WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHRISTOPHER LUCAS, *Applicant*

vs.

MARMOL RADZINER, AN ARCHITECTURAL CORPORATION; REDWOOD FIRE AND CASUALTY INSURANCE COMPANY dba BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants*

Adjudication Numbers: ADJ12142181; ADJ12142170
Los Angeles District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of the December 10, 2021 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found in relevant part that applicant, while employed as a laborer/construction worker on February 20, 2019, did not meet his burden of proof in establishing an injury arising out of and in the course of employment to his back.

Applicant contends that the evidentiary record supports a finding of injury arising out of and in the course of employment (AOE/COE). Applicant further contends that the WCJ should conform the date of injury to proof.

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.

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[1] Commissioner Lowe, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Deputy Commissioner Schmitz, who was previously a member of this panel, is unavailable. Other panelists have been substituted in their place.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the F&O.

FACTS

Applicant alleges both a specific and a cumulative injury. In ADJ1214170, applicant claimed injury to his back while employed as a laborer/construction worker by defendant Marmol Radziner, an Architectural Corporation, on February 20, 2019. Defendant denies injury AOE/COE. In ADJ1214181, applicant claimed injury to his back while similarly employed from April 1, 2018 to March 12, 2019.

The parties have selected Arthur Schwartz, M.D., and Divakar Krishnareddy, M.D., as the Qualified Medical Evaluators (QMEs) in orthopedic medicine.

On October 12, 2021, the parties proceeded to trial and framed for decision in both cases the issues of injury AOE/COE and whether compensation was barred because applicant's claim was filed after notice of termination or layoff pursuant to Labor Code[2] section 3600(a)(10). (Minutes of Hearing and Summary of Evidence, dated October 12, 2021, at p. 3:8.) The WCJ heard testimony from applicant and from defense witnesses Kristine Estrada, German Paredes, Todd Jerry, and Joey Fermann, and ordered the matter submitted for decision.

On December 10, 2021, the WCJ issued her decision, determining in relevant part that applicant did not sustain his evidentiary burden of establishing injury AOE/COE occurring on February 20, 2019. (Finding of Fact No. 4.) In the accompanying Opinion on Decision, the WCJ explained that medical records in evidence from applicant's treating physician Dr. Fisher indicated an initial visit date of February 14, 2019, and that applicant testified that he had seen Dr. Fisher on the day following the specific injury. The WCJ observed that this date was inconsistent with the date provided by applicant to subsequent evaluating physicians. (Opinion on Decision, at pp. 3-4.) The WCJ observed that payroll records demonstrate that applicant was not working on February 13, 2019, which would have been the day preceding his initial visit with Dr. Fisher. Because the history applicant provided to his evaluating physicians regarding the date of injury was not consistent with his trial testimony, the WCJ concluded that applicant had not met his

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

evidentiary burden of establishing injury AOE/COE to a preponderance of the evidence. (*Id.* at p. 4.)

Applicant's Petition asserts that "[a]pplicant has consistently claimed that … he treated with a doctor on his own in the days after the injury," and that any uncertainty as to the actual date of injury should be resolved by conforming the date of injury to proof. (Petition, at p. 2:24.)

Defendant's Answer observes that per payroll records and witness testimony, the last day applicant worked for the defendant was February 8, 2019, and that the earliest evidence that applicant sought medical treatment reflects a date of February 14, 2019, which is inconsistent with applicant's testimony that he sought medical treatment the day following his injury. (Answer, at p. 5:16.) Defendant also observes that the records of applicant's treating chiropractor Dr. Fisher do not contain evidence that applicant's injury was industrial in nature. (*Ibid*.)

The WCJ's Report states that the WCJ did not find applicant's testimony to be credible, that while applicant's testimony on direct examination was clear and concise, applicant was unable to recall many significant details on cross-examination. (Report, at p. 3.) The WCJ further notes that even were the date of injury conformed to applicant's testimony, it would not reconcile the multi-day gap between applicant's last day worked and when he first obtained chiropractic treatment with Dr. Fisher. Because applicant's testimony was not credible, and because conforming the date of injury to proof would not otherwise remediate the contradictions in the evidentiary record, the WCJ recommends we deny reconsideration. (*Id.* at p. 5.)

DISCUSSION

In California workers' compensation proceedings, the 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.) An injury must be proximately caused by the employment to be compensable. (Lab. Code, § 3600(a)(3); see also *Clark*, *supra*, at pp. 297–298.) Proximate cause in workers' compensation requires the employment be a contributing cause of the injury. (*Ibid*.) Whether an injury arose out of and in the course of employment is generally a question of fact to be determined based upon the circumstances of each case. (*Wright v. Beverly Fabrics* (2002) 95 Cal.App.4th 346, 353 [67 Cal.Comp.Cases 51].)

Here, applicant alleges industrial injury occurring on February 20, 2019. (Minutes, at p. 2:12.) Defendant contests the occurrence of an industrial injury. Applicant testified at trial that he sustained industrial injury to his low back "while offloading and uploading the bags of dirt and cement." (Minutes, at p. 5:17.) Applicant testified that he reported the injury the next day to supervisor Mr. Gustafson, and that he sought his own treatment from Dr. Fisher, a chiropractor. (*Id.* at p. 5:20.) Under cross-examination, applicant reiterated that "he called in sick and sought medical treatment the very next day after his injury with Dr. Fisher." (*Id.* at p. 7:5.)

However, as the WCJ notes in her report, the employer's payroll records indicate that applicant's last full day of work was February 8, 2011, while the subpoenaed records of Dr. Fisher indicate applicant's first date of treatment occurred on February 14, 2019. (Opinion on Decision, at pp. 3-4.) Thus, the WCJ was unable to reconcile applicant's trial testimony that he sought medical help the day after his injury with the medical and occupational evidence of the days worked by applicant.

Moreover, the WCJ has determined that "applicant's testimony lacked credibility." (Report, at p. 3.) The WCJ observes that "[d]uring his direct examination, the applicant testified clearly and concisely," but that "[o]n cross examination the applicant seemingly could not recall many significant details regarding his final days of employment with defendant or life activities." (*Ibid*.) The WCJ's Report cites to multiple instances in applicant's trial testimony wherein his inability to recall the specific events occurring at or near in time to his claimed injury significantly eroded her estimation of applicant's credibility. (*Ibid*.)

While it is true that the Board is the ultimate finder of fact, and we are entitled to make our own credibility determinations (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]; *Granco Steel, Inc. v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 191 [33 Cal.Comp.Cases 50]; *Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901 [55 Cal.Comp.Cases 196]; *Alexander v. Workmen's Comp. Appeals Bd.* (1968) 262 Cal.App.2d 756 [33 Cal.Comp.Cases 341]; *Wilhelm v. Workers' Comp. Appeals Bd.* (1967) 255 Cal.App.2d 30 [32 Cal.Comp.Cases 424]), and upon reconsideration, reject the findings of the WCJ and enter instead our own findings on the basis of our own review of the record (Lab. Code, § 5907; *Garza, supra*; *Rubalcava, supra*; *Buescher v. Workmen's Comp. Appeals Bd.* (1968) 265 Cal.App.2d 520 [33 Cal.Comp.Cases 537]; *Wilhelm, supra*; *Montyk v. Workmen's Comp. Appeals Bd.* (1966) 245

Cal.App.2d 334 [31 Cal.Comp.Cases 321]), when the WCJ's findings are supported by solid, credible evidence, they are to be accorded great weight by the Board, and we should only reject them on the basis of contrary evidence of considerable substantiality. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza, supra*; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [54 Cal.Comp.Cases 349].)

Here, following our independent review of the evidentiary record, the pleadings of the parties, and the WCJ's Report, we are not persuaded that "evidence of considerable substantiality" warrants disturbing the WCJ's factual determination that applicant did not meet the burden of proving, to a preponderance of the evidence, industrial injury. (*Lamb, supra*, 11 Cal.3d at p. 281; *Garza, supra*, 37 Cal.App.3d at pp. 798-799.) Based thereon, we decline to disturb the WCJ's factual determinations with respect to the issue of injury AOE/COE.

We will affirm the F&O, accordingly.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 10, 2021 Findings and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 4, 2026

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

CHRISTOPHER LUCAS
LEVIN AND NALBANDYAN
LAW OFFICES OF HARRIGAN, POLAN, KAPLAN & BOLDY
LAW OFFICE OF JOAN SHEPPARD

SAR/abs

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