WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ISRAEL REYNOSO, *Applicant*

vs.

T & S FRIEDKIN CA, INC.; ACE AMERICAN INSURANCE COMPANY, administered by CORVEL CORPORATION, *Defendants*

Adjudication Numbers: ADJ10978648; ADJ11005421
San Diego District Office

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.

Labor Code section 3208.3 states that "In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury." (Lab. Code, § 3208.3(b)(1).) This means that benefits for a psychiatric injury may be awarded only when the employee establishes that industrial factors account for more than 50% of the employee's psychiatric injury. (*Pacific Gas & Electric Co. v. Workers' Comp. Appeals Bd*. (2004) 114 Cal.App.4th 1174, 1181 [69 Cal. Comp. Cases 21].) There must now also be "objective evidence of harassment, persecution, or other basis for the alleged psychiatric injury." (*Verga v. Workers' Comp. Appeals Bd*. (2008) 159 Cal.App.4th 174, 186 [73 Cal.Comp.Cases 63].)

Defendant incorrectly relies on the reasoning in *Verga* to argue that applicant's mere perception of harassments are not actual events of employment and that he, therefore, fails to meet his burden of proof. We disagree. In *Verga*, the Court of Appeal agreed with the Appeals Board's finding that Verga's perception of harassment and persecution was insufficient to support her claim of injury where no objective evidence of that harassment existed and where Verga herself created

the negative work environment that she alleged caused her psychiatric injury. (*Verga, supra,* 159 Cal.App.4th at p. 174, 186.) The facts of this case are distinguishable.

In this case, there is no evidence that applicant intentionally abused his co-workers. Rather, as summarized the WCJ in the report, the record here contains objective evidence that Rogelio Alapiso's treatment of applicant consisted of actual events of employment that predominately caused his psychiatric injury. In a January 10, 2020 deposition, panel qualified medical examiner Elise Reed, D.O., testified that she assigned 53% of causation of injury to Mr. Alapiso's treatment of applicant. (Deposition of Dr. Reed, 1/10/20, at p. 13:17 - 14:15, Joint Exhibit 4.) Her description of that treatment as reported by applicant, whom she found credible (Dr. Reed's 5/10/19 report, at p. 25, Joint Exhibit 1), is consistent with applicant's trial testimony and corroborated by the trial testimony of defense witnesses, Mr. Alapiso and Gil Garcia. This testimony is summarized by the WCJ in the report. Moreover, we have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id*.)

While the record is less clear as to the existence of objective evidence that applicant's interactions with co-employees Gloria Claudat and Belen also consisted of actual events of employment causing injury, the allocation of causation Dr. Reed attributed to them (5% to Gloria Claudat and 2% Belen) does not defeat the finding that applicant's injury was predominately (or more than 50%) caused by actual events of employment. In his report, the WCJ noted that defendant did not establish a good-faith personnel action defense, which was an issue raised at trial. Because defendant does not dispute that determination, we do not address it.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 26, 2021

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

ISRAEL REYNOSO
LAW OFFICE OF MATTHEW A. VERDUZCO
FLOYD, SKEREN, MANUKIAN AND LANGEVIN

PAG/*pc*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*

REPORT AND RECOMMENDATION
ON PETITION FOR REMOVAL

I

INTRODUCTION

1. Applicant's Occupation:	Laborer
Applicant's Age:	50
Dates of Injury:	1/5/2014-1/5/2017 for both cases
Parts of Body Alleged:	psyche ADJ 11054421 ; ADJ 10978648 Back
2. Identity of Petitioner:	**T&S FRIEDKIN CA, INC.; ACE AMERICAN INSURANCE COMPANY ADM. BY CORVEL CORPORATION**
3. Timeliness:	Petition was Timely
4. Verification:	The Petition was verified.
5. Date of Issuance of Order:	January 29, 2021

6 Petitioner's Contention(s):

A. With Respect to ADJ11005421 (Psyche Injury): That the applicant did not meet his burden of proof because he "misperceived" actual events.

B. With Respect to ADJ10978648 (Back Injury): That the Medical Reporting of Dr. Yoo is not substantial medical evidence upon which a decision can be based.

II

FACTS/PROCEDURAL HISTORY

Both ADJ11005421 and ADJ10978648 have the same cumulative trauma date, January 5, 2014 to January 5, 2017. ADJ11005421 is a claim for injury to the psyche and ADJ 10978648 is a claim of injury to the low back. The applicant worked for defendant FRIEDKIN Ranch as a laborer for 18 years (June 1998 to January of 2017). His job duties consisted of a bit of everything that needed to be done running the gamut of running errands to the store, cleaning the yard, cleaning floors, cleaning the pool, caring for the dogs, laying and repairing pipe for the agriculture; cleanup of debris from trees and caring/feeding the horses (MOH SOE 9/8/2020 2:24-6:24). These activities were the basis for his claim for back injury.

The applicant's claim for psychiatric distress stems from his interaction with, and treatment by his supervisor Rogelio. The applicant felt that Rogelio Alapiso was mean and rude and that Rogelio favored family member employees over the applicant. Examples of discrimination were detailed on pages 7:2 through 10: 15 of the Minutes of Hearing/Summary of Evidence 9/8/2020). In particular, Rogelio told him when he was hired that he would not have hired the applicant. This was corroborated by Mr. Alapiso in his testimony. (MOH/SOE 11/9/2020 5: 18-6:3).

Gil Garcia, the foreman/ranch manager testified that Rogelio was a "rough guy" and that various employees would tell Mr. Garcia that Rogelio was pushing them hard and told them to hurry up. (MOH/SOE 10:3-4 and 10:13-18).

The trial concluded on November 9, 2020. A Findings and Award issued January 29, 2021 finding for the applicant on both claims of injury. The defendants filed a timely appeal on both cases on February 23, 2021.

III

DISCUSSION

A. CONTENTION A: WITH RESPECT TO ADJ11005421 (PSYCHE INJURY): THAT THE APPLICANT DID NOT MEET HIS BURDEN OF PROOF BECAUSE HE "MISPERCEIVED" ACTUAL EVENTS.

There are two California Supreme Court cases that have established the threshold for finding that the employment caused injury. The California Supreme Courtin *Maher v. WCAB* (1983) 48 Cal. Comp. Cas. 326, 328 that is sufficient to find injury A OE/COE if the employment is a *contributing cause*. The California Supreme Court confirmed that if the employment is a "contributing cause" it is sufficient to find injury. *Brandon Clark v. Southcoast Framing* (2015) 80 Cal. Comp. Cas. 489. This case also is governed by Labor Code §3208.3 Threshold of compensability for psychiatric injury. The requirements for causation of a psychiatric injury are as follows:

1. A psychiatric injury is compensable if it is a mental disorder which causes disability or need for medical treatment and is diagnosed bypsychologist or psychiatrist (3208.3 (a));

2. The employee establishes by a preponderance of the evidence **thatthe actual events of employment were predominant as to all causes combined of the psychiatric injury (3208.3 (b)(1)*;*** [emphasis not in the original]

3. No compensation under this division shall be paid by an employerfor a psychiatric injury if the action was *substantially* caused by a lawful, good faith personnel action.

> The burden of proof on this issue shall rest with the party asserting this issue.

Defendants' cases are not on point. The citations will not be repeated however the distinction factually to this case will be drawn. In Verga the applicant subjectively believed that the employee's actions were disdainful and persecutory. The Appeals Board found there were **no "actual events of employment"**. In *Haywood*, there was **no objective evidence of discrimination**. In *Herrera* the court found **no objective evidence of discrimination**. In *Fugimoto,* there were **rebuttal witnesses who testified that the events did not occur as claimed.** Finally, in *Higgins*, there **was no objective evidence to support the claims of harassment and prosecution**. This case is factually and legally distinguishable from the above "authorities" in as much that there was "objective evidence" of the actual events complained about.

In this case, the applicant met his burden of proof on prongs one and two of Labor Code §3208.2, via his testimony, the testimony of Rogelio Alapiso (MOH/SOE 11/9/2020 page 5:14 through 9:8); the testimony of Gil Garcia (MOH/SOE 11/9/2020 9: 10 to 10: 18); and thetestimony of Gloria Claudat (MOH/SOE 11/9/2020 10:21-13: 1) the report of Dr. Elise Reed (Jt. Ex. 1) and her deposition (Jt. Ex. 4).

In particular, the events complained of by the applicant were actual events and unrebutted as to whether they happened or not. In particular:

Applicant worked 18 years at the Friedkin ranch. He felt stress from work, and during the last five years at the Ranch he started having panic attacks. He was taken to the emergency room. One time the panic attacks came when he was at the store. He told Gil Garcia. He started treatment approximately four to five years before the end of his employment. This is supported by the review of records done by Dr. Reed in her report (Jt. Ex. 1). In that report she reviews records showing depression and treatment in records dated 3/8/16, 4/6/16, 5/6/2016, 5/20/2016, 5/31/16, 6/3/2016, 6/28/16, 7/21/16, 8/9/2016, 8/11/2016, 8/16/2016, 8/31/2016, 9/9/2016, 9/16/16, 9/30/16, 10/7/2016, 10/13/2016, 10/17/201 (patient may return to work), 10/18/16, 11/4/16, 11/15/16, 1/7/17(note: terminated from work and stress has reduced no longer having panic attacks), 1/27/17, and 5/19/17).

The applicant testified that he felt he was treated badly on several occasions, most often by Rogelio Alapiso. At one point Mr. Alapiso told him that he would not have hired him. The secretaries treated him with disdain. The applicant mentioned an incident where he was criticized for bringing in too few peas, although he brought all he had. Another incident occurred when he working on pipes with a co-worker and Rogelio toldthem to work faster, and that they were working like women. He told Gloria, one of thesecretaries that he was not given enough hours and she added a Saturday to his schedule. He was

assigned to care for the dogs, in particular an old sick one. There were times he had to drop everything to get lunch for Susan Friedkin. There were times getting the lunch conflicted with his grocery store run and he feared being late bringing the lunch. Sometimes, he would enter Ms. Friedkin's office and she would wave him off without saying anything because she was on the phone. Other secretaries like Belen would snap her fingers at him when he supposed to go to the store. (MOH/SOE 9/8/2020 7:2-12:2; MOH 11/9/2020 4:17-20; 4:20:5; 5:4-6). Mr. Arapiso also criticized him for the lemons he brought into the cook (MOH 11/9/20205:2-3).

These events were corroborated by the defense witnesses. Rogelio Alapiso testified that he had worked at the ranch 42-43 years. He told the secretaries that Mr. Reynoso was not able to do the work because he used to work on cars and the yard work was different. (MOH/SOE 11/9/2020 5:21-25). Mr. Alapiso confirmed that he had relatives and friends on the Ranch. They were from the same town in Mexico that he was from (MOH/SOE 11/9/2020 6:4-10). Mr. Alapiso recalls an incident about the lemons picked for the chef. Usually the applicant picked ripe lemons and that time he did not. (MOH/SOE 7:3-9). Mr. Alapiso also confirmed the pipe incident, but denied saying it was women's job. (MOH 7:14-18). Mr. Alapiso confirms that he assigned Mr. Reynoso to the "sick" dog. (MOH 7:24-8:2; 8:21-23). Mr. Gil Davis testified that Rogelio was a "rough guy" but did not mistreat the employees. He worked hard and pushes the guys all the time. There were various employees that would tell Mr. Garcia that Rogelio was pushing them hard, and that Rogelio would tell them to hurry up. (MOH/SOE 11/9/2020 10:3-4; 10: 13- 18).

Gloria Claudat testified that she has been employed by the Friedkin Ranch for 37 years. She is the Estate Manager. (MOH/SOE 11/9/2020 10:24-25). She testified that there would be times that she was on the telephone and she would wave Mr. Reynoso off. She meant no disrespect by this. (MOH/SOE 11: 18-24). She remembered Mr. Reynoso complaining close to the time he left about **working underpressure** and that he had a problem with Rogelio. She then put Mr. Gil Garcia in charge of Mr. Reynoso (MOH/SOE 11/9/2020 17:9-20).

Defendant does not try to claim the defense that the injury was substantially caused by good faith, non-discriminatory personnel action. In fact, none of the actions complained of by the applicant were "personnel actions". Dr. Reed stated in her deposition that the termination was 25% of all causes combined of his psychiatric injury. This falls far short of the "substantial cause" required for the affirmative defense. See condensed deposition Jt. Ex. 4 page 11: 3-24. The reduction in income was also a cause contributing 15%. Since the reduction in income is a natural consequence of the injury, the 15% has no meaning, except as potential non-industrial causation. It is not a good faith personnel action.

Dr. Reed assigned 5% to Gloria (secretary), 2% to Selan (secretary), 15% to finances, 25% to the termination leaving 53% to interactions with Mr. Arapiso. (Jt. Ex.4, page 14:1-15). It is clear that the applicant has meet his burden of proof for industrial causation of the psychiatric injury. Those interactions have all been confirmed as "actual events". Ms. Claudet added a Saturday to give the applicant more hours as Mr. Arapiso did not give him overtime and put Gil Garcia in as the applicant's supervisor rather than Mr. Arapiso.

Dr. Reed's report (Jt. Ex. 1) and her deposition testimony (Jt. Ex. 4) coupled with the excerpted records as well as the testimony described above meets the standard for substantial medical _evidence of an industrial psychiatric injury and supports a finding of injury AOE/COE to the applicant's psyche.

B. <u>CONTENTION B: WITH RESPECT TO ADJ10978648 (BACK INJURY): THAT HE MEDICAL REPORTING OF DR. YOO IS NOT SUBSTANTIAL MEDICAL EVIDENCE UPON WHICH A DECISION CAN BE BASED.</u>

The applicant's unrebutted testimony was that he worked for the Friedkin family for 18years. He worked in the position of a general maintenance person. He ran errands to the store, cut grass, trim trees, feed and washed the dogs and cleared floors. He hurt himself over time because of the heavy lifting, moving tree trucks and clearing debris in the driveway.(MOH 9/3/2020 3:1-15). The debris from the trees were caused when the trees were trimmedand also from storms. He cleaned debris from the pool (leaves that fell during the windy season). He would also help clean the living room, including cleaning the fireplace. He dug holes for plants and also to take care of underground pipes that occasionally leaked. He hadto bathe the dogs as well as feed them. (MOH/SOE 9/8/2020 4:7-6:24). In addition to clearing debris from the trees in the driveway, the applicant put garbagein the dumpsters. The applicant helped move tree branches and trunks from the driveway. This would be on a seasonal basis and happened about two times per year. He used a leaf blower for the leaves on the trees. The trunks weighed 90-100 pounds and took two people. He excavated and replaced pipes approximately seven time per year. He washed the three dogs three times per week. He also had an ill dog to take care of, sometimes two times per day. He did this for approximately 1 year. (MOH 2:7-3:22).

The defendant asserts that the reports of Dr. Yoo (Joint Exhibits 2 and 3) do not meet the requirements for substantial evidence. The requirements for substantial medical evidence are set for in *Escobedo v. v. Marshall's* (2005 *En Banc*) 70 Cal. Comp. Cases 604, presents a thorough discussion of these cases. This is because it is well established that any decision of the WCAB must be supported by substantial evidence. (Lab. Code, §5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274,281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases

500]; *Levesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].)

It has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [33 Cal.Comp.Cases 660]; *Travelers Ins. Co. v. Industrial Acc. Com.* (Ode/lo) (1949) 33 Cal.2d 685, 687-688 [14 Cal.Comp.Cases 54]; *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal. App.4th 1692, 1700-1702, 1705 [58 Cal.Comp.Cases 313].) Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162,169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525]; *Zemke v. Workmen's Comp. Appeals Bd.*, *supra*, 68 Cal.2d at p.798.) Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal. 2d 399, 407 (a mere legal conclusion does not furnish a basis for a finding); *Zemke v. Workmen's Comp. Appeals Bd.*, supra, 68 Cal.2d at pp. 799, 800-801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence); see also *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 (the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based).

Dr. Yoo's reports are consistent with the applicant testimony as well as that of the witnesses. Further it is consistent with the information provided by the defendant to Dr. Yoo. The doctor was not provided any records to review, nor were any rebuttal reports admitted into evidence by the defendant.

Further, defendant complains that there was no history of "previous back injury and back pain" and indeed there were not records of back pain prior to the employment by FRIEDKIN. All the records provided by defendants' are of a *subsequent* injury. Dr. Yoo evaluated the applicant in 2019. Both of his reports are dated in 2019 (See Jt. Ex. 2 (9/21/2019) and 3 (12/1/2019). The back injury at the *subsequent* employer was July 3, 2018 involving primarily the shoulder. It is unknown when the records of Preferred Employers' was obtained, however, the DOR was filed on January 17, 2020, after the receipt of both of Dr. Yoo's reports. The defendant did not object to the DOR requesting further discover. The parties proceeded to hearing on March 2, 2020 and the case was set for trial on April 29, 2020. On April 27, 2020, the defendant asked for a continuance due to COVID-19 orders, and the case was continued to June 15, 2020. At that time the Exhibits were admitted but the defendant objected to going forward as there

was no mechanism to "see" the applicant. Therefore, the case was continued on notice to September 9, 2020 on "Lifesize". The Exhibits, including the Preferred Employers records (Jt. Ex. 5) were filed on June 11, 2020. At no time was there any request by the defendant to get a supplemental report from Dr. Yoo, rather the defendant chose a strategy to ensure that either Dr. Yoo's report was invalidated or that the submission would be vacated to augment the evidentiary record.

The court believes that the testimony of the applicant and the reports of Dr. Yoo support the finding of an industrial injury to his back and are substantial medical evidence upon which to base an Award.

V

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Date: March 15, 2021
Respectfully submitted,
LINDA F. ATCHERLEY
Workers' Compensation Judge