

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

**ELIZABETH PARTIDA, *Applicant***

**vs.**

**STATER BROTHERS MARKETS and HARTFORD PROPERTY & CASUALTY  
INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT  
SERVICES, INC, *Defendants***

**Adjudication Number: ADJ11385647  
Riverside District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on November 3, 2020, wherein the WCJ found that applicant did not sustain an injury arising out of and in the course of employment (AOE/COE).

Applicant contends that the reports from the internal medicine - rheumatology qualified medical examiner (QME) Keyvan Yousefi, M.D., and orthopedic QME Joseph C. Hohl, M.D., are not substantial evidence regarding the orthopedic injury claims; and that the reports are not substantial evidence as to whether applicant should be evaluated by a psychiatric QME.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate, except for the last paragraph of the Discussion, (Report p. 4), and for the reasons discussed below, we will affirm the F&O except that we will amend the F&O to defer the issues of whether applicant sustained a psychiatric injury arising out of and in the course of employment and her entitlement to be evaluated by a psychiatric qualified medical examiner. Based thereon, we will amend the Order and return the matter to the WCJ to issue an amended decision consistent with this opinion.

## BACKGROUND

Applicant claimed injury to her back, elbows, wrists, hands, fingers, hips, knees, feet, and psyche, and in the form of stress and fibromyalgia, while employed by defendant as an inventory clerk during the period from November 2, 2002, through June 14, 2018. Applicant's employment with defendant was terminated in January 2017, and she was reinstated in May 2017. Her employment was again terminated as of June 29, 2018. The Application for Adjudication of Claim was filed on July 11, 2018.

On January 31, 2019, orthopedic QME Dr. Hohl evaluated applicant. Dr. Hohl took a history, examined applicant, reviewed the medical record, and diagnosed "Fibromyalgia." (Def. Exh. C, Dr. Hohl, January 31, 2019, p. 7.) He stated:

At this point in time, my opinion this individual is permanent and stationary and has 0% whole person impairment as a result of her work. ... ¶ ... I would apportion all her symptoms to her fibromyalgia and believe she can return to work to her normal occupation.  
(Def. Exh. C, pp. 7 – 8.)

The parties proceeded to trial on July 10, 2019. The matter was ordered taken off calendar for the parties to have applicant evaluated by a rheumatology QME. (Minutes of Hearing July 10, 2019.)

On September 9, 2019, rheumatology QME Dr. Yousefi evaluated applicant. Dr. Yousefi examined applicant, took a history, reviewed the medical record, and requested that he be provided treatment notes from Babak Zamiri, M.D. (Def. Exh. A, Dr. Yousefi, September 9, 2019, p. 12.) Dr. Yousefi was provided progress reports from Dr. Zamiri and laboratory test results from Arthritis Medical Clinic. After reviewing the additional medical records, Dr. Yousefi concluded:

I agree with Dr. Zamiri, the claimant's private rheumatologist, that the claimant does not meet the diagnostic criteria for lupus or any other autoimmune connective-tissue disorder. The claimant's clinical examination does not reveal greater than 11 tender points. Therefore, I do not believe that she meets the diagnostic criteria for fibromyalgia syndrome. ¶ The claimant has reached MMI status from the rheumatology standpoint. She qualifies for 0% whole person impairment from rheumatology standpoint.  
(Def. Exh. B, Dr. Yousefi, February 21, 2020, p. 3.)

At the June 4, 2020 Mandatory Settlement Conference (MSC) a continuance was granted so applicant could send the reports from Dr. Yousefi to Dr. Hohl for his review. (Minutes of Hearing (MOH), June 4, 2020.)

Dr. Hohl was provided Dr. Yousefi's reports and an MRI of applicant's left knee. In the supplemental report he stated that:

After reviewing these records, I have no reason to change my opinion of January 2019, that this applicant suffered 0% impairment due to her work activities with Stater Bros. I would agree with Dr. Yousefi that she probably does not have fibromyalgia and that she did not have 11 different tender points. Therefore, I think the diagnosis would have to be musculoskeletal pain, etiology undetermined.

(Def. Exh. D, Dr. Hohl, July 17, 2020, p. 2.)

At the July 23, 2020 MSC applicant objected to setting the matter for trial, discovery remained open for the supplemental report from Dr. Hohl, and the matter was scheduled for trial. (MOH, July 23, 2020.)

The parties again proceeded to trial on October 5, 2020. The issues submitted for decision included injury AOE/COE, permanent disability/apportionment, and the Labor Code section 3208.3(e) psychiatric injury post-termination defense. (Minutes of Hearing and Summary of Evidence (MOH/SOE), October 5, 2020, p. 2.)

## **DISCUSSION**

We first note, as the WCJ stated in the Report, Dr. Hohl and Dr. Yousefi each took a complete history, reviewed medical records, examined applicant, and explained the basis for their opinions. Applicant's disagreement with the doctors' conclusions do not make them invalid or render them to be not substantial evidence. "Applicant had the opportunity to question the doctors about their findings, but depositions were not scheduled." (Report, p. 4.) Thus, we agree that the reports are substantial evidence and we will not disturb the WCJ's Finding that applicant did not sustain the orthopedic injuries as claimed.

Regarding applicant's contention that she is entitled to be evaluated by a psychiatric QME, Labor Code section 3208.3 states in part:

(a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, ...

(b) (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. ...

(e) Where the claim for compensation is filed after notice of termination of employment or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury and one or more of the following conditions exist:

(1) Sudden and extraordinary events of employment were the cause of the injury.

(2) The employer has notice of the psychiatric injury under Chapter 2 (commencing with Section 5400) prior to the notice of termination or layoff.

(3) The employee's medical records existing prior to notice of termination or layoff contain evidence of treatment of the psychiatric injury. ...

(Lab. Code, § 3208.3.)<sup>1</sup>

In order to decide if a psychiatric QME is necessary, when a section 3208.3(e) “post-termination defense” is at issue, it must first be determined whether the psychiatric injury claim would be non-compensable based on section 3208.3(e). Clearly, if it is found that applicant has not met her burden of proof regarding the post termination provision of section 3208.3(e), there would be no legal basis for having applicant undergo a psychiatric QME evaluation. However, based on our review of the record, it is not clear that the WCJ analyzed the trial record in that context. Section 5313 requires a WCJ to state the reasons or grounds upon which a decision was made. (Lab. Code, § 5313.) A WCJ must explain the legal basis for the decision and refer to the evidence in the trial record that forms the factual basis for the decision. (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 - 476 (Appeals Board en banc).) Again, based on our review of the trial record, we cannot determine whether the evidence that was submitted was considered by the WCJ in the context of section 3208.3(e), in reaching the conclusion that applicant was not entitled to be evaluated by a psychiatric QME, and in turn, that applicant did not sustain a psychiatric injury AOE/COE.<sup>2</sup>

Accordingly, we affirm the F&O except that we amend the F&O to defer the issues of whether applicant sustained a psychiatric injury arising out of and in the course of employment

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise noted.

<sup>2</sup> It is important to note that in our Decision we are not making a determination as to the issues of injury AOE/COE or a psychiatric QME evaluation. We are returning the matter to the WCJ in order to have him conduct the analysis of those issues, as discussed herein.

and her entitlement to be evaluated by a psychiatric qualified medical examiner. Based thereon, we amend the Order and return the matter to the WCJ to issue an amended decision consistent with this opinion.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 3, 2020 Findings and Order, is **AFFIRMED**, except that it is **AMENDED** as follows:

#### **FINDINGS OF FACT**

1. Elizabeth Partida, while employed during the period from November 2, 2002, through June 14, 2018, as an Inventory Clerk, by Stater Brothers Markets, did not sustain injury arising out of and in the course of employment to her back, elbows, wrists, hands, fingers, hips, knees, feet, or in the form of stress and fibromyalgia; the issues of whether applicant sustained a psychiatric injury and her entitlement to be evaluated by a psychiatric qualified medical examiner are deferred.

#### **ORDER**

**IT IS ORDERED** that applicant take nothing by way of the claims of injury to her back, elbows, wrists, hands, fingers, hips, knees, feet, or in the form of stress and fibromyalgia; the issue of whether applicant is entitled to benefits as a result of the psychiatric injury claim is deferred.

**IT IS FURTHER ORDERED** that the matter is **RETURNED** to the WCJ to issue an amended decision consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**FEBRUARY 15, 2022**

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

**ELIZABETH PARTIDA  
TELLERIA, TELLERIA & LEVY  
MICHAEL SULLIVAN & ASSOCIATES**

**TLH/pc**

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

**REPORT & RECOMMENDATION OF JUDGE ON PETITION FOR  
RECONSIDERATION**

**Introduction**

Petitioner Elizabeth Partida (hereafter applicant), by and through her attorney of record, has filed a Petition for Reconsideration on November 25, 2020. Applicant is aggrieved by the Findings and Order, dated November 3, 2020, and asserts that the evidence does not justify the findings of fact, the finding of fact do not support the decision, and that by the order and decision made, the WCJ acted without or in excess of his power. The Petition is verified.

Respondent, Stater Bros Markets, insured by Hartford Property & Casualty Ins Co, administered by Sedgwick (hereafter defendant), by and through their counsel; Michael Sullivan & Associates; filed a verified Answer to the Petition for Reconsideration on 12/4/2020.

**FACTS**

Elizabeth Partida while employed during the period 11/2/2002 through 6/14/1918, as Inventory Clerk, occupational group number 360, was found to not have sustained an injury arising out of and in the course of employment to wrists, hands, fingers, elbows, back, knees, foot, hips, fibromyalgia, and stress/psyche.

On 7/11/2018 the applicant filed an Application for Adjudication of Claim alleging a continuous trauma injury from 11/2/2002 through 6/14/2018 to her foot, back, wrist, fingers, knee, hips, fibromyalgia, stress, and psyche.

The matter was set for trial on 7/10/2019. At that time, the matter went off calendar to develop the record by the parties obtaining a QME Panel in Rheumatology. Applicant Attorney had also requested a QME Panel in Psychiatry, but the request was deferred. This matter was re-set for trial on 10/5/2020.

At the trial on 10/5/2020, the applicant testified that in May 2008, she slipped and fell on her back. Another time, she was walking in the freezer and slipped and fell on her knee (Summary of Evidence, dated 10/5/2020 at page 5:12-13). She denied other injuries at Stater Brothers. She stated that she started having depression in 2007. She alleged harassment from work. She filed grievances as a shop steward. She contended that supervisors followed her at work (SOE, page 5:22-24).

The applicant testified that she was terminated on 1/26/2017 for not returning documentation to support FMLA. She was reinstated on 4/11/2017. She was terminated and last worked on 6/22/2017. She claimed that she was

terminated due to unauthorized overtime. She filed a grievance for her termination. She did not allege injuries when she was terminated (SOE, page 6:10-25).

### **APPLICANT'S CONTENTIONS**

1. The QME reports by Dr. Keyvan Yousefi and Dr. James Hohl are not substantial medical evidence on the issue of Causation of an orthopedic injury.
2. Dr. Yousefi's and Dr. Hohl's opinions are not substantial medical evidence on the need for a psychiatric QME.

### **DISCUSSION**

**Applicant contends that the QME reports by Dr. Keyvan Yousefi and Dr. James Hohl are not substantial medical evidence on the issue of Causation of an orthopedic injury.**

Applicant contends that the QME reports by James Hohl, M.D., are incomplete and cannot be the basis of a decision that requires to be based on substantial and credible evidence. Dr. Hohl ruled out fibromyalgia after reviewing reports by Dr. Keyvan Yousefi. Applicant disagrees with the finding of musculoskeletal pain, etiology undetermined.

Regarding the QME reports by Keyvan Yousefi, M.D., applicant contends that the report is incomplete and further explanation of the cause of the injuries is required.

James Hohl, M.D., prepared a Panel QME report dated 1/31/2019 (Exhibit C). She worked as an Inventory Clerk in the warehouse using a scanner to scan products and entailed long periods of walking. She walked 6 to 8 miles a day. Dr. Hohl was of the opinion that there was no impairment as a result of work. Her symptoms were better explained by fibromyalgia. Dr. Hohl noted that the applicant indicated that she was most comfortable wearing sandals whereas most people with plantar fasciitis are more comfortable in a supportive footwear. This statement implies that Dr. Hohl had some credibility concerns about the applicant.

Keyvan Yousefi, M.D., prepared a Panel QME in Rheumatology, dated 9/9/2019 (Exhibit A). The applicant complained of back pain, anxiety and depression. He took a history, reviewed medical records and reports, and examined the applicant. He requested an opportunity to review Dr. Zamiri's reports before making a final conclusion.

Dr. Yousefi, in his medical report dated 2/21/2020 (Exhibit B), stated that the applicant's examination did not reveal greater than 11 tender points. Medical

records by Dr. Zamiri were reviewed. Dr. Yousefi did not believe that she met the diagnostic criteria for fibromyalgia. There was no impairment.

Dr. Hohl prepared a supplemental report dated 7/17/2020 (Exhibit D), after reviewing the reports by Dr. Yousefi. He found no reason to change his opinion. Dr. Hohl agreed that the applicant did not have fibromyalgia. He thinks the diagnosis would be musculoskeletal pain, etiology undetermined.

Dr. Hohl and Dr. Yousefi took a complete history, reviewed medical records and reports, performed an examination, and composed and drafted the conclusions of the report. It was found that their reports constituted substantial medical evidence.

Applicant contests that the findings by Dr. Hohl and Dr. Yousefi. Applicant attorney contended that since applicant worked for defendant for 16 years, there was a cumulative trauma injury. Disagreement with the findings by a doctor do not make the finding invalid or not substantial medical evidence. Applicant had the opportunity to question the doctors about their findings, but depositions were not scheduled.

#### **RECOMMENDATION**

It is recommended that the Petition for Reconsideration be denied.

12/8/2020

DAVID THORNE

WORKERS'COMPENSATION ADMINSTRATIVE LAW JUDGE