WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE LEPE DELGADO, ***Applicant***

vs.

ABRISA HOLDING COMPANY, INC.; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, ***Defendants***

Adjudication Number: ADJ13196373
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact and Orders of November 5, 2024, wherein it was found that while employed as a sandblaster during a cumulative period ending on April 17, 2020, applicant sustained industrial injury to his cervical spine, thoracic spine, lumbar spine, shoulders, elbows/forearms/wrists, feet/ankles, psyche and teeth. All other issues were deferred. In this matter, in a Compromise and Release approved on October 22, 2021, in exchange for $70,600, applicant settled his claim against defendant. In the Compromise and Release, defendant agreed to "negotiate, defend adjust and/or litigate all liens of record…." The only parties appearing at the lien trial were defendant and lien claimant the Dental Trauma Center. Although the minutes of hearing of the October 17, 2024 trial list "Injury AOE/COE" and "body parts" as issues for determination in the WCJ's Report and Recommendation on Petition for Reconsideration (Report), the WCJ writes "This case involves a *lien trial* filed by the Dental Trauma Center" (Report at p. 1), that the "case was submitted on the non-IBR issue of injury aoe/coe in dentistry" (Report at p. 2) and that "The undersigned found that dental injury did occur as set forth by Dr. Schames at the Dental Trauma Center. No further issues were addressed." (Report at p. 2.) Since body parts other than injury to the teeth do not appear to be relevant to Dental Trauma Center's lien, it is unclear why the issue was listed so broadly in the minutes or why the WCJ made findings on those body parts.

Defendant contends that the WCJ erred in finding industrial injury. We have not received an answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will grant reconsideration, rescind the WCJ's decision, and issue a new decision finding that applicant did not sustain industrial injury to the teeth.

Preliminarily, we note that former Labor Code 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, Labor Code 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 Labor Code 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 in Events 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 December 5, 2024, and 60 days from the date of transmission is February 3, 2025. This decision is issued by or on February 3, 2025, so we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code 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 and Recommendation by the workers' compensation administrative law judge, the Report was served on December 5, 2024, and the case was transmitted to the Appeals Board on December 5, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on December 5, 2024.

Turning to the merits, applicant was evaluated by his primary treating physician, chiropractor Kim Torres, D.C. and complained of "dental problems from grinding his teeth." (May 13, 2020 report at p. 3.) Dr. Torres noted that applicant "saw a dentist in approximately late 2019 and had work on his teeth, even then he was grinding his teeth." (May 13, 2020 report at p. 1.) Dr. Torres referred applicant to a dentist for evaluation. Applicant was evaluated by Joseph Schames, D.M.D., one of lien claimant's providers, on June 17, 2021.

Discussing industrial causation of applicant's dental complaints and treatment, Dr. Schames wrote, "Dr. Lepe Delgado finds that in response to his industrial related orthopedic pain, he has also developed emotional stressors. Mr. Lepe Delgado finds that he is clenching his teeth and bracing his facial musculature in response to his orthopedic pain, and also in response to the emotional stressors experienced. This has caused him to develop facial and jaw pain." Dr Schames also reported that applicant stated his orthopedic injury was "compromising and impairing his ability to maintain proper and adequate oral hygiene procedures of brushing and flossing of his teeth and gums." (June 17, 2021 report at p. 3.)

Dr. Schames found that applicant showed clinical evidence of bruxism and wrote in his report that:

> Mr. Lepe Delgado may not have been aware that he may have had prior episodes of bruxism which can be due to obstructions of the airway during sleep or due to a prior non-industrial habit of bruxism due to the extra-pyramidal occurrences in the brain. These pre-existing episodes of bruxism can be present and not necessarily cause any facial pain, headaches, or TMJ area pain. However, it is with reasonable medical probability that the industrial exposure which caused Mr. Lepe Delgado to have resultant orthopedic pain and emotional stressors would have aggravated any pre-existing bruxism, where the scientific literature has documented that a person can have bruxism in response to pain and in response to stress.

(June 17, 2021 report at p. 11.)

Dr. Schames also diagnosed applicant with inflammation of the gums and wrote, "Even if Mr. Lepe Delgado had prior inflammation of the gums due to smoking, prior GERD, and/or dental neglect, there are numerous industrially related factors that with reasonable medical probability, at the very least, would be contributing to, aggravating, accelerating and/or lighting up of any prior inflammation of the gums." Dr. Schames wrote that because of applicant's orthopedic symptoms "it is with reasonable medical probability that Mr. Lepe Delgado is not performing proper and adequate oral hygiene." (June 17, 2021 report at p. 13.) Dr. Schames wrote that "Even if Mr. Lepe Delgado had these dental problems prior to the industrial exposure, it is with reasonable medical probability that Mr. Lepe Delgado's dental problems were contributed to and aggravated on an industrial basis." (June 17, 2021 report at p. 14.)

All findings of the WCAB must be based on substantial evidence. (*Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620 [Appeals Bd. en banc].) Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566].) There must be a solid and reasonable basis for a physician's final conclusion. It is not sufficient for the WCJ to blindly accept a medical opinion that lacks a solid underlying basis. (*National Convenience Stores v. Workers' Comp. Appeals Bd.* (*Kessler*) (1981) 121 Cal.App.3d 420, 427 [46 Cal.Comp.Cases 783].) As the Court of Appeal wrote in *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687], "In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. [Citation.] Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. [Citation.] Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citation.]"

"In workers' compensation matters, the burden of proof rests on the party or lien claimant 'holding the affirmative of the issue.' (Lab. Code, § 5705; see § 3202.5.) … [T]he lien claimant bears the burden of establishing the … entitlement to benefits and the reasonable value of the

services. [Citation.]" (*Zenith Ins. Co. v. Workers' Comp. Appeals Board (Capi)* (2006) 138 Cal.App.4th 373, 376-377 [71 Cal.Comp.Cases 374].) A lien claimant "has the burden of proving by a preponderance of the evidence that the claim is industrial." (*Hand Rehabilitation Center v. Workers' Comp. Appeals Bd. (Obernier)* (1995) 34 Cal.App.4th 1204, 1210 [60 Cal.Comp.Cases 289].)

In this matter, Dr. Schames's reporting does not constitute substantial medical evidence of dental injury. Dr. Schames did not take a detailed history of applicant's prior dental history or review applicant's prior dental records. Thus, Dr. Schames does not adequately explain if applicant's dental problems were worsened by industrial exposure. He ascribes applicant's dental injury to stress due to industrial "emotional stressors" without describing these emotional stressors in any detail. Dr. Schames explains that "the scientific literature has documented that a person can have bruxism … in response to pain as well as in response to stress" (June 17, 2021 at p. 11) but does not sufficiently explain why applicant's specific history, complaints, and clinical presentation make it medically probable that applicant's work contributed to his bruxism. It is not sufficient to state that under some circumstances stress or pain may contribute to bruxism. Similarly, Dr. Schames did not take a detailed history of how applicant's orthopedic pain was contributing to a lack of dental hygiene or how that lack of dental hygiene was contributing to a need for dental treatment or disability. Dr. Schames also states that applicant's ingestion of NSAIDs caused "qualitative changes" in applicant's saliva. (June 17, 2021 at p. 13.) But Dr. Schames fails to describe what he means by "qualitative changes" or discuss how it is contributing to a need for medical treatment or disability.

We thus find that lien claimant did not prove by a preponderance of the evidence that applicant sustained dental injury. Since this is the only body part relevant to lien claimant's medical treatment lien, we need not consider whether applicant sustained injury to any other body part. We will grant reconsideration, issue a finding that applicant did not sustain industrial injury to the teeth, and defer all other issues. If any other body part is relevant to any future issue in this case, the issue can be raised by a relevant party at the trial level.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings of Fact and Orders of November 5, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Orders of November 5, 2024 is **RESCINDED** and that the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Jose Lepe Delgado, age 58 at the time of the alleged injury, while employed during the period May 5, 2012 through April 17, 2020 as a sandblaster, did not sustain injury arising out of and in the course of employment to his teeth.

2. All other body parts and issues are deferred, with jurisdiction reserved.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALWESKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 3, 2025

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

JOSE LEPE DELGADO
BARKHORDARIAN LAW
WOOLFORD & ASSOCIATES
SAAM AHMADINIA

DW/oo

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