

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

YGNACIO PONCE, *Applicant*

vs.

**TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, insurer for
EARTHBOUND FARMS, *Defendants***

**Adjudication Numbers: ADJ10015666, ADJ12280547
Salinas 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 Orders (F&O) issued on July 19, 2021, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that (1) while employed as a material handler on January 23, 2015 in ADJ10015666 and during the period ending March 25, 2015 in ADJ12280547, applicant sustained injury to his right shoulder in ADJ10015666 and did not sustain injury to his left upper extremity, right upper extremity, neck, back, and psyche in both cases; (2) the primary treating physician is Dr. Cluff; (3) applicant became permanent and stationary on October 11, 2016; (4) applicant has not established new and further disability; and (5) applicant is not entitled to additional QME panels in internal medicine and psychology.

The WCJ ordered that applicant take nothing on claim number ADJ12280547 and that his petition to reopen for new and further disability dated April 10, 2018 be dismissed.

Applicant contends that the WCJ erroneously found that he is not entitled to an additional QME to determine whether he sustained injury to the psyche.

We received an Answer.

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

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

We have reviewed the contents of the Petition, the Answer and the Report. Based upon our review of the record, and for the reasons set forth below, as our Decision After Reconsideration, we will affirm the F&O.

FACTUAL BACKGROUND

On July 31, 2019, applicant filed a Declaration of Readiness to Proceed (DOR), requesting a Mandatory Settlement Conference (MSC) in ADJ10015666 on the grounds that applicant needed “WCAB ASSI[S]TANCE WITH PQME DISPUTE.” (DOR, July 31, 2019, p. 8.) The DOR does not state what body part or medical specialty may pertain to the dispute. (*Id.*)

On October 9, 2019, the WCJ held a MSC at which she ordered that a replacement QME panel in “MPR-Physical Medicine and Rehab” be issued. (Minutes, October 9, 2019, p. 3.) The issues presented at the MSC were otherwise resolved (*Id.*, p. 2.)

On April 20, 2021, the matter proceeded to trial on numerous issues, including injury arising out of and in the course of employment (AOE/COE) in ADJ12280547, parts of body injured in both cases, permanent disability, apportionment, need for further medical treatment, and good cause to reopen for new and further disability in ADJ10015666. (Minutes of Hearing and Summary of Evidence, April 20, 2021, pp. 2:22-3:8.)

With respect to applicant’s claim of entitlement to an additional QME to determine the issue of injury to the psyche, the relevant issues were stated as whether (1) applicant is entitled to an additional panel QME in psyche; and (2) applicant acted with due diligence to obtain an additional panel. (*Id.*, p. 3:10-17.)

The parties stipulated that while employed on January 23, 2015 in ADJ10015666 and during the period ending March 25, 2015 in ADJ12280547, applicant sustained injury AOE/COE to his right shoulder in ADJ10015666 and claims to have sustained injury AOE/COE to his left upper extremity, right upper extremity, neck, back, and psyche in both cases. (*Id.*, p. 2:7-10.)

At trial, applicant testified that on January 23, 2015, he was using a forklift to load a 3,000-pound roll of plastic onto a machine. He dismounted the forklift to use a five- to six-foot pry bar to pull bolts out of a steel bar running through the plastic roll to finish installing the plastic roll. While using the pry bar, he overextended his right arm. (*Id.*, p. 5:13-17.)

In the Opinion on Decision, the WCJ states:

With respect to the psyche claim, there is no substantial evidence to support causation.

Applicant has not demonstrated due diligence in obtaining the additional panels in psychology and internal medicine. Applicant is not entitled to additional QME panels in internal medicine or psyche. Applicant was diagnosed with a depressive disorder in 2016 by Dr. Paulette Jacome. Applicant amended his application on 10/3/18 to allege psyche. With respect to the internal issues, no internal body parts have been alleged to be injured. Finally, Applicant filed a DOR on 1/11/21 stating that he was ready to proceed on the issues.

(Opinion on Decision, p. 3.)

In the Report, the WCJ states:

With respect to the psyche claim, substantial evidence does not support causation.

...

Although Applicant was diagnosed with a depressive disorder in 2016 by Dr. Paulette Jacome, there was no discussion by her or any other physician as to predominant causation. The only testimony at trial about the alleged psychological injury was, “He suffers from depression.” (Minutes of Hearing and Summary of Evidence, 4/20/21, p. 6, lines 2-2.5.)

QME Dr. Murakami reviewed numerous treatment records from Dr. Robert Cluff, as well as the report by Dr. Jacome. Dr. Cluff’s treatment reports spanned the period of 11/23/15 through 6/24/19. (DEFT’S EX. D-2: Report, Mikiko Murakami, D.O., 6/22/20, Appendix B: Summary of Reviewed Medical Records, pp. 24-71.) In his 11/23/15 report, Dr. Cluff identified a “mild depressive disorder” and “chronic pain disorder associated with both psychological factors and general medical condition.” (DEFT’S EX. D-2: Dr. Murakami, p. 32.) Dr. Cluff mentions this diagnosis numerous times throughout the years. (DEFT’S EX. D-2: Supra.)

Despite having had years to develop this issue, Applicant has not availed himself of the panel process for psyche. After Applicant filed his Petition to Reopen on 4/16/18, the parties took part in five MSCs. (EAMS: Hearings in APP10015666.) A review of the records in EAMS reveals that prior to the issues being raised on the PTCS, Applicant had raised the psych QME issue at the 1/16/19 hearing only. Moreover, the DOR that led to this Trial was Applicant’s own.

Relevant procedural history is set forth below:

Applicant’s case in ADJ10015666 settled by Stipulations with Request for Award, with Award issued on 5/11/2017. (EAMS Doc IDs: 63775873, 63775872.)

On 4/16/18, Applicant filed a timely Petition to Reopen in that case alleging “an increase in permanent disability, need for temporary disability, need for further medical treatment and different vocational factors.” (Pet. to Reopen, d. 4/10/18, p. 1; EAMS Doc ID: 66785894.)

On 10/3/18, Applicant amended his application to allege psyche. (Amended App. for Adjud., 10/3/18; EAMS Doc ID: 6831697.)

On 11/14/18, defendant filed a DOR to move the case forward. (Deft's DOR; EAMS Doc ID: 27785323.)

On 11/26/18, Applicant filed an objection to defendant's DOR, for the purpose of taking QME Dr. Dan Azar's deposition and to obtain a psych QME evaluation. (Objection to DOR, dated 11/21/18; EAMS Doc ID: 68722773.)

On 1/16/19, over defendant's objection, the MSC was taken off calendar by the undersigned for the purpose of continued discovery, to include obtaining a psych panel. Under the comments in the Minutes of Hearing, the undersigned stated, "Applicant to request psych panel within 30 days." (Minutes of Hearing, 1/16/19; EAMS Doc ID: 69118583.)

On 6/7/19, Applicant filed an application in ADJ12280547, alleging a cumulative trauma injury to his bilateral upper extremities. (EAMS Doc ID: 70384183.)

On 1/11/21, Applicant filed a DOR stating under penalty of perjury that he was ready to proceed on the issues of PD, TD, future medical treatment, SJDB voucher eligibility, and AOE/COE in ADJ12280547. (Appl's DOR for MSC, EAMS Doc ID: 35134257.)

At the MSC on 2/10/21, a joint request for trial was made. (Minutes of Hearing; EAMS Doc ID: 73849208.)

On the five-pager, Applicant raised the issues of injury to several body parts in both cases, including psych, and the need for a QME panel in psych. (PTCS, d. 3/3/21, EAMS Doc ID: 73923458.)

Applicant has not demonstrated due diligence in obtaining the additional panel in psychology or psychiatry. Pursuant to Labor Code section 5502(d)(3), "If the claim is not resolved at the mandatory settlement conference, the parties shall file a pretrial conference statement noting the specific issues in dispute, each party's proposed permanent disability rating, and listing the exhibits, and disclosing witnesses. Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or *could not have been discovered by the exercise of due diligence prior to the settlement conference.*" (Lab. Code, § 5502, Italics added.)

(Report, pp. 1-4.)

DISCUSSION

Labor Code section 3208.3(b)² provides:

(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.

(2) Notwithstanding paragraph (1), in the case of employees whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury.

(3) For the purposes of this section, “substantial cause” means at least 35 to 40 percent of the causation from all sources combined.
(§ 3208.3(b).)

"Predominant as to all causes" for purposes of section 3208.3(b)(1) has been interpreted to mean more than 50 percent of the psychiatric injury was caused by actual events of employment. (*Dept. of Corr. v. Workers' Comp. Appeals Bd. (Garcia)* (1999) 76 Cal. App. 4th 810, 816 [90 Cal. Rptr. 2d 716, 64 Cal.Comp.Cases 1356].) This predominant causation threshold applies to psychiatric injuries pled as a compensable consequence of a physical injury. (*Lockheed Martin Corp. v. Workers' Comp. Appeals Bd. (McCullough)* (2002) 96 Cal.App.4th 1237, 1249 [117 Cal. Rptr. 2d 865, 67 Cal.Comp.Cases 245].) The Court of Appeal in *McCullough* opined that for a compensable consequence psychiatric injury, "the precipitating physical injury constitutes an 'actual event[] of employment' within the meaning of [section 3208.3(b)(1)]." (*Id.*)

Section 4660.1(c) bars an increase in an injured worker's permanent impairment rating for a psychiatric injury that is a compensable consequence of a physical injury occurring on or after January 1, 2013. However, an injured worker may receive an increased impairment rating for a compensable consequence psychiatric injury if the injury that the psychiatric injury resulted from is due to: (1) being a victim of a violent act or direct exposure to a significant violent act, or (2) a catastrophic injury. (Section 4660.1(c)(2).)

In this case, applicant alleges that his physical injury in ADJ10015666 and ADJ12280547 caused psychiatric injury in the form of “mild depressive disorder” and chronic pain disorder associated with psychological factors. (Report, p. 3.) This alleged compensable consequence psyche injury, however, is not the result of a violent act or catastrophic injury but cumulative

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

trauma to the left upper extremity, right upper extremity, neck, back and an overextension of the right shoulder. (Minutes of Hearing and Summary of Evidence, April 20, 2021, pp. 2:7-10, 5:13-17.) Consequently, the alleged psyche injury states no grounds for applicant to receive an increased impairment rating, and the claim is for medical treatment only.

However, there is no substantial evidence to support the alleged psyche injury because none of the medical reporting suggests that actual events of employment were the predominant cause of the injury. (Report, p. 2.) Seeking to obtain such reporting, applicant argues that he is entitled to an additional QME in psychology or psychiatry.

But discovery closed as of the date of the mandatory settlement conference, and any evidence subsequently obtained would be inadmissible unless applicant can demonstrate that it could not have been discovered through the exercise of due diligence. (Report, p. 4; see § 5502(d)(3).)

In this regard, applicant received his diagnosis of depressive disorder in 2016 and amended his application to allege injury to the psyche on October 3, 2018. (Opinion on Decision, p. 3.) The WCJ took a scheduled MSC off calendar in January 2019 to afford him an opportunity to obtain a QME panel for the alleged injury, with the WCJ stating that applicant was “to request psych panel within 30 days.” (Report, p. 4.) But applicant took no steps to obtain a psych panel and sought a panel in pain management approximately six months later instead. (*Id.*, DOR, July 31, 2019, pp. 8-9; Minutes, October 9, 2019, pp. 2-3.) After obtaining the panel in pain management, applicant failed to seek a psych panel until he raised the issue of entitlement to the panel for trial in March 2021. (Report, p. 4.)

Because applicant failed to request a psych panel when he had explicit authority from the WCJ to do so and failed to raise the issue of obtaining such a panel for over two years thereafter, we conclude that the WCJ correctly determined that he cannot demonstrate due diligence in obtaining the panel.

Accordingly, we will affirm the F&O.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Orders issued on July 19, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 31, 2025

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

**YGNACIO PONCE
RUCKA O'BOYLE
HAWORTH BRADSHAW**

SRO/bp

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