

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

**CECILIA HERNANDEZ DE MORENO, *Applicant***

**AMY'S KITCHEN; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,  
*Defendants***

**Adjudication Number: ADJ10586674  
San Francisco District Office**

**OPINION AND ORDER  
DENYING PETITION FOR RECONSIDERATION**

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award and Order of June 29, 2022, wherein it was found that while employed on July 31, 2015 as a janitor, applicant sustained industrial injury to her neck, back, and right shoulder causing permanent disability of 29% and the need for further medical treatment.

Applicant's Petition is not a model of clarity. It appears that the applicant is contending that the WCJ erred in not including a January 4, 2021 report from panel qualified medical evaluator orthopedist Patrick J. McGahan, M.D. as well as several other unspecified exhibits into the medical record. Applicant does not explain the relevance of these exhibits to any error in the WCJ's findings.

We will deny the applicant's Petition.

Although applicant's Petition is difficult to decipher, it appears that she is asking for the record to be further developed with a report from a panel qualified medical evaluator in psychology or psychiatry.

We note that applicant's initial Application for Adjudication of Claim and the April 6, 2017 Amended Application for Adjudication of Claim make no allegation of injury to the psyche. It appears that applicant's first claim of injury to the psyche appears on the March 2, 2020 Pretrial Conference Statement completed at the Mandatory Settlement Conference. In the recitation of issues to be determined, injury to "999 unclassified including psyche" is included. However, applicant did not request a QME panel in psyche. At the March 2, 2020 mandatory settlement

conference, discovery was closed other than a further supplemental report or deposition from orthopedist Dr. McGahan.<sup>1</sup>

Long after discovery closed at the March 2, 2020 mandatory settlement conference, other than the limited development allowed (Lab. Code, § 5502, subd. (d)(3)), applicant failed to request a psyche panel at a second February 8, 2021 mandatory settlement conference, after trial, or at the January 25, 2022 or June 20, 2022 trial hearings. On June 20, 2022, the matter was submitted. Eight days after submission of the matter, and only a day before the issuance of the WCJ's decision, for the first time, in a Petition to Augment the Record, applicant requested a psyche QME panel. Applicant did not explain in the Petition to Augment the Record or in the Petition for Reconsideration why she had not previously asked for an order for a QME panel in psyche. Indeed, applicant states in her Petition that Dr. McGahan recommended a psyche QME panel in a January 4, 2021 supplemental report. (This document is not in the evidentiary record.) If Dr. McGahan in fact recommended a psyche QME panel, applicant would have been able to procure such a panel without needing an order from the WCJ. Qualified Medical Evaluator Regulation 35.5(d) states:

At the evaluator's earliest opportunity and no later than the date the report is served, the evaluator shall advise the parties in writing of any disputed medical issues outside of the evaluator's scope of practice and area of clinical competency in order that the parties may initiate the process for obtaining an additional evaluation pursuant to section 4062.1 or 4062.2 of the Labor Code and these regulations in another specialty. In the case of an Agreed Panel QME or a panel QME, the evaluator shall send a copy of the written notification provided to the parties to the Medical Director at the same time. However, only a party's request for an additional panel, with the evaluator's written notice under this section attached, or an order by a Workers' Compensation Administrative Law Judge, will be acted upon by the Medical Director to issue a new QME panel in another specialty in the claim.

(Cal. Code Regs., tit. 8, § 35.5, subd. (d).)

Applicant does not explain why she did not seek a psych QME panel from the Medical Director after the issuance of Dr. McGahan's report.

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<sup>1</sup> Applicant sought removal of the MSC WCJ's setting of this case for trial, but the Petition for Removal does not make any mention of the need for discovery on any claim for injury to the psyche. In any case, the Petition for Reconsideration/Removal was denied. We note that our May 20, 2020 Order Denying Reconsideration/Removal was signed by former Commissioner Deidra E. Lowe and Commissioner Craig Snellings. Since the issuance of the May 20, 2020 order, Commissioner Lowe has left the Appeals Board and Commissioner Snellings was not available to participate in the determination of the instant Petition. They have been replaced on the instant panel with Commissioner Marguerite Sweeney and Commissioner José H. Razo.

In any case, we note that any psychiatric permanent disability in this matter would be subject to Labor Code section 4660.1(c) for this 2015 injury, and defendant has already paid the maximum 104-weeks (Lab. Code sec. 4656, subd. (c)(2)) of temporary disability indemnity (See Benefit Printout, Exhibit D). Here, the decision contains a general award of all medical treatment reasonably required to cure or relieve the applicant from the effects of the medical injury. When there is such an award of medical treatment, the WCAB may enforce an award of medical treatment at any time, even for a condition that was not included in the original award. (*Pirelli Armstrong Tire Co. v. Workers' Comp. Appeals Bd. (Van Zant)* 68 Cal.Comp.Cases 970 [writ den.]; *San Juan School Dist. v. Workers' Comp. Appeals Bd. (Flannery)* (1999) 64 Cal.Comp.Cases 1181 [writ den.] )

Applicant has not explained diligence or good cause to set aside the WCJ's decision, nor why she has been aggrieved, given that she can still make a showing of a need for psyche treatment on an industrial basis. We take no position on that matter.

With regard to any other documents or issues, applicant has not specifically identified any other exhibits to be considered in this matter or explained their relevance.

Finally, applicant's counsel complains that the WCJ's decision does not contain a specified sum of attorney's fees. The Award states, "Attorney's fees are awarded to applicant attorney in the sum of 15% of the permanent disability awarded in this case, the exact amount to be adjusted by the parties, with WCAB jurisdiction reserved in the event the parties do not resolve the issue." Applicant's counsel is correct that the better practice is to specify an exact sum. Without making a finding on the matter, given that the last payment of temporary disability indemnity was on February 27, 2019, and the 124.75 weeks of permanent disability indemnity have thus fully accrued (Lab. Code, § 4650, subd. (b)(1)), applicant's permanent disability indemnity award is \$36,177.50<sup>2</sup>, and 15 percent of this amount is \$5,426.63.

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<sup>2</sup> The parties stipulated to a permanent disability indemnity rate of \$290 per week. (Minutes of Hearing and Summary of Evidence of January 25, 2022 trial at p. 2.)

For the foregoing reasons,

**IT IS ORDERED** that Applicant's Petition for Reconsideration of the Findings and Award and Order of June 29, 2022 is hereby **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**



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

**August 30, 2022**

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

**CECILIA HERNANDEZ DE MORENO  
KENNETH D. MARTINSON  
MULLEN & FILIPPI**

**DW/oo**

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