84 Cal. Comp. Cases 107; 2019 Cal. Wrk. Comp. LEXIS 2

Court of Appeal, Fourth Appellate District, Division One

January 17, 2019 Writ of Review Denied

Civil No. D075018

Reporter
84 Cal. Comp. Cases 107 *; 2019 Cal. Wrk. Comp. LEXIS 2 **

Teodulfa Luis, Petitioner v. Workers' Compensation Appeals Board, Labor Finders International, ACE American Insurance, administered by ESIS, Respondents

Prior History:
[1]**

W.C.A.B. Nos. ADJ9511618, ADJ10100794—WCJ Charles W. Ellison II (SDO); WCAB Panel: Commissioner Sweeney, Chair Zalewski, Commissioner Lowe (concurring, but not signing)

Disposition: Petition for writ of review denied

Headnotes

CALIFORNIA COMPENSATION CASES HEADNOTES

Medical Evidence—Substantial Evidence—WCAB affirmed WCJ's findings that applicant who suffered industrial orthopedic injuries to her lumbar spine, cervical spine, right knee, and right upper extremity on 12/9/2013, and claimed to have sustained industrial injury to her back, right knee, and right hip on 5/26/2015, while working as bakery assistant, did not have any impairment or disability related to 2013 incident and did not sustain injury AOE/COE in 2015, that any impairment or disability applicant may have been experiencing was due to prior work-related injuries, and that applicant was not in need of further medical treatment, when WCJ's findings were based on opinion of agreed medical examiner, and WCAB concluded that agreed medical examiner's opinion constituted substantial evidence to support findings, when agreed medical examiner interviewed applicant on two occasions and reviewed 1,800 pages of medical records, including x-rays, [*108] MRIs, EMG testing, primary treating physician reports, progress reports, physical therapy notes, and orthopedic consultation reports, as well as compromises and releases executed by applicant relating to her prior work-related injuries, agreed medical examiner provided in-depth analysis to support his opinions, and applicant provided no evidence to support her allegation of bias by agreed medical examiner.

CALIFORNIA COMPENSATION CASES SUMMARY

By the Court:

"The petition for writ of review, the answer, the reply, and the exhibits submitted with the petition have been read and considered by Justices Huffman, Irion, and Dato.

"In 2013, Teodulfa Luis was employed by Labor Finders International, a temporary employment agency, and assigned to work as a bakery assistant at NeMo's Bakery. Luis alleges that on December 9, 2013, she was working at NeMo's Bakery when a stack of bread dough containers toppled over and pinned her against a bread dough machine, causing injuries to her lumbar spine, cervical spine, right knee, right upper extremity, bilateral hips, digestive and excretory systems, skin, and right hand. Luis' employer stipulated that she sustained injuries to her lumbar spine, cervical spine, right knee, and right upper extremity,

but denied all other claimed injuries. Luis sought treatment from her primary treating physician, Dr. Assad Michael Moheimani, and returned to perform modified work for her employer.

"Luis alleges that she sustained a second industrial injury after she returned to work. Luis contends that on or about May 26, 2015, she was performing modified work for her employer-specifically, holding a sign outside her employer's office-when a motorcycle accident occurred in her vicinity, requiring her to hurry out of the way. Luis alleges that the incident caused injuries to her back, hips, and right knee. Luis' employer denied all claimed injuries relating to the 2015 incident.

"Luis filed timely applications for benefits arising out of the 2013 and 2015 incidents and the parties selected Dr. Jeffrey Bernicker to serve as the agreed medical evaluator for both claims. Dr. Bernicker evaluated Luis on two occasions and authored four reports regarding the incidents.

"In his first two reports, which addressed only the 2013 incident, Dr. Bernicker stated that Luis has sustained numerous work-related injuries in the past while working for different employers, including (1) a 2001 incident that resulted in injuries to her left wrist, shoulder, neck, and right upper extremity; (2) a 2005 incident that resulted in injuries to her right knee, left shoulder, neck, and lumbar spine; and (3) a 2011 incident that resulted in injuries to her cervical spine and right knee. Claims relating to all of these injuries were resolved through compromises and releases. After reviewing 1, 800 pages of medical records, Dr. Bernicker opined that any impairment or disability Luis may have been suffering relating to her cervical spine, lumbar spine, and right knee were the exclusive function of her prior industrial injuries and/or a non-industrial disc disease, not the 2013 incident. In pertinent part, Dr. Bernicker stated as follows: 'Rarely throughout my career as a Medical-Legal Examiner serving the greater San Diego Workers' Compensation **[*109]** community (during which time I have issued well over 3,000 AME reports) have I encountered a case where there [is] so much evidence supporting extensive apportionment to prior industrial injuries.' Accordingly, Dr. Bernicker concluded that Luis sustained 0% whole person impairment due to the 2013 incident, did not require present or future medical care, and did not require permanent work restrictions. Dr. Bernicker later reiterated these findings in a third report.

"Dr. Bernicker also treated Luis and issued a report regarding the 2015 incident. In the report, Dr. Bernicker opined that Luis presented as a 'very poor historian' of the 2015 incident and 'was somewhat evasive.' Further, Dr. Bernicker noted that Dr. Moheimani (Luis' primary treating physician) conspicuously did not reference the 2015 incident in his notes until several months after it allegedly had occurred. Dr. Bernicker concluded that the 2015 incident 'either never occurred in the first place or, even if it hypothetically was considered to have occurred, simply represented a mild transient flare-up of the symptoms that had been well-documented prior to that date and for which the patient was already under active treatment.'

"Shortly before the trial on Luis' claims, Luis retained a new primary treating physician, Dr. Ramin Raiszadeh, who reviewed Luis' medical records and the deposition transcripts related to her claims, and prepared a report disagreeing with Dr. Bernicker's conclusions. Dr. Raiszadeh opined that Luis was not yet permanent and stationary, only partial apportionment to prior industries injuries was required, and Luis required further medical treatment.

"Luis' claims proceeded to trial and the Workers' Compensation Administrative Law Judge (WCJ) issued an opinion in favor of Luis' employer and the workers' compensation insurance carrier. Based on the testimony and 'credible and substantial medical reports' of Dr. Bernicker, the WCJ concluded that Luis did not have any impairment or disability arising out of or related to the 2013 incident, the impairment or disability that Luis may have been experiencing was due to her prior work-related injuries, and Luis did not require further medical care. The WCJ further concluded that Luis did not sustain industrial injury arising out of or related to the 2015 incident.

"Luis petitioned the Board for reconsideration on grounds that substantial evidence did not support the WCJ's findings. In particular, she argued that Dr. Bernicker's testimony and reports did not constitute substantial evidence because they were predicated on surmise, speculation, conjecture, or guess. Luis further argued that Dr. Bernicker was biased against her based on her history of work-related injuries. The Board denied Luis' petition for reconsideration. "By the present petition, Luis asks this court to issue a writ of review to determine whether the Board's order was 'not supported by substantial evidence.' (*Lab. Code, § 5952*.) Based on the same errors of which Luis complained to the Board, she asks this court to annul the Board's order. "Luis is not entitled to a writ of review. 'In considering a petition for writ of review of a decision of the [Board], this court's authority is limited. This court must determine whether the evidence, when viewed in light of the entire record, supports the award of the [Board]. This court **[*110]** may not reweigh the evidence or decide disputed questions of fact.' (*Western Growers Ins. Co. v.*

Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227, 233, 20 Cal. Rptr. 2d 26.) Further, an agreed medical examiner's opinion should be followed, unless there is good reason to find the opinion unpersuasive, given that the parties typically select an agreed medical examiner for her expertise and neutrality. (*Pearson Ford v. Workers'* Comp. Appeals Bd. (2017) 16 Cal. App. 5th 889, 892, fn.1, 225 Cal. Rptr. 3d 557.)

"Luis contends that Dr. Bernicker's reports and testimony did not constitute substantial evidence, in part, because he purportedly based his opinions on speculation and guesswork. Luis mischaracterizes the record. As the Board noted in its order denying reconsideration, Dr. Bernicker interviewed Luis on two occasions and reviewed 1,800 pages of medical records, including x-rays, MRIs, EMG testing, primary treating physician reports, progress reports, physical therapy notes, and orthopedic consultation reports, as well as the compromises and releases that Luis executed relating to her prior work-related injuries, before he prepared his opinions. Further, he supported his reports with in-depth analyses regarding the bases for his opinions. Accordingly, Luis' argument regarding the foundation of Dr. Bernicker's opinions lacks merit.

"Next, Luis contends that Dr. Bernicker's reports and testimony did not constitute substantial evidence because he was 'baseless[ly] bias[ed]' against her due to her prior history of work-related injuries. However, Dr. Bernicker testified in his deposition that his opinions did not turn on the mere fact that Luis had sustained prior work-related injuries and resolved claims relating to those injuries. Further, the WCJ expressly found Dr. Bernicker's reporting and testimony to be 'credible.' While Luis may disagree with this finding, '[o]n questions of credibility, we defer to the judgment of the WCJ, who is in the best position to observe the demeanor of the witness.' (*Sheffield Medical Group v. Workers' Comp. Appeals Bd. (1999) 70 Cal. App. 4th 868, 882, 83 Cal. Rptr. 2d 71.*)

"Finally, Luis argues that the WCJ should have deferred to the medical opinions of her primary treating physicians, who she describes as 'more comprehensive, reasonable, and unbiased' compared to Dr. Bernicker. However, '[t]he relevant and considered opinion of one physician may constitute substantial evidence, even though inconsistent with other medical reports in the record.' (*Chu v. Workers'* Comp. Appeals Bd. (1996) 49 Cal. App. 4th 1176, 1182, 57 Cal. Rptr. 2d 221.) Because the 'credibility of witnesses, the persuasiveness or weight of the evidence, and the resolving of conflicting inferences, are questions of fact' (*Western Electric Co. v. Workers'* Comp. Appeals Bd. (1979) 99 Cal. App. 3d 629, 644, 160 Cal. Rptr. 436), the Board did not err by accepting the WCJ's findings regarding Dr. Bernicker's credibility and according those findings 'the great weight to which they were entitled' (*Garza v. Workmen's Comp. App. Bd. (1970) 3 Cal. 3d 312, 319, 90 Cal. Rptr. 355, 475 P.2d 451).*

"The petition is denied.

"The answer filed by Luis' employer and the workers' compensation insurance carrier in response to the petition requested attorney's fees pursuant to *Code of* ***[*111]*** *Civil Procedure section 907*, which permits the court to 'add to the costs on appeal such damages as may be just' when it appears that the appeal was frivolous or taken solely for delay. '[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive-to harass the respondent or delay the effect of an adverse judgment-or when it indisputably has no merit-when any reasonable attorney would agree that the appeal is totally and completely without merit.' (*In re Marriage of Flaherty (1982) 31 Cal. 3d 637, 650, 183 Cal. Rptr. 508, 646 P.2d 179*.) 'Courts should employ sanctions sparingly to deter only the most egregious conduct.' (*Airlines Reporting Corp. v. Renda (2009) 177 Cal. App. 4th 14, 22, 99 Cal. Rptr. 3d 66*.) Although we deny review for the reasons discussed ante, there is no indication that Luis has taken this appeal for an improper purpose. Moreover, we cannot say that the appeal is so indisputably unjustifiable that any reasonable person would agree that is totally and completely devoid of merit.

"The request for attorney's fees is denied."

Irion, Acting P.J.

Counsel

For petitioner—Reyes & Associates, by Melodie Dan

For respondents Labor Finders and ACE American Insurance—Hanna, Brophy, MacLean, McAleer & Jensen, by Cortney M. Lemos-Crawford and Kelsey L. Paddock

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