

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE MORALES, *Applicant*

vs.

**CORPORATE PACKAGING INC. and
COMPWEST INSURANCE COMPANY, *Defendants***

Adjudication Number: ADJ12973629

Pomona District Office

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on January 4, 2024, wherein the WCJ found that applicant did not sustain an injury arising out of and in the course of his employment (AOE/COE); and the WCJ ordered that applicant take nothing by way of his injury claim.

Applicant contends that his subjective complaints of pain are consistent with the degenerative changes shown in the diagnostics and are evidence that he sustained injury AOE/COE as claimed; that the reports from primary treating physician (PTP) Yury Furman, M.D., are substantial evidence that applicant sustained injury AOE/COE; that the inconsistencies in what applicant told the various doctors are due to his lack of fluency in either English or Spanish, so if those inconsistencies are relevant, the record should be further developed to clarify applicant's history, job duties, and symptoms/conditions caused by the claimed injury; and that applicant should undergo medical-legal evaluations regarding his psychiatric, internal/respiratory, and visual/eye conditions.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from defendant.¹

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to his eyes, neck, bilateral shoulders, hands, wrists, lower back, bilateral knees, bilateral feet, psyche, and respiratory system while employed by defendant as a palletizer/box builder during the period from January 30, 2019, through January 30, 2020.

The following is a brief summary of the reports from PTP Mohammad Reza Rockny Mojabe, D.C., chiropractic qualified medical examiner (QME) Christopher A. Rapoff, D.C., and the PTP Yury Furman, M.D.

Applicant first received treatment from Dr. Mojabe on March 4, 2020. As to applicant's description of his job duties, Dr. Mojabe noted:

He indicates that his job duties included palletizing, lifting boxes and warehouse duties. He would lift water bottles each weight from 25 to 50 pounds from conveyor belt and placed on to the floor on the palate and build it up to 70 boxes-bottle case per palate and would palatalize 10-12 palate. In addition, he would lift 70 to 100 of 30-50 pound palates [sic] and carry to locations. He always walks around, being on his feet, reaching down to floor levels, forward or reach at shoulder or above levels while lifting, pulling pushing with light gripping. He requires bending, turning, twisting with neck and back.
(App. Exh. 22, Mohammad Reza Rockny Mojabe, D.C., March 4, 2020, p. 1.)

¹ The Answer consists of a one sentence argument that applicant's allegations are not supported by the evidence and a one sentence conclusion requesting that the F&O be sustained (Answer). The Answer is less than "skeletal;" in that there is no reference to any of the evidence submitted at trial nor is there a reference to the applicable statutory or case law. (Cal. Code Regs., tit. 8, § 10945)

On November 17, 2020, applicant was evaluated by chiropractic QME Dr. Rapoff. Regarding applicant's work duties, Dr. Rapoff stated:

Mr. Morales indicated through the course of a normal work day he would stack boxes of product, pallets and lifted cardboard over his head and placed the cardboard into a box-making machine. These boxes weighed between 30-80 pounds. He also reported moving the pallets around the floor by either using his feet or "nudging" them with his knees. He stated that he performed these work duties 8-10 hours per day, 45-60 hours per week.
(Def. Exh. C, Chris Rapoff, D.C., November 17, 2020, p. 6; see also Def. Exh. A, Chris Rapoff, D.C. December 11, 2022, p. 3.)

On the issue of prior injuries, Dr. Rapoff noted:

At some point in 2000 (exact date uncertain), Mr. Morales was involved in a car accident. He was a passenger at the time and suffered an injury' to his neck. After a series of treatments, Mr. Morales stated that the neck condition resolved. Mr .Morales indicated that he did receive a financial settlement because of this accident.
(Def. Exh. C, p. 7; see also Def. Exh. A, p. 74.)

As to the physical limitations caused by the alleged injury, applicant "... reports low back pain and burning after sitting more than 15-30 minutes. Mr. Morales states that he limits the amount of time that he sits." (Def. Exh. C, p. 19; see also Def. Exh. A, p. 25.) Dr. Rapoff concluded:

In my opinion, with reasonable medical probability, Mr. Morales did not suffer an industrial injury either specific or cumulative - while employed with Corporate Packing Inc. to his 1) neck, 2) left shoulder, 3) right shoulder, 4) left arm, 5) right arm, 6) left wrist, 7) right wrist, 8) low back, 9) left knee, 10) right knee, 11) left ankle 12) right ankle.
(Def. Exh. C, p. 71; see also Def. Exh. A, pp. 78 – 81.)

Applicant initially received treatment from Yury Furman, M.D., on April 22, 2021. (See App. Exh. 9, Yury Furman, M.D., April 22, 2021.) After a course of treatment, on January 17, 2022, Dr. Furman issued the permanent and stationary report. (App. Exh. 14, Yury Furman, M.D., January 17, 2022.) He described applicant's job duties as: "... moving pallets utilizing a manual pallet jack, pulling boxes near the operating machine, inserting cartons into the machine so it can build a package, utilizing an electric slicer, picking up the trash, and keeping the work area clean." (App. Exh. 14, p. 2.) Dr. Furman noted that, "The patient is a well-developed, well-nourished male. The patient has no problem moving in and out of the room. The patient has no problem moving onto and off exam table." (App. Exh. 14, p. 7.) The doctor found applicant's condition to

have reached maximum medical improvement. He stated applicant's "whole person impairment rating is 21%" and that it was "a direct result of the cumulative injury." (App. Exh. 14, pp. 16 - 18.)

After reviewing QME Dr. Rapoff's November 17, 2020 report, Dr. Furman stated:

Based on the review of this submitted P&S report by Chris Rapoff, DC, I respectfully disagree that there is no industrial causation to CT to multiple body parts on this case. Based on the review of the described job duties as a general laborer/machinist and considering the current subjective and objective findings, and what is biomechanically and medically reasonable, it is my opinion that the patient sustained CT injuries to the cervical spine, bilateral shoulders, bilateral wrists and hands, lumbar spine, bilateral knees due to the arduous work activities while working for Corporate Packing, Inc. (App. Exh. 14, p. 15.)

Dr. Rapoff re-evaluated applicant on December 6, 2022. (Def. Exh. A, Christopher A. Rapoff, D.C., December 21, 2022.) After re-evaluating applicant and reviewing additional medical records, including x-rays and MRIs, Dr. Rapoff reiterated that, "... it is my opinion with reasonable medical probability that NONE of Mr. Morales' current symptoms and complaints are due in any way to an industrial injury - either specific or cumulative..." (Def. Exh. A, p. 78.)

The parties proceeded to trial on June 26, 2023. The issues submitted for decision included injury AOE/COE, parts of body injured, temporary disability, and permanent disability. (Minutes of Hearing and Summary of Evidence (MOH/SOE), June 26, 2023, pp. 2 - 3.) On July 11, 2023, the WCJ issued an Order Vacating Submission that included an Order that the parties develop the record.

Pursuant to the WCJ's order to further develop the record, on October 17, 2023, Dr. Furman re-evaluated applicant (with a certified interpreter present) and based thereon, he submitted a permanent and stationary report. (App. Exh. 21, Yury Furman, M.D., October 17, 2023.) Dr. Furman again found that applicant had 21% whole person impairment and he repeated the statement from his previous report that he disagreed with Dr. Rapoff's opinion that applicant did not sustain a cumulative industrial injury, as claimed. (App. Exh. 21, pp. 18 - 20.)

At the December 4, 2023 trial applicant's exhibits 20, 21, and 22 were admitted into the record and the matter was again submitted for decision. (MOH/SOE, December 4, 2023.)

DISCUSSION

We first note that the Petition has twenty-five exhibits attached for a total of more than four hundred pages, which is in violation of Appeals Board Rule 10945(c). (Cal. Code Regs., tit. 8, § 10945.) The Appeals Board does not scour attached exhibits so the exhibits will not be considered. Counsel is reminded that failure to comply with the Appeals Board Rules may in the future be deemed sanctionable conduct.

It has long been well established that any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16]; *Universal City Studios, Inc. v. Workers' Compensation Appeals Bd. (Lewis)* (1979) 99 Cal.App.3d 647 [44 Cal.Comp.Cases 1133].)

To be substantial evidence a medical opinion must be based on pertinent facts, on an adequate examination and an accurate history. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, as explained by the WCJ in her Opinion on Decision:

Dr. Rapoff stated (Exhibit C, page 21);
However, during the examination, I observed conflicting actions by Mr. Morales that contradict his belief of "severe impairment." For example, Mr. Morales indicated during the interview that he was only able to sit for very short period of time due to lower back pain with prolonged sitting. In contrast to this, he sat for nearly 2 hours during the face-to-face interview without distress or need for position change. In addition, Mr. Morales stated that he had difficulty picking up objects and writing due to hand pain/weakness. However, the Bilateral Grip Strength testing during the physical examination demonstrated a satisfactory grip.

Dr. Rapoff's observation is consistent with what this WCJ observed. At the time of trial the applicant was seen sitting without issue. The applicant testified when he walks[,] he walks hunched over, the pain in his knees makes him limp (MOH, Summary of Evidence dated pg. 8, lines 12-14). The applicant was not observed walking hunched over or limping while entering the courtroom, walking to the witness stand or leaving the courtroom. The applicant appeared to move freely without pain.

What the applicant reported to each doctor also varied in regards to his complaints such as his ability to sit, walk and the prior injuries sustained. He

testified at trial that he spends a lot of time sitting down (MOH, Summary of Evidence dated pg. 8, lines 12-13). However, the applicant told his pain management doctor, Dr. Bohm that he is unable to sit more than a half hour (Exhibit 7, page 3).

In addition, the history provided in the medical reports varied from one doctor to another. The report of Dr. Bohm notes, the applicant had a prior rotator cuff surgery and Achilles surgery (Exhibit 7, page 2). This is relevant because the applicant is claiming bilateral shoulders and ankles. There is no mention of these injuries in any of the treating doctor's reports. The PQME took a history of an automobile accident in 2000, where the applicant sustained an injury to his neck. Again, this is important because the applicant is claiming a neck injury. This injury was not noted in any of the treating doctor's reports. (F&O, Opinion on Decision, p. 3.)

Having reviewed the trial record, we agree with the WCJ that there are several inconsistencies in the information provided to the various doctors whose reports were admitted into evidence. Also, the job duties described by the doctors are quite inconsistent with those identified in the Usual and Customary Job Description. (Def. Ex. F.)² Based thereon, we cannot determine the accuracy of the doctors' reports that were admitted into evidence, and in turn the reports are not substantial evidence.

The Appeals Board has the authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues submitted for decision. (Lab. Code §§ 5701, 5906; *Kuykendall v. Workers' Comp. Appeals Bd.*, (2000) 79 Cal.App.4th 396 [65 Cal.Comp.Cases 264] *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].)

Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) However, under the circumstances of this matter, we recommend that the WCJ schedule a conference in order to assist the parties in determining how best to develop the record to clarify applicant's history of injuries, his job duties/requirements while employed by defendant, and ultimately the issue of injury AOE/COE.

² We note that although the Job Description was not dated or signed by the employer or by applicant, it was admitted into evidence without objection.

Accordingly, we grant reconsideration, rescind the F&O, and return the matter to the WCJ for development of the record and further proceedings as appropriate.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued by the WCJ on January 4, 2024, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the January 4, 2024 Findings and Order is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 11, 2024

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

**JOSE MORALES
LAW OFFICES OF ALEXANDER SOLHI & ASSOCIATES, APC
HANNA, BROPHY, MacLEAN, McALEER & JENSEN, LLP**

TLH/mc

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