WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SAMSON BOGANIM,

Applicant,

vs.

BEVERLY HILLS HILTON; HILTON HOTELS CORPORATION, permissibly self-insured,

Defendants.

Case Nos. ADJ1898212 (LAO 0671427)
ADJ957820 (LAO 0688269)

OPINION AND DECISION AFTER RECONSIDERATION

In order to further study the factual and legal issues in this case, on April 16, 2008, we granted defendant's petition for reconsideration of a workers' compensation administrative law judge's ("WCJ") Findings & Award of January 31, 2008, wherein the WCJ denied an appeal from a Decision and Order filed by the Division of Workers' Compensation Rehabilitation Unit on July 21, 2006, which found that applicant was entitled to retroactive vocational rehabilitation maintenance allowance at the temporary disability rate from July 27, 1998 "and continuing until the employee meets with an agreed [qualified rehabilitation representative.]" In these cases, in a Findings and Award and Order issued on December 16, 2003 in LAO 0671427, it was found that, while employed as a security guard/supervisor during a cumulative period from July 15, 1986 to November 24, 1991, applicant sustained industrial to his neck and back, but not to his psyche, internal system, stomach, skin or in the form of headaches. In a Findings and Award and Order issued on December 16, 2003 in LAO 0688269, it was found that, while employed as a security guard/supervisor on September 3, 1990, applicant sustained industrial injury in the form of a hernia. The WCJ found that applicant's two industrial injuries combined to cause permanent disability of 9¾%.

Defendant contends that the WCJ erred in denying its appeal from the Rehabilitation Unit's Decision and Order, arguing that the WCJ erred in finding that the applicant was a qualified injured worker and arguing that it had no obligation to send a Notice of Potential Eligibility to the

applicant. We have received an answer from the applicant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration ("Report").

For the reasons stated by the WCJ in his Report, which we hereby, adopt and incorporate, we will affirm the Findings & Award of January 31, 2008.

For the foregoing reasons,

IT IS ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings & Award of January 31, 2008 be, and hereby is, **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

JAMES C. CUNEO

I CONCUR.

DEIDRA E. LOWE

JOSEPH M. MILLER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
OCT 07 2008

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

Samson Boganim
Allan H. Cutler, Esq.
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DW/aml

BOGANIM, Samson

CASE NO.: LAO 0688269 & LAO 0671427

SAMSON BOGANIM	**Vs.**	**HILTON HOTELS CORPORATION; SPECIALTY RISK SERVICES**
WORKERS' COMPENSATION JUDGE:		**ROGER A. TOLMAN, JR.**
DATE OF INJURY:		**03 September 1990 & CT from 15 July 1986 to 24 November 1991**

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

SPECIALTY RISK SERVICES, by and through their attorneys of record, has filed a timely Petition for Reconsideration challenging the Findings & Award of 31 January 2008. In the decision, the undersigned Awarded retroactive vocational rehabilitation benefits at the TD rate from 27 July 1998 until the applicant meets with a QRR. Applicant's counsel has filed a timely Answer in support of the decision. It is recommended that reconsideration be denied.

II

FACTS

SAMSON BOGANIM, born 04 June 1954 sustained an injury arising out of and in the course of his employment from 15 July 1986 to 24 November 1991 to his spine. Applicant's case-in-chief was tried in front of Judge Bray who is now

unavailable for most trials due to his continuing participation in the EAMS (Electronic Adjudication Management System) project. Therefore, when the defendant filed an appeal to the Decision and Order of the Rehabilitation Unit, the Presiding Workers Compensation Judge reassigned the case to the undersigned pursuant to 8 CCR Rule 10346.

The applicant relied on the report of Dr. Schiffman that found applicant to be a qualified injured worker (QIW) on 27 July 1998. The case went to trial on the issue of AOE/COE and Judge Bray issued a decision in applicant's favor on the issue of the continuous trauma to the back but rejected applicant's allegations of injury to other body parts and rejected the assertion of the existence of a specific injury.

Judge Bray's decision of 15 December 2003 attaches a lengthy and detailed Opinion on Decision that discusses several problems with applicant's version of events and discusses inconsistencies in the evidence. Judge Bray nevertheless found that applicant did indeed suffer a continuous trauma injury and awarded benefits based on the range of the evidence.[1] As a range of evidence decision, it was based on elements of both the applicant's treating doctor report and defendant's QME. The Findings and Award concluded that applicant was 9 ¾% disabled based on a preclusion from very heavy lifting.

[1] The finding of the spine injury on the continuous trauma was based on failure to deny the claim under Labor Code Section 5402.

Judge Bray also denied the allegations of a psychiatric injury and temporary disability but did not make any findings on the issues of vocational rehabilitation or vocational rehabilitation maintenance allowance (VRMA.)

On 04 March 2004, applicant's counsel sent a letter requesting Vocational Rehabilitation services and the beginning of VRMA including retroactive VRMA. The parties took their dispute to the Rehabilitation Unit ("the Unit") which decided to award Vocational Rehabilitation services and retroactive VRMA. The Unit based its decision on the 27 July 1998 report of Dr. Schiffman, the lack of any Notice of Potential Eligibility (NOPE) letter and Judge Bray's decision in favor of the applicant.

On appeal from the Decision and Order of the Unit (D&O) the undersigned heard the case. The applicant testified that his pre-injury lifting capacity was 100 pounds. He testified that he now limits himself to 15 to 25 pounds but admits that his work restriction envisions the ability to lift up to 75 pounds. His job as a working supervisor security guard he had to lift more than 75 pounds. For example, when he had to assist drunken guests, he had to lift more than 75 pounds. No witness from the defense testified at these proceedings and no witness for the defense rebutted these facts during the prior proceedings with regard to lifting capacity or applicant's job duties.

On cross examination, defendant brought up records of a subsequent incident in Las Vegas in which doctors record applicant lifting 270 lbs at a gym.

Applicant denied lifting this amount but admits dragging a weight across the floor, causing the subsequent injury.

III

DISCUSSION

Defense counsel makes five arguments against the decision. First he argues that the undersigned must follow the reasoning of Judge Bray in deciding the rehabilitation appeal. He also argues that there is no jurisdiction to hear the rehabilitation appeal. He next argues that the weight of evidence is against the finding of QIW. Also, he argues that a demand for vocational rehabilitation must be made in good faith. Lastly, he argues that it was error to not allow testimony of the Unit consultant who decided the case.

Dealing with the first issue, this is a case of painting with a broad brush instead of drawing with a drafting pencil. Defendant argues that since Judge Bray was seemingly unimpressed with the applicant's case at trial, that the undersigned should also be unimpressed and that the undersigned should thus find against applicant. In support of this, the defendant quotes from Judge Bray's Opinion on Decision to the effect that there are no objective factors of disability that support the work restrictions contained in Dr. Schiffman's report.

This argument proves too much and is at variance with the doctrine of Direct Estoppel of Judgments. The job of a judge faced with a prior decision is not to be unimpressed in the same way another judge might have been if he were available to make the decision. The judge's job is to follow the specific

findings of fact and conclusions of law of the prior judge and all findings necessary to those facts and then to decide the new issues of fact presented to him. He should not, and indeed cannot, think like the prior judge but must follow the findings of that other judge.

Here, Judge Bray found applicant to be precluded from very heavy lifting. Applicant's unrebutted testimony indicated that his pre-injury lifting capacity was 100 pounds. The rating manual then in effect defines a preclusion from very heavy lifting as a 25% loss in lifting capacity. (See the Schedule of Rating Permanent Disabilities (April 1997) at p 2-14.) Therefore, mathematically, if applicant's job required lifting more than 75 pounds, applicant would be QIW.

The fact that Judge Bray considered applicant's psychiatric claim unpersuasive and the fact that the higher work restrictions proposed by Dr. Schiffman were not supported by objective factors are irrelevant to the issue at hand. The undersigned must presume that Judge Bray must have considered these factors before awarding the work restriction that he arrived at. To attempt to relitigate these issues would be barred by the direct estoppel of a final judgment. For one judge to attempt to think like another would be an improper denial of the due process right to an impartial judge.[2]

Defendant's second argument is that the undersigned lacks jurisdiction to hear the vocational rehabilitation appeal. This argument is without merit.

[2] The undersigned has the utmost respect and admiration for Judge Bray. However, a judge must be an independent thinker who considers each question independently and without prejudice. To attempt to imitate another judge, however scholarly and honorable that judge might be, would be improper.

Applicant made the request in March 2004 and the decision of Judge Bray issued in December 2003. This is well within the one year statute of limitations provided in Labor Code §139.5(f) incorporating Labor Code §5404.5.

Defendant next argues that the weight of evidence is against the finding of QIW. Here, the defendant argues the facts. While the Appeals Board may make its own findings of fact, the Appeals Board gives "great weight" to the findings of fact of the trial judge. Garza vs. WCAB (1970) 35 CCC 500; 3 Cal.3d 312. Furthermore, the Appeals Board is bound by the final findings of fact contained in Judge Bray's decision of December 2003.

In the prior decision, while critical of the work restriction contained in Dr. Schiffman's report, Judge Bray does not find either the report of Dr. Miller or the report of Dr. Schiffman to lack substantial evidence. Judge Bray did not order development of the record. Instead, he crafted a careful decision that used elements from both reports to find injury and award permanent disability. That decision was never appealed and is now final.

The findings of the undersigned either flow from Judge Bray's specific findings or they are based on unrebutted credible testimony of the applicant.

Defendant next argues that a demand for vocational rehabilitation must be made in good faith. Review of Labor Code §139.5 and the former Labor Code §§4635 et seq. discloses no such requirement nor the standard for assessing this good faith. It is perhaps lamentable that a carrier or third party administrator is put in a position when they are forced to pay large sums of money for failure to

issue a NOPE letter. Yet that was the state of the law at the time. It was not the fault of the applicant that he made such a demand.

Lastly, defendant argues that the undersigned should have permitted the cross-examination of the Unit's consultant who issued the Decision and Order in this case. This is an interesting issue and was discussed at length prior to commencing trial. Counsel for both sides had sought to cross examine the Unit consultant but after discussing the issues, both sides agreed to withdraw their request in light of the fact that the appeal of the D&O is a trial de novo. See also 1 California Workers Compensation Law and Practice (1996, 5th Ed.) St Clair at pp. 742-743 and 8 CCR Rule 10957. Here, the fact that an appeal of a D&O is a trial de novo makes the cross-examination of the Unit consultant unnecessary.

Finally, the undersigned should also comment on the content of the Answer filed by applicant's counsel. While applicant's counsel does a good job of advocacy and does a particularly good job discussing the issues of Statute of Limitations and the issue of the subpoena of the Unit consultant, the undersigned does not agree with the analysis of the applicant's counsel on this case. The discussion of Labor Code §3202 is not legally correct and the argument that the decision of the undersigned is a "middle of the road" decision is not relevant. As the Appeals Board is well aware, Labor Code §3202 is merely a rule of statutory construction and not a rule for determining facts. The undersigned does not rely on applicant's attorney's interpretation of Labor Code §3202 to come to this decision.

With respect to the decision being in the "middle of the road" the undersigned does not seek decisions in the middle. The undersigned follows the law and the facts in each and every case. Sometimes the results are in the middle and sometimes they are not.

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

ROGER A. TOLMAN, JR.
Workers' Compensation Judge

Date: 3/10/08
Served on parties as shown on Official Address Record.
By: _____
Sally Saavedra

cc: Allan H. Cutler, PO Box 1049, So. Pasadena, CA 91031
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