WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE RAMIREZ, ***Applicant***

vs.

ALTMAN SPECIALTY PLANTS;
TRAVELERS, ***Defendants***

Adjudication Number: ADJ9589869
Riverside District Office

OPINION AND ORDER
CORRECTING CLERICAL ERROR

It has come to the Appeals Board's attention that its decision served on June 20, 2024 contains a clerical error consisting of the wrong date of service. The decision served on June 20, 2024 incorrectly states a service date of June 2, 2024.

We correct this clerical error by virtue of this decision without granting reconsideration, as such errors may be corrected without further proceedings at any time. (See 2 *Cal. Workers' Comp. Practice* (Cont. Ed. Bar, March 2019 Update) Supplemental Proceedings, § 23.74, p. 23-76.)

For the foregoing reasons,

IT IS ORDERED that the clerical error consisting of the wrong date of service set forth in the Board's **OPINION AND DECISION AFTER RECONSIDERATION** is **CORRECTED** to reflect the following date of service: June 20, 2024.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 26, 2024

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

JOSE RAMIREZ
LAW OFFICES OF JESSE A. MARINO
SIEGEL, MORENO & STETTLER

PAG/abs

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

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

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vs.

ALTMAN SPECIALTY PLANTS;
TRAVELERS, *Defendants*

Adjudication Number: ADJ9589869

Riverside District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's Petition for Reconsideration in order to further study the factual and legal issues.[1] This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings of Fact (Findings) issued on September 10, 2021, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that while employed by defendant on April 24 or 21, 2014, applicant sustained industrial injury to his left leg with amputation of the leg above the knee.

Defendant contends that the WCJ erred because the evidence does not establish industrial injury because the medical reporting is conclusory and does not constitute substantial medical evidence.

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

[1] Commissioner Sweeney, who was on the panel that granted reconsideration, no longer serves on the Appeals Board. Another panelist was appointed in her place.

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 10, 2021 Findings and return this matter to the trial level for further proceedings.

FACTS

The WCJ noted the following procedural history in his Opinion on Decision:

> This case had originally proceeded to a two-day trial on August 27, 2018 and October 8, 2018. On November 2, 2018, this WCJ issued a decision, denying the case. Applicant's attorney filed a Petition for Reconsideration on November 27, 2018, and the Workers' Compensation Appeals Board ("WCAB") denied reconsideration on January 28, 2019. On March 11, 2019, applicant's attorney filed a Writ with the Court of Appeal. On June 28, 2019, the Court of Appeal remanded the case at the request of the WCAB. The WCAB issued an Opinion and Decision after Remittitur on January 15, 2020, returning the case to the trial level for further development of the record.
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> The matter returned to trial on August 19, 2021, **but applicant was not present as court learned applicant had died**. The parties submitted the deposition transcript of Ramesh Karody, M.D., the panel QME, dated January 29, 2021, and an offer of proof from Jesse Perez, a defense witness, was read into the record after both attorneys agreed to the language. Defense counsel filed a trial brief on August 18, 2021. Applicant's attorney submitted a post-trial brief on August 27, 2021, and defense counsel filed a responsive post-trial brief on September 3, 2021. The case was submitted on September 3, 2021.

(Opinion on Decision, September 10, 2021, p. 1, (emphasis added).)

The WCJ summarized the facts of this case and analyzed injury as follows:

> In this case, it is undisputed that applicant contracted streptococcus viridans bacteremia according to the final diagnoses when applicant was discharged from the hospital after his surgeries. (Def. Exh. C, Parkview records, p. 1.) On October 3, 2017, applicant was evaluated by panel qualified medical evaluator ("PQME") Ramesh Karody, M.D. (Joint Exh. X, Joint Panel Qualified Medical Examination report, October 3, 2017.) Dr. Karody also diagnosed applicant with post streptococcus viridans bacteremia with infected left toe necrosis. (*Id.*, p. 18.)
>
> The dispute then turns to when and where streptococcus viridans entered applicant's body. Applicant stated scratches and pokes would

occur on his hands and feet from trimming the rose bushes. And pokes were common occurrences. He did not report the incidences of being poked because it was a normal part of work and applicant did not pay attention to it. (MOH/SOE Trial Day 1, 8/27/18, pp. 5:4-8.) During cross-examination, applicant reiterated he would also get scratches and cuts from pruning plants but never reported such problems because he felt it was the normal part of work. (*Id.*, p. 9:16-20.)

Erika Barajas, Office Manager for the location where applicant worked, testified that "injuries due to thorns are a common occurrence and they happen frequently," and include "scrapes, cuts, and scratches." (October 8, 2018 MOH, p. 4.) Employees are trained how to make a report of injury to their supervisor or to the office. (*Id.*, p. 3.) Although employees are trained to report all injuries, "big or small," employees do not report their thorn injuries on a daily basis. (*Id.*) Ms. Barajas testified that applicant received gloves when he was hired, and that he never told her that he had misplaced his gloves. (*Id.*,p. 3.)

Jesus Perez confirmed "people can receive cuts and pokes from the thorns from rose bushes." (August 27, 2018 MOH, p. 13.) Applicant was given gloves when he was hired and replacements when needed, but was not given rubber boots because he did not work in the irrigation department. (*Id.*, pp. 13-14.) Mr. Perez testified that he "believes the applicant was a regular general laborer" who worked in the "rose section," which consisted of 55 acres. (August 27, 2018 MOH, p. 10.) In the offer of proof, Jesus Perez would testify he cannot prove that the applicant did not cut, scrape, puncture, or in any other manner sustain an opening to his skin at or near the foot while working for Altman Plants, no matter how trivial of an opening. (MOH/SOE, Trial day 3, 8/19/21, p. 3:19-21.)

Dr. Karody had initially assessed applicant's condition and provided detailed opinions about the mechanism of injury. In his initial QME report, Dr. Karody stated applicant had uncontrolled diabetes mellitus which was pre-existing. Dr. Karody further stated applicant also had uncontrolled hypertension and an acute infection caused by streptococcus viridans. (Jt. Exh. X, pp. 21-22, QME report by Ramesh Karody, M.D., 10/3/17.) Dr. Karody continued, "Even though the infection is unrelated to any chemicals or soaking of his foot in water, it is highly likely that he had introduced the infection to the skin injury or skin breakdown in his left foot." (*Id.*, p. 22.)

At the doctor's first deposition, Dr. Karody confirmed that placing a foot in water would not cause the infection to attach to the body. (Jt. Exh. Y, Deposition transcript of Dr. Karody 3/23/18, pp. 26:10-14; 28:19-21.) The doctor opined the mechanism of injury had to have been a puncture in the skin or a breakdown of the skin for bacteria to enter. (*Id.*, pp. 26:15-19; 27:3-6.) Dr. Karody further opined a bacterial infection to erode the bone takes a few days to a few weeks. (*Id.*, p.

> 29:18-25.) And Dr. Karody found it would be unusual to see applicant's type of necrosis and osteomyelitis to develop in a matter of two days; he would assume the infection would have been present for a few weeks. (*Id.*, p. 30:6-16.)
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> Dr. Karody further stated that stepping on a rose bush itself can promote an infection (*Id.*, p. 28:17-18). Dr. Karody confirmed the claim would be industrial if applicant had a puncture wound to his foot or if applicant had stepped on a sharp stone or some other sharp object or something that would puncture his foot or cause any type of breakdown of the skin. (*Id.*, p. 35:6-21.)
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> At the second deposition, Dr. Karody stated with reasonable medical probability that the entry wound site was probably the foot, starting with the great toe. ((Joint Exh. AA, PQME deposition of Dr. Karody, January 29, 2021, p. 18:3-12.) Dr. Karody provided the theory of a possible mechanism of injury as stepping on a thorn or a rosebush, even though applicant had never reported such occurrence to either the doctor or his employer. The doctor confirmed it was possible that applicant may have stepped on a thorn and never noticed it. (*Id.*, p. 21:17-18.) Dr. Karody further stated, "People do get scratches. Sometimes they go . . . between rosebushes and they come back home with scratches . . . ." (*Id.*, p. 21:20-24.) Dr. Karody concurred that another entry of strep viridans through the bloodstream is through the oral cavity. (*Id.*, p. 24:18-20.)
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> Dr. Karody concluded: "In all probability, it is the streptococcus viridans that caused the causative factor for his foot infection and consequence amputation." (Joint Exh. AA, PQME deposition of Dr. Karody, January 29, 2021, p. 26:17-19.)

(*Id*. at pp. 3-4.)

DISCUSSION

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).) "When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

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).)

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 §§ 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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> * * *
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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).)

The issue of proximate cause for otherwise non-industrial injuries was fully discussed by the Supreme Court in *Latourette*:

> There are two principal exceptions to the general rule of non [ ] compensability for nonoccupational disease, or treatment therefor. First, if the employment subjects the employee to an increased risk

> compared to that of the general public the injury is compensable. Second, if the immediate cause of the injury is an intervening human agency or instrumentality of the employment, the injury is compensable. (Citation.)

(*Latourette v. Workers' Comp. Appeals Bd*., (1998) 17 Cal.4th 644, 654 [63 Cal.Comp.Cases 253 (citation omitted).)

The alleged injury in this matter is a bacterial infection. The parties have litigated this case as if they were litigating a direct occupational disease. A direct occupational disease occurs where the injured worker's point of infection can be established through evidence. Here, no such evidence is in the record, and it does not appear that such evidence exists. As neither party can establish the direct cause of the bacterial infection, the appropriate legal standard in this case is whether the infection meets the causation threshold for nonoccupational disease per *Latourette*. (*Ibid*.) Where it is impossible to pinpoint the direct cause of an infection, we must determine whether applicant's occupational duties exposed applicant to an increased risk of acquiring the infection to that of the general public. (*Ibid*.) This question was not presented to any of the doctors. Accordingly, the record requires development.

Accordingly, as our Decision After Reconsideration we will rescind the September 10, 2021 Findings of Fact.

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].) A significant issue was not raised by the trial court or the parties, but requires attention upon return. It does not appear that all proper parties were joined when this matter was resubmitted for trial.

Per the WCJ's Opinion, applicant was not present for trial because applicant has died.

Parties must properly identify themselves when appearing before the Appeals Board. (Cal. Code Regs., tit. 8, § 10390; see also, *Coldiron v. Compuware Corporation* (2002) 67 Cal.Comp.Cases 289 (Appeals Board en banc); *Coldiron v. Compuware Corporation* (2002) 67 Cal.Comp.Cases 1466 (Appeals Board en banc).)

All necessary parties must be joined prior to proceeding with a workers' compensation case. (Cal. Code Regs., tit. 8, § 10382.) "In death cases, all persons who may be dependents shall

either join or be joined as applicants so that the entire liability of the employer or the insurer may be determined in one proceeding." (*Ibid*.)

"The authority of an attorney necessarily ceases with the death of the client, for no one can act for a dead man. After the death of the client, his attorney therefore becomes a stranger to the proceeding." (*Swartfager v. Wells* (1942) 53 Cal.App.2d 522, 528; see also Civ. Code, § 2356, ["(a) Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by any of the following: . . . (2) The death of the principal."].)

It has long been held that an attorney does not have an interest in the subject of the lawsuit where attorney fees are contingent upon the outcome of the lawsuit. (*Isrin v. Superior Court of Los Angeles County*, (1965) 63 Cal. 2d 153.)

> [I]n litigation an attorney conducts for a client he acquires no more than a professional interest. To hold that a contingent fee contract or any "assignment" or "lien" created thereby gives the attorney the beneficial rights of a real party in interest, with the concomitant personal responsibility of financing the litigation, would be to demean his profession and distort the purpose of the various acceptable methods of securing his fee.

(*Id*. at 161.)

To be clear, an attorney is free to file a lien for the work performed in a case up to a client's death. However, when a client dies, the attorney may not act as an agent of a deceased person without consent.[2] Accordingly, the attorney must notify the parties and the court of the death and either withdraw representation or seek to represent an appropriate dependent or estate representative.

The appropriate representative to receive payment of inter-vivos benefits is found in Labor Code section 4700, which states:

> The death of an injured employee does not affect the liability of the employer under Articles 2 (commencing with Section 4600) and 3 (commencing with Section 4650). Neither temporary nor permanent disability payments shall be made for any period of time subsequent to the death of the employee. **Any accrued and unpaid compensation shall be paid to the dependents, or, if there are no dependents, to the personal representative of the deceased**

[2] The Appeals Board may proceed to act on a petition for reconsideration so long as it was filed prior to applicant's death. (Civ. Proc., § 377.21, ["A pending action or proceeding does not abate by the death of a party if the cause of action survives."].)

> **employee or heirs or other persons entitled thereto, without administration.**

(Lab. Code, § 4700, emphasis added.)

Accordingly, where a client dies and inter-vivos benefits are in dispute, the parties must join "all persons who may be dependents[.]" (Cal. Code Regs., tit. 8, § 10382(c).) If the descendent had no dependents, the parties must determine and then join a personal representative or other heirs, which requires evidence of a will or other estate plan, or in the absence of such evidence, the parties must follow the laws of intestate succession. (Prob. Code, §§ 6400, et. seq.)

The estate is not required to proceed through probate court. However, if probate has been established, the parties may simply join the estate representative appointed by the Probate Court.

It does not appear that any person was joined either as a dependent or as an estate representative of Jose Ramriez. It appears that this matter proceeded to trial in error as all necessary parties were not joined. Upon return, the parties must investigate this issue and ensure that all necessary parties are joined prior to proceeding with discovery, settlement, or resubmitting the issue for decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact issued on September 10, 2021, is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 2, 2024

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

JOSE RAMIREZ
LAW OFFICES OF JESSE A. MARINO
SIEGEL MORENO & STETTLER

EDL/mc

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