WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SERGIO MARTINEZ, *Applicant*

vs.

GIANT JIM PEST CONTROL, INC.; EVEREST NATIONAL INSURANCE COMPANY, administered by GALLAGHER BASSETT SERVICES, *Defendants*

Adjudication Number: ADJ10933797
Lodi District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant Everest National Insurance Company has petitioned for reconsideration of the Findings of Fact, Orders, and Award issued and served by the workers' compensation administrative law judge (WCJ) in this matter on March 26, 2024. In that decision, the WCJ found that applicant sustained a cumulative trauma (CT) injury arising out of and in the course of employment (AOE/COE) to the lumbar spine, bilateral knees, bilateral shoulder and bilateral hips as well as to his respiratory system during the CT period ending on November 1, 2016. The WCJ further found that pursuant to the stipulation of the parties, and the fact that the respiratory system has been found to be an industrial injury, the permanent disability is 100%, based upon substantial evidence. Future medical care and attorney fees were awarded, and liens were deferred. The parties were ordered to adjust benefits according to the findings of fact, with jurisdiction reserved.

Petitioner contends that the evidence does not justify the findings of fact that applicant sustained respiratory injury arising during the period of Everest National Insurance Company's coverage, as the applicant was exposed, during his 25-year employment history, to different pest control products, beginning in 1991, decades before defendant's coverage took effect.

Defendant also asserts that the applicant's orthopedic injuries are separate from the occupational respiratory disease, and that the comingling of these continuous trauma injuries was in error based upon an incorrect analysis of the period of exposure for, and proximate cause of, the respiratory disease.

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 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.

PROCEDURAL HISTORY

Applicant filed an Application for Adjudication of Claim (Application) for benefits on July 11, 2017, claiming cumulative trauma to his knee, shoulders, upper extremities, neck, and respiratory system AOE/COE during the period November 1, 2015 through November 1, 2016 as a result of his employment with defendant.

Per the stipulations of the parties at the trial on February 1, 2024, injury AOE/COE during the CT period ending on November 1, 2016 was admitted as to the lumbar spine, bilateral knees, bilateral shoulders, and bilateral hips. Applicant additionally claimed industrial injury to his respiratory system during the cumulative trauma period ending on November 1, 2016, which was denied by defendant. The parties stipulated that the applicant's permanent disability rated to either 89% based upon applicant's orthopedic injuries, or 100% , if the respiratory system was "found to be industrial." (Minutes of Hearing and Summary of Evidence (Minutes), dated February 1, 2024, p. 3).

Issues were posed as follows:

1. Body parts injured. The body part in dispute is the respiratory system.
2. Permanent disability. Is permanent disability 89 percent or 100 percent.
3. Need for further medical treatment regarding the respiratory system, if found industrial.
4. Attorney fees.

5. Substantial evidence of the reporting.

6. Liens are deferred.

(*Id.* at p. 3:8.)

No other issues are listed or identified, including the issue of date of injury.

The medical evidence and exhibits were entered into evidence, and applicant and defendant's manager testified at trial, after which the matter stood submitted.

On March 26, 2024, the WCJ issued her Findings and Award in which she found that during the CT period ending on November 1, 2016, applicant sustained a cumulative trauma injury AOE/COE to his lumbar spine, bilateral knees, bilateral shoulder, as well as to his respiratory system. As a result of same, and the stipulations of the parties, applicant was found to be 100% permanently disabled.

It is from this Findings and Award that defendant seeks reconsideration.

I.

Defendant claims in their petition that the evidence does not support the finding that the applicant's injurious exposure to chemicals first occurred in the period of their coverage; to wit, 2015-2016.

Instead, the defendant argues that the evidence supports that applicant's occupational disease arose in the 1990's and well before their liability for the employer's coverage.

As stated by the WCJ in her Report:

> Petitioner is aggrieved as they are the carrier for the last year of work for this long-term pest abatement worker. Petitioner has alleged in their Petition for Reconsideration, that the court failed to determine a date of the CT to the respiratory system and that the decision is thus faulty. The court directs your attention to the findings of fact #6 which states, "during the CT period ending on 11/1/2016, the applicant sustained a cumulative trauma injury arising out of and in the course of employment to the respiratory system." Thus, the court has defined a CT ending date.

The WCJ bases her findings of industrial respiratory injury upon the Agreed Medical Reporting of Peter Yip, M.D., and Raye Bellinger, M.D., stating that their medical reporting was based upon reasonable medical probability, and not speculative (Report, p. 3).

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

Labor Code Section 3208.1[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, 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].)

While defendant asserts that the applicant had a history consistent with the development of respiratory symptoms in 1995 and thereafter, in order for a date of injury under section 5412 to be found, there needs to be concurrence of disability and knowledge.

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

The WCJ found that the first known temporary disability period for applicant related to respiratory issues did not occur until November 1, 2018. The WCJ further found that the first mention of a work-related causation providing applicant knowledge of his work activities was the qualified medical evaluator (QME) report of Dr. Yip. He refers to a QME report in 2018[2] (Report, p. 3).

The WCJ states:

> Petitioner does not dispute the orthopedic injury stipulation and its permanent disability level. Petitioner does not dispute the stipulation of a 100% permanent disability rating if respiratory injury is found. Petition for Reconsideration does not dispute the fact that that respiratory injury was found. Petitioner does not dispute that there is a need for further medical treatment regarding the respiratory system injury. The only fact that petitioner is disputing is the date of the cumulative trauma claim. All other findings remain intact. (Ibid, p.3)

We preliminarily note that there is no distinct period of industrial exposure found by the WCJ, although the initial Application only cites to one year for this long-term employee.[3] While the parties stipulated to a CT period "ending on November 1, 2016," which was the last date of applicant's employment, there is no start date for the continuous trauma period.

Insofar as the defendant's argument is partly premised on claiming another carrier would be responsible for this claim due to a period of industrial exposure prior to their period of coverage, and **not** whether this employer is liable for applicant's injury, this period (assumed to be the entire period of applicant's employment), would be relevant. [4]

It is also noted that petitioner is not alleging that the applicant's respiratory injury isn't industrial; they instead argue that they would not be the responsible party for purposes of payment and liability for the injury. They further argue that the applicant's period of exposure and "proximate cause" for the respiratory issues is outside of their coverage period.

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

[2] This report does not appear to be in evidence.

[3] The record indicates applicant was employed by the defendant employer commencing in approximately 1992. (Minutes, 2/1/2024, p. 6:2-3).

[4] When a continuous trauma injury is plead, the entire period of industrial exposure may be at issue, and thus is often plead, especially if the date of injury is in issue.

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 defendant'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 defendant's Petition for Reconsideration of the Findings and Order issued on March 26, 2024 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 A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 17, 2024

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

SERGIO MARTINEZ
LAW OFFICE OF DANIEL MAST
ALBERT & MACKENZIE
OFFICE OF THE DIRECTOR-LEGAL UNIT (OAKLAND)
EMPLOYMENT DEVELOPMENT DEPARTMENT

LAS/abs

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