WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ZENAIDA AVILES, *Applicant*

vs.

PIH HEALTH HOSPITAL, permissibly self-insured; administered by ATHENS ADMINISTRATORS., *Defendants*

Adjudication Numbers: ADJ10908652, ADJ10908914
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the "Joint Findings and Award and Opinion on Decision" (F&A) issued on June 4, 2025, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant did not sustain industrial injury to her psyche during the cumulative period ending on May 25, 2017. The WCJ further found that applicant sustained industrial injury to the psyche in her specific injury case but barred any permanent disability from such injury pursuant to Labor Code[1] section 4660.1.

Applicant contends that the medical record constitutes substantial medical evidence to establish industrial injury to her psyche on a cumulative basis and that the WCJ erred in denying compensability of psychiatric permanent disability because applicant's injury has resulted in catastrophic consequences.

We have not received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of the WCJ's Report. Based on our review of the record we will grant applicant's Petition for

[1] All future references are to the Labor Code unless noted.

Reconsideration and as our Decision After Reconsideration, we will rescind the June 4, 2025 F&A and return this matter to the trial level for further proceedings.

FACTS

In ADJ10908652, applicant claims to have sustained an industrial injury to her psyche while working as a material processing tech during the cumulative period ending on May 25, 2017. (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 27, 2025, p. 2, lines 17-20.)

In ADJ10908914, applicant sustained an admitted industrial injury to her lumbar spine, right leg, right foot, and claims to have sustained industrial injury to her psyche[2] on September 22, 2015. (*Id*. at p. 3, lines 20-23.)

Applicant was seen by orthopedic qualified medical evaluator (QME) Humberto Galleno, M.D., who authored six reports in evidence. (Defendant's Exhibits A through F.) Dr. Galleno took a history of injury as follows:

> Patient states that on 09/22/15, while pushing two IV pumps each weighing approximately 25 pounds at a fast pace felt pain in her lower back. She did not fall. She continued to work with increasing pain to her lower back. The following day developed increasing pain to her lower back radiating to her right leg. She was not able to sleep. She reported the injury to her supervisor. On 09/23/15 she was referred to an industrial clinic. X-rays of the lumbar spine were taken and were reported to be unremarkable. She was diagnosed with a lumbar sprain. She was prescribed ibuprofen and Robaxin. She continued to work on modified duty. She was treated with physical. therapy treatments. On 12/23/15 she was referred for orthopedic consultation to Dr. Shah and was referred for lumbar spine MRI which was done on 01/15/16 which she claims showed a tear and a meniscal disc bulge. She continued to work on modified duty. She claims she was referred for two lumbar epidural injections which were not helpful. She was later referred to Dr. Alex Etemad. Prescribed pain medication and also ibuprofen. She has not returned to work since 06/16/17. She denies any additional injury or trauma to her lumbosacral spine. The lumbar spine has remained essentially unchanged over the past three months. She claims she was harassed by her supervisor and developed anxiety and depression. She was referred to Dr. Maloff for psychiatric treatment and has been prescribed Lorazepam and Lexapro.

(Defendant's Exhibit A, Report of Humberto Galleno, M.D., June 28, 2018, p. 2.)

[2] Although the minutes of hearing do not contain an allegation of injury to the psyche in applicant's specific injury case, this appears to be an error. Applicant alleged injury to the psyche in her application for adjudication. The parties litigated the issue including submitting the issue to the QME. Accordingly, the WCJ decided the issue with the implicit understanding that it was raised.

Applicant's MRI to the spine reported mild degenerative spondylosis and a four-millimeter disc bulge and posterior annular tear with mild neural foraminal stenosis in two levels. (*Id*. at p. 10.)

Applicant's orthopedic impairment was found 100% industrial due to the specific injury. (*Id*. at p. 25.)

Applicant's condition deteriorated and on November 9, 2020, applicant underwent a fusion of her spine. (Defendant's Exhibit F, Report of Humberto Galleno, M.D., February 5, 2024, p. 18.)

On August 20, 2022, applicant was walking at home with a cane when her right leg gave way causing her to fall and injure the right ankle. (*Id*. at p. 2.)

Applicant was seen by psychiatric qualified medical evaluator (QME) Perry Maloff, M.D., who authored four reports in evidence. (Defendant's Exhibits G through J.) Dr. Maloff took a history of injury to the psyche following applicant's specific injury which included pain flowing from her specific injury. (Defendant's Exhibit G, Report of Perry Maloff, M.D., November 17, 2017, p. 3.) Applicant further reported that her employer assigned her to work full duty when applicant had modified work restrictions. (*Id*. at p. 4.) Applicant further reported that her supervisor was upset at the number of breaks applicant required and limited her breaks to two 15-minute breaks and lunch. (*Ibid*.) There was also an issue over whether applicant was permitted to close the door to her workstation. (*Id*. at pp. 4-5.) Applicant perceived that her supervisor had an attitude while talking with her. (*Id*. at p. 5.) Applicant further disputed with her supervisor whether she properly notified him of time off. (*Ibid*.)

Applicant was diagnosed with major depression, single episode, moderate. (*Id*. at p. 14.) Dr. Maloff assigned *causation of injury* as 75% due to the specific injury and 25% due to applicant's conflict with her supervisor following the injury. (Defendant's Exhibit H, Report of Perry Maloff, M.D., October 17, 2018, p. 9.)

Dr. Maloff reevaluated applicant in 2020 and updated her diagnosis to an adjustment disorder with anxiety and depression. (Defendant's Exhibit I, Report of Perry Maloff, M.D., June 2, 2020, p. 22.) Dr. Maloff opined on causation as follows:

> This examiner has expressed the opinion the claimant did not suffer a continuous trauma psychiatric injury June 1, 2014 - May 25, 2017. I have concluded Ms. Aviles did suffer a continuous trauma injury beginning September 22, 2015, through the time she last worked at Presbyterian Intercommunity Hospital in October 2017. The predominant cause of the claimant's psychiatric condition is

> due to orthopedic injury sustained in the specific injury September 22, 2015. Contributing factors included a continuous trauma circumstance September 22, 2015 - October 2017 as a consequence of alleged continued harassment from manager, William. Whether or not such harassment was an actual event of employment is left to the trier of fact.

(*Id*. at p. 28.)

Dr. Maloff initially described causation of disability without apportioning between applicant's two injuries as follows:

> There is no evidence the claimant ever suffered from any psychiatric condition which caused her any difficulties competing in the open labor market prior to September 22, 2015. One hundred percent of the permanent psychiatric disability described by this examiner is due to industrial injury. There is no evidence the claimant suffered from any psychological difficulties which caused her impairment in her ability to compete in the open labor market prior to September 22, 2015.

(*Ibid*.)

Upon further reevaluation in 2022, Dr. Maloff changed his apportionment opinion to state that applicant's disability was intertwined as follows:

> Defense representatives have requested this examiner address apportionment taking the Benson decision into consideration. Applicant has suffered a mental health impairment that has been caused by two different injuries. She suffered an orthopedic injury September 22, 2015, to her lumbar spine with long-term consequences and a continuous trauma injury beginning September 22, 2015 - October 2017 secondary to difficulties with her manager (William). The dates of injury are identical, and the impact of each injury upon the other is inextricably intertwined, making it impossible to apportion impairment precisely to one injury or the other.

(Defendant's Exhibit J, Report of Perry Maloff, M.D., October 11, 2022, p. 26.)

DISCUSSION

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b) (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

(§ 5909.)

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on July 18, 2025, and 60 days from the date of transmission is Tuesday, September 16, 2025. This decision is issued by or on September 16, 2025, so that we have timely acted on the Petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

According to the proof of service for the Report and Recommendation by the WCJ, the Report was served on July 18, 2025, and the case was transmitted to the Appeals Board on

July 18, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 18, 2025.

II.

Section 5313 requires a WCJ to state the "reasons or grounds upon which the determination was made." The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton*, *supra*, at p. 478), and must be supported by substantial evidence (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16]). As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton*, *supra*, at p. 475.)

To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be 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* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

In *Rolda v. Pitney Bowes, Inc.* (2001), 66 Cal.Comp.Cases 241, 245-246 (Appeals Board en banc), we addressed the factors that a psychological evaluator must consider in opining on causation of psychological injury and disability under section 3208.3. Per *Rolda*, the evaluator is required to list all factors causing psychological injury and address the percentage of causation that each factor contributes to psychological injury, and list all factors causing psychological permanent disability and address the percentage of causation that each factor contributes to permanent disability.

Once the evaluator issues a *Rolda* compliant report, the WCJ should then determine whether the alleged injury involved actual events of employment, and whether each actual event of employment constituted a lawful, non-discriminatory, good faith personnel action. (§ 3208.3(h).) If the psychological injury is predominantly caused (51% or more) by actual events of employment (or 35% or more in cases of injury caused by violent act or exposure to a violent act), the psychological injury is compensable, unless the injury is substantially caused by lawful, nondiscriminatory, good faith personnel actions, in which case the injury is not compensable. (§ 3208.3.)

Date of injury for cumulative injury claims is established under section 5412, which states: "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (§ 5412.)

As used in section 5412, "disability" means either compensable temporary disability or permanent disability. (*Chavira v. Workers' Comp. Appeals Bd*. (1991) 235 Cal.App.3d 463 [56 Cal.Comp.Cases 631]; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte) (2004)* 119 Cal.App.4th 998 [69 Cal.Comp.Cases 579].) Medical treatment alone is not "disability" for purposes of determining the date of a cumulative injury pursuant to section 5412, but it may be evidence of compensable permanent disability. (*Rodarte*, *supra*, 119 Cal. App. 4th at p. 1005.) Likewise, modified work is not a sufficient basis for finding compensable temporary disability, but it may be indicative of a compensable permanent disability, especially if the worker is permanently precluded from returning to their usual and customary job duties. (*Id*.)

The existence of disability is a medical question beyond the bounds of ordinary knowledge, and, as such, will typically require medical evidence. (*City & County of San Francisco v. Industrial Acc. Com*. (*Murdock*) (1953) 117 Cal.App.2d 455 [18 Cal.Comp.Cases 103]; *Bstandig v. Workers' Comp. Appeals Bd*. (1977) 68 Cal. App. 3d 988 [42 Cal.Comp.Cases 114].) Knowledge requires more than an uninformed belief. Because the existence of disability typically requires medical evidence, an "applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability." (*City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985) 163 Cal.App.3d 467, 473 [50 Cal.Comp.Cases 53].)

In the Report, the WCJ errantly states that the QME concluded there was no basis for a psychiatric cumulative injury. This statement is based upon a misreading of the QME's reporting. The QME has clearly found that applicant sustained a cumulative injury to the psyche; the only question is whether applicant's originally plead date of injury should be conformed to the facts of the case. To that extent, no finding of fact issued at all as to the date of injury under section 5412.

Upon return, the parties must keep in mind that dates of injurious exposure under section 5500.5 and the date of injury under section 5412 are separate analyses. While the two dates may coincide, they are not synonymous. It appears that the parties are conflating these two dates interchangeably. The *Rolda* analysis in this case does not accurately reflect the opinions of the QME as the date of injury for the cumulative trauma is being confused with the dates of injurious exposure described by the QME.

Next, and if applicant's psychological injury is found to be industrial, the current medical record does not properly delineate what portions of applicant's psychological permanent disability may be compensable pursuant to section 4660.1.

Section 4660.1(c) states:

> (c) (1) Except as provided in paragraph (2), there shall be no increases in impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury. Nothing in this section shall limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury.

> (2) An increased impairment rating for psychiatric disorder shall not be subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following:
>
> (A) Being a victim of a violent act or direct exposure to a significant violent act within the meaning of Section 3208.3.
>
> (B) A catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury.

(§ 4660.1(c).)

Section 4660.1(c) does not preclude increases in impairment ratings when the psychiatric disability is *directly caused by the industrial injury*. (See *Ricablanca v. California Dep't of Corrections & Rehabilitation*, 2017 Cal. Wrk. Comp. P.D. LEXIS 147; *City of Los Angeles v. Workers' Comp. Appeals Bd*. (*Montenegro*) (2016), 81 Cal.Comp.Cases 611 (writ den.) [holding that impairment caused by sexual dysfunction arising directly from the industrial injury is not precluded under section 4660.1(c)]; see also, *Russell Madson v. Michael J. Cavaletto Ranches*, (ADJ9914916) (2017), 2017 Cal. Wrk. Comp. P.D. LEXIS 95 [holding that impairment to the psyche caused directly by the events of employment is compensable].)[3] "It is the responsibility of each medical evaluator to determine apportionment for the body parts or body systems within his or her area of expertise." (*Mayorga v. Dexter Axle Chassis Group*, 2015 Cal. Wrk. Comp. P.D. LEXIS 359, *16.)

[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citeable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board En Banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered a similar issue. We recommend that practitioners proceed with caution when citing to a panel decision and verify its subsequent history.

In our en banc opinion in *Benson*, we explained that limited situations may exist where a **joint and several award** of permanent disability may issue across multiple dates of injury. (*Benson v. Permanente Med. Group*, (2007), 72 Cal. Comp. Cases 1620, 1634 (Appeals Board en banc), (emphasis added); aff'd *Benson v. Workers' Comp. Appeals Bd*. (2009) 170 Cal.App.4th 1535.) Where some aspects of the industrially caused permanent disability form two or more separate industrial injuries that cannot reasonably be parceled out, then a combined joint and several award of permanent disability must issue even though other aspects of the industrially caused permanent disability from those injuries can be parceled out with reasonable medical probability. (See, e.g. *Alea North American Insurance Co. v. Workers' Comp. Appeals Bd*. (*Herrera*) (2018) 84 Cal. Comp. Cases 17 [2018 Cal. Wrk. Comp. LEXIS 123] (writ den.); *Flowserve Corp. v. Workers' Comp. Appeals Bd*. (*Espinoza*) (2016) 81 Cal. Comp. Cases 812 [2016 Cal. Wrk. Comp. LEXIS 92] (writ den.); *Northrop Grumman Systems v. Workers' Comp. Appeals Bd*. (*Dileva*) 80 Cal. Comp. Cases 749 [2015 Cal. Wrk. Comp. LEXIS 78] (writ den.); *Christiansen v. Facey Med. Found*., 2024 Cal. Wrk. Comp. P.D. LEXIS 2, *12.) However, an opinion establishing intertwined disability must constitute substantial evidence and may not merely conclude that such disability is intertwined without an adequate explanation.

It is not possible to determine on the present medical record whether applicant's impairment to the psyche was caused by applicant's physical injury, or as a direct injury via cumulative trauma. No substantial opinion explains the cause of disability. Dr. Maloff provided a conclusory opinion that the disability is intertwined, which does not constitute substantial medical evidence. Dr. Maloff must explain why it is not possible to parse out the causes of psychological disability.

Next, and to the extent that any psychological disability is found to be a compensable consequence of the physical injury, the parties must determine whether such disability is catastrophic. "Determination of whether an injury is catastrophic under section 4660.1(c)(2)(B) focuses on the nature of the injury and is a fact-driven inquiry." (*Wilson v. State Cal Fire* (2019) 84 Cal.Comp.Cases 393, 395 (Appeals Board en banc).) The fact-driven inquiry is conducted using the following factors:

1. The intensity and seriousness of treatment received by the employee that was reasonably required to cure or relieve from the effects of the injury.

2. The ultimate outcome when the employee's physical injury is permanent and stationary.

3. The severity of the physical injury and its impact on the employee's ability to perform activities of daily living (ADLs)

4. Whether the physical injury is closely analogous to one of the injuries specified in the statute: loss of a limb, paralysis, severe burn, or severe head injury.

5. If the physical injury is an incurable and progressive disease.

(*Id*. at p. 415.)

In the Opinion on Decision, the WCJ provided the following analysis with respect to the issue of whether applicant's specific injury was catastrophic:

> In this case, Applicant underwent two back surgeries as well as several epidural steroid injections and physical therapy. The Court finds that this is intense and serious treatment, but there is no indication that it was life-threatening like the treatment in the *Wilson* case that supported a finding of catastrophic injury. The ultimate outcome, severity of the injury and impact on activities of daily living were also substantial, but not akin to paralysis or the loss of a limb. Applicant worked for years after leaving PIH. PQME reported that the Applicant was able to cook, drive, do house chores, and perform personal hygiene, albeit with some difficulty and limitations. [Defendant's Exhibit Fat p. 5] This is not the same situation as a person who is paralyzed and unable to do these things at all, and the Court therefore finds that the catastrophic injury exception has not been established.

(Opinion on Decision, June 2, 2025, p. 7.)

While we do not reach the issue of whether applicant's injury was catastrophic because the medical record will require further development, we emphasize that the determination of whether an injury is catastrophic is based on the circumstances of an individual case, and we clarify the following with respect to the WCJ's analysis under factors 1 to 4. Factor 1, "intensity and seriousness of treatment," does not require that the treatment be life threatening so that the comparison to the applicant in *Wilson* is not relevant. Factor 2, "the ultimate outcome," is not

based on whether an applicant was able to work at some previous time, but is based on an applicant's current circumstances. Factor 3, "the severity of the physical injury and its impact" on applicant's ADLs, is based on medical evidence and does not require that a person is unable to perform any ADLs whatsoever; analogizing to loss of a limb or paralysis is not a proper consideration because that analysis is with respect to factor 4.

Per the above analysis, the decision does not adequately address the fact that the QME found the psychological disability intertwined, which would make the disability joint and several across *both* dates of injury. If the QME provides a substantial opinion that the disability is intertwined, then the disability is compensable as part of the cumulative injury claim. However again, for the reasons discussed above, the current record is not substantial as to an intertwined disability, and thus we cannot decide the issue.

Accordingly, we grant applicant's Petition for Reconsideration and as our Decision After Reconsideration, we rescind the June 4, 2025 F&A and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Joint Findings and Award issued on June 4, 2025, by the workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings and Award issued on June 4, 2025, by the workers' compensation administrative law judge is **RESCINDED**.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 16, 2025

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

ZENAIDA AVILES
MOORE & ASSOCIATES
WALL McCORMICK BAROLDI & DUGAN

EDL/mc

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