WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FRANCISCO VALLE, *Applicant*

vs.

BLH CONSTRUCTION COMPANY, INC.; REDWOOD FIRE AND CASUALTY INSURANCE COMPANY, administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES,
Defendants

Adjudication Number: ADJ16513831
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will grant reconsideration, amend Finding of Fact number 1 to find that applicant sustained injury to his cervical spine, lumbar spine, right hand, right shoulder, right knee, and left ankle and that defendant was insured by Redwood Fire and Casualty Insurance Company, administered by Berkshire Hathaway Homestate Companies. We will defer the issue of whether applicant sustained injury to his left shoulder, left hand, and nose, and otherwise affirm the Findings of Fact.

I.

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.
>
> (b)
>
> (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."

According to Events, the case was transmitted to the Appeals Board on July 19, 2024, and 60 days from the date of transmission is September 17, 2024. This decision is issued by or on September 17, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

According to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on July 19, 2024, and the case was transmitted to the Appeals Board on July 19, 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 July 19, 2024.

II.

On January 12, 2023, applicant was evaluated by qualified medical evaluator (QME) Michael J. Oechsel, M.D. (Exhibit 1, Report of Michael J. Oechsel, M.D., January 12, 2023.) By way of history, Dr. Oechsel noted that applicant complained of injury to his nose, neck, back, right

hand, right shoulder, right knee, and left ankle after a fall at work. (Exhibit 1, p. 3; see pp. 3-5.) He stated that: "I will address the orthopedic musculoskeletal injuries in this case. The injuries to the nose and/or dizziness do not fall within my scope of specialty." (*Id.*, p. 2.) He examined applicant and reviewed and summarized medical records. He provided the following diagnoses: neck pain with radicular symptoms; low back pain with radicular symptoms; right hand sprain/strain; right shoulder sprain/strain; right shoulder range of motion deficits; right knee sprain/strain; and left ankle sprain/strain. (*Id.*, p. 14.) He concluded that: "It is my opinion that this mechanism could cause injury to these stated areas of the neck, back, right hand, right shoulder, right knee, and left ankle. From an A0E/COE mechanism, this does appear to be work-related. . . .My opinions as to causation are based on a reasonable degree of medical probability." (*Ibid.*)

An employee bears the burden of proving injury arising out of and in the course of employment (AOE/COE) by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a) & 3202.5.) The Supreme Court of California has long held that an employee need only show that the "proof of industrial causation is reasonably probable, although not certain or 'convincing.'" (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) "That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].)

It is well established that decisions by the Appeals Board 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].) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's

findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].)

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . 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." (*McDuffie*, *supra*, at p. 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Id*.)

Here, we agree with the WCJ that applicant met his burden to show that he sustained injury on July 6, 2022, while employed by defendant as a construction worker. When the parties proceeded to trial on May 29, 2024, they stipulated that applicant claimed injury to his cervical spine, lumbar spine, both hands, both shoulders, right knee, left ankle, and nose. However, there is no medical evidence in the record with respect to the claimed body parts of nose, left shoulder, and left hand, and we note that QME Dr. Oechsel specifically declined to consider the issue of whether applicant sustained injury to his nose as it was out of his specialty. Thus, we conclude that the findings of injury to applicant's cervical spine, lumbar spine, right hand, right shoulder, right knee, and left ankle are supported by substantial medical evidence, but that the record must be further developed with respect to the issue of whether applicant sustained injury to his left shoulder, left hand, and nose. While Dr. Oechsel is an appropriate evaluator to consider the issue of injury to applicant's left shoulder and left hand, since he declined to address the issue of injury to applicant's nose, an additional QME may be appropriate.

Finally, we note that the parties stipulated at trial that defendant was insured by Redwood Fire and Casualty Insurance Company, administered by Berkshire Hathaway Homestate Companies at the time of applicant's injury. The Appeals Board may correct clerical errors at any time. (*Toccalino v. Worker's Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 558 [47

Cal.Comp.Cases 145].) The omission in the Findings of Fact as to the identity of defendant's workers' compensation insurance company appears to be a clerical error, and we will amend Finding of Fact 1 to include that information.

Accordingly, we amend the Findings of Fact to find that applicant sustained injury to his cervical spine, lumbar spine, right hand, right shoulder, right knee, and left ankle and that defendant was insured by Redwood Fire and Casualty Insurance Company, administered by Berkshire Hathaway Homestate Companies. We defer the issue of whether applicant sustained injury to his left shoulder, left knee and nose, and otherwise affirm the Findings of Fact.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact issued on July 1, 2024 by the WCJ is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact issued on July 1, 2024 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant, Francisco Valle, while employed on July 6, 2022, as a construction worker, at Sherman Oaks, California, by BLH Construction Company, Inc., insured by Redwood Fire and Casualty Insurance Company, administered by Berkshire Hathaway Homestate Companies, sustained injury arising out of and in the course of employment to his cervical spine, lumbar spine, right shoulder, right hand, right knee and left ankle. The issue of whether applicant sustained injury to his left shoulder, left hand and nose is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/ s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 17, 2024

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

FRANCISCO VALLE
GOLDMAN MAGDALIN
NABI LAW

LN/md

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION:

On July 18, 2024, the Defendant filed a timely and verified petition for reconsideration dated July 18, 2024, alleging that the undersigned WCJ erred in his Findings of Fact dated July 1, 2024. The Defendant contends that the undersigned WCJ erred in finding the Applicant credible and finding industrial causation based on the panel qualified medical evaluation report of Michael J. Oechsel, M.D., dated January 12, 2023.

STATEMENT OF FACTS:

The Applicant, while employed on July 6, 2022, as a construction worker, claimed to have sustained an industrial injury to his cervical spine, lumbar spine,
both shoulders, both hands, right knee, left ankle and nose [The Applicant issued his notice of intention to amend stipulations on May 31, 2024, to conform to the factual record.] from tripping and falling.

The parties appeared before the undersigned WCJ at trial on May 29, 2024, to adjudicate the compensability of the claim. The Applicant testified as follows:

> "On July 6, 2022, the Applicant, while he worked with co-workers Mario and Ramon Romo, cleaned an area worked on by plumbers. Since debris covered the floor, they created a pathway in order to put things in boxes. An elbow-shaped pipe fell from a full box, bounced off the floor and struck the Applicant's left boot. This caused him to trip and fall on his hands and the right side of his body. After falling, the Applicant told how he felt to Mario and Ramon who both laughed.
>
> The Applicant's supervisor was Richard Kovacs, but he was on vacation in Mexico with his girlfriend. The onsite supervisor at that time was Martin Rios. On July 14, 2022, when the Applicant began experiencing pain, he reported his injury to Mr. Rios. Mr. Rios laughed, refused to believe the Applicant and did not offer to send him for treatment. The Applicant later told a co-worker Juan who responded to see a doctor if in pain." (MOH/SOE, 03/29/2024, 4:8- 17)

Dr. Oechsel, in his panel qualified medical evaluation report dated January 12, 2023, opined on industrial causation as follows:

> "Mr. Valle describes a mechanism where he stepped into a PVC pipe with

his left foot stuck inside and tripped and fell to the ground. This ground level fall onto hard cement is described.

It is my opinion that this mechanism could cause injury to these stated areas of the neck, back, right hand, right shoulder, right knee, and left ankle. From an AOE/COE mechanism, this does appear to be work-related."

On July 1, 2024, the undersigned WCJ issued his Findings of Fact dated July 1, 2024, that, based on the Applicant's credible testimony and Dr. Oechsel's medical-legal opinion, the Applicant sustained an industrial injury to his cervical spine, lumbar spine, both shoulders, both hands, right knee and left ankle, but not to his nose.

Aggrieved by the undersigned WCJ's decision, the Defendant filed its petition for reconsideration.

DISCUSSION:

With respect to the testimonial evidence, a WCJ is not compelled to accept any witness testimony deemed preferential by an aggrieved party. Ultimately, a WCJ is the true finder of fact and is entitled to make his or her own credibility determinations. [*Garza v. Workmen's Comp. Appeals Bd.* (1970) 35 Cal. Comp. Cases 500, 505.] While the WCAB may reject the findings of a WCJ and enter its own findings on the basis of its review of the record, [Labor Code § 5907] when a WCJ's findings are supported by solid, credible evidence, they are to be accorded great weight and should be rejected only on the basis of contrary evidence of considerable substantiality. [*Lamb v. Workers' Comp. Appeals Bd*. (1974) 39 Cal. Comp. Cases 310, 314.]

In this case, despite the mocking criticism by the Defendant and demand for further discussion, the undersigned WCJ found the Applicant credible and rejected as not credible the testimonies of the Defendant's witnesses Richard Kovacs and Ramon Lopez Romo contradicting the Applicant's testimony. The Defendant's personal dissatisfaction with that credibility determination does not constitute contrary evidence of considerable substantiality that would constitute a basis for reversible error. Accordingly, this contention must fail.

With respect to the documentary evidence, while the WCAB may reject the findings of a WCJ and enter its own findings on the basis of its review of the record, [Labor Code § 5907] an aggrieved party's professed dissatisfaction with the conclusions of a WCJ and the unsupported imputation of unreliability of the well-grounded evidence he or she has relied upon is not sufficient to disturb a WCJ's decision. [*Shepard v. County of Los Angeles* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 151, *7-8 (Appeals Board noteworthy panel decision); *Lee v. Mitrant U.S.A. Corp*. (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 610, *5

(Appeals Board noteworthy panel decision); see *Place v. Workers' Comp. Appeals Bd.* (1970) 35 Cal. Comp. Cases, 525, 529 ("factual determinations of the Board must be upheld if there is substantial evidence in their support").]

Finally, for an expert's medical opinion to be substantial evidence it must be framed in terms of reasonable medical probability that is based on pertinent facts, an adequate examination, an accurate history and set forth proper reasoning in support of its conclusions. [*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 621 (Appeals Board en banc).] Reports and opinions are not substantial evidence if they are erroneous, based on facts no longer germane, contain inadequate medical histories and examinations, or rely on incorrect legal theories, surmise, speculation, conjecture, or guess. *[Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 36 Cal. Comp. Cases 93, 97.]

In this case, notwithstanding the Defendant's protesting complaints regarding Dr. Oechsel, he did not speculate or guess in providing his medical opinion on causation. He took an adequate medical history and conducted an adequate examination. Since his opinion relied on germane facts and reasonable medical probability, it was substantial medical evidence. As such, in matters that require scientific medical knowledge, a WCJ may not reject it merely because an aggrieved party is dissatisfied with it. [*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (1968) 71 Cal. Comp. Cases 1687, 1693.]

Therefore, for those reasons, the undersigned WCJ did not err in relying on the medical-legal opinion of Dr. Oechsel to find industrial causation.

RECOMMENDATION:

The undersigned WCJ respectfully recommends that the WCAB grant reconsideration to amend the Findings of Fact as follows:

1. The Applicant, Francisco Valle, while employed on July 6, 2022, as a construction worker, at Sherman Oaks, California, by BLH Construction Company, Inc., sustained injury arising out of and in the course of employment to his cervical spine, lumbar spine, right shoulder, right hand, right knee and left ankle, but not to his left shoulder, left hand and nose.

DATED: July 19, 2024

David L. Pollak
Workers' Compensation
Administrative Law Judge