

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

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4
5 **GLORIA RIVAS,**

6 *Applicant,*

7 **vs.**

8
9 **POSADA WHITTIER/BERG SENIOR**
10 **SERVICES; MAJESTIC INSURANCE**
11 **COMPANY,**

12 *Defendants.*

Case No. ADJ2078638 (LAO-0887310)

**OPINION AND ORDER
GRANTING RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

13 Defendant, Majestic Insurance Company, on behalf of its insured, La Posada Whittier/Berg
14 Senior Services, seeks reconsideration of the Findings and Award, issued December 17, 2009, in
15 which a workers' compensation administrative law judge (WCJ) found applicant, Gloria Rivas,
16 sustained an industrial cumulative trauma injury to her bilateral upper extremities and neck, but
17 not to her back, over the period January 2007 through September 18, 2007, while employed as a
18 housekeeper. The WCJ expressly deferred a determination of applicant's claim of injury to her
19 psyche, pending further development of the record.

20 Defendant contends the WCJ erred in deferring a determination of applicant's claim of
21 injury to her psyche, asserting that on this record the WCJ should have found that applicant failed
22 to sustain her burden of proof to establish that she sustained an industrial injury to her psyche.
23 Defendant argues that where applicant fails to meet her burden of proof, the WCJ abused his
24 discretion by deferring a determination of the issue and allowing applicant to obtain additional
25 medical evidence to prove her claim. Defendant does not contest the finding of injury to
26 applicant's bilateral upper extremities and neck. No answer to defendant's petition for
27 reconsideration has been received.

1 Following our review of the record, and for the reasons set forth below, we shall grant
2 reconsideration to reverse the WCJ's determination to further develop the record on the applicant's
3 claim of injury to her psyche, and will amend the Findings and Award to find applicant did not
4 sustain an industrial cumulative trauma injury to her psyche.

5 Background

6 Applicant claimed she sustained a cumulative trauma injury to multiple parts of her body,
7 including her psyche, over the period ending September 18, 2007, while employed as a
8 housekeeper by La Posada Whittier, a senior assisted living community. Defendant denied
9 applicant's claim of injury, and did not obtain any medical evidence.

10 Applicant filed a Declaration of Readiness, dated January 5, 2009, seeking a priority
11 conference and indicating she was prepared to proceed to trial. Defendant objected to the
12 applicant's Declaration of Readiness. A priority conference was held on May 28, 2009, at which
13 time the parties stipulated to proceed to trial on AOE/COE issues regarding applicant's orthopedic
14 and psyche injury claims only. In the delineation of additional issues to be tried, defendant asserted
15 applicant's medical evidence was inadmissible due to "false, inadequate and inaccurate history."

16 The matter was set for, and proceeded to trial on July 1, 2009 and August 3, 2009. In
17 support of her claim for an injury to her psyche, applicant offered the October 27, 2009 psychiatric
18 report of David Kauss, PhD, prepared in consultation with Dr. Warren Procci, following his
19 evaluation of applicant on August 7, 2008. (App. Exh. 11.) The report is identified as that of Dr.
20 Procci, though Dr. Kauss indicated that he evaluated applicant and then consulted with Dr. Procci
21 regarding diagnosis, assessment of disability and treatment recommendations.

22 Dr. Kauss diagnosed applicant as suffering from four disorders; Adjustment Disorder with
23 Mixed Anxiety and Depressed Mood; Female Hypoactive Sexual Desire Disorder due to Physical
24 Limitations; Insomnia-Type Sleep Disorder due to Pain; Psychological Factors Affecting Medical
25 Condition.

26 Dr. Kauss concluded that "As a result of the industrial injuries Ms. Rivas sustained during
27 the course of her employment with La Posada, she has experienced chronic pain on a near daily

1 basis that has come to dominate her life." He identified applicant's chronic pain from her
2 orthopedic injuries as a stressor that resulted in the development of her Adjustment Disorder, as
3 well as her frustration with her employer's handling of her complaints arising from her orthopedic
4 injuries. He concluded that "the industrial factors are predominant as to all causes combined of the
5 psychiatric injury." He considered applicant's history of non-industrial factors, identifying her
6 childhood as having been good, despite her "losses." She denied a history of physical or sexual
7 abuse. She described separating from her common-law husband, and father of three of her
8 children, because she lost interest in him, and has had difficulty attempting to re-unite with him. In
9 2000, one of her sons was murdered, and she used anti-depressants for one year to help complete
10 what he characterized as "an appropriate bereavement process."

11 As noted in defendant's petition, Dr. Kauss did not review applicant's medical records
12 before reaching his conclusions on the cause of applicant's injury. He did indicate in his report that
13 he looked forward to reviewing applicant's medical records "when they become available."
14 However, applicant did not obtain a further report. Dr. Kauss also indicated that applicant had no
15 legal history. However, a criminal background check requested by Home Care Providers,
16 performed in 2004, revealed three criminal misdemeanor convictions in 1990, 1991 and 1992.
17 (Def. Exh. A.) In her application for employment with La Posada Whittier, she denied any prior
18 criminal convictions. (Def. Exh. E.) She testified at trial that she was told that she only had to
19 reveal convictions that occurred in the prior ten years. She also testified that the application stated
20 that as well. We note that the application form applicant signed specifically states: "You must
21 disclose convictions, including reckless and drunk driving convictions even if: 1. It happened a
22 long time ago; 2. It was only a misdemeanor." She also testified that she had only one criminal
23 conviction.

24 Defendant cites applicant's history of depression as diagnosed through the Southern
25 California Family Medical Center in 2002 and subsequent years. (Def. Exh. B.) This is
26 inconsistent with the history taken by Dr. Kauss that applicant was on anti-depressant medications
27 for one year following the murder of her son in 2000, and that she had completed the bereavement

1 process.

2 Applicant testified that in 1986, her common-law husband hit her in the face and broke her
3 nose, requiring plastic surgery. She testified that she informed Dr. Procci about the incident.
4 However, there is no mention of her husband breaking her nose in the medical report. The records
5 from her employment at Home Care Providers indicate that in December of 2002, applicant
6 informed them that she had moved out of her home because her husband was abusive. In her
7 testimony, she denied this. This is inconsistent with Dr. Kauss's report that she separated from her
8 common-law husband after a 20-year relationship only because she had "lost interest" in her
9 husband.

10 In his Opinion on Decision, the WCJ concluded that Dr. Procci's medical report did not
11 constitute substantial evidence because he lacked an accurate history. He offered the following
12 basis for deferring a determination on applicant's claim of injury to her psyche:

13 "Applicant alleges psychiatric injury as well, based on the medical
14 report of Dr. Procci. However, Dr. Procci does not appear to have an
15 accurate history regarding Applicant's emotional injury. He notes
16 Applicant had a prior period of depression in 2000 — 2001, after her
17 son was murdered, for which she was on medication for about a
18 year. His report indicates Applicant recovered after that, and
19 suggests she had no further symptoms until the present injury.
20 However, the Southern California Family Medical Center records
21 show Applicant was further diagnosed with depression in April
22 2002, November 2002, and at various times between May 2003 and
23 January 2004. Thus, it is clear Applicant's depression in 2000-2001
24 did not resolve at that time, and she was not asymptomatic until
25 2007. Dr. Procci's faulty history is due, in part, to the fact that he did
26 not review the records from Southern California Family Medical
27 Center. It is necessary for him to do so and issue a supplemental
report."

23 Discussion

24 The issue here is whether the WCJ was correct in reopening the record to provide applicant
25 the opportunity to obtain additional evidence to establish her claim of injury to her psyche. Where,
26 as here, a party seeks to proceed to trial and is on notice that her medical evidence may be
27 inadmissible due to a "false, inadequate and inaccurate history," as was raised by defendant at the

1 pre-trial conference, she is not entitled to seek to shore up her case by obtaining an additional
2 medical report.

3 The WCJ concluded that the evidence applicant offered to establish that she sustained a
4 cumulative trauma injury to her psyche was not substantial evidence. He further concluded that it
5 was his duty to develop the evidentiary record where the existing record does not constitute
6 substantial evidence, citing *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62
7 Cal.Comp.Cases 924], *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63
8 Cal.Comp.Cases 261], and *McDuffie v. LACMTA* (2002) 67 Cal.Comp.Cases 138 [en banc], and
9 distinguishing *San Bernardino Community Hospital v. Workers' Compensation Appeals Board*
10 (*McKernan*) (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986] and *Telles Transport, Inc. v.*
11 *Workers' Comp. Appeals Bd. (Zuniga)* (2001) 92 Cal.App.4th 1159 [66 Cal.Comp.Cases 1290].

12 Under the proper circumstances, the Appeals Board's duty to develop a complete
13 evidentiary record upon which a final determination of all submitted issues may be decided
14 requires the matter to be reopened for further development of the record.

15 Labor Code section 5701, as applicable to proceedings at the original trial or hearing,
16 provides in relevant part:

17 "...The appeals board may ... from time to time direct any employee
18 claiming compensation to be examined by a regular physician. The
19 ... results of any ... examination shall be reported to the appeals
20 board for its consideration." (Emphasis added.)

21 Labor Code section 5906, as applicable to proceedings on reconsideration, provides in
22 pertinent part:

23 "Upon the filing of a petition for reconsideration, or having granted
24 reconsideration upon its own motion, the appeals board may, with or
25 without further proceedings and with or without notice affirm,
26 rescind, alter, or amend the order, decision, or award made and filed
27 by the appeals board or the workers' compensation judge on the basis
of the evidence previously submitted in the case, or *may grant*
reconsideration and direct the taking of additional evidence...."
(Emphasis added.)

1 Pursuant to the above-quoted Labor Code sections, the WCJ and the Appeals Board have a
2 duty to develop the record and not to leave unanswered issues which are identified as requiring
3 further evidence. (*Glass v. Workers' Comp. Appeals Bd.* (1980) 105 Cal.App.3d 297 [45
4 Cal.Comp.Cases 441]; *Raymond Plastering Co. v. Workers' Comp. Appeals Bd. (King)* (1967) 252
5 Cal.App.2d 748 [32 Cal.Comp.Cases 287]; *West v. Workers' Comp. Appeals Bd.* (1947) 12
6 Cal.Comp.Cases 86.) Specifically, and pursuant to Labor Code sections 5701 and 5906, the WCJ
7 or the Appeals Board may further develop the medical record where there are deficiencies,
8 inaccuracies, inconsistencies or incompleteness in particular medical records or reports, and where
9 none of the medical reports adequately discuss the crucial issues at hand. (*McClune, supra* at 265.)

10 However, as provided in Labor Code section 5502(e)(3), the evidentiary record is closed at
11 the time of the Mandatory Settlement Conference and evidence not disclosed at that time is
12 inadmissible, unless the proponent can establish the evidence was not previously available or
13 discoverable with the exercise of due diligence.

14 In *McKernan*, the court held that the Appeals Board's power to further develop the medical
15 record must defer to the statutory mandate of Section 5502, and that records and witnesses not
16 disclosed at the MSC cannot be subsequently admitted under the Appeals Board's power to
17 develop an adequate record. Of note, one doctor's report that was ultimately excluded by the court
18 was prepared just prior to trial and was more detailed than the doctor's disclosed report. The court
19 noted that it was the type of report that the applicant should have obtained prior to the MSC and
20 the record did not reveal good cause for her failure to have done so.

21 In *Telles Transport*, the court followed *McKernan* in holding the failure to disclose
22 evidence at the MSC precludes the Appeals Board from reopening the evidentiary record under its
23 duty to develop an adequate medical record. In that case, the court noted that applicant's attorney
24 made a tactical decision not to list specific records at the MSC, and his subsequent effort to have
25 them admitted was held to violate the requirement that all evidence be disclosed at the MSC.

26 We are persuaded that the holding in *Telles Transport* is applicable here. While the medical
27 evidence the WCJ seeks to obtain from Dr. Procci was not in existence at the time of the MSC, the

1 issue of the adequacy of applicant's evidence to meet her burden of proof was expressly raised by
2 defendant at that time. The pre-trial conference statement contains defendant's claim that
3 applicant's medical evidence was inadequate. Thus, applicant was on notice that the medical
4 evidence she proffered to establish her psychiatric injury was not substantial evidence, as it did not
5 have an adequate history. This was evident as her doctor offered his considered opinion on
6 industrial causation even though he acknowledged that he did not have the opportunity to review
7 her medical records. Applicant's attorney filed the Declaration of Readiness, contending that
8 applicant was prepared for trial, even though there had apparently been no effort made to provide
9 Dr. Kauss or Dr. Procci the applicant's medical records and obtain a supplemental report.
10 Applicant's attorney made a deliberate decision to seek a trial on the issue of injury to the psyche
11 AOE/COE, despite being on notice that applicant sought to establish her claim of injury to her
12 psyche on an inadequate medical report. This is akin to the invited error found in *Telles Transport*.

13 The WCJ suggests that *Telles Transport* is distinguishable on the grounds that it was he,
14 and not applicant, who was the proponent of obtaining new evidence, and therefore applicant was
15 not required to show why a supplemental report was not previously obtained and that there was no
16 invited error. We disagree. Since applicant was on notice of the deficiency of her medical evidence
17 with regard to her claim of injury to her psyche, she had the opportunity to cure the defect in the
18 record prior to filing a Declaration of Readiness, and prior to stipulating to proceed to trial on the
19 issue of injury to her psyche. A party is not entitled to assert she is prepared and ready for trial and
20 then be offered a second chance when it is determined that her evidence is not substantial medical
21 evidence and is not adequate to meet her burden of proof.

22 Accordingly, we shall grant defendant's petition for reconsideration and will find applicant
23 did not sustain an industrial cumulative trauma injury to her psyche.

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1 For the foregoing reasons,

2 **IT IS ORDERED** that the January 8, 2010 Petition for Reconsideration be, and hereby is,
3 **GRANTED**, and as our Decision After Reconsideration, the December 17, 2009 Findings and
4 Award is **AMENDED** as follows:

5 **FINDINGS OF FACT**

- 6 1. Applicant, GLORIA RIVAS, born March 11, 1959, while employed during the period
7 January 2007 through September 18, 2007, as a housekeeper, (Occupational Group No.
8 330), at Whittier, California, by POSADA WHITTIER/BERG SENIOR SERVICES,
9 sustained injury arising out of and occurring in the course of employment to the bilateral
10 upper extremities and neck, but not her back or psyche.

11 ...

- 12 3. The issue whether Applicant sustained injury arising out of and in the course of
13 employment to the other body parts is deferred, with jurisdiction reserved.

14 ...

- 15 8. The issue of the good faith personnel action defense of Labor Code Section 3208.3(h) is
16 moot.

17 **AWARD**

18 **AWARD IS MADE** in favor of **GLORIA RIVAS** against **MAJESTIC INSURANCE**
19 **COMPANY**, payable as follows:

- 20 (a) Temporary disability in accordance with Finding of Fact No. 5 above, less 15% of all
21 accrued, unpaid temporary disability, which shall be withheld from Applicant's award and
22 paid forthwith to Moore & Associates per Finding of Fact No. 7;

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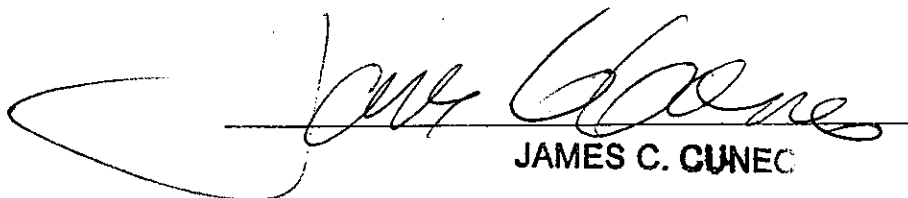
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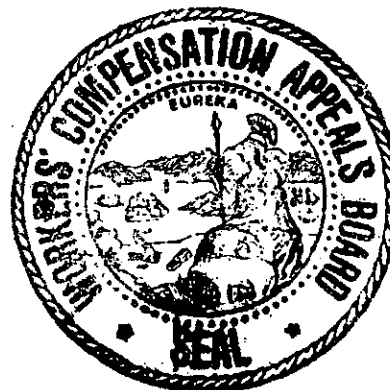
1 (b) Further medical treatment in accordance with Finding of Fact No. 6 above;

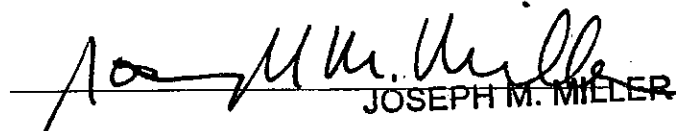
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3 **WORKERS' COMPENSATION APPEALS BOARD**

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7 **JAMES C. CUNEC**

8 **I CONCUR,**

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12 **ALFONSO J. MORESI**



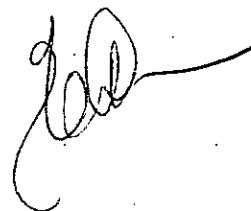
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15 
16 **JOSEPH M. MILLER**

17
18 **DATED AND FILED IN SAN FRANCISCO, CALIFORNIA**

19 **MAR 15 2010**

20 **SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT**
21 **THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:**

22 **Gloria Rivas**
23 **Moore & Associates**
24 **Cipolla, Calaba, Marrone & Wollman**

A handwritten signature in cursive script, appearing to be "J. Miller", written in dark ink.

25
26
27 **SV/jp**

RIVAS, Gloria