WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LUIS LOMELI, *Applicant*

vs.

COUNTY OF LOS ANGELES, PERMISSIBLY SELF-INSURED, *Defendants*

Adjudication Number: ADJ10280441
Marina Del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant seeks reconsideration of the May 2, 2023 Findings of Fact and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a medical case worker from December 1, 2014 to December 1, 2015, sustained industrial injury to his psyche.

Defendant contends the WCJ erred in admitting the reporting of treating physician Dr. Flores, that the WCJ erred in not admitting into evidence a proffered Labor Code[1] section 4600 letter, and that the reporting of Dr. Flores fails to fully address the issue of whether applicant's injury was substantially caused by lawful, nondiscriminatory and good-faith personnel action pursuant to section 3208.3(h).

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 allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto.

[1] All further statutory references are to the Labor Code unless otherwise stated.

Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will affirm the F&A.

In addition to the analysis set forth in the WCJ's Report, we observe the following. Section 3208.3 provides, in relevant part:

> 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.

(Lab. Code, § 3208.3(b)(1).)

"Predominant as to all causes" means that "the work-related cause has greater than a 50 percent share of the entire set of causal factors." (*Dept. of Corrections v. Workers' Comp. Appeals Bd. (Garcia)* (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356, 1360]; *Watts v. Workers' Comp. Appeals Bd.* (2004) 69 Cal.Comp.Cases 684, 688 (writ den.).) If the threshold for a compensable psychiatric injury has been met under section 3208.3(b), and the employer has asserted that some of the actual events of employment were good faith personnel actions, the WCJ must determine whether section 3208.3(h) bars applicant's claim. Section 3208.3(h) provides as follows:

> 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.

However, a defendant seeking to prevail on the basis of the protection afforded to it by section 3208.3(h) must first assert the issue of the applicability of the section. In addition, section 5705 provides in relevant part that "[t]he burden of proof rests upon the party or lien claimant holding the affirmative of the issue." (Lab. Code, § 5705.)

Here, the WCJ has appropriately analyzed the parties' respective burdens of proof and determined that on the instant record, defendant has not met its affirmative burden of establishing that lawful, nondiscriminatory good faith personnel action was a substantial cause of applicant's claimed psychiatric injury.

We will affirm the F&A, accordingly.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 2, 2023 Findings and Award is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 16, 2025

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

LUIS LOMELI
MITCHELL LAW CORPORATION
ZGRABLICH & MONTGOMERY

SAR/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

SUMMARY OF FACTS

On February 1, 2016, applicant filed an Application for Adjudication of Claim alleging injury to head, neck, shoulders, back and nervous system-stress from December 1, 2014 to December 1, 2015. It is undisputed by the parties that defendant timely denied injury arising out of and in the course of employment (AOE/COE).

At the March 4, 2020 Mandatory Settlement Conference (MSC), the parties jointly requested to set the matter for Trial. The parties submitted signed joint Pre-trial Conference Statement, dated March 4, 2020, framing the stipulations and issues, and listing exhibits (EAMS Doc ID72392084).

The case went on the record on April 21, 2021, February 28, 2022, March 30, 2022, and May 10, 2022.

On June 13, 2022, Findings of Fact & Order, Opinions on Decision were issued. This WCJ found that the medical reports from Nelson Flores, Ph.D., dated July 27, 2017 and October 22, 2019 (Exhibits 1 and 2) are admitted into evidence, that applicant did not sustain injury AOE/COE to his neck, back, bilateral shoulders and head, that all other issues are removed from submission, and Ordered further development of the record with both Dr. Flores and the Panel QME, E. Richard Dorsey, M.D. Neither party filed a Petition for Removal of said decision.

Applicant's attorney filed a Declaration of Readiness to Proceed, dated November 14, 2022. Both parties appeared at a MSC before this WCJ on January 12, 2023, jointly requesting to place the matter back on the Trial Calendar after Dr. Dorsey issued two supplemental reports while Dr. Flores issued one.

At the February 13, 2023 Trial, the parties stipulated to applicant's average weekly earnings, and this WCJ admitted Dr. Flores' September 16, 2022 report (Exhibit 9) and Dr. Dorsey's June 23, 2022 and September 3, 2022 reports (Exhibits C and D, respectively), into evidence. The case was re-submitted.

On February 27, 2023, Order Vacating Submission Pending Receipt of Rating from The Disability Evaluation Unit (DEU) was served. On the same date, Formal Rating Instructions and DEU Rating were also served.

On March 2, 2023, defendant timely objected to DEU Rating and thus, this matter was set for Trial/DEU Cross-examination on April 26, 2023.

At the April 26, 2023 Trial, this WCJ discussed with the parties and defendant waived cross-examination of the DEU rater as defendant's disputes are with respect to this WCJ's Formal Rating Instructions, which will be subject to a timely Petition for Reconsideration after a decision has been issued. At said Trial, defendant made a motion to admit a May 11, 2017 Labor Code §4600 designation letter, which this WCJ denied. The case was once again re-submitted for decision. No Petition for Removal was filed by either party.

On May 2, 2023, Findings of Fact & Award, Opinions on Decision were issued. On May 12, 2023, defendant filed a Petition for Reconsideration.

DISCUSSION

Medical reports from Nelson Flores, Ph.D., dated July 27, 2017 and October 22, 2019 (Exhibits 1 and 2):

The Findings of Fact & Order, Opinions on Decision, admitting Exhibits 1 and 2 into evidence were issued and served on June 13, 2022. There was no Petition for Removal of this finding/decision filed by defendant pursuant to 8 CCR §10955. Legally and procedurally, this finding/Order is final.

If the WCAB were to consider defendant's arguments herein despite the untimeliness of the "objection," this WCJ laid out the merits in the June 13, 2022 Opinions on Decision as to why Exhibits 1 and 2 are admitted into evidence over defendant's Opposition, dated April 20, 2021, as follows:

> A careful review of the signed Joint Pre-trial Conference Statements reveals that both the July 27, 2017 and October 22, 2019 reports from Dr. Flores were disclosed and specifically identified. Applicant submitted rebuttal evidence of two Proofs of Service, dated October 18, 2017 and November 15, 2019 (Court Exhibits AA and BB) to show service on defendant.
>
> The October 18, 2017 Proof of Service shows service of the "permanent and stationary report dated 07.27.2017 and bill regarding Luis Lomeli" on applicant's attorney, Gary Weessies, D.C., and Tristar at P.O. Box 11967, Santa Ana, CA 92711 (Court Exhibit AA). This address for Tristar is the same address as that in the Answer filed by defense attorney on March 29, 2016 (EAMS Doc ID #59867250). Defense attorney also entered appearance on this case on the same date via Notice of Representation with Proof of Service showing Tristar having said address (EAMS Doc ID #59867251). Clearly, the Official Address Record in EAMS noting the address for Tristar from February 1, 2016 to August 2, 2019 as P.O. Box 11028, Orange, CA 92856 is incorrect and thus, unreliable.

> Based on the October 18, 2017 Proof of Service, it is presumed that the July 27, 2017 report from Dr. Flores was served on the proper address for Tristar. This is a rebuttable presumption and defendant did not provide any evidence to rebut said presumption. As such, the July 27, 2017 report from Dr. Flores (Exhibit 1) is presumed to have been served on Tristar but not on defense attorney of record. On one hand, it is defective service without serving defense attorney pursuant to 8 CCR §10625. On the other hand, Tristar was properly served with said report so there was no prejudice or denial of due process to defendant. Since applicant bears the burden of proving injury AOE/COE and taking into consideration the spirit of liberal construction, as well as Labor Code §4060(b), it is found that the July 27, 2017 report from Dr. Flores (Exhibit 1) is admitted into evidence.
>
> The November 15, 2019 Proof of Services shows service of the "supplemental psychological medical-legal evaluation report 10/22/19 and bill regarding Luis Lomeli" on applicant's attorney, Dr. Weessies, and Tristar at the same address noted above (Court Exhibit BB). In EAMS, there appeared to be a global change of third party administrator (TPA) from Tristar to Sedgwick COLA Orange on August 2, 2019. A careful review into filenet under this case does not reveal any specific notice about said change on or around August 2, 2019. At Trial, defense attorney admitted that notice of change of TPA was not specifically sent to applicant's attorney. Defendant did not submit any evidence at Trial that applicant, applicant's attorney and/or Dr. Flores' office were notified of the change of TPA on or around August 2, 2019. Due process consists of notice and an opportunity to be heard. There was clearly no notice. To turn around and try to exclude a medical report that was served on the last known TPA when there was no proof of notice of change of TPA would be denial of applicant's due process right to sustain his burden of proving injury AOE/COE. Of course, as discussed above, it is still defective service not to serve defense attorney of record with said report pursuant to 8 CCR §10625. Once again, since applicant bears the burden of proving injury AOE/COE and taking into consideration the spirit of liberal construction, as well as Labor Code §4060(b), it is found that the October 22, 2019 report from Dr. Flores (Exhibit 2) is admitted into evidence.
>
> Defendant shall have an opportunity to send these reports to the Panel QME, Dr. Dorsey, for review.

In fact, this WCJ, via Findings of Fact & Order, dated June 13, 2022, ordered further development of the record by ordering Dr. Dorsey to review Exhibits 1 and 2 and issue one supplemental report. Dr. Dorsey issued two supplemental reports, dated June 23, 2022 and September 16, 2022 (Exhibits C and D), wherein he had the opportunity to offer his opinions thereto. Despite non-compliance with this WCJ's Order of getting one supplemental report, both reports from Dr. Dorsey were admitted into evidence as Exhibits C and D. Based on the foregoing, there was no denial of defendant's due process rights by admitting Exhibits 1 and 2.

Labor Code §4600 Designation Letter, dated May 11, 2017:

At the April 21, 2021 Trial, defendant objected to the admissibility of Dr. Flores' July 27, 2017 and October 22, 2019 reports (Exhibits 1 and 2) based on failure to serve defendant before discovery closed at MSC. Applicant submitted rebuttal evidence of two Proofs of Service, dated October 18, 2017 and November 15, 2019 (Court Exhibits AA and BB). Defendant did not offer any rebuttal evidence thereto. Defendant also did not raise Labor Code §4600 designation and/or submit the May 11, 2017 letter as evidence at said Trial. In fact, based on the date of this letter, it was in existence at the MSC but it was not listed as an exhibit in the Pre-trial Conference Statement, dated March 4, 2020.

Findings of Fact & Order, Opinions on Decision, dated June 13, 2022, were issued and served with no Petition for Removal and/or Petition for Reconsideration filed by either party to any of this WCJ's findings and/or Order. The finding/Order admitting Exhibits 1 and 2 is final.

At the February 13, 2023 Trial, defendant objected to the admissibility of Dr. Flores' supplemental report, dated September 16, 2022 (Exhibit 9), which was Ordered by this WCJ via Findings of Fact & Order, dated June 13, 2022. Defendant argued Labor Code §5502(d) but said code section is not applicable when the record was lacking and this WCJ performed her duty to further develop the record, especially when there was no Petition for Removal of this WCJ's decision/Order to further develop the record with both Dr. Flores and Dr. Dorsey. Contrary to this WCJ's Order, defendant obtained two reports from Dr. Dorsey and moved to admit both reports into evidence, which were admitted as Exhibits C and D. Based on the aforementioned reasons, this WCJ admitted Exhibit 9 into evidence over defendant's objection, and this is memorialized in the Minutes of Hearing Further, dated February 13, 2023, which were served by the court reporter on the same date. Once again, there was no Petition for Removal filed by defendant pursuant to 8 CCR §10955 to this WCJ's Order admitting Exhibit 9 into evidence over
its objection.

At the April 26, 2023 Trial/DEU Cross-examination, defendant, for the first time, brought up and made a motion to enter into evidence a May 11, 2017 Labor Code §4600 designation letter to support its opposition to the admissibility of Exhibit 9, which was already decided on the record at the February 13, 2023 Trial. This WCJ denied defendant's motion on the record because this May 11, 2017 letter was in existence at the April 21, 2021 Trial and yet defendant did not offer same as evidence and/or rebuttal evidence. This letter was in existence but not listed in the signed

joint Pre-trial Conference Statement, dated March 4, 2020, thus Labor Code §5502(d)(3) applies. Also, defendant did not file any Petition for Removal of this WCJ's finding/decision to admit Exhibits 1 and 2, and this WCJ's decision/Order to further develop the record with both Drs. Flores and Dorsey in the Findings of Fact & Order, Opinions on Decision, dated June 13, 2022. Defendant did not offer this letter into evidence at the February 13, 2023 Trial and did not file a Petition for Removal after service of the Minutes of Hearing Further, dated February 13, 2023, when this WCJ admitted Exhibit 9 into evidence over defendant's objection.

There was no denial of defendant's due process right by not admitting this May 11, 2017 letter into evidence. There is simply no legal, medical and/or factual basis to admit this letter at the April 26, 2023 Trial.

Dr. Dorsey's Opinions Are Not Substantial Medical Evidence:

Defendant argued that this WCJ should not have relied on Dr. Flores' medical reporting as it did not contain a Rolda analysis. As indicated in this WCJ's Opinions on Decision, dated May 2, 2023, lawful, non-discriminatory, good faith personnel actions defense under Labor Code §3208.3(h) is an affirmative defense, with the burden of proof resting on the party who is asserting said defense. The party asserting said defense has the burden of producing substantial medical evidence with a proper Rolda analysis. But defendant's argument herein is moot as defendant did not raise this affirmative defense in the Pre-trial Conference Statement or at Trial, thus it was waived. The lack of a Rolda analysis herein does not render Dr. Flores' medical reporting not reliable and not substantial medical evidence. In fact, this WCJ found Dr. Flores' medical reporting substantial medical evidence and relied on same to find injury AOE/COE to applicant's psyche, as well as award permanent disability, future medical care and attorney's fees.

Despite the opportunity to review all of the reports and/or records in this case, including the AME report from Peter Newton, M.D., dated July 18, 2017 (Joint Exhibit Z), who did not find any orthopedic/physical injury, and Dr. Flores' July 27, 2017 and October 22, 2019 reports (Exhibits 1 and 2), Dr. Dorsey still stood by his opinion apportioning 80% of all causes to cumulative trauma physical injuries without explaining how and why (Joint Exhibit Y, Exhibits C and D). It is important to note that the latter two reports (Exhibits C and D) were issued after this WCJ's Order developing the record. Dr. Dorsey's opinions are still not substantial medical evidence. This WCJ did fulfill her duty to supplement the record when the record was lacking, and

protected defendant's due process rights after admitting Exhibits 1 and 2 into evidence by allowing Dr. Dorsey to review these reports and give his opinions thereto. This WCJ does not have a duty to further develop the record *ad infinitum* to rescue a party who cannot sustain its burden when the burden of rebuttal shifts to it.

RECOMMENDATION

It is respectfully recommended that defendant's Petition for Reconsideration be denied for the reasons stated above. []

Dated: May 16, 2023

IVY W. MI
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE