WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VICTOR RUTTMAN, *Applicant*

vs.

CY PROPERTY MANAGEMENT; EMPLOYERS COMPENSATION INSURANCE GROUP, *Defendant*

Adjudication Numbers: ADJ17864269, ADJ18601862
Redding District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact and Order issued by the workers' compensation administrative law judge (WCJ) in this matter on February 5, 2025. In that decision, the WCJ found, in pertinent part, that applicant, while employed by defendant on May 18, 2023 as a maintenance man 1) sustained injury arising out of and in the course of employment (AOE/COE) to the low back, 2) applicant's earnings were $570.00 per week, warranting indemnity rates of $380.00 for temporary disability, 3) the proper occupational group number is 340, 4) the late cancellation fee for the deposition of the panel qualified medical evaluator (PQME) on August 19, 2024 was incurred unreasonably and unnecessarily by applicant's counsel, 5) the medical record does not support a need for medical care to the low back as a result of the May 18, 2023 industrial injury, and 6) there is no fund of benefits from which an attorneys' fee can be awarded.

The WCJ ordered applicant's counsel to pay the late cancellation fee, and deferred all other issues.

Defendant contends that the WCJ erred in finding applicant to have sustained a specific industrial injury AOE/COE on May 18, 2023, as the PQME found the claimed injury to be an exacerbation of a pre-existing condition, and as such, the injury is not compensable.

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

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

I.

Former 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.
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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 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 February 25, 2025, and 60 days from the date of transmission is April 26, 2025, which is a Saturday. The next business day that is 60 days from the date of transmission is Monday, April 28, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision was issued by or on April 28, 2025, so that we have timely acted on the petition as required by section 5909(a).

[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.

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 shall constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on February 25, 2025, and the case was transmitted to the Appeals Board on February 25, 2025. 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 February 25, 2025.

II.

Turning to the merits of the Petition, defendant argues that the reports of the QME Michael Ciepiela, M.D. do not support a finding that the applicant sustained a compensable industrial injury on May 18, 2023, as the QME opined that the applicant's specific injury on that date caused a temporary exacerbation of the applicant's underlying pre-existing medical condition, and thus is not compensable.

An aggravation is an increase in the severity of a pre-existing condition where the underlying pathology is permanently moved to a higher level. An exacerbation is a temporary increase in the symptoms of a pre-existing condition that returns to its prior level within a reasonable period of time. The industrial aggravation of a pre-existing condition constitutes an injury for workers' compensation purposes. (*Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615, 617 [1935 Cal. LEXIS 590; *Zemke v. Workers' Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358]; *Reynolds Electrical & Engineering Co. v. Workers' Comp. Appeals Bd.* (*Buckner*) (1966) 65 Cal.2d 438 [31 Cal.Comp.Cases 421].) The Appeals Board has previously held that the aggravation of a prior condition constitutes an injury when the aggravation causes a need for medical treatment and a period of temporary disability. (*City of Los Angeles v. Workers' Comp. Appeals Bd.* (*Clark*) (2017 W/D) 82 Cal.Comp.Cases 1404; *Johnson v. Cadlac, Inc*., 2021 Cal. Wrk. Comp. P.D. LEXIS 194.)

A problem sometimes arises where an employee has had an industrial accident causing or precipitating a particular condition and thereafter sustains another strain on the job. If the subsequent strain indeed aggravates and worsens that original condition, then it may be considered a new injury, to the extent of the aggravation or worsening. However, if the subsequent strain does not rise to the dignity of an aggravating injury, but rather is a mere exacerbation or recurrence of the original injury, then no new industrial injury has occurred. Another important distinction between an aggravation and an exacerbation is that if the second incident causes disability it is, by definition, an aggravation. That is because an aggravation causes the temporary or permanent disability while an exacerbation does not. [See *Clark v. City of Los Angeles* (W/D 2017) 82 CCC 1404.] Thus, if a second injury causes no additional temporary or permanent disability, it is likely a mere exacerbation.

Whether an employee's injury arose out of and in the course of employment is generally a question of fact to be determined in light of the particular circumstances of the case. (*Wright v. Beverly Fabrics* (2002) 95 Cal.App.4th 346 [67 Cal.Comp.Cases 51].) The burden of proving injury AOE/COE rests with the employee and must be met by a preponderance of the evidence. (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253] (*LaTourette*).)

In the instant case, we agree with the WCJ that the medical evidence as well as applicant's uncontradicted testimony at trial supports a finding that the applicant sustained an aggravation and not an exacerbation of his pre-existing condition. The May 18, 2023 incident required treatment beyond first aid, and applicant's unrebutted testimony at trial was that he was unable to return to work after his May 18, 2023, as the employer advised he could not do so unless he could perform his job. Further, the parties stipulated at trial that "the employer has furnished some medical treatment." (MOH/SOE, 1/14/25, 2:15.)

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Order issued on February 5, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 28, 2025

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

VICTOR RUTTMAN
ABDI & ASSOCIATES
BLACK & ROSE LLP

LAS/kl

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

&

NOTICE OF TRANSMISSION TO THE APPEALS BOARD

I.

INTRODUCTION

1. **Applicant's Occupation:** **Maintenance Man**
2. **Age at Injury:** **60**
3. **Date of Injury:** **5/18/2023**
4. **Parts of Body Injured:** **Low Back**
5. **Manner of Injury:** **Lifting box off a high shelf**
6. **The applicant is the petitioner**
7. **The petition was timely filed and verified**
8. **The Findings of Fact, Order and Opinion on Decision was issued on 1/31/2025**
9. **Petitioner contends that the evidence does not support a finding of a specific industrial injury on 5/18/23. Specifically, petitioner argues that the QME found the injury to be an exacerbation of a prior non-industrial condition, and as such an exacerbation cannot be a legally compensable industrial injury.**

II.

FACTS

The parties agree that on 5/18/23 the applicant was at work when he reached up to lift a box off a high shelf, twisted, and felt an immediate significant pain in his low back.

At trial, the parties stipulated that the defendant had provided some medical treatment, and in fact the QME listed the treatment the applicant received after the injury on pages 20 – 23 in Joint Exhibit AA.

The parties used Dr. Michael Ciepiela as an orthopedic PQME. That doctor saw the applicant on one occasion, and wrote two reports, in evidence as Joint Exhibits AA and BB.

In Joint Exhibit AA, Dr. Ciepiela `took an accurate history of the applicant's injury at work and concluded on page 29 that this incident was an exacerbation of underlying severe degenerative disc disease.

On page 30, the evaluator determined that the applicant would have reached a permanent and stationary condition post injury in about six weeks. This is consistent with the doctor's summary of the treatment records, which show the applicant off of work, on treating doctor's orders, until at least 6/17/23, found on pages 20 through 23.

Of note, the treating doctors as summarized by the PQME characterize this as an industrial injury.

The defendant has denied the injury is industrial, and it is not clear whether they have paid any temporary disability, as the applicant's entitlement to that benefit was not placed at issue at trial.

Trial occurred on 1/13/25 and thereafter a decision issued on 1/31/25. That decision found that there had been an injury at work on 5/18/23 when the applicant lifted the box off of a shelf. Defendant timely filed a petition for reconsideration therefrom, contesting the findings of fact that there had been any industrial injury at all. Petitioner argues that due to the PQME's characterization of the incident as an exacerbation, it cannot legally be an industrial injury, and therefore is not compensable.

III.

DISCUSSION

Labor Code section 3208.1 defines a specific industrial injury as follows:

"Any injury may be either: (a) "specific," occurring as the result of one incident or exposure which causes disability or need for medical treatment…"

Therefore, this definition requires EITHER a need for medical treatment, OR disability. A finding of either meets the definition of a specific injury.

The parties do not dispute that the applicant suffered this injury while at work, and while performing activities as directed by his employer (Summary of Testimony, page 5: 10 – 14).

The parties further stipulated that defendant did provide some medical treatment. The applicant testified under oath and without contradiction that his supervisor sent him get treatment through their workers' compensation insurance (Summary of Testimony, page 4: 1 – 3).

As noted above, the treating doctors, as summarized by the PQME on pages 20 - 23, clearly thought the applicant needed treatment as a result of this work injury, and did in fact provide such care, which included electro-diagnostic studies in the form of EMG/NCS.

Therefore, the evidence shows that the injury at work required treatment beyond first aid, as recommended by the employer, and for which at least some of which was paid by defendant per stipulation at trial.

This in itself is enough to meet the requirements of a specific injury as defined in LC section 3208.1.

But there's more.

In addition, the applicant testified that he has been unable to return to work since the 5/18/23 injury, and that his employer told him he couldn't come back to work unless he could do the job (Summary of Testimony, page 4: 4 – 6).

The treating physicians clearly had him totally temporarily disabled from the date of injury to 6/2/23, when he was released to modified work. Of course, there is no evidence that the employer made an offer of modified work, and this makes sense given the applicant's uncontradicted testimony that they could not modify his job.

This period of disability came to an end per the PQME about six weeks after the injury, when the applicant reached a permanent and stationary status. There is nothing in the evidentiary record to contradict this.

Therefore, the record clearly establishes that the applicant's industrial injury cause both a need for medical care and disability. This satisfies the definition of a specific injury as it is defined in LC section 3208.1.

Petitioner argues that because the PQME characterized this injury as the exacerbation, as opposed to aggravation of a well established non-industrial condition, that there can be no injury found.

A very similar situation occurred in City of Los Angeles v. WCAB (Clark) (2017) 82 CCC 1404 (writ denied).

In that case, the applicant was injured during a training exercise after being hired as a police officer. He required medical care and lost time from work due to this incident. The AME characterized this incident as an exacerbation of a non-industrial underlying condition, and the defendant denied liability based on the position that an exacerbation could not be an injury.

The case went to trial, and the WCJ determined that under these conditions, the incident was an industrial injury.

Defendant appealed, and the WCAB found that because the applicant received medical treatment and was temporarily disabled due to the incident, the applicant in fact sustained an injury that was a lighting up or aggravation of his pre-existing condition. The WCAB noted that the AME's opinion that the incident was only an exacerbation rather than an aggravation was based on an incorrect legal theory regarding the legal basis for what constitutes an injury, and was thus not substantial evidence on that issue.

Defendant filed a writ, but the Court of Appeal found it had no merit and denied further review.

In all significant respects this is the situation we have in our matter. Petitioner argues that because the PQME characterized the injury of 5/18/23 as an exacerbation, in spite of the clear need for medical treatment, some of which the defendant agrees they provided, as well as total temporary disability, this is not a compensable injury and they have no liability.

This is clearly contrary to the definition of injury in 3208.1 and the logic set forth by the board in the City of Los Angeles case, supra. As in City of Los Angeles, the PQME's characterization of the injury here as an exacerbation rather than an aggravation is simply legally incorrect, and on that issue alone is not substantial evidence. Likewise, the defendant's reliance on this obvious incorrect characterization, and their apparent ignorance of LC section 3208.1, cannot excuse them from their liability to the applicant for the necessary medical treatment he required and from the temporary disability liability incurred up to the date the applicant became permanent and stationary.

IV.

RECOMMENDATION

For the reasons discussed above, it is respectfully recommended that the petition for reconsideration be denied in its entirety.

V.

NOTICE OF TRANSMISSION

Pursuant to Labor Code Section 5909, the parties and the appeals board are hereby notified that this matter has been transmitted to the appeals board on 2/25/25.

DATE: 2/25/25

Curt Swanson
PRESIDING WORKERS' COMPENSATION
JUDGE