

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

RICARDO SARABIA FERNANDEZ, *Applicant*

vs.

**REXNORD AEROSPACE and HARTFORD CASUALTY INSURANCE COMPANY,
administered by CORVEL CORPORATION, *Defendants***

**Adjudication Number: ADJ10546340
Los Angeles District Office**

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

Applicant seeks reconsideration of the Findings of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on August 24, 2022, wherein the WCJ found in pertinent part that applicant did not sustain injury arising out of and occurring in the course of employment (AOE/COE) and based thereon that all other issues submitted for decision were moot; the WCJ ordered that applicant take nothing by way of his injury claim.

Applicant contends that the October 14, 2021, report from psychiatric qualified medical examiner (QME) Dmitriy L Sherman, M.D., is not substantial evidence regarding the issue of whether applicant sustained a psychiatric injury AOE/COE, and that "If injury is found it will be compensable under Labor Code 5402."

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to his eyes, neck, shoulders, back, psyche, and neurological system, and to his head in the form of headaches, while employed by defendant as a machinist/laborer during the period from September 2, 2014, through July 12, 2016.

On August 2, 2019, QME Dr. Sherman evaluated applicant. Dr. Sherman took a history, reviewed the medical record he was provided, and performed various psychiatric tests. He concluded that applicant's condition was not permanent and stationary, and that:

It is my opinion with a reasonable degree of medical probability that the actual events of employment (CT 0910212014 - 0711212016) injuries were the predominant causes from all other sources combined contributing to the psychiatric injury and were at least 51% or more due to the industrial factors (pursuant to labor code section 3208.3).
(Def. Exh. A, Dr. Sherman, August 2, 2019, p. 49.)

In his January 22, 2020 supplemental report Dr. Sherman stated that because applicant had "decided to leave recommended treatment" his condition was permanent and stationary and as to the cause of applicant's psychiatric condition he stated:

It is my opinion with a reasonable degree of medical probability that applicant sustained CT 0910212014 - 0711212016 psychiatric injuries AOE and COE which were directly related to the industrial CT exposure with symptoms causing severe and persistent impairment in his psychiatric, social and occupational functioning. ¶ In my opinion medical findings are potentially consistent with the injuries as claimed by the applicant since I don't have evidence to the contrary.
(Def. Exh. B, Dr. Sherman, January 22, 2020, p. 2.)

Dr. Sherman's deposition was taken on May 21, 2021. Dr. Sherman agreed with defense counsel, that he had not received/reviewed applicant's treatment records from Mission Community Hospital, nor had he received records from Kaiser. (Def. Exh. D, Dr. Sherman, May 21, 2021, deposition transcript, p. 7.) His testimony then included the following:

Q. Okay. And then based upon this information and your testimony here today, that it's more probable than not because we don't have anything else available to the contrary, what would your -- in your medical opinion, what is the best diagnosis for this applicant?

A. Before answering this question with a reasonable degree of medical probability, I still would like to review additional records you came across that will give you more information I can rely upon. ... ¶ I will defer my medical opinion in this, about exact diagnosis, to the time after I review additional medical records, including the article you came across.

(Def. Exh. D, pp. 22 – 23.)

A. ... On deposition he testified that he had a trauma from over thinking and over pressure, led to distrust, confused. Psychological injuries had to do with the actions of the people at work. As I indicated in my report, I really need to see personnel records. Have you had a chance to subpoena his personnel records? That will answer lots of questions if you have personnel records.
(Def. Exh. D, p. 24.)

In his October 14, 2021, supplemental report, Dr. Sherman noted that:

Mission community hospital records mentioned on deposition were not included in the new set of records (218 pages) I received. I don't have Mission Community hospital records and therefore I don't have documented evidence that he used cocaine daily as DA mentioned on my deposition.
(Def. Exh. C, Dr. Sherman, October 14, 2021, p. 3.)

In that report, Dr. Sherman later stated:

I still would defer formal Rolda analysis to after I will be given an opportunity to review personnel records and witness statements because at this time I don't have information about exact reasons of termination and I don't have witness statements at this point to make determination of what kind of issues employer had with him while he was employed.
(Def. Exh. C, p. 10.)

The parties proceeded to trial on August 8, 2022. The issues submitted for decision included injury AOE/COE and whether the Labor Code section 5402 injury presumption was applicable. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 8, 2022, pp. 2 – 3.)

DISCUSSION

We note that Dr. Sherman's reference to "Rolda" is in regard to the Appeals Board en banc decision wherein we explained that to determine if a psychiatric injury claim is compensable:

The WCJ, after considering all the medical evidence, and the other documentary and testimonial evidence of record, must determine: (1) whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination; (2) if so, whether such actual events were the predominant cause of the psychiatric injury, a determination which requires medical evidence; (3) if so, whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith, a factual/legal determination; and (4) if so, whether the lawful, nondiscriminatory, good faith personnel actions were a "substantial cause" of the psychiatric injury, a determination which requires medical evidence. Of course, the WCJ must then articulate the basis for his or her findings in a decision which addresses all the relevant issues raised by the criteria set forth in Labor Code section 3208.3.
(*Rolda v. Pitney Bowes (Rolda)* (2001) 66 Cal.Comp.Cases 241, 247 (Appeals Board en banc))

As we stated in *Rolda*, the issues of whether actual events were the predominant cause of the psychiatric injury, and whether the lawful, nondiscriminatory, good faith personnel actions were a substantial cause of the psychiatric injury, must be determined based on medical evidence. Although the reporting physician is not actually doing a “*Rolda* analysis” the medical reports addressing the issues, as noted above, are necessary factors to be considered by a WCJ when doing a “*Rolda* analysis.”

Here, Dr. Sherman repeatedly requested that he be provided the Mission Community Hospital treatment records and applicant’s personnel records including witness statements. Absent his review of those records, his reports are not based on pertinent facts and an accurate history, so they do not constitute substantial evidence. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

The WCJ and the Appeals Board have the authority to further develop the record where there is insufficient evidence to determine an issue that was submitted for decision. (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board 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].) Thus, it is appropriate that this matter be returned to the WCJ for further development of the record.

It is also important to note that pursuant to Labor Code section 5402:

If liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 90-day period.
(Lab. Code, § 5402(b).)

Our review of the trial record indicates there is no claim form in evidence, nor is there a denial notice in evidence. As such, there is no factual basis for determining if liability was “rejected within 90 days” of the claim form being filed. In turn, there is no basis for determining if the compensable injury presumption is applicable and/or whether it has been rebutted. Therefore, upon return of this matter, the record must also be further developed regarding the Labor Code section 5402 presumption.

Accordingly, we grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Order issued by the WCJ on August 24, 2022, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 24, 2022, Findings of Fact and Order is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

[Date]

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

**RICARDO SARABIA FERNANDEZ
TELLERIA TELLERIA & LEVY LLP
TESTAN LAW**

TLH/mc

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

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**Adjudication Number: ADJ10546340
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**OPINION AND ORDER
CORRECTING CLERICAL ERROR**

It has come to the Appeals Board's attention that its decision served November 14, 2022 contains a clerical error consisting of the omission of the date of service. The decision served contains a blank space where the date of service should appear.

We correct this clerical error by virtue of this decision without granting reconsideration, as such errors may be corrected without further proceedings at any time. (See 2 *Cal. Workers' Comp. Practice* (Cont. Ed. Bar, March 2019 Update) Supplemental Proceedings, § 23.74, p. 23-76.)

For the foregoing reasons,

IT IS ORDERED that the clerical error consisting of the omission of the date of service set forth in the Board's Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration to reflect the following date of service: November 14, 2022.

WORKERS' COMPENSATION APPEALS BOARD

s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 7, 2022

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

**RICARDO SARABIA FERNANDEZ
TELLERIA TELLERIA & LEVY LLP
TESTAN LAW**

TLH/mc

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