WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CARLOS HERRERA (Deceased); EBELIA ZUNIGA, ***Applicant***

vs.

ARYZTA, LLC; HARTFORD; ARCH INSURANCE; ACE AMERICAN INSURANCE, ***Defendants***

Adjudication Numbers: ADJ12032540; ADJ9816800; ADJ9749896
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant Ebelia Zuniga, the widow of decedent Carlos Herrera, seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Order/Award of July 29, 2024, wherein, as applicable to the instant proceedings, it was found that decedent did not sustain industrial injury in the forms of hypertension and stroke resulting in his death. In these matters, while employed on November 25, 2014 (ADJ9749896) and during a cumulative period ending November 25, 2014 (ADJ9816800), decedent sustained industrial injury to his low back, neck, and left shoulder. Applicant and decedent had also alleged injury to his right foot, hands, knees, and in the forms of diabetes, hypertension and stroke. Decedent sustained a stroke on April 21, 2018. Mr. Herrera was then placed in hospice care and died on October 15, 2018. Applicant alleges that the stroke was at least partially caused by hypertension which was in turn at least partially caused by medications used to treat Mr. Herrera's orthopedic industrial injuries, and that the stroke caused his death.

Applicant contends that the WCJ erred in finding that the hypertension and stroke were not industrial. We have received an Answer from defendants Hartford and Arch Insurance, who are jointly represented, 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 return this matter to the trial level for further development of the record, proceedings and decision.

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.
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> (b)
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> (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 September 17, 2024, and 60 days from the date of transmission is Saturday, November 16, 2024. The next business day that is 60 days from the date of transmission is Monday, November 18, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Monday, November 18, 2024, 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.

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[1] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 17, 2024, and the case was transmitted to the Appeals Board on September 17, 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 September 17, 2024.

Decedent was evaluated by primary treating physician orthopedist Ronald B. Perelman who issued a narrative report on January 26, 2015. Dr. Perelman was given a history of Mr. Herrera experiencing pain in his neck, middle back, low back, left shoulder and hand and wrists on November 25, 2014 while packing bread and work. Decedent was seen by U.S. Healthworks who diagnosed him with "acute stress disorder" and returned Mr. Herrera to work without restrictions. However, the decedent then saw his personal doctor who diagnosed the decedent with cervical spondylosis and lumbosacral spondylosis. He was then first seen by Dr. Perelman on December 8, 2014. (January 26, 2015 report at p. 2.) Dr. Perelman diagnosed Mr. Herrera with acute cervical, dorsal and lumbar spine strain and left shoulder strain which he felt was due to a specific November 25, 2014 injury. (January 26, 2015 report at p. 12.) Dr. Perelman noted that Mr. Herrera was taking hydryochlorothyazide, prednisone, Flexeril, and hydrocodone and noted that he had "known allergies to MOTRIN AND SOMA." (January 26, 2015 report at p. 5.) Dr. Perelman opined in the January 26, 2015 report that Mr. Herrera had reached maximal medical improvement (January 26, 2015 report at p. 12), found permanent impairment to the spine and left shoulder, including the need for a pain add on and found a need for further medical treatment in the forms of physical therapy, chiropractic care or acupuncture for flare ups with regard to the spine, and should have access to medication (NSAIDs) with regard to the left shoulder. (January 26, 2015 report at p. 12.)

Mr. Herrera was then seen by panel qualified medical evaluator orthopedist John L. Howard, M.D. who was given a history of orthopedic pain beginning in June of 2014 continuing through decedent's last day of work on November 25, 2014. (December 7, 2015 report at p. 3) Like Dr. Perelman, Dr. Howard noted that Mr. Herrera was allergic to Soma and Motrin (December 7, 2015 report at p. 6). Dr. Howard diagnosed Mr. Herrera with having had cervical,

lumbosacral, left shoulder, wrist and hand, and right foot strains, but found permanent impairment only with regard to the right shoulder. Dr. Howard opined that Mr. Herrera had no prophylactic work restrictions and no need for future medical treatment. (December 7, 2015 report at p. 10.)[2]

Mr. Herrera was then evaluated by occupational medicine physician Marvin Pietruszka, M.D. In a report dated July 10, 2017, Dr. Pietruszka noted that Mr. Herrera was "currently not taking any medications" and that Mr. Herrera had been taking Naprosyn but that it had been discontinued by Dr. Perelman in 2015. (July 10, 2017 report at pp. 2, 4.) Dr. Pietruszka noted that decedent was allergic to Soma, Ibuprofen, and seafood. (July 10, 2017 report at p. 3.) Mr. Herrera complained to Dr. Pietruszka of musculoskeletal pain at a constant severity of 9/10 in the spine and radiating to the upper extremities and the buttock. (July 10, 2017 report at p. 4.)

After Mr. Herrera's death, internist panel qualified medical evaluator Ira J. Perry, M.D. analyzed the issue of whether Mr. Herrera's death could be considered industrial. Dr. Perry noted that, while Mr. Herrera had a history of hypertension predating the industrial injury, his hypertension worsened after the industrial injury. (December 15, 2021 report at p. 163.) Dr. Perry opined that the stroke was industrial because Mr. Herrera's hypertension had been aggravated by steroids and NSAIDs used to treat decedent's orthopedic injury. (December 15, 2021 report at p. 164.)

At Dr. Perry's deposition, Dr. Perry was questioned at length regarding whether increased hypertension from medications could have been a contributing cause of Mr. Herrera's April 2018 stroke if there was no record of Mr. Herrera taking blood pressure increasing steroids or NSAIDS after early 2015. Dr. Perry noted that while Mr. Herrera's blood pressure did increase immediately after the injury, the blood pressure readings then decreased until 2017 and Mr. Herrera's dose of hypertension medication was decreased. (March 22, 2023 deposition at pp. 18-19.) While it is not completely clear whether Dr. Perry opined that it was medically probable, Dr. Perry appears to have testified that it was possible that use of steroids and NSAIDs in 2015 was a contributing cause of permanent increase in Mr. Herrera's hypertension which in turn was a contributing cause of the stroke. (March 22, 2023 deposition at pp. 38-39.)

[2] There were questions raised at Dr. Howard's October 27, 2017 deposition whether Dr. Howard's report was referencing the correct patient, since Dr. Howard measured the patient at a foot taller and 100 pounds heavier than in other medical records. (October 27, 2017 deposition at p. 19.) It does not appear that this question was ever clarified.

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.]"

The applicant for workers' compensation benefits has the burden of proving industrial causation. (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.App.4th 644, 650 [63 Cal.Comp.Cases 253] citing *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) However, in order to prove industrial causation, the applicant need only show that industrial factors were a contributing cause of the injury. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 299 [80 Cal. Comp. Cases 489].) "Further, 'the acceleration, aggravation or "lighting up" of a preexisting disease is an injury in the occupation causing the same.' [Citations.]" (*Clark*, 61 Cal.4th at p. 301.)

The WCJ rejected Dr. Perry's opinions because there was no evidence that Mr. Herrera was taking NSAIDs or steroids around the time of the stroke. Indeed, the record shows that decedent was taken off prednisone and naproxen in early 2015 and was allergic to ibuprofen. Nevertheless, the WCJ does not appear to evaluate Dr. Perry's opinion that even if decedent stopped taking medications increasing blood pressure in 2015, it could have still contributed to the 2018 stroke. We thus believe that the record should be developed on this issue, and the issue

should be reanalyzed on an augmented record. In the further proceedings, the reporting physician must more thoroughly explain the causative link between the medications and the eventual stroke and clarify whether such a link is medically probable. The reporting physicians may also opine on any other matters relevant to this matter.

The WCAB has a duty to further develop the record when there is a complete absence of (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) medical evidence on an issue. The WCAB has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) In accordance with that mandate, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level for further development of the record pursuant to *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc) and decision on the issue of industrial causation of the decedent's stroke and all other outstanding issues. In *McDuffie*, we held that the preferred method to follow when the medical record is in need of further development is to first obtain supplemental reports from the physicians that have already reported in the case. If that is not possible or not practicable, or if the record is still in need of development after this step, the parties should decide on an agreed medical evaluator. If the parties are unable to decide upon an agreed medical evaluator, or if the medical record is still insufficient, the WCJ is empowered to appoint a medical evaluator. We take no position on the ultimate resolution of any outstanding issue in this matter.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Order/Award of July 29, 2024is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order/Award of July 29, 2024 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 18, 2024

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

EBELIA ZUNIGA
SOLOV & TEITELL
DORMAN & SUAREZ

DW/oo

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