WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

THERESA VALENTINE, *Applicant*

ARCO DE ORO, INC., doing business as MCDONALD'S; CALIFORNIA RESTAURANT MUTUAL BENEFIT CORPORATION, administered by LWP CLAIMS SOLUTIONS, INC., *Defendants*

Adjudication Number: ADJ16904999
Riverside District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the August 10, 2023 Findings and Order (F&O) issued by a workers' compensation administrative law judge (WCJ), wherein it was found that applicant did not sustain injury arising out of and in the course of employment to her abdomen, stress, and psyche. The F&O stated that applicant's claim was barred by the six-month employment rule set forth in Labor Code section 3208.3(d).[1] The WCJ ordered that applicant take nothing by way of her claim.

Applicant contends that the WCJ erred in finding that she did not work for defendant for six months, and that her claim should therefore not be barred by section 3208.3(d).

We received an Answer from defendant. The WCJ submitted a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&O, and return the matter to the trial level for additional proceedings and a new decision by the WCJ.

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

FACTS

Applicant claimed to have sustained cumulative injury arising out of and occurring in the course of employment (AOE/COE) to her abdomen, stress, and psyche during the period April 20, 2022 through October 17, 2022.

On June 27, 2023, the parties proceeded to trial on the following single issue: "The periods applicant was employed pursuant to Labor Code Section 3208.3, as to whether the applicant worked for the employer for a six month period." (Minutes of Hearing (MOH), June 27, 2023, p. 2.) During trial, the WCJ admitted various records relating to applicant's employment period, including a pay statement history and a time-punch audit; however, the matter was submitted without witness testimony or the admission of any medical records explaining the nature of applicant's alleged injuries.

On August 10, 2023, the WCJ issued the disputed F&O denying applicant's claim. The Findings of Fact stated:

1. The Applicant Theresa Valentine, born [], while allegedly employed during the period 4-20-2022 through 10-20-2022, as a crew member, Occupational Group deferred, by Arcos De Oro, Inc. DBA McDonald's, did not sustain injury arising out of and in the course of employment to her abdomen, stress, and psych.

2. All other issues are moot by the finding that the applicant did not work for the employer for 6 months pursuant to Labor Code Section 3208.3(d).

(F&O, August 10, 2023, pp. 1-2.)

In the Opinion on Decision, the WCJ further stated:

> The only issue for trial was whether the applicant worked for the employer for a six month period which would preclude her claim of psyche and stress pursuant to Cal. Labor Code Section 3208.3(d). Applicant failed her burden of proof as to the required period of employment.
>
> California Labor Code §3208.3(d), provides in effect that no compensation shall be paid for an employee's psychiatric injury resulting from a "regular and routine employment event" unless the employee has been employed by the employer for at least six months. The requirement of six months' employment does not apply to employees whose psychiatric injuries are related to a physical injury or result from a "sudden and extraordinary employment condition."
>
> Based on the documentary evidence submitted by the parties, applicant's first date worked was on 04/21/2022 and her last date worked was 10/17/2022. This would

> be a total days worked of 181 days which equates to 25.86 weeks which equates to 5.95 months.
>
> There was no testimony and no medical reporting regarding the alleged injury to the abdomen, stress, and psych. The only medical evidence was an off work slip by Dr. Samuel Chan dated 10/18/22 (Applicant's Exhibit 1) which did not provide any comment as to any medical condition.

(Opinion on Decision, pp. 1-2.)

DISCUSSION

Section 3208.3(d) provides, in pertinent part, that "no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous. This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition." (Lab. Code, § 3208.3(d).)

We begin by noting that, as we read the Findings of Fact, it appears that the WCJ believed that a determination that applicant was not employed for six months meant that: 1) applicant's claim was barred by section 3208.3(d), and 2) applicant did not sustain injury AOE/COE. However, the latter is an incorrect reading of section 3208.3(d); that portion of the statute has nothing to do with whether an injury was industrial, i.e., AOE/COE. Additionally, injury AOE/COE was not an issue identified for determination at trial. Thus, the WCJ's finding that applicant did not sustain injury AOE/COE was unnecessary and lacked any legal basis.

Next, the WCJ's finding that section 3208.3(d) barred applicant's alleged stress, abdomen, and psyche injuries must be rescinded for several reasons. First, 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 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.) However, stress may cause a physical injury or a psychiatric injury or both.

When stress causes a physical injury, such as a heart attack or injury to the abdomen, section 3208.3 does not apply. However, there are two limited situations where section 3208.3

applies to psychiatric-physical injuries. First, as explained in *County of Son Bernadino v. Workers' Comp. Appeals Bd*. (*McCoy*) (2012) 203 Cal.App.4th 1469, 1474 [77 Cal.Comp.Cases 219], section 3208.3 bars recovery for physical injuries that are directly and *solely* caused by a psychiatric injury, which is found to be non-compensable under section 3208.3(h),[2] which relates to good-faith personnel actions by the employer.

In *Lockheed Martin Corp. v. Workers' Comp. Appeals Bd*. (*McCullough*) (2002) 96 Cal.App.4th 1237 [67 Cal.Comp.Cases 245], the reverse circumstance was addressed, namely, when a psychiatric injury is claimed to be a "compensable consequence" of an industrial physical injury. In *McCullough,* the court explained: "a 'compensable consequence psychiatric injury' is governed by section 3208.3....That is, a consequential psychiatric injury is compensable if and only if it is more than half attributable to a physical industrial injury." (*Id.* at p. 1249.)

Here, there is no evidence in the record as to the factual basis for applicant's claims, and there is no medical evidence in the record as to causation, as would be necessary to render a determination on that issue. (*McCoy, supra,* 203 Cal.App.4th at p. 1474; *McCullough, supra,* 96 Cal.App.4th at p. 1249; see also *Rolda v. Pitney Bowes* (*Rolda*) (2001) 66 Cal.Comp.Cases 241, 246 (Appeals Board en banc).)

In *CIGA v. Workers' Comp. Appeals Bd.* (*Avila*) (2004) 69 Cal.Comp.Cases 1323 (writ den.), the Appeals Board found that defendant had waived the issue of whether the evidence established the six-month requirement by not raising it until seeking reconsideration. Nonetheless, the Appeals Board held that even if the issue were not waived, "the burden to raise and establish the applicability of the six-month employment requirement is on the defendant. Thus, once an applicant presents substantial medical evidence to establish that a psychiatric injury meets the requirements of Labor Code § 3208.3(b), he or she is entitled to benefits unless the defendant establishes that the applicant has not complied with the six-month employment period provided in Labor Code § 3208.3(d)." (*Id.* at p. 1325.) Defendant is the party that will raise the issue of whether applicant was employed for the requisite six months for a psyche claim. Accordingly, as the party with the affirmative of the issue, defendant holds the burden of proof. This is akin to other affirmative defenses wherein the burden is on defendant to prove that the claim is barred for

[2] Section 3208.3(h) states: "No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. The burden of proof shall rest with the party asserting the issue."

a particular reason. (See Lab. Code, § 5705.) We observe that here, defendant presented no witness testimony on the length of applicant's employment, and the relevant evidence currently in the record is not substantial.

Section 5313 requires the WCJ to produce "a summary of the evidence received and relied upon and the reasons or grounds upon which the [court's] determination was made." (Lab. Code, § 5313; see also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-622 (Appeals Board en banc).) 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 [33 Cal.Comp.Cases 350].) 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(d); *Lamb, supra,* 11 Cal.3d at p. 281; *Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd*. (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Where the issue in dispute is a medical one, expert medical evidence is ordinarily needed to resolve the issue. (*Insurance Co. of North America v. Workers' Comp. Appeals Bd*. (1981) 122 Cal.App.3d 905, 912 [46 Cal.Comp.Cases 913]; *Peter Kiewit Sons v. Industrial Acc. Com*. (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188].)

In this case, as noted above, there is no testimony or other record evidence showing the factual basis for applicant's alleged injuries, nor is there any medical evidence regarding causation. We can hardly apply section 3208.3(d) to applicant's alleged abdominal injury without first knowing whether there is a causal nexus between it and her alleged psyche injury - a determination that cannot be made without competent medical evidence. (*McCoy, supra,* 203 Cal.App.4th at p. 1474; *McCullough, supra,* 96 Cal.App.4th at p. 1249; see also *Rolda, supra,* 66 Cal.Comp.Cases at p. 246.) Upon return to the trial level, the WCJ must revisit this issue, as well as the issue of the length of applicant's employment, after receiving additional evidence.

In closing, we offer the following nonbinding recommendations for the court's consideration upon return to the trial level. First, the parties should clarify the nature of applicant's alleged injuries and whether they are related, so that the extent of the application of the six-month employment rule under section 3208.3(d) can be determined. (*McCoy, supra,* 203 Cal.App.4th at

p. 1474; *McCullough, supra,* 96 Cal.App.4th at p. 1249.) Secondly, the WCJ may wish to review *CIGA v. Workers' Comp. Appeals Bd.* (*Mills*) (2007) 72 Cal.Comp.Cases 1146 (writ den.) for guidance on calculating the six-month employment period under section 3208.3(d). In *Mills*, the Appeals Board explained that substantial compliance with the six-month employment rule may be sufficient to meet the statutory requirement. In *Mills,* the Appeals Board found that the employee's psychiatric claim was not barred on the basis that she was unable to work for a consecutive two-week period during her six months of employment due to non-industrial pancreatitis. The Appeals Board explained that allowing the employee's psychiatric claim would not defeat the legislative purpose behind section 3208.3(d) because she "worked for *substantially* a full six month period except for two weeks of non-industrial illness...." (*Id.* at p. 1148, italics added; see *McCullough, supra,* 96 Cal.App.4th at p. 1242 ["The Legislature's apparent purpose in enacting subdivision (d) of section 3208.3 was to limit questionable claims for psychiatric injuries resulting from routine stress during the first six months of employment."].) The Appeals Board declined to count weekends off against the employee in determining whether she met the six-month mark, focusing instead on days of "actual service." We note that, in this case, pursuant to the WCJ's calculations, applicant worked for 5.95 months out of six. (Opinion on Decision, p. 2.) We note the similarity between the service periods in this case and in *Mills*, and based on our review of the limited record before us, it appears that applicant "substantially complied" with the six-month employment rule pursuant to the logic set forth in *Mills*.

Based on the foregoing, we will grant applicant's petition for reconsideration, rescind the F&O, and return this matter to the trial level, at which time the parties and the WCJ will have the opportunity to prepare a full and complete record consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the August 10, 2023 F&O is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 10, 2023 F&O is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ NATALIE PALUGYAI, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 6, 2023

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

THERESA VALENTINE
SOLOV & TEITELL
THOMAS KINSEY

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