WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FRANKIE SARMIENTO, *Applicant*

vs.

CAST AND CREW PAYROLL, INC.; PRODUCTION PROCESSING and CIGA by its servicing facility INTERCARE HOLDINGS INSURANCE SERVICES for LEGION INSURANCE COMPANY, in liquidation, *Defendants*

Adjudication Number: ADJ8923383
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant X-Ray Productions seeks reconsideration as an aggrieved party of the March 5, 2024 Findings and Order wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed during the period of November 22, 1978 through January 1, 2000[1] did not sustain industrial injury as a result of cumulative trauma.

Petitioner contends that the WCJ erred in failing to find a continuous trauma and contends that the evidence presented pursuant to Labor Code[2] sections 5500.5 and 5412 establish a cumulative trauma with an end date of either December 5, 1998 or November 22, 1998.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant defendant's Petition for Reconsideration. Our order granting the Petition for

[1] While the Finding of Fact indicates the claimed period of cumulative trauma to be November 22, 1978 through January 1, 2000, this appears to be a typographical error, as the Application for Adjudication dated January 11, 2013 and the trial Minutes of Hearing dated June 28, 2023 lists the period in issue as November 22, 1998 through January 1, 2000.

[2] All further references are to the Labor Code, unless otherwise stated.

Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

We highlight the following legal principles that may be relevant to our review of this matter:

Labor Code Section 3208.1 provides:

> "An injury may be either: (a) 'specific,' occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) 'cumulative,' occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. The date of a cumulative injury shall be the date determined under Section 5412."

Section 5412 provides:

> "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment."

Section 5500.5(a) provides:

> "Except as otherwise provided in Section 5500.6, liability for occupational disease or cumulative injury claims filed or asserted on or after [January 1, 1981] shall be limited to those employers who employed the employee during a period of [one year**] immediately preceding** either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, **whichever occurs first**." (*Emphasis added*).

As stated above, Labor Code section 5412 sets the date of injury for cumulative injury and occupational disease cases, as "that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (Lab. Code, § 5412.) Thus, to determine

the date of applicant's cumulative injury, there must exist a concurrence of disability and knowledge that it was caused by employment. Disability means either compensable temporary disability or permanent disability. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th 998 [69 Cal.Comp.Cases 579] (*Rodarte*).)

The record indicates that on January 11, 2013, defendant Production Processing, Inc./California Insurance Guarantee Association for Legion Insurance Company in liquidation (hereinafter referred to as CIGA), filed an application for adjudication claiming applicant sustained a cumulative trauma while employed by Cast and Crew during the period November 22, 1998 through January 1, 2000. CIGA is a co-defendant in a specific injury case (ADJ464812) filed by the applicant against Production Processing, Inc., and the petitioner in this case, X-Ray Productions, in which applicant claimed industrial injury while employed by defendants on November 22, 1998.

Defendant Cast and Crew disputed liability for the herein claimed continuous trauma injury, and on March 16, 2018, through their attorneys of record, petitioned for dismissal as a party defendant based upon the deposition testimony of the applicant that he did not perform any work after his specific November 22, 1998 date of injury.

This matter was thereafter set for trial for June 28, 2023 at which time all issues other than injury arising out of and in the course of employment during the period November 22, 1998 through January 1, 2000 were ordered deferred.

At trial, applicant was the sole witness, and testified that he was injured on a specific day in November 1998. He stated he does not understand what a cumulative trauma claim is, and did not feel as though he suffered a CT claim from 1998-2000. He further testified that he was honest and truthful with Dr. Berman, and that he although the payroll records show him continuing to work as a grip, he was not performing any work that would mirror the work of a construction worker. (Minutes of Hearing/Summary of Evidence, February 7, 2024, p. 4, lines 2-4, 19-21).

The parties introduced into evidence medical reporting, which included the medical reports and deposition transcripts of Jeffrey Berman, M.D., who was the Agreed Medical Examiner in the November 22, 1998 specific injury claim.

In his medical reporting of May 25, 2011, Dr. Berman's discussion regarding any continuous trauma injury after a review of the payroll records for applicant with Cast and Crew was as follows:

> The parties did provide records from Cast and Crew Production Payroll. This does change some conclusions. The applicant had informed me that he had not worked since the incident in November of 1998. In contrast, he did return to work. There are entries in the payroll records, noting that the applicant was paid for work activities subsequent to the subject incident. This was noted as well in the September 17, 2008 joint interrogatory. He worked as a production assistant. For a number of months up until June of 1999, he worked as a grip. I was asked whether the applicant had sustained a continuous trauma.
>
> Assuming that he indeed performed physical activities upon returning to work after the subject incident, then I believe that this realistically would have affected his condition adversely to some extent. This would be a smaller component. Clearly, the traumatic incident was most significant.
>
> I would suggest that the subsequent period of work activities would amount to 10% attributed to continuous trauma.
> I would therefore modify conclusions. The assumption is that he did in fact perform physical activities during that subsequent period of time. Obviously, if he performed less physical activities, then my opinion would change with regard to whether there was a continuous trauma.
>
> Assuming he did perform physical activities during that period of time, then I would apportion 65% to the subject incident and 10% to subsequent continuous trauma, with 25% to nonindustrial causation.
> (Ex. D, report of Jeffrey Berman, M.D., May 25, 2011, p. 2-3)

There appear to be no other medical reporting or evaluations in the current record specifically addressing the issue of the herein claimed continuous trauma period, either in the form of treating medical reports or reports by appointed qualified or agreed medical examiners.

Labor Code section 4060 applies to disputes over the compensability of any injury, and medical evidence is required if there is an issue regarding the compensability of the claim. Further, for injuries occurring prior to January 1, 2005, section 4062, as it existed before its amendment by SB 899, continues to provide the procedure by which AME and QME medical-legal reports are obtained in cases involving represented employees. *Simi v. Sav-Max Foods, Inc*. (2005) 70 Cal. Comp. Cases 217, 2005 Cal. Wrk. Comp. LEXIS 3 (En Banc).

With respect to the testimony of the applicant at trial, in his Report, the WCJ stated:

> The Applicant was a credible witness who testified he physically did not work for any employer as a production assistant, electrician, or grip after the specific injury of November 22, 1998 (Minutes of Hearing February 2, 2024, page 5, lines 3-6). Although the Applicant was compensated for work until approximately June 1999, the Applicant did not perform any physical work for the employer, but clocked in as he was owed "favors" from work he preformed [sic]on other jobs (Minutes of Hearing February 2, 2024, page 4, lines 13-17).
>
> The Applicant did not engage in physical activity for the Employer after November 22, 1998 due to his physical limitations, and light duty was not available to him (Minutes of Hearing February 2, 2024, page 6 lines 2-4).
>
> Based on the credible testimony of the Applicant, it is found the Applicant did not work for any employer doing physical work after November 22, 1998 and, thus, there is not a cumulative trauma claim
>
> …
>
> The Applicant's testimony is clear, unambiguous, and credible, ***he did not physically work for ANY EMPLOYER AFTER NOVEMBER 22, 1998***. Without physically working, which the applicant was clear he could not do after the date of injury, there cannot be work disabling injury on a cumulative trauma basis. The Applicant would need to physically work in order to support a cumulative trauma claim. (Report, pg.2-3).

Any decision of the WCAB must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [520 P.2d 978, 113 Cal. Rptr. 162] [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [475 P.2d 451, 90 Cal. Rptr. 355] [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [463 P.2d 432, 83 Cal. Rptr. 208] [35 Cal.Comp.Cases 16].)

In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [445 P.2d 313, 71 Cal. Rptr. 697] [33 Cal.Comp.Cases 660]; *Travelers Ins. Co. v. Industrial Acc. Com. (Odello)* (1949) 33 Cal.2d 685, 687-688 [203 P.2d 747] [14 Cal.Comp.Cases 54]; *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700-1702, 1705 [20 Cal. Rptr. 2d 778] [58 Cal.Comp.Cases 313].)

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. (*Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399, 407 [445 P.2d 294, 71 Cal. Rptr. 678] (a mere legal conclusion does not furnish a basis for a finding); *Zemke v. Workmen's Comp. Appeals Bd., supra, 68* Cal.2d at pp. 799, 800-801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence); see also *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 [443 P.2d 777, 70 Cal. Rptr. 193] (the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based). (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, it is unclear from our preliminary review whether the existing record is sufficient to support the decision, order, award, and legal conclusions of the WCJ, as well as whether further development of the record may be necessary with respect to the issues noted above.

II.

In addition, under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com*. (1958) 50 Cal.2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an

opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd*. (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd*. (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra,* at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Labor Code section 5901 states in relevant part that:

> No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

III.

Accordingly, we grant petitioner X-Ray Production's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed to WCABmediation@dir.ca.gov .

For the foregoing reasons,

IT IS ORDERED that petitioner X-Ray Production's Petition for Reconsideration of the Findings and Order issued on March 5, 2024 of a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 23, 2024

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

FRANKIE SARMIENTO
LEYVA & NIGHT
NEWHOUSE & CREAGER
LAW OFFICES OF ANDERSON & CHANG
MULLEN & FILIPPI
GRAIWER & KAPLAN

LAS/abs

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