WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JAIME RODRIGUEZ, *Applicant*

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS-DEUEL VOCATIONAL INSTITUTIONS, legally uninsured, administered by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Numbers: ADJ7070471; ADJ10027311
Lodi District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the September 10, 2024 Findings and Order (F&O) wherein the workers' compensation administrative law judge (WCJ) found that applicant's claimed August 16, 2011 injury to the bilateral shoulders and lumbar spine (ADJ10027311) was a separate and distinct injury and not a compensable consequence of applicant's claimed cumulative injury to the bilateral knees, bilateral shoulders, and lumbar spine (ADJ7070471).

Applicant contends that the WCJ's decision is speculative, in contradiction to the evidence, and in contravention to Labor Code[1] section 3202.

We have received an Answer from defendant. 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 (Petition), the Answer, the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the September 10, 2024 F&O and substitute it with a new F&O ordering further development of the record pursuant to section 5701.

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

FACTS

Applicant claimed that, while employed by defendant as a plant engineer during the period from October 22, 2008 through October 22, 2009, he sustained a cumulative injury arising out of and in the course of employment to the bilateral knees, bilateral shoulders, and lumbar spine. (ADJ7070471)

On August 16, 2011 while applicant was at work, applicant's left knee allegedly locked and caused him to fall and injure his bilateral shoulders and lumbar spine. Applicant alleges the fall and resulting injury was due to preexisting left knee issues stemming from his cumulative injury. Defendant alleges the August 16, 2011 incident is a new and separate injury.

At the time of both, the cumulative injury and the August 16, 2011 incident, defendant was, and continues to be, legally uninsured.

The parties proceeded with discovery and retained Dr. Charles Potter as the Agreed Medical Evaluator (AME).

In his June 25, 2018 report, Dr. Potter opined that the cumulative work injury to the bilateral knees and back "continued" through the date of the 2018 report, as "evidenced by increasing impairment" and medicals which indicated "worsening." (Exhibit A, p. 40.) With respect to the bilateral shoulders, he found impairment and causation "attributed to the specific injury of August 6, 2011." (Ibid.)

In his February 28, 2023 report, Dr. Potter found industrial causation to the bilateral shoulders, left knee, and back due to the "left knee g[iving] out." (Exhibit 2, p.14.)

On June 11, 2024, the matter proceeded to trial and applicant testified regarding a prior 2009 incident involving the left knee at work:

> "[H]is left knee locked and he fell while walking in the boiler house. He fell to the ground, felt pain in the left knee and low back. He continued working and got treatment. He stayed on full duty."
>
> (Minutes of Hearing, Order, and Summary of Evidence, June 11, 2024, p. 6.)

Applicant also testified regarding the August 16, 2011 incident:

> "[H]e was in a five foot high crawl space under the kitchen." "[H]is left knee locked up, and he fell hitting his back and shoulder on some piping contained within the crawl space. He acknowledged a knee injury (left knee) in 2006 while in the Navy, and he surgery on that knee in 2007."
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> (*Id*.)

Applicant was also cross examined by defendant regarding the August 16, 2011 incident:

> "He stated there was uneven ground, it was dark, and he was standing on slippery plastic that was wet in some places. He indicated that his left knee locked up."

(*Id*.)

After trial, the WCJ found the August 16, 2011 incident to be a "separate and distinct injury from the cumulative trauma." (Findings of Fact, Award, Order, and Opinion on Decision, p. 2.) In his Opinion on Decision (OOD), the WCJ indicated that while applicant's "left knee may have locked, there were many other factors that led to his eventual fall and injury" including the conditions of the crawlspace, as testified by applicant. (*Id*. at p. 3.) The WCJ therefore found it "plausible" that the August 16, 2011 injury would have occurred irrespective of applicant's left knee condition. (*Id*.)

DISCUSSION

I.

Preliminarily, former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected under the Events tab in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on October 17, 2024, and 60 days from the date of transmission is December 16, 2024. This decision issued by or on December 16, 2024, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report, it was served on October 17, 2024, and the case was transmitted to the Appeals Board on October 17, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on October 17, 2024.

II.

Turning to the merits of the Petition, applicant alleges that the August 16, 2011 incident to the bilateral shoulders and lumbar spine is a compensable consequence injury sustained as a result of the cumulative work injury from October 22, 2008 through October 22, 2009 to the bilateral knees, bilateral shoulders, and lumbar spine. A cumulative injury occurs from repetitive mental or physical activities at work over a period of time, causing disability or need for medical treatment. (§ 3208.1; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323]; *J.T. Thorp, Inc. v. Workers' Comp. Appeals Bd.* (*Butler*) (1984) 153 Cal.App.3d 327, 332-333 [49 Cal.Comp.Cases 224].) For any cumulative trauma claim, findings regarding the injury and the date of the injury must be based on substantial evidence such as medical opinion and testimony considering the entire record. (*Garza v. Workmen's Comp. App. Bd.* (*Garza*) (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500]; *Austin*, *supra*, at pp. 233- 241; *City of Fresno v. Workers' Comp. Appeals Board* (*Johnson*) (1985) 163 Cal.App.3d 470-473 [50 Cal.Comp.Cases 53].

Pursuant to section 5410, if a case has already been settled, within five years from the date of the original injury, the applicant must either establish that "the original injury" "caused new and

further disability" to the original body part (e.g. *Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, 922–923, 926–927 [72 Cal.Comp.Cases 778] [industrial injury to right shoulder with additional claimed period of temporary disability related to worsening condition and need for further surgery on right shoulder]) or injury to a new body part alleged to be a compensable consequence of the original injury. (See *Southern California Rapid Transit Dist., Inc. v. Workers' Comp. Appeals Bd.* (*Weitzman*) (1979) 23 Cal.3d 158 [44 Cal.Comp.Cases 107] [employee injured in car accident on the way home from delivering required work release note for prior compensable injury]; *Liberty Mutual Ins. Co. v. Industrial Accident Com. (Walden)* (1964) 231 Cal.App.2d 501, 504, [29 Cal.Comp.Cases 293] [development of asthma found to be directly attributable to industrial injury to the back].) Irrespective of whether the Appeals Board's continuing jurisdiction is invoked because of new and further injury to an original body part or injury to a new body part as a compensable consequence of the original injury, the new and further disability must be a result or an effect of the prior compensable injury and there must be substantial medical evidence of its existence. (*Applied Materials v. Workers' Comp. Appeals Bd. (Chadburn)* (2021) 64 Cal.App.5th 1042,1080 [86 Cal.Comp.Cases 331]; *Sarabi*, *supra*, at p. 926; *Weitzman*, *supra*, 23 Cal.3d 158.)

Here, the WCJ and defendant contend that the August 16, 2011 incident was a separate and distinct injury based upon "the existing record" and applicant's trial testimony. (Answer, p. 2.; Opinion on Decision (OOD), p. 3.) As noted above, applicant testified he was in a five-foot tall crawlspace with wet plastic and uneven ground. (Minutes of Hearing, Order, and Summary of Evidence, June 11, 2024, p. 6.) The WCJ therefore found it "very plausible" that "the fall within that crawlspace would've occurred regardless of the status of [applicant's] knee." (OOD, p. 3.) We note, however, that the WCJ also acknowledged the reports of Agreed Medical Evaluator (AME), Dr. Charles Potter, were "incongruous at best" and "lack[ed] consistency." (OOD, p. 4.)

Further, in our review of the record, there are no medicals in the record aside from the reports of Dr. Potter, which we similarly find to be inconsistent. In his June 25, 2018 report, Dr. Potter opined that the cumulative work injury to the bilateral knees and back "continued" through the date of the report, as "evidenced by increasing impairment" and medicals which indicated "worsening." In the same report, Dr. Potter found impairment and causation for the bilateral shoulders "attributed to the specific injury of August 6, 2011." (Exhibit A, p. 40.) In a subsequent report dated February 28, 2023, however, Dr. Potter found causation to the bilateral shoulders, left knee, and back due to applicant's "left knee g[iving] out." (Exhibit 2, p.14.) Although he

referenced the August 6, 2011 incident, it was unclear whether he believed the left knee gave out because of the original cumulative injury or as a result of the August 6, 2011 incident as a separate and distinct injury. Based upon Dr. Potter's reports, a number of issues remain unclear, including the end date of the cumulative work injury, the body parts involved in both, the cumulative and alleged specific injury, and whether the August 6, 2011 injury is one that is separate and distinct from the cumulative injury.

As explained in *Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc), a decision "must be based on admitted evidence in the record" (*Id.* at p. 478) and must be supported by substantial evidence. (§§ 5903, 5952, subd. (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Aside from providing assurance that due process is being provided, this "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton*, *supra*, at 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) In the instant matter, it appears that opinions of Dr. Potter may require further clarity in order to be considered substantial medical evidence.

Further, it is well established that 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 9 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 *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc), we stated that "Sections 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. (*Id*.)

Accordingly, we will grant the Petition, rescind the September 10, 2024 F&O, and substitute a new F&O ordering development of the record pursuant to section 5701. Given that any new and/or updated opinions by Dr. Potter may affect issues such as permanent disability, future medical, Almaraz/Guzman findings, and the like, any prior findings and orders pertaining to these issues which stem from the September 10, 2024 F&O will necessarily be rescinded. Further, for the purpose of obtaining a supplemental report, it is recommended that the parties inquire of AME, Dr. Potter, the following:

1. The start and end dates of the cumulative work injury (ADJ7070471).
2. Whether the August 16, 2011 incident (ADJ10027311) is a separate and distinct injury and the basis for this finding.

    a. If the August 16, 2011 injury (ADJ10027311) is a separate and distinct injury, a breakdown of the body parts injured in both claims should be provided. Otherwise, a breakdown of the body parts injured in the cumulative injury should be sufficient.

    b. If the August 16, 2011 injury (ADJ10027311) is found to be a separate and distinct injury and there is an overlap of one or more of the body parts with the cumulative injury (ADJ707047), apportionment between the two injuries should be addressed in accordance with *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113].

3. Apportionment for all injuries should be addressed in accordance with Labor Code section 4663 irrespective of overlapping body parts.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the September 10, 2024 Findings and Order is **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 10, 2024 Findings and Order is **RESCINDED** and **SUBSTITUTED** with a new Findings and Order as provided below.

FINDINGS OF FACT

1. The proper occupational code is group number 470 as claimed by applicant.
2. At the time of injury, the employer was legally uninsured.

3. Permanent disability is deferred pending additional development of the record.
4. The lien from the law offices of Gary Nelson is proper, and the present applicant's attorney is ordered to hold any attorney's fees in trust for resolution of said lien, to be adjusted between the parties. The WCAB is to retain jurisdiction.

ORDER

1. The parties are ordered to develop the record further and obtain a supplemental report from AME, Dr. Charles Potter.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 16, 2024

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

JAIME RODRIGUEZ
RANCANO & RANCANO
STATE COMPENSATION INSURANCE FUND

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