WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

IAN CHITWOOD*, Applicant*

vs.

HENSELL MATERIALS, INC.;
INSURANCE COMPANY OF THE WEST*, Defendants*

Adjudication Number: ADJ14842904

Santa Rosa District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration of the Findings and Order and Opinion on Decision (F&O) issued on August 27, 2024, by the workers' compensation administrative law judge (WCJ). This is our Opinion and Decision After Reconsideration.

The WCJ found, in pertinent part, that applicant did not sustain an industrial injury on February 18, 2021.

Applicant argues that the evidence does not support the Finding of Fact, that the WCJ failed to apply the rule of liberal construction, that the WCJ improperly created a negative inference from applicant's inability to testify, and that the WCJ's credibility determinations are not supported by the record.

We have received an answer from defendant.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the Petition for Reconsideration (Petition), the Answer, the contents of the Report, and we have reviewed the record in this matter including the trial transcript. Based upon our review of the record, as our Decision After Reconsideration we will rescind the August 27, 2024 F&O and substitute a new F&O that finds applicant's injury was industrial.

FACTS

Applicant worked as a loader/unloader when on February 18, 2021, he claims to have sustained a specific injury to his left shoulder, bilateral upper extremities, neck, back, head, and brain, and in the form of headaches. (Transcript of Proceedings (Transcript), July 24, 2024, p. 4, lines 9-17.) The matter proceeded to trial on the sole issue of injury arising out of and in the course of employment. (*Id*. at p. 4, lines 21-22.)

The parties stipulated that if applicant were called to testify, he would have no independent recollection of the events on February 18, 2021. (*Id*. at p. 60, line 25, through p. 61, line 7.) That is because in November 2021, applicant suffered a seizure with onset of retrograde amnesia. (Applicant's Exhibit 2, Report of Andrew Levine, Ph.D., April 1, 2024.) Accordingly, applicant did not testify in this matter.

Applicant was seen by qualified medical evaluator Steven Hickey, D.C., who authored one report in evidence. Dr. Hickey took the following history of injury:

> Mr. Chitwood provides the following written statement: "I was walking across jobsite balcony. The balcony floor was covered in wet plastic underlayment material and various debris. I slipped on the wet plastic material and debris then fell backwards into metal scaffolding. The scaffolding hooked under my left arm - impacting my left under arm/side, jolting the left side of my body upward and causing whiplash in my neck/head as I fell down to the ground."

(Applicant's Exhibit 1, Report of Steven Hickey, D.C., November 3, 2022, p. 3.)

Applicant's girlfriend testified that she spoke with him on the day of the accident for 53 minutes. (Transcript, *supra* at p. 66, lines 4-11.) Applicant told her that he slipped and fell at the jobsite, hitting his head. (*Id*. at p. 66, lines 12-17.) Applicant told her he was concerned about reporting the injury and how it would impact an upcoming bonus. (*Id*. at p. 68, lines 7-23.) He also wanted to see if the injury would subside on its own. (*Id*. at p. 69, lines 5-7.)

The girlfriend told applicant to take photos of where the accident happened, which applicant did while on the phone with the girlfriend. (*Id*. at p. 69, line 18, through p. 70, line 2.) Applicant entered these photos into evidence. (Applicant's Exhibit 17.) The photos appear to show a construction site and applicant's coworker, Mason, who was working with applicant on the day of injury was identified as appearing in one of the photos taken. (Trial Transcript, p. 73, line 24.)

The photo's digital timestamp indicates it was taken on February 18, 2021, at 11:27 a.m. (*Id*. at p. 77, lines 1-2.)

Multiple defense witnesses testified that applicant did not report an injury on February 18, a fact that applicant acknowledges. (*Id*. at p. 17, lines 7-16; p. 11, lines 32-33.) As explained by applicant's girlfriend:

> And I think he was -- you know, it was -- 'cause he didn't know if it was gonna be serious or minor, and I think he had the impression that if he reported and it ended up being minor that he would be the subject of the same type of mockery from the other guys around the yard, you know. And then, obviously, if he reported it and it ended up being serious and he had to take time off of work, then he was concerned, you know, that his bonus might be in jeopardy.

(*Id*. at p. 69, lines 10-17.)

Applicant continued to work regular duty until March 1, 2021, when he messaged his supervisor that he was not feeling well. (*Id*. at p. 85, lines 16-19.) Applicant first disclosed the work injury on March 9, 2021. (*Id*. at p. 107, lines 6-25.)

The QME reviewed the medical evidence in this case including the delayed reporting of injury by applicant. The QME found that notwithstanding applicant's delayed reporting of injury the medical evidence supported a finding that applicant's injury caused an aggravation to prior non-industrial injuries to the neck, and direct injury to the left upper extremity and low back. (Applicant's Exhibit 1, Report of QME Steven Hickey, D.C., p. 33.) The QME deferred comment on other injuries outside of orthopedics. (*Ibid*.)

DISCUSSION

In our prior order granting reconsideration, we noted a technical deficiency in the petition for reconsideration, which was that applicant failed to provide a verification to the petition. Thereafter, applicant filed the appropriate verification and thus, this deficiency was remedied.

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; Lab. Code[1], § 5705.) Applicant must prove by a preponderance of the evidence that an injury occurred AOE/COE. (§§ 3202.5; 3600(a).)

[1] All future references are to the Labor Code unless noted.

> 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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> 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).)

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).)

Applicant is required to prove industrial injury by a preponderance of the evidence. (§ 3202.5.) "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 weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence." (*Ibid*.)

Here, applicant sustained his burden of proving industrial injury. While ordinarily we would have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses, here we find that the evidence does not support the WCJ's credibility determinations. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505].) To the contrary, all of the evidence presented in this case supports applicant's version of events.

First, the WCJ takes issue with the fact that applicant himself did not testify; however, that is not a basis to find against applicant, particularly when the parties have stipulated that applicant

has no independent recollection of the events of injury following a seizure with retrograde amnesia. (MOH/SOE, *supra* at p. 2, lines 32-34.). Applicant is not required to appear at trial and testify. Instead, and "[d]epending on the facts, applicant's failure to testify may materially hinder her ability to prove her case. However, applicant's failure to appear for trial is not cause to dismiss her case." (*Martinez v. Friendly Franchisees Corp*., 2015 Cal. Wrk. Comp. P.D. LEXIS 358, *7.) Here, applicant was not capable of testifying due to non-industrial amnesia and no inference may be drawn from that fact.

The WCJ stated that she would have found injury if applicant's recitation of his injury was corroborated by the medical record. However, again, the medical record provides ample evidence corroborating applicant's reported mechanism of injury. Applicant first sought in-person treatment on March 8, 2021, which was prior to applicant's seizure. The emergency room report states:

> This 40--year-old male presents today with left cervical neck, trapezius. left shoulder, left deltoid and left tricep pain, he notes that he was injured on February 18, 2021 while at work he notes that the floor was wet and he slipped catching himself with his left arm and unfortunately catching his left elbow on scaffolding and ultimately striking his left axilla and left lateral chest scaffolding to avoid further injury, since that time he has had the left neck, left trapezius, left shoulder pain. He did not complete an initial work injury report as he was hoping the symptoms would improve, he has been using over-the-counter Aleve or naproxen and has tried CBD muscle rubs and other over-the-counter therapeutic approaches. He does have a palpable abnormality proximal to his left bicep along his bicep tendon as if it is a cyst or tendon injury. There is no ecchymosis and was no ecchymosis present reportedly. He has full range of motion to this left shoulder although it is painful, he notes that he had been able to work his normal work weeks trying to reduce the amount of work he was doing each week but ultimately is unable to complete his work week now due to pain. He presents today for evaluation and consideration of treatment.
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> He will be discharged with recommendations to follow-up with Worker's Compensation as he may require physical therapy or other imaging of this left shoulder, trapezius and left neck pain. He did verbalize understanding these recommendations, I did review the ultrasound and the x-ray with him. He did decline Robaxin after noting he would like to try it so we did not discharge him muscle relaxer, he is encouraged to use muscle rub Tylenol or ibuprofen as appropriate.

(Applicant' Exhibit 11, Report of St. Joseph Emergency Department, March 8, 2021, p. 2.)

The contemporaneous medical record matches the testimony provide by applicant's girlfriend and all the witnesses in this matter.

Furthermore, applicant argues, and the testimony supports the proposition that the workplace culture frowned upon reporting of work injuries. Per the testimony of Brice Weyer, the manager, another coworker's reported injury involving a gas cap was viewed as 'unmanly.' (Trial Transcript, July 24, 2024, p. 31, line 25.) He further elaborated on a prior workers' injury as follows:

> I would say if you've ever worked around men that do manly jobs, yeah, they would -- they might say something under their breath, but there was no hazing, not specifically anything against him. There was just more of an under-your-breath thing, you know.

(*Id*. at p. 32, lines 8-12.)

It is entirely reasonable to conclude that when one works in a shop where coworkers mumble under their breath when an injury is reported, that one might be discouraged from reporting an injury. This is precisely why such conduct is prohibited by law. (§ 132a.)

The WCJ further commented upon Ms. Nava's credibility because Ms. Nava and applicant were arrested for marijuana possession in 2013, but advised Dr. Levine that applicant did not take drugs prior to his non-industrial seizure. No credibility issues exist here. Ms. Nava clarified with Dr. Levine that applicant did not continue to use marijuana after he obtained his commercial driver's license, and thus, the issue has no bearing on whether applicant sustained an industrial injury.

Finally, Ms. Nava testified that she spoke with applicant immediately after the fall happened. The phone records corroborate that this conversation occurred on the day and time of the accident. (Applicant's Exhibit 18.) Furthermore, Ms. Nava instructed applicant to take pictures of where he fell, which applicant did. Per Ms. Nava's testimony, the electronic time stamps on the photos indicate they were taken immediately after the fall. This further corroborates the testimony presented by applicant.

Defendant argues that either applicant or Ms. Nava manipulated the time stamps in the photos. Ms. Nava noted in one of the photos the presence of defendant's witness, Mason Beattie, who was with applicant on February 18, 2021 delivering materials. (Trial Transcript, p. 73, line 24.) Thus, for these photos to have been manipulated as defendant suggests, Mr. Beattie, on his

own time, would have returned with applicant to the location of the injury. No evidence exists supporting this theory. Furthermore, Mr. Beattie testified against applicant's interests at trial. If Mr. Beattie were to assist applicant in fabricating photographs, it is unclear why he would testify that applicant did not mention an injury that day. Defendant's theory of manipulated photographs is not supported by the record.

All of the evidence in this matter and all of the testimony support applicant's explanation to his doctor on March 8, 2021. Applicant slipped and fell at work, but did not immediately report the injury. He took photos of the location at the suggestion of his girlfriend in case he would need to file a claim at a later date. Applicant returned to work for a few weeks while self-treating. Once the pain escalated, applicant sought professional medical help and reported the work injury.

Accordingly, as our Decision After Reconsideration we will rescind the August 27, 2024 F&O and substitute a new F&O that finds applicant's injury was industrial.

For the foregoing reasons,

IT IS ORDERED that as the Decision After Reconsideration of the Appeals Board, the F&O issued on August 27, 2024 is **RESCINDED** with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Ian Chitwood, who was 40 years old on the date of injury, while employed on February 18, 2021 as a loader/unloader at Samoa, California by Hensell Materials, Inc. insured for workers compensation by Insurance Company of the West sustained injury arising out of and in the course of employment to his neck, left upper extremity, and lower back.

2. Applicant's Exhibits 2, 17 and 18 and Defendant's Exhibit A are admissible.

3. All other issues are deferred, including the nature and extent of injury and additional body parts.

ORDER

IT IS ORDERED that Applicant's Exhibits 2, 17 and 18 and Defendant's Exhibit A are admitted into evidence.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 5, 2025

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

IAN CHITWOOD, IN PRO PER
RICHARD MONTARBO, ESQ.

EDL/mc

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