WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIA ROMERO, *Applicant*

vs.

BLOCK & COMPANY REALTORS dba PORTOLA HOTEL & SPA and TRANSPORTATION INSURANCE COMPANY, administered by CNA CLAIMPLUS, *Defendants*

Adjudication Numbers: ADJ9458289, ADJ10159353
Salinas District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant and defendant each seek reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on March 23, 2021, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her neck, right shoulder, and right upper extremity on November 3, 2013; that applicant's injury claim was not barred by the Labor Code section 3600(a)(10) post-termination defense (ADJ9458289); that the personnel and disciplinary documents offered in evidence by the parties, were irrelevant and excluded from evidence; and that applicant did not sustain a cumulative injury AOE/COE during period from October 1, 2012, through October 1, 2013 (ADJ10159353).

Applicant contends that the trial record contains substantial evidence that she sustained injury to her back, a psychiatric injury, and injury in the form of headaches, in addition to the neck, right shoulder, and right upper extremity injury, as found by the WCJ in case number ADJ9458289.

Defendant contends that the trial record does not contain substantial medical evidence that applicant sustained the specific injury; and that the exclusion of its exhibits 1 – 4, and the denial of its request to re-cross examine applicant at the January 27, 2021 trial, are a denial of its due process rights.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that both Petitions be denied. We did not receive an Answer from applicant nor from defendant.

We have considered the allegations in the Petitions 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 applicant's Petition and we will affirm the F&O except that we will amend the F&O to find that applicant did not sustain a psychiatric injury AOE/COE, and to defer the issue of whether applicant sustained an injury in the form of headaches, (Finding of Fact 1); we will deny defendant's Petition; and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to her head, neck, back, bilateral shoulders, bilateral upper extremities, bilateral wrists, and psyche, while employed by defendant as a housekeeper on November 3, 2013 (ADJ9458289). Applicant also claimed injury to her head, neck, back, bilateral shoulders, bilateral upper extremities, bilateral wrists, and psyche, while employed by defendant as a housekeeper during the period from October 1, 2012, through October 1, 2013 (ADJ10159353). [1] Applicant's employment with defendant was terminated on January 27, 2014.

Applicant received medical treatment from physiatrist Dhanu Panchal, M.D., starting on November 26, 2014. (App. Exh. A4, Dr. Panchal, November 29, 2014.) In his initial report, Dr. Panchal stated:

> Ms. Romero is a 44-year-old woman who stated that she injured her right shoulder on November 3, 2013. She stated that she was cleaning at shoulder level while working as a housecleaner when she started to feel the pain in her right shoulder. She continued to work until the end of the day when her pain increased.
> (App. Exh. A4, p. 1.)

Dr. Panchal later noted that applicant, "[Is] positive for headaches - She has feelings of nervousness, irritability, and anxiety." (App. Exh. A4, p.2.)

[1] The Finding that applicant did not sustain a cumulative injury AOE/COE in case number ADJ10159353 is not disputed and will not be addressed herein.

Pain medicine qualified medical examiner (QME) Paul C. Reynolds, M.D., evaluated applicant on February 20, 2015. Dr. Reynolds examined applicant and took a history, but there were no medical records to be reviewed. He stated that in addition to her orthopedic symptoms, applicant had "intermittent headaches, typically having a headache each and every day…," that her headaches were "stress related", that she was, "obviously experiencing some irritability and sadness secondary to her current condition" and he determined that applicant's condition had not reached maximum medical improvement (MMI). (App. Exh. A11, Dr. Reynolds, February 27, 2015, p. 2 and p. 6.) On October 13, 2015, Dr. Reynolds re-evaluated applicant. After re-examining applicant and reviewing the medical record, Dr. Reynolds determined that applicant's condition had reached MMI status and he concluded:

> As previously stated, the patient sustained a cumulative injury to the cervical spine, the right shoulder, and right upper extremity to include lateral epicondylitis and a first compartment de Quervain's tenosynovitis.
> (App. Exh. A9, Dr. Reynolds, October 21, 2015, p. 8.)

Dr. Reynolds subsequently reviewed applicant's September 23, 2015 deposition testimony and in his supplemental report he stated:

> The deposition testimony seems to indicate a specific injury date of November 3, 2013. ¶ … This testimony completely contradicts the history given by the injured worker to me as the QME on two different days of evaluation 02/20/2015 and 10/31/2015.
> (App. Exh. A8, Dr. Reynolds, January 5, 2016, pp. 1 -2.)

Psychiatric QME Alberto G. Lopez, M.D., evaluated applicant on June 2, 2016. Dr. Lopez took a history, performed various psychological tests, and reviewed the medical record. He concluded:

> In all medical probability, the examinee's depression is multifactorial. She was sad about her miscarriage. However, there was no persistent depression following this event. Rather she developed it following the November 2013 event, particularly when she was terminated in January 2014. As per the claimant's history, her depression developed primarily (over 50%) from [the] fact that she was terminated January 2014. ¶ However, at the same time, she has developed chronic pain, which is clearly industrial, as per the evaluation for Dr. Reynolds. She clearly requires psychological and psychiatric treatment on an industrial basis (nonindustrial as well).
> (App. Exh. A3, Dr. Lopez, June 2, 2016, p. 15.)

In his January 3, 2017 supplemental report, Dr. Lopez stated:

> As far as the examinee's percentage of causation of injury, I would assign the primary causation approximately 60% to the termination, and 30% to the injury and chronic pain, and 10% to other nonindustrial factors.
> (App. Exh. A2, Dr. Lopez, January 3, 2017, p. 2.)

On October 17, 2017, pain medicine QME William G. Brose, M.D., evaluated applicant regarding the specific injury claim and the cumulative injury claim. Dr. Brose took a history and reviewed the medical record, but the physical examination was limited due to a scheduling conflict applicant had, so a re-evaluation was set for December 5, 2017. (Def. Exh. D9, Dr. Brose, October 17, 2017.) After completing applicant's physical exam, Dr. Brose determined that applicant's condition had not reach MMI status, and he diagnosed:

> 1. Chronic right neck, shoulder, upper arm, forearm, elbow, wrist, and hand pain,
>
> 2. Possible diffuse myofascial syndrome upper and middle trapezius, biceps, triceps, deltoid, and flexor extensor muscles of the forearm,
>
> 3. Somatoform pain disorder,
>
> 4. Adjustment disorder,
>
> 5. Depression.
> (Def. Exh. D8, Dr. Brose, December 5, 2017, p. 5.)

After reviewing additional medical records, Dr. Brose addressed the issue of injury AOE/COE as follows:

> [C]ombined with the patient's right hand symptoms consistent with carpal tunnel seem present in both presentations. The characterization of a carpal tunnel syndrome by the RotaCare physicians and the presentation of the patient to me on my initial and subsequent examination with right hand numbness symptomatology are consistent and would be potentially arising from a cumulative trauma beginning as early as some two to three weeks before given the chronology of the symptoms as described. This would lead me to opine that the CT period of October 1, 2012, to October 1, 2013, is overly broad and the CT would likely be during the period of exposure October 1, 2013, to November 6, 2013, based upon the symptom complex and could conceivably extend as far back as the transition from the patient's work at Best Western to the Portola Hotels …
> (App. Exh. A13, Dr. Brose, November 13, 2018, p. 4.)

The parties proceeded to trial on November 28, 2018. The stipulations and issues were read into the record; the issues included injury AOE/COE and the post-termination defense, and the matter was continued. (Minutes of Hearing and Summary of Evidence (MOH/SOE), November 28, 2018.) Applicant testified at the January 23, 2019 trial. The WCJ's summary of applicant's testimony includes:

> Her injury was on 11/3/13. She was cleaning crystals in the restroom, and she discovered she could not move her head or her right arm in her usual way. This injury also affected her back and the nape of her neck. She had three to four rooms left to finish cleaning that day. ¶ She reported her injury right away to Carmen, who was her immediate supervisor on that day. … ¶ In addition to Carmen, she also reported the injury to Julia, who was the manager's assistant. …¶ Applicant left work at the end of the day, and then she saw a doctor on 11/6/13. … ¶ … When she continued working after her initial doctor's appointment, her schedule remained the same. She was cleaning the same number of rooms and working the same number of hours. In fact, she continued working until they fired her. Her last day of work was on 1/27/14. ¶ … Up until the termination, she was doing her regular job duties and was physically able to perform all of her job duties, but only while under medication. She missed one day of work, but then she went back to work and was able to handle the work because the workload was low during that time period, and she was able to rest. (MOH/SOE, January 23, 2019, pp. 4 – 7.)

Defendant was allowed by the WCJ to depose Dr. Brose on March 7, 2019, and was told to file the deposition transcript no later than April 8, 2019. (MOH/SOE, January 23, 2019, p. 1.) At the deposition, Dr. Brose reiterated his opinion that applicant sustained a cumulative injury while working for Portola Hotel and she did not sustain a cumulative injury while employed by Best Western. (Board Exh**.** W1, Dr. Brose, March 7, 2019, deposition transcript, pp. 37 – 38.)

The WCJ issued Findings and Orders on April 19, 2019, and issued an Order Vacating Findings and Orders on May 22, 2019. At the June 24, 2019 Status Conference, the WCJ ordered the parties to request a supplemental report from Dr. Brose to clarify his opinions regarding the cumulative injury claim. (See MOH, June 24, 2019, p. 2.)

Dr. Brose submitted a report addressing the questions asked by the WCJ. (App. Exh. A17, Dr. Brose, August 20, 2019.) The doctor's response to the questions included the following:

> Returning then to the questions posed by Ms. Roberts in her letter, I note that given the limited information available I still find the cumulative trauma period of three weeks dating to the onset of the patient's evaluation at the RotaCare clinic as the period of cumulative trauma October 1, 2012, to October 12 2012

> [typographic/clerical error]. I would describe the body parts to include the patient's right arm and neck including the shoulder.
> (App. Exh. A17, p. 3)
> It is in this way that I believe that the patient's three week cumulative trauma as described occurred and from this pathophysiology that I draw upon to characterize the development of the soft tissue changing resulting in the myofascial pain syndrome with adjacent tendinitis and tenosynovitis. ¶ I believe that the timeframe established is adequate to help characterize a cumulative trauma as described and without further detailed medical records do not feel that there is yet further information that would help make my reporting on this matter more accurate.
> (App. Exh. A17, p. 5.)

At the December 2, 2019 Mandatory Settlement Conference the matter was ordered taken off calendar to allow the parties to take Dr. Brose's deposition, limited in scope to the questions previously asked by the WCJ. (See MOH, December 2, 2019; MOH, June 24, 2019, p. 2.)

At the deposition, Dr. Brose testified that he continued to believe applicant sustained a cumulative injury during the period from October 1, 2013, through October 12, 2013, to her neck, right shoulder and right arm. (App. Exh. 19, Dr. Brose, June 16, 2020, deposition transcript, p. 12, p. 16.) Dr. Brose also explained his opinion that one month (or thirteen days) was a sufficient amount of time for applicant's cumulative injury to have occurred. (App. Exh. 19, pp. 16 -17.)

On January 27, 2021, the parties again proceeded to trial. Defense counsel was not allowed to call applicant as a witness, and based thereon counsel objected to the trial going forward. The WCJ stated that trial would proceed, "on the issues previously stated and stated today…" (MOH/SOE, January 27, 2021, p. 2.) Additional exhibits were admitted for identification (it appears App. Exhs. 17 and 19 were subsequently received into evidence)[2] and the matter was ordered submitted for decision as of February 10, 2021. (MOH/SOE, January 27, 2021, p. 1.)

DISCUSSION

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].)

[2] Applicant's Exhibit 18 was a copy of the November 13, 2018 report from Dr. Brose that was previously submitted/accepted into evidence as Applicant's Exhibit. 13.

A psychiatric evaluator must first determine the threshold issue of whether an injured worker sustained a psychiatric injury. Once a psychiatric injury has been found, the doctor must then address the issue of whether actual events of employment were the predominate (greater than 50%) cause of the psychiatric condition. (Lab. Code, §3208.3 (b).)[3] The doctor must explain what portion of the permanent disability is caused by the industrial injury and what portion is attributable to other industrial injuries or to nonindustrial factors. (Lab. Code, §§ 4663, 4664; *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 [72 Cal.Comp.Cases 565].)

Our review of the record indicates that QME Dr. Lopez was the only reporting physician that addressed the Labor Code section 3208.3(b) criteria for a compensable psychiatric injury. The relevant and considered opinion of one physician may constitute substantial evidence. (See *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, [35 Cal.Comp.Cases 525].) In his initial report, Dr. Lopez stated that applicant developed depression following the November 2013 event but, "… her depression developed primarily (over 50%) from [the] fact that she was terminated January 2014." App. Exh. A3, p. 15.) In his supplemental report, Dr. Lopez stated:

> As far as the examinee's percentage of causation of injury, I would assign the primary causation approximately 60% to the termination, and 30% to the injury and chronic pain, and 10% to other nonindustrial factors.
> (App. Exh. A2, p. 2.)

As noted above, applicant's employment with defendant was terminated on January 27, 2014. The WCJ found that applicant sustained injury AOE/COE to her neck, right shoulder, and right upper extremity on November 3, 2013. Based on the opinions of Dr. Lopez, the November 3, 2013 injury was not the predominant cause of applicant's psychiatric condition. Further, if the WCJ had found that applicant sustained the cumulative injury, the end period for the claimed cumulative injury was October 1, 2013. Again, if there had been a cumulative injury, it would not have been the predominant cause of applicant's psychiatric condition. There is no medical evidence in the trial record that is inconsistent with the reports from Dr. Lopez and we find his reports to be substantial evidence that the November 3, 2013 industrial injury is not the predominant cause of any psychiatric injury. The WCJ did not make a specific finding that applicant did not sustain a psychiatric injury and an issue raised at trial and not ruled upon is

[3] Labor Code § 3208.3(b)(1) states: In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury. (Lab. Code, § 3208.3.)

deemed decided "adversely as to the party in whose interest such issue was raised." (Lab. Code, § 5815.) However, under the circumstances of this matter it is appropriate that we amend the F&O to find that applicant did not sustain injury AOE/COE to her psyche.

The WCJ also did not make a finding as to the issue of applicant's headaches. However, in his Report, the WCJ stated:

> Dr. Reynolds said that Applicant's headaches were stress-related or due to tension arising from her orthopedic complaints ([Ex. A-11], pp. 6-7 and Ex. A-9, 10/21/15 report, p. 8), but I discounted his opinions regarding the cause of the headaches, as a subject more appropriately to be addressed by a neurologist. (Report, p. 4.)

In addition to Dr. Reynolds stating that applicant "typically" had headaches every day, treating physician Dr. Panchal noted that applicant was "positive for headaches." (App. Exh. A4, p.2.) Clearly, the trial record contains evidence that applicant experienced headaches on a regular basis subsequent to her November 3, 2013 injury. The trial record does not contain evidence indicating that the injury was or was not a causative factor as to applicant's headaches. It appears that the WCJ is correct that the issue of applicant's headaches should be addressed by a neurologist. The record as it now stands is not adequate to make a final determination as to the threshold issue of injury AOE/COE pertaining to applicant's headaches. The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *San Bernardino Community Hospital* v. *Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986].) Upon return of this matter, we recommend that the parties develop the record so that it contains substantial evidence to support a determination of the issues pertaining to applicant's headaches.

Regarding defendant's Petition, in the Report, the WCJ explained:

> Applicant credibly testified at trial that, "Her injury was on 11/3/13…cleaning crystals in the restroom, and she discovered she could not move her head or her right arm in her usual way." She reported her injury "right away" to her supervisor, Carmen, and to the manager's assistant, Julia (MOH/SOE, 1/23/19, p. 4). Defendant did not present any rebuttal testimony from employer witnesses. ¶ When seen initially by QME Brose, Applicant gave him a history of injury consistent with this, telling him, "On 10/01/2013…she was cleaning a sliding glass door in the bathroom very quickly and felt a very strong pain in her right

> arm and neck…and could not move her head…she really felt the pain by 11/3/13." (Brose report, 10/17/17, Ex. D-9, p. 2) When Applicant first saw Dr. Panchal, she told him, "…she injured her right shoulder on 11/3/2013…she was cleaning at shoulder level while working as a housecleaner when she started to feel the pain in her right shoulder." (Report of 11/26/14, Ex. A-5) When she saw Dr. Lopez, she insisted her injury was a specific injury on 11/3/13 to her right upper extremity cleaning a bathroom glass door. "She is well aware of the fact that Dr. Reynolds stated that there was cumulative trauma, but in reality it occurred that day. There seems to have been some misunderstanding." At the same time that Defendant has described reports from Dr. Brose as not qualifying as substantial evidence, Defendant appears to rely on statements Dr. Brose has made about Applicant's lack of credibility. Having heard Applicant's testimony and noting her consistent history to several reporting doctors, including Dr. Brose, I disagree with Dr. Brose's opinion that Applicant's history was unreliable. The evidence cited above very much supports a finding of a specific injury on or about 11/3/13.
> (Report pp. 4 – 5.)

It is well established that a WCJ's opinions regarding witness credibility are entitled to great weight. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500, 505]; *Sheffield Medical Group v. Workers' Comp. Appeals Bd. (Perez)* (1999) 70 Cal.App.4th 868 [64 Cal.Comp.Cases 358].) Here, the WCJ explained his opinion pertaining to applicant's credibility, with his reasoning and analysis thereon. We accept his determination regarding applicant's credibility and we do not disturb his decision that applicant sustained injury AOE/COE on November 3, 2013.[4]

Next, we agree with defendant that in workers' compensation proceedings, a party has a due process right to call and examine witnesses. (Gov. Code, § 11513; see *Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) It must be noted that at the January 23, 2019 trial, applicant was called as a witness to testify on her own behalf, and then she was cross-examined by defense counsel. The WCJ's Summary of Evidence contains approximately four pages of applicant's cross-examination testimony. (MOH/SOE, January 23, 2019, pp. 5 – 8, p. 9.) Defendant argues that not allowing defense counsel to re-call applicant to testify at the January 27, 2021 trial was a denial of its due process rights. As noted by the WCJ in his report, neither at the trial nor in its Petition did defendant make a showing of new evidence being discovered, or new issues being identified that would warrant calling

[4] We also remind counsel that arguments made in trial briefs are arguments, not facts.

applicant to testify at the January 27, 2021 trial. Thus, defendant made no showing that it was denied its due process rights.

Finally, regarding the post-termination defense exhibits not being accepted into evidence, we first note there is no dispute that applicant's employment with defendant was terminated on January 27, 2014. At the January 23, 2019 trial applicant testified that on November 3, 2013, the day of her injury, she told Carmen, her supervisor, and Julia, the manager's assistant, about her injury. As we stated earlier, we accept the WCJ's determination regarding applicant's credibility. Also, there was no testimony, or other evidence, submitted at trial that was inconsistent with applicant's testimony that she told her supervisor and the manager's assistant about the injury. Thus, we agree with the WCJ that the post-termination defense is not applicable and in turn, the exhibits are not relevant. It is also important to note that documents not signed by the "Employee," "Manager," "Witness," and/or "Human Resources" as well as those submitted with no foundation or explanation, are unlikely to be deemed substantial evidence.

Accordingly, we grant applicant's Petition and we affirm the F&O except that we amend the F&O to find that applicant did not sustain a psychiatric injury AOE/COE, and to defer the issue of whether applicant sustained an injury in the form of headaches, (Finding of Fact 1); we deny defendant's Petition; and we return the matter to the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Order issued by the WCJ on March 23, 2021, is **DENIED**.

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued by the WCJ on March 23, 2021, is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 23, 2021 Findings and Order is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant, Maria Romero, sustained injury on or about 11/3/13, as alleged in ADJ9458289, to her neck, right shoulder and right upper extremity, arising out of and occurring in the course of her employment (AOE/COE) as a housekeeper, Occupational Group 340, by Block & Company Realtors, dba Portola Hotel & Spa; applicant did not sustain a psychiatric injury AOE/COE; all issues regarding the claim of injury to applicant's head in the form of headaches are deferred.

* * *

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 11, 2021

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

MARIA ROMERO
RATTO LAW FIRM
STANDER REUBENS THOMAS KINSEY

TLH/*pc*

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