

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

DEREK BROWN, *Applicant*

vs.

SNOOZE HOLDINGS, INC.; EMPLOYERS ASSURANCE COMPANY, *Defendants*

**Adjudication Number: ADJ10954369
San Diego District Office**

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

Defendant Snooze Holdings, by and through its insurer, Employers Assurance Company, seeks reconsideration and/or removal from the Findings and Award, issued June 16, 2021, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a server on February 17, 2017, sustained an industrial injury to his head, jaw (TMJ/TMD), psyche, dental and nervous system, but not high blood pressure, resulting in 100% permanent disability.

Defendant contends the WCJ erred, first, in finding applicant sustained an industrial injury to his psyche as a direct consequence of his industrial injury. Defendant argues that applicant is precluded from receiving any permanent disability compensation for his psyche injury under Labor Code section 4660.1, because his psyche injury arose as a compensable consequence of his physical injury. Defendant further contends that the WCJ erred in relying on the opinion of primary treating physician, Dr. MacLean, rather than the opinion of Qualified Medical Evaluator Dr. Tawfique, to find applicant sustained a direct injury to his psyche, and that he became permanent and stationary on April 29, 2019, instead of August 30, 2018. Third, defendant contends that the WCJ erred in finding applicant is permanently totally disabled, arguing that the report of applicant's vocational expert is not substantial evidence, and defendant's vocational expert found applicant is amenable to vocational rehabilitation. Finally, that the WCJ erred in awarding attorney

fees in an amount based on an award of 100% permanent disability, but should be based on a finding of 68% permanent disability.

We have reviewed applicant's Answer to the Petition for Reconsideration. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant reconsideration, rescind the Findings and Award and return this matter for clarification on the issue of whether applicant's injury to his psyche constitutes a direct injury or is a compensable consequence of his physical injury.

At the outset, we note that the Appeals Board has 60 days from the filing of a Petition for Reconsideration to act on that petition. (Lab. Code §5909.) Here, however, through no fault of defendant, the timely-filed petition did not come to the attention of the Appeals Board until September 7, 2021, after expiration of the statutory time period. Consistent with fundamental principles of due process, we are persuaded, under these circumstances, that the running of the 60-day statutory period for reviewing and acting upon a timely filed Petition for Reconsideration begins no earlier than the Board's actual notice of the petition. (See *Shiple v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1107-1108 [57 Cal.Comp.Cases 493]; *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd. (Felts)* (1981) 119 Cal.App.3d 193 [146 Cal.Comp.Cases 622, 624].) Therefore, we will consider the Petition for Reconsideration on its merits.

FACTS

Applicant sustained an admitted industrial injury on February 17, 2017, when he struck his head on a coat rack while working as a server at a breakfast restaurant. He testified¹ at trial on

¹ Defendant challenges the reliance upon the WCJ's credibility determination because the trial testimony was taken over the telephone due to the Covid-19 restrictions on in-person trials. Defendant argues that in the absence of live testimony, the WCJ lacked the opportunity to judge applicant's credibility. The WCJ's credibility determinations are due great weight because the WCJ had the opportunity to hear the witness' testimony and judge its veracity. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505].) These credibility determinations may only be rejected where they are not supported by substantial evidence. (Ibid.) Most restatements of this general principle have used the verb "observe." However, we do not agree that observation must be strictly visual. We will not lightly overturn a WCJ's credibility determinations when those determinations are based upon live testimony, whether remote or in-person.

April 13, 2021, that at the end of his shift, he was cleaning out a sugar caddy in a booth, and as he was leaving the booth, he struck his head on the prongs of the coat rack. He testified that one prong hit him in the head, while the other hit his right temple, causing him to feel dizzy and disoriented. He was able to finish his shift and then was off over the weekend. When he returned to work on Monday, he was sent for a medical evaluation. He testified that he did work one or two days in the first few weeks after his injury. He testified that his psychological symptoms started a few weeks after this incident.

In his initial evaluation, Dr. MacLean found that “as a consequence of a concussion and associated injuries ...” from the head trauma on February 17, 2017, applicant “has incurred a psychiatric condition,” diagnosed as generalized anxiety disorder, but with a need to rule out post-concussion syndrome. (Ex. 6. Dr. MacLean Report, 4/6/17, p. 14.)

Describing the onset of applicant’s psychological condition, Dr. MacLean noted in his April 24, 2019 permanent and stationary report, that shortly after suffering the concussion, applicant attempted, but was unable, to return to work and became “sharply depressed with episodic suicidal ideation.” He also reported that the neurological QME found no evidence of seizures and recommended psychiatric treatment. (Ex. 5. Dr. MacLean Report, 4/24/19, p. 22.)

Dr. MacLean noted in a May 23, 2019 supplemental report that in addition to his depression and anxiety, applicant was diagnosed with a “mysterious muscle twitching syndrome,” referred to by the neurologist as benign fasciculation syndrome. Applicant was noted at the time of his emergency room treatment as having sustained a concussion and suffered from a post-concussion disorder.

In a December 19, 2019 progress report, Dr. MacLean found applicant continued to be “very symptomatic” with neurological issues, the likely cause of which is “the unpredictable and highly variable behavioral responses to a post-concussion syndrome.” He noted that applicant was “correspondingly anxious, depressed, and very worried about his future.” (Ex. 2.

In a supplemental report, dated March 2, 2020, Dr. MacLean addressed the relationship between applicant’s psychiatric symptoms and his industrial head trauma.

I would opine that Mr. Brown presents with a history of head trauma that has produced the current and ongoing range of psychopathology experienced by this patient. There is clearly no apparent evidence for a medical etiology. This patient has undergone extensive EEG testing that has been completely negative. Dr. Schweller initially believed that the patient might be suffering from subcortical

seizures but this diagnosis appeared to have been ruled out by extensive EEG testing. Dr. Schweller now opines that the muscle twitches may represent a psychological condition (conversion disorder) and the PQME neurologist has previously found that the twitches reflect a benign fasciculation syndrome exacerbated by anxiety.

Again, the ongoing psychopathology experienced by Mr. Brown is clearly the direct consequence of the head trauma experienced by this patient on 2-17-17. The intractable muscle twitches have had a devastating effect upon this patient's life. Mr. Brown is anxious, depressed, and occasionally experiences suicidal ideation. There is considerable helplessness and painful hopelessness regarding the future.

(Ex. 1. Dr. MacLean Report, 3/2/20, p. 2.)

Dr. Tawfique, the QME in psychiatry, diagnosed applicant with a non-industrial adjustment disorder with mixed anxiety and depressed mood, and a GAF score of 65, with an 8% whole person impairment. (Ex. B. 8/3/18 Dr. Tawfique QME Report, p. 3.)

Dr. Tawfique identified non-industrial factors as the predominant cause of his condition. (Ex. B. 8/3/18 Dr. Tawfique QME Report, p. 20; Ex. C. 9/24/18 Dr. Tawfique Supplemental QME Report, p. 4.) These factors were an arrest in 2010, in which applicant was detained overnight, which Dr. Tawfique inferred was due to substance abuse despite applicant's denial, "a strong genetic disposition to mental illness" indicated by the suicide of a cousin, his grandmother's bipolar disorder and his mother's PTSD. He also cited being raised by a single mother and the absence of applicant's father at a young age. Dr. Tawfique also relied upon applicant's MMPI-2 test results, though, as Dr. MacLean noted, Dr. Tawfique reported that the score was invalid.²

DISCUSSION

The issue here is whether applicant's injury to his psyche is compensable, as having been directly caused by events of his employment, or whether it constitutes a compensable consequence of his physical injury, and thus not entitled to additional disability compensation under Labor Code section 4660.1(c).

A secondary issue, which was not raised at the trial level prior to the submission of this matter, is whether applicant's physical injury qualifies as "catastrophic," pursuant to Labor Code section 4660.1(c)(2)(B), and falls under the exception that limits awards of permanent disability

² "An MMPI-2 was done by the applicant and evaluated by James N. Butcher, Ph.D. Claimant's results were invalid." (Ex. B. Dr. Tawfique, p. 18. The test results are not in evidence. See Ex. 5. Dr. MacLean, p. 9.)

in cases of psychiatric/psychological injury. Defendant challenges the WCJ's finding that the psychiatric injury was a direct result of applicant's physical injury, and argues that applicant has not raised, and cannot now contend, that he qualifies for compensation because his psychological injury was the result of a "catastrophic" injury. Applicant argues the inverse, that the medical evidence establishes he suffered a psychological injury as a direct result of his head trauma at work. Alternatively, he argues that his psychological injury was the result of a "catastrophic" injury.

With regard to psychiatric injuries, Labor Code section 3208.3(b) provides, in relevant part:

(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.
(Lab. Code, § 3208.3(b)(1).)

"Predominant as to all causes" in section 3208.3(b)(1) has been interpreted to mean more than 50 percent. (*Dept. of Corrections v. Workers' Comp. Appeals Bd. (Garcia)* (1999) 76 Cal. App. 4th 810, 816 [90 Cal. Rptr. 2d 716, 64 Cal. Comp. Cases 1356].) This causation threshold applies to all psychiatric injuries including those pled as a compensable consequence of a physical injury. (*Lockheed Martin Corp. v. Workers' Comp. Appeals Bd. (McCullough)* (2002) 96 Cal. App. 4th 1237, 1249.)

Labor Code section 4660.1(c) bars an increase in an injured worker's permanent impairment rating for a psychiatric injury that is a compensable consequence of a physical injury occurring on or after January 1, 2013. However, an injured worker may receive an increased impairment rating for a compensable consequence psychiatric injury if the injury that the psychiatric injury resulted from is due to: 1) being a victim of a violent act or direct exposure to a significant violent act, or 2) a catastrophic injury. (Labor Code section 4660.1(c)(2).)

In *Wilson v. State of CA Cal Fire* (2019) 84 Cal.Comp.Cases 393, 404 (Appeals Board en banc), the Appeals Board recognized that the "proscription against an increased rating for psychiatric injuries in section 4660.1(c) does not apply to psychiatric injuries directly caused by events of employment." Therefore, if applicant suffered a psychological injury directly from the head trauma at work, Labor Code 4660.1(c) would not prevent him from receiving permanent disability indemnity for the psychological injury.

The evaluating physicians must render an opinion as to whether the psychiatric injury was predominantly caused by actual events of employment. The physicians must further specify if the psychiatric injury is directly caused by events of employment or if the psychiatric injury is a compensable consequence of the physical injury.
(*Wilson*, 84 Cal.Comp.Cases at 414.)

With regard to whether applicant's psychological injury is a "direct" or a "consequential" injury, defendant argues that it is consequential, as applicant did not have "an immediate onset of psychological symptoms," and that his psychological symptoms arose "at a later date." (Petition, at p. 6.) In support of the assertion that applicant's psychological symptoms were not directly caused by his head injury on February 17, 2017, defendant notes an absence of "interaction with personnel or customers of the insured which may have resulted in any form of alleged psychiatric direct injury, but rather a physical impact which at a later date may have manifested symptomology related to a psychiatric condition." (Ibid. Emphasis in original.)

In his Answer, applicant argues that Dr. MacLean's articulation of a direct injury is supported by the medical record, whereby applicant's psychological symptomatology arose immediately

Here, the WCJ found Dr. MacLean's reporting established that the industrial injury was the predominant cause of applicant's psychological injury, meeting the standard in Labor Code section 3208.3(b)(1), and found applicant's psychological condition was a direct result of his industrial head trauma. The WCJ rejected the reporting of Dr. Tawfique, finding his opinion was based on "inaccurate histories and medical theories." (Opinion on Decision, p. 7.)

Two recent cases addressed the issue of direct versus consequential psyche injury. In *Valdes v. City of Torrance*, 2019 Cal. Wrk. Comp. P.D. LEXIS 456, a panel held that an injured worker's psychological condition, PTSD and an adjustment disorder, was directly caused by an industrial injury where the injured worker was nearly struck by a car and sustained an orthopedic injury when the car hit a shovel he was holding, causing injury to his shoulder. In the *Valdes* case, the psychological symptoms arose three weeks after the incident, and were not caused by his reaction to his orthopedic injury.

The panel in *Valdes* found there was substantial medical evidence to support the finding that the injured worker's psychological condition was directly caused by his experience of the accident, citing the psychiatric QME's reporting that the injured worker suffered nightmares about

the accident, his finding that actual events of employment caused 100% of his condition, and the injured worker's testimony.

Dr. Echeverria opined that applicant's psychiatric conditions were directly caused by the April 7, 2016 incident. His causation opinion was framed in terms of reasonable medical probability and he provided a thorough rationale for his conclusions. The QME's opinion is also supported by the findings of applicant's psychotherapist, Dr. Tholen. Furthermore, applicant's own trial testimony, which the WCJ found credible, reflects that applicant's psychiatric symptoms primarily relate to the incident itself, not to the physical sequelae resulting from the incident. There is therefore substantial evidence in the record to support a finding that applicant's psyche injury was directly caused by the incident, not as a compensable consequence of his orthopedic injury. (*Valdes v. City of Torrance*, 2019 Cal. Wrk. Comp. P.D. LEXIS 456, *13-14.)

In *Ortega v. Quality Home Care of Santa Cruz*, 2020 Cal. Wrk. Comp. P.D. LEXIS 195, a panel found an injured worker's psyche injury was directly caused by an incident where she was struck by a water balloon thrown from a moving car, which slammed her into her car. She was diagnosed with cervical and occipital parietal contusion, post-traumatic headaches and a somatoform disorder and depressive disorder. Citing an evaluating physician's finding that the injured worker was "psychologically and/or spiritually traumatized by the random seemingly spiteful act against her," the WCJ found the psychological injury was directly caused by the injurious incident, not as a compensable consequence of the incident.

In the instant case, the medical evidence the WCJ relied upon to conclude applicant sustained a direct psychological injury was the opinion of Dr. MacLean. However, as our review of his medical reporting indicates, his formulation of the cause of applicant's injury to his psyche is not without ambiguity. While he concludes in his final report that the psyche injury "is clearly the direct consequence" of the physical injury, he initially opined that applicant "incurred a psychiatric condition" as a "consequence of a concussion and associated injuries." (Ex. 6. Dr. MacLean Report, 4/6/17, p. 14.) In his final report, he also stated that the physical injury, hitting his head on the coat rack, "produced" his psychological condition. "I would opine that Mr. Brown presents a history of head trauma that has produced the current and ongoing range of psychopathology experienced by this patient." (Ex. 1. Dr. MacLean Report, 3/2/20, p. 2.) This would appear to place applicant's psyche injury into the category of a consequence of the physical injury and not directly caused by the physical injury.

The cases cited above, *Valdes* and *Ortega* illustrate cases in which a psychiatric condition was caused by a direct reaction to the industrial injury. In *Valdes*, the injured worker experienced nearly getting hit by a car. In *Ortega*, the injured worker was traumatized by being randomly targeted by a stranger throwing a water balloon. In both cases, the injured worker was found to have sustained a psychological reaction to experiencing a physical incident. In *Valdes*, the finding of a direct cause was based upon a medical opinion that was “framed in terms of reasonable medical probability and ... provided a thorough rationale for his conclusions.”

The opinions expressed by Dr. MacLean are not sufficiently articulated to make a determination as to whether the industrial incident was the direct or consequential cause of applicant’s injury to his psyche. We will therefore grant reconsideration to provide the parties with the opportunity to obtain additional reporting from Dr. MacLean to clarify this issue.

With regard to the other issues raised in defendant’s Petition for Reconsideration, while we see no error in the WCJ’s determination, we make no findings in that regard as we are returning this matter to the trial level for a new final determination.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award, issued June 16, 2021 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the Findings and Award, issued June 16, 2021, is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with the opinion herein, and for a new final determination by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 4, 2021

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

**DEREK BROWN
HIDEN, ROTT & OERTLE
TOBIN LUCKS**

SV/pc

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

CS