WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARIA JUAREZ OSUNA, ***Applicant***

vs.

AA HOLDINGS, INC.; EMPLOYERS ASSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ15278441
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Medland Medical, on behalf of Omid Haghighinia, D.C., seeks reconsideration of the October 30, 2024 Findings, Award, and Order (FA&O) wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that applicant while employed by defendant as a cook during the period from April 15, 2021 through October 10, 2021 claimed an injury arising out of and in the course of employment (AOE/COE) to the neck, upper extremities, hands, arms, chest, internal and pulmonary systems, and psyche/stress; and that Dr. Haghighinia, who served as applicant's primary treating physician, was not entitled to reimbursement for medical treatment services as he did not establish injury AOE/COE.

Dr. Haghighinia contends that he met his burden to show that applicant sustained injury AOE/COE; and that his November 22, 2021 medical legal report constitutes substantial medical evidence of injury AOE/COE.[1]

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

[1] In the Petition, lien claimant refers to medical legal reporting by qualified medical evaluators (QMEs) which are not in evidence. Thus, we do not consider any contentions by lien claimant with respect to the purported QMEs.

Subsequently, Medland Medical on behalf of Dr. Haghighinia, submitted and requested acceptance of a supplemental pleading in response to the WCJ's Report. We accept the proposed supplemental pleading and have considered it. (Cal. Code Regs., tit. 8, § 10964.)

We have considered the Petition, the contents of the Report, the supplemental pleading, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition, amend the WCJ's October 30, 2024 Findings, Award, and Order to find that applicant sustained injury AOE/COE to her neck, upper extremities, hands, and arms (Findings of Fact 1, 6), defer the issue of whether lien claimant is entitled to payment for its medical treatment services (Finding of Fact 7, Order c), otherwise affirm the decision, and return the matter to the WCJ for further proceedings consistent with this opinion.

FACTS

Applicant claimed that while employed by defendant as a cook during the period from April 15, 2021 through October 10, 2021, she sustained an injury AOE/COE to the neck, upper extremities, hands, arms, chest, internal and pulmonary systems, and psyche/stress. (ADJ15278441)

Applicant, while employed by defendant as a cook, also claimed a September 15, 2021 specific injury AOE/COE to the psyche. (ADJ17719615)

On November 9, 2021, applicant selected Dr. Omid Haghighinia, D.C. as her primary treating physician, and according to a bill provided by Dr. Haghighinia, applicant obtained treatment from November 24, 2021 through January 11, 2023. (Lien Claimant Exhibit 1.) Applicant attended 35 visits and Dr. Haghighinia billed for 118 items totaling $15,484.34. (*Ibid.*)

On November 22, 2021, Dr. Haghighinia issued a medical legal report diagnosing applicant with pain and stiffness in the bilateral hands and wrists. (Lien Claimant Exhibit 3, p. 7.) He found that "[b]ased on the physical examination performed," "the history of the injury," applicant's job duties, and "the length of time applicant was employed," there was a "reasonable degree of medical probability" that applicant sustained a "continuous trauma injury in the course of scope of [her] employment." (*Id.* at p. 9.) He found that her condition and complaints were the direct result of a "continuous trauma from 04/15/2021 through 10/10/2021." (*Ibid.*) It was noted that the diagnosis was made "without the benefit of reviewing the patient's entire medical records." (*Ibid.*) He noted that applicant had been working for defendant as a part-time cook "10-12 hours per day, 2 days a

week" since April 1, 2021 and "was no longer needed as of September 24, 2021." (*Id.* at p. 8.) He confirmed that applicant was working concurrently as a part-time employee thirty hours per month at IHSS. (*Ibid.*) It was noted that apportionment, if any, to employment at IHSS would be considered once she reached permanent and stationary status. (*Id.* at p. 11.)

In a follow-up exam completed on January 10, 2022, Dr. Haghighinia diagnosed applicant with a "cervical spine muscle strain bilaterally involving upper shoulder and shoulder blade with myofasciitis" and "slight radiculitis" in the "upper shoulder and shoulder blade, sometimes to the upper arm to upper extremity bilaterally." (Lien Claimant Exhibit 4, p. 4.) Upper extremity nerve conduction studies were recommended. (*Ibid.*)

In a follow-up exam completed on March 28, 2022, Dr. Haghighinia reviewed nerve conduction studies from March 3, 2022 with findings of right carpal tunnel syndrome, a radial nerve lesion in the bilateral upper extremities, median nerve lesions in the right upper extremity, and radiculopathy from the C5. (Lien Claimant Exhibit 5, p. 4.) He recommended an MRI of the cervical spine. (*Ibid.*)

In follow-up exam completed on June 20, 2022, Dr. Haghighinia reviewed a May 17, 2022 MRI of the cervical spine with findings of disc bulging at the C2 through the C7 and "severe straightening of the cervical lordosis" which "may reflect an element of myospasm." (Lien Claimant Exhibit 6, p. 5.)

On June 28, 2023, defendant and applicant entered into a Compromise and Release Agreement settling the claim for $10,000.00. Page 7 of the Compromise and Release Agreement indicated that "AOE/COE is disputed with respect to psychiatric claim of injury" as the employment period was "less than 6 months." AOE/COE was also "disputed with respect to the cumulative trauma due to her underlying nonindustrial morbid obesity."

On July 28, 2023, an Order Approving Compromise and Release (OACR) was issued by the WCJ.

Dr. Haghighinia's lien was not resolved in whole or in part along with settlement of the case-in-chief, and the parties proceeded to trial on September 16, 2024. According to the Minutes of Hearing, neither side submitted any reporting from a QME as evidence.

DISCUSSION

I.

Preliminarily, former Labor Code section 5909[2] 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.
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> (b)
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> (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.
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> (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 November 27, 2024, and 60 days from the date of transmission is January 26, 2025, which is a Sunday. (See Cal. Code Regs., tit. 8, § 10600(b).)[3] The next business day that is 60 days from the date of transmission is January 27, 2025, which is a Monday. This decision was issued by or on January 27, 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

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[2] Unless otherwise stated, all further statutory references are to the Labor Code.

[3] 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.

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 November 27, 2024, and the case was transmitted to the Appeals Board on November 27, 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 November 27, 2024.

II.

Turning now to the merits of the Petition, it is well-established that the burden of proof rests upon the party holding the affirmative of the issue. (Lab. Code, § 5705.) As such, when an employee claims injury AOE/COE, it is the employee who carries the burden of proof in establishing industrial causation and they must show that their employment was a contributing cause. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302; § 5705.) Once this burden has been met, the burden then shifts to the employer to provide evidence in rebuttal.

Section 3600(a) provides further guidance as to the two-part requirement for establishing injury AOE/COE. Pursuant to section 3600(a)(2), "at the time of the injury," the employee must be "performing service growing out of and incidental to his or her employment" and be "acting within the course of his or her employment." (Lab. Code, § 3600(a)(2).) With respect to the first part, i.e. injury arising out of employment, this occurs "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*, *supra*, at p. 297.) With respect to the second part, i.e. injury occurring in the course of employment, this refers to the "time, place, and circumstances under which the injury occurred." (*Id*.)

When a lien claimant litigates the issue of entitlement to payment for industrially related medical treatment, the lien claimant stands in the shoes of the injured employee and the lien claimant must prove by a preponderance of the evidence all the elements necessary to the establishment of its lien. (*Kunz v. Patterson Floor Coverings, Inc.* (2002) 67 Cal.Comp.Cases

1588, 1592 (Appeals Board en banc).) This includes establishing substantial evidence of injury AOE/COE. (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].) In order 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.)

Based upon our review of Dr. Haghighinia's reports, including the medical legal report dated November 22, 2021, Dr. Haghighinia took an accurate and adequate history of the injury, thoroughly examined the applicant, and explained how and why the industrial work exposure caused applicant's complaints. As such, we find that Dr. Haghighinia's reporting constitutes substantial medical evidence of injury AOE/COE to the neck, wrist, hands, upper extremities, and arms.

The WCJ alleges that there are "several inaccuracies" within Dr. Haghighinia's medical legal report, including the fact that he finds a cumulative injury from April 15, 2021 through October 10, 2021 yet writes that applicant first began working on April 1, 2021 and was laid off on September 24, 2021. (Report, p. 2; Lien Claimant Exhibit 3, p. 8.) As discussed in Dr. Haghighinia's proposed Answer, however, the cumulative trauma period of April 15, 2021 through October 10, 2021 "was determined by applicant's attorney and not by Dr. Haghighinia." Moreover, we observe that the WCJ has the power to amend pleadings at trial to conform to proof. (Cal. Code Regs., tit. 8, § 10517.)

The WCJ alleges that Dr. Haghighinia's medical legal report is not substantial medical evidence as it does not address the fact that applicant was working only twice weekly for defendant while concurrently working 30 hours a month for IHSS. We find this to be incorrect and, also, misleading. On page 8 of his medical-legal report, Dr. Haghighinia confirmed that applicant was working for defendant as a part-time cook "10-12 hours per day, 2 days a week." He also confirmed that applicant was working thirty hours per month at IHSS performing duties which consisted of repetitive lifting, pushing, twisting, and turning. (Lien Claimant Exhibit 3, p. 8.)

Here, the WCJ appears to confuse causation with apportionment. Notwithstanding concurrent employment with a second employer, a physician or evaluator may still find industrial causation with respect to employment with the first or primary employer, even if the concurrent employment contributed to the subject injury. This is highlighted on page 11 of Dr. Haghighinia's medical legal report wherein he specifically indicates that apportionment to applicant's employment at IHSS, if any, would be considered once applicant reached permanent and stationary status. Further, defendant's statement in the C&R that it disputed AOE/COE because of applicant's "underlying nonindustrial morbid obesity" also confuses causation with apportionment, since applicant's alleged obesity is only relevant with respect to apportionment, not causation.

Lastly, the WCJ claims that lien claimant failed to meet its burden of proof since applicant did not testify at trial and Dr. Haghighinia failed to review records pertaining to applicant's treatment while working with defendant. Lack of applicant testimony, however, is not fatal to a lien claimant's case as there is no statutory requirement that an applicant testify in order to meet their burden on AOE/COE. Further, with respect to treatment applicant allegedly obtained during her employment with defendant, as confirmed by the WCJ, "applicant did not recall who she saw or when." (Report, p. 3.) As such, there is no evidence that the alleged records were able to be obtained or reviewed by Dr. Haghighinia.

Aside from establishing injury AOE/COE, a lien claimant seeking medical reimbursement must also establish that the treatment provided was reasonable and necessary to cure or relieve the effects of the alleged industrial injury. (Lab. Code, §§ 4600, 4610.5(c)(2), 5705.) This is ordinarily achieved through utilization review (UR) and/or independent medical review (IMR) and employers are required to establish a UR process for treatment requests received from physicians (Lab. Code, §§ 4610, 4601.5; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230, 236.)

In the instant matter, defendant submitted no evidence that the UR or IMR process was completed by defendant. Thus, upon return, the WCJ shall consider to what extent lien claimant met its burden to show that its services were reasonable and necessary, and any amounts of payment owing.

Accordingly, we grant the Petition for Reconsideration, amend the WCJ's October 30, 2024 Findings, Award, and Order to find that applicant sustained injury AOE/COE to her neck, upper extremities, hands, and arms (Findings of Fact 1, 6) and defer the issue of whether lien claimant is entitled to payment for its medical treatment services (Finding of Fact 7, Order c), otherwise affirm the decision, and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that Medland Medical's Petition for Reconsideration of the October 30, 2024 Findings, Award, and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the October 30, 2024 Findings, Award, and Order is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

1. MARIA JUAREZ OSUNA while employed during the period April 15, 2021 through October 10, 2021, as a cook at San Bernardino, by AA Holdings Inc., sustained injury arising out of and occurring in the course of employment to her neck, wrist, hands, upper extremities, and arms and claimed injury in the form of stress.

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6. Medland Medical proved injury arising out of and occurring in the course of employment.

7. The issue of whether Medland Medical is entitled to payment for the treatment provided is deferred.

ORDERS

c. The issue of whether Medland Medical is entitled to payment for medical treatment is deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 27, 2025

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

TOBIN LUCKS
MEDLAND MEDICAL

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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