

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

FREDDIE BANUELOS, *Applicant*

vs.

**ROBERT BERCU, an individual, dba A-1 MINI STORAGE;
STATE FARM FIRE AND CASUALTY COMPANY, administered by SEDWICK
CLAIMS MANAGEMENT SERVICES, INC., *Defendants***

**Adjudication Numbers: ADJ12672803, ADJ12979844, ADJ12673709
Pomona District Office**

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

Defendant seeks reconsideration of three separate decisions issued concurrently by a workers' compensation administrative law judge (WCJ) on February 9, 2023. In a Findings and Order in case ADJ12672803, it was found that, while employed as a resident manager during a cumulative period ending May 2, 2019, applicant sustained industrial injury "of an orthopedic nature," but deferred making findings regarding specific body parts pending further development of the record. In a Findings and Order in case ADJ12979844, it was found that, while employed on February 1, 2015, applicant sustained industrial injury to his right knee. In a Findings and Order in case ADJ12673709, the WCJ ordered further development of the record, finding "Because of the nature of the injuries alleged in this claim the court is unable to determine, from the record, whether the applicant suffered any injuries of a psychiatric nature." In all three cases, defendant asserted the defense that applicant's claims were made after applicant received notice of termination. (Lab. Code §§ 3208.3, subd. (e), 3600, subd. (a)(10).)¹ The WCJ found that the employer had notice of the injury prior to the termination. (Lab. Code, §§ 3208.3, subd (e)(2), 3600, subd. (a)(10)(A).) Previously, in this matter, the WCJ had found in three separately issued decisions on March 7, 2022 that defendant could not assert the post-termination defenses of Labor

¹ However, as noted below, defendant only challenges the findings that the post-termination defense was not applicable in cases ADJ12979844 and ADJ12673709. Defendant does not raise this issue on reconsideration in case ADJ12672803.

Code section 3600(a)(10) and 3208.3(e) because the employer had failed to post notices required by Labor Code section 3550 et seq. On May 22, 2022, we granted reconsideration of the March 7, 2022 decisions, found that the failure to post the notices did not bar defendant from raising post-termination defenses, and returned the matter to the trial level for further analysis and decision.²

Defendant contends that the WCJ erred in (1) finding that the specific February 1, 2015 injury to the right knee (ADJ12979844) and the alleged cumulative injury to the psyche (ADJ12673709) were not barred by post-termination defenses, and in (2) finding industrial injury to the right knee in case ADJ12979844, finding injury of an “orthopedic nature” in case ADJ12672803, and purportedly finding psychiatric injury in case ADJ12673709, arguing that the opinions of qualified medical evaluator psychologist Douglas W. Larson, PhD and qualified medical evaluator orthopedist Humberto Galleno, MD did not constitute substantial medical evidence. We have received an Answer from the applicant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

With regard to the finding of an injury of an “orthopedic nature” in case ADJ12672803, as explained below, we will grant reconsideration, and defer the issue of industrial injury until a finding can be made that injury to at least one specified body part caused the need for medical treatment or disability. However, we otherwise affirm the WCJ’s findings. We affirm the WCJ’s rejection of the post-termination defense in cases ADJ12979844 and ADJ12673709 for the reasons stated by the WCJ in the Report, which we adopt and quote below. We also affirm the finding of injury to the right knee in case ADJ12979844 for the reasons stated by the WCJ in the Report, which we adopt and quote below. We note that Dr. Galleno opined that applicant sustained right knee injury as a result of his February 1, 2015 fall. (March 12, 2020 report at p. 14.) With regard to the purported finding of industrial injury to the psyche in case ADJ12673709 based on Dr. Larson’s reporting, the WCJ never made a finding of industrial injury to the psyche, thus we need not address this contention.

With regard to the finding of injury in case ADJ12672803, in which applicant has alleged cumulative injury to the right knee, left knee, left hip, “internal,” and in the forms of high blood pressure and diabetes, the WCJ found “orthopedic” industrial injury without specifying any body

² Since issuing our Opinion and Order Granting Reconsideration and Decision After Reconsideration of May 22, 2022, former panelist Commissioner Marguerite Sweeney has retired from the Appeals Board. Commissioner José H. Razo has been substituted in her place.

part or finding a need for medical treatment or disability. We note that a cumulative injury is defined as one “occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment.” (Lab. Code, § 3208.1, subd. (b).) A finding of “orthopedic” injury without finding a single body part that has caused the need for medical treatment or disability is unhelpful and creates confusion in defendant as to its obligation to advance any benefits. “Awards of the board ‘are subject to those general legal principles which circumscribe and regulate the judgments of all judicial tribunals.’ [Citations.] Accordingly, they must be sufficiently certain to permit enforcement.....” (*Toccalino v. Workers’ Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 557 [47 Cal.Comp.Cases 145].) We therefore grant reconsideration and amend the decision in case ADJ12672803 to defer the issue of industrial injury, pending further development of the medical record and decision.

We otherwise affirm the WCJ’s decisions for the reasons stated by the WCJ in the Report, which we quote below. As noted above, while defendant argues in its Petition that the reporting of psychologist Dr. Larson does not support a finding of industrial injury to the psyche in case ADJ12673709, the WCJ has not yet made any finding regarding industrial injury to the psyche, thus any such argument is premature. To the extent that defendant is arguing that the WCJ erred in ordering further development of the record on the issue of psyche injury, an order deferring issues for future determination pending further development of the record is not a final order and is thus subject to the removal standard rather than the reconsideration standard. (See *Capital Builders Hardware, Inc. v. Workers’ Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658 [81 Cal.Comp.Cases 1122].) The removal standard requires “significant prejudice” or “irreparable harm.” (Cal. Code Regs, tit. 8, § 10955, subd. (a).) Defendant has not met this standard, as it will be free to offer argument and evidence regarding the merits of the psyche claim in the further proceedings.

The portions of the Report which we adopt and incorporate are quoted below:

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

ADJ12673709 FREDDIE BANUELOS born on [] while employed during the period of January 1, 2008 through May 3, 2019, as a Resident Manager at Baldwin Park, California, by A-1 MINI STORAGE, whose workers’ compensation insurance carrier was **STATE FARM FIRE AND CASUALTY COMPANY administered by SEDGWICK CLAIMS MANAGEMENT**

SERVICES, INC.; claims to have sustained injury arising out of and occurring in the course of employment to stress, depression, anxiety, sleep impairment and headaches.

ADJ12672803 FREDDIE BANUELOS born on [] while employed during the period February 1, 2015 through May 2, 2019 as a Resident Manager at Baldwin Park, California, by A-1 MINI STORAGE, whose workers' compensation insurance carrier was **STATE FARM FIRE AND CASUALTY COMPANY administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.;** sustained injury arising out of and occurring in the course of employment.

ADJ12979844 FREDDIE BANUELOS born on [] while employed on February 1, 2015, as a Resident Manager at Baldwin Park, California, by A-1 MINI STORAGE, whose workers' compensation insurance carrier was **STATE FARM FIRE AND CASUALTY COMPANY administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.;** sustained injury arising out of and occurring in the course of employment to his right knee.

Defendant has filed a timely Petition for Reconsideration, objecting to said decisions in the following particulars:

1. Petitioner contends that the undersigned erred by acting in excess of judicial powers;
2. Petitioner further contends that the undersigned erred as the evidence did not justify the Findings of Fact.
3. Petitioner further contends that the undersigned erred insofar as the Findings of Fact did not support the Order, Decision or Award.

FACTS ON DISPUTED ISSUE(S)

The case had proceeded to trial previously and reconsideration had been granted as the WCAB indicated that the trial judge misapplied a legal theory in the prior Finding of Fact. The court further instructed that the record be developed as to whether the manager of the second A-1 Storage site could be considered applicant's manager. Brief testimony was taken on that issue and the matter was resubmitted for decision.

After trial, the court found that the Affirmative Defense of Post Termination failed as the employer knew of the injuries before they terminated applicant's employment. The court further found that the applicant sustained orthopedic injury, although nature and extent were still at issue, and that whether there was psychiatric injury needed to be further developed. The court relied on testimony of both the applicant and defense witnesses.

Denise Pavone was a senior manager to applicant. She testified that she could hire and fire employees, which applicant had no authority to do, he was told to report all issues to her, and she considered herself his senior manager. SOE 11/29/22, p.3, ln. 24- p. 4, ln. 2 and SOE 1/17/23, p.2, ln. 16-17.

The applicant testified that he lived on-site as the resident manager since 2009, (SOE 12/29/21, p.5, ln. 9-10) and during that time he was verbally and physically threatened by customers. SOE 12/29/21, p.4, ln. 23 – p.5, ln. 1, 25. Customers would wait for him in the lot and threaten to come to his onsite apartment to hurt him. SOE 12/29/21, p.5, ln. 7-10. Ms. Darlene Bercu, the owner, Ms. Denise Pavone, the senior manager, and Karen Ortega, the assistant manager, all confirmed that customers could get angry and confrontational. SOE 12/29/21, p.9, ln. 22-23, and SOE 1/17/23, p. 3, ln. 15-17. Ms. Ortega confirmed that she witnessed altercations between customers and applicant. SOE 12/29/21, p.10, ln. 16-19, p.11, ln. 2-5. He was physically assaulted and had to call the police on one occasion SOE 12/29/21, p.5, ln.24-25.

The stress started shortly after the time he became onsite manager in 2009, which was approximately 2011, and became unmanageable in approximately 2017-2018. SOE 12/29/21, p.7, ln. 3-5. Applicant testified that he told Ms. Pavone that he was stressed, lost sleep, experience nightmares, and having other symptoms of stress, usually prior to auctions of customers' property. SOE 11/29/22, p. 4, ln. 7-8, and p.4, ln. 19-20. He began to have panic attacks and other physical manifestations of stress. SOE/12/29/21, p.6, ln. 1-3.

Ms. Pavone admitted that applicant told her of the problems these interactions were causing him stress. SOE 1/17/23, p.3, ln. 11-12, but did not recall any specific discussions regarding nightmares or insomnia being work related. SOE 1/17/23, p. 3, ln. 12-13. She further stated she had discussions with the applicant related to his interactions with the customers (SOE 1/17/23, p.2, ln.22-23, and p.3, ln. 4-6), but did not take the complaints of stress and anxiety due to work seriously as applicant, "gave as good as he got." SOE 1/17/23, p. 5, ln. 7-8.

Ms. Bercu recalled applicant telling her of problems with the customers. SOE 12/29/21, p. 8, ln. 24- 25. She conceded that the interactions with the customers were likely more problematic than they were in the past (SOE 12/29/21, p. 9, ln. 11-12) and that customers likely treated her, an older woman, differently than they did applicant who was a large male. SOE 12/29/21, p.9, ln. 23-25.

He reported suffering anxiety to his personal doctor, Dr. Betts, on February 18, 2019. Exhibit B, p.18.

Applicant's job was, at times, physically arduous. His duties included removing, breaking down and disposing of large items, such as couches, pool tables, and entertainment centers, into the dumpsters, primarily at his job site, but

occasionally for the sister location. SOE 12/29/21, p2, ln.16-21 & p.3, ln. 24-p.3 ln. 1, p. 6, ln. 7-8. This was confirmed by the testimony of Ms. Ortega and Ms. Pavone. SOE 12/29/21, p.11, ln. 7-9, ln. 13-15 and SOE 1/17/23, p.4, line 8-9. Further, applicant testified that he would routinely be required to transport and unload large bags of mulch (aprox 40 lbs) and distribute them through the planters at his primary job site and the nearby sister facility. SOE 12/29/21, p. 2, ln. 22-24. This occurred approximately every three months or so. SOE 12/29/21, p.6, ln. 12-13. Additionally, he occasionally had to police shopping carts and load them onto the truck for return to local stores. SOE 12/29/21, p.2, ln. 5-7.

Applicant testified that he slipped on a weather matt and came down on his right knee. SOE 12/29/21, p.3, ln 8-10. This happened in front of the owners, Robert and Darlene Bercu, and a co-worker, Heidi Sanchez. SOE 12/29/21, p.3 ln. 10-13. Darlene Bercu asked if he was okay. SOE 12/29/21, p.3, ln. 13. Medical treatment or claim form was never offered. SOE 12/29/21, p.3, ln. 14-15. Ms. Bercu claimed she could not recall applicant slipping (SOE 12/29/21, p.8, ln. 16-17) and the court did not find Ms. Bercu's testimony that she wrote everything that happened down in a notebook to be persuasive. SOE 12/29/21, p.9, ln. 16-29. Further, Ms. Bercu could not recall ever telling Applicant how to report an injury. SOE 12/29/21, p.8, ln. 18-19. He later told Heidi that his knee bothered him. SOE 12/29/21, p.6, ln. 24.

Applicant stated that told Dr. Betts about his fall in 2015. SOE 11/29/22, p. 4, ln. 11-14. Dr. Betts records indicate that on June 3, 2019 a knee brace was ordered (Exhibit B, p.17) and on July 15, 2019 that applicant's knee pain persisted (Exhibit B, p. 16). It's noted that there was an illegible portion of the February 18, 2019 report where Applicant's anxiety was noted (Exhibit B p.18) and given that then next time he saw his doctor a knee brace was provided that this, likely, would have been when the device was ordered.

Applicant testified that he told the manager of the other location that his knee was bothering him and she told him to go get it taken care of. SOE 12/29/21, p.3, ln. 21-24. Medical treatment or a claim form was not offered. SOE 12/29/21, p.3, ln. 24-25. He discussed concerns about losing his job if the injury was reported with Denise. SOE 12/29/21, p4, ln. 4-6.

Applicant also testified that he started noticing problems with his left knee and hips several months after his fall. SOE 12/29/21, p.4, ln. 7-15. He did not tell Denise about the issues with his left knee and hips. SOE 12/29/21, p.4, ln. 15-16. Ms. Pavone was aware that applicant had problems with his knees at work, although he never said it was due to work (SOE 1/17/23, p. 2, ln. 13-15) and she witnessed him having difficulty managing the stairs at work to such an extent that there were times he could not navigate the stairs. SOE 1/17/23, p. 4, ln. 24-25. Ms. Pavone indicated if an employee claimed of pain, she would not ask

them if it was due to work. SOE 1/17/23, p. 4, ln. 20-22. She never offered applicant a claim form. SOE 1/17/23, p. 5, ln. 1-2.

Applicant was seen by Panel Qualified Medical Examiners in both orthopedics and psychological specialties. The orthopedic Panel Qualified Medical Examiner, Humberto Galleno, found injury consistent with both a specific injury to the right knee as well as a continuous trauma. Jt. Exhibit W, page 16. Panel Qualified Medical Examiner for Psychology, Douglas Larson, PhD, indicated in his April 4, 2020 report that applicant has psychological disability resulting from industrial causes: this is distributed between his firing, customer interactions, and dealing with pain. The applicant is not MMI and there was no Rolda analysis between, at the very least, the three attributable causes. Jt. Exhibit Z, page 28.

Applicant's employment was terminated on May 3, 2019.

THE POST TERMINATION DEFENSE FAILS BECAUSE OF EMPLOYER KNOWLEDGE

For ADJ12979844 the specific injury to the right knee and ADJ12672803 cumulative trauma for orthopedic complaints the defense fails.

Specifically, for the fall, the owner of the company witnessed his fall. The court finds the applicant's testimony about slipping on a mat more credible than that of Ms. Bercu who couldn't independently recall and claimed if she didn't write it down it didn't happen. Under a preponderance of the evidence standard (as defined by the California Judicial Counsel jury instruction CACI-200) it is more likely than not that applicant suffered a fall and because Ms. Bercu was not the one who fell it didn't mark itself on her memory as important.

On the continuous trauma orthopedic claim, his manager, Ms. Pavone witnessed him having issues, such as not being able to navigate stairs. He told her he was having problems with his knees. Everyone admits that the job could be arduous at times. No one ever offered him a claim form or asked if he needed medical attention. He testified, credibly, that he was worried if he said anything he'd lose his job. Further, as discussed at length in the prior decision and Recommendation on Reconsideration, the legal notices for how to report injuries and that there is protection from retaliation were shoved in a drawer.

The court also determined that he sought medical treatment prior to termination. The court may draw reasonable conclusions from the evidence. Here, applicant saw his doctor on February 18, 2019 where it was reported that he was experiencing anxiety and there is an illegible portion of the report in the complaints/diagnosis section (this was commented on by PQME Galleno) at his next appointment on June 13, 2019 he's provided with a knee brace due to persistent pain. Durable medical equipment is not generally handed out at the first mention of pain by general medical practitioners. Combined with the fact

that the pain is noted as persistent leads this court to the reasonable conclusion that the illegible portion of the Betts report in February 2019 noted applicant's knee issue. Thus, there is medical reporting in February of 2019, not quite three months prior to his termination.

Regarding ADJ12673709, the Cumulative Trauma for psych and stress, applicant told Ms. Pavone he was stressed. She confirmed this although she couldn't recall all the symptoms of stress he told her. She said he always had insomnia and issues – but he was the onsite manager of his facility for almost ten years. Ten years can stretch into memory as “always.” And, again, the February 18, 2019 report of Dr. Betts, shows he sought treatment for anxiety prior to his termination in May of that year.

The exceptions to the post termination defense under Labor Code §3600(a) that concern this case are either the employer had knowledge of the injury or the employee sought medical treatment prior to the date of termination. In the case at bar, the applicant proved both exceptions – through his credible testimony, the confirming testimony of defense witnesses, and through competent medical evidence.

ORTHOPEDIC AOE/COE FINDINGS ARE SUPPORTED

The court realizes it may have been inarticulate in the decisions regarding AOE/COE for the specific ... claim[]. The applicant's testimony establishes a specific fall and that he continued to have issues thereafter. PQME Galleno's March 12, 2020 report finds, medically, applicant suffered an injury from his fall and then his continued work created more trauma and injurious exposure. His subsequent deposition (Jt. Exhibit V) did not change his conclusions. He has established that his knee issues were caused, at least in whole or in part, by his job. The record, however, requires development as to the nature and extent as well of those injuries as well as apportionment to specific, continuous trauma and/or non-industrial causes.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the February 9, 2023 Findings and Order in case ADJ12672803, Findings and Order in case ADJ12979844, and Findings and Order in case ADJ12673709 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the February 9, 2023 Findings and Order in case ADJ12979844 and the February 9, 2023 and Findings and Order in case ADJ12673709 are **AFFIRMED** and that the February 9, 2023 Findings and Order in case ADJ12672803 is **AMENDED** as follows:

FINDINGS OF FACT

1. FREDDIE BANUELOS born on [] while employed during the period February 1, 2015 through May 2, 2019 as a Resident Manager at Baldwin Park, California, by A-1 MINI STORAGE, whose workers' compensation insurance carrier was **STATE FARM FIRE AND CASUALTY COMPANY administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.**; claims to have sustained injury arising out of and occurring in the course of employment to the right knee, left knee, left hip, "internal," and in the forms of high blood pressure and diabetes

2. The issues for trial were AOE/COE and the affirmative defense of Post Termination Notice.

3. Denise Elaine Pavone was, for all intents and purposes, Mr. Banuelos' supervisor. While she is the on-site manager of one facility, it is around the corner from the facility Mr. Banuelos worked and she stated would manage that one as well. She had input into the termination of Mr. Banuelos. If there was an injury at Mr. Banuelos' facility she would be notified and would go to the other site to assess what needed to happen in terms of care.

4. Mr. Banuelos indicated to her that he had knee issues, but he never specifically stated that his issues were from work. Ms. Pavone witnessed him struggling with knee pain. Mr. Banuelos had a specific fall at work (see ADJ12979844) witnessed by co-workers She never asked him if he felt it was work related, never offered him a claim form.

5. The issue of industrial injury is deferred, with jurisdiction reserved. Because of the nature of the injuries alleged in this claim the court is unable to determine, from the record, what orthopedic complaints the applicant are due to applicant's work and which are non-industrial in nature. Further, the court is unable to determine from the testimony whether, if any, of applicant's complains as to internal, high blood pressure and diabetes are wholly non-industrial or if all, or a portion thereof, was exacerbated/aggravated by his orthopedic injuries.

ORDER

The Parties are **ORDERED TO FURTHER DEVELOP THE RECORD** as to the existence, nature, and extent of applicant's injuries.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 24, 2023

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

FREDDIE BANUELOS
OTERO LAW
MICHAEL SULLIVAN & ASSOCIATES

DW/cs

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