

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

TRIVEIA DAIRE, *Applicant*

vs.

**INGLEWOOD UNIFIED SCHOOL DISTRICT, permissibly self-insured, administered by
KEENAN & ASSOCIATES, Defendants**

**Adjudication Numbers: ADJ10215937, ADJ9689890, ADJ9689886
Van Nuys District Office**

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

Applicant seeks reconsideration of the Joint Findings and Award, (F&A) issued by the workers' compensation administrative law judge (WCJ) on November 18, 2020, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her neck, back, right ankle, and in the form of GERD, lupus and Sjogren's Syndrome (autoimmune disease); that applicant did not sustain a psychiatric injury or injury in the form of diabetes or hypertension; and that applicant was temporarily totally disabled for the period from November 14, 2014, through March 10, 2016.

Applicant contends that the trial record does not contain substantial evidence regarding the claimed psychiatric injury so that issue should be deferred pending further development of the record, and that the reports from internal medicine-rheumatology qualified medical examiner (QME) Robert Fisher, M.D., are substantial evidence that applicant was temporarily totally disabled for the period from November 14, 2014, through March 20, 2018 (subject to the Labor Code section 4656(c)(2) 104 week limit).

We received a Joint Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petition for Reconsideration (Petition) and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we

will grant reconsideration, rescind the F&A, and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to her psyche, and injury in the form of GERD, lupus, Sjogren's Syndrome, and sleep disorder, while employed by defendant as a special education instructional aide during the period from March 1, 2005, through November 13, 2014 (ADJ 10215937).

Applicant claimed injury to her psyche, head, neck, back, lower extremities, and in the form of GERD, lupus, and Sjogren's Syndrome, while employed by defendant as a special educational instructional aide on March 20, 2014 (ADJ 9689890). She also claimed injury to her psyche, head, neck, back, bi-lateral shoulders, bi-lateral wrists, bi-lateral ankles, bi-lateral feet, and in the form of hypertension, diabetes, GERD, lupus, and Sjogren's Syndrome, while employed by defendant on July 23, 2013 (ADJ 9689886).

Applicant was initially evaluated by QME Dr. Fisher on February 9, 2015. (Court Exh. U, Dr. Fisher, March 9, 2015.) Dr. Fisher submitted several reports (see Court Exhs. R – Y) and his deposition was taken in August 2018. (Court Exh. Z, Dr. Fisher, August 14, 2018, deposition transcript.) In his most recent supplemental report Dr. Fisher reviewed and summarized a report from psychiatric QME Dr. Maged W. Botros. (Court Exh. V., Dr. Fisher, September 10, 2020.)

The parties proceeded to trial on November 12, 2020. The issues submitted for decision as to each injury claim were body parts, temporary disability during the period from November 13, 2014, through November 13, 2016, earnings, and attorney fees. (Minutes of Hearing and Summary of Evidence (MOH/SOE), November 12, 2020, pp. 2 - 4.)

DISCUSSION

We must first point out that decisions of the Appeals Board, and in turn, the WCJs, "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (2001) (Appeals Board *en banc*) 66 Cal.Comp.Cases 473, 476.) "The evidence submitted by the parties must be formally admitted and must be included in the record to enable the parties to comprehend the basis for the decision. Furthermore, a proper record enables any reviewing tribunal, be it the Board on

reconsideration or a court of further appeal, to understand the basis for the decision.” (*Hamilton, supra*, at 475.)

Here, in the Opinion on Decision the WCJ stated:

Dr. Botros was the QME in psychiatry. Her report was not placed into evidence, but it was reviewed in detail by Dr. Fisher (Ex. V). Dr. Botros took a detailed history and found that the patient lacks significant credibility since her history conflicts with the records. She found that the predominant cause of Applicant’s psychiatric symptoms and impairment were not work-related and pre-existed the injuries in question. Hence there can be no finding of psychiatric injury. (Joint Opinion on Decision, pp. 1 – 2.)

In the Report the WCJ stated:

The parties did not submit the QME report of Dr. Botros into evidence. So the Court was left with the detailed summary of the report as issued by Dr. Fisher in Ex. V. (Report, p. 4.)

The Petitioner relies to a great degree upon a deposition taken of Dr. Botros in July, 2020. This deposition was not put into evidence. The undersigned has never seen it or read it. The contents of evidence not put into evidence cannot be a basis for a decision. Hence its contents will not be discussed further, and it is inappropriate to cite additional documents that were not submitted into evidence in a Petition for Reconsideration. (Report, p. 5.)

Dr. Botros, as QME, found the Applicant to be evasive and non-credible in her attempt to assess the medical issues required to prove injury. No other physician in psychiatry had those detailed records, and hence Dr. Botros’ opinion was found to be compelling. (Report, p. 5.)

It appears that the WCJ’s decision that applicant did not sustain a psychiatric injury is based on the internal medicine-rheumatology QME Dr. Fisher’s review and summary of the April 17, 2020 report from psychiatric QME Dr. Botros, which was not in evidence.

We agree with the WCJ that, “The contents of evidence not put into evidence cannot be a basis for a decision.” (Report, p. 5.) As noted, the report from Dr. Botros was not offered or admitted into evidence, thus it cannot be considered. Further, a doctor’s summary of a report from another doctor, who specializes in a different area of medical practice, does not constitute substantial evidence as to the subject matter of the summarized report. Thus, the September 10, 2020 report from internal medicine-rheumatology specialist Dr. Fisher (Court Exh. V), is not

substantial evidence upon which a decision addressing the issue of psychiatric injury AOE/COE can be made.

Any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) The record in this matter, as it now stands does not contain substantial evidence upon which a finding regarding the issue of whether applicant sustained a psychiatric injury AOE/COE can be made. The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) Upon return, we recommend that the parties develop the record so that a proper determination of the issues submitted for decision can be made.

Finally, applicant asserts that Dr. Botros' report and deposition transcript were not offered into evidence because the doctor stated that he needed to re-evaluate applicant. Absent evidence pertaining to that issue, it cannot be addressed herein.

Accordingly, we grant reconsideration, rescind the F&A, and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Joint Findings and Award issued by the WCJ on November 18, 2020, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the November 18, 2020 Joint Findings and Award is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 12, 2021

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

**TRIVEIA DAIRE
ROWEN, GURVEY & WIN
MICHAEL SULLIVAN & ASSOCIATES LLP**

TLH/pc

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