

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

STEVEN ODESSKY, *Applicant*

vs.

**SMOGTOWN RECORDS; TRAVELERS PROPERTY CASUALTY COMPANY OF
AMERICA, *Defendants***

**Adjudication Number: ADJ8908424
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on September 5, 2019. By the F&A, the WCJ found that applicant sustained injury arising out of and in the course of employment (AOE/COE) to the arm, left elbow, skin and psyche. An award was made for permanent disability to the arm, left elbow and skin.

Defendant contends that the medical reporting is not substantial evidence on the issue of injury AOE/COE to applicant's skin and psyche.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will rescind the F&A and return this matter to the trial level for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

Applicant claims injury to the arm, left elbow, skin and psyche on March 21, 2013 while employed as a warehouse manager by Smogtown Records. Defendant has accepted compensability for the arm and left elbow, but disputes injury AOE/COE to the skin and psyche.

(Defendant's Exhibit K, Notice of Denial of Claim for Workers' Compensation Benefits, November 3, 2014.)

Howard Sofen, M.D. evaluated applicant as the dermatological qualified medical evaluator (QME). In his February 10, 2016 report, Dr. Sofen opined as follows in relevant part:

Psoriasis is an autoimmune disease that is characterized by a chronic scaling condition of the skin with variable clinical features. The exact cause of psoriasis is unknown, but hereditary and genetic factors are important as the condition has a strong genetic component. Psoriasis is not caused by allergies, infections, dietary deficiencies, or nervous tension. An individual must receive a combination of different genes (a combination which is likely to be different for different people) that work together to cause psoriasis. The individual must then be exposed to specific factors that can trigger his or her particular combination of genes to cause the disease. These triggers are not yet fully understood or defined, however; certain types of infection and stress have been identified as potential triggers. The fact that Mr. Odessky's psoriasis has flared subsequent to his industrially related injury, it may have been a contributing factor to his dermatological disease.

(Joint Exhibit No. 10, Medical report of Howard L. Sofen, M.D., February 10, 2016, p. 6.)

In a supplemental report, Dr. Sofen stated:

As previously stated in my report dated 02/10/16, psoriasis is an autoimmune disease. An individual must be exposed to specific factors that can *trigger* his or her particular combination of genes to cause the disease. These triggers are not yet fully understood or defined, however *stress has been identified as a potential trigger*. In my medical opinion, the fact that Mr. Odessky's psoriasis flared subsequent to his industrially related injury, it may have triggered his dermatological disease.

(Joint Exhibit No. 9, Medical report of Howard L. Sofen, M.D., August 24, 2018, p. 1, emphasis in original.)

Joshua Pretsky, M.D. evaluated applicant as the psychiatric QME. Dr. Pretsky diagnosed applicant with major depression. (Joint Exhibit No. 7, Medical report from Barrington Psychiatric Center, Joshua Pretsky, M.D., May 18, 2018, p. 32.) Dr. Pretsky's report states as follows in the causation section:

The claimant's Major Depression developed secondary to sequelae of the March 21, 2013 work injury. He initially experienced symptoms, which hat [*sic*] were not severe enough to diagnose a Major Depression, secondary to his experience

of pain and restricted use of his left arm, which made it difficult for him to do his job. Prior to the injury, the claimant was quite active, including scuba diving, riding bikes, riding a motorcycle, backpacking. Secondary to his injury, he has not been able to engage in any of these previously enjoyed activities.

After being terminated from his employment in April 2014, the claimant experienced increased psychological symptoms, though still at this point he was not evidencing a Major Depression. He experienced the onset of Major Depression following the outbreak of plaque psoriasis in approximately August or September 2014. It was after the outbreak of plaque psoriasis that the claimant experienced symptoms severe enough to diagnose a Major Depression. The claimant believes that, secondary to stress and various medications prescribed following his industrial elbow injury, he experienced the onset of plaque psoriasis. Dr. Sofen, in his February 10, 2016 Report of Panel Qualified Medical Examination in Dermatology, does find 50 percent apportionment to industrial factors and 50 percent apportionment to non-industrial factors. Regarding the industrial contribution, he indicates it might be “possibly due to stress” and deferred to an appropriate specialist in psychiatry. At the time he experienced the outbreak of plaque psoriasis, he was experiencing stress secondary to his left elbow pain and restrictions/limitations prior to surgery being performed in 2015.

The claimant experienced the onset of Major Depression after development of plaque psoriasis. He experienced the onset of Major Depression following the plaque psoriasis in part due to the significant pain and itching associated with this condition. Also, he also experienced the onset of Major Depression because of his physical appearance secondary to this condition. He reports red, blistery, scaly skin which would peel off. During one outbreak it was over 93 percent of his body, including his ears and his genitalia. When he went out in public, others treated him as if he was some type of a monster. For example, on one occasion, he was told that he was disgusting and that he should not be out in public. Even his own grown step-children have expressed concerns to their mother about whether it is safe to have their children, his step-grandchildren, around him. The claimant became very self-conscious about his appearance, lost interest in sexual relations, and, particularly when he is having an outbreak, avoided going out in public. He associates the outbreaks of psoriasis with increased stress. Through the present time he struggles to keep his life as stress free as possible for fear that he will experience another outbreak. Even when not experiencing an outbreak, he feels self-conscious about his appearance and has lost all interest in sexual relations.

Non-industrial medical conditions also impact the claimant’s psychological state. He suffers from cardiac artery disease and in 2012 had a stent implanted. On several occasions since the stent was implanted, he has been hospitalized secondary to episodes of chest pain and shortness of breath. He suffers from Hypertension, which based on medical records, at this time is poorly controlled due to failure to use medications as prescribed. In addition, records indicate the

claimant was diagnosed with skin cancer and had several basal and/or squamous cells removed last year. Although less than a substantial cause of the claimant's Major Depression, the nonindustrial medical conditions do impact his psychological state.

The termination of the claimant's employment in April 2014 impacted his psychological state, but was less than a substantial cause of his Major Depression. The claimant filed a wrongful termination claim and reportedly received a settlement of \$50,000. However, after he was terminated, he found contract work through the time he obtained full-time employment a year and a half ago.

At this time, the claimant's psychiatric history is not clear. During our evaluation the claimant reported receiving psychological treatment following his work injury. He also reports that at the time of his divorce almost 20 years ago, he experienced a period of depression and received approximately six to eight psychotherapy sessions. However, Dr. Hinze, in his report of December 11, 2014 psychological evaluation, indicates that, "The patient denies a history of mental health, illness, or treatment." During our evaluation, the claimant did not indicate that he was in the military, nor is there any mention of military service in the report of Dr. Hinze. However, records of Dr. Watkins indicate that in September 2003, he was referred to a psychologist, Dr. Sue Appleton. In addition, in a May 6, 2003 Prescription Note, Dr. Watkins indicates prescription of Lexapro 10 mg. In addition, in an October 19, 2000 note, Dr. Watkins makes a diagnosis of Posttraumatic Stress Syndrome and marital problems and indicates a referral to psychiatry. Moreover, records from the claimant's hospitalization at Huntington Memorial in 2015 indicates the claimant claims that not only was he in the military, but that he was actually a Navy Seal. In addition, in the Huntington Memorial notes, there is a reference to the claimant being diagnosed with Posttraumatic Stress Disorder and that he sees a therapist. There is also a reference to the claimant having other medical issues, but they are "classified" due to his time in the military. Based on these records, the claimant did evidence prior episodes of depression which will be taken into account when apportionment is addressed below.

The claimant also evidences estrangement from family members which has impacted his psychological state, but was not a substantial cause of his Major Depression. The claimant was close to his mother and, after she died, he was supposed to inherit several paintings, as well as antiques which they had shopped for together. However, after his mother died, his sisters "took everything," including art pieces and antiques which were meant for him. The claimant did not contest the will, but instead shut off contact with his sisters ever since, noting that, "If people choose to treat me that way, I don't want anything to do with them."

(Id. at pp. 33-35.)

Dr. Pretsky concluded the report:

Mr. Odessky is diagnosed with a Major Depression, Mild to Moderate. At no time has he experienced any temporary disability on a psychiatric basis. He has attained Maximal Medical Improvement with a GAF of 58. Sequelae of his work-related physical injury were the predominant cause of his Major Depression. At present he has attained Maximal Medical Improvement with a GAF of 58. On an industrial basis, he is in need of both individual psychotherapy and use of psychotropic medication.

(Id. at p. 37.)

The matter proceeded to trial in 2019 with the issues in dispute including injury AOE/COE to the skin and psyche. (Minutes of Hearing and Summary of Evidence, March 27, 2019, p. 2.)

Applicant testified as follows in relevant part:

The applicant was injured at work on March the 21st, 2013. The applicant was injured when he was lifting a heavy box from the floor and he felt a pop in his left arm. The applicant got medical treatment that same day. The applicant developed depression, anxiety, and stress which was caused by pain in his left arm and the work the applicant could not do because he could not use his left arm.

...

The applicant was treating for his condition. The applicant had not yet had arm surgery, but later on he had the surgery. The applicant was forced on to the job market even though he was physically impaired. Dr. Mostofi recommended surgery to the applicant's arm. The defendants were not authorizing the surgery. That impacted the applicant psychologically and it created a lot of worry because applicant had to live off of his savings and applicant had to file for EDD benefits which he received.

...

The applicant was informed by Dr. Parshinian that it flares up secondary to stress. The applicant thinks the plaque psoriasis started after the third rejection by Travelers of the repair of the applicant's arm. The applicant thinks it started in late 2013, but the applicant is not certain.

(Id. at pp. 5-7.)

Testimony from applicant continued on a second day of trial and included the following as relevant herein:

The applicant believes the plaque psoriasis started in late 2013. Before that, the applicant had not experienced anything like plaque psoriasis.

...

The applicant was diagnosed with PTSD from his divorce. The applicant's kids were taken away from him.

...

The applicant is stressed. The applicant didn't tell Dr. Sofen about the previous post-traumatic stress syndrome. The applicant did not tell Dr. Pretsky that his kids were taken away. Dr. Pretsky did not ask the applicant if he had any children.

QUESTIONS BY THE COURT:

The applicant got plaque psoriasis as a result of an injury to the elbow. Stress from the elbow pain caused the plaque psoriasis.

(Minutes of Hearing and Summary of Evidence, July 31, 2019, pp. 2-4.)

The WCJ issued the resulting F&A as outlined above.

DISCUSSION

The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a); 3202.5.)¹

Decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], italics and citations omitted.)

To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be

¹ All further statutory references are to the Labor Code unless otherwise stated.

erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Preliminarily, it is acknowledged that the two body parts in dispute, skin and psyche, are subject to different causation thresholds. With respect to the skin, it is sufficient for applicant to show that work was a contributing cause of the plaque psoriasis. (See *Clark, supra*, 61 Cal.4th at p. 298; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) Applicant need only show that industrial causation was "not zero" to show sufficient contribution from work exposure for the skin condition to be compensable. (*Clark, supra*, 61 Cal.4th at p. 303.) The burden of proof "manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].)

Alternatively, with respect to the psychiatric claim, section 3208.3(b)(1) provides, in relevant part, as follows:

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" for purposes of section 3208.3(b)(1) has been interpreted to mean more than 50 percent of the psychiatric injury was caused by actual events of employment. (*Dept. of Corr. v. Workers' Comp. Appeals Bd. (Garcia)* (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356].)²

The dermatological QME Dr. Sofen concluded that applicant's stress caused his psoriasis. Stress by itself is not an injury. "Stress is not a diagnosis, disease, or syndrome. It is a nonspecific set of emotions or physical symptoms that may or may not be associated with a disease or syndrome. Whether or not stress contributes to a disease or syndrome depends on the vulnerability

² If the psychiatric injury was caused by "being a victim of a violent act or from direct exposure to a significant violent act," the employee must instead show that actual events of employment were a substantial cause of the injury, which is statutorily defined as "at least 35 to 40 percent of the causation from all sources combined." (Lab. Code, § 3208.3(b)(2)-(3).)

of the individual, the intensity, duration, and meaning of the stress; and the nature and availability of modifying resources.” (American College of Occupational and Environmental Medicine (ACOEM) Practice Guidelines, 2nd Edition at p. 1055.)³ However, stress may cause a physical injury or a psychiatric injury or both.

Where stress causes a physical injury, the predominant causation threshold in section 3208.3 does not apply. Therefore, if stress from applicant’s orthopedic injury caused the psoriasis, applicant is only required to show that the industrial injury was a contributing cause of the psoriasis to a reasonable medical probability. Dr. Sofen opined that “the fact that Mr. Odessky’s psoriasis flared subsequent to his industrially related injury, it may have triggered his dermatological disease.” This conclusion is tenuous at best and suggests that Dr. Sofen’s causation opinion for applicant’s psoriasis is based solely on the temporal relationship of the flare occurring after his orthopedic injury. This does not constitute substantial evidence to support a finding of injury AOE/COE for applicant’s psoriasis.

In *Wilson v. State of CA Cal Fire* (2019) 84 Cal.Comp.Cases 393, 403-404 (Appeals Board en banc), causation of an injury was discussed as follows in relevant part:

Causation of an injury may be either direct or as a compensable consequence of a prior injury. More precisely, an injury may be directly caused by the employment. Alternatively, a subsequent injury is a compensable consequence of the first injury where it “is not a new and independent injury but rather the direct and natural consequence of the” first injury. (*Carter v. County of Los Angeles* (1986) 51 Cal.Comp.Cases 255, 258 (Appeals Board en banc).)

...

Whereas the first injury is directly caused by the employment, a compensable consequence injury is indirectly caused by the employment via the first injury.

A psychiatric injury may therefore be *directly* caused by actual events of employment or as a *compensable consequence* of an industrial physical injury. (See *Lockheed Martin Corp. v. Workers’ Comp. Appeals Bd. (McCullough)* (2002) 96 Cal.App.4th 1237, 1249 [67 Cal.Comp.Cases 245] [“the precipitating physical injury constitutes an ‘actual event[] of employment’ within the meaning of [section 3208.3(b)(1)]” for a compensable consequence psychiatric injury].) The predominant causation threshold applies to psychiatric injuries pled as a

³ At the time of Dr. Sofen’s 2016 evaluation of applicant, the American College of Occupational and Environmental Medicine (ACOEM) Guidelines 2nd Edition were adopted and incorporated for medical diagnosis and treatment of workers’ compensation stress related conditions. (Former Cal. Code Regs., tit. 8, § 9792.23.8.) Different ACOEM Guidelines are applicable under the current version of administrative director (AD) Rule 9792.23.8.

compensable consequence of a physical injury. (*Id.*)

Dr. Pretsky concluded that “[i]t was after the outbreak of plaque psoriasis that the claimant experienced symptoms severe enough to diagnose a Major Depression.” He considered applicant’s psychiatric condition to be the “[s]equelae of his work-related physical injury,” i.e., his depression was considered a compensable consequence of the physical injury, not directly caused by his work. Dr. Pretsky’s report indicates that applicant’s depression resulted from his psoriasis. However, if the physical injury to which applicant’s psychiatric injury is attributed is not found to be industrially caused by the trier of fact, then there can be no “compensable” consequence psychiatric injury flowing from the non-industrial condition. In other words, if the underlying physical injury claim (in this case psoriasis) is not compensable, then the psychiatric condition that is a consequence of that claim is also not compensable. (See e.g., *Doke v. Workers’ Comp. Appeals Bd.* (2004) 69 Cal.Comp.Cases 1577 (writ den.) [the Board concluded that it was inconsistent with both the workers’ compensation statutory scheme and the compensable consequence doctrine for a consequential injury to be compensable when the primary injury is not compensable].) As outlined above, further development of the record is necessary to determine if the psoriasis is compensable.

It is also acknowledged that an emotional reaction resulting from the workers’ compensation litigation process has been found not to be a compensable psychiatric injury. (See *Rodriguez v. Workers’ Comp. Appeals Bd.* (1994) 21 Cal.App.4th 1747 [59 Cal.Comp.Cases 14]. If applicant’s alleged injury resulted from stress related to the litigation process, this would not be compensable.

Additionally, Dr. Pretsky stated in his report that applicant’s “psychiatric history is not clear” and outlined discrepancies in the records reviewed. As discussed above, medical opinions that are based on inadequate histories are not substantial evidence. (*Hegglin, supra.*)

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.) The Appeals Board also has a constitutional mandate to “ensure substantial justice in all cases” and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers’ Comp.*

Appeals Bd. (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The “Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee.” (*San Bernardino Cmty. Hosp. v. Workers’ Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].)

The preferred procedure to develop a deficient record is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) The proper method to develop the record is thus for the parties to return to the physicians who have already reported in this case, including the dermatological and psychiatric QMEs. Thereafter, per *McDuffie*, if the existing physicians cannot cure the need for development of the record, the selection of an agreed medical evaluator (AME) should be considered by the parties. If the parties cannot agree to an AME, then the WCJ can appoint a physician to evaluate applicant pursuant to section 5701.

Therefore, we will return this matter to the trial level for further development of the record. This is recommended to include at a minimum supplemental reporting from the dermatological and psychiatric QMEs regarding causation for the skin and psychiatric claims.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued by the WCJ on September 5, 2019 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 22, 2022

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

**DIMACULANGAN & ASSOCIATES
MINAS NORDANYAN
STEVE ODESSKY**

AI/pc

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