

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

CARLA MILLER LARK, *Applicant*

vs.

**STARS BEHAVIORAL HEALTH GROUP;
NEW HAMPSHIRE INSURANCE COMPANY, administered by ACE USA/ESIS,
*Defendants***

**Adjudication Numbers: ADJ9582709, ADJ10172350, ADJ10172316, ADJ11069700
Anaheim District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in these cases. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Joint Findings and Award and Order (Joint F&A) issued by the workers' compensation administrative law judge (WCJ) on November 19, 2020. By the Joint F&A, the WCJ found in relevant part that the orthopedic agreed medical evaluator (AME) should be replaced. The WCJ also found that applicant sustained injury arising out of and in the course of employment (AOE/COE) to her psyche and awarded her temporary disability indemnity in ADJ9582709. A regular physician was appointed to evaluate applicant for the orthopedic body parts in this claim. The WCJ found that two of applicant's claims are barred by the statute of limitations (ADJ10172350 and ADJ10172316), and dismissed one claim with prejudice (ADJ11069700).

Defendant contends that the WCJ exceeded her authority by replacing the orthopedic AME with a regular physician. Defendant further contends that the evidence does not support a finding of injury AOE/COE to applicant's psyche and thus, she is not entitled to benefits in relation to this body part.

We received an answer from applicant who is pro per. The WCJ issued a Joint Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer 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 rescind the Joint F&A and issue a new decision

with a finding that Dr. Aval should continue acting as the AME. The other issues in dispute will be deferred pending further development of the record.

FACTUAL BACKGROUND

Applicant claims three injuries while employed as a mental health specialist by Stars Behavioral Health Group: 1) to the neck, back, legs, psyche, knees and feet through July 31, 2014 (ADJ9582709); 2) to the back on April 21, 2014 (ADJ10172350); and 3) to the back, left knee and left foot on April 24, 2014 (ADJ10172316).¹ Defendant has denied all of applicant's claims. (Defendant's Exhibits A-D, Denial notices, December 13, 2017, September 11, 2015, August 11, 2015, and September 20, 2014.)

The matter was scheduled for trial on June 19, 2017, at which time applicant was represented by an attorney. The parties agreed to use Dr. Soheil Aval as an orthopedic AME and the trial was taken off calendar. (Minutes of Hearing, June 19, 2017.)

Dr. Aval evaluated applicant on August 2, 2017 and was deposed in 2018. (Joint Exhibit AA, AME Report of Dr. Aval, August 2, 2017; Joint Exhibit BB, Deposition transcript of Dr. Aval, March 15, 2018.) Can Tang, M.D. evaluated applicant as the psychiatric panel qualified medical evaluator (QME) in 2015 and 2016, and was also deposed twice. (Joint Exhibit CC, Panel QME Report of Dr. Tang, May 9, 2016; Joint Exhibit DD, Panel QME Report of Dr. Tang, June 17, 2015; Joint Exhibit EE, Deposition transcript of Panel QME Dr. Tang, August 26, 2016; Joint Exhibit FF, Deposition transcript of Panel QME Dr. Tang, September 2, 2015.)

On November 7, 2018, applicant's attorney filed a Petition to be Relieved as Attorney of Record. Applicant also separately filed a Notice of Dismissal of Attorney on November 17, 2018.

Applicant's claims initially proceeded to trial on February 4, 2019 with applicant representing herself. (Minutes of Hearing and Summary of Evidence, February 4, 2019.) A Joint Findings and Award and Order issued on June 5, 2019, which included a finding that applicant sustained an injury AOE/COE to her psyche in ADJ9582709, but not to the other body parts pled. The WCJ also awarded applicant temporary disability indemnity.

Both parties sought reconsideration of the June 5, 2019 Joint Findings and Award and Order. Applicant argued in her Petition in relevant part that Dr. Aval should be replaced as the AME because he is biased against her.

¹ Applicant's fourth claim with a date of injury of July 31, 2014 (ADJ11069700) was dismissed with prejudice by stipulation of the parties. (Minutes of Hearing and Summary of Evidence, September 28, 2020, p. 6.)

We issued our Opinion and Decision After Reconsideration on September 26, 2019, wherein the Joint Findings and Award and Order was rescinded and the matter returned to the trial level for further proceedings to include further development of the record. The decision stated that clarification was necessary from both the psychiatric QME Dr. Tang and the orthopedic AME Dr. Aval. With respect to Dr. Tang, it was recommended that he clarify his opinion regarding causation for applicant's psychiatric injury. The issue of whether Dr. Aval should be removed as the AME raised in applicant's Petition was deferred since this issue had not been raised at trial.

On October 25, 2019, applicant filed a Request for Removal of Agreed Qualified Examiner Soheil M. Aval, M.D. An amended version of the request was filed by applicant on November 7, 2019. Defendant filed an objection to applicant's request on November 18, 2019.

Dr. Tang issued a supplemental report dated January 7, 2020. He opined as follows in pertinent part:

1. The applicant has one injury caused by different factors. The factors being a combination of alleged hostile work environment and physical pain. There is no evidence in the record or history for two separate distinct psychiatric injuries.
...
3. The predominate cause of applicant's psychiatric injury is the physical pain. As indicated in my report dated 5/9/16, page 32 "Her physical pain being the predominant cause of her current emotional distress is consistent with her deposition on 8/25/15 (see deposition page 166, line 18.)"
4. Her psychiatric symptoms are a consequence of her physical condition. That is the main source causing her psychiatric symptoms.
5. There is no period of temporary disability. My re-evaluation was an update of her condition and based on the re-evaluation, I determined there was no temporary disability period from a psychiatric standpoint.

(Defendant's Exhibit T, PQME Report of Dr. Tang, January 17, 2020, p. 2.)

The matter proceeded to trial again on September 28, 2020. The disputed issues included in relevant part the following (in ADJ9582709): injury AOE/COE to all body parts including the psyche and temporary disability for the periods of August 8, 2014 through March 12, 2015 and March 12, 2016 through July 1, 2016. (Minutes of Hearing and Summary of Evidence, September 28, 2020, p. 3.) The issue of whether Dr. Aval should be removed as the AME was identified as an issue in all three claims. (*Id.* at pp. 3, 5-6.) Additional exhibits were admitted into the record, including Dr. Tang's 2020 supplemental report. (*Id.* at p. 7.) The parties again stipulated to dismiss ADJ11069700 with prejudice. (*Id.* at p. 6.) Applicant testified at trial as follows in relevant part:

When asked if the applicant had specific evidence of race-based bias by Dr. Aval, she replied no. When asked if the applicant had specific evidence of gender-based bias by Dr. Aval, she replied no.

(*Id.* at p. 12.)

The WCJ issued the resulting Joint F&A as outlined above. In the Opinion on Decision, the WCJ explained the rationale for replacing Dr. Aval as follows:

The Court understands the preferred option is usually a return to the opining doctor for a supplemental report. There are times when a fresh set of eyes is necessary; this case has become muddled and appears to be one of those situations. The Court does not wish to place the good Drs. Aval or Yogaratham in the awkward position of impartiality under the weight of serious accusations of fraud and racial bias, among other accusations.

The Court is hesitantly granting the applicant's request for a new medical opinion. As the Court is of the opinion the parties would not be able to agree on a new AME, the Court will appoint Dr. Lawrence Feiwell as a General Physician.

(Opinion on Decision, November 19, 2020, p. 3.)

With respect to the finding of injury AOE/COE to the psyche and award for temporary disability, the WCJ opined as follows (citing to *Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc)):

Dr. Teng [*sic*] produced a supplemental report, dated January 17, 2020. In this report, he references his May 9, 2016 report and states the predominant cause of applicant's psychiatric injury is her orthopedic injury. He does not discuss his original opinion in his June 17, 2015 report, wherein he opined her psychiatric injury was predominantly caused by the actual events of employment. It is clear that the causation of Ms. Miller Lark's psychiatric injury morphed.

The Court remains consistent in its original opinion. The applicant testified in the first Trial that she reported her psychiatric symptoms to her supervisors and they were well aware of the situation. The Court found the applicant to be a credible witness, and her testimony was corroborated by correspondence to her supervisors prior to her last day of work (See Applicant's Exhibit 12). A few months prior, she saw Dr. Avants (See Applicant's Exhibit 17, dated 4/18/2014). The report states she is "here for follow up" (Applicant's 17, page 2) and discusses plan as "needs to work to set limits in her work environment and take time for self care." (Applicant's 17, page 3.) The following month, a new encounter states, "Her work has gotten to a point where she is unable to continue. The stress load and the needs of her clients are simply more than she can bear with the allotted resources. She is going to discuss this with her boss and wants

to take a leave to work up her neurological problems.” (Applicant’s 17, page 7, 5/14/2014.)

...

In the deposition testimony, [Dr. Tang] responds “correct” to the question that if her orthopedic injuries are not compensable, then her psychiatric injury would also not be compensable. It is unclear if the doctor is responding to a legal or a medical question. Based upon the applicant’s credible testimony, it is clear she suffered stress while employed with Stars Behavioral Health Group.

...

(2) There must be competent medical evidence establishing that the actual events of employment were the predominant cause -- i.e., greater than 50% -- of the injury to the psyche.

In this original report, Dr. Tang opines with reasonable medical probability that the actual events of employment were the predominant cause of applicant’s psychiatric injury. (6/17/2015, Joint Exhibit DD, page 63). In his second report, he opines that his opinion on causation remains unchanged, yet he changes it. The doctor indicates the actions taken by the employer, that being the disparaging remarks and failure to appoint a new supervisor, make up approximately 20% of the psychiatric injury. This is based upon the applicant stating most of her current psychiatric complaints were stemming from her current orthopedic status. In his 2015 report, however, on page 67, he opined 70% of the applicant’s psychiatric symptoms were caused by industrial factors, and on page 65 simply stated, “Overall, it is my clinical judgment and with reasonable medical probability that if the applicant was not exposed to working with Ms. Park at Stars Behavioral Health Group, the applicant would not have developed her current psychiatric symptoms and therefore would not have sustained a psychiatric injury.” The report is confusing, as is the subsequent deposition testimony. In his deposition, he responds “correct” to the question that if her orthopedic injuries are not compensable, then her psychiatric injury would also not be compensable. It is unclear if the doctor is responding to a legal or a medical question. In the doctor’s most recent supplemental report, he references his May 9, 2016 report and states the predominant cause of applicant’s psychiatric injury is her orthopedic injury. He does not discuss his original opinion in his June 17, 2015 report. It is clear that the causation of Ms. Miller Lark’s psychiatric injury morphed. At some point, it was predominantly caused by the actual events of employment.

(Id. at pp. 5-6.)

The WCJ included a finding that “[a]ll evidentiary rulings in the June 5, 2019 Opinion on Decision stand” and found that applicant’s Exhibits Nos. 35, 36 and 37 are not admissible, but Exhibit No. 38 is admissible. (Joint F&A, November 19, 2020, p. 1.)

DISCUSSION

I.

In represented cases, Labor Code section 4062.2(f) provides as follows in relevant part: “A panel shall not be requested pursuant to subdivision (b) on any issue that has been agreed to be submitted to or has been submitted to an agreed medical evaluator **unless the agreement has been canceled by mutual written consent.**” (Lab. Code, § 4062.2(f), emphasis added.)²

In this matter, the parties agreed to use Dr. Aval as an orthopedic AME when applicant was still represented by an attorney. Dr. Aval has evaluated applicant and been deposed. It is acknowledged that applicant is no longer represented and that section 4062.1 precludes an employer from seeking agreement to an AME with an unrepresented employee. (Lab. Code, § 4062.1(a).) That is not what occurred here since the agreement to use Dr. Aval as an orthopedic AME was made when applicant was represented by an attorney and entered into by her former attorney on applicant’s behalf. As stated above, an agreement to an AME may only be canceled by mutual written consent per section 4062.2(f). We discern no legal basis to permit applicant to unilaterally withdraw from the AME agreement because she is now unrepresented by counsel. Since only applicant wishes to withdraw from the agreement there is no mutual consent between the parties to cancel the AME.

Applicant alleged that Dr. Aval should be replaced as the AME because he was biased against her. Administrative Director (AD) Rule 40 permits an injured worker to discontinue a medical-legal evaluation as follows:

That subject to section 41(g), the injured worker may discontinue the evaluation based on good cause. Good cause includes: (A) discriminatory conduct by the evaluator towards the worker based on race, sex, national origin, religion, or sexual preference, (B) abusive, hostile or rude behavior including behavior that clearly demonstrates a bias against injured workers, and (C) instances where the evaluator requests the worker to submit to an unnecessary exam or procedure.

(Cal. Code Regs., tit. 8, § 40(a)(2).)³

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

³ AD Rule 41(g) states:

If the injured worker terminates the examination process based on an alleged violation of section 35(k), 40, 41(a) or 41.5 of Title 8 of the California Code of Regulations, and the Appeals Board later determines that good cause did not exist for the termination, the cost of the evaluation shall be deducted from the injured worker’s award. A violation of section 40 or of any part of section 41(a) or 41.5 by the evaluator shall constitute good cause for purposes of an Appeals Board

A WCJ may order a replacement medical-legal evaluator if the existing evaluator reveals a bias against the injured worker that constitutes a disqualifying conflict of interest as defined by AD Rule 41(c)(3). (See Cal. Code Regs., tit. 8, §§ 31.5(a), 41(c)(3) and 41.5(d)(4); see also *Beecham v. Swift Transportation Services* (November 27, 2017, ADJ10084731, ADJ10084732) [2017 Cal. Wrk. Comp. P.D. LEXIS 555] [the Appeals Board panel affirmed the WCJ’s order for a replacement QME panel based on the QME’s testimony regarding the employee’s presumed “Negro blood” and how it impacted her evaluation].)⁴

Applicant as the moving party bears the burden of proving by a preponderance of the evidence that Dr. Aval exhibited bias towards her such that a replacement evaluator is warranted. (Lab. Code, §§ 3202.5, 5705.) By her own admission in trial testimony, applicant has no specific evidence of race-based or gender-based bias by Dr. Aval. The record therefore does not support a finding that Dr. Aval demonstrated bias against applicant such that a replacement physician is warranted.

We discern no basis in the record to remove Dr. Aval as the AME. Consequently, we will rescind the Joint F&A and issue a new decision with a finding that Dr. Aval should continue as the AME.

II.

As stated in our September 26, 2019 Opinion and Decision After Reconsideration, 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].) It was also noted that the preferred procedure to develop a deficient record is to allow supplementation of the

determination. No party shall be liable for any cost for medical reports or medical services delivered as a result of an exam terminated for good cause.

(Cal. Code Regs., tit. 8, § 41(g).)

It is acknowledged that AD Rule 40 refers to an “evaluator selected from a QME panel,” which AME Dr. Aval is not. Bias against an injured worker by an AME rather than a panel QME is also not permissible.

⁴ Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers’ Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers’ Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

medical record by the physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

Our prior decision stated that Dr. Aval should clarify his opinion regarding the orthopedic parts since it was unclear if both knee x-rays were weight-bearing. It is presumed that no further reporting was obtained from Dr. Aval subsequent to our decision due to applicant's request for removal of Dr. Aval as the AME.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.) The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The "Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee." (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].)

Dr. Aval remains the AME per the discussion above and further development of the record with Dr. Aval remains necessary in order to adjudicate the disputed issues with respect to the orthopedic parts pled. It is recommended that a supplemental report be requested from Dr. Aval to clarify his opinions per the September 26, 2019 Opinion and Decision After Reconsideration.

III.

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, §§ 3202.5, 3600(a).) With respect to psychiatric injuries, section 3208.3 provides, in relevant part, as follows:

- (a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology

and criteria of the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, Third Edition–Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.

(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.

(Lab. Code, § 3208.3(a)-(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].)⁵

Dr. Tang’s prior findings were found not to constitute substantial evidence and further development of the record with Dr. Tang was recommended, particularly regarding his opinions on causation. In his subsequent 2020 report, Dr. Tang opined that the “predominate cause of applicant’s psychiatric injury is the physical pain” and that her “psychiatric symptoms are a consequence of her physical condition.”

The WCJ’s 2020 Opinion on Decision indicates that she agrees that Dr. Tang’s previous opinions are inconsistent and that his 2020 supplemental report does not adequately address causation.⁶ Despite citing to the requirement in *Rolda* that whether actual events of employment predominantly caused a psychiatric injury requires competent medical evidence, the WCJ concludes that although Dr. Tang’s opinions remain confusing, applicant’s psychiatric injury was “[a]t some point...predominantly caused by the actual events of employment” and issued a finding of injury AOE/COE to the psyche.

⁵ 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).)

⁶ The Minutes of Hearing and Summary of Evidence from the September 28, 2020 trial do not expressly state that the exhibits from the February 4, 2019 trial are being considered as part of the subsequent adjudication. These exhibits are still part of the evidentiary record in this matter. (See e.g., *Mantel v. Workmen’s Comp. Appeals Bd.* (1974) 37 Cal.App.3d 739 [39 Cal.Comp.Cases 223], see also *Klumpp v. I.A.C.* (1930) 107 Cal.App. 733.) It is noted that the trier of fact is obligated to identify all exhibits received in evidence. (Lab. Code, § 5313; Cal. Code Regs., tit. 8, § 10787; see also *Hamilton v. Lockheed Corp. (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) [medical records and other admitted documentary evidence must be clearly listed in the recorded minutes].) Best practice following rescission of a decision would be to expressly identify in further proceedings which exhibits, if any, that were previously admitted from prior hearings are being considered in adjudicating the current issues in dispute.

The record here remains lacking in substantial evidence to determine compensability for applicant's psychiatric injury. Dr. Tang's 2020 report indicates that applicant's physical pain is the "predominate" cause of her psychiatric injury. This language is unclear if he is opining that the effects of applicant's alleged physical injury (and specifically, which physical injury as there were three separate orthopedic claims pled) caused more than 50% of her psychiatric injury.

The record thus again requires further development with respect to applicant's psychiatric injury. As stated above, the Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. The preferred procedure per *McDuffie* is to return to the existing physicians in the matter.

In order to assist the parties in further developing the record, we offer the following guidance for evaluating whether the psychiatric injury is compensable. In *Wilson v. State of CA Cal Fire* (2019) 84 Cal.Comp.Cases 393, 403-404 (Appeals Board en banc), causation of an injury was discussed as follows in relevant part:

Causation of an injury may be either direct or as a compensable consequence of a prior injury. More precisely, an injury may be directly caused by the employment. Alternatively, a subsequent injury is a compensable consequence of the first injury where it "is not a new and independent injury but rather the direct and natural consequence of the" first injury. (*Carter v. County of Los Angeles* (1986) 51 Cal.Comp.Cases 255, 258 (Appeals Board en banc).)

...

Whereas the first injury is directly caused by the employment, a compensable consequence injury is indirectly caused by the employment via the first injury.

A psychiatric injury may therefore be *directly* caused by actual events of employment or as a *compensable consequence* of an industrial physical injury. (See *Lockheed Martin Corp. v. Workers' Comp. Appeals Bd. (McCullough)* (2002) 96 Cal.App.4th 1237, 1249 [67 Cal.Comp.Cases 245] ["the precipitating physical injury constitutes an 'actual event[] of employment' within the meaning of [section 3208.3(b)(1)]" for a compensable consequence psychiatric injury].) The predominant causation threshold in section 3208.3(b)(1) applies to psychiatric injuries irrespective of whether they are pled as a direct injury or as a compensable consequence of a physical injury. (*Id.*)

Due to the distinction between direct and compensable consequence psychiatric injuries, the *Wilson* decision held that:

The evaluating physicians must render an opinion as to whether the psychiatric injury was predominantly caused by actual events of employment. The physicians must further specify if the psychiatric injury is directly caused by events of employment or if the psychiatric injury is a compensable consequence of the physical injury.

(*Wilson, supra*, 84 Cal.Comp.Cases at p. 414.)

Pursuant to *Rolda*, whether the psychiatric injury involves actual events of employment is a factual/legal determination for the WCJ. (*Rolda, supra*, 66 Cal.Comp.Cases at p. 247.) The WCJ in this matter concluded that applicant suffered from stress during her employment with defendant. This conclusion does not end the inquiry in determining compensability for the psychiatric claim. Per *Rolda* and *Wilson*, “[d]etermination of causation of a psychiatric injury requires competent medical evidence.” (*Wilson, supra*, 84 Cal.Comp.Cases at p. 414.) Whether the alleged actual events of employment predominantly caused the psychiatric injury thus requires competent medical evidence.

Dr. Tang indicated in his 2020 report that applicant’s psychiatric injury was caused by more than one factor including an “alleged hostile work environment and physical pain.” Dr. Tang must parcel out the specific percentage of causation for applicant’s psychiatric injury for each alleged actual event of employment. If he is assigning causation for the psychiatric injury to one (or more) of her industrial physical injury claims, Dr. Tang must specify which physical injury (or injuries) he is attributing causation to for the psychiatric injury.⁷ Moreover, it is noted that if the physical injury to which applicant’s psychiatric injury is attributed is *not* found to be industrially caused by the trier of fact, then there can be no “compensable” consequence psychiatric injury flowing from the non-industrial condition. In other words, if the underlying physical injury claim is not compensable, then the psychiatric condition that is a consequence of that claim is also not compensable. (See e.g., *Doke v. Workers’ Comp. Appeals Bd.* (2004) 69 Cal.Comp.Cases 1577 (writ den.) [the Board concluded that it was inconsistent with both the workers’ compensation statutory scheme and the compensable consequence doctrine for a consequential injury to be compensable when the primary injury is not compensable].)

We emphasize that Dr. Tang’s role is to provide his opinion to a reasonable medical probability regarding causation for applicant’s psychiatric injury. (See *Escobedo v. Marshalls*

⁷ It is acknowledged that applicant has only pled injury to her psyche with respect to the cumulative trauma claim through July 31, 2014 (ADJ9582709). Two of applicant’s claims were found to be barred by the statute of limitations (ADJ10172350 and ADJ10172316) and the last claim has been dismissed per the parties’ stipulation (ADJ11069700). However, Dr. Tang’s 2020 report is unclear regarding which of these claims he is attributing to the psychiatric injury.

(2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc) [“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”].) Whether applicant has in fact sustained a compensable injury to her psyche or to the orthopedic parts pled is for the trier of fact to determine. As outlined above, a determination by the trier of fact that applicant has sustained a compensable psychiatric injury must be supported by competent medical evidence.

In conclusion, we will rescind the Joint F&A and issue a new decision finding that Dr. Aval should continue acting as the AME. We will retain the parties’ trial stipulations in the new decision, including the stipulation to dismiss ADJ11069700 with prejudice and the corresponding order dismissing that case. (See Lab. Code, § 5702; see also *County of Sacramento v. Workers’ Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114 [65 Cal.Comp.Cases 1].) The WCJ’s findings of fact that ADJ10172350 and ADJ10172316 are barred by the statute of limitations were not challenged and we will thus also retain these findings and include orders that applicant take nothing on these two claims. The WCJ’s orders regarding the admissibility of certain exhibits were also not challenged and will be retained.⁸ All other issues in dispute will be deferred pending further development of the record.

⁸ Defendant had previously challenged in its first Petition for Reconsideration the admissibility of some of applicant’s exhibits that were admitted into evidence pursuant to the June 5, 2019 Joint Findings and Award and Order. The WCJ incorporated her prior evidentiary rulings into the current Joint F&A (Finding of Fact No. 1; Orders). Defendant did not challenge the evidentiary rulings in the current Joint F&A in its second Petition for Reconsideration and therefore, we will retain these rulings in the new decision.

For the foregoing reasons,

IT IS ORDERED that as the Decision After Reconsideration of the Workers' Compensation Appeals Board the Joint Findings and Award and Order issued by the WCJ on November 19, 2020 is **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Carla Miller Lark while employed during the period 10-14-2013 through 07-31-2014 as a Mental Health Specialist at San Bernardino, California, by Stars Behavioral Health Group, whose workers' compensation insurance carrier was New Hampshire Insurance Company, administered by ACE USA/ESIS, claims injury arising out of and occurring in the course of employment to the neck, back, legs, psyche, knees and feet (ADJ9582709).
2. There is insufficient evidence in the record to address compensability for ADJ9582709.
3. Carla Miller Lark while employed on 4-21-2014 as a Mental Health Specialist at San Bernardino, California, by Stars Behavioral Health Group, whose workers' compensation insurance carrier was New Hampshire Insurance Company, administered by ACE USA/ESIS, claims injury arising out of and occurring in the course of employment to the back (ADJ10172350). This claim is barred by the statute of limitations.
4. Carla Miller Lark while employed on 4-24-2014 as a Mental Health Specialist at San Bernardino, California, by Stars Behavioral Health Group, whose workers' compensation insurance carrier was New Hampshire Insurance Company, administered by ACE USA/ESIS, claims injury arising out of and occurring in the course of employment to the back, left knee and left foot (ADJ10172316). This claim is barred by the statute of limitations.
5. The parties stipulated to dismiss ADJ11069700 with prejudice.
6. Applicant's earnings at the time of injury were \$910.35 per week producing a temporary disability rate of \$606.90 per week and a permanent disability indemnity rate of \$290.00 per week.
7. The employer has furnished no medical treatment.
8. The primary treating physician is David Johnson, M.D.
9. No attorney fees have been paid and no attorney fee arrangements have been made.
10. Dr. Soheil Aval should continue as the orthopedic AME.

11. All other issues in dispute are deferred pending further development of the record.

ORDERS

IT IS ORDERED that applicant take nothing on ADJ10172350 and ADJ10172316.

IT IS FURTHER ORDERED that ADJ11069700 is dismissed with prejudice.

IT IS FURTHER ORDERED that the following exhibits are admitted into evidence: applicant's Exhibits Nos. 1, 8, 9, 12, 13, 15, 18, 26 and 38, and defendant's Exhibit Q. The following exhibits are not admitted into evidence: applicant's Exhibits Nos. 35, 36 and 37.

IT IS FURTHER ORDERED that the other issues in dispute in ADJ9582709 are deferred pending further development of the record.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 13, 2022

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

**CARLA MILLER LARK
STANDER REUBENS
EMPLOYMENT DEVELOPMENT DEPARTMENT**

AI/pc

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

CS