

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

**REBECCA DURAN, *Applicant***

**vs.**

**FENIX MARINE SERVICES LIMITED; GREAT AMERICAN INSURANCE  
COMPANY ADJUSTED BY AMERICAN EQUITY UNDERWRITERS  
INCORPORATED, *Defendants***

**Adjudication Number: ADJ12535201  
Long Beach District Office**

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

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and Opinion on Decision 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 and Opinion on Decision, both of which we adopt and incorporate, and for the reasons stated below, we will grant reconsideration, affirm the WCJ's finding of industrial psychiatric injury, and amend Findings of Fact number 1 to include the admitted body parts to which the parties stipulated at trial.

Preliminarily, we note that a petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice ...." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied the applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period

that the file was misplaced. (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shipley*, “we are not convinced that the burden of the system’s inadequacies should fall on [a party].” (*Shipley, supra*, 7 Cal.App.4th at p. 1108.)

In this case, the Appeals Board failed to act on defendant’s petition within 60 days of its filing on September 9, 2022, through no fault of defendant. Therefore, considering that the Appeals Board’s failure to act on the petition was in error, we find that our time to act on the Petition for Reconsideration was tolled.

At trial, the parties stipulated to that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her neck, chest, abdomen, left wrist, and back. (Minutes of Hearing and Summary of Evidence (MOH/SOE), 7/7/22, at p. 2:6-8.) Accordingly, we will amend Findings of Fact number one to reflect that stipulation.

Finally, 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 foregoing reasons,

**IT IS ORDERED** that reconsideration of the August 17, 2022 Findings and Award is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers’ Compensation Appeals Board that the August 17, 2022 Findings and Award is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows:

#### **FINDINGS OF FACT**

1. Rebecca Duran, age 46, while employed on April 10, 2019, as a UTR Driver at Terminal Island, California, by Fenix Marine Services, LTD, whose workers’ compensation insurance carrier was Great American Walnut Creek, sustained injury arising out of and occurring in the course of employment to neck, chest, abdomen, left wrist, back and psyche.

\* \* \*

**AWARD**

**AWARD IS MADE** in favor of **REBECCA DURAN** against **GREAT AMERICAN INSURANCE COMPANY** as follows:

- a. All further medical treatment reasonably required to cure or relieve from the effects of the injury herein.

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**KATHERINE A. ZALEWSKI, CHAIR**  
**PARTICIPATING NOT SIGNING**



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

**DECEMBER 30, 2022**

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

**REBECCA DURAN  
CANTRELL GREEN  
LAUGHLIN, FALBO, LEVY & MORESI**

**PAG/pm**

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

**REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE ON PETITION FOR  
RECONSIDERATION**

**I.**

**INTRODUCTION**

Fenix Marine Services, Ltd., insured by Great American Insurance Company, adjusted by American Equity Underwriters, by and through their attorneys of record, has filed a verified, timely Petition for Reconsideration, challenging the Findings of Fact and Opinion on Decision dated August 17, 2022, on the following grounds;

- 1) The evidence does not justify the Findings of Fact;
- 2) By the Order and Findings of Fact issued by the Workers' Compensation Judge, the Appeals Board acted without or in excess of its authority; and
- (3) The Findings of Fact do not support the Award.

This is a case in which applicant sustained multiple orthopedic injuries that have been admitted, and claims to have sustained a direct injury to the psyche which is denied by defendant. It is from a decision finding that applicant sustained injury to the psyche resulting from the accident on April 10, 2019, that the employer seeks relief.

**II.**

**FACTS**

Rebecca Duran (hereafter applicant), born [], while employed on April 10, 2019, as a Utility Tractor Rig (hereafter UTR) Driver at Terminal Island, California, by Fenix Marine Services Limited, sustained injury arising out of and in the course of employment to the neck, chest, abdomen, left wrist and back, and claims injury to the psyche. She has worked with Pacific Maritime Association since approximately 1989.

At trial applicant described the injury as occurring while she was driving a UTR, which is a vehicle used to move large loads and containers. The UTR is a cab with a seat that carries tons of cargo (SOE Page 4, Lines 23.5 to 25). She was instructed by a signalman to drive forward which she did. Having moved her vehicle, the crane operator did not place the container on the clips, which resulted in the load being dropped onto the chassis. This caused the hinged cab to flip up and then come down with significant force on the chassis (SOE Page 3, Lines 21.5 through 25; Page 4, Lines 1 to 2). The force of the load bent the chassis. She required assistance getting out of the cab (SOE Page 4, Lines 2.5 to 3). The physical injuries claimed are admitted, only the claim of injury to the psyche is in dispute.

Applicant testified that she will not go near a UTR because she feels they are dangerous. She fears there will be another accident. She thinks about the UTR all the time while she is at work. The work is dangerous and she could get killed. She feels unsafe at work and she thinks

about the accident every day (SOE Page 4, Lines 13.5 to 16.5). She reports intrusive thoughts about the accident and tries to avoid situations that remind her of the accident. Additional complaints include restricted range of affect, irritability and hypervigilance (Exhibit AA Page 29, paragraph 1).

### **III.**

### **DISCUSSION**

Labor Code Sec. 3208.3(b) (1) provides in pertinent part:

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.

Predominant cause means that “actual events of employment” constitute more than fifty (50%) percent of the causal factors of injury (Department of Corrections/State of California v. WCAB (1999) (Garcia) 64 CCC 1356).

The accident on April 10, 2019, is an admitted industrial injury with psyche being the only body part disputed. The activities engaged in at the time of injury were indisputably work related, and the injury resulted from work conditions. The actual events of employment element has been met. Therefore, the next issue to be addressed is whether the accident is the predominant cause of the claimed psychiatric injury.

Dr. David Sones, the Agreed Medical Examiner (hereafter Dr. Sones or AME) in psychiatry, diagnosed Anxiety Disorder Not Otherwise Specified which preexisted the industrial injury of April 10, 2019. The industrial incident caused an aggravation of preexisting condition resulting in disability and need for medical treatment (Exhibit AA Page 32, paragraph 1 and 2). The AME concluded that the accident at work was the direct cause of the aggravation of the preexisting Anxiety Disorder Not Otherwise Specified, and that it was the predominant cause of injury (Exhibit AA Page 32, paragraph 4). Dr. Sones reached his conclusion regarding injury as follows:

Based upon examination of the applicant and a review of the available records, it is reasonably medically probable that the predominant cause amongst all causes of the aggravation of her Anxiety Disorder Not Otherwise Specified was the incident that occurred on April 10, 2019.

The Agreed Medical Examiner is selected by the parties based on expertise and neutrality. The AME’s opinion should normally be followed unless there is good cause to find that the opinion is not persuasive (Power v. WCAB (1986) 51 CCC 114; Siqueiros v. WCAB (1995) 60 CCC 150).

Defendant sets forth a lengthy recitation of applicant’s history which will certainly establish apportionment when that issue is before the court. As noted by the AME, the initial history provided by the applicant was incomplete, in that she left out details of her addiction to methamphetamine and difficulties with her husband and children. All of this information was addressed in the records and there is no reasonable basis to think that the AME was misled once

the records were reviewed and he was deposed. There was no indication at trial that applicant was attempting to mislead the court. The AME reports and deposition of Dr. Sones concluded that the cause of her current symptoms, need for treatment, and change of occupation, were predominantly caused by a direct work injury on April 10, 2019.

Defendant further asserts that the opinion of the AME should be considered insufficient because he did not break causation down into percentages. It is undisputed that Dr. Sones did conclude that the accident at work was predominant as to all causes, which should be sufficient to constitute substantial evidence on the issue of injury. The parties did not raise a legal, good faith, non-discriminatory personnel action, or apportionment, as the only issue is injury to psyche. As noted in applicant's answer, defendant's contention that a Rolda type analysis is required here is unsupported by the authority cited.

#### IV.

#### **RECOMMENDATION**

It is recommended that reconsideration be denied.

DATE: September 26, 2022

**Daniel Nachison**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE

## **OPINION ON DECISION**

### **I.**

#### **FACTS**

Rebecca Duran (hereafter applicant), born [], while employed on April 10, 2019, as a UTR Driver at Terminal Island, California, by Fenix Marine Services Limited, sustained injury arising out of and in the course of employment to the neck, chest, abdomen, left wrist and back, and claims injury to the psyche. She has worked with Pacific Maritime Association since approximately 1989.

At trial applicant described the injury as occurring while she was driving a UTR, which is a vehicle used to move large loads and containers. The UTR is a truck with a seat that carries tons of cargo (SOE Page 4, Lines 23.5 to 25). She was instructed by a signalman to drive forward which she did. Having moved her vehicle, the crane operator did not place the load on the clips, which resulted in the load being dropped onto the chassis. This caused the hinged cab to flip up and then come down with significant force on the chassis (SOE Page 3, Lines 21.5 through 25; Page 4, Lines 1 to 2). The force of the load bent the chassis. She required assistance getting out of the cab (SOE Page 4, Lines 2.5 to 3). The physical injuries are admitted only the claim of injury to the psyche is in dispute.

### **II.**

#### **DISCUSSION**

##### **INJURY TO THE PSYCHE**

Applicant has the burden of proof on the issue of injury to the psyche because they have the affirmative of the issue (Labor Code Sec. 5705). The party having the burden of proof on an issue must prove the elements disputed by a preponderance of the evidence (Labor Code Sec. 3202.5). Preponderance of the evidence means that when compared to the evidence opposed has a greater likelihood of truth.

Labor Code Sec. 3208.3(b) (1) provides in pertinent part:

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.

Predominant cause means that “actual events of employment” constitute more than fifty (50%) percent of the causal factors of injury (Department of Corrections/State of California v. WCAB (1999) (Garcia) 64 CCC 1356).

In determining whether events are “actual events of employment” a two-step analysis is applied. Initially, it needs to be shown that something occurred during the employment relationship. Secondly, the events were employment related. The distinction has been explained in a finding that situations involving lay-offs, loss of funds in company stocks, or changes of job

duties are not actual events of employment while being exposed to irate customers or dangerous working conditions are (See Pacific Gas and Electric Co. v. WCAB (Bryan) (2004) 69 CCC 21).

The accident on April 10, 2019, is an admitted industrial injury with psyche being the only body part in issue. The activities engaged in at the time of injury were indisputably work related, and the injury resulted from work conditions. The actual events of employment element has been met. Therefore, the next issue to be addressed is whether the accident is the predominant cause of the claimed psychiatric injury.

Dr. David Sones, the Agreed Medical Examiner (hereafter Dr. Sones or AME) in psychiatry, diagnosed Anxiety Disorder Not Otherwise Specified which preexisted the industrial injury of April 10, 2019. The industrial incident caused an aggravation of preexisting condition resulting in disability and need for medical treatment (Exhibit AA Page 32, paragraph 1 and 2). The AME concluded that the accident at work was the direct cause of the aggravation of the preexisting Anxiety Disorder Not Otherwise Specified, and that it was the predominant cause of injury (Exhibit AA Page 32, paragraph 3).

Applicant testified that she will not go near a UTR because she feels they are dangerous. She fears there will be another accident. She thinks about the UTR all the time while she is at work. The work is dangerous and she could get killed. She feels unsafe at work and she thinks about the accident every day (SOE Page 4, Lines 13.5 to 16.5). She reports intrusive thoughts about the accident and tries to avoid situations that remind her of the accident. Additional complaints include restricted range of affect, irritability and hypervigilance (Exhibit AA Page 29, paragraph 1).

There is considerable discussion in the reports and deposition of Dr. Sones concerning applicant's credibility as a witness. This was the result of information, not offered by applicant, that the AME obtained from the records. Although it is impossible to know whether the applicant deliberately attempted to mislead the doctor, there was nothing in her testimony at trial that causes the court to doubt her veracity, or that that her underlying condition was aggravated by the accident (See Garza v WCAB (1970) 35 CCC 500). The nature of the accident on April 10, 2019, would undoubtedly be frightening, not unlike a serious motor vehicle accident. There is little doubt that applicant has a lengthy history that would likely result in a psychologically fragile person. However, the new symptoms specifically attributed to the industrial injury show the aggravation of the Anxiety Disorder Not Otherwise Specified, which caused the need for disability and a change of job. These symptoms and limitations were predominantly caused by the work injury. The parties did not request the court to address permanent disability or apportionment at this time.

Therefore, it is found that applicant sustained injury AOE-COE to the psyche, resulting from the aggravation of her preexisting Anxiety Disorder Not Otherwise Specified, which was caused by the accident on April 10, 2019.



**III.**

**FUTURE MEDICAL TREATMENT**

The AME concluded that applicant will require medical treatment for the work injury that caused aggravation of the Anxiety Disorder Not Otherwise Specified (Exhibit AA Page 33, paragraph 5).

DATE: August 17, 2022

**Daniel Nachison**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE