WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERT JOHNSON, *Applicant*

vs.

ABM INDUSTRIES, INC., permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Defendants*

Adjudication Number: ADJ17714627
San Francisco District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the Answer and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, including the transcript for the hearing on May 21, 2024, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

I.

Former Labor Code section 5909[1] 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.

[1] All section references are to the Labor Code, unless otherwise indicated.

> (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 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 December 6, 2024, and 60 days from the date of transmission is February 4, 2025. This decision is issued by or on February 4, 2025, so that we have timely acted on the petition as required by Labor Code 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 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 December 6, 2024, and the case was transmitted to the Appeals Board on December 6, 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 6, 2024.

II.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id.*)

Accordingly, we deny the Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration 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

JANUARY 30, 2025

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

ROBERT JOHNSON
LAW OFFICES FOR THE INJURED WORKER, INC.
BRADFORD & BARTHEL, LLP

MB/*ara*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION AND NOTICE OF TRANSIMISSION TO WCAB

INTRODUCTION

Defendant seeks reconsideration of my Findings of Fact and Orders issued on November 1, 2024. The substantive decision set forth therein was a finding of injury AOE/COE. In its petition, defendant contends my Findings of Fact was issued without or in excess of the appeals board powers, the evidence does not justify the Findings of Fact, and the Findings of Fact to not support the Order, Decision or Award. The petition is timely and verified. I am not aware of an Answer having been filed to date.

FACTS

1. Procedural background

The primary issue in this trial was AOE/COE. Applicant was employed by the defendant as a stationary engineer on the date of the claimed injury. Applicant claims he sustained injury AOE/COE to his right knee, right leg, and right lower leg, and admits he was at home when the injury occurred. Defendant contends applicant was not working at the time of injury. There were two days of trial: May 21, 2024, and August 19, 2024. On the first day of trial, I granted applicant's request for leave to conduct further discovery after his cross-examination of the employer witness.

2. Evidence at trial and decision

As discussed in detail below, the parties offered a number of exhibits. In addition, the applicant and one employer witness testified at trial. At the second day of trial, applicant offered two additional exhibits into evidence and the matter was submitted. Defendant submitted a trial brief, of which I took judicial notice.

a. Reports of QME Juon-Kin Fong, M.D

Joint Exhibit 2 is a report of QME Dr. Fong dated 10/12/2023. In his report, Dr. Fong writes that the applicant:

> States that he was at home on call on the evening of the injury. He heard his phone ring which he was sitting in his recliner. The phone was in another room so he got up to answer it. He states that his right foot had fallen asleep while he was resting in the recliner and when he stood up his right knee buckled on him so unexpectedly that he fell on the knee with the knee going underneath him. He states that he heard three pops and then ad excruciating pain in the knee and leg and was unable to move it. He was living with his mother at the time who called an ambulance which subsequently came and took him to John Muir Hospital Emergency Department.
>
> (p. 1.)

Applicant underwent surgery for a torn ACL on 04/19/2023. (p. 2.)

Dr. Fong diagnosed applicant with "status post severe ligamentous injury, right knee, status post surgery with possible re-injury". He goes on to state "on exam, the knee is swollen. There is limited motion. There is a trace of instability…" Dr. Fong notes there was no cover letter, medical records, or job description provided to him. Dr. Fong assigns work restrictions, and finds applicant has not yet reached MMI status. (p. 5.)

Regarding causation, Dr. Fong states

> the patient appears to have injured his right knee when it collapsed on him when he stood up quickly and his full weight fell on the knee when it did give out. Ordinarily this could cause some damage to the knee if the individual is unprepared for it… [Applicant's] problems were compounded by the fact that he is an extremely large individual. Because of his size, the increased pressure that would have been placed on his knee would be more than what normally would be expected, leading to what essentially was a subluxation-type injury of the knee joint. This led to significant damage to the lateral and central ligaments of the knee necessitating the surgical repair….It would appear that the incident described by him, especially given his size, would have been sufficient to cause significant injury to the right knee as found thus far. The question, of course, is whether this occurred while he was working. The patient states that he was on call for work which meant he had to answer all calls on work issues from Friday night to early Sunday morning and this event happened around 2200 hours on Friday night when he was on call.
>
> (p. 6.)

Joint Exhibit 1 is a supplemental report of QME Dr. Fong dated 02/23/2024. In his report, Dr. Fong reviewed medical records and applicant's deposition transcript. He states his opinions stated in his original report remain unchanged. (p. 5.)

b. <u>Records from John Muir Medical Center</u>

Joint exhibit 3 is records from John Muir Medical Center – *Concord Campus*, dated 01/22/2023 – 01/23/2023. The records state in relevant part:

> Applicant…presents with right knee pain. He states he was sleeping in his recliner, when he got up, he put pressure on his right leg and it seemed to buckle. He states he thinks he may have hyperextended it and it seemed to go out to the right. He states he has pain to the back of his knee more on the lateral side. He endorses some tingling in his lower leg and foot as well. He states he was unable to ambulate. He feels that his knee is swollen and that he cannot rotate his entire leg medially. He denies any other injuries.
>
> (p. 6.)

An X-ray was taken. He was diagnosed with acute pain of right knee and soft tissue injury of right knee. Regarding additional diagnostic tests, the records state: "No indication for further imaging as likely soft tissue, can follow-up with outpatient MRI and consider CT of the knee…" (p. 10.) He was discharged with crutches. (p. 60.)

c. Records of Contra Costa Fire Department

Joint Exhibit 4 is records of Contra Costa Fire Department dated January 22, 2023. Under the heading "NARRATIVE", it states:

> Arrive to find a 4 [sic] year old male sitting up on the floor in his apartment. The patient complained of right knee pain. The patient stated he was sleeping in his recliner and woke up to go to bed but his right foot still felt a sleep [sic] and the patient tried to get up and he heard a coupe [sic] pops and he slid to the floor. The patient stated that he tried to get up off the floor and his right leg started to bow outwards at the knee…We arrived at the hospital without incident… RN at bedside.
>
> (p. 5.)

d. Pay stub

Joint Exhibit 5 is applicant's "Earnings Statement" from the employer. It is for the period beginning 01/16/2023 and ending 01/31/2023. "Regular" hours are 96.00. "Overtime" hours are 5.50. "Double time" hours are .50. "On call S T" hours are 12.00. (p. 1.)

e. Collective Bargaining Agreement

Joint Exhibit 6 is a Collective Bargaining Agreement between the Building Owners and Managers Association of San Francisco and the International Union of Operating Engineers, Stationary Engineers, Local No. 39. Pertinent sections state:

> Where 50% or more of an employee's scheduled hours fall between 6:00p.m. and 12:00 midnight, such employee shall receive a swing shift differential of $1.50 over the engineer's hourly rate of pay per hour for the entire shift. [¶] Where 50% or more of an employee's scheduled hours fall between 12:00 midnight and 6:00 a.m., such employee shall receive a graveyard shift differential of $1.75 over the engineer's hourly rate of pay per hour for the entire shift.
>
> (p. 12.)
>
> Employees who work in excess of 8 hours per day or in excess of 40 hours per scheduled work week shall be paid at the rate of time and one half for such excess. Employees who work in excess of 10 consecutive hours per day…shall be compensated at the rate of 2 times the straight time hourly rate of such excess. [¶] All time worked on the seventh consecutive work day of a particular week shall be paid at the overtime rate of double time.

(p. 13.)

> In the course of their normal duties and employment, engineers may be required to have a pager, cell phone or other communication device during off hours. The general intent of the use of such communication devices is to enable the engineers to maintain contact with appropriate parties including the employer. Unless otherwise specifically stated by the employer, the use of such a communication device during off hours is not intended to limit the employee's activities during off hours. [¶] In the event an employer requires an employee to be physically available to their work premises while off site during off hours, that intent shall be specifically communicated by the employer to the employee, and in such cases, the employee shall receive "standby" pay at the rate of one-half the applicable straight or overtime rate. Without such communication and compensation there shall be no expectation to respond.

(p. 14.)

> Engineers shall not perform electronic call back work unless requested and approved by the employer. The engineer shall submit weekly written reports of electronic call back work which must be approved by the employer in order to be paid. When an employee, following completion of their shift, and after said employee has left the premises, is contacted to resolve a work related issue, then that employee shall receive a minimum of 15 minutes pay at the applicable overtime hourly rate of pay without having to leave their current location in the resolution of the issue.

(p. 15.)

f. Deposition transcript of applicant

Joint Exhibit 7 is a deposition transcript of applicant. Applicant testified in his deposition that the injury occurred on January 23, 2023 between 2300 and 2330. (p. 34.) He further testified "I was sitting in my chair. I went to – the phone rang. As the phone was ringing, I stepped out of my chair, slipped. My knee tucked under my full body, and I fell to the ground. As I fell to the ground, I heard large pops in my knee." (*Id.*) He went on to testify that he was "getting up to answer the call from my engineer [Jonathan Andrade]." (pp. 34-35.) When asked if he picked up the phone, he testified, "Not at that moment, I think I was able to contact him at the hospital." (p. 35.) He testified that when he told Paige Salazar what happened, "I told her Jonathan called me, and I was responding to his call. Jonathan is my engineer, he was calling for his schedule." (p. 39.)

g. ABM Industries Report dated 05/04/2023

Applicant's Exhibit 1 is a Workers' Compensation incident report of the employer for applicant. The report states in relevant part:

Employer notified date: Sunday, January 22, 2023
Activity engaged in: getting up from office chair
Injury work process: work from home job duties
Loss description: EE was working from home on call. EE got up out of chair and fell out of chair, slipped and fell to floor. EE had rupture, tore corner of right knee. EE had surgery on right knee; dislocation or right knee joint. EE went to ER.
Comments/remarks: … Employee on call for Friday, Saturday, and Sunday.

h. Emails

Applicant's Exhibit 2 is emails between applicant and others at the employer. The emails are administrative in nature and are in regard to various disability forms, types of disability, and applicant's injury status.

3. Witness Testimony

a. Applicant

Applicant testified, in relevant part, that on the night of January 22, 2023, he was at home. The injury happened between 10:00p.m. and 10:30p.m. His deposition transcript says it happened between 23:00-23:30; he testified at trial that he got confused between what 10:00-10:30p.m. equaled in military time. He was awake and was sitting in his chair in the den. He heard his phone ring. His phone was in a different room than where he was sitting; the phone was in the bathroom. The ringtone was for his coworker, Jonathan Andrade, when the phone rang. He stood up to get out of his chair to answer the phone when he heard it ring. He stood up "in haste." Upon attempting to stand, he slipped, fell and was "in excruciating pain." His mom found him and called an ambulance. He testified that he does not know why the ambulance report said he was asleep and got up to answer the phone; he was not asleep when the phone rang.

Applicant further testified that he and the building manager, Paige Salazar, had an agreement whereby applicant would report that he worked eight hours per day on the on-call schedule, even though he was on call from Saturday afternoon through Monday morning, so that there was no overtime being claimed.

(May 21, 2024, MOH/SOE, pp. 3-7.)

4. Decision

I found that applicant had met his burden of proving injury AOE/COE by a preponderance of the evidence.

5. Contentions on reconsideration

In its petition for reconsideration, defendant contends this WCJ erred in finding the act of getting out of the chair was AOE/COE, that this WCJ erroneously concluded applicant was credible, and that this WCJ erred in finding the injury to occur in the course of employment.

DISCUSSION

Applicant bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302; Lab. Code, §§ 3600(a); 3202.5.) Labor code Section 3600[1] provides employer liability for workers' compensation benefits "in lieu of any other liability whatsoever to any person," "without regard to negligence," under the circumstances specified in the statute. (§ 3600, subd. (a).) "To be compensable, an injury must 'aris[e] out of and [be] in the course of the employment." (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal. 4th 644, 650) "Whether an employee's injury arose out of and in the course of [his or] her employment is generally a question of fact to be determined in light of the circumstances of the particular case." (*Mason v. Lake Dolores Group* (2004) 117 Cal. App. 4th 822, 830 (*Mason*).) Reasonable doubts as to whether an injury arose out of and in the course of employment are resolved in favor of the applicant. (*Garza v. Workers' Comp. Appeals Bd.* (1970) 3 Cal. 3d 312, 317.)

An injury arises out of the employment when "the employment and the injury [are] linked in some causal fashion." (*South Coast Framing, Inc., supra* at p. 297.) This requirement is an elaboration of the proximate cause requirement in section 3600, subdivision (a)(3). (*LaTourette, supra*, 17 Cal. 4th at p. 651, fn. 1.) But the concept of proximate cause in workers' compensation is significantly different than in tort law. (*South Coast Framing, Inc.*, at pp. 297–298.) For purposes of causation in workers' compensation, "[t]he danger from which the employee's injury results must be one to which he was exposed in his employment." "All that is required is that the employment be one of the contributing causes without which the injury would not have occurred." (*LaTourette*, at p. 651, fn. 1.)

In general, an injury occurs in the course of the employment if it occurs when the employee is working at the place of employment and doing "those reasonable things which his contract with his employment expressly or impliedly permits him to do." (*LaTourette, supra*, 17 Cal. 4th at p. 651.) "[A]n employee acts within the course of his employment when "performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied." (*LaTourette*, at p. 651.) Defendant contends standing up is a normal bodily movement and could have happened anywhere. Applicant testified he stood up "in haste" to answer what he knew to be a work call. This is sufficient to satisfy that the employment be one of the contributing causes without which the injury would not have occurred.

Defendant also contends applicant standing up to get up off of his couch was purely personal and not in furtherance of his duties. "An employee's personal purpose at the time of injury is irrelevant so long as he is engaged generally in performing a task for his employer." (*Williams v. Workers' Comp. Appeals Bd.* (1974) 41 Cal.App.3d 937, 942.) It is possible for off-premises injuries to be compensable under the personal comfort doctrine. The test is whether the activity was reasonably contemplated by the employment. (*SCIF v. WCAB (Cardoza)* (1967) 32 CCC 525, 527. See also *Ayala v. Fruit Harvest, Inc.* (2017) 82 CCC 1046 (panel decision) (injury compensable when applicant took lunch break in shady field adjacent to employer's property to escape scorching heat; there was no shade on employer's premises).)

[1] All other references are to the Labor code.

In its petition, defendant contends this WCJ did not state precisely what the causal link between the employment and the injury is. The causal connection between the employment and the injury need not be the sole cause; it is sufficient if it is a contributory cause." (*Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal. 3d 729, 733-734.) While there is mention of applicant's being "an extremely large individual" in the QME report, and "because of his size, the increased pressure that would have been placed on his knee would be more than what normally would be expected, leading to what essentially was a subluxation-type injury of the knee joint. This led to significant damage to the lateral and central ligaments of the knee necessitating the surgical repair….It would appear that the incident described by him, especially given his size, would have been sufficient to cause significant injury to the right knee as found thus far," this argument pertains to *apportionment*, not AOE/COE. An employee is entitled to Workers' Compensation benefits if the industrial injury merely accelerates, aggravates, or "lights up" a preexisting disease. (*Clark*, *supra*, 61 Cal.4th at p. 300.) In addition, the employee's physical condition is irrelevant to the causation analysis. (*Duthie v. WCAB* (1978) 86 CA3d 721, 727.) Therefore, even if applicant's size put him at a greater risk of suffering this injury, that does not refute that applicant's standing up, and slipping and/or buckling of the knee, was a reasonably probable contributory cause of his torn ACL.

Here, there is testimony regarding whether applicant was "on call" or on "standby" working for the employer when the injury occurred. (See May 21, 2024 MOE/SOE, pp. 3-12.) I do find applicant's testimony to be credible. In its petition, defendant contends applicant is not credible because there are some discrepancies in the accounts of how the injury occurred in the Contra Costa Fire Department report and the hospital reports. While there may be inconsistencies in applicant's testimony and the reports, I noted there are no inconsistencies in applicant's trial testimony. At trial, applicant even testified that he did not tell the paramedics that he was sleeping in his recliner and got up to go to bed when his knee buckled. (See May 21, 2024 MOE/SOE, p. 7.)

While it does appear that applicant was working for the employer – whether "on call" or on "standby" pursuant to his agreement with Paige Salazar (May 21, 2024, MOH/SOE, pp. 7-8) – the analysis here is whether applicant was in the course of his employment when his knee injury occurred. Applicant testified he stood up from the couch to answer his phone when he heard it ring. He testified he knew it was his coworker and engineer Jonathan Andrade because he had a unique ringtone programmed into his cell phone for him. Since applicant was the chief engineer, he had two other engineers that would call him regarding potential emergencies or other issues at the jobsite; the engineers were Jonathan Andrade and Marc. He further testified that he had been called by coworkers regarding work on the weekends "numerous times" after midnight. Applicant's unrebutted testimony is that Paige Salazar coordinated the agreement about him logging hours for being on call or on standby. (p. 5.)

Defendant further contends applicant is not credible because he testified in his deposition that the injury happened between 2300 and 2330 hours, yet testified at trial that it occurred between 10:00 and 10:30. I found applicant rehabilitated himself by testifying that he got confused that 10:00 p.m. actually translated to 2200 hours. Additionally, defendant contends applicant is not credible because it is "implied" that he testified at his deposition that he spoke to Jonathan Andrade when the phone rang, yet testified at trial that he spoke to him only once he got to the hospital and did

not speak to him when he attempted to answer the phone when it rang prior to the injury occurring. In fact, applicant did testify at his deposition that he did not talk to Jonathan "at that time" that the phone rang, and spoke to him only once he was at the hospital. Regardless, while there may be inconsistencies in applicant's testimony, they are not crucial to the mechanism of injury.

Here, applicant heard his phone ring, he knew it was from coworker Jonathan Andrade who was on the jobsite, and applicant stood up to go walk to answer his phone. The act of moving to answer the phone and putting pressure on his knee "leading to what essentially was a subluxation-type injury of the knee joint" is a contributing cause without which the injury would not have occurred. Applicant was acting within the course of his employment when performing a duty imposed upon him by his employer and one necessary to perform the terms of the employment contract. He was standing up to answer his phone, which he testified was in another room that he had to walk to, to answer a call regarding work. The QME and the ER reports corroborate the claimed mechanism of injury. Dr. Fong's report states, "[t]he patient appears to have injured his right knee when it collapsed on him when he stood up quickly and his full weight fell on the knee when it did give out…" (Exhibit 1, p. 6.) This satisfies the test whether the activity was reasonably contemplated by the employment.

Accordingly, I found applicant's injury to right knee, right leg, and right lower leg is industrially compensable. I deferred all other issues with WCAB jurisdiction reserved.

RECOMMENDATION

For the foregoing reasons, I recommend that defendant's Petition for Reconsideration, filed herein on November 26, 2024, be denied. This matter is being transmitted to the Appeals Board on the service date indicated below my signature.

DATE: 12/06/2024

Hillary R. Allyn
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE