

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

TRE'NEISHA THOMAS, *Applicant*

vs.

**BENIHANA; STARR INDEMNITY LIABILITY, administered by BROADSPIRE,
*Defendants***

**Adjudication Number: ADJ17880601
Lodi District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Order (F&O) issued on November 24, 2025, wherein the workers' compensation judge (WCJ) found, in relevant part, that applicant's claim of injury arising out of and in the course of employment (AOE/COE) to the psyche during the period from July 1, 2022 through May 25, 2023 while employed by defendant as a bartender is presumed compensable, and that defendant failed to rebut the presumption under Labor Code section 5402¹.

Defendant contends that the presumption was rebutted when applicant failed to present substantial medical evidence of a psyche claim within the meaning of section 3208.3. (Petition for Reconsideration (Petition), p. 2.) Defendant therefore requests further development of the record in lieu of a finding of compensability. (Petition, p. 3.)

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny the Petition.

¹ All further statutory references will be to the Labor Code unless otherwise indicated.

FACTS

On June 28, 2023, applicant filed an Application for Adjudication of Claim (Application) alleging that while employed by defendant as a bartender during the period from July 1, 2022, through May 25, 2023, she sustained injury AOE/COE to the nervous system (stress/psyche). Applicant also filed a copy of the DWC 1 (Claim Form). Both the Application and the Claim Form were served upon defendant on June 28, 2023 per the Proof of Service.

Thereafter, the parties retained Ryan Davis, M.D. as the psyche panel Qualified Medical Evaluator (PQME).

On October 25, 2023, applicant filed a Declaration of Readiness to Proceed to a mandatory settlement conference on the issues of injury AOE/COE and the 90- day presumption under section 5402.

The matter proceeded to hearing and was continued on several occasions before being set for trial on October 2, 2025. At trial, the parties stipulated, in relevant part, that no denial was issued by defendant and that applicant's psyche claim was presumed compensable under section 5402. (Minutes of Hearing and Summary of Evidence (MOH and SOE), October 2, 2025, p. 2.) The sole issue presented at trial was whether defendant rebutted the section 5402 presumption. The parties submitted as evidence, a report of Dr. Davis dated April 17, 2024, as well as a transcript of the deposition of Dr. Davis, which was conducted on May 21, 2025. (Exhibits 1-2.)

On November 24, 2025, the WCJ issued an F&A wherein she found, in relevant part, that defendant failed to rebut the section 5402 presumption.

It is from this F&A that defendant seeks reconsideration.

DISCUSSION

I.

Preliminarily, former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.

- (b)
- (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
 - (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected under the Events tab in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on December 29, 2025, and 60 days from the date of transmission is February 27, 2026. This decision was issued by or on February 27, 2026, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on December 29, 2025, and the case was transmitted to the Appeals Board on December 29, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that service of the Report provided accurate notice of transmission under section 5909(b)(2) because service of the Report provided actual notice to the parties as to the commencement of the 60-day period on December 29, 2025.

II.

Turning now to the merits of the Petition, pursuant to section 5401, within one working day from when an employer receives written notice or knowledge of an injury caused by

employment or knowledge of an assertion of an injury claim resulting in lost time from work beyond the employee's shift or medical treatment beyond first aid, the employer is required to provide the employee personally, or by first class mail, the Claim Form. (Lab. Code, § 5401.)

Here, applicant alleges that she sustained a cumulative injury to the psyche from July 1, 2022, through May 25, 2023, while employed by defendant. Applicant was apparently provided with a Claim Form, which she completed on June 9, 2023. The portion of the Claim Form pertaining to employer's date of receipt, however, was left incomplete. On June 28, 2023, the Claim Form was filed along with the Application. Per the Proof of Service, defendant was served with copies of both on the same date.

Pursuant to section 5402(b)(1), "[i]f liability is not rejected within 90 days after the date the Claim Form is filed under Section 5401, the injury shall be presumed compensable under this division." As noted above, the Claim Form was filed and served on June 28, 2023. As such, defendant had 90 days from June 28, 2023, to deny applicant's claim. To date, no denial has been issued. Further, during the October 2, 2025 trial, the parties stipulated to the lack of a denial and the applicability of the 5402(b)(1) presumption. (MOH and SOE, October 2, 2025, p. 2.)

Once a section 5402 presumption has been established, the burden shifts to defendant. In the case of *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Welcher)* (1995) 37 Cal.App.4th 675, 682-683 [60 Cal.Comp.Cases 717], the Court concluded that "the rebuttable presumption of Labor Code section 5402 was intended to affect the burden of proof...because it was created by the Legislature to implement the public policy of expediting workers' compensation claims. As such, once the underlying facts have been established, its effect in workers' compensation litigation is to place upon the defendant employer/carrier the burden of proving the employee/applicant does not have a compensable injury; in the absence of such proof, the consequences are adverse to the employer/carrier." We note also that the presumption is rebuttable only by evidence discovered subsequent to the 90-day period. (Lab. Code, §5402(b)(1).)

Here, defendant provided no such evidence. Defendant contends that applicant's failure to present substantial medical evidence of a psyche claim effectively rebuts the presumption of compensability under section 5402. (Petition, p. 2.) This is not the standard. Additionally, to the extent that defendant conflates compensability with the nature and extent of injury, we remind defendant that the issue of nature and extent of injury has yet to be determined. The medical reporting and deposition testimony of Dr. Davis, however, does establish industrial causation.

Thus, while defendant is entitled to defend the extent of their liability for applicant's injury, and conduct further discovery in this regard, given the lack of relevant rebuttal evidence, the issue of presumption of compensability under section 5402 has now been determined.

Accordingly, defendant's Petition is denied.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Order issued November 24, 2025, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 26, 2026

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

**TRE'NEISHA THOMAS
CENTRAL VALLEY INJURED WORKER LEGAL CLINIC, INC.
FLOYD SKEREN MANUKIAN LANGEVIN, LLP**

RL/cs

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