WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KENNETH CASE, *Applicant*

vs.

UNION DODGE, INC.; EVEREST NATIONAL INSURANCE COMPANY; ARROWOOD INDEMNITY COMPANY, *Defendants*

Adjudication Numbers: ADJ8024286, ADJ2761399
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Arrowood Indemnity Company (Arrowood) seeks reconsideration of an arbitrator's Conclusions of Law & Orders of January 24, 2023, wherein it was found that applicant sustained two separate cumulative injuries. It was found that the first cumulative injury's liability period ran from the year preceding February 4, 2004. A second cumulative injury was sustained corresponding to the Labor Code section 5500.5 period May 2004 to September 30, 2004. In this matter, in a Compromise and Release between applicant and defendant Everest Insurance Company (Everest) approved on April 21, 2014, in exchange for a structured settlement valued at $650,000, applicant settled his claims that while employed as a master automotive technician on December 2, 2004 (ADJ8024286) and during a cumulative period ending December 2, 2004 (ADJ2761399), he sustained industrial injury to his knees, psyche, "internal," back, gastro-intestinal system, lower extremities, feet, and in the forms of a hernia and hypertension. Applicant's employer was insured by Arrowood for the calendar year 2003 and by Everest for the calendar year 2004. After the approval of the Compromise and Release, Everest instituted contribution proceedings against Arrowood.

Arrowood contends that the arbitrator erred in finding two separate cumulative injury periods rather than the one cumulative case alleged by applicant and settled by Everest, arguing that Everest is not allowed to relitigate the number of injuries in the section 5500.5(e) contribution proceedings, and that substantial medical evidence supports the finding of only one cumulative injury. Arrowood also contends in its Petition that the arbitrator should have found additional

cumulative injuries subsequent to Everest's coverage period for alleged subsequent cumulative injuries. Finally, Arrowood contends that the arbitrator should have recused himself because he was provided inappropriate disclosures regarding settlement discussions.

We have received an Answer from Everest and the arbitrator has filed a Report and Recommendation on Petition for Reconsideration (Report).

We agree with Arrowood that the medical evidence supports the finding of only one cumulative trauma injury. Unfortunately for Arrowood, we find that the Labor Code section 5500.5 liability period for this cumulative injury is the one-year period preceding February 4, 2004. Since we find that the medical record supports only one cumulative injury, we need not decide whether Everest was legally barred from pursuing a second cumulative injury. With regard to the contention that the arbitrator should have recused himself, we will affirm for the reasons stated by the arbitrator in the Report. With regard to the apparent contention that Arrowood's liability should be reduced because of unpled subsequent injuries which may have not been considered by Everest in the settlement with applicant, the arbitrator has not yet specified Arrowood's liability, and thus Arrowood is free to make this argument in the remaining proceedings.

We borrow the relevant facts from the arbitrator's report. As explained by the arbitrator:

> Applicant had experienced right knee pain prior to 2004, and it continued leading up to a surgery on 02/04/2004. The medical record supports this conclusion and these facts do not appear to be in dispute. It is also clear that applicant returned to regular work in May of 2004. However, again applicant experienced further pain in the right knee that led to a second surgery on 09/30/2004. (see Everest Exhibit A 1, 11/28/2005 report of Dr. Danzig, pages 8 and 9).
>
> The record indicates that he returned to work after his September 2004 second surgery in late November 2004, worked for about one week and sustained a specific injury to the right knee on 12/04/2004, and did not return to work for Union Dodge thereafter. (Everest Exhibit A 8. Transcript of deposition of Larry Danzig dated 10/28/2021; page 9, line 9 through line 19).

(Report at p. 5.)

As noted in *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 234-235 [58 Cal.Comp.Cases 323], "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. [Citations.] The number and nature of the injuries suffered are questions of fact for the [trier of fact]. [Citations.]"

Prior to the *Austin* decision, in *Ferguson v. City of Oxnard* (1970) 35 Cal.Comp.Cases 452 (Appeals Bd. en banc), we held that where repetitive trauma in the same employment causes two periods of disability, two separate cumulative injuries have occurred. In *Aetna Cas. and Surety Co. v. Workmen's Comp. Appeals Bd. (Coltharp)* (1973) 35 Cal.App.3d 329, 342 [38 Cal.Comp.Cases 720], the Court of Appeal followed our decision in *Ferguson, supra*, and explained that "separate periods of disability occurring within the course of repetitive traumatic activities necessarily give rise to separate injuries…." Thus, prior to *Austin*, when two periods of cumulative trauma produced separate periods of temporary disability, the WCAB was required to find separate injuries as a matter of law.

While prior to *Austin*, the determination of the number of injuries was a legal issue, in *Austin*, the Court of Appeal flatly held that the "number and nature of the injuries suffered are questions of fact… [to be] determined by the medical history of the claimant and the medical testimony received." In *Austin*, the court found only one cumulative injury when the injured worker was disabled because of major depression on June 19, 1985 returned to work in late July of 1985, but left work again in March of 1987. Throughout the entire period, the injured worker continuously remained under a doctor's care and on medication. (*Austin*, 16 Cal.App.4th at p. 233.)

In this case, orthopedist Steven M. Ma, M.D., who acted as the qualified medical evaluator between applicant and Arrowood, opined that applicant sustained one cumulative injury with a period of exposure up to December 2, 2004. Orthopedist Larry A. Danzig who acted as agreed medical evaluator as between applicant and Everest appears to have opined that applicant sustained two separate cumulative injuries. In the arbitrator's Report, Dr. Danzig's deposition testimony is recited as follows:

> Q (Counsel for Everest) Okay. And so there is – based on your understanding of antimerger, does the fact that he had the surgery in February of 2004 with compensable total disability, does that support a finding of a cumulative trauma ending with that surgery?
>
> A My understanding is that, *since there was a period of compensable total disability for the three months, that's enough to make it a separate period of disability so that there are now distinct periods of disability.*

(Everest Exhibit A 8. Transcript of deposition of Larry Danzig dated 10/28/2021; page 13, lines 9 through 18; emphasis added)

Arrowood, however, as was its right under *Greenwald* [v. *Carey Distributing Co.* (1981) 46 Cal.Comp.Cases 703 [Appeals Bd. en banc]], referred the applicant to QME Steven Ma, M.D. who examined the applicant regarding the medical-legal issues relevant to the issue of contribution. In his report of 02/17/2021 Dr. Ma opined that there was only one period of cumulative trauma involving Union Dodge.2 He opined that the cumulative trauma ended in December of 2004. (Joint Exhibit J 15, page 41, second paragraph). However, it is apparent that he never addressed, or was not asked to address, the specific questions relative to the section 5412 requirements mentioned above. While Dr. Ma's opinion was logical from a medical standpoint, it lacked the detail necessary to constitute substantial medical evidence in connection with the contribution issues that are at the core of this dispute.

Testimony from Dr. Danzig appears to support this conclusion:

Q (Counsel for Everest) Okay. Thank you. And I noted in your most recent report which Mr. Tse discussed with you, you reviewed a report from Dr. Ma; is that correct?

A That's correct.

Q And did you review – in review of Dr. Ma's report, did you consider the concept of antimerger?

A I did.

Q And is it your opinion that Dr. Ma failed to address that concept in his conclusions where he had one long CT up through December 2nd of 2004?

A Dr. Ma decided logically that it was one long cumulative trauma. We're dealing with what the legal system says; not whet is logical. And the legal system clearly defines this into a separate period, separate periods of disability and separate periods of apportionment during that time frame with the first CT ending in February 2004.

(Everest Exhibit A 8. Transcript of deposition of Larry Danzig dated 10/28/2021; page 13, line 19 through page 14, line 10)

(Report at p. 8.)

However, review of these passages in the arbitrator's report show that Dr. Danzig's opinion was not a medical opinion, but rather a legal opinion based on the prior *Coltharp* doctrine. As noted above, under the law as it was understood prior to *Austin*, separate periods of disability meant separate cumulative injuries as a matter of law. It appears that Dr. Danzig was relying on this outdated legal principle in stating that it was his "understanding" that "since there was a period of compensable total disability for the three months, that's enough to make it a separate period of disability so that there are now distinct" injuries." Indeed, both Dr. Danzig and the arbitrator appear to agree that medically it was "logical" that applicant sustained only one cumulative injury, but appear to believe that they were obligated to find separate injuries as a matter of law because applicant sustained distinct periods of disability. However, as explained above, *Austin* makes clear that the number of cumulative injuries is now a question of fact based on the medical evidence. The arbitrator thus erred in finding more than one cumulative injury.

However, we agree with the arbitrator that applicant was first disabled on February 4, 2004, and had knowledge of disability at that time. As recited in the arbitrator's report, applicant testified that he had knowledge that his symptoms and disability were work-related "from the get-go." (May 16, 2005 deposition at p. 42; Arbitrator's Report at pp. 9-10.) Labor Code section 5500.5 states that the liability period for cumulative injury is the year preceding the earlier of the Labor Code section 5412 date of injury or the last date of injurious exposure. Labor Code section 5412 states that the date of injury in cumulative injury cases "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." Although applicant's injurious exposure lasted until December 2, 2004, the Labor Code section 5412 date of injury was February 4, 2004. Thus, the Labor Code section 5500.5 period for the cumulative injury is the one-year period preceding February 4, 2004.

With regard to the contention that the arbitrator should have recused himself after becoming privy to settlement discussions, we affirm for the reasons stated by the arbitrator in the Report. In the Report, the arbitrator states, "The reference of settlement negotiations by counsel for Everest, while likely in violation of Labor Code section 5278(a), does not require disqualification. Title 8, California Code of Regulations section 9721.12 lists the circumstances requiring disqualification and none of them apply here. The comments made by counsel for Everest have no bearing on my decision regarding the issues decided herein." (Report at p. 13.)

Finally, Arrowood argues that the arbitrator should have found subsequent injuries. However, it appears that the only issue decided by the arbitrator is the liability period for the injury settled by Everest and the applicant. No contribution amounts or percentages have been decided. In *Greenwald, v. Carey Distributing Co.* (1981) 46 Cal.Comp.Cases 703 (Appeals Bd. en banc), the Appeals Board, sitting en banc, made clear that, after an elected defendant institutes supplemental proceedings to seek contribution, a non-elected defendant may "defend itself as to any matter affecting its liability." (*Greenwald*, 46 Cal.Comp.Cases at p. 709.) Thus, in the further proceedings, Arrowood can argue that Everest settled for an excessive amount which Arrowood should not be liable for because Everest did not consider apportionment to subsequent injuries. We take no position on this or any other outstanding issue.

For the foregoing reasons,

IT IS ORDERED that that Defendant Arrowood Indemnity Company's Petition for Reconsideration of the Arbitrator's Conclusions of Law & Orders of January 24, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Arbitrator's Conclusions of Law & Orders of January 24, 2023 is **AMENDED** as follows:

Conclusions of Law

1. The date of injury per Labor Code section 5412, from which to begin look-back the period that will determine the division of liability, per Labor Code section 5500.5 is February 4, 2004.

Orders

IT IS ORDERED that the apportionment of liability per Labor Code section 5500.5 as between the co-defendants herein, shall be based upon the cumulative injury period set forth above, and the admitted specific injury on December 2, 2004.

IT IS FURTHER ORDERED that the issue of sanctions raised by Everest is deferred with jurisdiction reserved. Everest is also ADMONISHED not to disclose to the arbitrator any offers of settlement made by either party in this matter, in the past or in the future, per the language of Labor Code section 5278(a).

IT IS FURTHER ORDERED that all other issues are deferred, with jurisdiction reserved.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 18, 2023

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

KENNETH CASE
SILBERMAN & LAM
TOBIN LUCKS
MULLEN & FILIPPI
STEVEN SIEMERS, ARBITRATOR

DW/abs

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