

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

BRISA VARELA RODRIGUEZ, *Applicant*

vs.

**HABIT RESTAURANT, LLC and ZURICH AMERICAN INSURANCE COMPANY
administered by CORVEL CORPORATION, *Defendants***

**Adjudication Numbers: ADJ12390057, ADJ12364301
Oakland District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings, Order and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on December 22, 2021, wherein the WCJ found in pertinent part that on July 28, 2018, applicant sustained injury arising out of and occurring in the course of employment (AOE/COE), to her head, neck, and low back, (ADJ12364301); that applicant did not sustain an injury AOE/COE to her low back, upper extremity, abdomen, groin, psyche, or in the form of stress, on December 10, 2018 (ADJ12390057); that applicant's condition became permanent and stationary on September 10, 2020; that defendant offered modified work to applicant consistent with her work restrictions; that applicant was not entitled to temporary disability indemnity for the period from July 28, 2018, to the present and continuing; and that there is not good cause to have applicant evaluated by a neurology or psychology qualified medical examiner (QME).

Applicant contends that she has shown there is good cause for her to be evaluated by a psychology QME and a neurology QME, and that applicant stopped working for defendant on February 19, 2019, because, as a result of her work injury, she was unable to perform modified duties so she is entitled to an award of temporary disability indemnity benefits.¹

¹ The actual starting date of the benefits claimed by applicant is not clear. As discussed below, it appears applicant was claiming she was entitled to temporary disability indemnity benefits as of July 28, 2018, but there is no dispute that applicant's last day of work with defendant was February 19, 2019.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, and we will affirm the F&A except that we will amend the F&A to find that the issue of whether applicant sustained a psychiatric injury in case number ADJ12364301 and/or in case number ADJ12390057 is deferred (Finding of Fact 2), to find that applicant is entitled to temporary disability indemnity for the period from April 23, 2020, through September 10, 2020 (Finding of Fact 3), and to find that there is good cause for applicant to undergo a medical-legal evaluation by a physician in the field of psychiatry or psychology. Based thereon, we will amend the Award and return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to her head, neck, psyche, upper extremities, back, leg, groin, and abdomen, and in the form of stress, and headaches while employed by defendant as a cook on July 28, 2018 (ADJ12364301). Applicant also claimed injury to her head, neck, psyche, back, upper extremities, abdomen, groin, and in the form of stress, and headaches, while employed by defendant as a cook on December 10, 2018 (ADJ12390057). On December 11, 2018, applicant received treatment at Concentra Occupational Medical Center. The report indicates she could return to work with restrictions. (Def. Exh. N.) On February 27, 2019, applicant was again seen at Concentra, and was released to “Return to full work/activity today.” (Def. Exh. M, p. 4.) Applicant’s last day at work for defendant was February 19, 2019, and her employment was terminated as of March 5, 2019. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 26, 2021, pp. 7, 9, and 12.)

Chiropractic agreed medical examiner (AME) Moses Jacob, D.C., evaluated applicant on April 23, 2020. (Joint Exh.101, Dr. Jacob, April 23, 2020.) Dr. Jacob examined applicant, took a history and reviewed the medical record. The diagnoses included “Cervical spine sprain/strain” and “Sprain/strain, lumbosacral spine” but Dr. Jacob stated that applicant had not reached maximum medical improvement (MMI) and that she was temporarily totally disabled. (Joint Exh.101, pp. 13 – 15.)

AME Dr. Jacob re-evaluated applicant on September 10, 2020. (Joint Exh. 102, Dr. Jacob, September 10, 2020.) Dr. Jacob re-examined applicant, took an interim history and reviewed additional medical records. He concluded that applicant had reached MMI status and that her condition was permanent and stationary. (Joint Exh. 102, p. 7.) Dr. Jacob diagnosed cervical spine sprain/strain associated cervicogenic headaches [headaches caused by neck pain], lumbar mechanical discogenic pain with radicular involvement, and “Psychological component directed to the appropriate psychological evaluator.” (Joint Exh. 102, p. 8.)²

The parties proceeded to trial on August 26, 2021. The WCJ’s summary of applicant’s testimony includes the following:

She had another injury on 12/10/2018. ... ¶ She was sent to Concentra the next day. Concentra provided physical therapy, a check-up as to her pain, and pain medications. Concentra never gave her work restrictions but told her no lifting pushing or pulling more than 10 pounds. She gave defendant those work restrictions. Applicant was scheduled to return to work the next day. She went back to work but does not remember when that was. When she did go back to work, her job duties did not change. Her job duties never changed after 12/10/2018. She asked her supervisor about modified work but does not remember if she told her supervisor she was unable to perform some of her duties.

(MOH/SOE, August 26, 2021, p. 6.)

She stopped working for defendant on 2/19/2019 because she was experiencing constant pain and inflammation in her right arm. She mentioned that she was feeling unwell to her supervisor, Mr. Raul Fernandez, who told her she was exaggerating. Mr. Fernandez knew she was receiving treatment for her injuries.

(MOH/SOE, August 26, 2021, p. 7.)

After 12/10/2018, she returned to work. She had work restrictions on a note that she gave to her manager/supervisor. He looked it over and said it was fine. When asked if her manager explained how she should modify her work to meet her work restrictions, she said not at all. The restrictions included a lifting, pulling, and pushing restriction of 10 pounds. She stated that her work required her to not follow those restrictions. On occasion, she would ask others to help her with the restrictions, but sometimes everyone was busy and no one could help her. She believes there were about 10 people working each shift.

(MOH/SOE, August 26, 2021, p. 9.)

When asked if she was aware she was scheduled to work on 02/20/2019, she said yes, but that she did not show up on that date because her arm was hurting

² Dr. Jacob previously stated, “In my opinion there is a psychogenic aspect to this case, which I defer to the appropriate psychological evaluator.” (Joint Exh. 102, p. 8.)

a lot, she was not feeling well, and she did not go to work. She told Raul she was not going to show up for work that day in the morning of 02/20/2019. She did not seek any medical treatment that day but took pain medication. She stayed home and rested but went out and got something to eat at a restaurant at Graton Casino.

(MOH/SOE, August 26, 2021, p. 10.)

The WCJ's summary of defendant's general manager, Jennifer Chong-Lee, included:

She regularly visited defendant's Santa Rosa location two or three times a week. ¶ She was aware that applicant had work restrictions between 07/28/2018 and 02/19/2019, and she observed applicant working modified duties during that time. The modified duties during that time included working on a make-up station (wrap the burger or place sandwiches to be given to the guests) or help in an area where one cleans the tables after guests leave. These modified duties were consistent with her work restrictions.

(MOH/SOE, August 26, 2021, p. 12.)

The trial was continued and at the November 8, 2021 trial the matter was submitted. (MOH/SOE, November 8, 2021.) The issues submitted for decision included injury AOE/COE in case number ADJ12390057, the permanent and stationary (P&S) date in case number ADJ12364301, applicant's entitlement to temporary disability indemnity for the period from July 28, 2018, to the present and continuing, and whether applicant was entitled to be evaluated by a neurology QME and a psychology QME. (MOH/SOE, August 26, 2021.)

DISCUSSION

In her Report the WCJ stated:

Defendant terminated applicant for job abandonment on 03/06/2019. The termination notice states applicant was on the schedule to work on 02/20, 02/21, 02/22, 02/25, and 02/26 and that she did not call or show up to work. (Defendant's Exhibit F) Defendant advised applicant on 10/23/2019 that it was not paying temporary disability from 10/03/2019 and continuing because the employer offered modified work, applicant failed to return to work, and because the employer terminated her due to her job abandonment. (Defendant's Exhibit D)

(Report, p. 8.)

The WCJ concluded that, "[A]pplicant is not entitled to total temporary disability from 07/28/2018 to the present and continuing ..." (Report, p. 9.)

Pursuant to the ‘odd lot’ doctrine, a worker who is only partially disabled may receive temporary total disability payments if the partial disability results in a total loss of wages. (*Pacific Employers Ins. Co. v. Industrial Acc. Com. (Stroer)* (1959) 52 Cal.2d 417, 421 [24 Cal.Comp.Cases 144].) This doctrine places the burden on the employer to show that work within the capabilities of the partially disabled employee is available. If the employer does not make this showing, the employee is entitled to temporary total disability benefits. (*Id.*, at p. 422) However, an applicant may be estopped from claiming temporary disability indemnity corresponding to periods that he or she refused suitable modified work without good cause. (See *Vittone v. Workers’ Comp. Appeals Bd.* (2001W/D) 66 Cal.Comp.Cases 435.)

Here, applicant was released to work with limitations. (MOH/SOE, August 26, 2021, p. 9.) The WCJ explained that: “[A]fter considering the testimony at trial, and the evidence, I am persuaded that defendant offered modified work consistent with applicant’s work restrictions as of 12/11/2018 and continued to do so until applicant failed to return to work on 02/20/2019 and thereafter.” (F&A, p. 15, Opinion on Decision.) It is well established that a WCJ’s opinions regarding witness credibility are entitled to great weight. (*Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500, 505]; *Sheffield Medical Group v. Workers’ Comp. Appeals Bd. (Perez)* (1999) 70 Cal.App.4th 868 [64 Cal.Comp.Cases 358].) Based thereon, we agree with the WCJ that applicant was not entitled to temporary disability indemnity benefits during the period that she was partially disabled and defendant offered applicant modified work consistent with her work restrictions.

As noted above, the AME, Dr. Jacob stated that applicant was temporarily totally disabled from April 23, 2020, to September 10, 2020. As the AME Dr. Jacob was presumably chosen by the parties because of his expertise and neutrality. Therefore, his opinions should ordinarily be followed unless there was a good reason to find the opinions unpersuasive. (*Power v. Workers’ Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114, 117].) Having reviewed the entire trial record, we see no evidence that warrants a finding that Dr. Jacob’s opinions are unpersuasive. His opinions regarding applicant’s temporary disability status are substantial evidence. As such, Dr. Jacob’s reports are an appropriate basis for finding that applicant was temporarily totally disabled for the period from April 23, 2020, through September 10, 2020, and for awarding temporary disability benefits for that period.

Regarding the issue of whether applicant should be evaluated by a psychology QME, Labor Code section 3208.3 states in part:

(a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment ...

(b) (1) 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.

(2) Notwithstanding paragraph (1), in the case of employees whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury.

(3) For the purposes of this section, "substantial cause" means at least 35 to 40 percent of the causation from all sources combined.

(Lab. Code, § 3208.3.)

In the Report the WCJ stated:

Applicant did testify at trial that she experienced depression after her 07/28/2018 fall and that she also received some treatment for her depression from Dr. Del Gato this year, and that has helped. Some of her depression is due to personal things and some is caused by her health and her terrible financial situation. ... As the date of injury in this matter is 07/28/2018, and at this time there does not appear to be substantial evidence that applicant's injury is catastrophic or arose from a violent act, defendant is not liable for any permanent disability for a psychological injury. Defendant has been authorizing medical treatment for counseling. Applicant obtained psychotherapy from Callum Eastwood, Psy.D., and Arlene Roman-Delgado, Psy.D., on 02/03/2021, 02/19/2021, 03/15/2021, 04/02/2021, and 05/14/2021. (Applicant's Exhibit 14)

(Report, p. 11.)

As to a panel in psychology, applicant appears to claim that she should be permitted to obtain medical-legal reporting to determine whether her injury meets the definition of catastrophic injury. However, applicant had the opportunity at the trial on 08/07/2020 and 10/01/2020 to offer evidence that her 07/28/2018 fall would meet the definition of a catastrophic injury and she failed to do so.

(Report, p. 12.)

The record is clear that applicant claimed a psychiatric injury and that she received psychiatric treatment. The provisions of Labor Code section 3208.3(b) establish an injured worker's burden of proof (preponderance of the evidence) for a psychiatric injury and it defines a different burden of proof (actual events of employment were a substantial cause of the injury) if

the psychiatric injury is the result of a violent act. (Lab. Code, § 3208.3.) Whether or not applicant's July 28, 2018 slip and fall injury was a violent act does not determine the compensability of the psychiatric injury claim, it establishes her burden of proof.

Also, Labor Code section 4660.1 states:

(c) (1) Except as provided in paragraph (2), the impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury shall not increase. This section does not limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury.

(2) An increased impairment rating for psychiatric disorder is not subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following:

(A) Being a victim of a violent act or direct exposure to a significant violent act within the meaning of Section 3208.3.

(B) A catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury.

(Lab. Code, § 4660.1, underlining added)

Although an injured worker may not be entitled to an increased level of permanent disability unless the psychiatric injury is "catastrophic" or due to "a violent act," those factors are not relevant to the issue of his or her entitlement to psychiatric medical treatment. Applicant has been diagnosed as having a major depressive disorder (See App. Exh 14) and she has undergone psychiatric treatment. Finally, as noted above, AME Dr. Jacob specifically stated, "Psychological component directed to the appropriate psychological evaluator." (Joint Exh. 102, p. 8.)

The psychiatric injury claim is disputed and under the circumstances of this matter it is appropriate that applicant be examined by a psychology or psychiatry QME.

Accordingly, we grant reconsideration and affirm the F&A except that we amend the F&A to find that the issue of whether applicant sustained a psychiatric injury in case number ADJ12364301 and/or in case number ADJ12390057 is deferred (Finding of Fact 2), to find that applicant is entitled to temporary disability indemnity for the period from April 23, 2020, through September 10, 2020 (Finding of Fact 3) and to find that there is good cause for applicant to undergo a medical-legal evaluation by a physician in the field of psychiatry or psychology. Based thereon, we amend the Award and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 22, 2021 Findings, Order and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. Applicant, Brisia Varela Rodriguez, while employed on 07/28/2018 as a cook (Occupational Group Number 322) at Santa Rosa, California, by Habit Restaurant, LLC, insured by Zurich American Insurance Company and adjusted by Corvel Corporation, sustained injury to her head, neck and low back arising out of and occurring in the course of her employment (ADJ12364301); applicant did not sustain injury arising out of and occurring in the course of employment to her low back, her upper extremity, abdomen, groin, or in the form of stress, on 12/10/2018 (ADJ12390057), the issue of whether applicant sustained a psychiatric injury in case number ADJ12364301 and/or in case number ADJ12390057 is deferred, jurisdiction reserved.

3. Applicant is entitled to temporary disability indemnity for the period from April 23, 2020, through September 10, 2020, at the rate of \$256.97 per week.

* * *

7. Applicant has shown that there is good cause for her to undergo a medical-legal evaluation by a physician in the field of psychiatry or psychology; she has not shown good cause for her to undergo a neurology evaluation.

AWARD

* * *

b. Temporary disability indemnity at the rate of \$256.97 per week beginning April 23, 2020, to and including September 10, 2020, less credit for any sums heretofore paid on account thereof.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 13, 2022

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

**BRISA VARELA RODRIGUEZ
PACIFIC WORKERS' COMPENSATION LAW CENTER
LAUGHLIN, FALBO, LEVY & MORESI**

TLH/pc

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