WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CLELL HOBSON, JR., *Applicant*

vs.

NEW YORK YANKEES;
ACE AMERICAN INSURANCE COMPANY, administered by ESIS, et al., *Defendants*

Adjudication Number: ADJ9085188

Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration of the Findings and Order (F&O) issued on September 4, 2019, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues.[1] This is our Opinion and Decision After Reconsideration.

The WCJ found, in pertinent part, that applicant did not sustain industrial cumulative injury to multiple body parts while playing as a professional baseball player through the period ending on September 1, 1985 for the New York Yankees and the Los Angeles Angels. The WCJ further found that liability for cumulative injury per Labor Code[2] section 5500.5 existed no earlier than the period of 1989-1990. Finally, the WCJ found that all of the qualified medical evaluator ("QME") reporting obtained by the parties was inadmissible and excluded the reporting from evidence because both parties utilized the pre-2004 dueling QME system where each party obtained its own QME and neither party properly obtained a QME pursuant to sections 4060 and 4062.2.

Applicant contends that the WCJ erred because the evidence does not support finding injurious exposure during the 1989-1990 time period. Applicant further contends that the QME

[1] Commissioners Sweeney and Lowe were on the panel that issued the order granting reconsideration. Commissioners Sweeney and Lowe no longer serves on the Appeals Board. New panel members have been substituted in their place.
[2] All future references are to the Labor Code unless noted.

reporting was admissible because the injurious exposure period of section 5500.5 and not the date of injury per section 5412 controls the procedure for obtaining medical legal evaluations.

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration we will rescind the September 4, 2019 F&O and return this matter to the trial level for further proceedings.

FACTS

The primary issues on reconsideration surround the WCJ striking all QME reporting from evidence not ordering further development of the record. The WCJ's Report explains the basis for striking the QME reporting as follows:

> At trial, petitioner objected to admission into evidence of defendants' proposed medical-legal reports (Exhibits A, B, C & D). Petitioner contended Defendants' medical-legal evidence was inadmissible, arguing that Defendants used the "dueling QME" process rather than the Panel QME process. (MOH/SOE, May 30, 2019, page 7:3-4). Defendants tendered the same objection to the medical-legal reporting of petitioner, arguing inadmissibility upon identical grounds. (MOH/SOE May 30, 2019, page 6:5-6).
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> The court sustained the evidentiary objection of petitioner, excluding from evidence the medical-legal reporting of defendants; the court found Defendants' exhibits A, B, C & D inadmissible. As defendants had made the identical objection (upon identical grounds) to the medical-legal reporting of applicant (Exhibits 1-10), the court sustained the Defendants' objection to admissibility of exhibits 1-10.
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> The court opined:
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> "…The parties have made the precise same objections upon the precise same grounds to the medical-legal medical reporting. The court sustains these identical reciprocal objections. The court finds the entirety of medical-legal reporting offered by the parties to be inadmissible. The court therefore excludes from evidence: Applicant's exhibits 1 through 10 as inadmissible and Defendants exhibits A through D as inadmissible…" (Opinion On Decision 9/4/2019, page 12).

> At trial, petitioner, and defendants both objected to the medical-legal evidence. Petitioner and defendants both moved the court to exclude the medical-legal reporting. Petitioner and defendants urged at trial that the medical-legal reporting failed to comply with California Labor Code Section 4060 as amended in 2004. The court agreed with the evidentiary objection, found the evidence did not comply with California Labor Code Section 4060 as amended in 2004, and excluded the proffered medical-legal reports.

(WCJ's Report, pp. 2-3.)

The WCJ found no industrial injury, primarily upon the basis that all the medical reporting was excluded from evidence. The WCJ declined to order development of the record reasoning as follows:

> This court is mindful that there do exist circumstances under which a court should develop the record; however, this is not such a circumstance. This court was unable to conclude as a threshold matter that specific medical opinions were inaccurate, inconsistent, or incomplete (i.e. "deficient"). In the present case, the parties' successful motion to exclude left a record bereft of any medical-legal reporting to develop, or upon which a finding of injury AOE/COE might be made.
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> "As set forth in *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389 [65 Cal Rptr. 2d 431] [62 Cal.Comp.Cases 924, 926–927], Labor Code sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings. **Before directing augmentation of the medical record, however, the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent, or incomplete**. [emphasis added] (*Tyler, supra*, 62 Cal.Comp.Cases at p. 928 (WCJ determined that neither reporting physician was credible and thus their reports were not substantial evidence); *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [72 Cal. Rptr. 2d 898] [63 Cal.Comp.Cases 261, 265] (Court of Appeal remanded matter to the Board to determine whether to exercise its discretion to seek additional evidence where none of the medical reports adequately discussed the crucial issue of causation.))" McDuffie v. Los Angeles County Metro. Transit Auth., 67 Cal. Comp. Cases 138, 141-142, 2002 Cal. Wrk. Comp. LEXIS 1218, *8-9 (Cal. App. February 25, 2002)

(WCJ's Report, Pp. 4-5.)

DISCUSSION

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board 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].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

Substantial justice is "[j]ustice fairly administered according to the rules of substantive law, regardless of any procedural errors not affecting the litigant's substantive rights; a fair trial on the merits." (Black's Law Dictionary (7th ed. 1999).)

Labor Code section 5313 requires a WCJ to state the "reasons or grounds upon which the determination was made." The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton*, *supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton*, *supra*, at p. 475.)

In sports law, as happened here, a professional athlete may sustain a cumulative trauma injury over the of span many years, and in some cases, many jurisdictions. Yet, it must be resolved in a forum. If the claim is filed in California, then we must answer three basic questions:

1) Does California have subject matter jurisdiction over the alleged injury; if so,

2) Over what parties may California exercise personal jurisdiction; and finally,

3) Amongst those parties, and assuming an injury is proven to exist, who employed applicant for the last year of injurious exposure? Where any otherwise liable employers are unlawfully uninsured, then liability falls back to the last lawfully insured employer. (§ 5500.5.)

Here, there is no issue as to subject matter or personal jurisdiction. The sole question is establishing whether a cumulative injury occurred, and if so, who is liable under section 5500.5. To decide this issue, we must have substantial medical evidence that establishes the last date of injurious exposure. (§ 5500.5; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) In this case, the WCJ excluded all the medical-legal reporting from evidence. Accordingly, no findings can issue on the current record.

The WCJ correctly decided that all the QME reporting obtained in this matter was obtained in violation of sections 4060 and 4062.2. Section 4062.2 clearly states: "(a) Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section." (§ 4062.2(a).) Applicant claims a date of injury in this case of 2013. The parties should have followed the Labor Code in obtaining a QME. The dueling QME system only applies where the date of injury occurred before January 1, 2005. (*Nunez v. Workers' Comp. Appeals Bd*., (2006), 136 Cal. App. 4th 584.)

We make no decision on the merits at this time as no record exists to support such a decision. No exhibits address causation of applicant's injury. The present medical record is deficient as it does not exist. The parties may come to an agreement to withdraw their objections and resubmit the matter on the present medical record, which the WCJ may then review and issue a decision on the merits. In the alternative, the parties may proceed with obtaining a QME through the proper channels.

For the same reason we cannot decide the issue, it was error for the WCJ to find a period of injurious exposure without any medical evidence supporting the finding of fact. The fact that applicant's career may have continued into 1990 does not compel the conclusion that applicant experienced injurious exposure through 1990. Expert medical evidence must support such a conclusion. (See *Hamilton*, *supra*.)

Accordingly, as our Decision After Reconsideration we will rescind the September 4, 2019 F&O and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued on September 4, 2019, is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 16, 2024

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

CLELL HOBSON
GLENN, STUCKEY & PARTNERS, LLP
HANNA, BROPHY, MacLEAN, McALEER & JENSEN, LLP

EDL/mc

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