

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

JORGE MENDOZA, *Applicant*

vs.

**BERKELEY CEMENT, INC., insured by
INSURANCE CO. OF THE WEST, *Defendants***

**Adjudication Number: ADJ18177050
San Jose District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

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

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on November 15, 2024, wherein the WCJ found in pertinent part that applicant's psychiatric injury was not caused by a sudden and extraordinary event and is therefore barred per Labor Code section¹ 3208.3(d).

Applicant contends that the WCJ should have found that his injury was caused by a sudden and extraordinary employment condition within the meaning of section 3208.3(d).

We have not received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition and the contents of the Report with respect thereto.

Based on our review of the record, and for the reasons discussed below, we will rescind the WCJ's November 15, 2024, Findings and Order, substitute new Findings of Fact, and return the matter to the WCJ for further proceedings consistent with this decision.

BACKGROUND

We will briefly review the relevant facts.

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

Applicant claimed injury to his right arm, right shoulder, right hip, and psyche while employed by defendant as a laborer on May 11, 2023. Defendant accepted the claim as to applicant's right arm, right shoulder, and right hip.

The following is from the WCJ's Report:

Applicant sustained an injury arising out of and in the course of his employment on 5/11/2023 to his right arm, right shoulder, right hip and claimed to have sustained injury to his psyche as compensable consequence. Claim is accepted wherein psyche is denied under LC §3208.3(d) as applicant was employed for less than a month.

The issue at trial was whether applicant's injury was sudden and extraordinary under the LC §3208.3(d) exception; and if so, whether applicant is entitled to seek additional QME Panel in psychiatry.

In lieu of testimony, applicant submitted a written offer of proof at trial.

...

Applicant also offered into evidence CAL/OSHA violation citation.

(Report, pp. 1-2.)

Defendant did not call any witnesses to trial. In lieu of testimony, applicant's offer of proof is as follows:

1. Jorge Mendoza was an employee of Berkeley Cement Inc., insured by ICW, when he was injured on 5/11/23. He had been employed for less than six (6) months on that date.
2. On 5/11/23, Mr. Mendoza had been working on a raised scissor lift for more than an hour at a height of approximately 20 feet.
3. At approximately 10am, Mr. Mendoza attempted to lower the scissor lift in order to exit the equipment. Suddenly, the scissor lift tipped over and fell, with Mr. Mendoza still engaged with the lift.
4. Mr. Mendoza had used that lift several previous times without incident. He had used similar scissor lifts at previous jobs without incident.
5. Mr. Mendoza has never seen or heard of another scissor lift tipping over during regular operation. He had no expectation that the lift he was on might tip over.
6. The facts are true to the best of my memory, and if called to testify on these matters, this would constitute my testimony. I swear to this under penalty of perjury.

(Exhibit 5, applicant's offer of proof dated August 27, 2024, pp. 1-2.)²

Exhibit 6 consists of subpoenaed records from OSHA, dated November 9, 2023, which state in pertinent part:

Citation 2 Item 1 Type of Violation: Serious Accident-Related

Title 8 CCR Section 3646. Operating Instructions (Elevating Work Platforms).

(a) No employee shall ride, nor tools, materials, or equipment be allowed on a traveling elevated platform unless the following conditions are met:

(3) The surface upon which the unit is being operated is level with no hazardous irregularities or accumulation of debris which might cause a moving platform to overturn.

Violation:

Prior to and during the course of the investigation, the employer failed to ensure that the surface where an employee was operating a scissor lift (Model-JLG 1930 19-ft, #167839) was level with no hazardous irregularities (e.g., extension cord) or accumulation of debris (e.g., plywood) which might cause a moving platform to overturn. As a result, on or about May 11, 2023, an employee suffered a serious injury when the elevated work platform overturned.

Date By Which Violation Must be Abated: Corrected During Inspection

Proposed Penalty: \$22500.00

(Exhibit 6, subpoenaed records of OSHA dated November 9, 2023, pp. 000017, 000044.)

DISCUSSION

I.

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, §§ 3202.5, 3600(a).) With respect to psychiatric injuries, section 3208.3 provides, in relevant part:

(a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to

² Applicant's Offer of Proof is verified under penalty of perjury. Thus, while it is titled an Offer of Proof, it is actually a declaration under penalty of perjury and is admissible as testimonial evidence. (See Evid. Code, §§ 702, 710.)

procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition–Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.

(b) (1) 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.

...

(d) Notwithstanding any other provision of this division, 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(a)-(b) and (d).)

Here, it is undisputed that applicant was employed by defendant for less than six months at the time of the injury. Defendant asserts applicant's psyche claim is barred by section 3208.3(d). Therefore, we must consider whether applicant's psyche injury was the result of a "sudden and extraordinary employment condition," within the meaning of section 3208.3(d).

Although the Legislature refers to the term "sudden and extraordinary" employment condition in section 3208.3(d), it does not define "sudden" or "extraordinary" in the statute. In *Matea v. Workers' Comp. Appeals Bd.*, the Court of Appeal noted that Webster's Third International Dictionary "defines 'sudden' as 'happening without previous notice or with very brief notice : coming or occurring unexpectedly : not foreseen or prepared for.'" (*Matea v. Workers' Comp. Appeals Bd.* (2006) 144 Cal.App.4th 1435, 1448 [71 Cal.Comp.Cases 1522].) The Court further observed that "extraordinary" is defined "as 'going beyond what is usual, regular, common, or customary'; and 'having little or no precedent and usu[ally] totally unexpected.'" (*Id.* citations omitted.)

Analysis of the decisions addressing whether a psychiatric injury resulted from a "sudden and extraordinary employment condition" reveal that this is a primarily fact-driven inquiry. "Each case must be considered **on its facts** in order to determine whether the alleged psychiatric injury occurred as a result of sudden and extraordinary events that would naturally be expected to cause

psychic disturbances[.]” (*Matea, supra*, 144 Cal.App.4th at p. 1450, emphasis added.) Consequently, appellate decisions focus heavily on the individual facts in determining whether an employment condition was sudden and extraordinary. By extension, the determination of whether an event is “sudden and extraordinary” within the meaning of section 3208.3(d) also hinges on the evidence in the record, or lack thereof.

Based on the evidence presented, applicant’s injury was the result of a “sudden” employment condition, as described in section 3208.3(d). As he attempted to lower the scissor lift in order to exit the equipment, it suddenly and unexpectedly tipped over and fell. (Exhibit 5, applicant’s offer of proof dated August 27, 2024, p. 1.) Because the employment condition that caused applicant’s psychiatric injury was “sudden” within the meaning of section 3208.3(d), we turn to whether it was “extraordinary.” In light of the legislative and judicial history, the reference to an “extraordinary” employment condition in section 3208.3(d) is an event that is not regular and routine, going beyond what is usual, regular, common, or customary. (*Matea, supra*, at 1448, quoting Webster’s.)

In *Matea*, the injured worker sustained an admitted orthopedic injury while working in a Home Depot store when a rack of lumber fell on his left leg and psychiatric injury was claimed as a compensable consequence. (*Matea, supra*, 144 Cal.App.4th at p. 1438.) The worker had not been employed for six months when the injury occurred and the employer denied that any psychiatric injury was compensable, contending that the injury was not caused by a sudden and extraordinary employment condition. (*Id.*) Similar to the instant case, applicant’s testimony was not extensive and defendant did not present any testimony. *Matea* testified that “he injured his foot when a rack of lumber fell on his left leg.” (*Matea, supra*, 144 Cal.App.4th at p. 1449.) The court noted that “[w]hile the record is sparse and the facts are few concerning what caused the lumber to fall, we believe that all the lumber in a rack falling into an aisle and onto an employee’s leg causing injury to the employee was in this case such an uncommon, unusual, and totally unexpected event or occurrence” (*Matea, supra*, 144 Cal.App.4th at p. 1450.)

The Court allowed that while gas main explosions and workplace violence may constitute extraordinary events, the Court found these examples too restrictive, writing as follows:

We also agree that the sudden and extraordinary employment condition language in Section 3208.3, subdivision (d), could certainly include occurrences such as gas main explosions or workplace violence. However, giving the language of the statute ‘its usual, ordinary import’ [citation], in

light of its legislative history, and liberally construing the statute in the employee's favor (§3202), we believe that the Legislature intended to except from the six-month limitation psychiatric injuries that are caused by 'a sudden and extraordinary employment condition,' and not by a regular or routine employment event....

Gas main explosions and workplace violence are certainly uncommon and usually totally unexpected events; thus, they may be sudden and extraordinary employment conditions. **However, we believe that there may also be other 'sudden and extraordinary' occurrences or events within the contemplation of section 3208.3, subdivision (d) that would naturally be expected to cause psychic disturbances** even in diligent and honest employees. Therefore, if an employee carries his or her burden of showing by a preponderance of the evidence that the event or occurrence that caused the alleged psychiatric injury was **something other than a regular and routine employment event or condition, that is, that the event was uncommon, unusual, and occurred unexpectedly,** the injury may be compensable even if the employee was employed for less than six months....

(Matea, supra, 144 Cal.App.4th at pp. 1448-1449, emphasis added.)

With respect to applicant's burden and defendant's decision not to present any testimony, the Court stated:

[N]o testimony was presented regarding how often lumber falls from racks into the aisles at The Home Depot, and there was no evidence presented that such occurrences are regular and routine events. We must assume, as the WCJ assumed, that they are uncommon, unusual and totally unexpected events; **otherwise, The Home Depot would have presented testimony to the contrary.** Therefore, **in the absence of any contrary evidence, when Matea presented evidence that he was injured as a result of all the lumber from a rack falling onto him, he met his burden of proving that he was injured as a result of a sudden and extraordinary employment condition** as required by section 3208.3, subdivision (d).

(Matea, supra, 144 Cal.App.4th at p. 1450.)

Similar to the case before us, Matea provided sparse testimony about the events that caused the injury. Because defendant presented no testimony regarding how often lumber falls from racks into the aisles or that such occurrences are regular and routine events, the court concluded it was an extraordinary employment condition. Here, applicant presented evidence that he was injured as a result of a scissor lift tipping over and falling. There is an OSHA citation that defendant failed to ensure that the surface where applicant was "operating a scissor lift was level with no hazardous irregularities (e.g., extension cord) or accumulation of debris (e.g., plywood) which might cause a

moving platform to overturn.” (Exhibit 6, subpoenaed records of OSHA dated November 9, 2023, pp. 000017, 000044.) Defendant presented no evidence that a scissor lift suddenly tipping and falling is a regular, routine, common, or customary event. (*Matea, supra*, 144 Cal.App.4th at pp. 1448-1450.)

In *State Compensation Ins. Fund v. Workers’ Comp. Appeals Bd. (Garcia)* (2012) 204 Cal.App.4th 766 [77 Cal.Comp.Cases 307], the Court agreed with the view expressed in *Matea* “that an employment event is sudden and extraordinary if it is ‘something other than a regular and routine employment event or condition, that is, that the event was uncommon, unusual, and occurred unexpectedly’ (Citations.) We agree with this more expansive interpretation. Depending upon the circumstances, an accidental injury may be uncommon, unusual and totally unexpected.” *State Compensation Ins. Fund v. Workers’ Comp. Appeals Bd. (Garcia)* (2012) 204 Cal.App.4th 766, 772-773 [77 Cal.Comp.Cases 307].) The Court concluded that an avocado picker did not offer “**particularly strong evidence on extraordinariness**” to support his claim that his fall from a 24-foot ladder was unusual or extraordinary. (*Garcia, supra*, 204 Cal.App.4th at p. 774, emphasis added.) The Court in *Garcia* noted that there was no evidence the employer violated any safety regulations (204 Cal.App.4th at p. 775), whereas in the matter before us there is evidence that defendant violated safety regulations. (Exhibit 6, subpoenaed records of OSHA dated November 9, 2023, pp. 000017, 000044.)

Here, unlike *Garcia* who fell from a ladder, the lift was not secured properly and the entire piece of equipment tipped and fell, taking applicant with it. In the Qualified Medical Evaluator (QME) report of Dr. Kasendorf, he stated that:

Mr. Mendoza had an injury at work to the right arm, elbow, low back, right hip, right knee, and right foot on May 11, 2023. The injury occurred when he was at the top of a scissor lift. The applicant reports that the lift was not secured properly and fell on his right side. The applicant fell to the ground and hit his right arm, low back, and right leg. He had immediate pain. His co-workers informed the supervisor. Medical attention was offered. The applicant was transported to the emergency room by ambulance.

(Exhibit 1, QME Report of Roger Kasendorf, D.O., February 13, 2024, p. 34.)

In *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Guzman)* (2018) 20 Cal.App.5th 796, 800 the injured worker was the only witness at trial. He was injured when he was operating a compactor on a 45-degree slope, the compactor struck a rock in the soil, and it fell backwards. *Guzman* testified that he had previously only used a compactor on flat surfaces. (*Id.* at p. 810.) The

Court focused on the distinction between working on flat surfaces and working on a slope, noting that Guzman did not introduce any evidence regarding what regularly or routinely happens if a compactor hits a rock on a slope, as opposed to a flat surface. (*Id.*) Moreover, because he had previously worked on flat surfaces only, the Court found that his history of maintaining control of a compactor and being accident-free on flat surfaces had little bearing on whether the event that occurred while he was on the slope was uncommon, unusual, and unexpected. (*Id.*)

In *Wal-Mart Stores, Inc. v Workers' Comp. Appeals Bd. (Garcia)* (2003) 112 Cal.App.4th 1435 [68 Cal.Comp.Cases 1575], the Court described the worker's injury as flowing "from the effects of an admitted routine physical injury," but without any discussion of the circumstances in holding that compensation for the related injury to psyche was barred by section 3208.3(d). The Court did not explain how it reached the view it offered in dicta that "extraordinary" employment conditions would include "events which would naturally be expected to cause psychic disturbances even in a diligent and honest employee."³

Here, the weight of the evidence supports a finding that the employment condition causing applicant's injury was sudden and extraordinary. Being tangled in a scissor lift as it falls is not a regular, routine, common, or customary part of a construction worker's employment condition. Based on the evidence presented, including applicant's offer of proof and the medical reports entered into evidence, the accident involving the scissor lift was a "sudden" and "extraordinary" employment condition, e.g., it was not regular, routine, common, usual, expected, common, or customary. (*Matea, supra*, 144 Cal.App.4th at p. 1448, quoting Webster's.) Moreover, defendant presented no contrary evidence. Here, we are persuaded that the weight of the evidence supports a finding that the employment condition causing applicant's injury was sudden and extraordinary.

As to the issue of whether applicant is entitled to a psyche QME, based on our review of the reporting of applicant's treating physician Michael Yoshida, M.D., and Dr. Kasendorf, a QME in Physical Medicine and Rehabilitation/Pain Medicine, we are persuaded that the record supports such a finding. Primary treating physician Dr. Yoshida and QME Dr. Kasendorf both recommend psychological treatment. (Exhibit 1, QME Report of Dr. Kasendorf, February 13, 2024, p. 56;

³ The reference to a "diligent and honest employee" in *Wal-Mart Stores, Inc. v Workers' Comp. Appeals Bd.* (2003) 112 Cal.App.4th 1435 [68 Cal.Comp.Cases 1575], has been cited in subsequent cases, but that phrase does not appear anywhere in the statute or legislative history.

Exhibit 2, Report of Michael Yoshida, M.D., May 6, 2024, p. 3; Exhibit 3, Report of Dr. Yoshida, April 29, 2024, p. 3; Exhibit 4, Report of Dr. Yoshida, January 25, 2024, p. 6.)

Accordingly, we rescind the Findings and Order issued by the WCJ on November 15, 2024, substitute new Findings of Fact, and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued by the WCJ on November 15, 2024, is **RESCINDED** and the following **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Applicant, Jorge Mendoza, born [], while employed on May 11, 2023 as a laborer at Berkeley, CA, by Berkeley Cement, Inc., sustained injury arising out of and in the course of employment to his right arm, right shoulder, and right hip.
2. At the time of the injury, the employer's workers compensation carrier was Insurance Company of the West.
3. Applicant's earnings at the time of injury were \$2,003.43 per week, warranting an indemnity rate of \$1,335.62 for temporary disability and statutory maximum for permanent disability.
4. Applicant was employed for less than 6 months.

5. Compensation for the claimed psychiatric injury is not barred by Labor Code section 3208.3(d).
6. Applicant is entitled to an additional QME panel in psychiatry.
7. All other issues are deferred with jurisdiction reserved.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG L. SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 6, 2026

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

**JORGE MENDOZA
MANUEL REYNOSO
TOBIN LUCKS
EMPLOYMENT DEVELOPMENT DEPARTMENT**

JB/pm

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