

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

LENNARD HUTCHINSON, *Applicant*

vs.

**CITY AND COUNTY OF SAN FRANCISCO;
self-insured, adjusted by the WORKERS' COMPENSATION DIVISION, *Defendants***

**Adjudication Number: ADJ8034870
Oakland 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 and defendant seek reconsideration of the Findings and Award (F&A) issued on May 14, 2021, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as an electrician by defendant on July 18, 2011, applicant sustained injury to the cervical spine; (2) the injury resulted in permanent disability of 43%, entitling applicant to permanent disability benefits of \$58,423.29, payable biweekly at the rate of \$230.00 per week, with defendant entitled to a credit for all permanent disability advances made; (3) applicant is entitled to reasonable and necessary future medical care; and (4) applicant's attorney is entitled to a fee of 15%, or \$8,763.50, to be subtracted from the far end of the award if necessary.

The WCJ awarded applicant permanent disability benefits, medical treatment, and attorney's fees in accordance with these findings.

Applicant contends that the WCJ erroneously (1) failed to find that he sustained injury to the psyche; and (2) found that defendant is entitled to apportionment of 10% or any amount at all.

Defendant contends that the WCJ erroneously failed to find that it is entitled to apportionment of 20% and that applicant is not entitled to a 3% WPI pain add-on.

We received an Answer from defendant.

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

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

We have reviewed the contents of the Petitions, 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&A and substitute findings that defer the issues of whether applicant sustained injury to the psyche, the amount of permanent disability, and attorney's fees; and we will return the matter to the trial level further proceedings consistent with this decision.

FACTUAL BACKGROUND

On March 15, 2021, defendant filed in EAMS a three-page document entitled "Defendant Exhibit H Correspondence from DCA Norman to AA Jerez," which was dated March 10, 2020.

On March 21, 2021, the matter proceeded to trial on the following issues:

1. Parts of body injured. Applicant claims injury to psyche, internal, low back, head, consciousness, and neuro psych.
 2. Permanent disability apportionment.
 3. Need for further medical treatment.
 4. Attorney fees.
 5. The applicability of the six-month rule, and whether or not Applicant's claim for injury to his psyche is barred by the six-month rule.
 6. Whether or not Dr. Bruce McCormack is a QME or panel QME, Defense Counsel has five days from today's date to submit supplemental trial exhibits to prove that.
- (Minutes of Hearing and Summary of Evidence, March 21, 2021, pp. 2:36-3:3.)

The record does not show that the WCJ admitted defendant's exhibit H into evidence or that any party requested that the document be admitted in evidence. (*Id.*, pp. 2-9.)

In the Report, the WCJ states:

Applicant's claim for injury to his cervical spine was accepted while his claim for injury to his psyche was denied.

Defendant argued that applicant's claim for psychiatric injury is barred by the 6-month rule. Applicant had alleged that his employment record supports employment for longer than 6 months but even if the 6-month rule bars applicant's claim, since the injury was sudden and extraordinary, applicant is entitled to psychiatric permanent disability.

...

PSYCHIATRIC INJURY:

...

[A]pplicant did not sustain a compensable psychiatric injury because he was not employed by the employer for more than 6 months and he did not meet any of the exceptions to the 6-month rule.

Michael Ho was called by defendant as a witness for the employer. Mr. Ho testified that applicant had two separate and distinct periods of employment with the City & County of San Francisco; 2010 and 2011.

During his first period of employment applicant worked a total of 8 weeks. In 2011 applicant worked a total of 15 days.

...

Since only actual days worked can be counted toward the 6-month employment period applicant's claim for compensable psyche injury is barred.

(Report, pp. 1-3.)

DISCUSSION

Labor Code section² 3208.3(d) provides, in pertinent part, that "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." (§ 3208.3(d).) This provision applies to psyche claims pled as a compensable consequence of a physical injury. (*Wal-Mart Stores, Inc. v. Workers' Comp. Appeals Bd. (Garcia)* (2003) 112 Cal.App.4th 1435 [68 Cal.Comp.Cases 1575].)

Section 5705 states that the "burden of proof rests upon the party or lien claimant holding the affirmative of the issue." (§ 5705.) Applicant thus bears the burden of proving his injury arose out of and in the course of her employment (AOE/COE). (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297–298, 302; § 3600(a).) Once he has met that burden, the burden shifts to defendant to prove any alleged affirmative defenses to the injury.

In *CIGA v. Workers' Comp. Appeals Bd. (Avila)* (2004) 69 Cal.Comp.Cases 1323 (writ den.), the Appeals Board found that defendant had waived the issue of whether the evidence established the six-month requirement by not raising it until seeking reconsideration. Nonetheless, the Appeals Board held that even if the issue were not waived, the 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 section 3208.3(b), the applicant is entitled to benefits unless the defendant

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

establishes that the applicant's period of employment was not six months as required by section 3208.3(d). (*Id.* at p. 1325; see also *Guadarrama v. Workers' Comp. Appeals Bd.* (2012) 77 Cal.Comp.Cases 894 (writ den.) [Commissioner Brass in dissent states that the defendant did not present any employment records to establish applicant's length of employment with any accuracy and thus failed to meet its burden of proof].)

Applicant's Petition contends that the WCJ erroneously failed to find that he sustained injury to the psyche because his non-continuous period of employment amounts to at least 6 months. Specifically, applicant asserts that defendant's exhibit H contains an attendance sheet located at pages 25 through 28 which shows that he performed work for defendant for 96 days in 2011 and a termination letter located at page 25 which shows that he performed work for defendant for 92 days in 2010. (Petition, pp. 6:15-7:6.)

WCAB Rule 10945 provides:

- (a) Every petition for reconsideration, removal or disqualification shall fairly state all of the material evidence relative to the point or points at issue. Each contention shall be separately stated and clearly set forth. A failure to fairly state all of the material evidence may be a basis for denying the petition.
- (b) Every petition and answer shall support its evidentiary statements by specific references to the record.
(Cal. Code Regs., tit. 8, § 10945(a)-(b).)

Here, applicant's Petition improperly relies upon exhibit H because it was not admitted in evidence, and it is of insufficient length to contain the attendance sheet and termination letter applicant cites. (Minutes of Hearing and Summary of Evidence, March 21, 2021, pp. 2-9.) In doing so, the Petition also fails to fairly state the material evidence relating to the issue of whether applicant's period of employment may be calculated to meet the 6-month requirement.

Although applicant's reliance on exhibit H renders his Petition subject to denial on procedural grounds and we remind applicant's attorney not to violate Rule 10945 in future, the parties' failure to present exhibit H and other documentary evidence such as the attendance sheet and termination letter for consideration by the WCJ leaves the record on the issue of whether applicant's period of employment meets six-month requirement incomplete.

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the

WCJ's decision. (§ 5313.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id.* at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350])).

Because the evidentiary record on whether applicant's period of employment meets the section 3208.3(d) six-month requirement is incomplete, we conclude that the record requires further development on the issue of whether applicant sustained injury to the psyche.

Accordingly, as our Decision After Reconsideration, we will rescind the F&A and substitute findings that defer the issues of whether applicant sustained injury to the psyche, the amount of permanent disability, and attorney's fees; and we will return the matter to the trial level further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration, that the Findings and Award issued on May 14, 2021 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant Lennard Hutchinson, born on ____, while employed on July 18, 2011, as an electrician, occupation group variant 380, in San Francisco, California, by CCSF Public Utilities Commission, Waste Water Treatment Program, sustained injury arising out of and in the course of employment to his cervical spine. At the time of injury, the employer was permissibly self-insured, adjusted by the Workers' Compensation Division.
2. Applicant is entitled to reasonable and necessary future medical care for the injury to the cervical spine.
3. The issue of whether applicant sustained injury to the psyche is deferred.
4. The issue of permanent disability is deferred.
5. The issue of attorney's fees is deferred.

6. All other issues are deferred.

AWARD

AWARD IS MADE in favor of **LENNARD HUTCHINSON** against **City and County of San Francisco** of further medical treatment to cure or relieve from the effects of the industrial injury to the cervical spine.

IT IS FURTHER ORDERED that this matter is hereby **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 17, 2025

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

**LENNARD HUTCHINSON
BOXER & GERSON
CITY AND COUNTY OF SAN FRANCISCO, OFFICE OF THE CITY ATTORNEY**

SRO/es

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