WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LISA KIRKLAND, *Applicant*

vs.

McDONNELL DOUGLAS, CALIFORNIA INSURANCE GUARANTEE ASSOCIATION by its servicing facility INTERCARE for FREMONT INDEMNITY, in liquidation, KERLAN-JOBE, STATE COMPENSATION INSURANCE FUND, HEALTHSOUTH by ACE AMERICAN INSURANCE COMPANY administered by CORVEL, *Defendants*

Adjudication Numbers: ADJ4081061 (ANA 0284084); ADJ9220545
Anaheim District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant California Insurance Guarantee Association (CIGA) seeks reconsideration of the October 22, 2024 Findings and Order (F&O) wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant while employed as a laborer on July 30, 1990 by McDonnell Douglas (ADJ4081061) sustained injury arising out of and in the course of employment (AOE/COE) to her cervical spine, thoracic spine (thoracic outlet syndrome), lumbar spine, bilateral upper extremities (from shoulders to fingers), and neurological systems (reflex sympathetic dystrophy and headaches) and did not sustain a cumulative injury AOE/COE to the neck, upper extremity, right shoulder, or right arm while employed during the period from August 16, 2000 through May 30, 2003 (ADJ9220545) as an occupational assistant by Kerlan-Jobe Orthopedic Medical Clinic (Kerlan-Jobe). The WCJ found that the reporting of Qualified Medical Evaluator (QME), Dr. Roger Sohn, did not constitute substantial medical evidence of injury. CIGA therefore remains liable for applicant's injury as State Compensation Insurance Fund (SCIF) is not "other insurance" as contemplated under Insurance Code section 1063.1(c)(9).

CIGA contends that the apportionment findings of Dr. Sohn are substantial medical evidence whereas the apportionment findings of Drs. George Watkin and David Kim, which were

relied upon by the WCJ in making the above determinations, are not. As such, CIGA argues that SCIF should assume liability for the injury under Insurance Code section 1063.1(c)(9).

We have not received an Answer from SCIF. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition and the contents of the Report, which we adopt and incorporate herein. We have also reviewed the record in this matter. For the reasons discussed below, we will deny the Petition.

FACTS

Applicant, while employed as a laborer on July 30, 1990 by McDonnell Douglas, sustained an industrial injury to her cervical spine, thoracic spine (thoracic outlet syndrome), lumbar spine, bilateral upper extremities (from shoulders to fingers), and neurological systems (reflex sympathetic dystrophy and headaches). (ADJ4081061)

Applicant, while employed as an occupational assistant for Kerlan-Jobe Orthopedic Medical Clinic during the period from August 16, 2000 through May 30, 2003, is also alleged to have sustained an industrial injury to the neck, upper extremity, right shoulder, and right arm. (ADJ9220545) The Application for Adjudication of Claim was filed by CIGA on November 4, 2013, on applicant's behalf.

The July 30, 1990 specific injury claim (ADJ4081061) ultimately resolved via a Findings and Award (F&A) which was issued by a WCJ on December 20, 2001. CIGA took over administration of this claim when insurer, Fremont Indemnity for Industrial Indemnity, was ordered into liquidation on July 2, 2003 and became insolvent.

Subsequent to the F&A, Dr. Roger Sohn was retained as a defense QME for the July 30, 1990 injury and issued numerous reports from 1998 through 2016. In a report dated February 4, 2015, he indicated that applicant denied "any contribution to her injury from Kerlan-Jobe. She stated that her condition has continued to worsen over time based on her initial injury, and this represents a national progression of her disease. Thus, Kerlan-Jobe would not be considered apportionable. The condition is strictly related to her employment at McDonnell-Douglas/Boeing." (Exhibit CC, p. 14.) However, in a report dated September 23, 2016, Dr. Sohn changed course and found that applicant "did get worse after working at Hematology Consultants and later at Kerlan

and Jobe." (Exhibit BB, p. 33.) He apportioned 25% of applicant's condition to "her employers after Boeing/McDonnel Douglas." The 25% was to be "split equally among Hematology Consultants and Kerlan and Jobe." (*Id.* at p. 35.) During an October 21, 2015 deposition, Dr. Sohn recalled that applicant was "adamant that she wasn't having any contribution at Kerlan-Jobe" and testified that this was his initial reasoning for not finding apportionment to subsequent employment. (Exhibit QQ, pp. 7, 34.) He later testified that "Kerlan-Jobe has to be somewhat responsible" and he would therefore continue to divide the 25% equally between the two employers. (*Ibid.*)

Dr. David Kim served as applicant's Qualified Medical Evaluator (QME) for the July 30, 1990 injury. He issued various reports from 1996 through 2019. In his March 25, 2016 report, he found that applicant's "impairment/disability" was the "direct result of the initial specific injury and the progression of the conditions caused by that injury." (Exhibit 2, p. 12.) He found that there was no apportionment "due to a subsequent employment." (*Ibid.*)

Dr. George Watkin served as the orthopedic QME for the cumulative trauma claim. In a report dated July 13, 2016, Dr. Watkin found it medically probable that applicant's permanent disability was "due to factors that predate her work for Kerlan-Jobe." (Exhibit D, p. 134.) As such, he did not find "evidence to substantiate a continuous trauma injury." (*Ibid.*) He noted also that applicant was "adamant that her condition had nothing to do with Kerlan-Jobe, [and that] it all went back to the job at McDonnell Douglas." (*Id*. at p. 126.) Thereafter, Dr. Watkin reviewed various reports, including the September 23, 2016 report of Dr. Sohn. Dr. Watkin did not change his opinions. (Exhibit C, p. 4.) He reiterated this once again in a subsequent report dated September 17, 2018 wherein he reviewed extensive additional records, including various reports from Dr. Sohn. (Exhibit B, p. 21.)

On April 15, 2024 and May 8, 2024, the parties proceeded with a multi-day trial on various issues, including whether applicant sustained a July 30, 1990 injury AOE/COE to her cervical spine, thoracic spine (thoracic outlet syndrome), lumbar spine, bilateral upper extremities (from shoulders to fingers), and neurological systems (reflex sympathetic dystrophy and headaches) while working at McDonnell Douglas; whether applicant sustained an injury AOE/COE from August 16, 2000 through May 30, 2003 to the neck, upper extremity, right shoulder, and right arm while working at Kerlan-Jobe; permanent disability; need for future medical; and if injury

AOE/COE was found for the cumulative injury, whether SCIF would be deemed "other insurance."

On October 22, 2024, the WCJ issued a F&O wherein he found, in relevant part, that liability remained CIGA as there was substantial medical evidence of injury AOE/COE for the July 30, 1990 injury belonging to CIGA but not for the cumulative injury claimed from August 16, 2000 through May 30, 2003 belonging to Kerlan-Jobe and SCIF. (F&O, pp. 1-2.)

DISCUSSION

I.

Preliminarily, 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, 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 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 under the Events tab 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 December 17, 2024, and 60 days from the date of transmission is February 15, 2025, which is a Saturday. The next business day that is 60 days from the date of transmission is February 18, 2025, which is a

Tuesday. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision was issued by or on February 18, 2025, so that we have timely acted on the petition as required by section 5909(a).

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. Section 5909(b)(2) provides that service of the Report and Recommendation shall constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on December 17, 2024, and the case was transmitted to the Appeals Board on December 17, 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 section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on December 17, 2024.

II.

Turning now to the merits of the Petition, Insurance Code section 1063.2(a) specifies that CIGA's fundamental statutory mandate is to pay and discharge the "covered claims" of insolvent insurers. Insurance Code section 1063.1(c)(1) sets forth the general definition of "covered claims," which, as relevant here, includes "the obligations of an insolvent insurer ... (i) imposed by law and within the coverage of an insurance policy of the insolvent insurer … [and] (vi) in the case of a policy of workers' compensation insurance, to provide workers' compensation benefits under the workers' compensation law of this state … ." (See also *Cal. Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd.* (2004) 117 Cal.App.4th 356 [69 Cal.Comp.Cases 186]; *Cal. Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd.* (2003) 112 Cal.App.4th 364 [68 Cal.Comp.Cases 1448].) Insurance Code section 1063.1(c)(9)(i) provides that "'[c]overed claims [do] not include any claim to the extent it is covered by any other insurance of a class covered by this article [14.2] available to the claimant or insured [.]" As such, in cases where there is coverage by a solvent insurer, CIGA has no duty to pay and discharge any claims and may in fact seek reimbursement

[1] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

from the "other" insurer for any benefits paid after insolvency for which the "other" insurer would have been liable. This may arise in cases wherein CIGA shares coverage in a cumulative injury with another insurer, or as is the case here, where there is a separate injury, whether specific or cumulative, that involves overlapping body parts.

Here, the WCJ in his October 22, 2024 F&O found injury AOE/COE on July 30, 1990 while applicant was employed at McDonnell Douglas, but did not find injury AOE/COE during the alleged cumulative injury period from August 16, 2000 through May 30, 2003 while applicant was employed by Kerlan-Jobe. As noted above, the cumulative injury included body parts which overlapped with those claimed in the July 30, 1990 injury. Since injury AOE/COE was not found in the cumulative injury claim, the WCJ held that liability remained with CIGA for the July 30, 1990 injury under Insurance Code section 1063.2(a) as there was no "other" as per Insurance Code section 1063.1(c)(9)(i). The WCJ indicated his findings were based upon the lack of "substantial medical evidence" in the reporting of Dr. Roger Sohn on the issue of injury AOE/COE at Kerlan-Jobe. (*Ibid.*)

It is well established that any award, order, or decision of the Appeals Board, including decisions by WCJs, must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence, an expert medical opinion must be framed in terms of reasonable medical probability, be based on an accurate history and examination, and must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) "[A] medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (citations) 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. (citations)" (*Gatten*, *supra*, at p. 928.) "A medical report which lacks a relevant factual basis cannot rise to a higher level than its own inadequate premises. Such reports do not constitute substantial evidence to support a denial of benefits.

(citation)" (*Kyle v. Workers' Comp. Appeals Bd* (*City and County of San Francisco*) (1987) 195 Cal.App.3d 614, 621.)

Upon review of the record, we agree with the WCJ that the reports of Dr. Sohn are lacking in substantial medical evidence on the issue of apportionment. In a report dated February 4, 2015, Dr. Sohn indicated that "Kerlan-Jobe would not be considered apportionable. The condition is strictly related to her employment at McDonnell-Douglas/Boeing." (Exhibit CC, p. 14.) However, in a subsequent report dated September 23, 2016, Dr. Sohn reversed his opinion without providing a sufficient basis. He alleged that applicant got "worse after working at Hematology Consultants and later at Kerlan and Jobe" and apportioned 25% of applicant's condition to both employers but conceded that applicant performed "relatively easy type work" at Kerlan-Jobe. (Exhibit BB, p. 33.) Nonetheless, he held that applicant's subsequent work, combined with applicant's apparent "fragility," led to worsening of applicant's condition. During his October 21, 2015 deposition, Dr. Sohn similarly provided vague and conclusory findings when he testified that "Kerlan-Jobe has to be somewhat responsible" and he would continue to divide the 25% apportionment equally between the two employers. (Exhibit QQ, p. 34.) He alleged that this seemed "logical" since applicant had a "litany of surgeries" after her employment with Kerlan-Jobe and Hematology Consultants. (Id. at p. 33.) He failed to explain, however, why the July 30, 1990 industrial injury would not have produced the same need.

CIGA argues that it is the reporting of Dr. Kim and Dr. Watkin that are lacking in substantial medical evidence on the issue of apportionment. Based upon our review of the record, however, we find that both doctors took an accurate and adequate history, thoroughly examined the applicant, reviewed all medical records provided, and explained how and why the alleged cumulative injury did not contribute to applicant's complaints and why the original July 30, 1990 industrial injury led to continued worsening.

In his March 25, 2016 report, Dr. Kim indicated that applicant's "impairment/disability" was the "direct result of the initial specific injury and the progression of the conditions caused by that injury." (Exhibit 2, p. 12.) He explained that although applicant has been declared permanent and stationary in the past, "she has never gone long without significant treatment." (*Ibid.*) He underscored the fact that applicant's shoulder complaints were initially treated with surgery and despite having undergone no less than four surgeries, "she failed to improve in terms of pain to a level that was tolerable on an everyday basis." (*Id.* at pp. 11-12.) As a result, applicant "continually

sought out additional care" and was ultimately diagnosed with thoracic outlet syndrome in 1998 or 1999 which led to thoracic outlet decompression on the right side, then the left. (*Id.* at p. 12.) Around the same time, applicant developed reflex sympathetic dystrophy and complex regional pain syndrome which Dr. Kim noted "does not arise as the result of a repetitive injury" but rather, "from specific events such as surgery or traumatic injury." (*Ibid.*)

Similarly, Dr. Watkin in his July 13, 2016 report found it "medically probable" that applicant's "current permanent disability is due to factors that predate her work for Kerlan-Jobe." (Exhibit D, p. 134.) He noted that there was no evidence to substantiate a continuous trauma injury and found, upon review of applicant's history, that hers was a "classic story of how one injury to an upper extremity" can "cascade into multiple other conditions including compensatory conditions on the opposite side." (*Id.* at pp. 133-134.) Like Dr. Kim, he determined that applicant "suffered from reflex sympathetic dystrophy" due to "trauma of surgery." (*Id.* at p. 134.) He concluded his report by finding that applicant's condition was "a direct or indirect compensable consequence of her July 30, 1990 injury." In a subsequent report dated February 27, 2017, Dr. Watkin reviewed additional medical records, including the September 23, 2016 report of Dr. Sohn. Notwithstanding Dr. Sohn's opinions, he continued to find applicant's condition "was not due to her work for Kerlan-Jobe." (Exhibit C, p. 4.) He underscored the fact that applicant's condition "has continued to deteriorate and result in further surgeries even though she has not worked in more than ten years." (*Ibid.*) In yet another report dated September 17, 2018, Dr. Watkin was asked to review numerous other medicals, including reports from Dr. Sohn and a copy of the transcript from Dr. Sohn's October 21, 2015 deposition. He noted that "although it is possible" applicant "had increased pain" while working, he did not "believe that the work caused any increased permanent partial disability in and of itself." (Exhibit B, p. 21.)

CIGA argues that Drs. Kim and Watkin base their opinions on applicant's alleged "insistence that her complaints of pain stayed the same no matter what she did." (Petition, p. 12.) As noted above, however, the doctors have both indicated that applicant's condition has continued to worsen since the initial July 30, 1990 injury. Dr. Kim has also noted the possibility that applicant's pain may have increased during her subsequent employment. However, as explained by both doctors, any increase in disability was the result of the July 30, 1990 injury and not applicant's work at Kerlan-Jobe.

Further, the WCJ has indicated that his findings were based partially on applicant's testimony that 1) her symptoms and conditions stem from her initial injury at McDonnell-Douglas and 2) her pain increased during the day whether at home or work. (Report, p. 3.) CIGA alleges that applicant's testimony is inconsistent with the evidence. The WCJ, however, appears to have found applicant's testimony credible and pursuant to *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500], credibility determinations of the WCJ, as the trier of fact, are entitled to great weight based upon the WCJ's opportunity to observe the demeanor of the witnesses and weigh the witnesses' statements in connection with their manner on the stand. Credibility determinations are not to be disturbed except where there is contrary evidence of considerable substantiality. (*Id*.) No such evidence was provided here. Accordingly, CIGA's Petition is denied.

For the foregoing reasons,

IT IS ORDERED that CIGA's Petition for Reconsideration of the October 22, 2024 Findings and Order is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 18, 2025

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

LISA KIRKLAND
ROSE, KLEIN & MARIAS
GUILFORD, SARVAS & CARBONARA
STATE COMPENSATION INSURANCE FUND
ALBERT & MACKENZIE

RL/*pm*

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