2017 Cal. Wrk. Comp. P.D. LEXIS 384

Workers' Compensation Appeals Board (board Panel Decision),

Opinion Filed May 24, 2017

W.C.A.B. No. ADJ9341102—WCJ Clint Feddersen (VNO); WCAB Panel: Commissioners Razo, Brass, Zalewski

Reporter
2017 Cal. Wrk. Comp. P.D. LEXIS 384 *

Danielle Casarotti, Applicant v. Cisco's Mexican Restaurant, Star Insurance Company, administered by Illinois Midwest Insurance Agency, Defendants

Status:

CAUTION: This decision has not been designated a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are on banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: [*1]

The Petition for Reconsideration is *denied*.

Core Terms

drink, seizure, intoxicate, alcohol, floor, restaurant, workers' compensation, course of employment, petition for reconsideration, industrial causation, panel decision, withdrawal, bartender, surveillance video

Headnotes

HEADNOTES

Injury AOE/COE-Intoxication-Seizures-WCAB affirmed WCJ's finding that applicant, while working as bartender on 1/28/2012, suffered compensable injury to her brain, neck, back, head, psyche, sleep and eyes after falling off barstool due to seizure caused by alcohol withdrawal, and held that applicant's workers' compensation claim was not barred by intoxication defense in *Labor Code § 3600(a)(4)* as asserted by defendant, when evidence at trial, including opinion of panel qualified medical evaluator Mark Pulera, M.D., established that applicant had no alcohol in her blood and was

not intoxicated at time she fell, and that seizure leading to fall was due to *absence* of alcohol/alcohol withdrawal rather than alcohol intoxication, and WCAB rejected defendant's argument that applicant's history of alcoholism as it related to her injury was sufficient to satisfy elements of *Labor Code § 3600(a)(4)* even though Applicant was not drinking at time injury occurred, and applied holding in *Employers Mut. Liability Ins. Co. v. I.A.C. (Gideon) (1953) 41 Cal. 2d 676, 263 P.2d 4, 18 Cal. Comp. Cases 286,* where Supreme Court held that injuries suffered [*2] by employee when he fell at work after having nonindustrial, idiopathic seizure were compensable, to conclude that applicant's injuries in this case arose out of her employment and were compensable even though they resulted from nonindustrial alcohol withdrawal seizure [Note: Defendant's petition for writ of review was subsequently denied on August 18, 2017, *sub nom*. Ill. Midwest Ins. Co. v. Workers' Comp. Appeals Bd. (Casarotti), *2017 Cal. Wrk. Comp. LEXIS 83*]. [See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.20*, *4.92*; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, §§ 10.03[1], 10.06[2].]

Counsel

For applicant—***Odjaghian*** Law Group

For defendants—Law Offices of Bradford & Barthel

Opinion By: Commissioner Jose H. Razo

Opinion

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration **[*3]** is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Jose H. Razo

I concur,

Commissioner Frank M. Brass

Commissioner Katherine Zalewski

* * * *

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

Counsel for defendant, Illinois Midwest Insurance Agency, on behalf of Star Insurance Company, has filed a timely, verified petition for reconsideration from the Findings and Order and Opinion on Decision dated March 6, 2017. The only two issues submitted for decision, and decided, were injury arising out of and in the course of employment, and whether compensation is barred by the intoxication defense provided under *Labor Code § 3600(a)(4)*. The Findings and Order of March 6, 2017 found

that the intoxication defense does not bar applicant's claim, and that applicant Danielle Casarotti, age 27 at the time of her injury, sustained injury arising out of and in the course of employment to her brain, neck, back, head, psyche, sleep, and eyes on January 28, 2012, while employed by Cisco's Mexican Restaurant as a bartender.

Defendant's petition is based upon four contentions: (1) that the undersigned incorrectly interpreted *§ 3600(a)(4)* in finding applicant's claim is not barred by the **[*4]** intoxication defense, (2) that the California Supreme Court's opinion in *Employers Mutual Liability Ins. Co. v. Industrial Accident Commission (Gideon) (1953) 41 Cal.2d 676* is inapplicable to the facts of the present case, (3) that applicant's assertion of employer consent to drinking on the job is not credible testimony, and (4) that the treating physicians' reports are not substantial evidence.

On April 10, 2017, counsel for applicant filed a timely, verified answer to the petition for reconsideration.

II.

FACTS

At trial on January 19, 2017, applicant Danielle Casarotti testified that she has now been sober for five years (MOH/SOE 01/29/2017, p. 5, lines 20–21), but when she was working as a bartender at Cisco's Mexican Restaurant, bartenders drank at the bar during work hours, and the manager was aware of this (*Id., p. 6*, lines 9–10). Customers bought her drinks, and consequently she was encouraged to drink on the job, even though she had problems with alcoholism (*Id., p. 6*, lines 11–14). Ernesto, her immediate supervisor, had a sexual relationship with her (*Id., p. 8*, lines 23–24). He gave her shots of alcoholic beverages before and after work hours, and sometimes this caused her to **[*5]** black out (*Id., p. 6*, lines 16–18). Ernesto also gave her bottles of liquor to take home (*Id., p. 6*, lines 18–19).

The only thing applicant remembers of her injury of January 28, 2012 is cleaning up the restaurant, wiping down the countertops, and that there was a lot of water on the floor (*Id., p. 5*, lines 20–23). She doesn't even remember waking up in the hospital. (*Id.*)

Applicant testified that she has problems with her memory, as well as headaches, and trouble remembering words, doing two things at once, and concentrating (*Id., p. 6*, lines 4–5). Last year, in 2016, she lost consciousness while she was at Target (*Id., p. 6*, lines 1–3). Her mother told her that she had seizures as a baby (*Id., p. 6*, lines 24–25).

Applicant's mother, Lisa Casarotti, testified that applicant had seizures as a child at 6 months, 9 months, and 13 months, usually with a fever, and the pediatrician said that it could carry over into adulthood (*Id., p. 10*, lines 22–23). Once every couple of weeks, Lisa Casarotti saw applicant working at Cisco's, where she saw patrons buying drinks for her daughter and other bartenders and waitresses (*Id., p. 10*, lines 14–15). It was difficult for Lisa Casarotti to see her **[*6]** daughter, who had a drinking problem, drinking at work (*Id., p. 10*, lines 14–16). Applicant and her two children now live with Lisa Casarotti (*Id., p. 10*, lines 16–17). Applicant had great grades in college, but now has memory problems and is "more scattered" than she was before her work injury (*Id., p. 10*, lines 17–21). Lisa Casarotti believes her daughter fell down stairs in 2004, but doesn't know if applicant was taking Norco then or had anxiety or depression, because they did not live together at that time and applicant did not share these things with her (*Id., p. 11*, lines 20–24).

Angela Franco, manager of the Cisco's Mexican Restaurant location where applicant worked, testified that she was a bar manager when applicant worked there (*Id., p. 12–15*, lines 22–23). Applicant wasn't a great bartender (*Id., p, 12*, line 16). Customers said she was always "high," "a space cadet," "ditzy," and "off" (*Id., p. 12*, lines 16–17). Ms. Franco did not witness applicant's fall at work (*Id., p. 12*, line 22). However, applicant's boyfriend was there, and told Ms. Franco that applicant had a seizure (*Id., p. 12*, line 25).

Ms. Franco helped Ernesto make a recording of a security video that shows applicant **[*7]** counting money on the bar when "everything seizes up" and she goes down on the floor (*Id., p. 13*, lines 1–4). They recorded the video on a phone, then put the video from the phone onto a flash drive or CD (*Id., p. 13*, lines 10–11).

Ms. Franco testified that she has never taken a drink on the job (*Id., p. 13*, lines 13–14). Patrons buy her drinks all the time, but she drinks these after her shift (*Id., p. 13*, lines 14–15). According to Ms. Franco, employees were not forced to drink at Cisco's (*Id., p. 14*, line 3). There was a written policy at Cisco's not to drink on the job (*Id., p. 14*, lines 5–6).

Ernesto Rodriguez, who has worked for Cisco's Mexican Restaurant for 25 years, and has been the General Manager for about 14 years, testified that on some days applicant was "good," and on some days she was "off" (*Id., p. 14*, lines 17–19). He was at the restaurant on the day of applicant's injury, but saw the injury later on surveillance video, which was recorded on a DVR from cameras about 20 feet away from the bar (*Id., p. 14*, lines 22–23). He recorded the surveillance video from a computer monitor with his cell phone (*Id., p. 14*, lines 24–25).

Sometimes Mr. Rodriguez drank with applicant **[*8]** after work while they were not on duty (*Id., p. 15*, lines 1–3). Patrons also buy drinks for employees of Cisco's, and there is no policy prohibiting this (*Id., p. 15*, lines 18–19). Employees were allowed to drink after work, but could be written up, suspended or fired if they had drinks on the job (*Id., p. 15*, lines 3–5). Mr. Rodriguez gave away bottles of liquor that were given to him as free samples by vendors, but he did not force anyone to drink these bottles (*Id., p. 15*, lines 5–7). Mr. Rodriguez did have a sexual relationship with applicant, but he never forced her to drink so she would black out in order to have sex with her (*Id., p. 15*, lines 8–9).

Panel QME Mark Pulera, M.D., after reviewing all of applicant's medical records, came to the conclusion that applicant's fall at work and resultant head injury were "due to a seizure, and the seizure is due to alcohol withdrawal within reasonable medical probability" (QME Report of Mark Pulera, M.D. dated October 27, 2016, admitted as Defendant's Exhibit B, p. 13, para. 2). Although the alcohol withdrawal was not shown to be industrial, applicant's circumstances at the time of the seizure and fall were industrial, as she suffered **[*9]** from a fall on the employer's premises, in the course of employment, from the height of a barstool, where she was working, against the floor next to the bar.

Thus, based upon the medical reports and deposition testimony of Panel QME Mark Pulera, M.D., admitted as Defendant's Exhibits A, B, C, and D at trial, with due consideration of the medical reports of treating doctors Diemha Hoang, M.D. (Applicant's Exhibits 1 and 2), Mark Levine, Ph.D. (Applicant's Exhibit 3), and Warren Procci, M.D., Ph.D. (Applicant's Exhibit 4), all of which also supported a finding of industrial injury, and the surveillance video of January 28, 2012 admitted into evidence as Defendant's Exhibit E, authenticated by the testimony of Ernesto Rodriguez at trial, it was found that applicant sustained injury to her brain, neck, back, head, psyche, sleep, and eyes, arising out of and occurring in the course of employment on January 28, 2012, and that the injury was not caused by the intoxication of applicant, within the meaning of *Labor Code § 3600(a)(4)*. It is from these findings that defendant has filed a timely, verified petition for reconsideration.

III.

DISCUSSION

Defendant has raised the issue of whether the **[*10]** Findings and Order are based upon a correct interpretation of *California Labor Code section 3600(a)(4)*, which requires as a condition for workers' compensation benefits that "the injury is not caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee."

Based upon the medical reports and deposition testimony of Mark Pulera, M.D., and the surveillance video of January 28, 2012 admitted into evidence as Defendant's Exhibit E, authenticated by the testimony of Ernesto Rodriguez at trial, it is found that applicant did not fall and strike the floor on January 28, 2012 as a direct result of being intoxicated at the time of injury, and accordingly the injury was not "caused by intoxication." There was no evidence that applicant was intoxicated at the moment that she fell and struck the floor. On the contrary, it was the medical opinion of Dr. Pulera that the fall was due to a seizure that was due to alcohol *withdrawal*. In other words, the *absence* of alcohol, and not its presence, was the cause of the seizure that in turn caused applicant to fall from a bar stool at Cisco's **[*11]** Mexican Restaurant onto the floor below. The suddenness of applicant's fall in the surveillance video is consistent with the opinion of Dr. Pulera that a seizure, and not a mere lack of coordination due to intoxication, caused the fall that in turn caused the injury to applicant's brain, neck, back, head, psyche, sleep, and eyes when she struck the hard floor next to the bar.

It was therefore found that Dr. Pulera's opinion that applicant fell onto the floor due to a seizure, related to non-industrial alcohol withdrawal, resulting in injury to the head and other body parts, is a medically probable explanation of the mechanism of injury. However, Dr. Pulera's conclusion that the injury is therefore nonindustrial is inconsistent with the holding of the California Supreme Court in *Employers Mutual Liability Insurance Company v. Industrial Accident Commission (Gideon) (1953) 41 Cal.2d 676, 678* that "[i]t is settled in this state and elsewhere that an injury suffered from a fall on the employer's premises, in the course of employment, from a height on or against some object, arises out of the employment and is

compensable, even though the fall was caused by an idiopathic condition of the **[*12]** employee…" Accordingly, while Dr. Pulera's medical reasoning appears to be sound, his legal conclusion that the injury is non-compensable is found to be incorrect as a matter of law.

Defendant contends the holding of the California Supreme Court in *Gideon* is "inapplicable to the facts at hand." This argument does not seem to have any merit. *Gideon* involved an applicant who, while walking down an aisle on his employer's premises, had an idiopathic seizure not connected with his employment, which caused him to fall to the concrete floor and strike his head thereon. The facts in *Gideon* are in this respect practically identical to the facts at hand, with a non-industrial seizure causing the employee to fall and strike the floor while working. The legal holding of *Gideon*, stated above, is also precisely applicable to the facts of this case, with an injury suffered from a fall on the employer's premises, in the course of employment, from a height on or against some object, which therefore arises out of the employment and is compensable, even though the fall was caused by a condition not shown to be industrial.

Given the holding in *Gideon*, and the absence of any evidence that applicant was **[*13]** intoxicated at the moment she fell, it is unnecessary to consider defendant's contention that applicant's testimony about employer consent to drinking on the job was not credible. This testimony would only become relevant in the event it was found that applicant was in fact intoxicated at the moment she fell, or that withdrawal from alcohol use falls under the intoxication defense of *Labor Code § 3600(b)(4)*, in which case applicant's testimony would have been considered sufficiently credible, and corroborated by the other witnesses, to support a finding that applicant's alcohol use was at least partly industrial while she was working at Cisco's Mexican Restaurant, because it is undisputed that the employer did in fact allow customers to buy drinks for applicant and other bartenders, even though the employer defendant's two manager witnesses testified that the official policy was to make employees wait until the end of their shifts to drink those beverages.

Defendants' contention that the treating doctors' reports did not constitute substantial medical evidence is also not dispositive of any of the issues decided in the Findings and Order of March 6, 2017, as the medical opinions of **[*14]** Panel QME Dr. Pulera are alone sufficient to support the finding of industrial causation of a fall injury. The finding of industrial causation is based upon application of the legal holding in *Gideon* to the medical findings of Panel QME Dr. Pulera, who initially found that "there is industrial causation for the body parts of brain, head, sleep, back, and neck" (QME Report of Mark Pulera M.D. dated July 25, 2016, admitted as Defendant's Exhibit C, p. 54, para. 3), as well as to the eyes, insofar as Dr. Pulera deferred to Dr. David Sami's finding of opthalmological impairment (*Id., p. 55*, para. 4). Dr. Pulera later changed his opinion to find that these body parts were nonindustrial solely based upon his finding that applicant's seizure was due to alcohol withdrawal, apparently not realizing that while his medical conclusions were well taken, his legal conclusion was inconsistent with the holding of the California Supreme Court in the *Gideon* case, cited *supra*. This is understandable, as Dr. Pulera's expertise is primarily in medicine, not law, and apparently he was unaware that *Gideon* requires a finding of industrial causation where an injury is suffered from a fall on the employer's **[*15]** premises in the course of employment, from a height on or against some object, even though the fall was caused by a condition not shown to be industrial. The treating physicians' reports corroborate industrial causation; however, Panel QME Dr. Pulera's medical findings, applied to the holding in *Gideon*, are sufficient to support a finding of industrial causation of injury.

IV.

RECOMMENDATION

It is respectfully recommended that the petition for reconsideration be denied.

Clint Feddersen

Workers' Compensation Administrative Law Judge

Dated: April 12, 2017

End of Document