WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CANDELARIA HUICOCHEA, *Applicant*

vs.

C M GRADO ENTERPRISES; WILLIAMSBERG NATIONAL INS. CO., Administered by ILLINOIS MIDWEST INSURANCE, *Defendants*

Adjudication Number: ADJ9042484

Van Nuys District Office

OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION
AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award (F&A) issued on May 8, 2024, by the workers' compensation administrative law judge (WCJ).

The WCJ found, in pertinent part, that applicant sustained industrial injury to her left ankle, left leg, lumbar spine, and in the form of reflex sympathetic dystrophy (RSD) to the left ankle. The WCJ further found that applicant's occupational group number was 321 and that she did not sustain industrial disability in the form of aggravation to diabetes. The WCJ further found that applicant's injuries caused applicant to sustain 24% permanent partial disability, but the WCJ ordered further development of the record on the issue of permanent disability as applicant's RSD and lumbar spine had not been rated.

Defendant argues that the WCJ erred because the finding of injury to the lumbar spine and in the form of RSD is not supported by substantial medical evidence. Defendant further argues that the award of permanent partial disability was incorrectly calculated using the 1.4 modifier contained in Labor Code section 4660.1, when applicant's date of injury predated the 2013 amendments to the Labor Code.

We have not received an answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we grant reconsideration to correct the error in the permanent disability rating, but otherwise deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, and the contents of the WCJ's Report. Based on our review of the record, we will rescind the WCJ's May 8, 2024 F&A, substitute a new F&A deferring the issue of permanent disability, but otherwise affirming the finding of injury to the lumbar spine and in the form of RSD, and return this matter to the trial level for further proceedings consistent with this decision.

FACTS

Applicant initially sustained an admitted industrial injury on March 27, 2012, when her left foot got caught on a rug, causing it to sprain. (Defendant's Exhibits AAA and B.)

Per the WCJ's Opinion on Decision:

> There are a significant number of medical reports listed as exhibits in this case, as such, the procedural history merits discussion. The case was first tried by retired Judge Rasmusson on December 18, 2014. Testimony and Exhibits were admitted into the record. However, on January 5, 2015, the submission was vacated for development of the record and more specifically to address issues outlined regarding the shortcomings of reports from PQME Dr. Andrew Katz.
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> Numerous hearings were held on the case after the submission was vacated and ultimately, the case was returned to the trial calendar on April 23, 2018, before Judge Rasmusson. Additional exhibits were offered at that trial and the case was resubmitted for decision. The body parts claimed were also amended during that trial to include diabetes, regional sympathetic dystrophy (RSD), gait derangement and lumbar spine. The previously claimed parts were left foot and left ankle.
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> On May 2, 2018, Judge Rasmusson issued an Order Vacating the Submission from April 23, 2018. He noted that neither the PTP's reports nor the reports of Dr. Alade, the PQME, adequately addressed the issues in the case.
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> On May 22, 2018, Judge Rasmusson issued an order appointing Dr. Arthur Fass as a 5701 physician in place of the PQME, Dr. Clement Alade. Subsequently, Dr. Fass was replaced by Dr. Tye Ouzounian.

> On December 6, 2023, the matter was returned to the trial calendar and proceeded to trial with the undersigned judge. A trial date of February 7, 2024, was continued as the WCJ had insufficient time to begin the trial due to her involvement with several other matters also set for trial. On April 9, 2024, the matter was submitted for decision and the decision now follows.

(Opinion on Decision, May 8, 2024, pp. 1-2.)

Dr. Ouzounian has authored three reports that are in evidence and was deposed. (Defendant's Exhibits VV, WW, XX, and YY.) In finding industrial injury to the lumbar spine and in the form of RSD, the WCJ summarized the reporting and testimony of the regular physician and applicant's primary treating physician as follows:

> Defendant admits industrial injury to the applicant's left foot and ankle. Applicant also alleges injury to her back, internal in the form of diabetes, gait derangement and RSD. Based upon applicant's credible testimony and the medical report(s) of Dr. Tye Ouzounian M.D., dated September 25, 2022 and his deposition of September 13, 2021, and the reports of Dr. Jan Merman, primary 'care physician, it is found that applicant also sustained injury in the form of gait derangement, resulting in lumbar injury as a compensable consequence, arising out of and occurring in the course of employment.
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> **REPORTS OF DR. TYE OUZOUNIAN**
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> In his report of September 25, 2022, he states:
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> Her impairment is better described using Table 17-5, Lower Limb Impairment Due to Gait Derangement. Ms. Huicochea has a Class d impairment for which requires routine use of a short leg brace, which is 15% whole person impairment. I believe her whole person impairment related to the alleged incident is 15%. (Defendant's Exhibit "YY" page 1, para, 5)
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> He then apportions 10% of the impairment to prior falls, predating her current injury. The falls resulting in fractures of the left ankle occurred in Mexico in 1974 and in Lancaster in 2005.
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> Apportionment is found to be valid.

DEPOSITION TESTIMONY OF DR. TYE OUZOUNIAN

As to the Lumbar condition he testified at the deposition on September 13, 2021, as follows:

BY MR. NOLAN:

Q. I think the big elephant in the room is trying to be hidden by counsel is his question of whether the rating, the impairment rating you gave, Doctor, was strictly for the leg or for the ankle as opposed to a combination of an ankle being caused or a gait being caused by a back?

A. I rated a lower extremity impairment which would be the ankle. But from her history, it appears a significant portion of that impairment is due to residuals from the back. I didn't rate her back.

Q. And would it be significant to you that the back injury may not have developed at the time of the ankle injury, but sometime later due to her altered gait?

A. I don't know what you mean -- I don't know what you mean by significant. If it occurred later due to altered gait due to industrial injury, it's industrial.

Q. Right. It would be based on compensable consequence, correct?

A. Correct.

Q. Okay. So the lack of any finding in past reports with regard to back, would just mean that she hadn’t progressed sufficiently to have a compensable consequence to the back?

A. Well, assuming her statement that her back pain occurred because of an altered gait and not lifting up something at home when she was cooking dinner.

Q. Right. Or a fall or subsequent motor vehicle accident or something.

A. Correct.

Q. Right? Okay. And your assessment of this injured worker and apportionment is going to be based on your assessment and not necessarily just grandfathering in or taking the words of other physicians in regards to an apportionment and causation; is that correct?

A. Counsel, my job is to evaluate the medical documentation and to provide my opinion.

Q. Okay. And if there's already a finding by the WCAB that her lower extremity condition is work related and it is an accepted injury, then what flows from there any compensable consequence would naturally be industrial. Do you agree with that premise?

A. That's my understanding of how the rules work.

REVIEW OF REPORTS OF DR. JAN MERMAN

Dr. Jan Merman, a neurologist who was treating the applicant, wrote in her report dated January 3, 2017, that applicant had a diagnosis of reflex sympathetic dystrophy of the left foot, type I due to her fracture. (Exhibit 9, page 5, para 5). There is no medical evidence offered by Defendants to rebut this finding.

In another report dated November 15, 2017, Dr. Merman stated that the "patient still has a lot of leg and back pain and uses a cane to walk." (Exhibit 7 Page 1, para 1). In her report of August 9, 2017, she said they applicant has daily constant back pain and daily headaches. Significantly, she says the applicant has had complications with her gait from the time she started seeing her. (Exhibit 10, page 2, para 1).

The reports of Dr. Ouzounian and Dr. Merman support the finding of compensability as to the back and the RSD.

(*Id*. at pp. 6-7.)

DISCUSSION

Defendant first challenges the permanent disability rating, which is admittedly in error. Accordingly, we will rescind that portion of the award and return that issue to the trial level. We will not issue an amended permanent disability rating at this time as there is an insufficient record to establish an interim award of permanent disability.

The WCJ issued a partial rating based upon gait derangement, but ordered further development of the record as to impairment of the lumbar spine and in the form of RSD. In general, the Appeals Board issues an award of permanent disability only when applicant has been declared permanent and stationary and has received a rating for all body parts claimed. (Cal. Code Regs., tit. 8, § 10152 ["A disability is considered permanent when the employee has reached maximal

medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment."]

There are cases that may warrant the court intervening and issuing an interim award of permanent disability. For example, in cases of progressive insidious disease, the Appeals Board may issue an interim award of permanent disability and reserve jurisdiction to issue a final award once applicant's condition becomes permanent and stationary. (*General Foundry Serv. v. Workers' Compensation Appeals Bd*. (*Jackson*) (1986) 42 Cal.3d 331.) However, even in such cases, we are rating the entirety of the disability and reserving jurisdiction with the expectation that permanent disability will worsen. No such exception exists here.

Perhaps in another case, an interim award of permanent disability may be warranted. However, here, too many variables exist to issue an interim award of permanent disability to one aspect of a body part, while reserving jurisdiction on others. This is particularly so as the alleged impairment to the body parts may overlap. For example, the WCJ awarded a partial award of permanent disability in the form of gait derangement of the lower extremities, but applicant's RSD also appears to impact the lower extremities. If we are rating the lower extremities, even on an interim basis, we require a complete record to issue such a rating. (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).)

To be clear, and notwithstanding the discussion above, defendant is required to begin advances of a reasonable estimate of permanent disability upon termination of temporary disability, unless exempted by statute. (Lab. Code, § 4650(b), ["**[R]egardless of whether the extent of permanent disability can be determined at that date**, the employer nevertheless shall commence the timely payment required by this subdivision and shall continue to make these payments until the employer's reasonable estimate of permanent disability indemnity due has been paid[.]"].)

The next issue raised by defendant is the WCJ's finding of injury to the lumbar spine and in the form of RSD.

When applicant claims a physical injury, applicant has the initial burden of proving industrial causation by showing the employment was a contributing cause. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302; § 5705.) Applicant

must prove by a preponderance of the evidence that an injury occurred AOE/COE. (Lab. Code[1], §§ 3202.5; 3600(a).)

> The requirement of Labor Code section 3600 is twofold. On the one hand, the injury must occur in the course of the employment. This concept ordinarily refers to the time, place, and circumstances under which the injury occurs. On the other hand, the statute requires that an injury arise out of the employment. It has long been settled that for an injury to arise out of the employment it must occur by reason of a condition or incident of the employment. That is, the employment and the injury must be linked in some causal fashion. (*Clark*, 61 Cal.4th at 297 (internal citations and quotations omitted).)
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> The statutory proximate cause language [of section 3600] has been held to be less restrictive than that used in tort law, because of the statutory policy set forth in the Labor Code favoring awards of employee benefits. In general, for the purposes of the causation requirement in workers' compensation, it is sufficient if the connection between work and the injury be a contributing cause of the injury.

(*Clark, supra* at 298 (internal citations and quotations omitted).)

Defendant argues that the reporting of Dr. Merman does not constitute substantial medical evidence. For the reasons stated by the WCJ in both the Opinion on Decision and the Report, we find substantial evidence supports the WCJ's finding of injury to the lower back and in the form of RSD.

As no party challenged the WCJ's findings on the following issues, we have preserved them: occupational group number, injury in the form of diabetes, earnings, temporary disability, reimbursement to EDD, reimbursement for self-procured medical mileage, need for future medical care, and the employer's failure to offer return-to-work.

We have deferred the issues of permanent disability, apportionment, and attorney's fees.

Accordingly, we will grant reconsideration and as our Decision After Reconsideration we will rescind the WCJ's May 8, 2024 F&A, substitute a new F&A deferring the issue of permanent disability, but otherwise affirming the finding of injury to the lumbar spine and in the form of RSD, and return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

[1] All future references are to the Labor Code unless noted.

IT IS ORDERED that defendant's Petition for Reconsideration of the May 8, 2024 F&A is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the May 8, 2024 F&A is **RESCINDED** with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. CANDELARIA HUICOCHEA, at age 60, while employed on March 27, 2012, as a machine operator, occupational group number 321, at Lancaster, California, by C M GRADO ENTERPRISES, whose workers' compensation insurance carrier was WILLIAMSBERG NATIONAL INSURANCE COMPANY, administered ILLINOIS MIDWEST INSURANCE, sustained injury arising out of and occurring in the course of employment to her left ankle, left leg, lumbar spine, and in the form of gait derangement and reflex sympathetic dystrophy (RSD) to the left ankle.

2. Applicant did not meet her burden in proving that the internal condition of diabetes was industrially caused or aggravated.

3. The issues of permanent disability, apportionment, and attorney's fees are deferred.

4. Applicant's earnings at the time of injury were $301.16 per week producing a temporary disability rate of $200.77 per week and a permanent disability indemnity rate of $200.77 per week.

5. The injury resulted in temporary disability for the period beginning on March 29, 2012 and continuing for 104 weeks, payable at the rate of $200.77 per week.

6. The employer did not, within 60 days of the disability becoming permanent and stationary, make an offer to applicant of regular work, modified work or alternative work, in the manner prescribed by the Administrative Director, for a period of at least 12 months.

7. Applicant will require further medical treatment to cure or relieve from the effects of the industrial injury.

8. Applicant is entitled to reimbursement of self-procured medical mileage, the exact amount of which is deferred to the parties to adjust with jurisdiction reserved in the event of a dispute.

9. The Employment Development Department (EDD) has paid applicant Unemployment Compensation Disability Benefits during the period of December 15, 2013 through December 15, 2014 at the rate of $189.00 per week. EDD is entitled to recover its lien in full plus interest as allowed by California Unemployment Insurance Code § 2629.1.

AWARD

AWARD IS MADE in favor of CANDELARIA HUICOCHEA against WILLIAMSBERG NATIONAL INS. CO. of:

a. Temporary disability indemnity at the rate of $200.77 per week beginning March 29, 2012 and continuing for 104 weeks.

b. Future medical treatment reasonably required to cure or relieve from the effects of the industrial injury.

c. Reimbursement of EDD for sums owed based on period of temporary disability awarded.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings consistent with this decision**.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 30, 2024

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

CANDELARIA HUICOCHEA
LAW OFFICE OF RONALD NOLAN
MULLEN & FILIPPI, LLP

EDL/mc

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