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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

BELITA RIGOLI BETANCOURT,

Applicant,

vs.

**VONS, A SAFEWAY COMPANY, permissibly
self-insured,**

Defendant.

Case No. ADJ2854178 (VNO 0456317)

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted defendant's Petition for Reconsideration of the January 28, 2013 Amended Findings and Award of the workers' compensation administrative law judge (WCJ). The WCJ found, among other things, that applicant, while employed by defendant during the cumulative period from January 1997 through April 9, 2002 as a cashier/checker, sustained industrial injury to her neck, back, headaches, bilateral hands and upper extremities, bilateral lower extremities, fibromyalgia, psyche, hypertension and gastrointestinal, causing permanent disability of 100%, without apportionment. The WCJ further found that the injury to the psyche was caused by and intertwined with applicant's fibromyalgia, and applicant is in need of medical treatment to cure or relieve from the effects of the injuries, in accordance with the recommendations of Dr. Hirsch, Dr. Ali, Dr. Fonseca, Dr. Shaw, Dr. Levine and Dr. Maloff.

Defendant contends: (1) applicant's October 25, 2010, amended application¹ to include the psyche was untimely pursuant to Labor Code section 5502(d)(3) because it was amended after the December 11, 2008 mandatory settlement conference; (2) further development of the record previously ordered by the Appeals Board in our June 7, 2010 Opinion and Decision After Reconsideration was limited to the development of the opinion of Dr. Shaw regarding permanent disability for body parts.

¹ Defendant's Petition for Reconsideration incorrectly refers to the date of the amendment of the application as "on or about January 31, 2011."

1 previously listed as being at issue at the time of the mandatory settlement conference in 2008; (3) the
2 amended application was untimely because it was filed more than five years after the date of injury; and
3 (4) the January 28, 2013 Amended Findings and Award is not based on substantial evidence because it is
4 based on the report of Dr. Shaw that incorporates applicant's psychiatric permanent disability, which
5 defendant claims should not be considered in the formulation of her overall level of permanent disability.
6 Applicant filed an Answer, refuting defendant's claims. Applicant also alleged that defendant's Petition
7 was frivolous because it raised issues which were previously decided in this case. In his Report and
8 Recommendation on Petition for Reconsideration, the WCJ recommended that reconsideration be denied.

9 As our Decision After Reconsideration, we shall affirm the January 28, 2013 Amended Findings
10 and Award with the following opinion.

11 BACKGROUND

12 This matter has been the subject of prior proceedings at the Appeals Board. On June 7, 2010, we
13 issued our Opinion and Decision After Reconsideration, following the WCJ's February 3, 2010 Findings
14 and Award, wherein the WCJ found that applicant's injury herein caused 100% permanent disability and
15 a need for further medical treatment, without any apportionment of permanent disability. The body parts
16 found to have been injured in the February 3, 2010 Findings and Award did not include a finding of
17 injury to the psyche. In our June 7, 2010 prior Opinion, we returned the matter back to the trial level for
18 further development of the medical record on the issue of substantial evidence to support the 100%
19 permanent disability finding. At page 8 of our prior Opinion, we stated:

20 Specifically, Dr. Shaw opines that applicant's fibromyalgia (which is a
21 chronic pain condition), coupled with her orthopedic injuries, and the
22 expected associated psyche reactions in the future caused by chronic pain,
23 renders applicant 100% permanently disabled. There is nothing in the
24 record, or even in the applicant's testimony, that establishes psychiatric
25 factors of disability or a psychiatric injury, which applicant is specifically
26 not claiming. The medical reporting of Dr. Shaw is critically flawed in that
27 it is speculative and based on conjecture, and thus, his opinion cannot
constitute substantial evidence. (*Zemke v. Workmen's Comp. App. Bd.*
(1969) 68 Cal.2d 794 [33 Cal.Comp.Cases 358].)

1 On October 25, 2010, applicant filed a letter with the WCJ along with the Amended Application
2 for Adjudication of Claim, alleging that the injury also includes injury to the psyche, and requesting that
3 discovery be re-opened regarding the allegation of a psychiatric component to the injury. Defendant
4 filed Points and Authorities on December 31, 2010, regarding the inclusion of injury to the psyche on the
5 amended application.

6 On February 8, 2011, the WCJ issued a Findings of Fact Opinion and Order Re: Ruling to
7 Re-open Discovery (Discovery Order), wherein the WCJ found that the amended application established
8 a compelling reason to re-open discovery to allow applicant to develop the issue of injury to her psyche
9 as a result of the April 9, 2002 injury. In response to the WCJ's February 8, 2011 Discovery Order,
10 defendant filed a Petition for Removal. On April 4, 2011, we issued an Order Denying Removal.
11 Because there was no appeal of the April 4, 2011 Order Denying Removal, the February 8, 2011
12 Discovery Order regarding the psychiatric component of applicant's injury has become final.

13 On January 28, 2013, the WCJ issued the Amended Findings and Award which found, among
14 other things, that applicant sustained a cumulative trauma from January 1997 through April 9, 2002 to
15 her neck, back, headaches, bilateral hands and upper extremities, bilateral lower extremities,
16 fibromyalgia, psyche, hypertension and gastrointestinal. The WCJ also made a specific finding that
17 applicant sustained an injury to her psyche which was "caused by and intertwined with applicant's
18 fibromyalgia." As a result, applicant's injury was found to have caused permanent disability of 100%
19 without apportionment, as well as the need for further medical treatment. In his Amended Opinion on
20 Decision, the WCJ specified that the award of permanent disability was based upon several medical
21 reports: the February 6, 2006 report of Dr. Ali; the September 8, 2008 report of Dr. Hirsch; the
22 December 29, 2004 report of Dr. Fonseca, the March 26, 2012 report of Dr. Shaw; and the
23 November 18, 2011 report of Dr. Maloff.

24 It is from the January 28, 2013 Amended Findings and Award that defendant seeks
25 reconsideration.

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1 Because the April 4, 2011 Order Denying Removal was never appealed, the issue of whether applicant is
2 allowed to pursue discovery regarding her allegation of injury to her psyche has been determined with
3 finality in favor of applicant and cannot be re-litigated.

4 Defendant also alleges that the WCJ did not have jurisdiction to allow the amendment of the
5 application to include injury to the psyche more than five years after the date of injury. This contention
6 fails because the Appeals Board still had original jurisdiction of the issue at the time that the WCJ issued
7 the February 8, 2011 Discovery Order. Accordingly, the statute of limitations is not a bar to the
8 amendment of the application to include the psyche.

9 **2. The Inclusion of Psychiatric Factors of Permanent Disability as a Basis for the 100% Permanent Disability Award**

10
11 Defendant contends that the inclusion of psychiatric factors of permanent disability in the
12 formulation of applicant's 100% permanent disability award is improper, because of its contention
13 addressed above, that applicant should not have been allowed to allege injury to her psyche. Defendant's
14 only claim that applicant is not 100% permanently disabled is because applicant's level of permanent
15 disability would be at a level less than 100%, if psychiatric factors were not included. Because defendant
16 cannot re-litigate the amendment of the application to include psychiatric factors, its argument that the
17 100% permanent disability award is not based upon substantial evidence, is invalid. Accordingly, we
18 shall affirm the January 28, 2013 Amended Findings and Award.

19 **3. Defendant's Petition for Reconsideration is not frivolous**

20 Although it is our determination that the issue of the amendment of the application to include
21 injury to the psyche was previously determined with finality after the April 4, 2011 Order Denying
22 Removal was not appealed by defendant, we note that this is a very complex issue. Furthermore, the
23 issues involved were not so clearly defined as to warrant the imposition of sanctions on defendant for the
24 filing of its Petition for Reconsideration.

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1 For the foregoing reasons,

2 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation
3 Appeals Board, that the January 28, 2013 Amended Findings and Award are **AFFIRMED**.

4 **WORKERS' COMPENSATION APPEALS BOARD**

7 I CONCUR,

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6 T. 9. -3~6~
FRANK M. BRASS

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9 [Signature]
10
11 **MARGUERITE SWEENEY**

12 [Signature]
13
14 **DEIDRA E. LOWE**



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16 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

17 **JAN 16 2014**

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

20 **ARTHUR CSILLAG**
21 **BELITA RIGOLI BETANCOURT**
22 **LAUGHLIN, FALBO, LEVY, & MORESI**

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27 **JG:mm**

RIGOLI BETANCOURT, Belita

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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

BELITA RIGOLI BETANCOURT,

Applicant,

vs.

**VONS, A SAFEWAY COMPANY, permissibly
self-insured,**

Defendant.

Case No. ADJ2854178 (VNO 0456317)

**OPINION AND ORDER
GRANTING RECONSIDERATION**

Reconsideration has been sought by defendant with regard to a decision filed on January 28, 2013.

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted in order to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration will be granted for this purpose and for such further proceedings as we may hereinafter determine to be appropriate.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **GRANTED**.

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1 **IT IS FURTHER ORDERED** that pending the issuance of a Decision After Reconsideration in
2 the above case(s), all further correspondence, objections, motions, requests and communications shall be
3 filed in writing only with the Office of the Commissioners of the Workers' Compensation Appeals Board
4 at either its street address (455 Golden Gate Avenue, 9th floor, San Francisco, CA 94102) or its Post
5 Office Box address (PO Box 429459, San Francisco, CA 94142-9459), and shall not be submitted to the
6 Van Nuys District Office or any other district office of the WCAB and shall not be e-filed in the
7 Electronic Adjudication Management System.

8 **WORKERS' COMPENSATION APPEALS BOARD**

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11 **DEIDRA E. LOWE**

12 **I CONCUR,**

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14 
15 **FRANK M. BRASS**

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17 **MARGUERITE SWEENEY**



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20 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

21 **APR 17 2013**

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

24 **BELITA RIGOLI BETANCOURT**
25 **LAUGHLIN FALBO**
26 **ARTHUR CSILLAG**

27 **jmp**

RIGOLI BETANCOURT, Belita

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

WCAB CASE NUMBER ADJ2854178

BELITA RIGOLI BETANCOURT, -vs- VONS, A SAFEWAY
COMPANY,
Permissibly self-insured,

JUDGE: JOHN C. GUTIERREZ

DATE: February 28, 2013

**REPORT AND RECOMMENDATION ON
DEFENDANT'S PETITION FOR RECONSIDERATION**

It is recommended that the Petition for Reconsideration filed on behalf of Vons. A Safeway Company permissively self-insured by and through their respective counsel (hereinafter Petitioner) be denied:

INTRUDUCTON

Petitioner makes similar arguments regarding the development of the record to include a psyche component mentioned by Dr. Shaw and Dr. Levine (Petitioners QME). Dr. Shaw had diagnosed the applicant with fibromyalgia related to her industrial disability attributable to her industrial injury. Dr. Shaw and Dr. Levine were of the opinion that applicant's psychiatric symptoms were intertwined with her diagnosed fibromyalgia. At trial applicant's attorney motioned to have applicant's psychiatric component added to her industrial injury claim.

DISCUSSION

Applicant's motion to add psyche to her industrial injury claim was granted. Petitioner filed a Petition for Removal which was denied allowing the medical evidence to be further developed. The medical record was developed in psychiatry, whereupon applicant and Petitioner obtained psychiatric medical reports to address the work-relatedness of applicant's claimed psyche to applicant's diagnosed fibromyalgia. Dr. Nathan reported for Petitioner, who found that applicant's depression was primarily due to a personnel action. Dr. Maloff reporting for applicant, gave a more persuasive diagnosis, that verified Dr. Shaw's opinion that applicant was also suffering from psychiatric component attributable to her fibromyalgia, which was supported by Dr. Levine. Dr. Maloff in his report dated November 18, 2011 states on pages 83 and 84:

"Ms. Rigoli-Betancourt has suffered significant losses, the result of cumulative orthopedic trauma and subsequent development of fibromyalgia, a condition which causes chronic pain, significant fatigue, non-restorative sleep, and can cause significant depression as well."

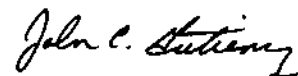
Dr. Maloff further states on pages 84 and 85, "I believe that while the conclusions of Dr. Shaw and Dr. Levine are similar in many respects, some of the difference in their opinions concerning the patient's level of disability and date reaching permanent and status can be bridged by understanding that some of her disability was caused by psychological factors not taken into consideration by either."

The Appeals Board has already addressed the question of opening discovery by allowing the medical record to be further developed. This was based the existing medical record that indicated that the applicant had a psychiatric component attributable to her fibromyalgia attributable to her industrial orthopedic injury. The report of Dr. Shaw, who diagnosed applicant with fibromyalgia, had indicated in a prior report that the applicant had a psychiatric component that closely intertwined with her fibromyalgia. Dr. Shaw' medical observations were verified by Dr. Maloff in his report of November 18, 2011.

RECOMMENDATION

Based upon the foregoing, it is recommended that the Petition for Reconsideration be denied.

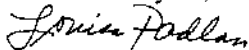
DATE: February 28, 2013



John C. Gutierrez
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

**Filed and Served by mail on counsel
and parties as shown below.**

Date: February 28, 2013



By: Louisa Padlan

SERVICE:

ARTHUR CSILLAG BURBANK, US Mail
BELITA RIGOLI BETANCOURT, US Mail

BELITA RIGOLI BETANCOURT

ADJ2854178
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