WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANTRON LEE, ***Applicant,*** **vs.** **STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS AND REHABILITATION, PLEASANT VALLEY STATE PRISON, legally uninsured, administered by STATE COMPENSATION INSURANCE FUND,** ***Defendants.***	**Case No. ADJ6652737** **(Fresno District Office)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

Defendant seeks reconsideration of the Findings of Fact, Award, Orders and Opinion on Decision (F&A) issued by the workers' compensation administrative law judge (WCJ) on August 31, 2017, wherein the WCJ found in pertinent part that as a consequence of Valley Fever, applicant sustained injury to his knees, ankles, feet, circulatory system, musculoskeletal system, and respiratory system and that applicant had 76% permanent partial disability. The WCJ also ordered, in pertinent part, that the June 29, 2017 deposition transcript (Joint Exh. U), the March 28, 2017 report (Def. Exh. 3) from the internal medicine agreed medical examiner (AME), Gerald Markovitz, M.D., the Google Earth map of applicant's home (Def. Exh. 2) and the January 1, 2014 NIOSH Report (Def. Exh. 1) were not admitted into evidence.[1]

Defendant contends that the transcript of the deposition of Dr. Markovitz had been admitted into evidence at the July 10, 2017 trial, that the opinions from Dr. Markovitz are not substantial evidence that applicant's Valley Fever was industrially related, that the injury to applicant's heart and his Valley Fever

[1] The minutes indicate that applicant objected to defendant's exhibits 1 and 2 "based on relevance." The WCJ excluded both exhibits but the Opinion on Decision did not address why the exhibits were excluded. Also, we note that in his May 6, 2015 report, (Joint Exh. C) Dr. Markowitz refers to and discusses the NIOSH Report. It is not clear why or how a report discussed by an AME would be deemed "not relevant."

are two separate injuries with different dates of injury so they should be rated separately, and that defendant is entitled to credit for a temporary disability indemnity overpayment.

The WCJ has retired so we did not receive a Report and Recommendation on Petition for Reconsideration. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer. Based upon our review of the record, and for the reasons set forth below, we will grant reconsideration, rescind the F&A and return the matter to the trial level for further proceedings consistent with our decision and a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to his knees, ankles, feet, circulatory system, musculoskeletal system, and respiratory system while employed by defendant as a correctional officer during the period ending October 15, 2007.

On April 29, 2009, applicant was evaluated by Dr. Markowitz, and he issued a report stating that:

> "Mr. Lee presented today for AME evaluation in the field of internal medicine. He developed a case of primary pulmonary coccidiomycosis [coccidioidomycosis] (Valley Fever). There is a Presumption for pneumonias in Correctional Officers and he developed a pneumonia, so there is no reason to deny industrial responsibility for his Valley Fever."

(Joint Exh. J, Gerald Markovitz, M.D., April 29, 2009, p. 6.)

On December 10, 2009, applicant was evaluated by James L. Strait, M.D., the orthopedic AME, and he issued a report. He concluded that:

> "It would be my opinion that Mr. Lee developed symptomatic synovitis in the right knee, right ankle, and left foot and ankle, as a result of his contacting coccidiomycosis [coccidioidomycosis]. My opinion is based on the facts that the applicant had an abnormal bone scan and became symptomatic only a week after being taken off medication for his coccidiomycosis. Added to that is the fact that the applicant also had an abnormal MRI study consistent with erosive synovitis."

(Joint Exh. O, James L. Strait, M.D., December 10, 2009, p. 4.)

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On June 8, 2015, Dr. Markovitz submitted a supplemental report. He stated that:

> "I was asked to review this document as well as answer questions posed by both parties. (¶) In terms of the NIOSH report, the authors do state that it is not possible to determine if each confirmed case of coccidioidomycosis among the prison employees was due to an exposure at work or outside of work. (¶) The threshold for Workers' Compensation is not medical certainty, but rather medical probability. This document confirms that both inmates and employees at these two prisons surveyed have higher than average rates of coccidioidomycosis than the general population even in the endemic areas of Fresno and King's County. ... (¶) Taking all of this into consideration, it is more probable than not that the patient contracted Valley Fever as a result of occupational exposures rather than non-occupational exposures."

(Joint Exh. C, Gerald Markovitz, M.D., May 6, 2015, pp. 3 – 4.)

Applicant filed a declaration of readiness to proceed. On February 16, 2017, the parties attended a mandatory settlement conference (MSC) and submitted a pre-trial conference statement. On page four of the pre-trial conference statement the WCJ ordered that discovery was closed. The WCJ stated that defendant had requested a supplemental report from the AME, that there was no objection to the declaration of readiness, and ordered that the trial judge would rule on the admissibility of the AME report.

On April 13, 2017, the parties appeared but the WCJ was unavailable for trial (Opinion on Decision, p.4) and the parties appeared before a different WCJ who continued the matter to June 10, 2017. The notes on the minutes indicate that defendant had received a supplemental report from Dr. Markovitz which it had requested on the day of the MSC. Applicant's attorney asked to depose Dr. Markovitz and the WCJ re-opened discovery, limited to the deposition of Dr. Markovitz. Admissibility of the supplemental report and the deposition transcript was deferred to the trial judge.

Subsequently, the doctor's deposition was taken on June 29, 2017.

On July 10, 2017, the parties proceeded to trial. The exhibits included Joint Exhibit U, which was identified as the "Deposition Transcript of Gerald Markovitz, M.D., dated 6/29/2017. (**To be submitted by 8/1/2017.**)" (MOH, July 10, 2017, p. 3, [emphasis in the original].) The WCJ noted that except for

defendant's exhibits 1, 2, and 3, all of the exhibits were "ordered into evidence." (MOH, July 10, 2017, p. 4.)

At trial applicant testified that:

> "He worked some hours each day in the environment surrounding the prison and construction was ongoing for the Coalinga State Hospital across the road from Pleasant Valley State Prison. There was dust and no protection or masks."

(MOH, p. 6.)

Both parties submitted post-trial briefs on August 1, 2017. Defendant's brief included the transcript of the June 29, 2017 deposition of Dr. Markovitz. (Defendant's Post-Trial Brief, pp. 11 – 42.)

DISCUSSION

In the Opinion on Decision the WCJ stated that defendant did not show good cause or due diligence that would warrant admitting the transcript of the June 29, 2017 deposition into evidence. Our review of the record indicates that counsel for applicant requested that he be allowed to depose Dr. Markovitz. Also, the MOH state that the deposition transcript was offered as a joint exhibit, that neither party objected to it being admitted, and that it was ordered admitted into evidence. (Minutes, April 13, 2017, MOH July 10, 2017.) The transcript was timely submitted by defendant. (Defendant's post-trial brief, pp. 11 – 42.) There does not appear to be any basis for excluding the transcript from evidence.

Defendant contends that applicant's heart injury is the result of cumulative trauma and that the Valley Fever "is the result of a single, unknown exposure to Valley Fever spores." (Petition, p. 6.) Among the issues raised at the trial was whether applicant's hypertensive heart disease had a different date of injury than the Valley Fever claim. (MOH, p. 3.)

Pursuant to Labor Code section 5412:

> "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment."

(Lab. Code § 5412.)[2] The record contains several reports indicating that over a period of time applicant experienced various symptoms due to his heart condition and other symptoms caused by the Valley Fever. (see e.g., Joint Exh. J, pp. 5 – 6, Joint Exh. G, pp. 7 – 11, Joint Exh. D, pp. 2 – 4.) However, the record does not contain evidence which addresses the section 5412 criteria for determining the date of injury. It appears that applicant's heart injury and his Valley Fever (including the symptoms that are a consequence thereof) may have been the result of separate injuries or they may have been caused by one period of cumulative trauma, but the current record does not contain adequate evidence to make that determination. We note that although Dr. Markovitz stated that applicant's Valley Fever was "a result of occupational exposures" and that applicant's "heart trouble" is also industrial (Joint Exh. C, p. 4) he did not provide an opinion as to whether applicant's injuries were caused by one or more periods of cumulative trauma, nor did he state that applicant sustained a specific injury.

Since the actual date of injury and the number of injuries an injured worker sustained are threshold issues, the trial record must contain substantial evidence addressing those issues. Here, as discussed above, the record does not contain substantial evidence regarding these issues.

In its Petition defendant states that the WCJ failed to address whether Valley Fever, which Dr. Markovitz identified as "a pneumonia" is considered a pneumonia for purposes of the Labor code section 3212.10 pneumonia presumption. (Lab. Code § 3212.10.) Section 3212.10 states in pertinent part that:

> "... [T]he term 'injury' as used in this division includes heart trouble, pneumonia, tuberculosis, and meningitis that develops or manifests itself during a period in which any peace officer covered under this section is in the service of the department or unit. ... (¶) The heart trouble, pneumonia, tuberculosis, and meningitis so developing or manifesting itself shall be presumed to arise out of and in the course of employment."

(Lab. Code § 3212.10.) The statutory language in section 3212.10 does not identify or designate a specific type of pneumonia nor does it limit the applicability of the presumption to a specific type of pneumonia. If the Legislature had intended to limit the presumption, it would have done so.

[2] All further statutory references are to the Labor Code unless otherwise noted.

"In interpreting statutes, if the 'language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature.'. . ." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299]; *Rehman v. Department of Motor Vehicles* (2009) 178 Cal.App.4th 581, 586 [100 Cal.Rptr.3d 516].) Thus, it appears that Valley Fever is a "pneumonia" for the purpose of applying the section 3212.10 presumption.

Defendant asserts that the reports from Dr. Markovitz are not substantial evidence because he did not specify when or where applicant was exposed to Valley Fever spores. However, as noted above, the doctor did explain why as an employee of the Pleasant Valley State Prison, "...it is more probable than not that the patient [applicant] contracted Valley Fever as a result of occupational exposures...." (Joint Exh. C, pp. 3 – 4.) Also, as stated above, since the section 3212.10 presumption appears to be applicable, the issue of when or where applicant was exposed to the spores is irrelevant, absent evidence rebutting the presumption.

Defendant contends that applicant should not receive further permanent disability indemnity payments because it is entitled to credit for a temporary disability indemnity overpayment for benefits paid during the period from April 17, 2009 through January 12, 2012.

The Appeals Board has the discretion to allow a credit for overpaid compensation against an award of a different species of compensation. (Lab. Code § 4909; *Genlyte Group v. Workers' Comp. Appeals Bd. (Zavala)* (2008) 158 Cal.App.4th 705 [73 Cal.Comp.Cases 6]; *Gamble v. Workers' Comp. Appeals Bd.* (2006) 143 Cal.App.4th 71 [71 Cal.Comp.Cases 1015].) The WCJ must weigh the equities and consider whether granting such a credit will result in an undue burden and hardship to applicant. (*Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827 [45 Cal.Comp.Cases 1106].) In *Maples* the Court of Appeal stated that equitable principles are frequently applied to workers' compensation matters, that equity favors allowance of a credit if the credit is small and does not cause a significant interruption of benefits, that the allowance of a credit of overpayment of one benefit against a second benefit can be disruptive and in some cases totally destructive of the purpose of the second benefit, and that the injured employee should not be prejudiced by defendant's actions when the employee received benefits in good faith with no wrong-doing on his part. (*Maples, supra.*) Here,

defendant does not allege, nor is there evidence in the record indicating, that there was any "wrong-doing" by applicant regarding the temporary disability benefits. Instead, defendant admits that the payments "were all accidental overpayments." (Petition, p. 7.)

As discussed above, the transcript from the deposition of Dr. Markovitz was offered as a joint exhibit, without objection from either party, and it was ordered accepted into evidence. Thus, it is evidence contained in the trial record and it should be considered by the trial judge. Also, as discussed earlier, the record does not contain substantial evidence regarding the date and/or dates of injury. Under these circumstances, it is appropriate that we rescind the F&A and return the matter to the trial level for further proceedings consistent with this opinion and a new decision from which any aggrieved person may timely seek reconsideration. It is important to note that because the August 31, 2017 F&A is rescinded, none of the issues raised by the parties at the July 10, 2017 trial have been finally decided, and it is appropriate for the parties to set forth stipulations and issues when the matter is before the new WCJ.[3] Also, the interim orders, which deferred to the trial judge the issues of whether the March 28, 2017 report from Dr. Markovitz and the deposition transcript would be admitted into evidence, remain in effect. Thus, when the matter is returned to the trial level, the WCJ to whom the case is assigned will address those issues.

Accordingly, we grant the Petition for Reconsideration, rescind the F&A and return the matter to the trial level.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact, Award, Orders and Opinion on Decision issued by the WCJ on August 31, 2017, is **GRANTED.**

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[3] Our Order rescinding the F&A is not a final order disposing of any issues raised at trial. (*Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679].)

IT IS FURTHER ORDERED as the Appeals' Board's Decision After Reconsideration that the August 31, 2017 Findings of Fact, Award, Orders and Opinion is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion. When the WCJ issues a new decision any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

CHAIR
KATHERINE ZALEWSKI

JOSE H. RAZO

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOV 16 2017

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

ANTRON LEE
LAW OFFICES OF LENAHAN LEE ET AL.
STATE COMPENSATION INSURANCE FUND

TLH/abs