

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

JOAQUIN GUARDADO GALVANEZ, *Applicant*

vs.

**JACOBELLIS SAUSAGE COMPANY INC., and
OAK RIVER INSURANCE COMPANY administered by
BERKSHIRE HATHAWAY HOMESTATE COMPANIES;
INSURANCE COMPANY OF THE WEST, *Defendants***

Adjudication Numbers: ADJ13080333, ADJ13080332

Marina del Rey District Office

**OPINION AND DECISION
AFTER
RECONSIDERATION**

We previously granted defendant'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

Jacobellis Sausage Company Inc., and Oak River Insurance Company (defendant) seek reconsideration of the Amended Findings and Award and Orders (F&A) issued by the workers' compensation administrative law judge (WCJ) on May 11, 2022, wherein the WCJ found in pertinent part in case number ADJ13080332 that on March 17, 2017, applicant sustained injury arising out of and in the course of his employment (AOE/COE) to his right middle finger; and in case number ADJ13080333 that during the period from March 17, 2017, through March 4, 2020, applicant sustained injury AOE/COE to his neck, back, left shoulder, and fingers.

Defendant contends that regarding case number ADJ13080333, it was prejudiced by not receiving the trial transcript it had requested; that the F&A was not supported by substantial evidence; and that the trial record should have been further developed after the WCJ issued the Order rescinding the February 24, 2022 Findings & Award.²

¹ Commissioners Sweeney, who was a member of that panel has since retired and another panel member has been assigned in her place.

² Defendant's Petition does not raise any issues regarding the F&A in case number ADJ13080332 and that injury claim will not be addressed herein.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received a Response (Answer) from applicant.³

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 affirm the F&A except that we will amend the F&A to defer the issues of whether applicant sustained injury AOE/COE to his left shoulder and his fingers; and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his right middle finger while employed by defendant as a meat processor on March 17, 2017 (ADJ13080332). Applicant also claimed injury to his neck, back, left shoulder, and fingers while employed by defendant during the period from March 17, 2017, through March 4, 2020 (ADJ13080333).

On July 15, 2021, chiropractic qualified medical examiner (QME) Arbi Mirzaians, D.C., evaluated applicant. Dr. Mirzaians examined applicant and took a history. He described the physical demands of applicant's job as follows:

As a meat processor/food preparer, he states that he would use a metal hook with a handle to forcefully place them into the meat that was to be ground. He would lift the heavy containers of meat, weighing anywhere between 80 to 90 pounds, and load them into the grinding machine. He was required to lift this load from ground level or waist level, and carry it overhead in order to place it into the grinding machine. ... After the meat had been ground, it would drop into a container, which weighed in total approximately 500 pounds or so. This container was on wheels, and he would then push this container towards another machine, ... and at that point, the load was so heavy that the second machine he would push it towards, was motorized and it would lift and transport the load of ground meat. ¶ ... His work required walking, prolonged standing, static standing, bending, stooping, carrying, twisting, firm and power grasping, heavy lifting below, at, and above shoulder level, and other physically demanding requirements, as described earlier.

(Joint Exh. 3, Dr. Mirzaians, July 27, 2021, p. 4.)

Dr. Mirzaians concluded that applicant sustained injury to his cervical spine, lumbar spine, left shoulder, and "right 3rd digit" (right middle finger) and stated:

³ Defendant Insurance Company of the West filed a "Response to Applicant's Response." The Response was a supplemental pleading and did not comply with the provisions of Appeals Board rule 10964. Therefore, it is not accepted and will not be considered. Insurance Company of the West did not file an Answer to Oak River Insurance Company's Petition.

Based upon the information provided to me by the injured worker ... I find that to a degree of reasonable medical probability industrial causation exists as it relates to the left shoulder, cervical spine, and lumbar spine. These injuries are directly arising from his occupational demands.

(Joint Exh. 3, p. 16.)

After reviewing treatment notes from Di Giulio, D.C., in his November 1, 2021 supplemental report Dr. Mirzaians noted:

There appears to be some inconsistency as to the shoulder injury. There is reference to the right shoulder in Dr. Di Giulio's notes, and the claim made for the continuous industrial trauma, for which I am serving as the qualified medical evaluator, alleges a left shoulder injury. In all of the notes of Dr. Di Giulio, there is reference made to a right shoulder injury, as well as a pain diagram, making reference to a right shoulder injury. This pain increased following lifting at work, as per the documents. Interestingly however, there is another pain diagram, noting supraspinatus and infraspinatus tenderness on the left side. The notes make reference to a right shoulder pain with acknowledgment of pain developing out of employment at Jacobellis Sausage and mention of Mr. Becerra, and the work relatedness of the injury. ... ¶ ... The medical records, which remain pending, are those of Dr. Fernando Rey, as well as the diagnostic studies, which I had requested, including right hand 3-view x-rays, cervical spine non contrast MRI, left shoulder non contrast MRI, lumbar spine, non contrast MRI, upper and lower extremity bilateral NCV/EMG study.

(Joint Exh. 4, Dr. Mirzaians, November 1, 2021, pp. 6 – 7.)

Dr. Mirzaians was provided additional medical reports, and in the December 8, 2021 supplemental report he stated:

Thank you for submitting the records of Dr. Rey. At this point, the matters that remain pending are the diagnostic studies that had been requested. ... ¶ I would appreciate the opportunity to review these necessary medical legal diagnostic studies and the opportunity to re-evaluate this patient ... At this point, it would be most appropriate to re-evaluate him for updated physical examination findings.

(App. Exh. 5, Dr. Mirzaians, December 8, 2021, p. 4.)

The parties proceeded to trial on January 24, 2022, and the matter was submitted for decision. The WCJ's summary of applicant's testimony included:

The company is a meat processing company, and Applicant worked as a meat processor for the Defendant. He would lift heavy containers of meat to move them around from place to place and also would perform other jobs. He would load the trucks and he would grind the meat. ¶ He would also do other jobs. He would take the boxes which were loaded with meat, and sometimes there were pallets, and he would unload them from the truck. The estimate[d] weight of the

boxes of meat was 60 to 70 pounds. ¶ He worked for this company for 13 years. (Minutes of Hearing and Summary of Evidence (MOH/SOE) January 24, 2022, pp. 3 - 4.)

The WCJ rescinded the February 24, 2022 Findings and Award and Orders and the matter was again set for trial. All parties were present at the May 11, 2022 trial. Co-defendant Insurance Company of the West accepted the right middle finger specific injury claim (ADJ13080332), and the cumulative injury claim (ADJ13080333) was submitted for decision. (Minutes of Hearing, May 11, 2022.) The issues submitted were injury AOE/COE, earnings, and temporary disability indemnity. (MOH/SOE, January 24, 2022, p. 3.)

DISCUSSION

We first note that the Policy and Procedural Manual Index Number 1.135 Transcript Requests, Administrative Director rules 9990 and 9991, and Appeals Board rule 10800, contain specific rules and instructions to be followed by a party requesting a trial transcript. Cal. Code Regs., tit. 8, §§ 9990 and 9991; Policy and Procedural Manual Index Number 1.135.) Having reviewed the entire record including all documents in the Electronic Adjudication Management System (EAMS) ADJ file, we see no indication that defendant complied with any of the requirements applicable to the making of a request for a trial transcript. Based thereon, there is no legal support for defendant's argument that because it did not receive a trial transcript, its due process rights were "absolutely violated." (Petition, p. 6.) In fact, defendant's failure to comply with the various procedures required in order to receive a trial transcript from the court reporter/transcript clerk, renders the issue moot.

Any award, order, or decision of the Appeals Board must be supported by substantial evidence. (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 Cal.Comp.Cases 500].) In the Opinion on Decision the WCJ stated that the finding of injury AOE/COE was based on applicant's "credible" testimony, and the November 1, 2021 report from QME Dr. Mirzaians. (F&A, p. 3, Opinion on Decision.) It is well established that a WCJ's opinion regarding witness credibility is entitled to great weight. (*Garza v. Workmen's Comp. Appeals Bd.*, *supra*, at 319.) Also, it is important to note that when deciding a medical issue, such as whether an applicant sustained a cumulative injury, the WCJ must utilize expert medical opinion. (See *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) Here, the physical examination of applicant and

applicant's description of his job duties resulted in QME Dr. Mirzaians determining that the left shoulder, cervical spine, and lumbar spine were "directly arising from his occupational demands." (Joint Exh. 3, p. 16.) Subsequently, on two separate occasions, Dr. Mirzaians was provided medical records to review. (See Joint Exh. 4 and App. Exh. 5.) Review of those records did not change Dr. Mirzaians' opinions regarding the cause of applicant's cervical and lumbar spine injuries. Thus, as to those issues, we agree with the WCJ that applicant's testimony and the reports from Dr. Mirzaians constitute substantial evidence that applicant sustained injury AOE/COE to his cervical and lumbar spine. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

It appears that Dr. Mirzaians is awaiting additional diagnostics and a re-evaluation of applicant before he addresses the issues of permanent disability and apportionment. However, it also must be noted that in his November 1, 2021 supplemental report Dr. Mirzaians discussed various inconsistencies in the record as to whether applicant sustained injury to his right shoulder, left shoulder, or both shoulders. (Joint Exh. 4, pp. 6 – 7.) To be substantial evidence, a medical opinion must be based on pertinent facts, on an adequate examination and on an accurate history. (*Escobedo v. Marshalls, supra.*) The inconsistencies in the medical record, as discussed by Dr. Mirzaians, render his earlier opinions not substantial evidence as to applicant's shoulder injury. Review of the record also indicates that Dr. Mirzaians did not review any medical records pertaining to, and did not provide an opinion as to, the claimed "fingers" injury.⁴ Therefore, the record does not contain substantial evidence regarding 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, such as injury AOE/COE and/or parts of body injured. (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 [62 Cal.Comp.Cases 924].) Under the circumstances of this matter, as discussed above, although defendant made no objection at the May 11, 2022 trial to the matter being re-submitted on the existing record, we agree with defendant that the record needs to be further developed, but the development of the record shall be limited to the issues of applicant's shoulder injury and the "fingers" injury.

⁴ Again, we note that the right middle finger specific injury claim (case number ADJ13080332) was accepted by defendant Insurance Company of the West.

Normally, when the medical record requires further development, the record should first 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).) Upon return of this matter, we recommend that the WCJ schedule a status conference to facilitate the parties reaching an agreement regarding how best to develop the record.

Finally, as to defendant's argument that it was "disallowed" from establishing "applicant's identification by requesting a form of valid identification card" (Petition, p. 4), defendant has not shown good cause to require that applicant produce some form of "valid" identification at the time of trial. There is nothing in the record suggesting that the employer had any doubt as to the applicant being their employee, and there was nothing new occurring at the trial to raise suspicion over whether the person testifying was the applicant. We see no factual and/or legal support for defendant's argument.

Accordingly, we affirm the F&A except that we amend the F&A to defer the issues of whether applicant sustained injury AOE/COE to his left shoulder and his fingers; and we return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Award of May 11, 2022, is **AFFIRMED**, except that it is **AMENDED** as follows:

**FINDINGS OF FACT
AWARD AND ORDERS**

* * *

Applicant, Joaquin Guardado Galvanez, born XX-XX-XXXX, while employed during the period March 17, 2017, through March 4, 2020, as a meat cutter, in Burbank, California, by Defendant Jacobellis Sausage, sustained injuries to his neck and back arising out of and in the course of his employment; the issues of whether applicant sustained injury to his left and/or right shoulder, and injury to his fingers are deferred.

* * *

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 8, 2024

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

**JOAQUIN GUARDADO GALVANEZ
WACHTEL LAW
GREENUP, HARTSTON & ROSENFELD
HALLETT, EMERICK, WELLS & SAREEN**

TLH/mc

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