APPEALS BOARD PANEL DECISIONS

Ruth Carrera Lugo, Applicant v. County of Los Angeles, PSI and administered by Tristar Risk Management, Defendants

W.C.A.B. No. ADJ7203622—Workers' Compensation Appeals Board (Board Panel Decision)

82 Cal. Comp. Cases 1208, 2017 Cal. Wrk. Comp. P.D. LEXIS 306

Opinion Filed July 10, 2017

Publication Status: **CAUTION:** This decision has not been designated a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Prior History: W.C.A.B. No. ADJ7203622—WCJ Craig Alan Glass (VNO); WCAB Panel: Commissioners Brass, Lowe, Razo

Disposition: Defendant's Petition for Reconsideration of the April 17, 2017 Findings and Award is *denied.*

Counsel: For applicant—Glauber Berenson
For defendants—Tobin Lucks

Evidence—Medical Reports—Suspended Physicians—WCAB, affirming WCJ's finding that applicant nursing aid suffered 44 percent permanent disability as result of 8/25/2009 industrial injury to her right elbow and wrist, held that WCJ did not err in relying on report of Philip Sobol, M.D., to determine extent of applicant's orthopedic impairment, notwithstanding that Dr. Sobol was ultimately suspended from workers' compensation system based on fraud conviction pursuant to Labor Code § 139.21, when WCAB reasoned that Labor Code § 139.21 does not make reports prepared prior to suspension inadmissible and declined to read Labor Code § 139.21 as blanket prohibition on use of reports from suspended doctors, and WCAB found that Dr. Sobol's reports were prepared years before his suspension, that no proof was introduced at trial connecting Dr. Sobol's conviction with his treatment in this case or preparation of report such that reliance on report would be improper, and that, under circumstances, WCJ properly admitted and relied upon Dr. Sobol's reports on issue of permanent disability. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.08[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.51.]

Opinion By: Commissioner Frank M. Brass

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award issued on April 17, 2017 by the workers' compensation administrative law judge (WCJ), wherein the WCJ found applicant sustained a permanent disability of 44% resulting from an injury to her right elbow and right wrist. Defendant contends the WCJ erred in

relying on the report of Philip Sobol, M.D., to determine the extent of applicant's orthopedic impairment, because Dr. Sobol has been suspended from the workers' compensation system based on a fraud conviction, pursuant to Labor Code section 139.21, and that the WCJ erred in relying on the reporting of Arthur Lipper, M.D., to determine the extent of applicant's sleep impairment.

We received an Answer from applicant. We also received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ, recommending we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, the Petition, the Answer, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, we will deny reconsideration.

With respect to defendant's contention that the WCJ erred in admitting the report of Dr. Sobol because he has subsequently been suspended from the workers' compensation system, Labor Code section 139.21 states that that a provider who has been convicted of a triggering crime shall be "suspended from participating in the workers' compensation system as a physician, practitioner, or provider." (Lab. Code § 139.21(a)(1).) However, the statute does *not* make reports prepared by suspended physicians prior to suspension inadmissible. By way of comparison, we note that Labor Code section 139.2, which relates to the removal of doctors from the qualified medical examiner (QME) lists, provides that a report from a suspended QME "that is not complete, signed, and furnished to one or more of the parties [as of the date of suspension] . . . shall be inadmissible." (Lab. Code § 139.2(m).) Had the Legislature wished to make reports prepared by suspended doctors prior to suspension inadmissible, it presumably would have explicitly done so. We decline defendant's invitation to read into Labor Code section 139.21 a blanket prohibition on the use of reports from suspended doctors.

Here, Dr. Sobol's report was prepared in 2013, years before his suspension. No proof was introduced at trial connecting Dr. Sobol's conviction with his treatment in this case or the preparation of the report, such that reliance on the report would be improper. Under the circumstances, we agree with the WCJ that Dr. Sobol's report was admissible evidence upon which the WCJ was entitled to rely.

Wish respect to defendant's contentions that the WCJ erred in relying on certain medical reports rather than others in determining the extent of applicant's sleep impairment, it is well established that the WCJ may choose to credit those medical reports he or she finds most persuasive. (*Jones v. Workers' Comp. Appeals Bd.* (1968) 68 Cal. 2d 476, 479 [33 Cal. Comp. Cases 221, 223]; see also *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal. 3d 372, 378–379 [35 Cal. Comp. Cases 525, 529–530, 35 Cal.Comp.Cases 525].) Any conflict in the evidence is resolved in favor of the Board's findings. (*Jones, supra*, 68 Cal. 2d at 479; *Rogers Materials Co. v. Industrial Acc. Com.* (1965) 63 Cal. 2d 717, 721 [30 Cal. Comp. Cases 421, 423].)

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award of April 17, 2017 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Frank M. Brass

I concur,

Commissioner Deidra E. Lowe

Commissioner Jose H. Razo

* * * *

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

PETITIONERS' CONTENTIONS:

Petitioner, defendant the Los Angeles County/LAC USC-DPT 160, permissibly self-insured, administered by Tristar Risk Management, contends: (1) that the Court should not rely on the medical reporting of Phillip Sobol, M.D., a now suspended doctor; and, (2) that the Court cannot rely on the entire record and/or range of evidence to determine permanent disability.

II

STATEMENT OF FACTS

Ruth E. Carrera Lugo, _____ while employed on 8/25/09, as a nursing aid, occupational group number 340, at East Los Angeles, California, by Los Angeles County/LAC USC-DPT 160, permissibly self-insured, administered by Tristar Risk Management, sustained admitted injury arising out of and in the course of her employment to her right shoulder, sleeping difficulties, upper G.I. and lower G.I.; and claims to have sustained injury arising out of an in the course of her employment to her right elbow, right wrist, and psyche.

At the time of injury, the employee's earnings were $489.44 per week warranting indemnity rates of $326.32 per week for temporary disability and $230.00 per week for permanent disability.

The employer paid temporary disability of $326.32 (per week) from 4/27/11 to 3/22/13, for a total of $33,797.43, and permanent disability of $230.00 per week from 4/30/13 through 11/11/13, for a total of $6,440.00.

The employer furnished some medical treatment.

The matter came regularly to trial on 2/22/17.

The applicant was the only witness called.

The applicant testified on her own behalf and was cross-examined.

Applicant introduced four (4) medical exhibits (including PR-2's).

Defendant offered into evidence nine (9) exhibits, some ultimately not accepted into evidence, including three (3) medical reports.

After reviewing the testimonial and documentary evidence, the Court issued the following Findings and Award:

FINDINGS OF FACT

1. Exhibits "1", "2", and "3", are admitted into evidence.

2. Exhibits "A", "B", "C", "D", "E", and/or "F", are not admitted into evidence.

3. Exhibits "H" and "I", the medical reports of Charles Glatstein, M.D., dated 1/27/16 and 5/10/16 are admitted into evidence.

4. Defendant's objection to the Court's rating instructions dated 4/7/17 is overruled.

5. The applicant did suffer injury arising out of and in the course of her employment to her right elbow and right wrist.

6. The applicant did not suffer injury arising out of and in the course of her employment to her psyche.

7. Applicant was entitled to temporary disability indemnity benefits for 104 weeks at the rate of $326.32 per week, per California Labor Code, section 4656, from 8/26/09 and forward, less credit for wages earned and benefits paid as and for temporary disability indemnity benefits.

8. Applicant sustained a permanent disability of forty-four (44%) percent, after apportionment, equivalent to 229.00 weeks of permanent disability, payable beginning the day after temporary disability benefits end at the rate of $230.00 per week, in the total sum of $52,670.00, less attorney fees and less credit to defendants for payments made as to this claim as and for permanent disability advances.

9. Defendant is not entitled to a "credit" for "overpayment" of temporary disability indemnity benefits.

10. Applicant is in need of further medical treatment to cure or relieve from the effects of said injury.

11. Applicant actually, reasonably and necessarily incurred costs for the purposes of proving a contested claim, and is entitled to reimbursement for costs of necessary medical treatment, said liens to be paid in accordance with the appropriate fee schedule or, in the absence of a fee schedule, in reasonable amounts, with jurisdiction reserved in the event of a dispute over reasonable value only.

12. The reasonable value of the services rendered by applicant's attorney is $7,900.00, payable in one lump sum, from accrued benefits or from the far end of the award, should there be insufficient accrued benefits in order to pay the fees as one lump sum.

It is from this Order that defendant the Los Angeles County/LAC USC-DPT 160, permissibly self-insured, administered by Tristar Risk Management, files this timely and verified, "Petition for Reconsideration"

III

DISCUSSION

Reliance on reporting of a suspended doctor

Defendant asserts that the Court cannot rely on the medical reporting of Phillip Sobol, M.D., a doctor now suspended by the WCAB, due to a criminal conviction.

There was no evidence offered by either party that the criminal conviction involved any actions and/or reporting as to this case.

There is neither case law offered nor any cogent argument why the Court should not or could not rely on the reporting of Dr. Sobol.

The Court found the reporting of Dr. Sobol to be consistent with the evidence and testimony of the applicant. The reporting was well reasoned and best described the issues before the Court.

The reporting of David E. Fisher, M.D., the PQME, did not accurately set forth the complaints and symptoms of the applicant and did not accurately set forth the permanent disability impairment of the applicant. The report was conclusionary.

The Court relied on Dr. Sobol as to the orthopedic complaints.

Sleeping Difficulties

As to the issue of the admitted injury of "sleeping difficulties", the Court was presented with multiple reports as to the issue.

The Court reviewed all medicals as to this issue and accepted the findings of Arthur Lipper, M.D., listed as exhibit "4" and taken into evidence without objection. In his report, the doctor did in fact incorporate the findings of other medical professionals, as is often the case.

The report of Dr. Lipper was complete, consistent with the testimony and the other medical evidence.

The Court notes that the report of PQME Glenn Andrew Marshak, M.D., dated 9/2/15, and offered into evidence as joint exhibit "Z", also finds a 17% permanent disability as to sleep disorder. While Dr. Marshak finds apportionment of 10%, the Court did not find the apportionment to be valid.

Petitioner asks the Court to rely on the reporting's of PQME neurologist Charles Glatstein, M.D. (See exhibits "H" and "I").

The Court found that, as to the injury of "sleep disorder", the doctor's reports were not consistent with the testimony or the other medical evidence. The doctor's apportionment was unreliable and led the Court to believe that the doctor's reporting could not be relied upon as to the injury of "sleep disorder".

IV

RECOMMENDATION

For the reasons stated above, it is respectfully submitted that the Petition for Reconsideration filed by Petitioner, defendant the Los Angeles County/LAC USC-DPT 160, permissibly self-insured, administered by Tristar Risk Management, should be **denied**.

Craig Alan Glass

Workers' Compensation Administrative Law Judge

Johnny Escovedo, Applicant v. California Community News, Pacifi Insurance Company, administered by Gallagher Bassett, Defenda

W.C.A.B. Nos. ADJ3661243—Workers' Compensation Appeals B Panel Decision)

82 Cal. Comp. Cases 1215, 2017 Cal. Wrk. Comp. P.D. LEXI

Opinion Filed June 2, 2017

Publication Status: **CAUTION:** This decision has not been desig nificant panel decision" by the Workers' C Appeals Board. Practitioners should proceed when citing to this panel decision and should al subsequent history of the decision, as these d subject to appeal. WCAB panel decisions are thority, particularly on issues of contemporane trative construction of statutory language [se Workers' Comp. Appeals Bd. (1989) 209 C 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145 WCAB panel decisions are not binding precede banc decisions, on all other Appeals Board workers' compensation judges [see Gee v. Wor Appeals Bd. (2002) 96 Cal. App. 4th 1418, 14 Cal. Comp. Cases 236]. While WCAB panel d not binding, the WCAB will consider these dec extent that it finds their reasoning persuasive [se Santa Fe Extruders (2011) 76 Cal. Comp. Case (Appeals Board En Banc Opinion)]. LexisNe consultants have deemed this panel decision because it does one or more of the following lishes a new rule of law, applies an existing rul facts significantly different from those stated i sions, or modifies, or criticizes with reason existing rule; (2) Resolves or creates an appare the law; (3) Involves a legal issue of contir interest; (4) Makes a significant contribution to ture by reviewing either the development of wo pensation law or the legislative, regulatory, history of a constitution, statute, regulation, or d law; and/or (5) Makes a contribution to the b available to attorneys, claims personnel, judges and others seeking to understand the workers' tion law of California.