

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

RUTH QUEVEDO, *Applicant*

vs.

**J&J TRADING POST, INC.; SEQUOIA INSURANCE COMPANY, administered by
AMTRUST AMERICA, *Defendants***

**Adjudication Number: ADJ12469521
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order 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 and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on July 29, 2022. By the F&O, the WCJ found that applicant did not sustain an injury arising out of and in the course of employment (AOE/COE) to any of the parts pled. Applicant was ordered to take nothing on her claim.

Applicant contends that the WCJ failed to consider uncontroverted evidence and one of the defendant's witnesses had self-contradictory testimony.

We did not receive an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of applicant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will affirm the F&A.

FACTUAL BACKGROUND

Applicant claims injury to the hands, shoulders, arms, low back, neck, psyche, left foot and sleep through May 28, 2019 while employed as a cashier by J&J Trading Post, Inc. Defendant has denied this claim in its entirety for lack of evidence to support an industrial injury and based on the post-termination defense. (Defendant's Exhibit A, Denial Notice to applicant, September 5,

2019.)

Mark Fleming, D.O. evaluated applicant as the orthopedic qualified medical evaluator (QME). Dr. Fleming provided diagnoses solely for pain to the neck, low back, right shoulder and both wrists. (Defendant's Exhibit C, Panel QME Report of Mark Fleming, D.O., March 12, 2020, p. 35.) He concluded that the evidence did not support that applicant's conditions are industrially related. (*Id.*)

Reporting from the primary treating physician (PTP), Dr. Thomas Truong, was provided to Dr. Fleming and a supplemental report requested. In his August 7, 2020 supplemental report, Dr. Fleming stated in pertinent part:

Ms. Ruth Quevedo claimed during the history to have sustained injury to the right shoulder, right arm, bilateral hands, neck and low back over a period of time from June 2014 to May 2019, while employed as a cashier for J&J Trading Post, Inc. Over the above dates, while working as a cashier and customer service representative, according to Ms. Ruth Quevedo she sustained cumulative trauma injuries due to repetitive activities. She indicated her job requirements were variable and included greeting customers, cleaning, dishwashing, and restocking. The applicant reported the gradual onset of pain in her various body parts in February or March 2019. She denied reporting the pain to her employer and was terminated from employment in May 2019. She subsequently worked several other jobs. The history obtained from the applicant during the Panel Qualified Medical Evaluation include relatively mild complaints of pain and the subjective complaints were not supported by objective findings. In addition to the clinical findings, the credibility of the applicant was questionable as the description of her pain and sensory complaints were nonphysiologic, the applicant never notified her employer of the condition nor sought medical attention and the applicant was terminated from her employment. **Additionally, the alleged timing of the onset of the various pains would have exactly correlated with the birth of her child.** With these constellation of findings, this examiner found it medically reasonable to conclude that the evidence did not support that Ms. Quevedo's conditions were industrially related to the claimed injury and therefore, I deferred findings as to disability status, impairment, apportionment, work restrictions or future medical treatment. An additional factor considered was that the job description and responsibilities, as described by Ms. Quevedo were of significant variety that no one task would have been performed at such frequency to cause a repetitive type injury.

(Defendant's Exhibit D, Panel QME Report of Mark Fleming, D.O., August 7, 2020, pp. 7-8, emphasis in original.)¹

¹ The April 21, 2021 Minutes of Hearing and Summary of Evidence inadvertently states that this report is by the psychological QME, but it is actually by Dr. Fleming.

Review of Dr. Truong’s March 19, 2020 report did not alter Dr. Fleming’s opinions and he reiterated that the “subjective complaints [are] not supported by objective findings amongst the findings.” (*Id.* at p. 9.) He also noted “that several of [Dr. Truong’s] diagnosis [*sic*] are not based on objective findings but rather the interpretation of subjective complaints.” (*Id.*)

Harrell Reznick, Ph.D. evaluated applicant as the psychological QME. Dr. Reznick did not find evidence to support any psychiatric diagnoses for applicant. (Defendant’s Exhibit E, Report of Panel QME Harrell Reznick, Ph.D., November 12, 2020, p. 28.) He concluded that applicant did not sustain a psychological injury. (*Id.* at p. 31.)

The matter proceeded to trial over several days with the disputed issues identified as including injury AOE/COE and the post-termination defense. (Minutes of Hearing and Summary of Evidence, April 21, 2021, p. 2.) Applicant offered medical reporting from Dr. Truong as exhibits at trial. (*Id.* at pp. 3-4.) Applicant testified at trial, as did several employer witnesses.

The WCJ issued the F&O as outlined above.

DISCUSSION

The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers’ Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a); 3202.5.)²

Decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) “The term ‘substantial evidence’ means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...It must be reasonable in nature, credible, and of solid value.” (*Braewood Convalescent Hosp. v. Workers’ Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], italics and citations omitted.) To constitute substantial evidence “. . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.”

² All further statutory references are to the Labor Code unless otherwise stated.

(*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) “Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board’s findings if it is based on surmise, speculation, conjecture or guess.” (*Hegglin v. Workmen’s Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Preliminarily, it is acknowledged that the parts pled as injured are subject to different causation thresholds. With respect to the orthopedic parts, applicant must show that work was a contributing cause. (See *Clark, supra*, 61 Cal.4th at p. 298; *McAllister v. Workmen’s Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) Lay testimony alone generally cannot establish industrial causation in a cumulative trauma injury claim. (*Peter Kiewit Sons v. I.A.C. (McLaughlin)* (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188].)

The orthopedic QME Dr. Fleming conducted a thorough evaluation of applicant and explained the rationale for his conclusions based on his objective examination and applicant’s history as detailed in the medical records. Dr. Truong’s conclusions are based on an inaccurate history regarding applicant’s job duties while employed by defendant. Dr. Truong also did not review any medical records. We agree with the WCJ that the orthopedic QME Dr. Fleming’s reporting is more persuasive than Dr. Truong’s and constitutes substantial evidence that applicant did not sustain an injury AOE/COE to the orthopedic parts pled.

With respect to the psychiatric claim, applicant must “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).) “Predominant as to all causes” for purposes of section 3208.3(b)(1) has been interpreted to mean more than 50 percent of the psychiatric injury was caused by actual events of employment. (*Dept. of Corr. v. Workers’ Comp. Appeals Bd. (Garcia)* (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356].)³

The psychological QME Dr. Reznick concluded that applicant did not suffer from any psychiatric condition and did not sustain a psychiatric injury. Applicant did not offer evidence rebutting Dr. Reznick’s opinion regarding causation. Applicant did not meet her burden of proving

³ If the psychiatric injury was caused by “being a victim of a violent act or from direct exposure to a significant violent act,” the employee must instead show that actual events of employment were a substantial cause of the injury, which is statutorily defined as “at least 35 to 40 percent of the causation from all sources combined.” (Lab. Code, § 3208.3(b)(2)-(3).)

an injury AOE/COE to her psyche either.

The WCJ also based her findings on the credibility of testimony from applicant and the employer witnesses regarding applicant's job duties and the harassment allegations. She concluded that applicant was not a credible witness, but the defense witnesses testified credibly. We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza, supra*, 3 Cal.3d at pp. 318-319.) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id.*)

Therefore, we will affirm the F&O.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Orders issued by the WCJ on July 29, 2022 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 17, 2022

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

**CIPOLLA CALABA WOLLMAN & BHATTI
LAW OFFICE OF ROBERT S. LEE
RUTH QUEVEDO**

AI/pc

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