WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MOSES FRANKLIN, ***Applicant***

vs.

CLINE COLLISION CENTER; SEQUOIA INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ13521490
Santa Rosa District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

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.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 18, 2022

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

FRANKLIN MOSES
PENINSULA INJURED WORKERS CENTER
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN

AS/ara

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

Defendant, Sequoia Insurance Company, through their attorney of record Michael Easley of Hanna, Brophy, MacLean, McAleer & Jensen, LLP, filed a timely, verified Petition for Reconsideration challenging the Findings and Award dated August 30, 2022.

Applicant suffered an industrial injury to his lumbar spine as a result of a specific injury on July 9, 2020 during the course of his employment as an auto body technician, for the employer Cline Collision Center. The injury occurred when the applicant lifted a Peterbilt hood, allegedly weighing approximately 500 pounds. He was age 40 on the date of injury.

In the F&A, the undersigned WCJ found that the Applicant sustained injury arising out of and in the course of employment to his lumbar spine on July 9, 2020. The undersigned WCJ found that there was insufficient evidence to support industrial injury to the applicant's neck and bilateral knees resulting from the specific industrial injury of July 9, 2020. The applicant was awarded temporary disability for the period from July 16, 2020 and continuing at the weekly rate of $1,055.50 and future medical treatment.

Petitioner contends:

a. The board's finding of a specific injury of 7/9/20 is not based on substantial evidence as it cites only selected portions of the entire record supporting specific injury and disregards other portions of the record that contradict a finding of specific injury. *Petition page 6, line 3 to page 8, line 8*.
b. The WCJ's Order to Develop the Record could only be issued if neither party presented substantial evidence on which a decision could be based. The development of the record that occurred changed nothing in the record, so it follows that the WCJ's Findings and Award is not based on substantial evidence. *Petition, page 8, lines 9-27*.
c. The Findings and A ward leaves in dispute the specifically submitted trial issue of whether applicant suffered cumulative trauma by not addressing it and clarification of the Findings and A ward is necessary. *Petition p. 8, line 28, p. 11, line 7*.

II FACTS

On July 9, 2020, Applicant sustained an industrial injury to his lumbar spine when he lifted a Peterbilt hood, allegedly weighing approximately 500 pounds during the course of employment as an auto body technician for Cline Collision Center, Liability for this injury has been denied.

A few days after the specific injury, on July 16, 2020, the applicant obtained medical treatment from Kaiser Permanente for pain and muscle spasms in his leg. Dr. Gong of Kaiser noted that the applicant lifted something heavy the prior week and the pain has worsened since then. (App. Exh. 9, Dr. Gong, 7/16/20.) Dr. Gong took the applicant out of work and modified duty. (Id.)

Scott Taylor, M.D. was utilized as the Panel Qualified Medical Evaluator. In his initial evaluating report of September 9, 2021, Dr. Taylor found industrial causation to the injury of July 9, 2020 and diagnosed 15-Sl degenerative joint disease with right lower extremity radiculopathy and chronic low back pain. (App. Exh. 1, Dr. Taylor, 9/9/21.) The applicant had not yet reached maximum medical improvement. According to Dr. Taylor, the applicant had not received adequate medical treatment. (Id.)

Subsequently, Dr. Taylor's deposition was obtained at the defendant's request. In his deposition, Dr. Taylor testified as follows:

> Q: So, the answer was that this intends to be your final opinion in these two reports?
> A: My opinion about what? What are you referring to?
> Q: Causation of injury.
> A: On page eight, it says, "It's medically reasonable to assume the patient's need for medical care stems from the industrial injury of July 9, 2020." It was on page eight of September--·:
> Q: Yes, Doctor. That's what I read to you earlier. And my question was: Is that intended to be your final opinion on causation?
> A: It is final unless I see some other evidence to say it is different. That's what I concluded, at that time.
> …
> Q: So, just confirming here, dispite (sic) the records you were produced, there's no change in your opinion about causation, correct?
> A: Correct.
> (Def. Exh. G., Dr. Taylor deposition, p. 7, line 22- line 19- p. 8, line 18.)

However, Dr. Taylor further testified that he would like to review the applicant's deposition transcript to further clarify his opinion,

> Q: So, would it be your recommendation that you see this applicant, again for further examination so you have the opportunity to get clarity from this record?
> A: I don't know how much clarity it would give me, but I would like a deposition to read.
> Q: I can give you a copy of the deposition transcript, as well.
> A: That would be great. I'd like to see that and see the questions that were noted and see what happens.
> …
> Q: But first you –

A: I definitely want to see the deposition. That's important. If you can ask him those questions, and you can get a straight answer, that would be great. (Def. Exh. G, Dr. Taylor deposition, p. 37, line 25- p. 38, line 17.)

This matter was tried on the issues of A OE/COE, parts of body injured, earnings, temporary disability, need for further medical treatment, attorney's fees, whether there was substantial evidence of date of injury and injury, and Labor Code section 3208.2. Essentially at issue for adjudication is whether the applicant sustained a specific injury on July 9, 2020 or a cumulative trauma from August 8, 2012 through July 9, 2020.

At trial, the applicant credibly testified that he worked for Cline Collision Center for over 20 years and last worked on July 16, 2020. (MOH/SOE p. 5, lines 22-23.) According to the applicant, he would bend and twist all day at his job for eight to 10 hours a day. He also had to crawl on concrete at work. (MOH/SOE p. 5, lines 44-46.)

The applicant had to lift heavy objects without the proper tools or equipment. In July 2020, the applicant was injured while lifting a Peterbilt hood, weighing over 500 pounds. (MOH/SOE p. 5, lines 30-31; MOH/SOE p. 7, lines 10-11.) The applicant believes that lifting the Peterbilt hood caused problems with his back. (MOH/SOE, p. 6, lines 37-40.)

The applicant has had a number of back injuries while working at Cline. (MOH/SOE p. 7, lines 35-36.) In the applicant's opinion, the problems with his neck, back and lmees are due to his repetitive job duties at Cline. (MOH/SOE p. 7, lines 36-38.)

After review of the medical reports, submission was vacated for further development of the record pursuant to *McDuffie v. Los Angeles Metropolitan Transit Authority* (2002) 67 CCC 138. Specifically, the parties were ordered to provide the QME Scott Taylor, M.D. the applicant's deposition transcript, per his request, for his review and comment. (EAMS Doc. No. 75365855.)

Dr. Taylor issued a supplemental report indicating his prior opinions did not change after review of the applicant's deposition. (WCAB Exh. I.) This matter was resubmitted as of June 21, 2022. (EAMS Doc. No. 75632014.)

An F&A issued finding that the applicant sustained their burden in proving a specific industrial injury on July 9, 2020 arising out of and occurring in the course of employment to his lumbar spine. The applicant was awarded temporary disability for the period beginning July 16, 2020 and continuing, payable at the rate of $1,055.50 per week. All other issues were deferred with jurisdiction reserved.

It is from this Findings and Award. that petitioner seeks reconsideration.

II
DISCUSSION

The petitioner argues that the "Board decision cites only the evidence supporting the conclusion that applicant sustained a specific injury of 7/9/2020" and "no consideration is given to conflicting evidence from the same sources that support supports (sic) a cumulative injury over a specific injury or supports neither a specific or cumulative injury to the exclusion of the other". (Petition, p. 7, lines 22-25.) Yet, this argument confuses the issue at trial.

Labor Code section 3208.1 states,

> An injury may be either: (a) "specific," occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) "Cumulative," occurring as a repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment.

Labor Code section 3208.2 further provides,

> When disability, need for medical treatment, or death results from the combined effect of two or more injuries, either specific, cumulative or both, all questions of fact and law shall be separately determined with respect to each such injury.

Contrary to petitioner's assertion, only one of the applicant's two cases were submitted for decision. Whether the applicant suffered an additional CT injury, in a separately pled case in ADJ15593502, was neither at issue nor submitted. Instead, the limited issue is simply if the industrial injury in ADJ13521490 constituted a specific injury or cumulative trauma. The finding of a specific injury in this matter does not bar a claim for a related but distinct injury arising from the same of period of employment.

In *Austin*, the Court of Appeal wrote:

> In any given situation, there can be more than one injury, either specific or cumulative or a combination of both, arising from the same event or from separate events. (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1990) 219 Cal.App.3d 1265, 1271; *City of Los Angeles v. Workers' Comp. Appeals Bd*. (1978) 88 Cal.App.3d 19, 29; *State Comp. Ins. Fund v. Workmen's Comp. App. Bd.* (1969) 1 Cal.App.3d 812, 819.) The number and nature of the injuries suffered are questions of fact for the WCJ or the WCAB. (*Aetna Cas. & Surety Co. v. Workmen's Comp. Appeals Bd.* (1973) 35 Cal.App.3d 329,341; *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627, 637.) For example, if an employee becomes disabled, is off work and then returns to work only to again become disabled, there is a question of fact as to whether the new disability is due to the old injury or whether it is due to a new and separate injury. (See *Assurance Corp. v. Industrial Acc. Com.* (1922) 57 Cal.App. 257, 259-260; *Huston v. Workers' Comp. Appeals Bd.* (1979)

> 95 Cal.App.3d 856.) In addition, one exposure may result in two distinct injuries, posing another question of fact. (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.*, supra, 219 Cal.App.3d at p 1271.) If a worker not only suffers a nervous breakdown but also develops an ulcer as a result of work-related stress, there would be two distinct injuries from one exposure. The nature and the number of injuries suffered are determined by the events leading to the injury, the medical history of the claimant, and the medical testimony received.
> (*Austin*, 16 Cal.App.4th at pp. 234-235.)

Here, the court separately found, based on substantial medical evidence, a specific injury resulting from the sole incident of the applicant lifting a hood in the course of his employment consistent with Labor Code section 3208.2. An injury is established by a period of temporary total disability and need for medical treatment. (*Aetna Casualty Surety Co. WCAB* (*Coltharp*) 38 CCC 70.) An applicant claiming an injury is entitled to benefits when proving that the incident resulted in the need for medical care, or any disability at all, as here.

Petitioner oddly asserts that the supplemental report of Dr. Taylor, requested by the court, is not substantial medical evidence because he didn't change his prior opinion. (Petition p. 8, lines 22-27.) Yet, this applies an incorrect legal standard.

A physician's opinions must be framed in terms of reasonable medical probability, must not be speculative, must be based on pertinent facts and/or an adequate examination and history, and must set forth the reasoning in support of its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604,621 (en banc).)

Of course, Dr. Taylor is not obligated to change his prior opinion after review of the applicant's deposition testimony. A change in a QME's opinion does not confer substantiality. Instead, Dr. Taylor's reporting is considered substantial because he was given an adequate medical history and conducted a thorough examination. Dr. Taylor did not speculate or guess in providing his medical conclusions. Therefore, since his reports were based upon germane facts and reasonable medical probability, they are considered substantial medical evidence.

Any decision of the WCJ or Workers' Compensation Appeals Board (WCAB) must be supported by substantial evidence in light of the entire record. (*Escobedo v. Marshalls* (2005) (Appeals Board en banc) 70 Cal.Comp.Cases 604, 620; *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310, 314]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500, 503]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627,635 [35 Cal.Comp.Cases 16, 22].) Substantial evidence presented in this case supports the finding that applicant sustained a specific injury to his lumbar spine on July 9, 2020, with an associated period of temporary disability. There is nothing in the petition to disturb this finding.

Any contention that the undersigned WCJ failed to fully explain the basis for its opinion is remedied by this report and recommendation. (*Smales v. WCAB* (1980) 45 CCC 1026 (writ denied).)

IV
RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Dated: October 6, 2022

Respectfully submitted,

Katie F. Boriolo
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE