cook, which required preparing lunch and dinner for about 110-115 patients. However, the hospital then got busier and she had to cook for about 160 patients. In addition, she served the food onto metal dishes, which she would heat up. Other co-workers would place the dishes onto the racks to take to patients. The physical requirements consisted of prolonged standing and walking; repetitive bending, stooping and squatting; repetitive twisting, turning and reaching above and below shoulder level and waist level; repetitive arm and hand movement, simple and forceful grasping, torqueing motions and fine finger manipulation. She lifted and carried up to 65-70 pounds. She worked 8 hours per day, 5 days per week.
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> (Ex. 1, Report of Steven N. Brourman, M.D., dated April 29, 2020, at p. 2.)

In a subsequent report of April 7, 2021, the AME addressed the issue of causation of the claimed cumulative injury as follows:

> According the January 27, 2021 cover letter, the applicant has also filed a cumulative trauma claim from July 23, 2008 to July 23, 2018 involving the shoulders. However, there is no evidence that she was having problems with her right shoulder prior to the specific injury on April 12, 2018, and there are no left shoulder complaints documented until approximately nine months after she last worked for the subject employer. Hence, there is simply no evidence that she sustained cumulative trauma injuries to her shoulders from April 12, 2008 to April 12, 2018.
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> (Ex. 4, Report of Steven N. Brourman, M.D., dated April 7, 2021, at p. 4.)

Here, it is unclear whether the AME has fully considered applicant's work history as described in his initial report of April 7, 2021. To be considered substantial evidence, a medical opinion "must be predicated on reasonable medical probability." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen's Comp Appeals Bd.* (1968) 69 Cal. 2d 408, 413, 416-17, 419 [71 Cal. Rptr. 697, 445 P.2d 313, 33 Cal.Comp.Cases 660).) An opinion is not substantial evidence if it is based on "inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-21 [2005 Cal. Wrk. Comp. LEXIS 71].)

In order for the medical-legal opinions expressed by the AME to constitute substantial medical evidence, they must be based on a complete medical history, and directly address facts that are germane to the issue causation, including whether applicant's work history and job duties were causative of her bilateral shoulder injuries. The lack of contemporaneous shoulder complaints is not, in and of itself, dispositive of the issue.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain

additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record…the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie, supra*, at p. 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Ibid*.)

Accordingly, we will return the matter to the trial level for development of the record. The WCJ may wish to consider instructing the parties to return to the AME for supplemental reporting to address (1) whether applicant's work activities during the claimed cumulative injury period may have contributed to the claimed injuries, and (2) whether applicant sustained injury and/or disability arising out of the mistakenly authorized left shoulder surgery. Since we are returning the matter for further development of the record, we did not consider and make no determination on the issue of apportionment.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 4, 2023 Joint Findings and Award 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/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 14, 2023

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

VERONICA ALVAREZ MARTINEZ
WOLFF WALKER LAW
LUNA LEVERING & HOLMES

SAR/abs

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