

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

**DANA MCKEE, *Applicant***

**vs.**

**AEROTEK, INC.; ALLEGIS, INC.; ACE AMERICAN INSURANCE COMPANY,  
*Defendants***

**Adjudication Number: ADJ12386691  
Sacramento District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, for the reasons stated in the WCJ's report, which we adopt and incorporate, and discussed below, we will deny reconsideration.

The dissent concludes that this injury is not sudden and extraordinary under Labor Code section 3208.3(d) because applicant's injury as a result of walking off a loading dock was not uncommon, unusual and unexpected. As discussed by the WCJ in his Report, there are cases where an injury from falling was found not to be sudden and extraordinary. (See *Bayanjargal v. Workers' Comp. Appeals Bd.* (2006) 71 Cal.Comp.Cases 1829 (writ den.) [roofer slipping and falling off a roof was not extraordinary because it was an ordinary risk of the job]; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Garcia)* (2012) 204 Cal.App.4th 766 [77 Cal.Comp.Cases 307] [an avocado picker falling from a ladder was not extraordinary]; *Travelers Casualty & Surety Co. v. Workers' Comp. Appeals Bd. (Dreher)* (2016) 246 Cal.App.4th 1101 [81 Cal.Comp.Cases 402] [live-in maintenance supervisor's slip-and-fall on rain-slicked concrete while walking between the complex's buildings was not extraordinary].) In those cases, the employees were engaged in the type of work where an injury from a fall was deemed an ordinary risk of their occupation, e.g., a roofer may fall off the roof or an avocado picker on a ladder may fall off the ladder. These risks were inherent to the employees' work and therefore were not uncommon, unusual or unexpected employment conditions.

In this matter, applicant was employed as a nurse case manager. This position was an office job working at a desk with a computer and phone. Applicant was injured when she fell off a loading dock outside the employer's building while trying to walk to the cafeteria. She testified that being on the loading dock would not be part of any job she would be doing for defendant and that she did not receive any safety training or protocols about walking around the loading dock.

Falling in the manner and place that applicant did cannot be considered an ordinary risk of her job as a nurse case manager. The loading dock was not part of applicant's anticipated work area. Nothing in her administrative-type job duties would necessitate performing work using the loading dock. This was not a routine physical injury or the result of a routine employment event that all employees who work for the same employer in this occupation may experience or expect within the first six months of their employment. (See *Matea v. Workers' Comp. Appeals Bd.* (2006) 144 Cal.App.4th 1435, 1449 [71 Cal.Comp.Cases 1522] [sudden and extraordinary employment conditions are those events "that would naturally be expected to cause psychic disturbances even in diligent and honest employees"].) That the incident occurred due to applicant's inattention introduces an element of blame for how the injury occurred, which is improper in our no-fault system. (See Lab. Code, § 3600(a) [liability for injury AOE/COE shall exist against an employer "without regard to negligence"]; see also *Mathews v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 719, 728-735 [37 Cal.Comp.Cases 124] [outlining the history of the state workers' compensation system and its no-fault provisions].)

We therefore agree with the WCJ's conclusion that applicant's psychiatric injury is not barred by section 3208.3(d) and will deny defendant's Petition.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the Findings of Fact issued by the WCJ on May 5, 2021 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



I DISSENT (see separate dissenting opinion),

/s/ JOSÉ H. RAZO, COMMISSIONER

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

**JULY 22, 2021**

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

**DANA MCKEE  
EASON & TAMBORNINI  
MICHAEL SULLIVAN & ASSOCIATES LLP**

*AI/pc*

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

## DISSENTING OPINION OF COMMISSIONER RAZO

I respectfully dissent. I would grant defendant's Petition, rescind the Findings of Fact and issue a new decision finding that applicant's psychiatric injury was not caused by a sudden and extraordinary employment condition and is consequently barred by Labor Code section 3208.3(d).

Section 3208.3(d) bars compensability for a psychiatric injury where an employee has been employed by the employer for less than six months unless the injury was caused by a sudden and extraordinary employment condition. (Lab. Code, § 3208.3(d).) The parties in this matter do not dispute that applicant was employed by defendant for less than six months at the time of her injury on June 5, 2019. The only dispute is whether applicant's fall off a loading dock was a sudden and extraordinary employment condition. Applicant bears the burden of proving the injury was caused by a sudden and extraordinary employment condition by a preponderance of the evidence. (Lab. Code, §§ 3600(a), 3202.5.)

A "sudden and extraordinary" employment condition means something that is not regular and routine, and is uncommon, unusual and unexpected. (See *Matea v. Workers' Comp. Appeals Bd.* (2006) 144 Cal.App.4th 1435, 1449 [71 Cal.Comp.Cases 1522].) The Court of Appeal in *Matea* noted that the dictionary "defines 'sudden' as 'happening without previous notice or with very brief notice : coming or occurring unexpectedly : not foreseen or prepared for.'" (*Id.* at p. 1448.) The Court further observed that "extraordinary" is defined "as 'going beyond what is usual, regular, common, or customary'; and 'having little or no precedent and usu[ally] totally unexpected.'" (*Id.*)

Whether an injury resulted from a "sudden and extraordinary employment condition" is a primarily fact-driven inquiry. (See *Matea, supra*, 144 Cal.App.4th at p. 1450 ["Each case must be considered on its facts in order to determine whether the alleged psychiatric injury occurred as a result of sudden and extraordinary events that would naturally be expected to cause psychic disturbances even in a diligent and honest employee".]) Therefore, the specific facts of the injury must show that the employment condition causing the injury was uncommon, unusual and unexpected, and did not result from a routine and regular event in order to qualify for the exception in section 3208.3(d).

Applicant's injury occurred when she was walking from a building and fell off a loading dock because she failed to notice that there was a drop off in the walkway. Falling from an obvious ledge due to inattention to one's surroundings is the kind of incident that could reasonably be

expected to occur. (See e.g., *Travelers Casualty & Surety Co. v. Workers' Comp. Appeals Bd. (Dreher)* (2016) 246 Cal.App.4th 1101, 1108 [81 Cal.Comp.Cases 402] [maintenance supervisor's slip-and-fall on rain-slicked concrete was the kind of incident that could reasonably be expected to occur].) This incident cannot be characterized as uncommon, unusual and unexpected such that it is "sudden and extraordinary" as those terms have been defined by case law. Applicant's claim for a psychiatric injury is therefore not compensable per section 3208.3(d).

In conclusion, I dissent.



**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

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

**JULY 22, 2021**

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

**DANA MCKEE  
EASON & TAMBORNINI  
MICHAEL SULLIVAN & ASSOCIATES LLP**

*AI/pc*

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

**REPORT AND RECOMMENDATION ON PETITION FOR  
RECONSIDERATION**

**I  
INTRODUCTION**

Date of Injury:	June 5, 2019
Age on DOI:	59
Occupation:	Nurse case manager
Parts of Body Injured:	Left tibia and right humerus accepted.
Psyche, right shoulder, bilateral knees and bilateral legs claimed.	
Identity of Petitioners:	Defendant
Timeliness:	The petition was timely <sup>1</sup>
Verification:	The petition was verified.
Date of Order:	May 5, 2021
Petitioners Contentions:	Defendant asserts that it was incorrect to find that the mechanism of applicant's injury constituted a sudden and extraordinary event of employment for purposes of determining the claim of psychiatric injury was not barred by Labor Code section 3208.3(d).

**II  
FACTS**

Applicant sustained injury to her left tibia and right humerus while working as a nurse case manager for Aerotek, Inc., on June 5, 2019. This temp agency assigned her to work for Blue Shield on Blue Shield's El Dorado Hills campus. On her second day of work, while on a break and looking for the cafeteria, she stepped off a loading dock and fell several feet to the bottom of the dock.

Applicant claimed injury to several parts of body, including psyche. The psychiatric claim was denied, and applicant was evaluated by Dr. Benjamin Carey acting as a PQME. Dr. Carey found that she had sustained injury to her psyche predominantly caused by the accident. Defendant continued to deny the case because applicant had not been employed by the employer for six months, as generally required by Labor Code<sup>2</sup> section 3208.3(d).

The case went to trial, with applicant's primary contention being that the event qualified as a "sudden and extraordinary employment condition," justifying an exception to the six-month rule.

A Findings of Fact was made on May 5, 2021, finding that the accident was a sudden and extraordinary event and, as such, the claim was not barred by section

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<sup>1</sup> Petitioner initially filed a Petition for Reconsideration on May 24, 2021. It subsequently filed an Amended Petition for Reconsideration on May 28, 2021, apparently deleting some references to evidence outside of the record. Both petitions were timely. It is the Amended Petition's timeliness considered here and the merits of it addressed.

<sup>2</sup> All subsequent statutory references are to the Labor Code.

3208.3(d). It is this finding which is the subject of the Petition for Reconsideration.

### **III** **DISCUSSION**

1. The event was sudden

Defendant has argued that the event was not sudden because "applicant had to walk several steps toward the loading dock" before falling. For purposes of the determination, all of the ordinary steps that applicant had taken that day, up to the one which led to her fall, were not considered. The event happened when applicant tried to take a step on what she thought was solid ground but was instead a void. It was that one step which led to the fall, and the evidence showed that this happened suddenly.

2. A fall off of a loading dock was not a routine event for a nurse case manager

In the case of *Mattea v. Workers' Comp. App. Bd.* (2006) 144 Cal.App.4th 1435, the court of appeal stated:

Gas main explosions and workplace violence are certainly uncommon and usually totally unexpected events; thus, they may be sudden and extraordinary employment conditions. However, we believe that there may also be other "sudden and extraordinary" occurrences or events within the contemplation of section 3208.3, subdivision (d) that would naturally be expected to cause psychic disturbances even in diligent and honest employees. Therefore, if an employee carries his or her burden of showing by a preponderance of the evidence that the event or occurrence that caused the alleged psychiatric injury was something other than a regular and routine employment event or condition, that is, that the event was uncommon, unusual, and occurred unexpectedly, the injury may be compensable even if the employee was employed for less than six months. (*id.*, at 1448-1449.)

For a nurse case manager, a fall off of a loading dock does not appear to be a regular and routine employment event. Applicant testified that she understood the job to be a desk job. No testimony was provided to the effect that the job involved any loading dock work, or that loading dock falls were a regular and routine event for her job position.

While defendant has shown that, in this highly fact-intensive inquiry, sometimes falls are considered regular and routine, these cases are easily distinguished. Maintenance workers whose job it is to walk back and forth on slippery sidewalks do routinely slip and fall on these sidewalks. Dump truck workers

who climb up and down from dump trucks do routinely fall off of these trucks. Office workers bump into each other and fall walking down corridors.

Defendant has argued that there are many accidents occurring within the generic category of "falls," presumably making every fall routine. This provides an overly broad classification of these accidents. Some falls are routine and some are not. In this case, for a nurse case manager, a fall off of a loading dock is not routine.

Finally, defendant argues that the accident would not have occurred if applicant had only been more aware of her surroundings. This may be true but it does not follow that the event therefore was not sudden and extraordinary. Workers' Compensation is a no-fault system. Applicant's injury is compensable even if it could have been avoided.<sup>3</sup>

#### **IV** **RECOMMENDATION**

It is respectfully recommended that defendant's Petition for Reconsideration be denied.

Date: June 17, 2021

Michael Geller

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE

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<sup>3</sup> It is noteworthy that the undisputed evidence from multiple witnesses was that the warning chain intended to keep passersby from wandering into the loading dock was not properly in place. Even if fault were a consideration, one wonders where the fault would have been found.