WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LESLIE ELIZABETH MCCAIN, *Applicant*

vs.

WALLIS CONSTRUCTION, INC.;
STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ11102338
Salinas District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on June 2, 2022. By the F&A, the WCJ found that applicant, while employed on September 24, 2014 by defendant, Wallis Construction, Inc., sustained injury arising out of and occurring in the course of employment (AOE/COE) to her left elbow, left wrist, right wrist, psyche, and to her neck and shoulders, consisting of myofascial pain. The WCJ also found that applicant's psyche injuries did not result from a "violent act," and that, as a result, applicant was not entitled to an award of permanent disability (PD) for the psychiatric consequences of her physical injuries pursuant to Labor Code section 4660.1(c)(2)(A).[1]

Applicant contends that her psyche injury resulted from a violent act and that she is entitled to PD for her psyche injuries.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of applicant's Petition for Reconsideration, defendant's answer, and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which is adopted and incorporated herein, we will deny reconsideration.

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[1] All further statutory references are to the Labor Code unless otherwise stated.

BACKGROUND

Applicant, while employed on September 24, 2014 as a laborer by Wallis Construction, Inc., sustained injury AOE/COE to her left elbow, left wrist, right wrist, and psyche, and claims to have sustained injury AOE/COE to her neck and shoulders, consisting of myofascial pain. (Minutes of Hearing, April 28, 2022, p. 2.) According to the record, applicant waited roughly 1½ months to seek treatment for her physical injuries, at which point she visited Doctors on Duty, where she was evaluated by Michael Luder, M.D. on November 7, 2014. (Exh. D-2, Doctor's First Report of Work Injury, Michael Luder, M.D., November 7, 2014.) During her visit, applicant informed Dr. Luder that, when the injury occurred, she was "using a weed whacker, lost her footing and hit her left elbow into a wall…." (Exh. D-2, p. 1.) Thereafter, on December 2, 2014, applicant visited an Urgent Care facility where she similarly told Robert Martin, PT (physical therapist) that the injury occurred when "[s]he was weedwhacking in [a] small space…She lost footing and fell into [a] wall hitting (L) elbow with wall and weedwhacker." (Exh. D-3, Robert Martin PT Report, December 2, 2014, p. 1.)

According to the record, applicant provided various different versions as to how her injury occurred during subsequent doctors' visits between 2015 and 2017, stating at various times that: (1) her injury was caused by repetitive use working in construction; (2) that a "jackhammer" fell on her arm; (3) that a "hand held compactor" struck her left elbow when she tried to block it from striking a door; (4) that a "200-pound" weedwhacker fell on her left arm; (5) that the weedwhacker became stuck, she tripped, fell backward, and the machine struck her left elbow; and (6) that her feet got stuck in the mud, she fell backward, and the weedwhacker's handle hit her left elbow. (Exh. J-7, Alberto G. Lopez, M.D., Panel Qualified Medical Evaluation, February 7, 2019, pp. 10-20, 30; Exh. J-4, Panel Qualified Medical Evaluation, Patrick McCreesh, M.D., November 10, 2017, p. 8; Exh. J-1, Panel Qualified Medical Evaluation, Melinda Brown, M.D., January 22, 2020, p. 2; Exh. J-5, Alberto G. Lopez, M.D., Panel Qualified Medical Reevaluation, May 6, 2020, pp. 8-39.)

In 2019 and 2020, Alberto Lopez, M.D., evaluated applicant as the psychiatric qualified medical evaluator. He concluded that the "event resulted in a depression," and that she did not have post-traumatic stress disorder. (Ex. J-7, p. 32.) Dr. Lopez diagnosed applicant with major depressive disorder with paranoid trends. (Exh. J-5, p. 45.) Regarding causation, Dr. Lopez stated:

> In all medical probability, the examinee's Major Depression is the result predominantly (over 51%) from the work injury of September 24, 2014.
>
> As stated before, it is likely that a whacker falling on top of the examinee weighing some 200 pounds would indeed constitute a "violent act," although it was an accident. This is a legal determination let to the ultimate Trier of Fact. It would seem to meet the significant 35% to 40% threshold.

(Exh. J-5, pp. 45-46.)

On April 28, 2022, the parties proceeded to trial. Among the issues raised was whether or not the 'violent act' exception applied. (Minutes of Hearing, April 28, 2022, pp. 1, 4.) Applicant did not testify, and the matter was submitted.

DISCUSSION

An employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd*. (2015) 61 Cal.4th 291, 297-298, 302; Lab. Code, §§ 3600(a); 3202.5.) With respect to psychiatric injuries, section 3208.3(b) provides, in relevant part, as follows:

> (1) 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.
>
> (2) Notwithstanding paragraph (1), in the case of employees whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury.

(Lab. Code, § 3208.3(b)(1)-(2).)

For injuries occurring on or after January 1, 2013, section 4660.1(c) provides as follows:

> (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 bum, or severe head injury.

(Lab. Code, § 4660.1(c)(1)-(2).)

Here, applicant's injury occurred on September 24, 2014, i.e., after January 1, 2013, and it is undisputed that her psyche injury was not a "direct" injury, and that it was a compensable consequence of her physical injuries. (Lab. Code, § 3208.3; see *Wilson v. State Cal Fire* (2019) 84 Cal.Comp.Cases 393 (Appeals Board en banc) [explaining that section 4660.1(c) applies to compensable consequence injuries].) Thus, there is no dispute that section 4660.1 applies. Rather, the parties dispute whether applicant may receive an increased permanent impairment rating under section 4660.1(c)(2)(A), and applicant bears the burden of proving that her psyche injury resulted from either being a victim of a violent act or direct exposure to a significant violent act. (See also *Wilson, supra,* 84 Cal.Comp.Cases at p. 402.)

Applicant contends that her psyche injury resulted from a "violent act," as defined in two panel decisions: *Larsen v. Securitas Security Services* (2016) 81 Cal.Comp.Cases 770 ["[b]eing hit by a car under these circumstances constitutes a violent act"] and *Madson v. Michael J. Cavaletto Ranches* (February 22, 2017, ADJ9914916) [2017 Cal. Wrk. Comp. P.D. LEXIS 95] [applicant was pinned and crushed in his truck after an accident, and feared that the truck would catch fire before he could be rescued]. Subsequent decisions since *Larsen* and *Madson* have followed the definition of a "violent act" for purposes of section 4660.1 as an act that is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening. (See *Lopez v. General Wax Co., Inc*. (June 19, 2017, ADJ9365173) [2017 Cal. Wrk. Comp. P.D. LEXIS 291] [candle maker's partial finger amputation in a machine was a violent act]; *Allen v. Carmax* (July 10, 2017, ADJ9487575) [2017 Cal. Wrk. Comp. P.D. LEXIS 303] [accident after car brakes failed when the applicant attempted to avoid hitting a pedestrian resulting in collision with a cement pillar was a violent act]; *Greenbrae Management. v. Workers' Comp. Appeals Bd*. (2017) 82 Cal.Comp.Cases 1494 (writ den.) [landscaper's fall from a tree hitting his head multiple times and losing consciousness was a violent act].)

Here, the WCJ found that applicant's psyche injury was not compensable under section 4660.1(c)(2)(A) because the act of slipping and falling and being struck in the elbow by a weedwhacker was not a "violent act" within the meaning of the statute. We agree with the WCJ's conclusion. Significantly, since applicant did not provide testimony at trial, it is unclear exactly how the injury occurred, and the WCJ was unable to weigh the testimony and determine whether the event was of the type that would be considered a violent act. (See *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500] [WCJ's credibility determination given great weight because the WCJ has the opportunity to observe the demeanor of the witnesses].)

Even accepting the version of events that were contained in QME Dr. Lopez's report, the force of this incident cannot be characterized as either extreme or intense, and applicant did not lose consciousness after her fall and kept working after the incident, explaining that she "fully expected her symptoms to resolve promptly." (Exh. J-4, p. 8; Exh. J-7, p. 11.) Applicant did not seek immediate medical treatment after the incident and continued to work her usual and customary job duties for the next six weeks. (Exh. J-1, p. 3.) Applicant's injuries are instead akin to those that we have previously determined were *not* the result of a violent act, such as when an applicant walked into a glass wall and hit his head, but did not lose consciousness or require immediate medical treatment (*Zarifi v. Group 1 Automotive* (June 11, 2018, ADJ9042929) [2018 Cal. Wrk. Comp. P.D. LEXIS 300]), or when an applicant's foot was crushed by a falling gate, but he was able to drive himself to obtain medical treatment (*Garcia v. Church* (November 9, 2018, ADJ10544189) [2018 Cal. Wrk. Comp. P.D. LEXIS 530]).

Accordingly, we deny the petition for reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 5, 2022

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

LESLIE MCCAIN
SPRENKLE & GEORGARIOU
STATE COMPENSATION INSURANCE FUND

AH/*pc*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Applicant has filed a timely and verified Petition for Reconsideration from the Findings And Award issued on 6/2/22. The Petition raises the usual statutory grounds. Petitioner contends that her industrial injury was caused by a "violent act," within the meaning of Labor Code Section 4660.1(c)(2)(A), and the WCJ's Finding otherwise was in error. Defendant filed a verified Answer on 6/13/22.

II

STATEMENT OF MATERIAL FACTS

Applicant/Petitioner was employed on 9/24/14 as a laborer by Wallis Construction, Inc., when she lost her footing and hit her elbow into a wall, sustaining an injury to her left elbow (Doctor's First Report of Work Injury, Michael Luder, MD, 11/7/2014, Ex. D-2; Martin PT report, 12/3/14, Ex. D-3). There is nothing in the record showing any medical treatment until she saw Dr. Luder a month and a half after the injury. The X-rays he obtained of the elbow were normal, and the diagnosis was "left elbow pain and lateral epicondylitis." He prescribed physical therapy and medications.

In the six weeks following the injury, Applicant continued to perform her usual and customary duties (Report of Melinda Brown, MD, 1/22/2020, Ex. J-1).

By the time she saw QME McCreesh three years later, the history changed. Now, according to Applicant, she fell down, and the weed whacker fell on top of her, striking her left elbow (Report, Dr. Patrick McCreesh, 11/10/17, Ex. J-4). A similar history is provided to Dr. Brown in her 2020 evaluation (Report, Melinda Brown, M.D., 1/22/20, Ex. J-1).

Applicant did not testify at her trial on 04/28/2022.

In relevant part, I ruled that Applicant's injury was not the result of a violent act and that Applicant was not entitled to an award of permanent disability for the psychiatric consequences of her physical injuries.

III

DISCUSSION

The issue in this case is whether Applicant's injury was the result of a violent act, thereby entitling her to an increase in permanent disability for the psychiatric effects of her physical injuries per Labor Code Sec. 4660.1(c)(2)(A). The seminal case for this is the Board's *en banc* decision in

Wilson v. State of California (2019) 84 CCC 393. There, the Board defined a "violent act" as an act characterized by either a strong physical force, extreme or intense force, or by an act that is vehemently or passionately threatening.

Applicant's injury does not fit the Board's definition of a "violet act" in *Wilson.* She was not struck by a car or a projectile, did not lose consciousness, did not fall from a significant height, continued to work full duty for six weeks, without seeking medical treatment; and did not sustain a traumatic brain injury or any head injury. Given the change in history from what she initially reported to the health providers and what she reported to the QME's years later, Applicant's account of how she was injured lacks credibility.

IV

RECOMMENDATION

I recommend that the Petition for Reconsideration be Denied.

Respectfully submitted,

MICHAEL H. YOUNG
Workers' Compensation
Administrative Law Judge