

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

KELSI FITZGERALD, *Applicant*

vs.

**RABOBANK - OPERATIONS CENTER; SOMPO AMERICA FIRE & MARINE
INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ13114280
Santa Barbara District Office**

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

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of April 6, 2023, wherein it was found that while employed during a cumulative period ending January 1, 2019, applicant sustained industrial injury to her upper extremities and respiratory system in the forms of rheumatoid arthritis and sarcoidosis causing temporary disability "in an amount to be adjusted by the parties or requiring further development of the record." It was also found that "whether or not applicant requires future medical care requires development of the record...."

Defendant contends that the WCJ erred in finding industrial injury, arguing that the finding of industrial injury was not based on substantial medical evidence. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will grant reconsideration, rescind the WCJ's decision, and return this matter for further development of the record and decision on the issue of industrial injury.

Applicant was evaluated by qualified medical evaluator rheumatologist Melvin C. Britton, M.D. Dr. Britton took a history of extensive long-standing non-industrial issues beginning in applicant's childhood. Dr. Britton noted that applicant had been diagnosed with rheumatoid arthritis and sarcoidosis prior to commencing her employment at Rabobank. Dr. Britton reported that applicant's employment was both physically and mentally arduous, writing in a December 10, 2020 report:

She was working for Rabobank and her work was arduous for a number of reasons. Physically, it was quite demanding because much of the work that she did had to be done on Eastern Standard Time. She awakened at 5:00am and started working in money transfers by 6:00am. She was using her arms and hands continually for data entry and other valuable tasks. She found the work extremely stressful and the goals which were set by her superiors were quite extensive and intense. She had to work very quickly but had to be extremely accurate in her data entries, otherwise her material would be returned.

During her time at Rabobank, she was subjected to constant harassment and criticism by her supervisor who was very hostile to her and to others. She began having increased pain and sought to have modification for her work. She found that standing with some support was slightly helpful but she continued to have a great deal of back pain. Then, she began to have tachycardias and had episodes of shortness of breath. On several occasions, she fainted at work, one time striking her head when she fell. During this time, her supervisor was very unpleasant to her. She ultimately complained about him, and he was ultimately fired. However, she was having so many symptoms and the job was so difficult, that she quit her job at Rabobank.

(December 10, 2020 report at p. 3.)

Despite the fact that applicant had long-standing non-industrial sarcoidosis and rheumatoid arthritis, Dr. Britton apparently opined that mental stress stemming from applicant's employment exacerbated applicant's condition:

Sarcoidosis is not mentioned in the Guides to the Evaluation of Permanent Impairment, Fifth Edition, nor is Rheumatoid Arthritis, since these are clearly not industrial injuries. I feel that this lady is totally disabled at this time from any gainful employment. I also feel that her decision to leave her Rabobank job was influenced by the abuse and harassment which she received while she was at the job. I also feel that this abuse and harassment contributed to the pain which she felt in her affected joints. Dr. Robert Barth, a psychologist and expert in the pathogenesis of fibromyalgia has written that in cases of fibromyalgia and chronic regional pain syndrome (and both of these are certainly suggested by this lady's history) that the ultimate etiology is psychosocial.

I feel that there was cumulative trauma in addition to her underlying Sarcoidosis and Rheumatoid Arthritis that contributed to her inability to continue to work.

(December 10, 2020 report at p. 13.)

Dr. Britton testified at his October 13, 2021 deposition, "[H]er illness is certainly not entirely industrial. But I thought there was an industrial component to it, and that the problems which she had at work aggravated it. And that was my interpretation and opinion. Another

physician might come to another conclusion.” (October 13, 2021 deposition at p. 16.) Later in the deposition, Dr. Britton testified, “So we don’t know what there is and we don’t know what aggravates it, we don’t know what causes it. And, to a large extent, you know, it’s under the control of many things. And we know that all these physical things we have are influenced by psychological factors, and we’re just working them all out right now. And when you have a disease that has as many unknowns in it, the sarcoid, why, then you have to sort of come up with your own idea. And this is my own idea. Another person might have another idea.” (October 13, 2021 deposition at p. 18.)

All findings of the WCAB must be based on substantial evidence. (*Le Vesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620 [Appeals Bd. en banc].) As the Court of Appeal wrote in *E.L. Yeager Construction v. Workers’ Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687], “In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. [Citation.] Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. [Citation.] Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician’s opinion, not merely his or her conclusions. [Citation.]”

The applicant for workers’ compensation benefits has the burden of proving industrial causation. (*LaTourette v. Workers’ Comp. Appeals Bd.* (1998) 17 Cal.App.4th 644, 650 [63 Cal.Comp.Cases 253] citing *McAllister v. Workmen’s Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) However, in order to prove industrial causation, the applicant need only show that industrial factors were a contributing cause of the injury. (*South Coast Framing, Inc. v. Workers’ Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 299 [80 Cal. Comp. Cases 489].)

The current reporting and testimony of Dr. Britton does not constitute substantial medical evidence sufficient to satisfy applicant’s burden of proof. Dr. Britton’s conclusions are stated after “I feel...” and are not stated based on reasonable medical probability. Additionally, Dr. Britton does not sufficiently explain how mental stress contributed to a need for medical treatment or disability. In order to constitute substantial medical evidence, Dr. Britton must explain why it is medically probable that applicant’s mental stress contributed to a need for medical treatment or

disability. While in his report, Dr. Britton states, “Dr. Robert Barth, a psychologist and expert in the pathogenesis of fibromyalgia, has written that in cases of fibromyalgia and chronic regional pain syndrome ... that the ultimate etiology is psychosocial,” Dr. Britton should explain in more detail how this or any other study ties to the applicant’s specific condition, and should explain how any of these studies provide supporting evidence that it is medically probable that industrial factors are a contributing cause of a need for medical treatment or disability.

The WCJ and the Appeals Board have a duty to further develop the record when there is a complete absence of (*Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) medical evidence on an issue. The WCAB has a constitutional mandate to ensure “substantial justice in all cases.” (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) Since, in accordance with that mandate, “it is well established that the WCJ or the Board may not leave undeveloped matters” within its acquired specialized knowledge (*Id.* at p. 404), pursuant to Labor Code section 5906, we will return this matter to the trial level for further development of the record and decision regarding whether industrial factors were a contributing cause of disability or the need for medical treatment. We express no opinion regarding the ultimate resolution of this or any other mater.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of April 6, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of April 6, 2023 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 23, 2023

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

**KELSI FITZGERALD
GHITTERMAN, GHITTERMAN & FELD
GOLDMAN, MAGDALIN & KRIKES
SILBERMAN AND VAN OST**

DW/oo

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