WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JUAN NAVARRETE, *Applicant*

vs.

SELECT STAFFING; REAL TIME STAFFING, dba EMPLOYBRIDGE/KAMRAN STAFFING; XL INSURANCE AMERICA, administered by BROADSPIRE, *Defendants*

Adjudication Number: ADJ9934566
Marina del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. Having completed our review, we now issue our Decision After Reconsideration.

Applicant and defendant each seek reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on November 24, 2021 wherein the WCJ found in pertinent part that applicant, while employed from March 1, 2011 through March 4, 2015 as a forklift operator by defendant, sustained injury arising out of and in the course of employment (AOE/COE) to his back and neck and did not sustain injury AOE/COE to the left foot, foot drop, shoulders, nervous system, skin, and melanoma.

Applicant contends that the medical reporting of treating physicians Nachman Brautbar, M.D., and Ronald Zlotolow, M.D., is substantial evidence to support that applicant sustained injury AOE/COE in the form of melanoma.

Defendant contends that the WCJ erred when she did not admit applicant's June 30, 2016 deposition transcript into evidence on the grounds that "applicant was not mentally fit to participate in his deposition"; and that applicant did not meet his burden of proving industrial injury to the cervical and lumbar spine.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that applicant's Petition be granted and defendant's Petition be denied.

We have considered the allegations in the Petitions, the Answer, and the contents of the Report. Based on our review of the record, and as discussed below, we will rescind the F&O and return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

We will briefly review the relevant facts.

Applicant claimed a cumulative injury while employed by defendant as a forklift driver during the period from March 1, 2011 to March 4, 2015 to his skin (cancer), lumbar spine, neck, shoulders, depression, anxiety, and insomnia. Applicant was diagnosed with melanoma of the skin in October 2014.

On April 21, 2015, applicant filed an Application for Adjudication of Claim (Application).

On June 30, 2016, defendant's former attorney took applicant's deposition with the assistance of Spanish a interpreter. (Exhibit I, 6/30/2016, marked for ID only.)

On September 18, 2019, defendant's new attorney took applicant's deposition with the assistance of a Spanish interpreter. (Exhibit J, 9/18/2019, marked for ID only.)

On August 2, 2021, the matter came on for trial.

On November 24, 2021, the WCJ issued her Findings & Award.

DISCUSSION

I.

We first consider applicant's Petition.

In the Report, the WCJ stated that:

> "Applicant testified as follows: he used a forklift outside for 3 years without a roof over his head or any covering over his head. The sunlight hit his head, neck, back and arms. He did not wear a uniform. While working he wore a short-sleeved shirt, sleeveless, or long-sleeved shirt." Minutes of hearing Summary of evidence dated April 1, 2020 at page 3:12-14).
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> On October 20, 2014, pathology biopsy was taken from applicant and was confirmed malignant melanoma with a positive deep and peripheral margins. Applicant was diagnosed with malignant melanoma of skin of trunk. (Exhibit D Chino Valley Medical Center Records Review by Dr. James Hamada). Applicant testified that he sought medical treatment by going to Chino Valley Medical Center

ER in March 2015 when he was diagnosed by the doctor with skin cancer. He further testified that before this diagnosis of skin cancer, it had never been diagnosed before. Applicant did not tell the truth that his first knowledge of melanoma was in March 2015 when he was notified of skin cancer in October 2014. But Applicant Petitioner's knowledge of when he had cancer is not a determining factor in whether he had cancer AOE/COE during the continuous trauma period. The location of Applicant's skin cancer to the back is depicted in a Photographic Wound Documentation dated 05/05/15 at Chino Valley Medical Center. (Exhibit K designated portions of SDT records from Chino Medical Center dated 05/12/2015). From this photograph it does not appear that there was any removal of skin in or near Applicant's neck and that the wound created by the cancer removal was located in the upper part of applicant's back and was not near the neck area.

Applicant saw Dr. Nachman Brautbar on 11/27/18, January 16, 2019 and on other occasions, however, this WCJ is not considering Dr. Brautbar's Medical Reports in that the record does not include a Permanent and Stationary Report by Dr. Brautbar. In the Opinion of this WCJ, Dr. Brautbar's reporting is not complete and is not substantial evidence without an MMI Report.

Applicant was seen by Dr. Ronald Zlotolow, PTP in internal medicine on July 11, 2019. (Exhibit 11 dated 06/07/19 through 07/31/19). On June 07, 2019, he wrote two PR-2 report that give a diagnosis of Psoriasis, dorsalgia unspecified, allergic contact dermatitis, unspecified. In his report there is no diagnosis of cancer. Defendant Petitioners' argue the significance of psoriasis on Applicant Petitioner's neck however any medical interpretation of the presence of psoriasis on the neck is a medical condition for which Dr. Zlotolow did not explain in his medical reports. On July 31, 2019, Dr. Zlotolow issued a Permanent and Stationary Report. There is no medical report which shows that Dr. Zlotolow performed a physical examination of applicant's body including his back and neck. His assertion that he examined Applicant's back and neck is suspect. Defendant Petitioners argue that because Dr. Zlotolow it is an internist, he would not have occasion to look at Applicant Petitioner's neck and back. One might further argue that psoriasis on the neck would be out of the specialization of an internist and more and in the specialization of a dermatologist.

In the Opinion of this WCJ, Dr. Zlotolow's Medical Reports are not substantial evidence on grounds that there is no report that shows that he performed a physical examination of applicant's back and neck. His opinion that with reasonable medical probability applicant's exposure to the sun on the job did play a substantial factor in development of his melanoma is without merit. (Exhibit 12 dated 07/31/2019).

Dr. Bernard Raskin, a dermatologist, wrote a Labor Code Section §4050 medical report for defendant. (Marked for identification purposes only as Defendants' Exhibit F). He did not personally see Applicant's back and neck in

person. In the opinion of this WCJ Dr. Raskin's report is not Substantial Medical Evidence.

In the Opinion of this WCJ, the Medical Records of Dr. Brautbar and Dr. Zlotolow are not Substantial Medical Evidence. In the Opinion of this WCJ there needs to be further development of the record under **Tyler and McClune**. This WCJ would like to appoint a regular doctor under Labor Code Section §5701 to examine Applicant Petitioner and the medical reports to establish whether there was melanoma in Applicant Petitioner's neck which would not be covered and would be exposed to the sun by Applicant's Petitioner's wearing a T-shirt. The California Supreme Court has long held that an employee need only show the proof of industrial causation is reasonably probable, although not certain or convincing. (McAllister supra). Here Applicant Petitioner has satisfied McAllister. Pursuant to the Medical Report of Dr. Hamada dated November 12, 2018, Applicant Petitioner sustained industrial injury to his back and neck.

(Report, 1/10/2022, pp. 6-7.)

The WCJ concluded by recommending that applicant's Petition be granted so that she could appoint a regular doctor under Labor Code section 5701. We agree with the WCJ's recommendation, and we will rescind the F&O.

II.

Although we are rescinding the F&O, we will consider the contentions in defendant's Petition with respect to the admission of applicant's June 30, 2016 deposition transcript. (Exhibit I.) We observe that the WCJ did not actually issue a finding that the deposition transcript was not admissible so that upon return the WCJ should consider the issue and issue an order.

We begin with the relevant code sections governing admission of exhibits. Code of Civil Procedure section 2025.620 states in relevant part that:

> At the trial or any other hearing in the action, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition … so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with the following provisions:
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> (a) Any party may use a deposition … for any other purpose permitted by the Evidence Code.
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> (b) An adverse party may use for any purpose, a deposition of a party to the action, or of anyone who at the time of taking the deposition was an officer, director,

> managing agent, employee, agent, or designee under Section 2025.230 of a party. It is not ground for objection to the use of a deposition of a party under this subdivision by an adverse party that the deponent is available to testify, has testified, or will testify at the trial or other hearing.

(Cal Code Civ. Proc., § 2025.620)

> Labor Code section 5807 states in relevant part that:
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> All hearings and investigations before the appeals board or a workers' compensation judge are governed by this division and by the rules of practice and procedures adopted by the appeals board. In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division. . . .

(Lab. Code, § 5708.)

> Labor Code section 5709 states that:
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> No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division. No order, decision, award, or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure.

(Lab. Code, § 5709.)

"The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

In the matter of *Huerta v. ACCO Engineered Systems*, an Appeals Board panel rescinded the WCJ's decision because the WCJ incorrectly found that the deposition transcript of applicant's supervisor taken in the third-party civil case was inadmissible at trial. (*Huerta v. ACCO Engineered Systems* 2014 Cal. Wrk. Comp. P.D. LEXIS 715.)[1] The panel concluded that applicant

[1] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron*

was entitled to introduce the deposition transcript because the statements made by applicant's supervisor, who was defendant's employee at the time of his deposition, were admissible as party admissions even if the deposition transcript contained inadmissible hearsay. The WCJ and the Appeals Board are not bound by common law or statutory rules of evidence, and admission of the supervisor's deposition transcript did not cause undue surprise or prejudice to defendant because defense counsel participated in the supervisor's deposition and had an opportunity to cross-examine the supervisor.

Here, defendant's attorney took applicant's depositions with the assistance of a Spanish language translator, and applicant was represented by an attorney. When applicant explained his medication regime, he was asked if he was able to testify, and he replied that he was. Moreover, his attorney then clarified on the record that applicant was able to testify, and the deposition proceeded.

Yet, in her Report, the WCJ discussed applicant's credibility and whether the applicant's deposition testimony was substantial evidence. She apparently believed that because she did not have a list of applicant's medications, she could not "determine whether or not applicant had the capacity to testify. The parties did not and this WCJ cannot make a determination that Applicant Petitioner's Testimony at his Deposition is to be given greater weight than his 5 days of testimony. It *[sic]* observed applicant for 5 days. I listened intently to his answers to questions during a time when applicant was not taking chemotherapy. During his Deposition, applicant was taking a lot of medication and chemotherapy which arguably cause his mind to not be as clear as it should be and that he was not capable of sitting for Deposition." (Report, 1/10/2022, p. 5.) However, it is not the role of the WCJ to decide whether applicant was fit because that conclusion must be based on medical evidence.

Applicant's deposition is clearly admissible. It was taken under oath, and applicant was represented by counsel and provided with a Spanish interpreter. The role of the WCJ is to admit the evidence and then consider the evidence to determine whether it is substantial. (See Lab. Code, §§ 5708, 5709.) A conclusion that the evidence is not substantial is not, without more, a basis to exclude it, and deposition transcripts that are admitted into the record of proceedings can be helpful

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v. Santa Fe Extruders (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].) Here, we refer to *Huerta* because it considered a similar issue.

to the trier of fact. Because hearsay is admissible in workers' compensation proceedings, the testimony can be offered as proof of a fact in dispute. In assessing credibility, a showing of prior inconsistent statements and/or admissions against interest can be significant, and due process is afforded when the deponent witness has an opportunity to respond and explain their responses.

If we were not rescinding the decision in its entirety, we would order that the deposition transcript is admitted. When trial proceedings commence, the WCJ should admit the deposition transcript and give applicant's deposition testimony the evidentiary weight that she deems appropriate when issuing her new decision.

Accordingly, we rescind the F&A and return the matter to the WCJ for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued on November 24, 2021, by the WCJ is **RESCINDED** and the matter is **RETURNED** to the WCJ for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 1, 2026

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

JUAN NAVARRETE
HINDEN & BRESLAVSKY
FABIANO, CASTRO & CLEM

DLM/oo

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