WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

RACHEL DAVIS, *Applicant*

vs.

BARRETT BUSINESS SERVICES, INC.; ACE AMERICAN INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ14425169
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Order of August 12, 2024, wherein it was found that applicant did not sustain industrial injury to the kidney while employed during a cumulative period ending February 28, 2021. The WCJ thus ordered that applicant take nothing by way of her workers' compensation claim.

Applicant contends that the WCJ erred in finding that she did not sustain industrial injury. Applicant argues that the WCJ should have followed the opinions of treating physician Robert Harrison, M.D. rather than the opinions or panel qualified medical evaluator internist Robert Noriega, Jr., M.D. We have received an Answer from the defendant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

As explained below, although the WCJ was correct in determining that applicant had not established industrial injury on the current record, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level for further development of the record and decision so that this matter can be determined on an augmented record.

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.

(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.

(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 23, 2024, and 60 days from the date of transmission is Friday, November 22, 2024. This decision is issued by or on Friday, November 22, 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.

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 23, 2024, and the case was transmitted to the Appeals Board on September 23, 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 23, 2024.

Turning to the merits, in this matter, QME Dr. Noriega examined the applicant twice and wrote several reports and sat for deposition. Dr. Noriega noted that applicant had been diagnosed with tip variant focal segmental glomerulosclerosis (FSGS). Applicant claims that chemicals that she was exposed to at work caused or contributed to the development of her FSGS. Dr. Noriega reviewed data sheets related to the chemicals that applicant was exposed to at work and reviewed applicant's voluminous medical records. While Dr. Noriega noted that industrial contribution was a possibility, he was unable to state that industrial contribution was medically probable. He testified at his deposition that the "record at this time substantiates or supports idiopathic or primary focal segmental glomerulosclerosis." (October 24, 2023 deposition at p. 26.) Nevertheless, Dr. Noriega testified that he remained "open to any discovery of information of any … new information … on the employment disclosures." (October 24, 2023 deposition at p. 26.)

The medical record also contains an April 28, 2024 report from treating physician Dr. Harrison. Dr. Harrison apparently examined the applicant twice, on May 2, 2021 and on July 6, 2023. According to Dr. Harrison's report, he reviewed only Dr. Noriega's medical-legal reports and not any medical treatment records before rendering his opinion. (April 28, 2024 report at p. 2.) Dr. Harrison concluded that applicant's FSGS was industrial, relying primarily on "medical and scientific literature pertaining to the relationship between organic solvent (hydrocarbon) exposure and chronic kidney disease." (April 28, 2024 report at p. 3.)

In her Report, the WCJ explains that she found Dr. Harrison's report to not constitute substantial medical evidence, writing:

> Dr. Harrison's report fails to state within reasonable medical probability based on pertinent facts and adequate examination and history that Applicant's injury arose out of employment or occurred during the course of employment. Applicant argues that Dr. Harrison demonstrated knowledge of the issue and correlated his opinion with scientific studies. However, this is merely window dressing as Dr. Harrison failed to take into consideration any of the facts or history beyond his assertion of scientific evidence supporting causation. Dr. Harrison generally refers to her condition as kidney disease when citing alleged scientific studies. This general terminology can result in confusion, as Applicant was not diagnosed with chronic kidney disease but rather FSGS. These two conditions, although causing damage to the kidneys, cannot be identified as one in the same as there are different symptoms, classifications and pathologies. Dr. Harrison's reliance on the general term "chronic kidney disease" is simply because he could not or did not find any studies which discuss FSGS. Dr. Harrison's failure to specifically address FSGS results in a reporting that is incorrect and based on surmise and conjecture.

> As to the scientific studies cited, Dr. Harrison provides citation to studies linking exposure to mixed organic solvents resulting in increased risk for kidney disease. On its face, while it suggests exposure can result in increased risk of development of kidney disease, the citation to studies by Dr. Harrison is nothing more than speculation. There is no indication Dr. Harrison considered the particular substances Applicant had exposure to and whether those substances are identified as part of the study. Furthermore, there is no information to determine if the study cited considered Applicant's FSGS condition. Dr. Harrison did not pour over the thousands of treatment records that Dr. Noriega did, nor did Dr. Harrison provide any information or rebuttal as to the findings of Dr. Noriega. Simply put, Dr. Harrison drafted a rather hasty report finding general scientific studies related to kidney disease risk increasing in the presence of mixed organic solvent usage, and concluded it was "likely" that exposure caused her condition. This conclusion fails to meet the burden of proof and substantial medical evidence standard to justify a finding of AOE/COE.

(Report at p. 3.)

Given that Dr. Noriega was open to the possibility of industrial contribution and open to reconsider his opinion if more information was presented to him, we will grant reconsideration and rescind the WCJ's opinion in order for applicant to procure a report from Dr. Harrison addressing the deficiencies found by the WCJ. In the further proceedings, Dr. Harrison should comment on whether any studies or applicant's clinical presentation speak to the specific chemicals that applicant was exposed to or to the specific condition she has been diagnosed with. Dr. Noriega should be given the opportunity to review and comment upon Dr. Harrison's reporting and any new evidence.

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 proceedings and decision on the issue of industrial causation. In granting reconsideration and returning this matter to the trial level for further proceedings and decision, we are mindful of the fact that "[t]he applicant for workers' compensation benefits has the burden of establishing the 'reasonable probability of 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].) Applicant is reminded that she will have the burden of establishing industrial injury in the further proceedings. We express no opinion on the ultimate resolution of any issue in this case.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Order of August 12, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order of August 12, 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/ _ KATHERINE A. ZALEWSKI, CHAIR __

I CONCUR,

/s/ _ ANNE SCHMITZ, DEPUTY COMMISSIONER __

JOSÉ H. RAZO, COMMISSIONER _____
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 22, 2024

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

RACHEL DAVIS
BOXER & GERSON
HERMANSON, GUZMAN & WANG

DW/oo

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