WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LEE HAGAN, *Applicant*

vs.

CITY OF SAN BERNARDINO, PSI;
adjusted by ADMINISURE, *Defendants*

Adjudication Number: ADJ17102623
San Bernardino District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant in pro per seeks reconsideration of the Findings and Order (F&O) issued on September 28, 2023 by a workers' compensation administration law judge (WCJ). The WCJ found that applicant did not meet his burden of proof to establish that he sustained an injury to his nervous system-psyche on September 18, 2022 in the course of his employment. The WCJ ordered that applicant take nothing by reason his workers' compensation claim.

Applicant contends that the F&O was procured through the fraudulent testimony of defendant's witness Sergeant Anna McKenna related to the Airport Security Plan; that he did violate his work assignment on September 18, 2022 and that he responded to the accident at issue with the intention to provide medical aid to his girlfriend; that his prior counsel was negligent in preparation for trial; and, that he be allowed to further develop the record.[1]

Defendant filed an Answer to Petition for Reconsideration (Answer). The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report), wherein the WCJ recommended the petition be denied because the question of whether applicant's psyche injury arose during the course of his employment was a legal question based on a question of fact for the factfinder and did not involve any questions for determination by a panel qualified medical evaluator (QME).

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[1] Given our disposition, we do not reach applicant's contentions of fraud, and note that any contention regarding attorney or professional negligence is not an issue within the Board's jurisdiction.

We have reviewed the entire record in this matter, the allegations of the Petition and the Answer, and the contents of the Report. Based on our review of the record and for the reasons set forth below, we grant reconsideration. It is our decision after reconsideration to rescind the F&O and return this matter to the trial court for further development of the record consistent with this decision. Should a final decision issue thereafter, any aggrieved party may seek reconsideration.

BACKGROUND

Applicant filed an Application for Adjudication (Application) on December 23, 2022 alleging injury to his nervous system-psyche (psyche) while employed as a police officer while responding to a traffic accident on December 18, 2022. (Application, ¶¶1-2.)[2]

Defendant denied applicant's claim on December 29, 2022 stating that the claim did not arise out of and/or in the course of his employment. (Def. Exh. A, Denial Notice, December 29, 2022.)

Defendant requested a change of venue on January 13, 2023, and a change of venue order was issued on January 24, 2023. (Petition for Change of Venue, January 13, 2023; Order Changing Venue, January 24, 2023.)

In January and February 2023, defendant filed at least three petitions to quash applicant's subpoenas duces tecum wherein applicant requested documents in defendant's possession including but not limited to police reports, photographs, and videos pertaining to Lee Hagan and the date and location of the December 18, 2022 incident; applicant's employment file, personnel file and employer's claim file; payroll records; and, the adjusting agency claim's file and benefits' notices. (See Petitions to Quash Subpoenas, file-dated January 13, 2023 and February 14, 2023.) Defendant cited several reasons to support its petitions to quash, including that the "requests are unreasonably cumulative, duplicative and obtainable from some other source that is more convenient, less burdensome or less expensive. Defendants assert that *the records being sought are readily available from Defendants without the need for and the expense of requesting the records by way of Subpoena Duces Tecum*." (Petition to Quash Subpoenas, January 13, 2023, p. 2; February 14, 2023, p. 2, emphasis added.)

[2] We note that pleadings in workers' compensation proceedings are informal (*Rubio v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196, 200), and that "[p]leadings may be amended by the Workers' Compensation Appeals Board to conform to proof." (Cal. Code Regs., tit. 8, § 10517.)

Orders quashing applicant's subpoenas duces tecum were issued but gave applicant 20 days to object. (See Orders Quashing Subpoenas Duces Tecum dated January 24, 2023 and February 24, 2023.)[3]

Defendant filed a Declaration of Readiness to Proceed (DOR) on February 14, 2023 to try the "threshold issue of AOE/COE...on a factual basis as the applicant was not acting with the scope of his duties at the time of the alleged incident." (DOR, Declaration.) there is no objection to the DOR in the record.

The mandatory settlement conference (MSC) was held on April 27, 2023. (Pre-Trial Conference Statement (PTCS), April 27, 2023.) Applicant included as "other issues:"

> Applicant asserts that the following items (which should be in the possession of Defendant) should also be provided to Applicant's counsel prior to any trial taking place: (1) transcript and/or audio recording of the dispatch communications related to the 9/18/2022 motor vehicle accident involving Melissa Keaggy, and (2) the police report generated in relation to the 9/18/2022 motor vehicle accident involving Melissa Keaggy. Applicant's counsel reserves the right to add the above to the exhibit list when/if they are made available.

(PTCS, p. 3, Other Issues.) Defendant objected to applicant's request for items one and two raising issues of "due diligence" and "probative value...when the MVA is not in dispute." (*Ibid*.)

Trial went forward on June 29, 2023 on the sole issue of injury arising out of and in the course of employment. (Minutes of Hearing and Summary of Evidence (MOH), June 29, 2023, p. 2.) Defendant asserted the affirmative defense of "frolic and detour." (*Ibid.*) A Doctor's First Report of Occupation Injury or Illness and seven treating reports of William H. Soltz, Ph.D., were admitted into evidence. (See MOH, p. 3, App. Exhs. 1-9.) Defendant's Denial Notice and a Concentra Medical Report dated October 24, 2022 were admitted into evidence. (*Id.,* pp. 3-4, Def. Exhs. A-B.) The police report of the September 18, 2022 motor vehicle accident (MVA) involving Melissa Keaggy, applicant's girlfriend, was admitted at trial as Joint Exhibit Z.[4]

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[3] We note that the WCJs who issued the Orders quashing were not precise in citation to the date of the defendant's petitions or the subpoenas being quashed.

[4] Despite defendant's objections to formal subpoena requests from applicant for documents in its possession, and applicant's subsequent written request at the MSC (see PTCS, p. 3) for the transcripts and/or audio recording of the dispatch communications related to the MVA (MVA dispatch communications), the MVA dispatch communications are not in the record and were not introduced or admitted as an exhibit at trial. (See "judge-tweaked PTCS – 6-29-2023.PDF," June 30, 2023.)

Applicant testified at trial. (MOH, p. 5.) In pertinent part, applicant testified as follows:

> He carried a dispatch radio. Their radios are the same as patrol division and so they are listening to the primary dispatch radio that all officers are hearing.
>
> On that day, he had a radio. It started off as a quiet day at the airport. ...
>
> Witness' girlfriend at the time, he had just gotten her a job at the airport as manager of the concessions at the airport. He knew she was driving to work on witness' motorcycle She had her license and permission to ride it. He followed her travel because he lives in the mountains and he wants to make sure she is safe. He did this via his I-phone [*sic*] app. As he was listening to the radio, the same officer who said she was responding to the initial call said she would be stopping insofar as there was an accident at 5th and Waterman. Witness looked at his phone to let his girlfriend Melissa know about the accident at 5th Street to tell her to use 3rd Street. Then he knew she sometimes kept her cell phone on her handlebars to be able to see texts or to hear music.
>
> At that time, he didn't realize that she was involved. *It wasn't until he opened up the maps that he heard the radio in the background and heard that a motorcycle was involved and the rider was down and unresponsive in the street. He was still at the terminal at that time.*
>
> *He still didn't put the pieces together and it wasn't until he pulled up the maps that he realized that she was already at the intersection. When he realized she was at the intersection, he was sitting down - he had just bought a snack. He stood up and his heart started racing. He called the watch commander Dave Carlson. His voice was wavering and he asked over and over if it was a yellow motorcycle.* He told witness that he didn't know but he would find out.
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> As he hung up the phone with him, he called his partner, Ruben Navarro and advised him to come monitor the sterile area of the airport because he had to go check on Melissa. At that time, he didn't know if a yellow motorcycle was involved.
> ...
>
> After he called his watch commander and asked his partner to come to secure the terminal, witness went to his unit parked outside. They leave their units running in case there is an emergency, and *he drove the five blocks to the intersection*, and there were several officers on scene. When asked if there was any rule or policy of leaving his post at the airport, witness responded that he wasn't aware of any. The FAA policy he was aware of stated that one officer at the airport, which is why he contacted Officer Navarro. Officer Navarro was on the premises and in the same passenger terminal.

When he was about half a mile away, on east 5th Street, heading westbound, he could see that it was a yellow bike. After he saw that, he pulled his unit behind a unit already parked there and he turned on his lights. The ambulance was already there. He was present when they cut off her clothes, when they gave her oxygen through an air bag and when they put pain medication into her leg via IV. In almost nine years of service with the department, it was his experience that where a motorcycle was involved and the rider is unresponsive, it was nearly always a fatality. It was violent and graphic. The damage from the motorcycle was extensive, but Melissa was wearing all her motorcycle gear and a very nice helmet, and at the time witness saw no blood or violence. He had responded to other motorcycle accidents before. Usually it is a result of reckless driving and people not wearing appropriate gear and people sustain violent injuries Melissa had no obvious outward injury other than a cut on her leg and deformity of both forearms.

Once he saw her state, he was only on the scene for a short amount of time, and witness' supervisor, Antonio Silva, put witness in his unit and took witness to Loma Linda to the emergency room, following the ambulance. They let witness into the emergency room. Witness had to call her parents while they were in the car on the way to Loma Linda. His supervisor didn't want witness to drive anymore. Witness could barely get the words out of his mouth.

Shortly after arriving at Loma Linda, witness spoke with the surgeon who advise witness that she sustained a severe traumatic brain injury, despite having been in such a good helmet, and they would have to operate on her immediately to save her life. Witness was asked to notify all her family. The doctor told witness that he didn't think she was going to make it.

...

If witness had to pinpoint when the stress began, it was when he put all the pieces together of what he heard on the radio and saw on his map. He feared for her driving the motorcycle every single day.

...

At the time he indicated he put two and two together, he was still in the building at the airport. When he pulled up maps, this was on his phone.

(MOH, pp. 6-10.)

Defendant called three witnesss: Watch Commander on September 18, 2022, Sergeant David Carlson (MOH, p. 11); Patrol Sergeant on September 18, 2022, Sergeant Jose Loera (MOH, p. 14); and applicant's direct supervisor (not on duty) on September 18, 2022, Sergeant Anna McKenna (MOH, p. 16). Seargeant Loera's knowledge of the training for the aiport "is very basic"

as he never took the extensive training that applicant took in order to be assigned at the airport. (MOH, p. 15.)

Sergeant Carlson testified in pertinent part as follows:

> As watch commander, witness was aware of a motorcycle accident that day. He received a call from Mr. Hagan that day. He recalls Mr.Hagan calling him within a minute or two of the accident being reported. It was fast. Everything went very quickly. The substance of the conversation, when the crash went out over the radio, *Lee called him and asked if it was a yellow motorcycle involved, and he said that her GPS was tracking to that intersection where the crash occurred, and witness stated that his heart dropped*. Witness called another officer and asked if a yellow motorcycle was involved and he was told yes, and witness' heart dropped again and he through [*sic*] that Lee's girlfriend was involved.
>
> QUESTIONING BY THE COURT
>
> Witness didn't call Lee back, he didn't get a chance to. He spoke with Sgt. Loera and told him that he thought that it was Lee's girlfriend who was involved, and Sgt. Loera told witness that Lee was pulling up right then.
> ...
>
> *It was witness' understanding that Lee was still at the airport when he got the call from him.*
>
> *It was always witness' understanding that Lee thought his girlfriend was involved in the collision, because he asked if a yellow motorcycle was involved, that he had a yellow motorcycle and his girlfriend was tracking to that location.*
> ...
>
> Mr. Hagan was not written up for breach of protocol, to witness' knowledge.

(MOH, pp. 11-14.)

Sergeant Loera testified that applicant performed no duties required by an officer at the scene of the MVA involving his girlfriend, and had to be led to the side of the road and out of the way so that the Sergeant could perform his own duties as first supervisor to the incident. (*Ibid.*)

Sergeant McKenna was not on duty on September 18, 2022. (MOH, p. 16.) It is unclear whether Sergeant McKenna herself underwent the same training as applicant. She testified that applicant underwent the training necessary to be assigned to the airport including airport security and operations, and a week-long LAWA training. (*Id.*, pp. 16-17.) It was her testimony that two officers were required to be present at the airport pursuant to the airport security plant and the police part of the TSA guidelines – otherwise, flights would have to cease. (*Id.*, p. 16.) Applicant

was not allowed to leave the airport to respond to the MVA of his girlfriend. (*Id.*, p. 17.) The two officers necessary for airport passenger operations to run were required to be on the airport property in order to have the required 7-minute response time to the airport. (*Ibid.*)

The WCJ allowed post-trial briefs on the legal issues, including whether applicant should be evaluated by a panel qualified medical evaluator (QME). (MOH, p. 2.)

The WCJ issued the F&O on September 28, 2023 finding that applicant "did not sustain his burden of proof of injury occurring in the course of his employment to the psyche." (F&O, Findings of Fact no. 1.) The WCJ ordered that applicant "take nothing" as a result of his workers' compensation claim against defendant. (F&O, Order.) In the Opinion on Decision, the WCJ explained the decision as follows:

> Applicant testified that as he was listening to the police radio, the same officer who said she was responding to the initial call said she would be stopping insofar as there was an accident at 5th and Waterman. Applicant looked at his phone and wanted to let his girlfriend, Melissa, know about the accident at 5th Street to tell her to use 3rd Street. He testified that he knew she sometimes kept her cell phone on the handlebars to be able to see texts or to hear music. At that time, applicant didn't realize that Melissa was involved in the accident at 5th and Waterman. It wasn't until he opened up the map app on his phone that he heard the radio in the background and heard that a motorcycle was involved and the rider was down and unresponsive in the street. Applicant was still at the airport terminal at that time. He still didn't put the pieces together, and it wasn't until he pulled up the maps that he realized that Melissa was already at the intersection and his heart started racing. Applicant called the watch commander, Dave Carlson, and asked over and over if it was a yellow motorcycle. Carlson told applicant that he didn't know, but he would find out.
> ...
>
> Applicant testified that when he was about half a mile away, on east 5th Street, heading westbound, he could see that it was a yellow motorcycle.
> ...
>
> *There appears to be little doubt that applicant's injury to his psyche arose out of his employment, insofar as he heard about the accident that he ultimately learned involved his girlfriend, Melissa, via the police radio in his possession.* However, for an injury to be deemed industrially compensable, it must both arise out of the employment and occur in the course of the employment, and it is applicant's burden to prove both elements. *It is in regard to "course of employment" that applicant's injury claim fails to be determined industrially compensable.*
> ...

> Without permission and in contravention to the directive that there be two officers on site at the airport whenever flights were coming in or going out per the airport security plan and TSA requirements, *applicant materially deviated from the course of his employment for purely personal reasons, to find out whether or not it really was his girlfriend who was involved in the accident after he put "two and two together," even though it was not confirmed to him by any police radio traffic or call from any supervisor.*
>
> Hagan deviated from his assigned post, leaving the airport without the two mandated officers on the premises during airport flight operation hours, and thus creating a substantial or material deviation from his duties. Leaving the airport was a complete departure from the employer's business, which was to have two officers stationed at the airport during flight operation hours. Hagan's deviation was neither unintentional nor was it accidental – he left his post without permission and arrived at an accident scene where he was neither asked to assist nor did he perform any police officer duties in furtherance of the department's business at the accident scene.
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> ...
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> *While the medical examiners all find that applicant's injury to his psyche arose out of his employment, the facts of the case and testimony of the credible employer witnesses prove that the injury did not occur in the course of applicant's employment insofar as applicant's injury did not occur in the furtherance of any of his assigned police duties or police business.* Based upon my review of the evidence in its totality, I find that applicant did not sustain an industrially-compensable injury to his psyche.

(Opinion on Decision, pp. 5-7.)

In the Report, the WCJ attempts further clarification:

> **While applicant believes that his stress began when he put all the pieces together of what he heard on the radio and saw on his map app, he also testified that he feared for his girlfriend driving the motorcycle every single day. While it may be true that applicant put "two and two" together while he was still at the airport, he did not know for sure that the accident involved his girlfriend until arriving at the scene when he saw his wrecked yellow motorcycle lying on the pavement, and at that point, he was not acting in the capacity of a police officer, but as a boyfriend of an accident victim.**
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> ...
>
> **Insofar as applicant's injury claim was more in the form of a legal question relating to the factual determination of course of employment than a medical question, the undersigned finds that evaluation by a Panel QME is unnecessary** insofar as defendant has successfully argued that applicant's claim of injury did not occur in the course of his employment since applicant deviated

> from his employment for purely personal reasons and his actions did absolutely nothing in furtherance of the employer's business.

(Report, p. 7.)

MEDICAL EVIDENCE

Applicant first treated for an "acute stress disorder" on October 21, 2022 with Shaheen Zakaria, M.D. (App. Exh. 1, Doctor's First Report of Occupational Injury or Illness, October 21, 2022, pp. 3-4.) Applicant reported to Dr. Zakaria that on September 18, 2022 his fiancée was in a motorcycle accident with a police SUV. (*Id.*, at p. 1.) Applicant reported that he "heard over the radio there was a traffic collision at the intersection and he proceeded to respond to the call," and "realized that it was his motorcycle and then saw his fiancé unconcscious." (*Ibid*.) Applicant's mood and affect were "grieving and tearful." (*Id.*, p. 2.) He was taken off work and given a "psychology referral." (*Id.*, p. 3.)

Applicant was referred to licensed clinical psychologist William H. Soltz, Ph.D., and first saw Dr. Soltz on November 4, 2022. (App. Exh. 2., Report of Dr. Soltz dated 11-4-22 [*sic*].) Dr. Soltz diagnosed applicant with an adjustment disorder "secondary to the trauma and the accident that brought him to the point of confusion" and that he was considering a diagnosis of post-traumatic stress reaction. (*Id.*, p. 4.) In the "Explanation of the Problem," Dr. Soltz states as follows:

> On September 18. 2022 he was at the airport, making a full sweep of the area. Melissa was on her way to the coffee shop. He was driving a motorcycle from Wrightwood and came down the freeway and exited on Fifth Street. She was on her way to the airport when this accident occurred. The applicant tells me that he had familiarity with where she was as they had a phone app that allowed him to follow her actions coming to work. He had heard there was an accident somewhere close by and thought that the traffic was holding his fiance up. He ultimately realized that it was her accident that occurred. He ran to his unit and ultimately came to the scene where she was completely unconscious.

(App. Exh. 2, p. 2.)

In the "Summary," Dr. Soltz states as follows:

> The applicant, Lee Hagan, was at the scene of the trauma although he was not sent there by the department. He saw the manifestations of the accident and it continues to be a trauma to which he is struggling with.

> He is dealing with secondary symptoms, including nightmares, trouble sleeping, appetite and concentration limitations, and a high level of anxiety for which he is trying very hard to maintain himself.
>
> I would call him temporarily totally disabled secondary to the trauma that he experienced at the time that he came to the scene of the accident and the continuing emotional trauma of dealing with an incapacitated individual, i.e. his fiance.

(App. Exh. 2, p. 5.)

Applicant spoke to Dr. Stolz again on November 15, 2022, but Dr. Stolz noted no further information related to the mechanism of the injury itself. (See App. Exh. 4, Report of Dr. Soltz dated November 15, 2022.)

On November 16, 2022, Dr. Stolz issued another report wherein he amended the "problem" as follows:

> The applicant was on duty at the time. He was following her movements through his cell phone and heard on the radio about the accident.
>
> He was, at the time, working as an officer and although his duty was at the airport, he did go to the scene of the accident. He has been quite traumatized.
> ...
>
> One might argue that this was not work related, but I believe that when you look at the totality here, we are left with the conclusion that this is a work-related traumatic issue...
> ...
>
> He does not sleep normally and is preoccupied with the trauma, certainly approaching a post-traumatic stress-type reaction...

(App. Exh. 3, Report of Dr. Soltz dated November 16, 2022, pp. 1-2.)

Applicant spoke with Dr. Soltz again on December 2, 2022, December 7, 2022, and December 27, 2022. (See App. Exhs. 5-8.) Dr. Stolz did not note any further information related to the mechanism of the injury itself the reports related to those interviews. (*Ibid.*)

There is no indication in the record that the QME Dr. Stolz reviewed the MVA police report and/or the MVA dispatch communications.

DISCUSSION

The sole issue presented in this matter is whether applicant sustained a compensable injury pursuant to Labor Code[5] section 3600. An injury is compensable if it arises out of and in the course of the worker's employment. (Lab. Code, § 3600.) An employer is liable for workers' compensation benefits "without regard to negligence...for any injury sustained by his or her employees arising out of and in the course of the employment..." (Lab. Code, § 3600(a).) The injury must be sustained while "the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment." (Lab. Code, § 3600(a)(2).)

Any determination of compensability must be "guided by the...fundamental principle that the requirement is to be liberally construed *in favor of awarding benefits*." (*Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal. 3d 729, 732-733 [48 Cal.Comp.Cases 326], emphasis in the original; see *Westbrooks v. Workers' Comp. Appeals Bd.* (1988) 203 Cal.App.3d 249, 253.) Therefore, "[a]ny reasonable doubts as to whether the act is contemplated by the employment, in view of this state's policy of liberal construction in favor of the employee, should be resolved in favor of the employee. (citation)" (*Western Greyhound Lines v. Industrial Acci. Com. (Brooks)* (1964) 225 Cal.App.2d 517, 520-521 [acts taken for an employee's personal comfort and gain while off an employer's premises may not deviate from employment].)

The concept of "in the course of the employment" generally, "... refers to the time, place, and circumstances under which the injury occurs." (*Maher, supra,* 33 Cal.3d at p. 733; see *Westbrooks, supra,* 203 Cal.App.3d at p. 252.) "Arising out of" employment is "a more difficult question," and generally refers to the causal connection between the employment and the injury. (*Id*.) In other words, the injury must be "proximately caused by the employment, either with or without negligence." (Lab. Code, § 3600(a)(3).) Proximate cause in workers' compensation cases is not the same as in civil tort cases. (*Maher, supra*, 33 Cal.3d at p. 734, fn. 3 citing *Truck Ins. Exchange v. Industrial Acci. Com. (Dollarhide)* (1946) 27 Cal.2d 813, 816 [1946 Cal. LEXIS 359].)[6] In workers' compensation cases, "'[a]ll that is required is that the employment be one of

[5] All further references are to the Labor Code unless otherwise noted.

[6] "'[A]lthough Labor Code section 3600 refers to "proximate cause," its definition in workers' compensation cases is not identical to that found in the common law of torts. [Citation.] "In fact, the proximate cause requirement of Labor Code section 3600 has been interpreted as merely elaborating on the general requirement that the injury arise out of the employment." [Citation.] The danger from which the employee's injury results must be one to which he was

the contributing causes without which the injury would not have occurred.' (citations)..." (*Maher, supra*, 33 Cal.3d at p. 734, fn. 3; see *South Coast Framing, supra*, 61 Cal.4th at pp. 297-299 ["We have recognized the contributing cause standard since the very beginning of the workers' compensation scheme."].)

Although it is the employee's burden to demonstrate by a preponderance of the evidence that he or she sustained a compensable injury (Lab. Code, §§ 3600(a), 3202.5, 5705), the concept of what constitutes a work-related injury is broad. (*South Coast Framing, supra*, 61 Cal.4th at p. 298.)[7] The determination of whether an injury arises out of and in the course of employment is based on "criteria" that are "fluid," and "must therefore be decided on the facts peculiar to each case." (*Westbrooks, supra*, 203 Cal.App.3d at p. 255; see *Latourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 651-652 [63 Cal.Comp.Cases 253].) "Even if, arguendo, the issue is debatable...all reasonable doubts as to whether an injury is compensable are to be resolved in favor of the employee." (*California Compensation & Fire Co. v. Workers' Comp. Appeals Bd. (Schick)* (1968) 68 Cal.2d 157, 161.)

The "facts peculiar" to this case are that applicant's injury is to his nervous system-psyche. The material question of fact determined by the WCJ related to the genesis of applicant's injury to his psyche, i.e., did applicant's injury begin when he heard the report on his dispatch radio and realized that his girlfriend was involved in the MVA at 5th and Waterman; or, did applicant's injury only begin when he physically saw the yellow motorcycle as he was driving up to the MVA and knew for certain that it was his girlfriend? Only once it is determined *when* applicant's psyche injury began is it possible to determine whether or not the injury arose out of and in the course of his employment.

Without addressing the medical evidence in this case other than to say that "the medical examiners all find that applicant's injury to his psyche arose out of his employment" (Opinion on Decision, p. 7), the WCJ nonetheless concludes the question *against* applicant. "Insofar as applicant's injury claim was more in the form of a legal question relating to the factual

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exposed in his employment. [Citation.] "'All that is required is that the employment be one of the contributing causes without which the injury would not have occurred.'" [Citation.]' (*LaTourette, supra*, 17 Cal.4th at p. 651, fn. 1, quoting Maher, supra, 33 Cal.3d at p. 734, fn. 3.)" (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297, 298 [80 Cal.Comp.Cases 489] (*South Coast Framing*).)

[7] Cases involving the issue of industrial causation "may run a gamut from the blatantly obvious to the scientifically obscure." (*Peter Kiewit Sons v. Industrial Acci. Com.* (1965) 234 Cal.App.2d 831, 839.)

determination of course of employment than a medical question, the undersigned finds that evaluation by a Panel QME is unnecessary." (Report, p. 7.)

> While applicant believes that his stress began when he put all the pieces together of what he heard on the radio and saw on his map app, he also testified that he feared for his girlfriend driving the motorcycle every single day. While it may be true that applicant put "two and two" together while he was still at the airport, he did not know for sure that the accident involved his girlfriend until arriving at the scene when he saw his wrecked yellow motorcycle lying on the pavement, and at that point, he was not acting in the capacity of a police officer, but as a boyfriend of an accident victim.
>
> Insofar as applicant's injury claim was more in the form of a legal question relating to the factual determination of course of employment than a medical question, the undersigned finds that evaluation by a Panel QME is unnecessary...

(Report, p. 7.)

We disagree with the WCJ's analysis and conclusions. Primarily, we disagree because whether applicant sustained a compensable psychiatric injury "requires both lay and medical evidence for support." (*Insurance Co. of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905, 911-912 [46 Cal.Comp.Cases 913].)

> Lay testimony must support the occurrence of injurious incidents which are employment related. Lay testimony alone, however, cannot establish psychiatric injury. Expert medical evidence must support the proposition that the employment incidents are related to the development of the psychiatric condition. (See *Baker v. Workmen's Comp. Appeals Bd.* (1971) 18 Cal.App.3d 852 [96 Cal.Rptr. 279]; *Bstandig v. Workers' Comp. Appeals Bd*. (1977) 68 Cal.App.3d 988, 995-996 [137 Cal.Rptr. 713].) "'[Where] the truth is occult and can be found only by resorting to the sciences,'" the WCAB must utilize expert medical opinion. (*Bstandig, supra,* 68 Cal.App.3d at p. 995.) "The difficulty is that the problem was not one of lay theory, but one of diagnosis, prognosis and treatment in an occult branch of medicine."(*Id*., at p. 996.)

(*Kemp, supra,* 122 Cal.App.3d at p. 912.) Indeed, it is a "general proposition that the medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." (*Peter Kiewit Sons v. Industrial Acci. Com*. (1965) 234 Cal.App.2d 831, 839 [30 Cal.Comp.Cases 188].)

Many of the relevant lay facts appear to be undisputed. Applicant was on his shift at the airport when he heard a report on his dispatch radio of an MVA at 5th and Waterman involving a motorcycle. (MOH, pp. 6-10.) He opened the maps application on his i-Phone and saw that his

girlfriend's location was 5th and Waterman – he stood up, his heart started racing, he called Watch Commander Sergeant David Carlson and with a "wavering" voice asked him "over and over" if it was a yellow motorcycle. (*Id.*) Sergeant Carlson confirms that applicant was at the airport when he received this call, and that his own "heart dropped" because he realized applicant thought it was his girlfriend involved in that MVA. (*Id.*, at pp. 11-14.) When applicant hung up the phone with Sergeant Carlson, he called his co-worker at the airport and told him to cover the sterile area of the airport because he was leaving to go to his girlfriend. (MOH, pp. 6-10.)

Applicant then left the airport, got into his cruiser, and proceeded to drive to the MVA at 5th and Waterman – when he was about one-half a mile away, he saw the yellow motorcycle and knew it was his girlfriend. (MOH, pp. 6-10.) There also appears to be little dispute that applicant arrived at the scene in distress, and did not perform any duties as a police officer while at the site of the MVA. (*Id.*, p. 15.) He saw his girlfriend's clothes being cut off, being given oxygen through a bag, and pain medication being given intravenously in her leg. (*Id.*, pp. 6-10.) Applicant was driven to the hospital by a colleague who didn't want him to drive, and he "could barely get the words out of his mouth" to her family during calls on the way. (*Id.*) Once at the hospital, the surgeon told him he did not think his girlfriend was going to make it. (*Id.*)

On reconsideration, applicant does dispute many of the lay facts related to whether his actions in leaving the airport were in violation of the Airport Security Plan, and whether or not he continued to act in his capacity as a police officer until he at least reached the site of the MVA. As stated in the Petition for Reconsideration:

> Pages 51-53 of the Airport Security Plan outline the details of required law enforcement support concisely and indicate that an Airport Officer's duty remains within a 7 min response radius of the Sterile Area. I well within this requirement, as was Ofc. Navarro, proving that there was no physical deviation from the established parameters of my assignment as trained. I received no training from Sgt McKenna directly as she claimed, and she was also incorrect about what she stated to be "explicit training" on something not remotely contained of the Airport Security Plan.
>
> Sgts' Carlson and Loera admitted to knowing very limited information about SBD Airport Operations. Sgt Carlson stated that he only had a second-hand understanding of Airport and could not speak to the airport policy. I responded to the accident with the intention to assist with medical aid, however with AMR already in scene and providing medical aid, I walked myself to the side of the road without assistance and awaited any news without any hindrance to the scene. All parties were in agreement that there was no known violation of any

> SBPD policy, therefore I was not subject to any discipline for my actions and well within my assigned duties that day.

(Petition for Reconsideration, Attachment, p. 1.)

Unfortunately, there is no substantial medical evidence in the record to support a finding, one way or the other, as to whether applicant's psyche injury is compensable. A decision of the Workers' Compensation Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-81 [39 Cal.Comp.Cases 310].) To be considered substantial evidence, a medical opinion "must be predicated on reasonable medical probability." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-17, 419 [33 Cal.Comp.Cases 660].) An opinion is not substantial evidence if it is based on "inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-21.)

The WCJ does not support the F&O with discussion of the medical reporting of treating physician Dr. Soltz, concluding only that "the medical examiners all find that applicant's injury to his psyche arose out of his employment..." (Opinion on Decision, p. 7.) Unfortunately, the reporting of Dr. Soltz is incomplete and not clearly based on reasonable medical probability, and is based on an inadequate history; therefore, the reporting is not substantial evidence.

Dr. Soltz first reported that "applicant...was at the scene of the trauma [MVA] although he was not sent there by the department," and that he "ultimately" realized that it was girlfriend at the scene of the MVA. (App. Exh. 2., p. 5.) Dr. Soltz concluded in that initial report that applicant was "temporarily totally disabled secondary to the trauma that he experienced at the time that he came to the scene of the accident and the continued emotional trauma of dealing with an incapacitated individual..." (*Ibid.*) In a later report, Dr. Soltz appeared to have received additional information about the mechanism of applicant's injury and stated that applicant "was following her movements through his cell phone and heard on the radio about the accident" while "working as an officer..." and that he "has been quite traumatized." (App. Exh. 3, p. 1.) Dr. Soltz goes on to state that "given the totality here..." applicant's injury was a "work-related traumatic issue." (*Id.*, p. 2.) This conclusion appears to include all aspects of the incident in applicant's trauma, including following her movements through his cell phone as he was hearing about the accident on his dispatch radio

while still on post at the airport. In addition, there is no indication that Dr. Soltz was ever asked to consider that question, or any other related questions about when the injury to applicant's psyche began. Regardless, the conclusion is simply too ambiguous to support a final order on whether applicant's injury is compensable or not.

Dr. Stolz diagnosed applicant with an adjustment disorder "secondary to the trauma and the accident that brought him to the point of confusion" and that he was considering a diagnosis of post-traumatic stress reaction. (App. Exh. 2, p. 4.) Later, Dr. Stolz states that applicant's condition was "approaching a post-traumatic stress-type reaction." (App. Exh. 3, p. 2.) There is no further clarification from Dr. Stolz as to what this means, or whether applicant's diagnosis includes or does not include a post-traumatic stress disorder diagnosis or not. Indeed, there is no discussion of how Dr. Soltz came to his diagnosis, a description of the diagnosis, nor any discussion of the physiological and/or psychological mechanism of these types of injuries to inform his conclusions and establish that his opinions are based on reasonable medical probability. The only comment we can find in his reporting is that the claim "is quite complicated and does involve somewhat of a subjective leap." (*Id.*, p. 1.) This type of comment begs clarification. However, none is forthcoming in any of his subsequent reports. (See App. Exhs. 4-8.)

Dr. Soltz' reporting is also based on an inadequate history as it does not appear he was ever provided with more detailed information regarding the timeline of events related to applicant's psyche injury other than the general statements noted above. It does not appear that Dr. Soltz ever received information about incidents on the date of injury from Sergeant Carlson, or any of defendant's other witnesses, nor is it obvious that Dr. Soltz received the detailed information about the incident testified to by applicant at trial, i.e., his racing heart, pressured speech, etc.

Thus, the reporting of Dr. Soltz is incomplete and may not be based on reasonable medical probability, and are based on an inadequate history. As such, Dr. Soltz' reports are not substantial evidence and cannot be the basis for a final order of compensability. Consequently, and given the "peculiar facts" of this case, without substantial evidence of when applicant's injury arose, it is not possible to determine whether the injury arose during the course of his employment.

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.*

(1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) However, this discretionary authority must be reconciled with the discovery cut-off contained in Labor Code section 5502(d)(3), which closes discovery at the time of the mandatory settlement conference. (See *Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396 [65 Cal.Comp.Cases 264]; *San Bernardino Community Hospital v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986].)

In this case, there were approximately six months between the filing of the Application and the trial. In between the Application and trial, defendant filed a Petition to Change Venue, which was ordered at the end of January 2023. In reality, therefore, there were five months between the onset of this case and the trial. During those five months, applicant's counsel did conduct discovery against defendant in the form of various subpoenas duces tecum, each of which was challenged and ordered quashed with the seeming promise from defendant that it would informally produce the documents requested. It appears defendant did so for some of the documents – but not all, including the MVA dispatch communications that are at the center of this claim.

Defendant filed the DOR that eventually brought this matter to trial on the sole issue of AOE/COE, and it is true that applicant did not object to that DOR. The record does not record any objection to bringing the issue to trial at the time of the MSC, but there appears to have been a request for a QME evaluation at the time of trial and the WCJ did allow post-trial briefing on the issue. Unfortunately, there is no written record of when and how the issue of the QME evaluation was raised, and in what context. Although in hindsight, it was not the model of diligence for applicant to fail to object to the DOR or to fail to object on the record to this matter being brought to trial so quickly, the fact remains that this matter *was* brought to trial very quickly and before the record was ready to determine the issue presented. The WCJ should have realized that a QME evaluation was necessary to determine the question of when the injury to applicant's psyche began. Without medical expertise to assess this question, it is not possible to determine whether applicant's injury arose out of an in the course of his employment.

Accordingly, we grant reconsideration and as our decision after reconsideration, we rescind the F&O and return this matter to the trial level for further development of the record consistent with this decision. Should a final decision issue thereafter, any aggrieved party may seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued on September 28, 2023 by a workers' compensation administration law judge is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued on September 28, 2023 by a workers' compensation administration law judge is **RESCINDED** and this matter is **RETURNED** to the trial level for further development of the record consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 19, 2023

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

LEE HAGAN
GOLDMAN, MAGDALIN & KRIKES

AJF/abs

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