

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

Case No. LBO 261918

KEITH SEXTON,

Applicant,

vs.

NORTHROP GRUMMAN
CORPORATION; NATIONAL UNION
FIRE INSURANCE, CONSTITUTION
STATE SERVICE,

Defendant(s).

OPINION AND ORDER
GRANTING RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION

Defendant, National Union Fire Insurance Company, has filed a petition "for reconsideration and/or removal" with regard to the Findings, Award and Orders issued by the workers' compensation referee (WCR) on March 13, 1996.¹ The WCR found that applicant, while employed as a truck driver/loader-unloader "from about 1978 to March 1975," sustained industrial injury to neck and left minor extremity. The WCR found that this injury caused no temporary disability. As set forth in the WCR's Opinion on Decision, the extent of permanent disability, if any, was deferred to further hearing. Defendant contends that the report of Dr. Alban, upon whom the WCR relied, does not constitute substantial evidence to support the finding of industrial injury.

The Appeals Board is empowered to reweigh the evidence following an independent examination of the record to reach a conclu-

¹The WCR's decision of March 13, 1996, is "final" for purposes of seeking reconsideration; thus, defendant's request that we treat its petition as one for removal under Labor Code section 5310 only in the event that we deem such decision not to be final, is moot.

1 sion which differs from that of the WCR, based on contrary evi-
2 dence of considerable substantiality. (See, e.g, Allied
3 Compensation Insurance Co. (Lintz) (1961) 57 Cal.2d 115, 26
4 Cal.Comp.Cases 241; Garza v. WCAB (1970) 3 Cal.3d 312, 35 Cal.
5 Comp. Cases 500.) In addition, a decision may not be based on
6 medical opinion that does not constitute substantial evidence, in
7 other words, that is erroneous, or based on facts no longer ger-
8 mane, an inadequate history or an incorrect legal theory
9 (Insurance Co. of North America v. WCAB (Kemp) (1981) 122
10 Cal.App.3d 905, 46 Cal.Comp.Cases 913; Place v. WCAB (1970) 3
11 Cal.3d 372, 35 Cal.Comp.Cases 525). Furthermore, the Board may
12 choose from among conflicting medical reports those which it deems
13 most persuasive (Jones v. WCAB (1968) 86 Cal.2d 86), and the rele-
14 vant and considered opinion of one physician may constitute sub-
15 stantial evidence, even though inconsistent with other medical
16 reports in the record. (Place v. WCAB, supra, 3 Cal.3d at p.378;
17 Smith v. WCAB (1969) 71 Cal.2d 588, 592.)

18 Based upon our review of the record, and in accordance with
19 the foregoing authorities, we will reverse the finding of indus-
20 trial injury for the reasons discussed below.

21 The only reference in the WCR's Opinion on Decision regard-
22 ing the medical evidence is the statement that a review of Dr.
23 Alban's report together with applicant's testimony supports a
24 "prima facie showing" of industrial injury. In his Report and
25 Recommendation, the WCR acknowledges that Dr. Alban's report is
26 "unartful" and "might have been more detailed," but nevertheless
27 was "more credible" than defendant's evaluator, Dr. Blatt, pre-

1 sumably based upon applicant's testimony that "he spent no more
2 than fifteen minutes with Dr. Blatt." The WCR also notes, but
3 fails to discuss, defendant's contention that Dr. Alban's report
4 was based upon an inadequate history.

5 We first note that Dr. Alban's September 25, 1995 report was
6 based in large part upon his upon his examination of applicant
7 more than a year earlier, on August 16, 1994. As stated in Dr.
8 Alban's report, he also saw applicant on September 14, 1994 and
9 November 1, 1994. Dr. Alban's records for these visits (part of
10 Joint Exhibit X) do not indicate that applicant's condition is
11 related to his work; a note dated January 3, 1995, however,
12 states that applicant "has decided this is work related."

13 Dr. Alban's sole statement regarding the issue of industrial
14 causation in his September 25, 1995 report is as follows: "As Mr.
15 Sexton had no specific injury to the cervical spine, it is likely
16 that his work activities as a truck driver have contributed to
17 the development of his cervical condition." Dr. Alban fails to
18 discuss the mechanism of such injury or how applicant's work
19 duties contributed to his condition. Dr. Alban was apparently
20 not given the opportunity to review and comment upon the opinion
21 of Dr. Blatt, who concluded that applicant's condition was not
22 related to his work.

23 In his report of January 24, 1995, based upon his examina-
24 tion of applicant on that date, Dr. Blatt opined:

25 ". . . [Applicant] describes his occupation as that
26 of doing driving of the truck with any loading or
27 unloading of the truck being perform[ed] with pneu-
matic forklifts. The patient, therefore, clearly
states that he does minimal, if any, significant

1 bending, stooping or lifting.

2 "The patient began to develop symptoms of paresthe-
3 sis of the left index, long and ring fingers in
4 January 1994. He treated on a private nonindustrial
5 basis with his private physician, Dr. Meyers, with
6 anti-inflammatory medication. He was then referred
7 to Dr. Alban, an orthopedic surgeon, in June 1994
8 again on a private nonindustrial basis. An MRI scan
9 was performed in August 1994 revealing a herniated
10 disc at C6-7 impinging on the left C7 nerve root.
11 He was seen by Dr. David Morgan on a private non-
12 industrial basis for neurosurgical consultation
13 where surgery was recommended.

14 "The patient relates the herniated cervical disc to
15 bouncing within the truck.

16 ". . .

17 "In my medical opinion, as a Board Certified
18 Orthopedic Surgeon, I feel that the patient has a
19 well documented extrusion on MRI scan of the C6-7
20 disc which I do not feel is related to the patient's
21 work situation. I do not feel that driving of a
22 truck would result in a herniated disc. I feel that
23 if the herniated disc was due to a bouncing within
24 the truck that there would certainly have been a
25 very specific incident in which the patient's head
26 hit the cab of the truck resulting in a significant
27 impact force.

"Obviously, the patient denies any such specific
injury. The patient also clearly denies any
significant lifting that he performs at work as the
loading and unloading of the trucks is performed by
using a pallet.

"I would, therefore, conclude again that this pa-
tient has not sustained an industrially related
injury to his neck, specifically the extruded disc
at C6-7."

23 In his report of March 13, 1995, after review of records from
24 Dr. Alban, including his office chart, nerve conduction and EMG
25 study and MRI report, and records from Dr. Morgan, Dr. Blatt stated
26 that he found no need to alter his conclusion that applicant's
27 herniated cervical disc was neither caused nor aggravated by his

1 work.

2 We believe that due to the deficiencies in Dr. Alban's
3 report, as set forth above, it cannot be deemed substantial evi-
4 dence to support the WCR's finding of industrial injury.
5 Moreover, we find Dr. Blatt's opinion persuasive and the WCR has
6 given no cogent basis for rejecting same, e.g., false or inade-
7 quate history, failure to review records or tests, or that his
8 report fails to comply with any of the other criteria set forth
9 in WCAB Rule 10606, etc.

10 The applicant holds the burden of proof for all facts essen-
11 tial to show an industrial injury resulting in disability or
12 death. (Lab.Code, §§5705, 3202.5; Wehr v. WCAB (1985) 165
13 Cal.App.3d 188, 50 Cal.Comp.Cases 165.) That burden has not been
14 met in the present case where there is no substantial medical
15 evidence to support a finding of industrial injury. Accordingly,
16 we will grant reconsideration, and reverse the WCR's decision.

17 For the foregoing reasons,

18 **IT IS ORDERED** that defendant's Petition for
19 Reconsideration is **GRANTED**.

20 **IT IS FURTHER ORDERED** that Findings, Award and Orders
21 issued on March 13, 1996, are **RESCINDED** and the following
22 **SUBSTITUTED** therefor as the Decision After Reconsideration of
23 the Workers' Compensation Appeals Board:

24
25 **FINDINGS OF FACT**

26 1. Applicant, while employed as truck driver/loader-unloader
27 during a cumulative period ending in March 1995, by Northrup Grumman

1 Corporation, insured by National Union Fire Insurance Company c/o
2 Constitution State Service, did not sustain industrial injury to his
3 neck and left minor upper extremity.

4 2. Applicant reasonably and necessarily incurred medical-legal
5 expense to prove a contested claim, payable as follows: \$250.00 to
6 Glow and Kreida.

7 3. All other issues are moot.

8

9

ORDERS

10 **IT IS ORDERED** that defendant reimburse medical-legal costs in
11 accordance with Finding No. 4.

12 **IT IS FURTHER ORDERED** that the report of Joseph Alban, M.D.,
13 dated September 25, 1995, is admitted into evidence as applicant's
14 Exhibit 1.

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1 IT IS FURTHER ORDERED that applicant take nothing further by
2 reason of this claim.

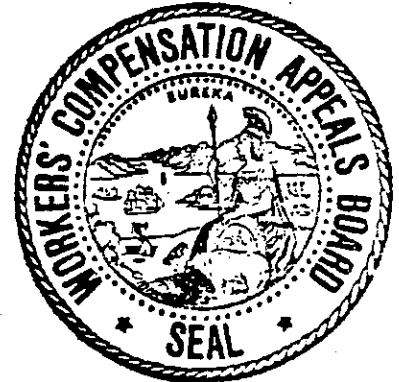
3 WORKERS' COMPENSATION APPEALS BOARD

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5 *[Signature]*

6
7 I CONCUR,

8
9 *Aileen N. Heath*

10
11 *Colleen D. Conroy*



12 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

13 MAY 17 1996

14 SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN
15 ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.

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vp *[Signature]*