WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CORIE EMERY, *Applicant*

vs.

HERTZ CORPORATION; and ACE AMERICAN INSURANCE COMPANY, adjusted by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ11964867
Oakland District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate as quoted below, and for the reasons stated below, we will deny reconsideration.

We adopt and incorporate the following quote from the WCJ's report:

INTRODUCTION

> By timely and verified Petition for Reconsideration, filed August 31, 2021, defendant seeks reconsideration of my Finding of Fact that applicant's injury was not barred per Labor Code Section 3208.3(d) as it arose from a sudden and extraordinary condition. Applicant has not filed an Answer as of the date of this Report and Recommendation. I recommend that the Petition for Reconsideration be denied.

STATEMENT OF FACTS

> Applicant was hired as a manager trainee for Hertz Corporation (hereinafter referred to as defendant) in approximately September of 2018. Her duties involved primarily responding to customers on the phone as to rental cars as well as cleaning cars and monitoring the office. She normally worked alone although there was another worker on occasion at her location. She worked on a fulltime basis and had no physical restrictions before the work injury.

Applicant was hired through the Fairfield office although she was placed at the Vacaville office. Applicant had experience in customer service before her date of hire. Defendant provided some training to applicant at time of hire, which applicant described as mostly computer training and customer service.

Applicant stated that she did not receive any specific training in how to deal with rude or upset customers. She was told that should any specific incident occur with an upset customer, she was to contact her direct supervisor. When asked whether she was trained to call 911 should a situation occur, applicant stated that she was to call her direct supervisor first before calling 911.

Prior to the December 2018 incident, applicant testified that she experienced numerous situations with rude or irate customers. She recalled that during "bad" weeks, applicant had two to three such events per day, but during "good" weeks, she might not experience any rude customers at all. Applicant believed she was qualified to deal with rude customers due to her prior work experience in customer service.

On December 27, 2018, applicant was working alone at defendant's office. Sometime before noon, applicant received a phone call from a customer who was looking to rent a car. After initially putting the customer on hold, applicant and the customer began discussing the details of renting a car.

Applicant recalled that the customer requesting information as to a "senior discount". Defendant trained applicant to respond to any request for discounts by referring the customer to the customer service department. Applicant was not empowered to discuss discounting with members of the public.

When applicant relayed this information to the customer, the customer became mad and began insulting applicant. The customer also mentioned that he was going to contact his lawyer as to this problem. Defendant trained applicant that whenever a customer mentioned getting a lawyer, she was to direct the customer to the customer service department and to terminate the call.

Applicant advised the customer that she was advising him to contact the customer service department and she then terminated the call. Applicant recalled being upset at the tenor of the first call.

Approximately several minutes later, applicant recalled the angry customer calling back and was even madder at applicant because she hung up on him. Applicant recalled the customer yelling at her that he was "going to come down to her office and teach her a lesson about customer service".

Applicant also recalled that the customer was going to come down and "hurt her" or "shoot her". After three days of trial, applicant could not recall whether the customer said that he was going to "hurt" her or "shoot" her.

Applicant was shocked and scared by the customer's tone and she took very seriously the threats made against her. Applicant had had experience dealing with angry customers on the phone, but she did not recall ever being threatened as she was on this day.

Applicant was very upset and shaken by the incident. She recalled that during her training, she was instructed to contact her direct supervisor should something like this occur. She called her direct supervisor but he was not available and she left a message. She then called the area supervisor who advised her to lock the doors to the office and hide in a back room and someone would come to the office to assist her.

Applicant did lock the doors to the office and hid in the back room. Her direct manager did come to the office and unlocked the doors. She explained the situation to the manager but she felt that the manager did not take the threat to applicant seriously. The manager asked her if she was able to finish her shift and while she tried to continue to work, she was too upset and she asked to receive medical treatment.

After some confusion as to whether applicant was going to file a workers compensation claim, applicant did file a claim and she was sent to receive medical treatment from North Bay Occupational Clinic where Dr. Steven Bratman, an occupational health physician, evaluated applicant on January 8, 2019. He noted the history of the threatening call to applicant and Dr. Bratman recommended applicant be seen by Dr. David Green, a psychologist. Dr. Bratman stated that while he believed that applicant could continue working, she was not to work alone.

On January 3, 2019, applicant's manager determined that applicant's symptoms prevented her from answering the phones at the office. The manager determined that applicant was to be assigned to cleaning cars. Applicant attempted to clean the cars as assigned but she developed symptoms to her low back and left shoulder. Despite advising her manager of these symptoms, applicant was not sent for medical treatment or was not given a claim form to report another injury. Applicant recalled her manager telling her that "you're not hurt".

Dr. Bratman saw applicant again on January 22, 2019. In his report of that date, Dr. Bratman noted that applicant said that her manager told her that she was not as stressed as she was claiming and appeared dismissive of her complaints. The manager also told applicant that "you are not good enough at your job or mature enough to handle a situation". These comments upset applicant and Dr. Bratman advised applicant to record these exchanges with her manager should they recur (Applicant Exhibit 8, reports of Steven Bratman, M.D.)

Sedgwick Claims Management, defendant's claims adjusting agency (hereinafter referred to as Sedgwick), authorized Dr. Green to evaluate applicant. Dr. Green saw applicant on January 28, 2019 and took a history from her. He also performed several psychological tests. No medical records were sent to Dr. Green for review.

After his exam, Dr. Green prepared a report in which he diagnosed applicant with an Adjustment disorder with mixed anxiety that he related to the phone incident. Dr. Green confirmed that actual events of employment were the predominant cause of the condition and he recommended a course of psychological treatment combined with psychotropic medications. Dr. Green concluded that applicant was not temporarily totally disabled on a psychiatric basis but she needed the course of treatment recommended (Defense Exhibit I, report of David Green. Ph.D., dated 1/28/2019).

Applicant retained the Farber Law Offices (later renamed Pacific Workers Compensation Law Center) on February 15, 2019. Applicant attorney filed two Applications for Adjudication of Claim at the Oakland District Office on February 22, 2019. The psychiatric claim was assigned case number ADJ 11964867 and the back/shoulder claim was assigned case number ADJ 11964847.

On March 12, 2019, Sedgwick issued a denial of applicant's psychiatric claim due to the defense contained in Labor Code Section 3208.3(d), the lack of six months of employment rule. Sedgwick notified Dr. Green and Dr. Bratman that the claim was denied and that no further treatment would be authorized. Applicant has not received any psychiatric treatment throughout the history of the claim.

Sedgwick did accept applicant's back claim as industrial. On March 28, 2019, applicant attorney designated Dr. Joseph Centeno to serve as applicant's treater for this claim and Sedgwick notified Dr. Centeno of his authorization to treat applicant on April 3, 2019. However, applicant was not seen by Dr. Centeno until July 30, 2019.

In August of 2019, applicant relocated to Las Vegas, Nevada. On August 20, 2019, applicant attorney filed a change of address notice with the Oakland District Office with a copy sent to Sedgwick and its attorney (Applicant Exhibit 11, notice of change of address of applicant, dated 8/20/2019).

The parties selected James Shaw, M.D. to serve as Panel Qualified Medical Evaluator (PQME). Dr. Shaw examined applicant on June 17, 2020 and prepared his report on July 14, 2020. In this report, Dr. Shaw determined that applicant had reached MMI status as of the date of his evaluation and had permanent disability to her low back of a 5% Whole Person Impairment (WPI) with a need for medical treatment. Dr. Shaw deferred the issue of whether

applicant has injured her left shoulder to the Trier of Fact (Applicant Exhibit 3, PQME report, James Shaw, M.D., dated 7/15/2020).

On August 31, 2020, defense counsel filed a Declaration of Readiness to Proceed to address the issues in dispute on both claims. Applicant attorney did not object to the DR. At the September 23, 2020 Mandatory Settlement Conference before WCJ Therese daSilva, the parties agreed to set the matters for trial before me.

I conducted three days of trial (1/4/2021, 2/10/2021 and 3/15/2021). Applicant was the only witness to testify on all three days via Lifesize Cloud. Defendant produced no rebuttal testimony. The matter was submitted for decision on March 15, 2021 with only the claim for medical mileage submitted on the orthopedic claim and only injury AOE/COE submitted on the psychiatric claim.

In my original decisions, I found that applicant's injury was the result of a sudden and extraordinary event but that further medical discovery was required. On applicant's physical claim, I awarded some but not all of applicant's claimed mileage. Defense Counsel filed a Petition for Reconsideration but [sic] on the orthopedic claim. Neither party appealed my decision on the orthopedic claim.

Due to the concern over losing jurisdiction on the incorrect claim, I vacated both decisions and reset the matters for additional hearings. At the August 4, 2021 trial, only the psychiatric claim was resubmitted for decision.

DISCUSSION

Applicability of Labor Code Section 3208.3(d)

Defendant contends that applicant's claim for psychiatric injury is barred as she had less than six months employment with defendant. Labor Code Section 3208.3(d) states:

> "…no compensation shall be paid pursuant to this division for a psychiatric injury…unless the employee has been employed by that employer for at least six months. The six months need not be continuous. This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition."

Applicant makes no contention that she worked for at least six months. Defendant makes no claim that the alleged injurious phone call was not "sudden". Therefore, it appears that the only applicability for this defense is whether the threatening phone call was "extraordinary".

The extraordinary prong of this section has been analyzed through numerous decisions. In *Matea v. Workers Comp Appeals Bd* (2006) 144 Cal App.4th 1435 [71 Cal Comp Cases 1522], the six month defense did not apply when lumber fell on top of applicant at a Home Depot…. However, in *State Compensation Insurance Fund v. Workers Comp Appeals Bd* (*Garcia*)(2012) 204 Cal App. 4th 766 [77 Cal Comp Cases 307], an avocado picker's fall from a 24 foot ladder was not considered extraordinary as the event was not uncommon, unusual or unexpected.

Defendant relies upon *Matea v. Workers Comp Appeals Bd* (2006) 71 Cal Comp Cases in its contention that applicant's injury was not extraordinary. In the *Matea* decision, the Court of Appeals held that the limitations was to address "the types of events that would naturally be expected to cause psychiatric disturbances even in a diligent and honest employee" and that such occurrences included "gas main explosions or workplace violence".

In applying this standard to applicant's situation, I believe that a credible threat against her person by an unknown person over the phone meets the requirement of "workplace violence"….

Defendant also raises the issue of burden of proof and that it contends that applicant failed to meet her burden. I did find applicant to be credible throughout three days of testimony and I find her perception that she was in danger after receiving the calls in question to be valid.

Defendant chose not to put any rebuttal testimony in evidence. As I have found applicant to be credible as to establishing that these threats were "extraordinary", it is defendant's burden to rebut the defense.

More telling as to the "extraordinary" nature of the phone call is defendant's callous response to same. Applicant testified credibly as to the disrespectful responses from her manager to her claim. Applicant testified as to several rude and unprofessional responses from her employer and she complained about them to both Dr. Bratman and Dr. Green. Defendant presented no rebuttal to applicant's credible testimony.

….

In analyzing the facts of the present case, I made the formal finding that applicant's injury was extraordinary within the context of the authority provided above. First, applicant received no specific training from defendant in how to deal with a threatening customer, leading one to draw the inference that defendant did not believe that a threatening phone call was common, usual or routine. Second, applicant credibly testified that these threats were different from her experience with prior upset customers and that it was extraordinary.

….

> Based upon applicant' credible testimony and the lack of any rebuttal evidence from defendant, I make the formal finding that applicant's injury was the result of a "sudden and extraordinary" employment condition and that her claim is not barred pursuant to Labor Code Section 3208.3(d).
>
> I recommend that defendant's Petition for Reconsideration be denied.
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> (Report, at p. 1-6.)

In addition to the reasons stated by the WCJ, we note that Labor Code section 3208.3(d) bars compensability for a psychiatric injury where an employee has been employed by the employer for less than six months unless the injury was caused by a sudden and extraordinary employment condition. (Lab. Code, § 3208.3(d).) The parties do not dispute that applicant was employed by defendant for less than six months at the time of the injury or that the cause of the injury was "sudden." The only dispute on reconsideration is whether the cause of the injury was "extraordinary." In *Matea v. Workers' Comp. Appeals Bd*. (2006) 144 Cal.App.4th 1435, 1449 [71 Cal.Comp.Cases 1522]), the Court of Appeal defined "extraordinary" as "'going beyond what is usual, regular, common, or customary'" and "'having little or no precedent and usu[ally] totally unexpected.'" (*Id*.)

In this case, the summary of applicant's trial testimony indicates that applicant was "shocked" by the customer's tone and comment; that "she felt that this went beyond an irate customer;" that "[s]he took his tone seriously;" and that "she felt strongly at the time, … that the customers threat was serious." (Minutes of Hearing and Summary of Evidence (MOH/SOE), 1/4/21 at p. 10:31-42.) She further testified that "she was scared because she did take this seriously" and "was very upset." (MOH/SOE, 2/10/21, at p. 3:14-15.) She further testified that she texted with the area supervisor who "told her to lock the office doors and contact [another employee] to stay away" (MOH/SOE, 1/4/21 at p. 11:8-13) and to "go to a back room and lock that door and wait for a manager." (MOH/SOE, 2/10/21, at p. 3:14-15; 34-35.) Applicant also testified that "her experience with customer service in the past did not involve these types of threats; that "Applicant has worked in the customer service field before. She is familiar with dealing with aggressive customers. However, this incident was unique to her and was very serious to her." (MOH/SOE, 2/10/21, at p. 8:8-18.)

We have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id*.)

For the reasons stated by the WCJ in the report, we agree that the applicant provided credible and unrebutted testimony that the threatening call went beyond what is usual, regular, common, or customary and was totally unexpected. Therefore, the WCJ properly found it to be extraordinary.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 1, 2021

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

CORIE EMERY
PACIFIC WORKERS COMPENSATION LAW CENTER
MICHAEL SULLIVAN AND ASSOCIATES

PAG/bea

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