WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ERNESTO ACEVEDO (MARIO RECINOS GONZALEZ), ***Applicant,*** **vs.** **HAITBRINK ASPHALT PAVING, INC. (A CORP) AND REDWOOD FIRE AND CASUALTY INSURANCE COMPANIES ADMINISTERED BY BERKSHIRE HATHAWAY HOMESTATE COMPANIES,** ***Defendants.***	**Case No. ADJ3869833 (RIV 0081149)** **OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION**

Defendants Haitbrink Asphalt Paving, Inc. / Redwood Fire & Casualty Insurance Companies administered and adjusted by Berkshire Hathaway Homestate Companies (defendant) seeks reconsideration of the Findings of Fact (FF) issued by a workers' compensation administrative law judge (WCJ) on December 12, 2012. In that FF, the WCJ found that applicant Ernesto Acevedo (applicant) sustained industrial injury on September 6, 2007 and industrial injury on September 10, 2007 as a compensable consequence.

Defendant contends that: applicant is barred from receiving benefits for his second injury as a compensable consequence because applicant refused to file a claim for his first injury and refused to comply with employer control of his medical treatment; and, applicant did not meet his burden to show that his September 10, 2007 injury arose out of and in the course of employment.

We received an answer from applicant. We received an Amended Report and Recommendation (Amended Report) from the WCJ in response to the Petition for Reconsideration,[1] which recommends that the petition be denied.

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[1] The WCJ issued a Report on January 22, 2013 and amended it on February 19, 2013 to correct a clerical error. Before that, on February 7, 2013, defendant had filed a response to the Report pointing out the clerical error. Since the WCJ issued the Amended Report, we need not address that response.

We have reviewed the record and considered the allegations of the petition for reconsideration and the answer and the contents of the Amended Report. Based on our review of the record, for the reasons stated in the Amended Report which we adopt and incorporate, and for the reasons stated below, we will deny defendant's petition.

We begin with defendant's contention that applicant is barred from receiving benefits.

Labor Code section 5401, subdivision (a) requires an employer to provide an employee with a claim form and notice of the employee's eligibility for benefits, and subdivision (b) lists all of the notice requirements and provides that the notice and the claim form must be available in Spanish. When an MPN is in place as alleged here by defendant, Labor Code section 4616.3, subdivision (a) requires the employer to arrange an initial medical evaluation.

Here, defendant provided applicant with an authorization in English with the clinic information on it, signed by defendant's owner Hunter Haitbrink. (Exhibit 5, Authorization for Central Occupational Medicine Providers (COMP); Exhibit D, Deposition of Applicant, p. 14, lines 8-17.) This form, although conveniently titled "COMP," does not take the place of the required claim form and notice. There is no evidence that defendant provided applicant with a claim form or notice and no evidence that defendant attempted to arrange a medical appointment for applicant. (See Minutes of Hearing, August 12, 2010, Testimony of Hunter Haitbrink, p. 3, lines 18-31, p. 5, lines 3-5, 10-13.)

It is defendant's obligation to provide the claim form and notice and to arrange medical treatment. *An offer must be made before it can be refused.* Thus, defendant's argument that applicant's injury is not a compensable consequence because applicant refused to file a claim and refused to comply with employer control of his medical treatment fails.

We turn now to defendant's contention that the finding that applicant was en route to treatment and sustained injury as a compensable consequence was not supported by substantial evidence.

In *Laines v. Workmen's Comp. Appeals Bd.* (1975) 48 Cal.App.3d 872, 879 [40 Cal.Comp.Cases 365], the Court of Appeal recognized that:

> "The most serious problem with providing coverage in the case of the trip to the doctor's office . . . is that the employer lacks the opportunity to exercise any control over the trip. *The **time** the trip is made, the **route** followed, and the **means** of transportation employed are **completely within***

> ***the discretion of the employee,*** *and the employer is thus unable to insure that the trip is reasonably safe and free of unnecessary hazards.*
>
> Given the arguments set forth above, a choice must be made between requiring the employer to bear the risk of the employee's injury or requiring the employee to bear the risk of any mishap that may befall him while seeking statutorily required medical attention. We conclude that the risk should be borne by the employer. We determine, therefore, that the *industrial injury* of petitioner was ***a proximate cause*** *of his accident injury.* (Italics and bold added.)"

Here, applicant walked-in to Dr. Yu's office on Friday night as a new patient, without an appointment and nearly at closing time, and was examined by Dr. Yu. (Exhibit 4, Appointment Book of David Bao Vu, D.C., p. 1; Exhibit B, Deposition of David Bao Vu, D.C., May 15, 2008, p. 10, line 11-20, p. 15, lines 8-22, p. 28, lines 2-25.) While at Dr. Yu's office, applicant scheduled a subsequent appointment for Monday at 10:15 a.m. (Exhibit 4, p. 2; Exhibit B, p. 10, lines 19-24, p. 11, lines 7-10, p. 12, lines 18-22, p. 24, line 13 – p. 25, line 2; Exhibit D, Deposition of Applicant, July 23, 2008, p. 23, lines 2-12.) Dr. Yu testified that he would have seen applicant later in the day on Monday, again as a walk-in, if he had time available, and he confirmed that his appointment book for that day showed an opening for 4:00 p.m. (Exhibit B, p. 24, line 13 – p. 25, line 1; Exhibit 4, p. 2.) The fact that applicant had scheduled a subsequent appointment, even if he missed it, lends support to applicant's contention that he intended to return to Dr. Yu, and given that Dr. Yu easily accommodated applicant on Friday, it was not unreasonable that applicant expected that Dr. Yu would once again accommodate him.

Applicant's driver Esteban Vasquez told the investigating police officer that he did not know the area well. (Exhibit 1, Traffic Collision Report, p. S1; MOH, June 2, 2010, Testimony of Jeffrey Scott, p. 3, lines 7-8.) Applicant testified that he instructed his driver to take him on an alternate route because the side streets had fewer signals and there was less chance he could be stopped. (Exhibit D, p. 36, line 23 – p. 37, line 6.) The investigating officer confirmed that there were fewer street lights and that it was less patrolled on Sampson and that "[s]uch a route would be more logical for an unlicensed driver to avoid detection." (MOH, June 2, 2010, Testimony of Jeffrey Scott, p. 5, lines 10-15.) When the WCJ was driven on the route travelled by applicant and his driver, the *entire trip* from applicant's home to CVS pharmacy to the accident site to Dr. Yu's took only *ten minutes.* (MOH, November 3, 2010, Site

Inspection Summary, p. 3, lines 6-23.) Although it is not in the record, the trip from CVS pharmacy to the accident site had to have taken substantially less than that. And, the entire geographic area was less than four miles. (See Exhibits O, R, Q, P, S, T, Google Maps.)

Applicant provided a reasonable explanation for why applicant selected the route he did. Moreover, the difference in the route from what defendant claims is the most direct route was at most a few blocks, and time-wise, given the signal lights on Magnolia, the length of the time it took to make the trip was substantially similar. (See *Esquivel v. Workers' Comp. Appeals Bd.* (2009) 178 Cal.App.4th 330, 334 [74 Cal.Comp.Cases 1213].)

Applicant testified that he asked Vasquez to be his driver and to take him to the doctor because he was in pain as a result of his industrial injury of September 6, 2007. (Exhibit D, p. 29, lines 18-25, p. 30 lines 2-3, p. 44, lines 6-10, p. 45, lines 23-25.) Applicant's driver told the investigating officer that he was taking applicant to the doctor and then testified to the same at statement under oath. (Exhibit 1, Traffic Collision Report, pp. 8, S1; Exhibit F, Statement Under Oath of Esteban Vasquez Carrera, October 12, 2007, p. 16, lines 17-22.)

Although defendant speculated in hindsight about what would, could, or should have happened on September 10, 2007, none of defendant's "facts" add up to evidence that applicant was not on his way to Dr. Yu's at the time of the accident.

We agree with the WCJ that applicant met his burden to show that he was on his way to the doctor's office at the time of the accident, and thus, the trip arose out of and in the course of employment as a compensable consequence. (See *Southern California Rapid Transit Dist. Inc. v. Workers' Comp. Appeals Bd. (Weitzman)* 23 Cal. 3d 158, 165 [44 Cal.Comp.Cases 107]); *Rodgers v. Workers' Comp. Appeals Bd.* (1985) 168 Cal.App.3d 567, 574-575 [50 Cal.Comp.Cases 299]).)

Accordingly, we deny defendant's petition for reconsideration.

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For the foregoing reasons,

IT IS HEREBY ORDERED that defendant's Petition for Reconsideration of the Findings of Fact of December 12, 2012 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

FRANK M. BRASS

CONCURRING, BUT NOT SIGNING

ALFONSO J. MORESI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAR 05 2013

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

ERNESTO ACEVEDO C/O RUTH RECINOS
LAW OFFICE OF RENE H. PIMENTEL, ATTN: RENE H. PIMENTEL
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AS/jp