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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ENRIQUE INIGUEZ, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD, BLUE ROSE CONCRETE CONTRACTORS, INC. et al., Respondents.	No. B276997 (W.C.A.B. No. ADJ7672487)

PROCEEDINGS to review a decision of the Workers' Compensation Appeals Board. Annulled and remanded.

Law Office of Nizinski & Associates, Loren Nizinski and Mikhail Baklan for Petitioner.

Richard L. Newman, Anne Schmitz, and Peter Ray for Respondent Workers' Compensation Appeals Board.

Tobin • Lucks and Christopher Arthur Ball for Respondents Blue Rose Concrete Contractors, Inc. and Zurich North America-Los Angeles.

In 2012, the workers' compensation judge (WCJ) determined that the employee had sustained industrial injuries to his right shoulder and left knee. A medical report issued in 2013 identified additional injuries to the neck and back. In 2015, the WCJ ruled that the claim for injuries to the neck and back was barred by the 2012 decision because that decision had found injuries only to the right shoulder and left knee. A majority of the Workers' Compensation Appeals Board (appeals board) upheld the WCJ's 2015 decision.

We granted the employee's petition for a writ of review and directed the parties to brief whether the 2012 decision was a final judgment entitled to preclusive effect under either collateral estoppel or res judicata. The appeals board responded by acknowledging that it had erred in concluding that the 2012 decision barred the claim for injuries to the neck and back. The appeals board requested that we summarily annul its decision and remand the case for further proceedings. The employer, however, insists that the 2012 decision bars the claim for injuries to the neck and back. We do not agree with the employer. We therefore annul the decision of the appeals board and remand for further proceedings.

FACTS

The applicant and petitioner, Enrique Iniguez (Iniguez), claimed to have sustained injury arising out of and in the course of his employment at Blue Rose Concrete Contractors, Inc. (Blue Rose) to his head, neck, back, both shoulders and lower extremities.

On March 21, 2011, the panel qualified medical evaluator, David E. Fisher, M.D., concluded that Iniguez sustained injury to his left knee, right shoulder, and low back. Dr. Fisher found the injuries to the right shoulder and left knee to have been 100 percent industrially caused. Although

Dr. Fisher concluded that the low back strain was essentially resolved, Dr. Fisher apportioned 70 percent of the low back to the industrial injury and 30 percent to nonindustrial disc desiccation and a prior motor vehicle accident.

Dr. Fisher reevaluated Iniguez's condition on August 29, 2013. In this reevaluation, Dr. Fisher found nerve damage (radiculopathy) to Iniguez's neck and low back.[1] Dr. Fisher's review of medical records indicated that the electrodiagnostic evidence of radiculopathy in the neck and low back were completed on September 22, 2010, but were not provided to Dr. Fisher for his 2011 opinion.[2] Dr. Fisher apportioned 70 percent of the neck and back injury to the industrial injury and 30 percent to nonindustrial causes. Dr. Fisher also noted injury to the right shoulder and left knee, as previously found. The right shoulder and left knee injuries were again found to be 100 percent industrial injuries.

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1 Dr. Fisher diagnosed a cervical strain with electrodiagnostic evidence of a right C6-7 radiculopathy and lumbosacral strain with spinal stenosis of a bilateral L5-S1 radiculopathy.

2 The September 22, 2010, study showing injury to the neck and back is not listed in the medical records reviewed by Dr. Fisher for his 2011 report but this study is listed in his 2013 report.

PROCEDURAL HISTORY

A. Proceedings in 2011 and 2012

At a November 22, 2011 hearing, the issues presented for hearing were:

"1. Injury AOE/COE.[3]

"2. Whether applicant's claim was barred under post-termination under Labor Code Section 3600 [, subdivision] (a)(10).

"3. Whether applicant's claim was barred for failure to report within 30 days as provided under Labor Code Section 5400.

"4. Applicant is raising Labor Code Section 5403 indicating that failure to give notice under section 5400 is not a bar to recovery if the employer was not mislead or prejudiced by such failure."

No other issues were identified for determination on November 22, 2011. No new issues were identified for determination at the second hearing on February 13, 2012.

On February 24, 2012, the WCJ determined Iniguez "sustained injury arising out of and occurring in the course of employment to the right shoulder and left knee." *There is no further finding that these were the only industrial injuries*. The WCJ also concluded that Iniguez's claim was not barred by Labor Code sections 3600, subdivision (a)(10)[4] or 5400.[5]

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3 Arising out of and in the course and scope of employment.

4 All further statutory references are to the Labor Code unless otherwise indicated.

Section 3600, subdivision (a)(10) provides the employer's affirmative defense of post-termination compensation claim for injury arising out of and occurring in the course of employment.

5 Section 5400 requires written notice to the employer within 30 days of an injury which is claimed to have caused disability or death.

B. 2015 proceedings

A hearing was held on May 4, 2015. The issues identified for determination included parts of body injured (with Iniguez claiming injury to the cervical and lumbar spine and sleep disorder), permanent disability, and apportionment, among other issues.

The WCJ determined Iniguez sustained industrial injury to his right shoulder and left knee. Iniguez was found 8 percent permanently disabled without apportionment.

The WCJ's rationale on limiting the injury to the shoulder and knee was that Iniguez had previously claimed injury to the cervical and lumbar spine in 2011[6] but had testified that he sustained injury to the shoulder and knee. Iniguez had not testified in 2011 that he injured his back. Although the WCJ had not specifically stated that there was no injury to the cervical and lumbar spine, given section 5815,[7] "the absence of including those body parts meant no injury had been found." No petition for reconsideration having been filed, the WCJ concluded the 2012 findings had become final. The WCJ therefore found the claim for injury to the cervical spine and lumbar spine barred by collateral estoppel.

Iniguez petitioned for reconsideration.

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6 There was no medical evidence supporting this claim until Dr. Fisher's August 29, 2013 medical report.

7 "Every order, decision or award, other than an order merely appointing a trustee or guardian, shall contain a determination of all issues presented for determination by the appeals board prior thereto and not theretofore determined. Any issue not so determined will be deemed decided adversely as to the party in whose interest such issue was raised." (§ 5815.)

The WCJ recommended reconsideration be denied on the merits. In addition to collateral estoppel, the WCJ raised res judicata as a basis for precluding Iniguez's claim for injury to the neck and back.

RULINGS OF THE APPEALS BOARD

A. The majority decision

A majority of the appeals board adopted and incorporated the WCJ's report and affirmed the decision. The majority noted that the minutes of the 2011 hearing did not defer any alleged body part with respect to the injury AOE/COE issue and that Iniguez only testified to injuring his foot and shoulder. Because Iniguez did not file a petition for reconsideration to the WCJ's 2012 findings, the majority found Iniguez waived his subsequent claim of neck and back injury.

B. The dissent

The dissent found two reasons to rescind the WCJ's decision and to remand the matter to the WCJ to revisit the issue of which body parts were injured by the industrial injury. First, the dissent found the 2012 decision to be noncompliant with section 5313[8] because it did not resolve all of the body parts claimed in the 2011 minutes. Second, the dissent found that the WCJ in her report added res judicata as a basis for barring the neck and back injury when the original opinion identified only collateral estoppel. Given that collateral estoppel and res judicata are not the same, the dissent found a

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8 "The appeals board or the workers' compensation judge shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (§ 5313.)

violation of due process to affirm the 2015 decision without giving Iniguez an opportunity to respond to the new explanation in the WCJ's report.

The dissent concluded that the confusion about body parts was a result of the WCJ's failure to comply with section 5313. The dissent disagreed with the WCJ's reasoning that pursuant to section 5815, it was up to Iniguez to correct the WCJ's decision by filing a petition for reconsideration.

DISCUSSION

Injuries to specific body parts, or which injuries were industrially injured, was not an issue listed for decision prior to the 2012 hearing. It is evident that the plan for the 2012 hearing was to decide certain threshold issues that were potentially determinative of Iniguez's claim. The determination of what industrial injuries Iniguez has sustained was clearly left for a future hearing or hearings. Nonetheless, the WCJ found in the 2012 hearing that Iniguez had sustained industrial injuries to his right shoulder and left knee.

Blue Rose contends that this amounts to a finding that Iniguez had not sustained injuries to the back and neck; in other words that this was a final determination that Iniguez had sustained *no other industrial injuries*.[9]

This contention is belied by the record. In the first place, the WCJ did not find in the course of the 2012 hearing that injuries to the right shoulder and left knee were the only industrial injuries that Iniguez had sustained. The case would have been largely over if that had been the finding but it is evident that no one thought that the case was anywhere near over in 2012.

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[9] Blue Rose's claim that the issue of injuries to the back and neck was actually submitted for decision in 2012 contradicts the record since this issue was not identified for the 2012 hearing and it is also negated by the circumstance that it was not until Dr. Fisher's 2013 medical report that these injuries were medically identified. (See fn. 2., *ante*.)

That is plainly shown by the fact that one of the issues identified for the 2015 hearing was "Parts of body injured." This, of course, made good sense since that issue had not been identified for the 2012 hearing. It is therefore simply not true that the 2012 determination was that *only* the right shoulder and left knee had been injured *and* that there were no other industrial injuries.

Viewed in terms of the four corners of the actual record, it misconstrues that record to claim that the 2012 determination was that the *only industrial injuries* were those to the right shoulder and left knee. It is one thing to conclude that there were industrial injuries to the right shoulder and left knee. It is quite another decision that these were the only injuries. The WCJ never made this additional decision in 2012.

Given that there simply is no finding, ruling or decision in 2012 that the injuries to the right shoulder and left knee were the only industrial injuries, the notion that the 2012 findings should be construed to mean that injuries to the shoulder and knee were the only industrial injuries is either just an argument or an inference. However, as an argument it is not persuasive and as an inference it is unreasonable. It certainly lacks any support in the record of the 2012 hearing since no part of that hearing contains the finding that injuries to the right shoulder and left knee were the only industrial injuries. It also fails because the determination which body parts were injured was one of the designated issues for the 2015 hearing which is of course totally inconsistent with the theory that the 2012 hearing determined all industrial injuries. It is significant there is no record of Blue Rose objecting to the identification of the issues for the 2015 hearing, which prominently included the issue of injuries to the cervical and lumbar spine.

We have no doubt that the 2012 determinations of the WCJ was not a final award under the usual meaning of finality. (*Lyon v. Goss* (1942) 19

Cal.2d 659, 670 (*Lyon*).)[10] However, it is not necessary to resort to the principle that only final awards are entitled to preclusive effect, whether by collateral estoppel or res judicata.[11] The decision that Blue Rose claims was made—that injuries to the right shoulder and left knee were the *only* industrial injuries—was in fact never made in 2012. Since there was no such decision, it is pointless to consider whether it had a preclusive effect.

We strongly agree with the appeals board's response to our inquiry that "the finding of industrial injury to certain body parts [right shoulder and left knee] does not preclude applicant from later presenting evidence of industrial injury to other body parts in a subsequent proceeding." This is an entirely correct and reasonable position, and its initial position was unreasonable for the reasons we detail above. (§ 5952, subd. (c).)

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10 "It is not the form of the decree but the substance and effect of the adjudication which is determinative. As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory." (*Lyon*, *supra,* 19 Cal.2d at p. 670.)

11 "The doctrine of res judicata applies only to judgments and orders that are final in the sense that no further judicial act remains to be done to end the litigation." (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 363, p. 985.)

DISPOSITION

The decision of the Workers' Compensation Appeals Board affirming the findings and award of the workers' compensation judge entered in July 8, 2016, is annulled and the matter is remanded to the Workers' Compensation Appeals Board for further proceedings.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT