WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHEYANNE MORENO, *Applicant*

vs.

CALSELECT INSURANCE SERVICES; STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ12744384
San Bernadino District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to further study the factual and legal issues.[1] This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O) issued on April 9, 2021, wherein the workers' compensation administrative law judge (WCJ) found that while employed as a customer service representative during the period of June 29, 2019 through March 4, 2020, applicant did not sustain injury arising out of and in the course of employment through a sudden and extraordinary event which qualifies for an exception to the 6-month employment requirement of Labor Code section 3208.3(d).

The WCJ ordered that applicant take nothing on her claim.

Applicant contends that the WCJ erroneously failed to find that her alleged injury resulted from a sudden and extraordinary event.

We received an Answer from defendant.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition be denied.

We have reviewed the contents of the Petition, the Answer and the Report. Based upon our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will rescind the F&O and return the matter to the trial level for further proceedings consistent with this decision.

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[1]Commissioner Sweeney is no longer a member of the Workers' Compensation Appeals Board. Commissioner Capurro has been substituted in her place.

FACTUAL BACKGROUND

On June 30, 2020, the matter proceeded to trial of the following issues:

> 1. Whether the applicant's claim falls within the exception under Labor Code Section 3208.3(d); whether the applicant's psychiatric injury was caused by a sudden and extraordinary employment condition.
>
> All other issues are deferred pending the outcome of the threshold issue.
>
> (Minutes of Hearing, June 30, 2020, p. 2:19-22.)

The parties stipulated that (1) while employed as a customer service representative during the period June 26, 2019 through March 4, 2020, applicant claims to have sustained injury arising out of and in the course of employment to her psyche; (2) applicant claims multiple other body parts sustained injured and that the issues of these body parts will be deferred pending the outcome of the trial; and (3) applicant's first day of work with defendant was June 26, 2019. (*Id.*, p. 2:2-17.)

The WCJ admitted limited exhibits into evidence consisting of applicant's November 18, 2019 application for adjudication, March 4, 2020 letter amending the application for adjudication, and November 15, 2019 claim form. (*Id*., pp. 2:24-3:4.) The WCJ noted that the parties were permitted to introduce additional exhibits, if needed, at subsequent hearings. (*Id*., p. 3:5-7.)

In the Opinion on Decision, the WCJ states:

> According to the owner, Sean McMullen the Applicant did not work for him after November 14, 2019. (See MOH/SOE October 19, 2020, p. 3 ll. 22-25)
> . . .
> The Applicant testified to verbal harassment by other employees in her office. The undersigned found the Applicant to be a credible witness.
> . . .
> According to Mr. McMullen he first learned of any issues of harassment by the Applicant's co-workers on November 12, 2019. (See MOH/SOE October 19, 2020, p. 3 ll. 1-2)
>
> On November 14, 2019 the Applicant was being harassed at work. The Applicant's mother called Sean McMullen. Mr. McMullen was not in the San Bernardino office but in his Irwindale office. When he became aware of the situation he drove to San Bernardino. When he arrived the Applicant was in her car in the parking lot. The Applicant was taken to Loma Linda hospital. However, she was not evaluated as the wait time in the emergency room was 3 to 4 hours.
> . . .

The Applicant's alleged harassment by other employees, over a period of several months, was neither sudden nor extraordinary. The Applicant failed to meet her burden of proof to demonstrate her injury was a result of a sudden or extraordinary event. Her claim for psychiatric injury is barred pursuant to Section 3208.3(d).

(Opinion on Decision, pp. 1-3.)

In the Report, the WCJ states:

The Applicant was transported by ambulance to Loma Linda University Medical Center on November 14, 2019. One of the ambulance personnel told the Applicant she may have been suffering a panic attack.

. . .

The Applicant did not return to work for the Defendant following November 14, 2019. By February 2020 the Applicant had found employment with another insurance agency. The Applicant resigned her employment with the Defendant on March 4, 2020.

. . .

The Applicant testified she was harassed, called names by her coworker, and humiliated in front of office staff over a period of five months.

. . .

The Applicant stated that her phone calls, which had been recorded for training purposes, were played back in front of other office personnel. Some co-workers teased and harassed the Applicant over her phone conversations with customers.

. . .

Mr. McMullen testified he was first notified about the harassment on November 13, 2019. The Applicant testified that she believed she told Mr. McMullen of the harassment several days before the panic attack in November 2019. It did not appear to the court that Mr. McMullen, owner of the Defendant insurance agency, was aware of the alleged harassment until early November 2019 and or several days prior to the Applicant's alleged panic attack.

(Report, pp. 1-2.)

DISCUSSION

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, §§ 3600(a),[2] 3202.5.) With respect to psychiatric injuries, section 3208.3 provides:

(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 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

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

> 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.
> (§ 3208.3(a)–(b) and (d).)

In this case, the parties stipulated that applicant claimed injury to the psyche while employed as a customer service representative during the period June 26, 2019 through March 4, 2020, deferred the issues of whether and when applicant sustained injury,[3] and proceeded to trial on the "threshold issue" of whether the "claim falls within the exception under Labor Code Section 3208.3(d)." (Minutes of Hearing, June 30, 2020, p. 2:2-22.)

Under this framing of issues, applicant's burden of establishing that she sustained injury to the psyche during the period of June 26, 2019 through March 4, 2020 under section 3208.3(a)-(b)(1) was deferred with the result that she was now required to prove that she was not barred from receiving workers' compensation benefits under section 3208.3(d) because she was either employed for at least six months or her alleged injury resulted from a sudden and extraordinary event.

But as stated in *CIGA v. Workers' Comp. Appeals Bd*. (*Avila*) (2004) 69 Cal.Comp.Cases 1323 (writ den.):

> [T]he 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

[3] Under section 5412, the "date of injury in cases of . . . cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (§ 5412.) Hence, the issue of whether applicant sustained cumulative injury to the psyche requires a determination of when the injury occurred within the meaning of section 5412.

> establishes that the applicant has not complied with the six-month employment period provided in Labor Code § 3208.3(d).
>
> (*Id*. at p. 1325; see also *Milla v. United Guard Security, Inc*., (2020) 86 Cal.Comp.Cases 71 [stating that the assignment of the burden of proof to applicant to establish the six-months period of employment was improper]; § 5705 [providing that the burden of proof rests upon the party or lien claimant holding the affirmative of the issue].)

Because the burden on the issue of whether applicant was employed by defendant for six months was misassigned to applicant, we conclude that the WCJ issued the F&O in error.

We also note that since the burden of proof was misassigned to applicant, defendant presented no documentary evidence to suggest that the period of employment was less than six months; and, as we will explain, the testimony of defendant's owner, Mr. McMullen, that applicant did not return to the office after November 14, 2019 is not necessarily sufficient to establish that applicant's period of employment was less than six months.

In *CIGA v. Workers' Comp. Appeals Bd*. (*Mills*) (2007) 72 Cal.Comp.Cases 1146 (writ den.), the Appeals Board explained that substantial compliance with the six-month employment rule may be sufficient to meet the statutory requirement. There, 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.)

In this case, Mr. McMullen testified that applicant did not work after November 14, 2019, when he found her in her car outside the office, suggesting that her period of employment was approximately five months. On the other hand, applicant testified that her employment continued until March 4, 2020, when she submitted her resignation, suggesting that she was employed approximately nine months, including the five-month period she testified she was harassed.

Since it is unclear whether and on what terms the parties maintained the employment relationship between November 14, 2019, and March 4, 2020, the record should be further developed as to the issue of whether applicant's period of employment substantially complies with section 3208.3(d).

The Appeals Board has the discretionary authority to develop the record when appropriate to fully adjudicate the issues. (§§ 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].)

Accordingly, we will return the matter to the trial level for development of the record of whether defendant may establish that applicant's period of employment was less than six months. In doing so, we note that if defendant so establishes applicant's period of employment, the burden of proof shifts to applicant to prove her alleged injury resulted from a sudden and extraordinary event. (§ 5705.)

We also offer our nonbinding recommendation that the court consider reframing the issues for trial to require applicant meet her initial burden of establishing that she sustained injury to the psyche; and, once that alleged injury is established, then require defendant to prove that her period of employment was less than six months. We believe that such a framing of issues may afford each party an opportunity to meet its respective burden of proof based upon a complete record.

Accordingly, we will rescind the F&O and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration, that Findings and Order issued on April 9, 2021 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 25, 2025

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

CHEYANNE MORENO
SOLIMON RODGERS P.C.
STATE COMPENSATION INSURANCE FUND

SRO/bp

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