WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SHIVA HAZEGHAZAM, *Applicant*

vs.

COUNTY OF SACRAMENTO, Permissibly Self-Insured, *Defendant*

Adjudication Number: ADJ11296458
Sacramento 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 Award of July 23, 2024, wherein it was found that while employed on October 13, 2027 as a probation officer, applicant sustained industrial injury to her right knee, right ankle, and right foot, but not to her left knee. It was found that applicant's industrial injury caused permanent disability of 2% after apportionment. It was also found that applicant's injury did not require further medical treatment.

Applicant contends that the WCJ erred in not finding a compensable consequent injury to the left knee and in finding permanent disability of only 2%.

As explained below, we will grant reconsideration, rescind the WCJ's decision and return this matter to the trial level for further development of the medical record and decision.

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 5, 2024, and 60 days from the date of transmission is Monday, November 4, 2024. This decision is issued by or on Monday, November 4, 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 5, 2024, and the case was transmitted to the Appeals Board on September 5, 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 5, 2024.

Turning to the merits, the WCJ based her decision on the opinions of panel qualified medical evaluator orthopedist Robert Henrichsen, M.D., who authored 12 reports and sat for one deposition session. Dr. Henrichsen described a history that applicant's right knee "popped" while

running up the stairs at work. (September 25, 2018 report at p. 2.) Applicant underwent an MRI which showed chondromalacia and a medial meniscal tear. Applicant underwent surgery on May 1, 2018. Following the surgery, the applicant was having difficulty extending her right ankle, so she would walk on her metatarsal heads, which aggravated pre-existing plantar fasciitis. Applicant reported that in June of 2018, she fell and contused her left knee. (September 25, 2018 report at pp. 2-3.)

Ultimately, Dr. Henrichsen found that the only compensable permanent disability attributable to the industrial injury was the meniscal tear while going up the stairs. Dr. Henrichsen found that the aggravation of the plantar fasciitis had resolved and that the other right lower extremity impairment was non-industrial. (July 3, 2019 report at p. 2.) Applicant also complained of left knee symptoms theorizing that her left knee symptoms were caused by her June 2018 fall or by favoring her right knee. Applicant eventually underwent a meniscectomy in March of 2020. (June 25, 2020 report at p. 2.) Dr. Henrichsen opined that the left knee meniscectomy was non-industrial, explaining that it was not caused by the June 2018 fall because there was no record of applicant complaining of left knee symptoms after the fall, and that his own clinical evaluation during this period did not evidence any meniscal tear. (March 12, 2021 report at p. 5.) Dr. Henrichsen also opined that any left knee injury was not a result of favoring the right knee because the right knee had significantly improved by the time of the left knee complaints and because Dr. Henrichsen did not believe that favoring one extremity could produce a meniscal tear in the opposite extremity. (March 12, 2021 report at p. 5; July 19, 2022 report at pp. 16-17; My 15, 2023 report at p. 4.)

Applicant was also evaluated by secondary treating physician Ritch V. Jacobs, D.C., who in addition to the history taken by Dr. Henrichsen also documented a later fall injuring the left knee. (January 3, 2023 report at p. 2.) Dr. Jacobs found whole person impairment of 7% with regard to the right knee based on gait derangement (AMA Guides, Table 17-5, p. 539.) Although Dr. Jacobs noted degenerative changes that preceded the industrial injury he attributed 90% of applicant's impairment to industrial factors given her 18-20 years of employment. With regard to the left knee, Dr. Jacobs found industrial injury based on overcompensation of her right knee injury and found 5% whole person impairment. Dr. Jacobs opined that applicant should have a pain add-on of 1% for each knee, and opined that 40% of the left knee impairment was attributable to non-industrial factors. (January 3, 2023 report at pp. 6-8.)

Given the disparity of the medical opinions in the record and questions regarding whether the medical opinions utilized the correct legal standard, 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. In the further proceedings, if the parties cannot agree to an agreed medical evaluator, the WCJ should consider appointing an independent medical evaluator (Lab. Code, § 5701.)

In reanalyzing the issues in this case, we note that a disabling incident sustained as a consequence of a prior industrial injury generally constitutes compensable "new and further disability" attributable to the original injury. (See generally *State Comp. Ins. Fund v. IAC* (*Wallin*) (1959) 176 Cal.App.2d 10, 13 [24 Cal.Comp.Cases 302] [amputated finger using power saw at home which resulted from vision problems from an industrial injury constituted "new and further disability" caused by prior industrial injury]; *Beaty v. Workers' Comp. Appeals Bd.* (1978) 80 Cal.App.3d 397, 401 [43 Cal.Comp.Cases 444] [a fall off of a ladder while helping a family member build a swimming pool caused by a prior industrial shoulder injury constituted "new and further disability" caused by the prior industrial shoulder injury]; *Sedam v. Workers' Comp. Appeals Bd.* (2011) 76 Cal.Comp.Cases 272, 274 [writ den.] ["compensable consequence injuries relate[] back to the date of the original injuries; they [are] not given a new date of injury."].)

Additionally, Labor Code section 3202.5 states, in pertinent part, "All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law. 'Preponderance of the evidence' means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth." When translated to the standard necessary for expert medical opinions, this means reasonable medical probability, meaning more likely than not. Certainty, or anything approaching certainty, is not the proper standard. (*McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [33 Cal. Comp. Cases 660].) In order to be considered industrial, work need only be a contributing cause of a physical injury. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 299 [80 Cal. Comp. Cases 489].) "Further, 'the acceleration, aggravation or "lighting up" of a preexisting disease is an injury in the occupation causing the same.' [Citations.]" (*Clark*, 61 Cal.4th at p. 301.)

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 all outstanding issues. In the further proceedings, the parties should attempt to agree to an agreed medical evaluator. To the extent that the parties cannot agree to agreed medical evaluator, the WCJ should consider the appointment of an independent medical evaluator to determine the medical issues de novo.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Award of July 23, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of July 23, 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/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 4, 2024

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

SHIVA HAZEGHAZAM
NOVEY LAW GROUP
LENAHAN, SLATER, PEARSE & MAJERNIK

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