

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

OLGA PELAYO, *Applicant*

vs.

**KW INTERNATIONAL; TRAVELERS PROPERTY CASUALTY COMPANY OF
AMERICA, *Defendants***

**Adjudication Numbers: ADJ13205884; ADJ13205888
Long Beach District Office**

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

Lien claimant Premier Psychological Services seeks reconsideration of the July 28, 2023 Findings and Orders issued by the workers' compensation administrative law judge (WCJ) in both case numbers listed above, wherein the WCJ disallowed lien claimant's lien on the basis that there was no compensable injury to applicant's psyche in either her specific injury or cumulative trauma claims. Lien claimant asserts the WCJ erred by failing to properly consider the opinions of Mark H. Michaels, PhD ("Dr. Michaels") and in failing to consider lien claimant's arguments relating to the presumption of compensability and the compensability of the portion of the claim that lien claimant alleges to be medical-legal expenses, rather than treatment.

We received an Answer. 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 the Petition for Reconsideration and return the matter to the WCJ to issue a new decision that adequately parses the medical evidence and arguments raised as they apply to each of the two claims.

PROCEDURAL BACKGROUND

Applicant filed two Applications for Adjudication. In the first, Case No. ADJ13205884, applicant alleged a cumulative trauma claim to her neck, shoulders, elbows, wrists, hands, back, knees, psyche, sleep, bladder, and right arm while employed by defendant as a packer from January 5, 2013 to January 17, 2020. In the second, Case No. ADJ13205888, applicant alleged a specific injury to her knee, back, right ankle, psyche and sleep, sustained on February 15, 2019 during that same employment. On May 13, 2020, defendant accepted applicant's specific injury as to the orthopedic injuries but denied as to the psyche claims "because LC 3208," without further explanation. (Ex. A, at p. 1.) On August 12, 2020, defendant denied the entirety of applicant's cumulative trauma claim, stating:

After careful consideration of all available information, we are denying liability for your claim of injury. Workers' compensation benefits are being denied because you did not report the injury until after you received notice of your layoff/termination. California Labor Code section 3600(a)(10) and Labor Code 3208.3(e) prohibits payment of compensation for a claim filed after a notice of termination or layoff where the injury allegedly occurred prior to the notice of termination or layoff. Furthermore, there is lack of substantial medical evidence or factual evidence to support a compensable industrial cumulative trauma injury and the result from the employer level investigation. Lastly, your claim is denied based upon failure to meet the threshold for a compensable psyche claim, good faith personnel action as it appears that your claim is barred by Labor Code 3208.3(h) that precludes compensation where a claimed injury arises from lawful, non-discriminatory good faith personnel actions.

(Ex. B, at p. 1.)

Lien claimant filed its lien for treatment and medical reports provided by Dr. Michaels, who was applicant's self-selected primary treating physician for the psyche portions of her claims. In the course of that treatment, Dr. Michaels prepared a number of reports related to applicant's claims, as well as providing medical treatment. Dr. Michaels found that applicant sustained a compensable work-related psyche injury, and attributed 100% of applicant's psyche complaints to her work for defendant. (Ex. 8, at pp. 18-19.)

Ray L. Craemer, M.D. ("Dr Craemer"), prepared an Agreed Medical Examiner (AME) report in the case with regard to applicant's orthopedic claims. According to Dr. Craemer's report, applicant's orthopedic injuries were limited to those sustained on February 15, 2019; in Dr.

Craemer's view, applicant did not suffer any orthopedic cumulative trauma injury. (See Ex. X, at pp. 14–15.)

Both claims were settled via a Compromise and Release (“C&R”) approved and filed on February 15, 2022. The C&R states: “This case is settled based on the 08/06/2021 report of Dr. Ray Craemer. Per Dr. Craemer there is no cumulative trauma injury and only a specific dated 2/15/2019.” (C&R, at p. 7.)

The matter proceeded to trial on June 12, 2023 on the issue of the lien for services provided by Dr. Michaels. The two cases were consolidated for purposes of trial, with the issues listed as: (1) injury arising out of and in the course of employment (“AOE/COE”); (2) liability for lien claimant's lien; (3) whether defendant waived the right to contest the charges of medical/legal expense for failure to comply with WCAB Rule 10786(e); (4) lien claimant's entitlement to penalties and interest; and (5) whether the presumption of compensability applied. (Minutes of Hearing & Summary of Evidence (MOH/SOE), 6/12/2023 at pp. 2–3.) Evidence was admitted and the matter taken under submission. (*Id.* at pp. 4–5.)

The WCJ issued his Findings and Orders (F&O) on July 28, 2023, disallowing lien claimant's lien in both case numbers. (F&O, at p. 2.)¹ The WCJ's Opinion on Decision (“OOD”), filed separately and applying to both case numbers, cites Dr. Craemer's finding of no cumulative injury. (OOD, at p. 2.) It goes on opine that defendant “has sustained its burden of proving the post-termination defense” based on the denials of applicant's psyche claims in each case. (*Id.* at pp. 2–3.) Other issues raised by lien claimant were determined to be moot based on the finding of no compensable injury. (*Id.* at p. 3.)

This Petition for Reconsideration followed. The Report, responding to the Petition, states that “the Compromise and Release, which was signed by the applicant, casts serious doubts as to if an injury arose out of and in the course of employment with regard to applicant's denied psychiatric claim.” (Report, at p. 2.) It therefore explains that “with the conflicting information between the medical reports and the settlement documents and without any testimony from the applicant to clarify this conflicting information,” the WCJ found that lien claimant did not sustain its burden of proving a compensable injury. (*Ibid.*)

¹ The WCJ issued separate Findings and Orders in each case number, but the contents of each are identical aside from the case number.

DISCUSSION

The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755.) A decision "must be based on admitted evidence in the record" (*Hamilton, supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.)

Here, we do not believe that the Opinion on Decision and the Report meet the above requirements. Specifically, the WCJ fails to explain why Dr. Craemer's report – an AME report pertaining to applicant's orthopedic injuries – casts any light one way or the other on whether applicant suffered (1) a compensable specific psyche injury or (2) a compensable cumulative trauma psyche injury. Furthermore, the OOD itself contains no acknowledgement of Dr. Michaels' finding of a compensable psyche injury, while the Report concludes that Dr. Michael's report "conflict[s]" with the settlement documents, without explaining the basis for that conflict.

Similarly, the WCJ's conclusion in the OOD that defendant "proved" the post-termination defense contained in Labor Code section 3208.3 does not appear to distinguish between the specific and cumulative injury claims, even though it appears that the defense was only raised as to the cumulative trauma claim.² Nor, given the fact that this conclusion was not repeated in the Report, can we be sure that the WCJ still believed this conclusion to be correct in light of the Petition for Reconsideration.

Accordingly, we will rescind the F&Os in both case numbers, and return the matter to the WCJ for further proceedings consistent with this opinion. Any new decisions by the WCJ should

² The denial of the specific claim states that it was "because LC3208 [*sic*]," without further explanation. Even giving defendant the benefit of the doubt that this citation was meant to be to Labor Code section 3208.3, rather than to Labor Code section 3208, which has no bearing on the issues raised, the denial itself provides no basis for inferring which if any defenses outlined in Labor Code section 3208.3 defendant was basing its denial upon.

clearly distinguish between the specific and cumulative injury claims, with citations to substantial evidence (or the lack thereof) to support any conclusions made as to the compensability of the lien.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Orders issued on July 28, 2023 in Case Nos. ADJ13205884 and ADJ13205888 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the July 28, 2023 Findings and Orders issued in Case Nos. ADJ13205884 and ADJ13205888 are **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ NATALIE PALUGYAI, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 19, 2023

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

**DIMACULANGAN & ASSOCIATES
PAPERWORK & MORE
PREMIER PSYCHOLOGICAL SERVICES
TRAVELERS DIAMOND BAR**

AW/pm

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