WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

KAREN YOUNG, *Applicant*

vs.

CEDARS-SINAI MEDICAL CENTER, Permissibly Self-Insured, *Defendant*

Adjudication Number: ADJ13956162
Marina Del Rey District Office

OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Order of October 3, 2023, wherein it was found that while employed as a medical assistant during a cumulative period ending June 23, 2020, applicant sustained industrial injury to the psyche. Applicant also claims industrial injury to the right wrist, "sleep-neurology," and "head-cognitive," but all other issues other than injury to the psyche were deferred.

Defendant contends that the WCJ erred in finding industrial injury to the psyche, arguing that the reporting of qualified medical evaluator psychiatrist Marina Lensky, M.D. did not constitute substantial medical evidence that actual events of employment were the proximate cause of the psychiatric injury. Defendant also appears to argue that it should be allowed further discovery to develop the record on and raise the defense that applicant's psychiatric injury was substantially caused by good faith, nondiscriminatory personnel actions. (Lab. Code, § 3208.3, subd. (h).) We have received an Answer from applicant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report, which we adopt, incorporate, and quote below, we will deny the defendant's Petition. We note that, while Dr. Lensky noted several factors which may be a basis for apportionment once applicant's condition becomes permanent and stationary, Dr. Lensky clearly stated that industrial factors were the predominant cause of applicant's injury. In order to constitute substantial evidence of injury, a reporting physician is not required to parcel out the exact percentage of industrial and nonindustrial contribution. Dr. Lensky set forth industrial and nonindustrial stressors and opined that industrial factors were the

predominant cause of injury. Additionally, we note that although defendant points to applicant's mother's passing as a possible cause of applicant's depression, the death took place after applicant sought psychiatric treatment as a result of her work injury (June 17, 2021 report at pp. 64, 88), and thus could not be a cause of applicant's injury, although factors subsequent to injury may be a basis for apportionment. (Lab. Code, § 4663, subd. (c).)

We have omitted a portion of the Report in which the WCJ writes that industrial events were the sole cause of the psychiatric injury. (Report at p. 5.) This appears to contradict Dr. Lensky's opinion that applicant " developed industrial aggravation of pre-existing anxiety and depressive disorders due to alleged mistreatment by [her] manager." (June 17, 2021 report at p. 89.) It appears that in parceling out percentages of causation, Dr. Lensky was not discussing whether actual events of employment were the predominant cause of injury but was rather incorrectly parceling out only industrial factors in determining whether the good faith nondiscriminatory personnel action defense applied. (*San Francisco Unified Sch. Dist. v. Workers' Comp. Appeals Bd.* (Cardozo) (2010) 190 Cal.App.4th 1 [75 Cal.Comp.Cases 1251] [in determining whether personnel actions substantially caused psychiatric injury, both industrial and nonindustrial factors must be considered].) However, Dr. Lensky's error in this regard is harmless, given that if defendant did not meet the threshold when utilizing only industrial factors, it necessarily would not meet the threshold when nonindustrial factors further diluted the percentage contribution of any personnel actions. In any case, as noted by the WCJ, defendant did not raise the defense at trial.

I.
INTRODUCTION

> This case went to Trial on 8/3/23. In a Findings of Fact dated and served on 10/3/23, the judge wrote:
>
> *"Karen Young did sustain psychiatric injury arising out of and occurring in the course of employment at Cedars Sinai Medical Center."*
>
> On 10/26/23 Defendant filed a timely and verified Petition for Reconsideration but did not directly raise any of the five grounds set forth in Labor Code Section 5903. Instead Petitioner wrote:
>
> *"This Petition seeks the reconsideration of the F&O's two specific findings:*

(A) Applicant sustained a psychiatric injury arising out of and in the course of her employment with Defendant (AOE/COE); and

(B) Defendant forfeited the good-faith personnel action defense".

(NOTE--The judge never used the word "forfeited" or "forfeit" in his decision.)

Applicant filed an Answer on 11/6/23.

II.
FACTS

Applicant Karen Young, at age 30, filed a workers compensation claim against her employer Cedars-Sinai Medical Centers (Cedars) for injuries to her right wrist, sleep/neurology, head/cognitive and psyche while employed as a medical assistant (Patient Services Representative) between the periods of 6/23/19 to 6/23/20. Defendant denied the injury and a panel QME was obtained in both neurology and psychiatry.

The focus of the Petition for Reconsideration is the finding of an industrially-caused psychiatric injury. The relevant general history is Karen Young began working as a medical assistant at Cedars in 2011 and things seemed generally fine until the pandemic in March 2020. Her job duties changed and increased significantly. She started working at home as the pandemic came but eventually stopped working for Cedars in June 2020. Karen Young told her physicians about being overworked and about being harassed by a supervisor named Kenton Halim.

Dr. Chodakiewitz was the PQME in neurology. (Exhibits 1 & 2) He found injury but his findings were too conclusory to be substantial medical evidence. The judge decided the record needed further development with regards to the body parts right wrist, neurology, head, and sleep. The Opinion on Decision discusses in detail why this is done. Defendant did not appeal this part of the judge's trial decision.

Defendant is appealing the judge's determination that the medical report of psychiatric panel-QME Dr. Marina Lensky (Exhibit 4) is substantial medical evidence which led to a Findings of Fact that Karen Young sustained a compensable psychiatric injury at Cedars.

The judge's Opinion and Findings never used the word "forfeited" with regards to any potential good faith personnel action defense.

III.
DISCUSSION

Petitioner's 14 page pleading is not the model of clarity and is full of nitpicking and distractingly unnecessary hyperbole. Petitioner raises multiple problems with Dr. Lensky's reporting but ignores why they seemingly did nothing to cure these problems until two years after the report was received and after the case was destined to be set for Trial.

As a reminder, all body parts are denied. The case was filed on 12/7/20 and by June of 2021 there was a PQME report from psychiatrist Dr. Lensky which found psychiatric injury that was 100% caused by three actual events of the workplace. They are:

20% Negative Performance Evaluation FEB/MAR 2020
20% Overwork and Stressful Work Environment
60% Harassment by a Supervisor

When this report came out over two years ago Defendant was arguably required under Labor Code Section 4063 to pay compensation. (i.e. treatment, temporary disability), or file a Declaration of Readiness. (DOR) They did neither. Instead Applicant had to file a DOR to get an additional panel after no initial agreement was made on a joint basis. The parties eventually resolved that dispute and agreed to an additional panel in neurology with QME Dr. Chodakiewitz. However, when Dr. Chodakiewitz needed additional testing performed, Applicant had to a file a second DOR to get it done.

Then when Dr. Chodakiewitz issued his second report finding injury, Defendant again neither filed a DOR nor paid compensation in violation of LC 4063 which states:

"If a formal medical evaluation from an agreed medical evaluator or a qualified medical evaluator selected from a three member panel resolves any issue so as to require an employer to provide compensation, the employer shall, except as provided pursuant to paragraph (2) of subdivision (b) of Section 4650, commence the payment of compensation or file a declaration of readiness to proceed."

Defendant did not take Applicant's Karen Young's deposition as far as the judge knows. Also, as far as the judge knows Defendant never sought a supplemental report from Dr. Lensky or sought to take her deposition until only recently.

Defendant is the one complaining about the quality of the medical evidence despite its legal duty to provide a good faith investigation pursuant to Title 8, CCR 10109. Petitioner in this case was required under this regulation to conduct a reasonable and timely investigation. Petitioner may not restrict its investigation

to preparing the defense of the claim, but must fully and fairly gather pertinent information *"whether that information requires or excuses benefit payment."*

Title 8, CCR 10109 also specifically states that Applicant's burden of proof does not excuse Defendant's duty to investigate. Moreover, *"The claims administrator may not restrict its investigation to the specific benefit claimed if the nature of the claim suggests that other benefits might also be due."*

The judge questions how under these circumstances Petitioner can nitpick Dr. Lensky's report, stating it has a fatal flaw, its inconsistent, its implausible, and facially invalid, yet show the judge they did nothing prior to discovery cut off to fix these claimed problems despite having two years to do so.

DR. LENSKY'S REPORT IS INTERNALLY INCONSISTENT, LOGICALLY IMPLAUSIBLE, AND FACIALLY INVALID

The judge disagrees that Dr. Lensky's report is not substantial medical evidence. The Opinion on Decision stated:

"There is indeed substantial medical evidence of an industrially caused psychiatric injury. Dr. Lensky's report is 92 pages long. At page 50 is where the records review focuses on events that are part of the cumulative trauma. Dr. Lensky reviews treatment records from when Applicant first stopped working with complaints of headaches, anxiety, and work-related stress. Dr. Lensky reviewed reporting from Dr. Bamshad who apparently was treating Applicant in 2020 for psychiatric symptoms. He reviewed reports of psychologist Dr. David Scott for treatment in 2020 for work related stress. The reporting of Applicant's account of the injury is quite detailed as shown at pages 67 to 72.

This is a well written report and a good example of what is substantial medical evidence. The PQME discussion of the injury at pages 87 to 90 was convincing. Defendant goes out of their way in picking apart this report but the judge believes it is high quality. Any concerns over an unreliable MMPI are discussed by the PQME. This report has also been in existence for almost two years. Defendant had sufficient opportunity to obtain a supplemental report or take Dr. Lensky's deposition.

Also, If Defendant wanted to break down the 60% causation apportionment assigned to the main harasser Kenton Halim then why didn't they have Mr. Halim testify, or have taken his deposition, or deposed the PQME in an effort to comply with their duty to provide a good faith investigation? Moreover, even if it were broken down by separate events Defendant does not separately list what they might be or argue that any particular event could potentially be a lawful, good faith, personnel action.

Dr. Lensky's causation discussion is substantial medical evidence that serves to

meet Applicant's burden of proof regarding predominate (sic) cause of the psychiatric injury. The burden then shifts to Defendant on any issues related to the Rolda case or good faith personnel action. Defendant does not deserve extra time under the circumstances to meet this burden of proof.

The judge is issuing a Findings of Fact determining there is an industrially caused psychiatric injury at Cedars Sinai"

PQME Dr. Lensky in her only report found Applicant was temporarily partially disabled and not MMI. The PQME deferred any findings on permanent disability and apportionment. Petitioner seems to twist this deferral as somehow affecting the PQME's findings on percentages of causation of injury, i.e. the predominant cause requirement.

This type of argument suggests Petitioner may not fully understand the distinction between apportionment of causation and apportionment to permanent disability.

The issue of permanent disability was not set for Trial. The psychiatric injury was set on the issue of injury AOE/COE only. There was no need for evidence on apportionment to permanent disability. Failure to make a conclusion on PD and apportionment does not render the PQME findings on causation any less meaningful as Petitioner suggests in an unnecessarily hyperbolic manner.

If omitted in the original decision, the judge can now make clear he relies on Dr. Lensky's findings that psychiatric injury is caused by three actual events of the workplace.

[Further discussion of industrial causation omitted.]

THE QME REPORT SUFFERS FROM OTHER FATAL FLAWS

It appears Defendant is raising for the first time in a Petition for Reconsideration that the Zoom telemedicine evaluation Applicant had with PQME Dr. Lensky is somehow defective since certain conditions were not met. The judge is not convinced and this issue should have been raised prior to the evaluation itself.

Defendant also again raises the issue of the MMPI test and why Applicant was not able to complete it. This MMPI issue seems to only be a problem for Defendant as Dr. Lensky did not let it interfere with her conclusions on causation. (Pages 89-90) Dr. Lensky wrote with regards to the MMPI:

"In spite of credibility concerns it is my opinion with the reasonable degree of medical probability that Ms. Young's claim of psychiatric disability is compensable pursuant to LC 3208.3"

Again, Defendant had the opportunity, if not a duty under Reg. 10109, to timely clarify anything about this medical opinion that might be an issue later on in the case. Dr. Lensky's medical report was likely in the party's hands by July 2021. Defendant had plenty of time to further question Dr. Lensky about her conclusions or alleged omissions.

THE WCJ'S DENIAL OF RE-OPENING OF DISCOVERY FOLLOWING PRIOR COUNSEL'S SUDDEN DEATH IS REVERSIBLE ERROR

Petitioner continues to use the death of prior defense counsel as an excuse. However, accommodation was already provided. The case should have been set for Trial at the MSC on 5/6/23. Instead the parties made a joint agreement to another MSC held on 7/3/23.

The judge also addressed this issue in great detail in the Opinion on Decision at pages 2 to 4. The discussion is too lengthy to be included in this report. However, it should be reviewed as part of this report as the judge did carefully analyze Defendant's due process and right to further discovery.

ADDITIONAL CONTENTIONS MADE BY PETITIONER

Petitioner seems to blame the judge for denying them due process with regards to their ability to call as a witness the so-called main harasser Kenton Halim. Again, this argument only serves to shine a light on Defendant's lack of due diligence. Defendant listed this witness on their Pre-Trial Conference Statement which was filed on 6/27/23. The Trial was held on 8/3/23. This is sufficient time to locate Mr. Halim. His cooperation should arguably have been requested by Defendant as soon as the 2021 report of Dr. Lensky came out blaming 60% of the cause of the psychiatric injury on his mistreatment of Applicant Karen Young. Under the totality of the circumstances, Defendant did not deserve any additional time or a continuance to try to get Mr. Halim to testify.

Finally, the judge did not make any decision that Defendant somehow "forfeited" their right to put on a Rolda defense and show that a substantial cause of the injury was a lawful, good faith, personnel action. Instead Defendant basically put up no Rolda defense or even raised it as an issue on the Pre-Trial Conference Statement. (EAMS #47016653)

The judge in no way bifurcated or separated the issue of predominant cause (AOE/COE) with the intent to allow a second bite of the apple in a separate trial on whether the injury is barred as a good faith personnel action. The good faith personal action defense is part and parcel of any AOE/COE analysis. It was fairly predictable to all parties that Applicant would likely meet her predominant cause burden of proof. The injury is therefore compensable unless Defendant can show it is barred as being substantially caused (35-40%) by a good faith,

lawful, non-discriminatory personnel action. In this regard Defendant listed no trial exhibits and called no witnesses. They didn't ask Karen Young about it during the cross-examination. They didn't offer into evidence the actual written personnel action that PQME Lensky assigned 20% causation of the psychiatric injury.

IV.
RECOMMENDATIONS

It is respectfully recommended that Defendant's Petition for Reconsideration be denied.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Order of October 3, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 26, 2023

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

KAREN YOUNG
LESTER J. FRIEDMAN
CDLP LAW

DW/oo

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