

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

GINA ROSALES, *Applicant*

vs.

COUNTY OF RIVERSIDE; permissibly self-insured, *Defendant*

**Adjudication Number: ADJ10645876
Riverside District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted the Petition for Reconsideration (Petition) filed by applicant, Gina Rosales, in order to further study the factual and legal issues raised therein. This is our Opinion and Decision After Reconsideration.

Applicant, acting in pro per, seeks reconsideration of the Findings and Order and Opinion on Decision (F&O) issued in this case by a workers' compensation administrative law judge (WCJ) on July 19, 2022. In the F&O, the WCJ found that applicant, while employed during the period of November 1, 1994 to July 20, 2016 as a Health Services Assistant by defendant, the County of Riverside, did not sustain injury arising out of and in the course of employment (AOE/COE) to psyche, head, back and body systems. The WCJ further found that, absent injury AOE/COE, the remaining issues in the case were moot, and issued a "take-nothing" order.

We received an Answer from defendant. The WCJ submitted a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny reconsideration.

We have considered the allegations of the Petition, the 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 F&O, substitute new findings of fact, and return this matter to the trial level for a supplemental medical opinion regarding applicant's alleged body systems injuries and for a new decision by the WCJ.

BACKGROUND

On January 18, 2022, the matter proceeded to trial on the issues of: (1) injury AOE/COE; (2) permanent disability; (3) apportionment; (4) occupation group number; (5) the need for further medical treatment; (6) liability for self-procured medical treatment; (7) attorney fees; and (8) the application of Labor Code section 3208.3.¹ (Minutes of Hearing (MOH), January 18, 2022, pp. 2-3.)

During trial, applicant testified that she experienced various stressors while working for defendant as a Health Services Assistant that caused injuries to her psyche, head, back, and body systems. Applicant testified that her supervisor, Lilia Granizo, was verbally aggressive toward her at the workplace, making rude comments toward her, interrupting her in front of patients or clients, and telling her that she did not speak English well and that she needed to find another job. (Minutes of Hearing/Summary of Evidence (MOH/SOE), May 2, 2022, p. 5.) Applicant also testified that Ms. Granizo pushed her, called her “stupid,” threw papers at her, and followed her to the bathroom and “other places,” which made applicant feel “sick and stressed.” (MOH/SOE, May 2, 2022, pp. 5-6; MOH/SOE, June 21, 2022, p. 4.) Ms. Granizo testified during trial and denied applicant’s allegations. (MOH/SOE, June 21, 2022, p. 7.)

Applicant also testified that a coworker, Anita Scott, physically touched her three times at work, and stated that she had reported one such incident to a different supervisor, Lorena Novak-Bull. During trial, Ms. Novak-Bull confirmed that applicant had reported one such incident to her. (MOH/SOE, May 2, 2022, pp. 6, 8; MOH/SOE, June 21, 2022, p. 5.)

In addition to testimony, the WCJ received and admitted medical reports issued by Qualified Medical Evaluators (QMEs) in the respective fields of internal medicine, psyche, and orthopedics. The QME in internal medicine, James Sherman, M.D., opined that applicant suffered injury AOE/COE to her body systems in the form of gastroesophageal reflux disease (GERD) and hypertension. (Jnt. Exh. 1, pp. 9-11; Jnt. Exh. 3, pp. 3-4.) Psyche QME, Allen Lee, M.D., opined that, so long as the WCJ believed that applicant was credible, and that the mistreatment at work actually occurred, those events would provide a basis for finding that applicant suffered a psyche injury AOE/COE; otherwise, Dr. Lee stated, “If the trier of fact determines that [applicant’s] history is not accurate...then the amount of causation of the psychiatric injury that was assigned to the mistreatment at work would be nonindustrial.” (Jnt. Exh. 5, pp. 30, 32-33.) The WCJ also

¹ All further statutory references are to the Labor Code unless otherwise stated.

admitted reports from applicant's primary treating physician (PTP), Nelson Flores, Ph.D., who opined that applicant's psyche injury was AOE/COE. (Applicant Exh. 10, p. 9; see also Applicant Exhs. 5, 7, 8.) Orthopedic QME, Emile Wakim, M.D., concluded in his report that there was no basis for finding an orthopedic injury AOE/COE. (Jnt. Exh. 4, p. 52.)

After trial, the WCJ found that applicant failed to establish that she sustained injury AOE/COE. The WCJ further found that, absent injury AOE/COE, the remaining issues in the case were moot, and, as a result, ordered that applicant take nothing on her claim. (F&O, p. 2.)

In her Petition, applicant asserts that: (1) the Board acted without or in excess of its powers; (2) the order, decision, or award was procured by fraud; (3) the evidence does not justify the findings of fact; (4) petitioner has discovered new evidence material to her which she could not with reasonable diligence have discovered and produced at the hearing; and (5) the findings of fact do not support the order, decision or award.

DISCUSSION

1. Alleged GERD and hypertension AOE/COE

Section 3600 imposes liability on an employer for workers' compensation benefits only if its employee sustains an injury "arising out of and in the course of employment" (AOE/COE). (Lab. Code, § 3600(a).) When an applicant claims a physical injury, the applicant has the burden of proving industrial causation by showing that the employment was a contributing cause of the injury. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, § 5705.) An applicant must prove by a preponderance of the evidence that an injury occurred AOE/COE. (Lab. Code, §§ 3202.5, 5705.) An applicant need only show that industrial causation was "not zero" to show sufficient contribution from work exposure for the physical injury to be compensable. (*Clark, supra*, at p. 303.)

In this case, the WCJ found that applicant failed to sustain her burden of proving that she sustained injury AOE/COE to her body systems in the form of GERD and hypertension. In doing so, the WCJ rejected the explicit findings to the contrary made by internal medicine QME, James Sherman, M.D., who opined that applicant sustained both injuries AOE/COE. (Jnt. Exh. 1, pp. 9-11; Jnt. Exh. 3, pp. 3-4.) In his Opinion on Decision, the WCJ explained:

The court did not find applicant credible. Defense witnesses[] were credible and their testimony was also persuasive.

[Applicant] did not sustain an injury [AOE/COE] with the internal condition of hypertension and GERD....

James Sherman, M.D., was the panel Qualified Medical Examiner (“QME”) who assessed applicant’s internal condition. He concluded applicant’s hypertension disorder was caused on an industrial basis. (QME report by James Sherman, M.D., dated 6/17/20, Jt. Exh. 1, p. 9-10.) Dr. Sherman also opined applicant’s gastroesophageal reflux disorder industrial. (QME report by James Sherman, M.D., dated 3/27/21, Jt. Exh. 3, p. 3.) However, Dr. Sherman predicated his conclusions on the alleged harassment at work and/or applicant’s supervisor. The doctor stated applicant had significant stress and anxiety in her workplace for the County of Riverside. She was harassed by her supervisor for the past seven years. She has been the victim of verbal abuse much of that time. (QME report of Dr. Sherman dated 6/17/20, Jt. Exh. 1, p. 9.) The court cannot rely on Dr. Sherman’s opinions because the doctor’s assessment was based on unsubstantiated facts; there was no corroborating evidence of harassment or stress at the work place. Based on the testimony presented at trial, Dr. Sherman’s factual history has been undermined, and therefore his conclusions including causation are unsupported.

(F&O, p. 4.)

In his Findings of Fact, the WCJ also found: (1) “The court does not find applicant credible,” (2) “The court finds defense witnesses credible and persuasive,”² and (3) “Dr. James Sherman’s internal medicine conclusions are based on unsupported facts, and the court does not rely on his opinions.” (F&O, p. 1, Findings of Fact Nos. 2-4.)

However, the WCJ’s view that applicant failed to provide a credible, accurate work history did not justify his refusal to rely on Dr. Sherman’s medical opinions as *any* evidence that applicant sustained GERD and hypertension AOE/COE. Instead, as discussed below, the proper standard for evaluating Dr. Sherman’s medical opinions was to determine whether those opinions constituted *substantial evidence* that applicant sustained GERD and/or hypertension AOE/COE.

It is well established that decisions by a WCJ or the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen’s Comp. Appeals Bd. (Lamb)* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd. (Garza)* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].) To constitute substantial evidence “...a medical opinion must be framed in terms of reasonable medical probability, it must not be

² While it was clearly within the WCJ’s discretion to discuss witness credibility in his Opinion on Decision, these statements do not belong in the Findings of Fact, as they do not comport with the general requirement that findings of fact in a workers’ compensation decision are to be made in terms of ultimate fact, which do not include witness credibility. (Lab. Code, §§ 5313, 5953; *Lumberman’s Mutual Casualty Co. v. I.A.C.* (1946) 29 Cal.2d 492, 499 [11 Cal.Comp.Cases 289].) We will therefore remove these statements from the Findings of Fact.

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.” (*Escobedo v. Marshalls, CNA Insurance Co.* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc) (*Escobedo*); *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924] [WCJ determined that neither reporting physician was credible and thus their reports were not substantial evidence].) “Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board’s findings if it is based on surmise, speculation, conjecture, or guess.” (*Hegglin v. Workmen’s Comp. Appeals Bd.* (*Hegglin*) (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) Whether a physician’s opinion constitutes substantial evidence “must be determined by the material facts upon which his opinion was based and by the reasons given for his opinion.” (*Id.* at p. 170.)

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. (Lab. Code, §§ 5701, 5906; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc) (*McDuffie*).) In *McDuffie*, we stated that “[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record...the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete.” (*Id.* at p. 141.)

Here, whether Dr. Sherman’s medical opinions were based upon an accurate, credible description of applicant’s work history goes to whether his opinions constituted substantial evidence that applicant sustained GERD and/or hypertension AOE/COE. (*Lamb, supra*, 11 Cal.3d at p. 281; *Garza, supra*, 3 Cal.3d at pp. 317-319; *Hegglin, supra*, 4 Cal.3d at pp. 169-170; see also *Clark, supra*, 1 Cal.4th at pp. 297-298.) There is consequently a need to further develop the medical record on these issues. (*McDuffie, supra*, 67 Cal.Comp.Cases at pp. 141-142.) Per *McDuffie, supra*, the preferred procedure would be for the parties to return to Dr. Sherman, so that he may reevaluate applicant’s internal condition, review the trial record, and take the WCJ’s concerns regarding applicant’s credibility into account. (*Id.* at p. 142.) If Dr. Sherman cannot cure the need for development of the medical record, the parties should consider selecting an Agreed

Medical Evaluator (AME). (*Ibid.*) If the parties cannot agree to an AME, the WCJ may appoint a physician to evaluate whether applicant sustained GERD and/or hypertension AOE/COE. (*Id.* at pp. 142-143; Lab. Code, § 5701.)

Therefore, we will return this matter to the trial level for further development of the medical record to address the deficiencies outlined by the WCJ regarding applicant's GERD and hypertension claims.

2. *No psyche and orthopedic injuries AOE/COE*

We decline to disturb the WCJ's conclusions that applicant failed to demonstrate that she sustained psyche and orthopedic injuries AOE/COE. First, as noted above, according to psyche QME Allen Lee, M.D., whether applicant's psyche injury was AOE/COE was entirely dependent upon the WCJ's view of applicant's credibility. Dr. Lee explained:

Based on the available evidence for review if the claimant's history is accurate....I would estimate one-third causation of the psychiatric injury to be assigned to nonindustrial factors and two-thirds to be assigned to industrial factors.

* * *

Note that the opinions regarding causation of the psychiatric injury by the mistreatment at work [] are such as long as the claimant's history is accurate. Whether the claimant's history is accurate would be deferred to the trier of fact. If the trier of fact determines that the claimant's history is not accurate and that the mistreatment at work did not occur, then the amount of causation of the psychiatric injury that was assigned to the mistreatment at work...would be nonindustrial.

(Jnt. Exh. 5, pp. 28, 32-33.)

Here, the WCJ found that applicant did not provide a credible or accurate work history, rendering, according to Dr. Lee, applicant's psyche injury to be entirely nonindustrial. (Jnt. Exh. 5, pp. 32-33.) The WCJ also explained why the remaining evidence provided in support of applicant's psyche claim, namely, the reports from applicant's PTP, Nelson Flores, Ph.D., was not substantial evidence, and applicant does not explain, nor do we see, any reason to overturn this finding. (F&O, p. 4; Lab. Code, § 3208.3 [industrial causation threshold for psyche injuries].)

We also decline to overturn the WCJ's finding that applicant did not suffer an orthopedic injury AOE/COE. In so finding, the WCJ adopted the medical opinion of orthopedic QME Emile Wakim, M.D., whose report satisfied the requirements of *Escobedo, supra*, as it was framed in terms of reasonable medical probability, clearly identified the records reviewed, the results of

applicant's physical examination, and the basis for the conclusions reached. (*Escobedo, supra*, 70 Cal.Comp.Cases at p. 621.) Additionally, there is nothing to indicate that Dr. Wakim's medical opinion was based upon speculation or surmise. Accordingly, we see no error in the WCJ's decision to accept Dr. Wakim's medical opinion and to reject applicant's orthopedic injury claim.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the F&O issued by the WCJ on July 19, 2022 is **RESCINDED** and that the following is **SUBSTITUTED** therefore:

FINDINGS OF FACT

1. Applicant, Gina Rosales, while employed during the period of November 1, 1994 to July 20, 2016, as a Health Services Assistant, at Riverside, California, by the County of Riverside, did not sustain injury arising out of and in the course of employment to psyche, head, and back.
2. The medical opinions of Nelson Flores, Ph.D., are not substantial medical evidence.
3. Applicant has an occupational group number of 112.
4. All other issues in the case are deferred.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 7, 2023

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

**GINA ROSALES
HANNA BROPHY**

AH/cs

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