WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIA OCHOA, *Applicant*

vs.

FXI, INC.; ACE AMERICAN INS. CO., administered by ESIS, *Defendants*

Adjudication Number: ADJ12878263
San Francisco District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration of the Findings and Order (F&O) issued on October 21, 2020, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.

The WCJ found that applicant failed to prove industrial causation of her injury because the WCJ found that applicant's history of injury was not credible.

Applicant argues that the findings of the WCJ are not supported by substantial medical evidence and that the WCJ's findings on credibility are inconsistent.

We received an answer from defendant.

The WCJ filed a Report recommending that the Petition for Reconsideration be denied.

We have considered the allegations in the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record. Based upon our review of the record, as our Decision After Reconsideration we will rescind the October 21, 2020 F&O and return this matter to the trial level for further proceedings.

FACTS

Applicant was working on October 10, 2019, when she claims to have sustained an industrial injury to her shoulders, upper extremities, and neck. (Minutes of Hearing and Summary of Evidence, p. 2, lines 6-10.) The matter proceeded to trial primarily upon the issue of whether applicant's injury was industrial. (*Id.* at p. 2, lines 27-38.)

Applicant was seen by Qualified Medical Evaluator (QME) Diane Michael, D.C., who authored two reports in evidence. (Joint Exhibits AA and BB.) Dr. Michael took the following history of injury:

> Ms. Ochoa describes her injury occurring on October 10, 2019 while moving heavy mattress foam pieces. She describes placing pieces of foam into a wooden cart, pulling the cart to a table and placing the foam pieces onto the table.
>
> Ms. Ochoa was pulling a piece of mattress foam the size of a California king weighing approximately 40-50 pounds. She flipped it over onto the table with her right upper extremity. She felt immediate symptoms in her right upper extremity. Initially, the symptoms were greater in the right elbow but with continued work it progressed up the neck and down to the right hand. She felt a pulling sensation from her right shoulder through her elbow and hand.
>
> She continued to work in pain and self-procured with topical cream and over the counter medication. Her symptoms worsened and she reported it on November 14, 2019.

(Joint Exhibit AA, Report of QME Diane Michael, D.C., March 3, 2020, p. 2.)

The QME opined on causation of injury as follows:

> Absent medical records to the contrary, based on the mechanism of injury, the examination, objective factors and subjective symptomatology, I have determined with reasonable medical probability, that the patient received the above stated injuries as a result of the work exposure.
>
> The patient reports working and carrying out activities of daily living without restrictions or limitations, no disabilities and no ongoing treatment to the areas of complaint at the time of the aforementioned injury.

(*Id*. at p. 8.)

At the initial consultation, the QME noted that no medical records were provided for her to review. (*Id*. at p. 3.) The QME requested the parties provide medical records to complete the review. (*Id*. at pp. 8-9; see also Joint Exhibit BB, Report of QME Diane Michael, D.C., July 10, 2020, p. 2.)

Applicant first reported her injury in November following an incident when she was written up for hitting a coworker with a piece of cardboard. (MOH/SOE, *supra* at p. 6, lines 14-19; p. 13, lines 18-30.) Applicant denied hitting anyone with cardboard and said that the cardboard dropped accidentally. (*Ibid*.)

DISCUSSION

I.

When applicant claims a physical injury, applicant has the initial burden of proving industrial causation by showing the employment was a contributing cause. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302; § 5705.) Applicant must prove by a preponderance of the evidence that an injury occurred AOE/COE. (Lab. Code[1], §§ 3202.5; 3600(a).)

> The requirement of Labor Code section 3600 is twofold. On the one hand, the injury must occur in the course of the employment. This concept ordinarily refers to the time, place, and circumstances under which the injury occurs. On the other hand, the statute requires that an injury arise out of the employment. It has long been settled that for an injury to arise out of the employment it must occur by reason of a condition or incident of the employment. That is, the employment and the injury must be linked in some causal fashion. (*Clark*, 61 Cal.4th at 297 (internal citations and quotations omitted).)
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> * * *
>
> The statutory proximate cause language [of section 3600] has been held to be less restrictive than that used in tort law, because of the statutory policy set forth in the Labor Code favoring awards of employee benefits. In general, for the purposes of the causation requirement in workers' compensation, it is sufficient if the connection between work and the injury be a contributing cause of the injury.

(*Clark, supra* at 298 (internal citations and quotations omitted).)

Ordinarily, the WCJ's determination on credibility is given great weight because the WCJ had the ". . . opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand." (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505].) However, here, the WCJ stated in the Opinion on Decision that:

> There are facts in this case that point in both directions, both in favor and opposed to Applicant's credibility.
>
> First, it must be pointed out that there is nothing inherently unlikely about Applicant's account of her alleged injury. The motions she described to Dr. Michael and at trial seem perfectly consistent with

[1] All future references are to the Labor Code unless noted.

> the motions she performed in her usual work for FXI. It is quite common for legitimate injuries to take place without witnesses, and none of the witnesses presented were able to directly rebut the Applicant's testimony about how the injury occurred. **There was nothing in Applicant's testimony, manner, or demeanor that would, by itself, lead one to reject her testimony.**

(Opinion on Decision, October 22, 2020, p. 3, (emphasis added).)

No *Garza* issue exists in this case. The WCJ did not reject applicant's testimony based upon her manner of testifying. On the contrary, the WCJ's discussion of credibility arises merely from the fact that applicant reported her injury around the same time that she was being disciplined. (*Ibid*.) To the extent that the WCJ's report could be read as questioning applicant's credibility, the Report is not congruent with the Opinion on Decision, and thus, we cannot rely on the WCJ's determinations.

"[T]he medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." (*Peter Kiewit Sons v. Industrial Acci. Com.* (*McLaughlin*) (1965) 234 Cal.App.2d 831, 839 [30 Cal.Comp.Cases 188]; see also, *Peter Kiewit Sons v. Industrial Acci. Com.* (*McLaughlin*) (1965) 234 Cal.App.2d 831 [30 Cal.Comp.Cases 188] "[i]n a field which forces the experts into hypothesis, unaided lay judgment amounts to nothing more than speculation"].)

As the WCJ noted, it is common for injured workers to delay reporting a claim and to do so only after self-treatment fails. While reporting a delayed claim in tandem with employee discipline warrants additional investigation, it cannot be the *sole* basis to deny an industrial injury. There must be evidence, either factual or medical, supporting the conclusion that applicant's injury is non-industrial.

Next, and for the same reasons discussed above, even if we accept applicant's description of the injury as true, a decision on injury arising out of and occurring in the course of employment requires substantial medical evidence.

To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "When the foundation of an expert's testimony is determined to be inadequate as a matter

of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

Here, the present QME reporting does not constitute substantial medical evidence because no party provided the QME with applicant's medical records, and thus, the QME's preliminary opinions on AOE/COE are based upon an inadequate history. Without any substantial medical opinion, we cannot decide the issue of industrial injury.

Accordingly, as our Decision After Reconsideration we rescind the October 21, 2020 F&O and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Appeals Board that the Findings and Order issued on October 21, 2020 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER
PARTICIPATING, NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 23, 2024

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

MARIA OCHOA
LAW OFFICES OF NADEEM MAKADA
LAUGHLIN FALBO LEVY & MORESI

EDL/mc

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