

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

RONALD PERKINS, *Applicant*

vs.

**ALBERTSONS COMPANIES, INC. permissibly self-insured, administered by
SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

Adjudication Number: ADJ12560810

Riverside District Office

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on January 4, 2024, wherein the WCJ found that applicant's psychiatric injury was not predominantly caused by actual events of employment, and the WCJ ordered that applicant take nothing by way of his injury claim.

Applicant contends that the October 6, 2022, and May 24, 2023, reports from psychiatric qualified medical examiner (QME) Edward L. Spencer, M.D., are substantial evidence that the actual events of applicant's employment were the predominant cause of his psychiatric injury.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (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, for the reasons stated in our November 22, 2021 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (Opinion), which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will grant reconsideration, rescind the F&O, and amend the application to claim a cumulative psychiatric injury We will return the matter to the Presiding WCJ for re-assignment to another WCJ; and for the newly assigned WCJ to conduct further proceedings consistent with this

opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to his psyche and nervous system while employed by defendant as a warehouse supervisor on February 5, 2019. He was taken to the Corona Regional Medical Center emergency department on February 5, 2019; he underwent diagnostics and was admitted to the hospital. Applicant was transferred to the Kaiser Corona Psychiatry Department and was discharged from care on February 10, 2019. (See Def. Exhs. B – G; see also, Joint Exh. 1, Edward L. Spencer, M.D., October 23, 2020, pp. 40 – 48, review of medical records.)

QME Dr. Spencer evaluated applicant on September 30, 2020. In his report and subsequent deposition testimony, Dr. Spencer repeatedly stated that he was not provided the complete medical record, and that further review of the medical record, and a re-evaluation of applicant was necessary for him to adequately address the issue of whether applicant sustained a compensable psychiatric injury. (e.g. Joint Exh. 1, pp. 14 – 15; see also Joint Exh. 2, Edward L. Spencer, M.D., January 25, 2021, deposition transcript, pp. 10 – 12, 18 - 19.)

The parties proceeded to trial on March 15, 2021, and the matter was continued. At the August 16, 2021 trial the matter was submitted for decision. Minutes of Hearing and Summary of Evidence (MOH/SOE) August 16, 2021, p. 1.) The issues submitted for decision were injury AOE/COE, whether the record should be further developed, and whether the injury was self-inflicted pursuant to Labor Code Section 3600(a)(5). (MOH/SOE, March 15, 2021, p. 2; MOH/SOE, June 8, 2021, p. 2.) Applicant filed a Petition for Reconsideration of the September 9, 2021 Findings and Order wherein the WCJ found that applicant did not sustain a psychiatric injury arising out of and occurring in the course of employment (AOE/COE). Based on our review of the record, in the November 22, 2021 Opinion we explained that because he was not provided an adequate record, Dr. Spencer’s report and deposition testimony were not substantial evidence. Therefore, we rescinded the September 9, 2021 Findings and Order and returned the matter to the WCJ for further development of the record.

Dr. Spencer was provided approximately 3000 pages of medical records to review and based thereon he stated, “In summary, re-evaluation of the applicant is required to render final opinions given the additional information reviewed.” (Joint Exh. 3, Edward L. Spencer, M.D.,

April 1, 2022, p. 9.) The doctor re-evaluated applicant on September 14, 2022. After re-examining applicant and taking an interim history, Dr. Spencer concluded:

In such a situation it would be more likely that the predominant cause of the brief psychotic disorder was extreme emotional turmoil brought about by a perception of long term discriminatory treatment and viewing events at the workplace through the lens of that perception, with a lesser contribution from cannabis use, which did occur based on the medical records and the testimony, and the contribution of which to psychotic experiences was discussed in my first report. ¶ I would assess that the available information supports a finding of 55% causation due to perception of chronic adverse work circumstances such as discrimination, 25% due to events occurring on or after 2/2/2019 at the workplace that the applicant perceived to be harassing, discriminatory, or stressful, and 20% due to the effects of cannabis use creating physiological and psychological conditions favorable for the development of a psychotic reaction to stress. ¶ The psychotic disorder appears to have resolved as there is no objective evidence of continued psychotic symptoms. ¶ He now has a diagnosis of an adjustment disorder with mixed anxiety and depressed mood. The cause of the adjustment disorder appears most likely to be a reaction to the perceived loss of his career, frustration with Albertson's and the legal process, and there is no basis for a determination that it would have occurred but for the changes in the applicant's life circumstances brought about by the Brief Psychotic Disorder. Therefore[,] I would consider the Adjustment Disorder to have the same causal components as the Brief Psychotic Disorder.

(Joint Exh. 4, Edward L. Spencer, M.D., September 14, 2022, p. 14.)

Dr. Spencer was asked to submit a supplemental report clarifying his opinions on causation and apportionment. In his May 24, 2023 report, he stated:

The information available to me at this time, including the applicant's statements at his re-evaluation, his testimony to the judge as summarized, and from review of all the records, is supportive of my revised opinion from October 6, 2022, which was causation of the brief psychotic disorder which had resolved into mixed adjustment disorder was 55% due to perceived chronic adverse circumstances such as discrimination, 25% to acute events occurring on or after 2/2/2019 that the applicant perceived to be harassing, and 20% due to the "effects of cannabis use creating physiological and psychological conditions favorable for the development of a psychotic reaction to stress."

(Joint Exh. 6, Edward L. Spencer, M.D., May 24, 2023, p. 5.)

The parties again proceeded to trial on September 28, 2023. The reports from Dr. Spencer were admitted into evidence and the matter was continued. (MOH/SOE, September 28, 2023.) At the November 6, 2023 trial, the matter was submitted for decision. (MOH/SOE, November 6, 2023.)

DISCUSSION

Pursuant to Appeals Board rule 10517, “Pleadings may be amended by the Workers’ Compensation Appeals Board to conform to proof.” (Cal. Code Regs., tit. 8, § 10517.) Having reviewed the entire record, including applicant’s trial testimony and the reports from QME Dr. Spencer, it is clear that although the injury claim was pled as a specific injury, applicant is actually claiming a cumulative psychiatric injury, occurring over the course of his employment with defendant. Based thereon, we will amend the application to accurately identify applicant’s cumulative psychiatric injury claim.

To be substantial evidence a medical opinion must be based on pertinent facts, on an adequate examination and accurate history, and it must set forth the basis and the reasoning in support of the conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

As noted above, in our Opinion we discussed the fact that in his initial report, and deposition testimony, Dr. Spencer clearly explained that he was unable to perform an adequate examination of applicant and that the medical record he reviewed did not constitute an accurate history. He repeatedly indicated that in order to be fully informed, and to be able to provide an appropriate analysis as to the issue of injury AOE/COE, he needed to review the complete medical record, and he stated that it might be appropriate for him to re-evaluate applicant. Based thereon, we concluded that his report and deposition testimony were not substantial evidence that applicant did not sustain an injury AOE/COE. (See Opinion, p. 5.) Subsequently, after reviewing the extensive medical record and re-examining applicant, Dr. Spencer reached the opposite conclusion and stated that applicant’s employment with defendant was the predominate cause of applicant’s psychiatric condition. Having again reviewed the entire record, we see no factual or legal basis for altering our previously stated determination that Dr. Spencer’s initial report, and deposition testimony (Joint Exhs. 1 and 2) are not substantial evidence and in turn, they are not an appropriate basis for determining the issue of injury AOE/COE.

Thus, upon return of this matter, the WC must determine whether Dr. Spencer’s subsequent reports constitute substantial evidence that applicant sustained a cumulative psychiatric injury AOE/COE. If it is found that the reports are not substantial evidence, then it will be the responsibility of the WCJ and the parties to determine how best to develop the record.

Further, under the circumstances of this matter, if it is ultimately determined that applicant did sustain a psychiatric injury AOE/COE, it is important to note that 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, ... ¶ ... (h) No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. The burden of proof shall rest with the party asserting the issue. (Lab. Code, § 3208.3)

The September 28, 2023 Stipulations and Issues state that defendant asserted the Labor Code section 3208.3 “good faith personnel action” defense. (MOH/SOE, September 28, 2023, p. 2.) The Appeals Board has laid out the four-step “good faith personnel action defense” analysis that a WCJ must perform when that defense is an issue submitted for decision. (*Rolda v. Pitney Bowes* (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc) (*Rolda*)). The analysis is to be conducted as follows:

After considering all the medical evidence, and the other documentary and testimonial evidence of record, the WCJ must determine: (1) whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination; (2) if so, whether such actual events were the predominant cause of the psychiatric injury, a determination which requires medical evidence; (3) if so, whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith, a factual/legal determination; and (4) if so, whether the lawful, nondiscriminatory, good faith personnel actions were a "substantial cause" of the psychiatric injury, a determination which requires medical evidence. The WCJ must then articulate the basis for his or her findings in a decision which addresses all the relevant issues raised by the criteria set forth in Labor Code section 3208.3, including specific references to the trial record to support the findings. (*Rolda, supra*, at p. 247.)

Again, if it is determined that applicant sustained a psychiatric injury AOE/COE, then the WCJ will need to perform a *Rolda* analysis to determine if the psychiatric injury is compensable.

Accordingly, we grant reconsideration and rescind the F&O. Given the tangled history of this case, we conclude that the parties would be better served by a re-assignment to a new WCJ. (Lab. Code, §§ 5300, 5301, 5708.) Therefore, we return the matter to the PWCJ for re-assignment to another WCJ (Cal. Code Regs., tit. 8, § 10346(a)); and for the newly assigned WCJ to conduct

further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued by the WCJ on January 4, 2024, is **GRANTED**; and the injury claim is **HEREBY AMENDED** to claim that applicant sustained a cumulative psychiatric injury during the period of his employment with Albertsons Companies, Inc. ending February 5, 2019.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the January 4, 2024 Findings and Order is **RESCINDED**, and the matter is **RETURNED** to the Presiding WCJ to assign this injury claim to another WCJ; and for the newly assigned WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER
PARTICIPATING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 25, 2024

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

**RONALD PERKINS
NIZINSKI & ASSOCIATES
GODFREY, GODFREY & ORTEGA, LLP**

TLH/mc

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