WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

RAYMA CALDERON, *Applicant*

vs.

DAVE AND BUSTERS;
ACE AMERICAN INSURANCE COMPANY/ESIS, INC., *Defendants*

Adjudication Number: ADJ11349951
San Francisco District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration[1] in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Joint Findings of Fact & Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on August 22, 2021. By the F&A, the WCJ found in relevant part that applicant sustained injury arising out of and in the course of employment (AOE/COE) to her head while employed by the defendant on March 25, 2018 as a janitor. She further found that applicant's primary treating physician is Tariq Mirza, M.D., and that the injury caused the need for further medical treatment.

Defendant contends that the WCJ improperly determined that defendant had not rebutted the presumption of injury for applicant's claim under Labor Code section 5402(b)(1).

We received an Answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's Answer and the contents of the Report with respect thereto. Based on our review of the record, and as discussed below, we will affirm the F&A.

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[1] Commissioner Lowe, who was on the panel that issued the order granting reconsideration, no longer serves on the Appeals Board. Another panelist has been appointed in their place.

FACTUAL BACKGROUND

Applicant claimed injury to her head, neck, eye, right arm, brain, and psyche while employed by defendant as a janitor on March 25, 2018.

A document entitled "Employee Injury Report" dated April 2, 2018 states:

> [Applicant] is a service support employee, around 7:00pm she was conducting a restroom check and was kneeled [*sic*] down. ¶ Multiple body parts…¶ Specific injury…¶ Occurrence date: 03/25/2018…Date Employer notified: 03/25/2018.
>
> (Applicant's Exhibit 1, Employee Injury Report, April 2, 2018, p. 2.)

In a report dated April 2, 2018, Heather M. Guilbault, P.A. states:

> Diagnosis[:] injury of the head
> First aid: This is not a first aid claim.
> Causation: The findings on exam and diagnosis are consistent with the injury reported by patient. Prior factors such as injuries/ medical conditions/ diseases/ prior activities or exposures are not contributing to the findings. The findings cannot [be] possibly [be] produced by natural progression of pre-existing conditions or aging. In conclusion, the reported injury, more likely than not, is causing the current symptoms and findings.
> Treatment plan narrative: [Applicant] reports 7 days of difficulty waking from sleep, dizziness, headache, and N/V which has not let up – for this reason I instructed her to be escorted direct[i]ly to Mills Peninsula ER for CT of head and eval. Triage form completed and given to pt. FU scheduled for tomorrow am 4/3.
>
> (Defendant's Exhibit S, U.S. HealthWorks Medical Group, April 2, 2018, pp. 3-5.)

A letter from defendant to applicant dated December 6, 2018, stated in relevant part as follows:

> After careful consideration of all available information, we are denying liability for your claim of injury…After careful consideration of all the available information, we are denying liability only for your claim of injury to your bilateral eyes, neck, memory loss, dizziness, loss of concentration, brain, arms, left shoulder, left leg and speech as there is no medical evidence to support an industrial injury. *Your head is/are related to your work. We will be authorizing reasonable medical care to treat your head.* (Italics added.)

(Applicant's Exhibit 3, Defendant's Partial Denial Notice, December 6, 2018, p. 1.)

On July 15, 2021, the parties appeared for trial on the issue of the applicability of the presumption under Labor Code section 5402. No witness testimony was offered.

DISCUSSION

Section 5402(b)(1) states that:

> If liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 90-day period.

In *Welcher*, the Court concluded that: "the rebuttable presumption of Labor Code section 5402 was intended to affect the burden of proof . . . because it was created by the Legislature to implement the public policy of expediting workers' compensation claims. As such, once the underlying facts have been established, its effect in workers' compensation litigation is to place upon the defendant employer/carrier the burden of proving the employee/applicant does not have a compensable injury; in the absence of such proof, the consequences are adverse to the employer/carrier." (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Welcher*) (1995) 37 Cal.App.4th 675, 682-683 [60 Cal.Comp.Cases 717].)

Here, in her Opinion, the WCJ concluded that applicant had established that the presumption applied to applicant's injury case. However, defendant did not deny applicant's claim; it accepted liability for injury to applicant's head on December 6, 2018. Accordingly, the presumption does not apply. Said another way, if there is a subsequent denial of injury after an acceptance within the 90-day statutory period, and an employer challenges whether an injury occurred, the issue becomes whether an applicant sustained injury AOE/COE.

As stated in the WCJ's Opinion,

> In defendant's trial brief at page 3:27 to 4:2, defendant admits that applicant's head injury was industrial and that the issue for trial is a "nature and extent" issue as follows:
>
> > Furthermore, this is a **nature and extent** issue. Per Applicant's attorney's Exhibit-4, the December 6, 2018 partial denial notice clearly states that **Applicant's injury to the head was accepted**, but denied for the claimed injuries to the bilateral eyes, neck, memory loss, dizziness, loss of concentration, brain, arms, left shoulder, and speech. (Emphasis added.)
>
> Despite this statement in the trial brief, curiously, defendant's position at trial appears to be that defendant denied the entire injury, including the injury to the head, relying on PQME Dr. Anderson's "deferral of AOE/COE" to the trier of fact. (Opinion, pp. 2-3.)

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On 11/9/2020, (after the 10/20/2020 report referenced above from Dr. Anderson issued,) defendant again sent applicant notice that her industrial injury head "claim is accepted." (See MOH, Page 5:3.)

At trial, defendant argued that the specific "rebuttal" information discovered after the 90 day "investigatory period" was essentially that applicant was not credible. In fact, the caption at defendant's trial brief page 4:22-23 reads in pertinent part, "**Issues surrounding causation and AOE/COE relate to [applicant's] credibility**." (Opinion, p. 4.)

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In the case of ***South Coast Framing v. WCAB (Clark***),) (2015) 80 Cal Comp Cases 489, the California Supreme Court stated, "All that is required [to prove industrial injury] is that the **employment be one of the contributing causes** without which the injury would not have occurred." Emphasis added. As discussed above, applicant's employment as a janitor is not in dispute. Nor does it appear that anyone, for the past 3 years has disputed applicant's mechanism of industrial injury to her head. She slipped while cleaning the bathroom, hit her head on the stall door, fell backwards and then hit her head for a second time, this time on the toilet, after which she lost consciousness. As explained above, all parties, including defendant, stipulate that this industrial injury to applicant's head occurred at the workplace. Defendants would now like to avoid liability for this claim by casting doubt on applicant's credibility, but defendant has failed to list with specificity what statements have been made by applicant that are not credible. (Opinion, p. 5.)

An employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a) & 3202.5.) The Supreme Court of California has long held that an employee need only show that the "proof of industrial causation is reasonably probable, although not certain or 'convincing.'" (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) "That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].)

Here, defendant admits that applicant struck her head while at work. Thus, applicant has met her burden to show injury AOE/COE.

We observe, and defendant admitted, that defendant's arguments go to the nature and extent of injury, and not to whether an injury occurred. While defendant is entitled to vigorously defend the extent of its liability for applicant's injury, we see no basis for defendant's challenge to the WCJ's finding that applicant sustained injury AOE/COE to her head while employed by the

defendant on March 25, 2018 as a janitor. We caution the parties that given the scarce resources of the WCAB, they should consider whether pursuing a particular avenue of litigation is beneficial, especially in light of clear Supreme Court precedent such as *South Coast Framing, supra*.

Accordingly, we affirm the F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Finding & Award issued by the WCJ on August 22, 2021 is **AFFIRMED**.

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

March 19, 2024

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

RAYMA CALDERON
LAW OFFICE OF NADEEM H. MAKADA
LAUGHLIN, FALBO, LEVY & MORESI

AS/mc

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