WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JAMES MC DUFFIE, *Applicant,* **vs.** **LOS ANGELES COUNTY METROPOLITAN TRANSIT AUTHORITY, Permissibly Self-Insured, c/o CONSTITUTION STATE SERVICE COMPANY,** *Defendant(s).*	**Case No. MON 254928** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

On October 1, 2001, the Board granted defendant's petition for reconsideration of the decision dated July 19, 2001, wherein the workers' compensation administrative law judge (WCJ) found, among other things, that "[t]he present orthopedic medical record is lacking." The WCJ thereby deferred the issues of temporary disability, permanent disability, apportionment and medical treatment "pending receipt of a report from a Court appointed medical evaluator." After granting reconsideration to study the record and because of the important legal issue this presented, that is, the preferred procedure to be followed where the medical record requires further development, and in order to secure uniformity of decision in the future, the Chairman of the Board, upon a majority vote of its members, reassigned this case to the Board as a whole for an *en banc* decision on this issue. (Lab. Code, §115.)[1]

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[1] The Board's en banc decisions are binding precedent on all Board panels and WCJs. (WCAB/DWC Policy & Procedure Manual, Index No. 6.16.1.)

As set forth below, we conclude that where the medical record requires further development either after trial or submission of the case for decision, the preferred procedure is first to seek supplemental opinions from the physicians who have already reported in the case. If the supplemental reports or depositions of the previously reporting physicians cannot or do not sufficiently develop the record, an agreed medical evaluator (AME) may be considered. Finally, if none of these options succeeds or is possible, the WCJ or the Board may then appoint a medical examiner.

In her decision of July 19, 2001, the WCJ found that applicant, while employed as a bus operator from March 4, 1976 through June 29, 1999, sustained industrial injury to both knees and in the form of hypertension. The WCJ found that applicant's claims were not barred by the statute of limitations. As to the deferred issues noted previously with respect to the applicant's bilateral knee injury, the WCJ appointed Alex Angerman, M.D., to examine applicant and submit a report, the cost of which was ordered payable by defendant.

In its petition, defendant contended that (1) "the appointment of a. . . medical evaluator by the WCJ should not be the... first action in further developing the medical record;" (2) the report of Dr. Burstein, relied on by the WCJ to find applicant's industrial hypertension injury, does not constitute substantial evidence; and (3) the WCJ erred in finding that applicant's claims were not barred by the statute of limitations.

With respect to defendant's second and third contentions, based on our review of the entire record, and for the reasons stated by the WCJ in her report and recommendation (report), we are persuaded that the opinion of Dr. Burstein is substantial evidence in support of the finding of industrial hypertension, and that the WCJ properly found that applicant's claims were not barred by the statute of limitations. Accordingly, we adopt and incorporate the WCJ's report with respect to these findings and will affirm them.

We agree, however, with defendant's first contention as to further development

of the medical record. Therefore, we will amend the WCJ's decision to rescind the appointment of Dr. Angerman as a medical evaluator in this case, and return this matter to the trial level so that the preferred procedure for further development of the medical record can be followed, and for decision thereafter on all outstanding issues.

I. BACKGROUND

Applicant was hired by defendant as a bus operator on March 4, 1976, and worked in that capacity until his retirement on June 30, 1999. On September 22, 1999, he filed a claim for cumulative injury to both knees and in the form of hypertension. Each party subsequently had him examined by qualified medical evaluators (QMEs). Defendant obtained the reports of Drs. Berman and Meth for applicant's orthopedic and hypertension injuries, respectively. Applicant submitted the reports of Dr. Sobol for the injury to his knees and that of Dr. Burstein for his hypertension.

In his permanent and stationary report of April 24, 2000, Dr. Sobol opined that applicant's bilateral knee injury was industrial. Dr. Sobol also concluded that applicant was limited to semi-sedentary work, without apportionment, and required further medical treatment. Dr. Berman, on the other hand, concluded in his report of January 11, 2001, that applicant's "present condition would be apportioned to nonindustrial factors and relates to degenerative joint disease."

This matter proceeded to trial on April 11, 2001, at which applicant was the only witness. On July 19, 2001, the WCJ issued the decision at issue here. As set forth above, the WCJ, among other things, determined applicant's bilateral knee injury to be industrial. With respect to the medical evidence on permanent disability and apportionment for the bilateral knee injury, the WCJ stated in her Opinion on Decision:

> "Considering the totality of the evidence, a finding is made [that] Dr. Berman failed to give due consideration to the effect on Applicant's knees from repetitive and continuous bus driving activities over a prolonged period of time. Dr. Sobol, on the other hand, failed to give due consideration to property maintenance

physical activities which Applicant testified he has been doing since he retired.

"Based on review of the medical record, it is noted in the Doctor's Certificate dated 2/11/92 signed by Ralph Diliberto, M.D. and in the signed Claim Statement of Employee Form dated 2/2/92, the right knee surgery was recorded as resulting from a sport activity with injury.

"For the reasons stated herein, a finding is made [that] the medical record is lacking and needs to be augmented with a report from Alex Angerman, M.D., a Court appointed medical evaluator.

"Dr. Angerman is directed to consider, if medically justifiable, the impact of the non-industrial sport injury requiring surgery on the right knee in 1992 and the effect of that injury on apportionment as well if appropriate [and] the impact of Applicant's subsequent property maintenance activities."

Pursuant to defendant's timely petition from the WCJ's decision, reconsideration was granted in order to allow sufficient opportunity to further study the factual and legal issues in this case. It was subsequently determined that an en banc decision would be appropriate with respect to the issue of further developing the medical record.

II. DISCUSSION

As set forth in *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924, 926-927], Labor Code sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings.[2] (See also *Lundberg v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 436 [33 Cal.Comp.Cases 656, 659]; *King v. Workers' Comp. Appeals Bd.* (1991) 231

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[2] Labor Code section 5701 provides, in pertinent part: "The appeals board may also from time to time direct any employee claiming compensation to be examined by a regular physician" and that "the results of any... examination shall be reported to the appeals board for its consideration."

Labor Code section 5906 provides, in pertinent part, that the "[u]pon the filing of a petition for reconsideration, or having granted reconsideration on its own motion, the appeals board... may grant reconsideration and direct the taking of additional evidence."

Cal.App.3d 1640 [56 Cal.Comp.Cases 408, 414]; *Raymond Plastering v. Workmen's Comp. Appeals Bd.* (*King*) (1967) 252 Cal.App.2d 748 [32 Cal.Comp.Cases 287, 291].) Before directing augmentation of the medical record, however, the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete. (*Tyler, supra*, 62 Cal.Comp.Cases at p. 928 (WCJ determined that neither reporting physician was credible and thus their reports were not substantial evidence); *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261, 265] (Court of Appeal remanded matter to the Board to determine whether to exercise its discretion to seek additional evidence where none of the medical reports adequately discussed the crucial issue of causation.))[3]

In this case, we agree with the WCJ, as stated in her decision and set forth above, that the medical record is incomplete and requires further development on the extent of applicant's orthopedic permanent disability, including the issue of apportionment.[4] We disagree, however, that the first and best option for further developing the medical record is the appointment of a new medical examiner unfamiliar with the case.

Rather, where the WCJ determines after trial or submission of a case for decision that the medical record requires further development, the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. Each side should be allowed the opportunity to obtain

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[3] Supplementation of the medical record, whether on behalf of the applicant or the defendant, may also be necessary to protect the due process rights of the parties. (See *M/A Com-Phi v. Workers' Comp. Appeals Bd. (Sevadjian)* (1998) 65 Cal.App.4th 1020 [63 Cal.Comp.Cases 821, 825].)

[4] As stated by the Court in *San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986, 991-993], however, the power of the Board or of the WCJ to further develop the record under Labor Code sections 5701 and 5906 cannot be used to circumvent the clear intent and language of Labor Code section 5502(d)(3). Thus, the record may properly be further developed with new evidence where, as here, neither side has presented substantial evidence on which a decision could be based, but not where a decision could be rendered on the existing record and the party seeking to introduce new evidence had failed to show, as required by Labor Code section 5502(d)(3), that such evidence "was not available or could not have been discovered by the exercise of due diligence prior to the [mandatory] settlement conference." (*Id.*)

supplemental or additional reports and/or depositions with respect to the area or areas requiring further development, i.e., the deficiencies, inaccuracies or lack of completeness previously identified by the WCJ and/or the Board. (*Tyler, supra*, 62 Cal. Comp.Cases at p. 928.) Only if the supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record, should other physicians be considered.

If the use of physicians new to the case becomes necessary, the selection of an agreed medical evaluator (AME) by the parties should be considered at this stage in the proceedings. In this regard, the Labor Code section 4061 and 4062 time limits on choosing an AME[5] do not, of course, contemplate the situation where the medical record requires further development after discovery had been completed. The time limitations contained in Labor Code sections 4061 and 4062 refer to the initial stages of medical discovery when the treating doctor has been the only physician reporting on the medical issues in dispute. Moreover, where the medical record requires further development, the parties' selection of an AME, rather than each side choosing a new QME, is consistent with the goal of expediting the resolution of the case while keeping additional medical-legal costs to a minimum.

Finally, if none of the procedures outlined above is possible, the WCJ may resort to the appointment of a regular physician, as authorized by Labor Code section 5701.[6] If such an evaluation is appropriate, its cost, as those of the other evaluations previously discussed, are properly payable as a medical-legal expense under Labor Code sections 4620 et seq.

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[5] Following the treating physician's permanent and stationary report, Labor Code sections 4061(c) and 4062(a) provide a ten-day period, which may be extended an additional twenty days by agreement of the parties, in which to select an AME, after which time "the parties may not later select an [AME]."

[6] As noted in *Tyler, supra*, 62 Cal.Comp.Cases at p. 928, however, appointments of *independent medical examiners* are limited by Labor Code section 139.1 to cases with injuries occurring prior to January 1, 1991.

The procedure we have outlined in this opinion is consistent with the policy goals of Labor Code sections 4061 and 4062. These sections require that the parties attempt to agree on an AME before obtaining separate QME evaluations. If successful, this promotes prompt resolution of disputes and minimizes medical-legal expenses. If the parties cannot agree to an AME at an early stage, the prohibition against later selection of an AME encourages the parties to select QMEs who are sufficiently objective and competent that their reports will be able to withstand scrutiny at trial and will be persuasive to the trier of fact.

This procedure also furthers the policy goals of Labor Code sections 4061 and 4062 by requiring that the parties be constrained by the choices of examiners they have previously made. Only where those examiners are no longer available for further evaluations, or where the medical information required to develop the record is not within the expertise of those examiners, or where there is other good cause not to obtain supplemental reports or records from those examiners should the WCJ consider encouraging the parties to select an AME or appointing a "regular physician."

Therefore, we will amend the WCJ's decision to rescind the appointment of Dr. Angerman, and return this matter to the trial level for further development of the medical record from Drs. Sobol and Berman addressing the specific deficiencies outlined by the WCJ.[7]

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[7] Although that does not appear to be the situation here, we note that in some cases, it will, of course, be appropriate to obtain a supplemental opinion from the treating physician.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Board (En Banc) that the Interim Findings and Award and Order of July 19, 2001, is **AFFIRMED** except that Finding of Fact No. 14 and the Order appointing Dr. Angerman as a medical evaluator, as well as all references to said appointment and evaluation in Findings of Fact Nos. 4-8 and 15, are **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

MERLE C. RABINE, Chairman

COLLEEN S. CASEY, Commissioner

JAMES C. CUNEO, Commissioner

WILLIAM K. O'BRIEN, Commissioner

FRANK M. BRASS, Commissioner

JANICE J. MURRAY, Commissioner

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

FEB 25 2002

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES SHOWN ON THE OFFICIAL ADDRESS RECORD EXCEPT THE LIEN CLAIMANTS.

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