WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JEANETTE CHAMORRO, *Applicant*

vs.

SAPUTO CHEESE USA, INC.; QBE STONINGTON INSURANCE, administered by SEDGWICK; ZURICH AMERICAN INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ10793276; ADJ10870183
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board previously granted reconsideration to further study the factual and legal issues in this case. This is our decision after reconsideration.

Defendants Stonington Insurance Company and Zurich North America each seek reconsideration of the June 1, 2020 Findings, Award and Order wherein the workers' compensation administrative law judge (WCJ) found that applicant sustained an injury from October 10, 2009 through October 10, 2010 to her arms, hand, fingers, upper extremities, and thumbs in ADJ10793276 and that applicant sustained an injury from August 31, 2016 through August 31, 2017 to her lumbar spine, right shoulder, bilateral wrists, cervical spine, and hands in ADJ10870183. The WCJ found that applicant was entitled to 41% permanent total disability and that all permanent disability was caused by the injury in ADJ10870183. The WCJ found that applicant was entitled to temporary disability indemnity as a result of the injury in ADJ10793276 and was entitled to future medical care for both injuries.

Stonington Insurance Company contends that the WCJ erred in finding that all permanent disability resulted from the second cumulative trauma injury.

Zurich contends that it is entitled to a credit for temporary disability indemnity paid during the same time period as the Employment Development Department (EDD) was also paying applicant.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) in response to each petition, recommending that the petitions be denied. We have considered the Petitions for Reconsideration, the contents of the Reports and the record in this matter. For the

reasons discussed below, as our Decision After Reconsideration, we will rescind the June 1, 2020 Joint Findings, Award and Order, and return the matter to the trial level for further proceedings and a new decision.

FACTS

Applicant filed two applications. The application in ADJ10793276 is for a specific injury on October 10, 2010 to applicant's upper extremities and multiple other body parts as a result of the "repetitive nature of her job duties." (March 13, 2017, Application for Adjudication of Claim, paragraph 2.) The application in ADJ10870183 is for a cumulative injury through March 1, 2017 to the same body parts identified as the application in ADJ10793276. (March 13, 2017, Application for Adjudication of Claim, paragraph 2.)

After Dr. Laura Hatch was selected by the WCJ to act as an Independent Medical Evaluator (IME), the parties agreed to utilize her as an Agreed Medical Evaluator (AME) in this case. Dr. Hatch has issued multiple reports and was deposed twice.

Dr, Hatch first evaluated applicant as an IME on October 8, 2017. Dr. Hatch reported that applicant has been employed as a cheese packer since 1995, working 50 to 55 hours per week. (Exh. J4, October 18, 2017, Laura Hatch M.D., Independent Medical Exam Report, p.2.) On October 10, 2010, applicant reported symptoms of pain, numbness, and tingling in her upper extremities to her employer. After applicant was evaluated by a physician, her employer provided modified duties and reduced hours. (Ibid.) Applicant had left carpal tunnel surgeries on August 25, 2011 and October 1, 2014 and a left trigger thumb release on July 31, 2015. She had a right carpal tunnel release surgery on November 10, 2011 and a ganglion cyst removed from her right thumb on May 26, 2016. (Id. at p. 8.)

Dr. Hatch reevaluated applicant on May 31, 2018. Dr. Hatch noted an onset of low back complaints and opined that applicant's right wrist condition had not yet reached maximum medical improvement. (Exh. J3, May 31, 2018, Laura Hatch M.D., Comprehensive Medical-Legal Report, p. 41.) Dr. Hatch provided whole person impairment ratings for all other body parts and noted that applicant had returned to her usual and customary duties. (Ibid.)

On August 19, 2019, the WCJ ordered that ADJ10793276 and ADJ10870183 be consolidated. The parties submitted the cases for decision on the issues of date of injury in ADJ10793276 and whether applicant sustained one cumulative trauma or two. In a September 19,

2019 Joint Findings and Order, the WCJ issued a finding in ADJ10793276 that "applicant's date of injury is October 10, 2009 through October 10, 2010" and ordered that the pleadings be amended to conform to proof. The WCJ issued a finding in ADJ10870183 that applicant sustained an injury from August 31, 2016 to August 31, 2017 and ordered that pleadings be amended to conform to proof that applicant sustained an injury from May 26, 2016 through May 26, 2017. Neither party sought reconsideration of this decision or requested clarification regarding the discrepancy in the dates between the finding of fact and the order.

Dr. Hatch was deposed twice. At her second deposition on January 8, 2020, Dr. Hatch was asked to comment on whether applicant's right shoulder injury was due to the second cumulative trauma injury. She answered: "That may be a legal determination more than a medical determination." (Joint Exh. 6, January 8, 2020, Deposition of Laura Hatch M.D., 46:18-19.) However, when asked to apportion applicant's injuries to various body parts between the two cumulative trauma injuries, Dr. Hatch suggested that the injuries be divided on a "pro rata basis" based on years of employment. (Id. at 49:1-8.)

On June 1, 2020, the WCJ issued the decision that is the subject of defendants' petitions for reconsideration.

ANALYSIS

Labor Code section 3208.1[1] provides that a cumulative industrial injury occurs whenever the repetitive physically traumatic activities of an employee's occupation cause any disability or a need for medical treatment. The date of injury for an industrial cumulative trauma injury is defined by Section 5412, as follows: "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." As used in Section 5412, "disability" means either compensable temporary disability or permanent disability. (*Chavira v. Worker's Comp. Appeals Bd*. (1991) 235 Cal.App.3d 463 [56 Cal.Comp.Cases 631]; *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998 [69 Cal.Comp.Cases 579].)

Before addressing the current dispute, we must first address the August 19, 2019 Findings and Order wherein the WCJ found, in ADJ10870183, that applicant sustained an injury from

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

August 31, 2016 to August 31, 2017 and, in ADJ10793276, that "applicant's date of injury is October 10, 2009 through October 10, 2010." In ADJ10870183, the WCJ ordered that pleadings be amended to conform to proof that applicant sustained an injury from May 26, 2016 through May 26, 2017 which differs from the date in the Findings of Fact. In addition, given that the application in ADJ10670183 alleges injury through March 1, 2017, applicant had knowledge of industrial injury on that date. Pursuant to Section 5412, in order to assign a date of injury after applicant's date of knowledge, applicant's first date of disability as a result of the injury must be after the date of knowledge. With respect to the finding in ADJ10793276, although applicant first reported her symptoms to her employer in 2010 and received treatment beginning in 2010, the application for that injury was not filed until March 13, 2017. The WCJ did not adequately address applicant's date of knowledge or first date of disability.

The August 19, 2019 Findings and Order appears to have created unnecessary confusion and serves as a reminder that piecemeal adjudication of issues should be avoided whenever possible. To the extent the WCJ's findings are based on a clear mistake of fact or law, they may be set aside.

In this case, the threshold issue remains whether there were two cumulative trauma injuries or a single injury. If there were two injuries, the issue of apportionment of permanent disability between the two dates of injury must be addressed and requires medical evidence. Separate cumulative trauma injuries occur where "periods of disability and/or need for medical treatment [are] interspersed within the course of the repetitive activities." (*Aetna Casualty & Surety Co. v. Workmen's Comp. Appeals Bd*. (*Coltharp*) (1973) 35 Cal.App.3d 329 [38 Cal.Comp.Cases 720] and *Ferguson v. City of Oxnard* (1970) 35 Cal.Comp.Cases 452 (Appeals Board en banc).) There is a single cumulative trauma with one date of injury (i.e., the first period of compensable temporary disability) where periods of temporary disability were linked by a continued need for medical treatment under *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd*. (*Austin*) (1993) 16 Cal.App.4th 227 [58 Cal.Comp.Cases 323].) Of course, the number and nature of the injuries suffered are questions of fact for the WCJ or the Appeals Board. (*Western Growers Ins. Co* (*Austin*), 16 Cal.App.4th at pp. 234–235; *Aetna Cas. & Surety Co*. (*Coltharp*) 35 Cal.App.3d at p. 341.)

When *Western Growers* (*Austin*) is read in conjunction with the Labor Code section 3208.1 definition of "cumulative injury," the anti-merger provisions of Labor Code sections 3208.2 and

5303, and the holding of *Aetna Casualty* (*Coltharp*), the following principles apply: (1) if, after returning to work from a period of temporary disability and a need for medical treatment, the employee's repetitive work activities again result in *injurious* trauma (i.e., if the employee's occupational activities after returning to work from a period of temporary disability cause or contribute to a new period of temporary disability, to a new or an increased level of permanent disability, or to a new or increased need for medical treatment), then there are *two* separate and distinct cumulative injuries that cannot be merged into a single injury (Lab. Code §§ 3208.1, 3208.2, 5303; *Aetna Casualty* (*Coltharp*), *supra*, 35 Cal.App.3d at p. 342); and (2) if, however, the employee's occupational activities after returning to work from a period of industrial temporary disability are *not* injurious (i.e., if any new period of temporary disability, new or increased level of permanent disability, or new or increased need for medical treatment result solely from an *exacerbation* of the *original* injury), then there is only a *single* cumulative injury and no impermissible merger occurs. (Lab. Code, §§ 3208.1, 3208.2, 5303; *Western Growers* (*Austin*), *supra*, 16 Cal.App.4th at p. 235.)

With any cumulative trauma injury, the cumulative trauma period includes the entire period of employment where the injured worker engaged in the activities that caused the injury. However, not all employers who employed the applicant during the cumulative trauma period are liable for benefits.

Section 5500.5 provides:

> Except as otherwise provided in section 5500.6, liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, [1981], shall be limited to those employers who employed the employee during a period of [one year] immediately preceding either the date of injury, as determined pursuant to section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first. (Lab. Code, § 5500.5(a).)

For any cumulative trauma injury, the 5412 date of injury must be determined before the 5500.5 liability period can be ascertained. Further exposure to occupational hazards after the 5412 date of injury does not change the period of liability under 5500.5.

In this case, in order to determine if applicant sustained one or two cumulative trauma injuries, and, if she sustained two injuries, the portion of applicant's permanent disability caused by each injury, we must return this matter to the trial level for further development of the medical

record. Given that the applicant had multiple surgeries and associated periods of temporary disability, one key question will be whether applicant had a continuous need for medical treatment as a result of the injury first reported in 2010 linking the periods of temporary disability. While the benefit printout provided by Zurich establishes that applicant received medical treatment on certain dates, there is no substantial medical evidence on whether applicant continuously required medical treatment.

If applicant sustained two injuries, it is settled law that when two industrial injuries combine to cause permanent disability, the permanent disability caused by each must be separately awarded, unless the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability. *(Benson v. The Permanente Medical Group* (2007) 72 Cal.Comp.Cases 1620 (Appeals Board en banc), affirmed sub nom. *Benson v. Workers' Comp. Appeals Bd*. (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113].) Prior to *Benson*, separate industrial injuries involving a common body part were routinely combined into a single award of permanent disability when they became permanent and stationary on the same date, in accordance with the holding of the Supreme Court in *Wilkinson v. Workers' Comp. Appeals Bd*. (1977) 19 Cal.3d 491 [42 Cal.Comp.Cases 406 (*Wilkinson*). However, the new regime of apportionment adopted by the Legislature as part of Senate Bill 899 (SB 899) changed the *Wilkinson* rule by repealing former section 4750 and by requiring, in the new section 4663, that permanent disability be apportioned by parceling it out based upon its causative sources. In *Benson v. Permanente Medical Group*, *supra,* 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113, 130] the Court of Appeal opined: "We cannot conceive that the Legislature would intend to 'replace' or 'repeal and recast' the rules of apportionment but still retain the *Wilkinson* doctrine." In this case, Dr. Hatch has not addressed apportionment between the two injuries.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *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].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain

additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . 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." (*McDuffie, supra,* at p. 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Id*.)

Given that the record requires further development on the number and nature of injuries and apportionment between injuries pursuant to *Benson, supra*, we must return this matter to the trial level.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings June 1, 2020 Joint Findings, Award and Order is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings and a new decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 6, 2022

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

EMPLOYMENT DEVELOPMENT DEPT., STATE DISABILITY INSURANCE
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN
JEANETTE CHAMORRO
LAW OFFICE OF TRACEY LAZARUS
MEHR & ASSOCIATES

MWH/oo

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