WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE REYES,

Applicant,

vs.

HART PLASTERING; FREMONT COMPENSATION INSURANCE COMPANY, in liquidation; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION; and CAMBRIDGE INTEGRATED SERVICES, INC. (Servicing Facility),

Defendant(s).

Case No. POM 261149

OPINION AND DECISION AFTER RECONSIDERATION

On December 3, 2004, we granted applicant's Petition for Reconsideration of the Findings and Order issued by a workers' compensation administrative law judge (WCJ) on September 16, 2004. In that decision, the WCJ found that applicant did not sustain an industrial injury to various parts of his body when, while employed as a plasterer on May 22, 2000, he fell from a scaffold following a non-industrial seizure. In his Opinion on Decision, the WCJ stated that, based on the opinions of Robert Kounang, M.D., and Ronald Kent, M.D., applicant's fall was "caused by pre-existing seizure activity."

Applicant contends, in substance, that the finding of no industrial injury was erroneous and unjustified, asserting under the principles set forth in *Employers Mutual Liability Ins. Co. of Wisconsin* v. *Industrial Acc. Com.* (*Gideon*) (1953) 41 Cal.2d 676 [18 Cal.Comp.Cases 286] that, although an idiopathic seizure is not compensable, the injuries sustained from hitting the ground at work are compensable. Defendant filed an answer to the petition for reconsideration.

In his Report and Recommendation on Petition for Reconsideration, the WCJ opined that

Labor Code section 4663,[1], as amended by Senate Bill (SB) 899 (Stats. 2004, ch. 34, §34), "requires a physician to address the issue of apportionment of causation"; that applicant's injury was precipitated by his preexisting seizure disorder; and, therefore, that the petition should be denied because "the applicant's condition was caused by his pre-existing seizure condition."

For the reasons discussed below, we hold that the amendments to sections 4663 and 4664, which concern apportionment of permanent disability, have not affected the statutes governing the determination of whether an injury arises out of and occurs in the course of employment, i.e., sections 3600 and 3208.3, or the case law interpreting those statutes.

BACKGROUND

Applicant, while employed as a plasterer by Hart Plastering on May 22, 2000, sustained severe injuries when he fell approximately 53 feet. He was working on the third story of a five-story building when he attempted to step onto a scaffold. His right foot missed the wooden board and he fell through the space between the scaffold and the wall. He was subsequently hospitalized for four days.

The employer rejected liability for the injury. After trial, the WCJ determined that the medical record was not adequate for decision and appointed Dr. Kounang as a "regular physician" pursuant to section 5701. In his report dated November 4, 2003, Dr. Kounang concluded: "Mr. Reyes's fall on 05/22/00 was caused by a preexisting seizure activity." On the basis of that report and the WCJ's interpretation of section 4663, the WCJ concluded that applicant had not sustained an injury arising out of and occurring in the course of his employment.

DISCUSSION

Section 3600 provides that, to be compensable, an injury must arise out of and in the course of employment." (Lab. Code, §3600). "This two-pronged requirement is the cornerstone

[1] All further statutory references are to the Labor Code.

of the workers' compensation system." (*Maher* v. *Workers' Comp. Appeals Bd.* (1983) 33 Cal. 3d 729 [48 Cal.Comp.Cases 326, 328]). Section 3600 was not amended by SB 899.

It has long been settled that for an injury to "arise out of employment" it must "occur by reason of a condition or incident of [the] employment." That is, the employment and the injury must be linked is some causal fashion. However, the causal connection between the employment and the injury need not be the sole cause of the injury; it is sufficient if the employment is a contributory cause. (*Maher*, *supra*, 48 Cal.Comp.Cases at 329).[2]

"Apportionment" is a term of art for determining the liability of an employer for permanent disability caused by an industrial injury in relationship to permanent disability caused by other factors, if any. Prior to the enactment of SB 899, permanent disability could be apportioned between the industrial injury and the permanent disability that preexisted the industrial injury (former Lab. Code, §4750), that was caused by the normal progression of a prior nonindustrial disease process (former Lab. Code, §4663), or that was caused by a subsequent noncompensable injury (former Lab. Code, §4750.5). (See generally *Franklin* v. *Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224 [43 Cal.Comp.Cases 310]; *Fresno Unified School District v. Workers' Comp. Appeals Bd*. (*Humphrey*) (2000) 84 Cal.App.4th 1295 [65 Cal.Comp.Cases 1232].)

In SB 899, the Legislature replaced former sections 4750, 4750.5 and 4663 with new sections 4663 and 4664. Section 4663(a) now states: "Apportionment of permanent disability shall be based on causation." Section 4663(c) now requires evaluating physicians to determine the approximate percentage of permanent disability caused by the direct result of the industrial injury and the percentage of permanent disability caused by other factors occurring both before and after the industrial injury. Section 4664 now creates a conclusive presumption that the permanent disability found in a prior award exists at the time of any subsequent industrial injury,

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[2] With regard to psychiatric injury, the Legislature has enacted a "new and higher threshold of compensability" (Lab. Code, §3208.3(c)), but that standard is not relevant here. (See, e.g., *Lockheed Martin Corp*. v. *Workers' Comp. Appeals Bd*. (*McCullough*) (2002) 96 Cal.App.4th 1237 [67 Cal.Comp.Cases 245].)

and limits the lifetime accumulation of permanent disability awards to 100% for any one region of the body.

These sections enact new standards for the determination of the liability of the employer for permanent disability. They may call into question the continuing viability of the case law interpreting the repealed apportionment statutes. But the subject matter of new sections 4663 and 4664 is the same as the subject matter of former sections 4750, 4750.5 and 4663. These sections do not affect the determination of the compensability of an industrial injury pursuant to sections 3600 or section 3208.3. Therefore, they are not relevant to the issue of whether applicant's injury arose out of and occurred in the course of his employment.

The leading case on the compensability of a fall on the employer's premises resulting from an idiopathic condition is *Gideon*, *supra*. While walking down an aisle on his employer's premises, the employee had an idiopathic seizure not connected with his employment, which caused him to fall to the concrete floor and strike his head. The California Supreme Court held that the injury was compensable: "The fact remains that he injured himself while at work on the employer's premises, the injury being the striking of his head against the floor, a condition incident to the employment. His [idiopathic] condition may have been a contributory cause but it was not the sole cause of his injury." (*Gideon*, *supra*, 18 Cal.Comp.Cases at 288.)

The present case is on all fours with the principles stated in *Gideon*. Here, applicant's fall was caused by his nonindustrial seizure disorder, but the injury was the striking of his body against the wall, scaffolding, possibly a landing, and ultimately the ground. It is not disputed that the injury occurred in the course of his employment. His injury is therefore compensable.

Accordingly, we will rescind the WCJ's decision and substitute a finding that applicant's injury arose out of and occurred in the course of his employment. We will return the matter to the WCJ for further proceedings and a determination of the benefits to which applicant may be entitled. Although an issue may later arise concerning apportionment of any permanent disability under the new apportionment statutes, that potential issue does not affect the finding of industrial injury.

For the foregoing reasons,

IT IS ORDERED as the Appeals Board's Decision After Reconsideration that the Findings and Order issued on September 16, 2004 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Jose Reyes, born October 12, 1961, while employed as a plasterer by Hart Plastering on May 22, 2000, sustained an injury arising out of and occurring in the course of his employment.

2. All further issues are deferred, with jurisdiction reserved before the workers' compensation administrative law judge in the first instance.

IT IS FURTHER ORDERED that the matter is returned to the workers' compensation administrative law judge for further proceedings and decision on the remaining issues.

WORKERS' COMPENSATION APPEALS BOARD

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I CONCUR,

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DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD.
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