

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

**VICTORIA NIDOY, *Applicant***

**vs.**

**EISENHOWER MEDICAL CENTER, permissibly self-insured, administered by ATHENS  
ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ12471786  
Riverside District Office**

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

Applicant seeks reconsideration of the Findings and Orders (F&O), issued by the workers' compensation administrative law judge (WCJ) on July 13, 2021, wherein the WCJ found that applicant did not sustain a psychiatric injury arising out of and occurring in the course of employment (AOE/COE).

Applicant contends that the reports and deposition testimony of psychiatric qualified medical examiner (QME) David M. Reiss, M.D., are not substantial evidence, that defendant's evidence did not rebut applicant's testimony, and that defendant did not overcome the Labor Code section 5402 presumption of compensability.<sup>1</sup>

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petition for Reconsideration (Petition), and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise noted.

## BACKGROUND

Applicant claimed a psychiatric injury while employed by defendants as a registered nurse, during the period from July 1, 2017, through May 3, 2018. She was initially treated by psychologist H. Gordon Blount, Ph.D., on June 4, 2018. (App. Exh. 2, Dr. Blount, June 4, 2018.) Dr. Blount diagnosed applicant as having an acute stress disorder with occupational problems. He stated that applicant was temporarily totally disabled on a psychiatric basis and he recommended ongoing psychological treatment. (App. Exh. 2, p. 4.)

On February 4, 2019, applicant was evaluated by QME Dr. Reiss. (Def. Exh. C, Dr. Reiss, February 19, 2019.) Dr. Reiss interviewed applicant and reviewed the limited medical record he was provided. The interview addressed several factors including “History of Present Illness, Occupational History, Past Medical History and Mental Health History. (Def. Exh. C, pp. 7 – 12, original in upper case.) Dr. Reiss diagnosed “Depressive Disorder” and “Problems related to employment” and concluded that:

As described in the above Formulation, while I can state that unless other, contradictory data arises, Ms Nidoy's Major Depression is "predominantly" due to Ms Nidoy's perception of "objective workplace stresses," the compensability of Ms Nidoy's claim of industrially-related psychiatric injury will be determined by the findings of the Trier of Fact as to whether or not the "stresses" to which Ms Nidoy were subjected consisted "substantially" of non-discriminatory, lawful, good faith, personnel actions vs. having constituted a "hostile work environment."

(Def. Exh. C, pp. 15 – 16, underlining and quotations in original.)

Dr. Reiss was provided investigation reports to review and in his July 7, 2019 supplemental report he stated:

I note that the cover letter received with the documentation referred to above states, “... the enclosed social media and surveillance report confirm she [Ms Nidoy] is fully engaged in work and establishing her own business. Enclosed are the photos of the grand opening of her Villa Victoria Resort on March 16, 2019...” The reports reviewed do not include clear documentation of Ms Nidoy's specific activities regarding the resort (e.g., ownership; participation specific occupational or ownership duties during the period of time in question, other than the meeting referred to below), but a quick Google search I did for, “Villa Victoria Resort owner” provided the following links: ...

(Def. Exh. B, Dr. Reiss, July 7, 2019, p. 3.)

Dr. Reiss later concluded:

In my opinion, the surveillance depicting Ms Nidoy traveling to and from an appointment at Dr. Blount's office on June 11, 2019 is not of any definitive significance. It certainly is not outside the realm of possibility that [applicant] could have been sincerely extremely emotionally upset while discussing her situation with me on February 4, 2019, but able to present well to superficial observation while traveling to and from an appointment over two months later. ¶ On the other hand, if the information suggesting Ms Nidoy's active participation in a business venture is accurate, I must conclude that notwithstanding that Ms Nidoy still might have experienced sincere emotional upset and narcissistic injury regarding certain workplace events, Ms Nidoy's credibility must be considered NIL regarding her allegations that workplace circumstances caused any diagnosable psychiatric illness or injury, any period of psychiatric work-impairment, and/or the need for Ms Nidoy to have received any formal mental health treatment related to workplace events. (Def. Exh. B, pp. 4 – 5.)<sup>2</sup>

Treating physician, Dr. Blount reviewed the July 7, 2019 supplemental report from Dr. Reiss. Dr. Blount disagreed with Dr. Reiss regarding applicant's credibility and stated:

Dr. Reiss, to his credit, did not consider the video surveillance to be relevant. However, he viewed the advertising website and made assumptions, as had the investigators, as to Ms. Nidoy's activities, concluding, as the investigators had speculated, she was engaged in gainful "work activities" and therefore she must be mis-representing her psychiatric condition (in spite of what Reiss had objectively determined at the time of his examination) and was therefore so lacking in credibility all prior determinations must be reversed. ¶ ... That having been said, Victoria Nidoy has made some improvement during her psychological treatment, although she has not yet attained Maximum Medical Improvement. Nothing from Dr. Reiss' reporting has prompted this Psychologist to alter his opinion(s) in this matter, which include his opinion that the patient has sustained a compensable industrial psychiatric injury, continues to require treatment, and will continue to participate in treatment as determined by the Primary Treating Physician. (App. Exh. 1, Dr. Blount, October 31, 2019, p. 17.)

Dr. Reiss reviewed Dr. Blount's October 31, 2019 report and commented that:

Dr. Blount asserted that rather than providing a supplemental report as I had been requested to do, I should have requested to re-evaluate Ms Nidoy. ¶ I do not see how re-evaluating Ms Nidoy would have any impact upon the issue of Ms Nidoy's credibility, since, as I stated in my supplemental report, the new evidence provided clearly indicated that Ms Nidoy had misinformed me about both her occupational status and her level of activity - such that any retrospective diagnosis of Ms Nidoy's condition based upon the misleading history she

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<sup>2</sup> The Investigation Reports, reviewed by the doctor, were admitted into evidence as Defendant's Exhibits D and E.

provided would remain below the threshold of falling “within reasonable medical probability.” (Def. Exh. A, Dr. Reiss, January 21, 2020, p. 5.)

Dr. Reiss was deposed on March 31, 2020. (App. Exh. 3, Dr. Reiss, March 31, 2020, deposition transcript.) His testimony included the following:

Q. Okay. So you can't say one way or other if she was dishonest to you then?

A. I can say that within reasonable medical probability she was being dishonest. Can I say absolutely? No.

Q. Okay. And just because of the Facebook page that shows her opening a resort in the Philippines? ...

A. Correct, that she was actively involved in that, yes. Assuming that that was true and legitimate, yes. And based on the information I was given, there were enough --what appeared -- again, I defer to the trier of the fact.

(App. Exh. 3, p. 12.)

Q. In the materials presented to you, did it state when she started being actively involved in this venture?

A. I do not believe it said when she was actively involved in it. It had the date of a meeting she had in March of 2019 but it did not state when she had started to be involved.

Q. And also in the materials presented to you, does it show her level of involvement? Could they just be using her name and that's it?

A. Anything is possible. The documentation speaks for itself and the liability is totally up to the trier of fact.

(App. Exh. 3, p. 13.)

The parties proceeded to trial on June 23, 2021. (Minutes of Hearing and Summary of Evidence (MOH/SOE), June 23, 2021.) The WCJ's summary of applicant's testimony included:

The property, Villa Victoria Resort, was purchased by her ex-husband in 2003. Her ex-husband died in 2011. She has a family who manages the property which has been licensed by Airbnb since 2019. Her name was added to the social media platform. She is not listed as a contact as she cannot manage it from here. She is there only as a referral or a question. ¶ She was in the Philippines in March 2019. She was there for the grand opening of the resort. She was there for 15 days. ¶ In February 2019, she was evaluated by Dr. David Reiss. During that evaluation there were times when she felt like she would “kill herself.” She basically spends all of her time alone. She sits at home staring at nothing, has no desire to be around people, and she does not participate in any religious or social gatherings. ¶ After telling this to Dr. Reiss and Dr. Blount, there were problems in the Philippines and her family was running the place without her knowledge. She did not know what to do, so she was “going crazy.” She had lost her job. Her family was running the place and she should come home. She felt like she could die and she did not care. She was only in her town for 5 days. She had a terrible car accident. She was sedated and asleep the whole time. She does not even

remember flying back to the U.S. The picture in the video was a “show.” Her family was there to support her, and they took care of her during this trip. She was not stable. She was very, very depressed. She did not want to stop working as she was only 62 or 63 at the time.  
(MOH/SOE, pp. 5 – 6.)

The issues submitted for decision included injury AOE/COE and the section 5402 presumption of compensability. (MOH/SOE, p. 2.)

## DISCUSSION

We first note that section 5401 states in part:

(c) The completed claim form shall be filed with the employer by the injured employee, or, in the case of death, by a dependent of the injured employee, or by an agent of the employee or dependent. Except as provided in subdivision (d), a claim form is deemed filed when it is personally delivered to the employer or received by the employer by first-class or certified mail. A dated copy of the completed form shall be provided by the employer to the employer’s insurer and to the employee, dependent, or agent who filed the claim form.  
(Lab. Code, § 5401.)

Section 5402(b) states:

If liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 90-day period.  
(Lab. Code, § 5402.)

Based on our review of the trial record, it appears that there was no claim form submitted and/or admitted into evidence. Also, there is no evidence that a claim form was delivered to or received by defendant. Section 5402(b) clearly states that an injury claim is presumed compensable if liability is not rejected within 90 days of the claim form being filed, as defined in section 5401(c). Absent evidence that a claim form was delivered, there is no evidence as to if or when the 90 day period started. In turn, there is no evidence that liability was denied after the 90 day period had expired. Thus, the section 5402 presumption is not applicable in this matter and it will not be further addressed herein.

It is well established that an award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd.*

(1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) To be substantial evidence a medical opinion must be based on pertinent facts, on an adequate examination and an accurate history, and it cannot be based on surmise, speculation, conjecture, or guess. (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, the Finding that applicant did not sustain injury AOE/COE is based on the opinions of QME Dr. Reiss, as stated in his supplemental reports and deposition testimony. (F&O, p. 2.)

As noted above, in the February 19, 2019 report Dr. Reiss discussed his interview with applicant and he discussed the limited medical record he was provided. He described applicant's "subjective description" of her psychiatric condition (Def. Exh. C, pp. 9 – 10) but he did not identify or otherwise discuss any subjective factors, i.e. it appears that he did not perform any psychiatric or psychological testing. Dr. Reiss diagnosed applicant as having Depressive Disorder, but he did not describe any objective basis for his opinions.

In his July 7, 2019 report, Dr. Reiss noted that the "cover letter" he received from defense counsel stated that the social media/surveillance investigation confirmed that applicant was "fully engaged in work and establishing her own business." (Def. Exh. B, p. 3.) He then stated that the reports did not include clear documentation of applicant's activities regarding the resort but his "quick Google search" indicated applicant was the owner of the Villa Victoria Resort. (Def. Exh. B, p. 3.) Based thereon, Dr. Reiss concluded, notwithstanding that applicant "might have experienced sincere emotional upset and a narcissistic injury regarding certain workplace events, Ms Nidoy's credibility must be considered NIL..." (Def. Exh. B, p. 3) and that she did not sustain the psychiatric injury as claimed. (Def. Exh. B, p. 6.) It is important to note that although he said the surveillance investigation reports did not document applicant's activity level, Dr. Reiss did not explain why the fact that she owned the resort meant that applicant had engaged in "deceptive behaviors consistent with malingering and/or fraud." (Def. Exh. B, p. 6, underlining in original.) Nor did he explain why he agreed with counsel's contention that the picture of applicant standing with a group of people was evidence that applicant had not sustained a psychiatric injury. (See Def. Exh. E, June 13, 2019 Investigation Report.)

Finally, although Dr. Reiss repeatedly stated his opinion that applicant was dishonest, misleading, and not credible, at his deposition, Dr. Reiss testified that, “Anything is possible. The documentation [investigation reports] speaks for itself and the liability is totally up to the trier of fact.” (App. Exh. 3, p. 13.) At the trial applicant testified that her family supported her and took care of her during the trip to the Philippines; that she was not stable and was very, very depressed. (MOH/SOE, p. 6.) In the Opinion on Decision the WCJ stated that, “[A]pplicant testified in a generally truthful and credible manner...” (F&O, p. 7, Opinion on Decision.) A WCJ’s opinions regarding witness credibility are entitled to great weight. (*Garza v. Workmen’s Comp. Appeals Bd. supra*, 319; *Sheffield Medical Group v. Workers’ Comp. Appeals Bd. (Perez)* (1999) 70 Cal.App.4th 868 [64 Cal.Comp.Cases 358].) Applicant’s testimony regarding her activity while in the Philippines was wholly inconsistent with the opinions and conclusions stated by Dr. Reiss.

As discussed above, our review of the reports from Dr. Reiss and his testimony clearly indicate that his opinions are not based on pertinent facts, but instead are based on his surmise and speculation, as to applicant’s actual level of activity while in the Philippines, as well as his conjecture, and guess that she was dishonest, misleading, and not credible. Dr. Reiss testified that “Anything is possible” but he did not explain how or why the pictures of applicant standing with a group of people were evidence that applicant was engaged in “deceptive behaviors consistent with malingering and/or fraud.” (Def. Exh. B, p. 6, underlining deleted.) Finally, the fact that Dr. Reiss did not perform any psychiatric or psychological testing indicates that his opinions are not based on an adequate examination. For these reasons, the reports from Dr. Reiss and his deposition testimony are not substantial evidence upon which a decision may be based.<sup>3</sup>

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit*

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<sup>3</sup> It is also important to note that an evaluating physician is to consider only the records/evidence provided by the parties. (Lab. Code, § 4062.3(b).) A “quick Google search” is not records provided to the doctor by the parties. A social media search regarding an injured worker is inappropriate conduct for an evaluating physician and information from a social media search cannot be a factor considered by the physician in reaching his or her conclusions.

*Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc.) However, Dr. Reiss specifically stated:

I do not see how re-evaluating Ms Nidoy would have any impact upon the issue of Ms Nidoy's credibility, since, as I stated in my supplemental report, the new evidence provided clearly indicated that Ms Nidoy had misinformed me about both her occupational status and her level of activity...  
(Def. Exh. A, p. 5.)

For the reasons discussed herein, it is not appropriate for applicant to be re-evaluated by Dr. Reiss. Under these circumstances, it is necessary that the parties have applicant evaluated by an agreed medical examiner (AME), or in the alternative, the parties may request that the WCJ appoint a regular physician. (Lab. Code § 5701.)

Accordingly, we grant reconsideration, rescind the F&O, and return the matter to the WCJ for 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 Orders issued by the WCJ on July 13, 2021, is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 13, 2021 Findings and Orders is **RESCINDED** and the matter is **RETURNED** to the 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/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**November 8, 2021**

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

**VICTORIA NIDOY  
LAW OFFICES OF LOUIS BERMEO  
LUNA SILVA**

**TLH/pc**

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