WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EMILY BALL, *Applicant*

vs.

COUNTY OF SACRAMENTO, permissibly self-insured, *Defendants*

Adjudication Number: ADJ16839738
Sacramento District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant has filed a petition for reconsideration (Petition) of the Findings of Fact and Order issued and served by the workers' compensation administrative law judge (WCJ) on May 29, 2024. In that decision, the WCJ found that applicant sustained an injury arising out of and in the course of her employment to her psyche in the form of post-traumatic stress disorder (PTSD) during the alleged cumulative trauma period ending on July 4, 2022. The WCJ further found that applicant's injury was shown to be substantially caused by a lawful, nondiscriminatory and good faith personnel action, and ordered applicant's injury claim barred by the affirmative defense found in Labor Code section 3208.3(h).

Petitioner contends that the WCJ erred in finding that applicant's claim was barred by Labor Code section 3208.(h) as such section does not apply to applicant's presumptive industrial injury under Labor Code section 3212.15.

Defendant filed a response to the Petition.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending denial of the Petition or return of the case to the district office if it is found that the applicant's claim is not barred by section 3208.3(h).

We have considered the Petition for Reconsideration (Petition), the response, the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting the

Petition is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

Preliminarily, we note the following which may be relevant to our review:

The WCJ stated in his Opinion, in relevant part, the following:

> Dr. Ann Allen, M.D. evaluated Applicant as the agreed medical examiner for her industrial injury. Dr. Allen examined Applicant on April 3, 2023.
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> Dr. Allen gave her expert medical opinion regarding causation of Applicant's psychiatric injury and the diagnosis of the injury. Dr. Allen determined that Applicant's psychiatric injury was 100% caused by her employment and diagnosed her with PTSD as a result of the injury. Applicant proved by a preponderance of the evidence that she suffered a psychiatric injury arising out of and in the course of her employment pursuant to Labor Code Section 3208.3 and that she is entitled to the presumption of injury created by Labor Code Section 3212.15.
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> Defendant asserted that Applicant's claim for industrial injury is barred by Labor Code Section 3208.3(h). Defendant holds the affirmative on the affirmative defense created by Labor Code Section 3208.3(h). Dr. Allen gave her expert medical opinion that assigned 30% of the causation of Applicant's injury to her employment with Defendant to her workload in the Communications Center, 30% of the causation to her work in the Communications Center triggering recollections of past employment related traumatic events and 40% of the causation of the psychiatric injury to being placed on a Personal Improvement Plan. The Personal Improvement Plan (PIP) was a personnel action that meets the substantial cause threshold as defined by Labor Code Section 3208.3(b)(3).
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> Applicant asserted that Labor Code Section 3208.3(h) does not apply to injuries entitled to the presumption created by Labor Code Section 3212.15. Labor Code Section 3802.3(h) provides:
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> 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.

> Labor Code Section 3208.3(h)'s reference to "compensation under this division" includes compensation pursuant to Labor Code 3212.15 as it is also part of Division 4. Therefore, Applicant's claim for benefits related to her industrial injury is barred by the affirmative defense created by Labor Code 3208.3(h).

(Opinion, p. 3, 4.)

Labor Code section 3212.15, which applies to applicant in her position as a Sargent Deputy Sheriff for the Sacramento County Sheriff's Department, states, in relevant part:

> **(b)** In the case of a person described in subdivision (a), the term "injury," as used in this division, includes "post-traumatic stress disorder," as diagnosed according to the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association and that develops or manifests itself during a period in which any person described in subdivision (a) is in the service of the department, unit, office, or agency.
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> **(c)** For an injury that is diagnosed as specified in subdivision (b):
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> (1) The compensation that is awarded shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.
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> (2) The injury so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with the presumption. This presumption shall be extended to a person described in subdivision (a) following termination of service for a period of 3 calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.
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> **(d)** Compensation shall not be paid pursuant to this section for a claim of injury unless the person has performed services for the department, unit, office, or agency for at least six months. The six months of employment need not be continuous. This subdivision does not apply if the injury is caused by a sudden and extraordinary employment condition.
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> **(e)** This section, as added by Section 2 of Chapter 390 of the Statutes of 2019, applies to injuries occurring on or after January 1, 2020.
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> (Cal Lab Code § 3212.15.)

Applicant's Petition asserts, in relevant part:

> Labor Code § 3208.3 does not distinguish who is covered and what mental disorders are covered. It applies to all employees and all mental disorders. On the other hand, Labor Code § 3212.15 narrowly applies to a specific class of employees and a single type of injury. Labor Code § 3212.15 only includes "post-traumatic stress disorder." No other type of injury is included. Labor Code § 3212.15 is the epitome of a specific statute. It applies only to active firefighting members, peace officers and fire and rescue service coordinators suffering only from "post-traumatic stress disorder" that develops or manifests itself during a period in which the person is in the service of the department, unit, office, or agency.
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> …Labor Code §§ 3208.3 and 3212.15 concern the same subject because both encompass the psychiatric disorder of PTSD. Because Labor Code § 3212.15 is the latest expression of legislative will, Labor Code § 3212.15 controls over Labor Code § 3208.3. The enactment's chronology supports an interpretation of mutual exclusivity.

(Petition, pp. 6, 12.)

Defendant, in its Answer, alleges as following:

> The AME diagnosed PTSD. We do not even need to consider Labor Code section 3212.15 as the AME evaluator already indicated the predominate cause threshold was met. In this particular case, there is no need for a presumption for injury. Rather, the issue is whether the State of California wants to completely disregard Labor Code section 3208.3(h) after over 20 years and now provide compensation for injuries substantially caused by personnel actions. That certainly does not appear to be the intent of the statute.
> (Answer, p. 6.)

II.

Any decision of the WCAB must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd. (1974)* 11 Cal.3d 274, 281 [520 P.2d 978, 113 Cal. Rptr. 162] [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd. (1970)* 3 Cal.3d 312, 317 [475 P.2d 451, 90 Cal. Rptr. 355] [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd. (1970)* 1 Cal.3d 627, 635 [463 P.2d 432, 83 Cal. Rptr. 208] [35 Cal.Comp.Cases 16].)

In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's*

Comp. Appeals Bd. (1968) 69 Cal.2d 408, 413, 416-417, 419 [445 P.2d 313, 71 Cal. Rptr. 697] [33 Cal.Comp.Cases 660]; *Travelers Ins. Co. v. Industrial Acc. Com. (Odello)* (1949) 33 Cal.2d 685, 687-688 [203 P.2d 747] [14 Cal.Comp.Cases 54]; *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700-1702, 1705 [20 Cal. Rptr. 2d 778] [58 Cal.Comp.Cases 313].)

Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399, 407 [445 P.2d 294, 71 Cal. Rptr. 678] (a mere legal conclusion does not furnish a basis for a finding); *Zemke v. Workmen's Comp. Appeals Bd., supra,* 68 Cal.2d at pp. 799, 800-801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence); see also *People v. Bassett (1968)* 69 Cal.2d 122, 141, 144 [443 P.2d 777, 70 Cal. Rptr. 193] (the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based). (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, it is unclear from our preliminary review whether the existing record is sufficient to support the decision, order, award, and legal conclusions of the WCJ, as well as whether further development of the record may be necessary with respect to the issues noted above.

III.

Finally, we observe that under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal. 2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with

proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [62 Cal.Rptr. 757, 432 P.2d 365]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra,* at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Labor Code section 5901 states in relevant part that:

> "No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …"

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision

is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

IV.

Accordingly, we grant applicant's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued on May 29, 2024 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 12, 2024

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

EMILY BALL
MASTAGNI HOLSTEDT
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN

LAS/*abs*

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