

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

3
4 **SHIMO WANG,**

5 *Applicant,*

6 vs.

7 **SOUTHERN CALIFORNIA EDISON,**

8 *Defendant.*
9

Case Nos. **ADJ8674800**
ADJ8674808
ADJ8674815
(Long Beach District Office)

OPINION AND DECISION
AFTER
RECONSIDERATION

10 On July 10, 2015, we granted reconsideration in order to further study the factual and legal issues
11 in this case. This is our Decision After Reconsideration.

12 Applicant seeks reconsideration of the Joint Findings of Fact and Order (F&O) issued on
13 April 16, 2015, by the workers' compensation administrative law judge (WCJ). The WCJ found that
14 applicant did not suffer injury arising out of and in the course of employment (AOE/COE) to his heart.
15 Applicant contends that the WCJ erred in finding that applicant's injury was not industrial because
16 applicant sustained a physical injury to his circulatory system and not a psychological injury caused by
17 stress subject to the good faith personnel action defense.

18 We have received an answer from defendant. We received a Report and Recommendation on
19 Petition for Reconsideration (Report) from the WCJ, recommending we deny reconsideration.

20 We have received a request to consider a supplemental petition filed by applicant on May 29,
21 2015, which we deny. (Cal. Code Regs., tit. 8, § 10848.) We have not considered the contents of
22 applicant's supplemental petition.

23 We have considered the allegations of the Petition for Reconsideration, the answer, and the
24 contents of the WCJ's Report. Based on our review of the record as our Decision After Reconsideration
25 we rescind the WCJ's F&O, and return this matter to the WCJ for further proceedings and development
26 of the record and a new decision by the WCJ consistent with this opinion. After the WCJ issues a new
27 decision, any aggrieved party may timely challenge the new decision by appropriate petition.

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FACTS

Applicant began working for defendant on August 28, 2006, as a senior engineer. (Exhibit B, Applicant's Personnel File, at pp. 125, 152.) While at work on November 23, 2011, January 1, 2012, and February 1, 2012, applicant became ill and went to the hospital with chest pains, dizziness, and shortness of breath. The record is not clear as to applicant's exact diagnosis. Applicant refers to the events as "heart attacks," which were pled as specific injuries to the heart. Applicant did not plead injury to his psyche.

Applicant was examined by a qualified medical evaluator (QME) cardiologist Cao Van Pham, M.D., who issued a report dated May 9, 2012. (Exhibit X, Report of Cao Van Pham, M.D., dated May 9, 2012.) From Dr. Pham's records review, he concluded that applicant suffers from high blood pressure and had significant narrowing of the arteries resulting in recurrent ischemia and angina. A stent was placed to relieve the narrowing in November 2011. Dr. Pham opined on causation as follows:

From a medical probability point of view, the examinee is considered to have developed successive Acute Coronary Syndromes in November 2011, January and February 2012 prompting emergency admissions and coronary interventions during the course of his employment (COE) with Southern California Edison. Whether these medical developments should be considered as Arising Out of Employment (AOE) and the examinee considered a medically Qualified Injured Worker from the cardiac and peripheral vascular points of view, depend on the validity of the examinee's allegation of "retaliation - harassment - abusive management".

In summary, the examinee's Acute Coronary Syndromes at work prompting successive emergency admissions and coronary interventions are currently considered the results of work-related or industry induced injury, unless the examinee's allegation of "retaliation - harassment - abusive management" can be refuted by the examinee's employer or its agents, namely the involved supervisor and managers. (*Id.* at pp. 27-28.)

Despite no party pleading a psychiatric injury, applicant was also examined by a psychiatric QME.¹ At the psychiatric evaluation, applicant complained of stress from multiple facets of his job. (See generally Exhibit A, Report of Rodney Reid, M.D., dated July 22, 2013.) Applicant complained of stress from friction caused by an attempt to change his working hours. (*Id.* at p. 39, 55.) Applicant was given a

¹ The psychiatry examination proceeded with an unlicensed interpreter, which raises a concern as to its veracity.

1 negative performance review for the first time during his tenure after a change of supervisor. (*Id.*) His
2 workload increased. (*Id.* at p. 40.) Applicant's lunch breaks were shortened. (*Id.* at p. 40, 56) He was
3 not provided accommodations for his temporary work restrictions. (*Id.* at p. 56.) And finally, applicant
4 was placed on a Performance Improvement Plan (PIP) which constituted a series of meetings with
5 supervisors and additional missions that applicant would have to perform or face demotion or
6 termination. (*Id.* at p. 33-34.) Applicant was ultimately terminated, allegedly because of his
7 non-compliance with the PIP program.

8 Dr. Reid diagnosed applicant with "adjustment disorder with mixed anxiety and depressed mood,
9 chronic" and assigned a global assessment of function score of 68. (*Id.* at p. 51.) Dr. Reid opined on
10 causation as follows:

11 Following careful psychiatric evaluation, it is my opinion that the
12 applicant's psychiatric injury was the result of the personnel actions that
13 the applicant perceived as harassment and workplace retaliation by his
14 supervisors. I defer to the Trier-of-fact to determine whether or not the
15 personnel actions that Mr. Wang was subjected to were appropriate and
16 fair and, thus, whether or not Mr. Wang's claim is compensable.

17 * * *

18 It is my opinion, with reasonable medical certainty, that the events of
19 employment were the predominant (>50%) cause of Mr. Wang's
20 psychiatric injury that developed after 11/23/2011. This injury meets
21 requirements under section 3208.3 for predominant cause. Mr. Wang's
22 psychiatric injury was caused (100%) by personnel actions that Mr. Wang
23 perceived as a form of harassment and workplace retaliation. (*Id.* at
24 pp. 61-62.)

25 Nowhere in Dr. Reid's report did Dr. Reid opine that applicant's psychiatric injury caused applicant's
26 internal symptoms. Dr. Pham, the cardiologist, never reviewed or commented upon Dr. Reid's report.

27 Defendant argued that applicant's claimed heart injury occurred as a result of stress caused by
28 good-faith non-discriminatory personnel actions, and thus, per the holding in *McCoy* the injuries were
29 not compensable. (*County of San Bernadino v. Workers' Comp. Appeals Bd. (McCoy)* (2012) 203
30 Cal.App.4th 1469 [77 Cal.Comp.Cases 219].)

31 This matter proceeded to trial on eight separate dates. The sole issue for trial was whether
32 applicant's injury was compensable. The parties focused the trial testimony to answer the question of
33 whether the stress that applicant endured as a result of his work constituted lawful good-faith

1 non-discriminatory personnel actions. The trial further focused on applicant's placement in the PIP
2 program as seemingly the sole source of applicant's stress. The WCJ "found that the applicant's heart
3 issue is a physical manifestation that directly and solely results from the compliance of the PIP." (Opinion on
4 Decision dated April 16, 2015, at p.3.)

5 At trial on March 20, 2014, applicant testified that he felt harassed, retaliated against and
6 abusively managed while at work. (Minutes of Hearing and Summary of Evidence, March 20, 2014 trial
7 at 3:3-4.) Applicant testified that he had sent an email to a senior vice-president hoping that applicant's
8 suggestions for a project would be followed instead of the recommendation of his supervisors. (*Id.* at
9 3:17-19.) On September 1, 2011, applicant was called into a meeting with three of his supervisors,
10 Mr. Juan Castenada, Mr. Frank Habibi, and Mr. Robert Sherick. (*Id.* at 3:17-23.) Applicant was advised
11 that his email to the senior vice-president was "beyond his position" and that applicant would need
12 additional education. (*Id.*) Applicant was then placed in the PIP program. (*Id.* at 4:1-4.)

13 On each of the three dates of injury, applicant was attending a PIP meeting. At each meeting,
14 applicant protested the continuation of the PIP program, became ill, and was hospitalized for complaints
15 of chest pain, dizziness, and shortness of breath. Applicant argued that his placement on the PIP program
16 was retaliation for having emailed his suggestions, which were contrary to his supervisors, to a senior
17 vice-president. (*Id.* at 3:24-25; Exhibit A, at 33, 36, 41.) Thus, applicant argued that the personnel
18 actions were discriminatory and not done in good faith. In an email sent on August 31, 2011, from
19 Director Doug Kim to applicant's supervisor, Robert Sherick, Mr. Kim stated:

20 I am fine with his having a different point of view. I also think a quality
21 answer comes from a healthy discussion over diverse ideas, but I have a
22 problem with his disrespect for the process. It sounds like he had
23 opportunities to bring his ideas to the table, but because they were not
24 adopted, he chose to go to the top without engaging anyone in his
25 organization. My concern is putting him on another project is not going to
26 address the root issue. I need you and Mike to see me and help me
27 understand what we can do to help Shimo. (Exhibit B at pp. 170-171.)

25 Robert Sherick testified that applicant was placed on the PIP program in order to formally help
26 applicant in the areas he needed improvement. (Minutes of Hearing and Summary of Evidence,
27

1 February 24, 2015 trial, at 2:20.) He testified that the PIP plan was not retaliation against applicant. (*Id.*
2 at 3:14-15.) However, Mr. Sherick's own email seems to contradict his testimony:

3 I wanted to provide some background information concerning this e-mail
4 from Shimo to David. Shimo is a Senior Engineer in the Power System
5 Technologies group and reports through me. When the original e-mail
6 exchange between Andy Free and Shimo took place at the beginning of the
7 year, I asked Shimo to bring the discussion to the CRAS team. Apparently
8 Shimo felt he was not being heard and decided to take it to Jim instead.
9 Shimo's basic premise is that we will be able to optimize our remedial
action schemes within the CRAS. There is certainly that potential with the
CRAS, but as I have explained to Shimo it is outside of the scope of what
was proposed and approved by the CPUC and outside of the scope of the
CRAS program. As you well know, the introduction of new technology
like CRAS is not a simple process and adding additional complexity to the
CRAS program is not prudent for a successful implementation.

10 **I am working with Shimo's supervisor to provide him with additional**
11 **coaching. He recently had strong objections to his performance**
12 **appraisal and this may have had some influence on his decision to**
13 **reach out to David directly. Based on this unwillingness to work within**
14 **the project team, I am going to reassign him to other activities.** I will
continue to encourage him to express his views, but I believe his inability
to listen to others and incorporate their views into his thinking make him
ineffective for the CRAS program.

15 Let me know if you have any questions concerning this. (Exhibit B at
16 p. 171 (emphasis added).)

17 These emails were exchanged on August 31, 2011. Applicant was placed on the PIP program on
18 September 1, 2011, the very next day. Defendant's core values statement espouses fostering a positive
19 and open environment and to handle issues openly and directly. (Exhibit B at p. 210.) Management has
20 a stated responsibility to "ensure employees are comfortable raising issues[.]" (*Id.* at p. 227.)
21 Defendant's stated policy is: "[I]f you feel pressured to do something you feel is not right, or if you are
22 otherwise unsure what to do, you should ask for help. You may contact your manager or supervisor, a
more senior manager or officer[.]" (*Id.* at p. 211.)

23 In the opinion on decision, the WCJ determined that defendant had no retaliatory motive when it
24 instituted the PIP program against applicant; that the stress from the PIP program was the only cause of
25 applicant's injury to his heart; and that because the PIP program constituted a lawful, non-discriminatory,
26 good faith personnel action, defendant was not liable for the injury to applicant's heart. However, no
27 specific finding of fact was made regarding the good-faith personnel action defense.

1 DISCUSSION

2 I.

3 Labor Code, section 3208.3² was enacted on July 16, 1993, as part of a package of
4 comprehensive workers' compensation reform legislation. (1993 Cal AB 119.) Section 3208.3(h) was
5 designed to decrease the perceived fraud and abuse occurring with purely psychiatric claims. (*Lockheed*
6 *Martin vs. Workers' Comp. Appeals Bd. (McCullough)* (2002) 96 Cal.App.4th 1237, 1249 [67
7 Cal.Comp.Cases 245].) In *McCullough*, the court interpreted section 3208.3 as applying to all
8 psychiatric injuries, including psychiatric injuries that are a compensable consequence of physical
9 injuries. *McCullough* focused on the precise words of the statute while acknowledging "the undeniable
10 fact that the Legislature was aiming primarily at phony stress claims, especially those filed by disgruntled
11 short-term former employees(.)" (*Id.*)

12 A plain reading of section 3208.3 clearly limits the requirements of the section to "psychiatric
13 injuries" however manifested, but not to physical injuries. However, under *McCullough*, psychiatric
14 injuries, which include physical sequelae, are still psychiatric injuries. Thus, it is important to understand
15 the difference between physical injuries and psychiatric injuries in determining how section 3208.3
16 applies.

17 When applicant claims a physical injury, applicant has the initial burden of proving industrial
18 causation by showing his employment was a contributing cause. (*South Coast Framing v. Workers'*
19 *Comp. Appeals Bd.* (2015) 61 Cal.4th 291, 297-298, 302; § 5705.) Applicant must prove by a
20 preponderance of the evidence that an injury occurred AOE/COE. (§§ 3202.5; 3600(a).)

21 The requirement of Labor Code section 3600 is twofold. On the one hand,
22 the injury must occur in the course of the employment. This concept
23 ordinarily refers to the time, place, and circumstances under which the
24 injury occurs. On the other hand, the statute requires that an injury arise
25 out of the employment. It has long been settled that for an injury to arise
26 out of the employment it must occur by reason of a condition or incident of
27 the employment. That is, the employment and the injury must be linked in
some causal fashion. (*South Coast Framing*, 61 Cal. 4th at 297 (internal
citations and quotations omitted).)

² All future references are to the Labor Code unless noted.

1 The statutory proximate cause language [of section 3600] has been held to
2 be less restrictive than that used in tort law, because of the statutory policy
3 set forth in the Labor Code favoring awards of employee benefits. In
4 general, for the purposes of the causation requirement in workers'
5 compensation, it is sufficient if the connection between work and the
6 injury be a contributing cause of the injury. (*Id.* at 298 (internal citations
7 and quotations omitted).)

8 Unlike physical injuries, section 3208.3 imposes a different burden of proof for psychiatric
9 claims. The initial threshold for proving a psychiatric injury uses the following analysis:

- 10 1) Did actual events of employment cause the psychiatric injury? (Factual Issue)
- 11 2) If so, were the events of employment predominant to all causes combined or a substantial
12 cause in cases of psychiatric injury by violent act? (Medical Issue)

13 (§ 3208.3(b); *Rolda v. Pitney Bowes Inc.*, (2001) 66 Cal.Comp.Cases 241, 245 (Appeals
14 Board en banc).)

15 Once the psychiatric injury threshold is met, defendant can raise multiple affirmative defenses to
16 the compensability of the psychiatric injury, including the good faith personnel action defense, which
17 reads: “No compensation under this division shall be paid by an employer for a *psychiatric injury* if the
18 injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. The burden
19 of proof shall rest with the party asserting the issue.” (§ 3208.3(h), emphasis added.)

20 For purposes of section 3208.3, it is important to understand what a “psychiatric injury” is.
21 Psychiatric injury has often been described as falling within one of three categories: “(1) physical injury
22 producing psychic trauma or symptoms not physiologically verifiable [physical-mental]; (2) psychic
23 trauma producing physical injury [mental-physical]; and (3) psychic trauma producing psychological
24 injury [mental-mental].” (*McCullough, supra*, 96 Cal.App.4th at 1246 fn. 6 (internal citations omitted).)
25 “Psychiatric injury” is statutorily defined by section 3208.3(a) as an injury diagnosed under the American
26 Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) or the
27 terminology and diagnostic criteria of any other psychiatric diagnostic manual approved and accepted
nationally by practitioners in the field of psychiatric medicine. (§§ 139.2(j)(4); 3208.3(a).)

Here, defendant argues that applicant's stress from the PIP program is a psychiatric injury.
However, “[s]tress is not a diagnosis, disease, or syndrome. It is a nonspecific set of emotions or
physical symptoms that may or may not be associated with a disease or syndrome. Whether or not stress

1 contributes to a disease or syndrome depends on the vulnerability of the individual, the intensity,
2 duration, and meaning of the stress; and the nature and availability of modifying resources.”³ (American
3 College of Occupational and Environmental Medicine (ACOEM) Practice Guidelines, 2nd Edition at
4 p. 1055.) In short, although cumulative stress can result in injury, stress alone is not a psychiatric injury.

5 Section 3208.3 clearly limits its application to psychiatric injuries. Generally, psychiatric injuries
6 are those injuries that are diagnosed by the DSM-IV.⁴ Heart conditions are not diagnosed under
7 DSM-IV. Thus, heart conditions by legal definition cannot be psychiatric injuries; they are physical
8 injuries.⁵ In order for a heart condition to fall within the “mental-physical” definition of a psychiatric
9 injury, the evidence must establish that industrial causation of the heart condition flows entirely from the
10 psychiatric injury.

11 Defendant argues that the holding in *McCoy* should apply to the facts of this case. In *McCoy*,
12 applicant pled an underlying psychiatric injury and pled headaches as a compensable consequence of the
13 psychiatric injury. The court held: “[T]hat section 3208.3, subdivision (h), precludes recovery for
14 physical manifestations that are directly and *solely* resulting from the psychological injury suffered as a
15 result of good faith personnel actions.” (*McCoy, supra*, 203 Cal.App.4th at 1474 (emphasis in original).)
16 *McCoy* expressed a limited exception for conditions that are solely the compensable consequence of a
17 psychological injury, which is then found to be non-compensable. *McCoy* is factually distinguishable
18 from this case because neither applicant nor defendant has pled a psychiatric injury under section 3208.3

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22 ³ The American College of Occupational and Environmental Medicine (ACOEM) Guidelines 2nd Edition are adopted and
23 incorporated for medical diagnosis and treatment of workers’ compensation stress related conditions. (Cal. Code Regs., tit. 8,
24 § 9792.23.8.) There are stress based diseases, which the DSM-IV can diagnose (i.e. post-traumatic stress disorder or acute
25 stress disorder); however, these diseases follow a set diagnostic criteria separate and apart from typical everyday work stress.

26 ⁴ On a case by case basis, other psychiatric diagnostic manuals may be used so long as the opinion is substantial. (§§
27 139.2(j)(4); 3208.3(a).) Some psychiatric doctors are beginning to use the DSM-V as the most recent “manual approved and
accepted nationally by practitioners”. (*Id.*) The analysis in this case is the same under either DSM-IV or V.

⁵ This interpretation is consistent with the Legislature’s incorporation of “heart trouble” alongside a multitude of other
statutorily presumptive physical injuries. (See § 3212 et. seq.)

1 and even if it were pled⁶, defendant has not proven on this record that applicant's claimed heart injury
2 was caused solely by a psychiatric injury, later found to be non-compensable.

3 Section 3208.3 is only applicable to psychiatric injuries. Where in cases like *McCoy*, a defendant
4 contends that applicant's claimed physical condition is the sole result of a non-compensable psychiatric
5 injury, defendant must prove that:

- 6 1) Applicant suffered a psychiatric injury; and
- 7 2) The psychiatric injury is not compensable pursuant to section 3208.3; and,
- 8 3) The psychiatric injury was the sole industrial cause of the physical condition.

9 Here, applicant's claimed injury to his heart is not defined as a psychiatric injury in the DSM-IV
10 and therefore it is not per se a psychiatric injury within the parameters of section 3208.3 and, on this
11 record, defendant has not met its burden of proving that applicant's heart injury is a "mental-physical"
12 psychiatric injury, using the three-pronged analysis above.

13 II.

14 We also find that the internal medicine QME's report from Cao Van Pham, M.D., is not
15 substantial evidence. (See Exhibit X.) The report is difficult to comprehend due to the lack of useful
16 headings, run-on sentences, meandering paragraphs, and vague terminology. The QME refers to "Acute
17 Coronary Symptoms" when discussing applicant's injury without detailing applicant's medical diagnosis.
18 Applicant refers to the episodes as "heart attacks" in the petition for reconsideration. However, the
19 QME's report does not mention "heart attacks" or "myocardial infarction" anywhere. The QME's
20 diagnosis is vague and his conclusions regarding industrial causation of the "Acute Coronary Symptoms"
21 are conclusory. The report is not substantial medical evidence.

22 Without substantial medical evidence, the proper procedure is to develop the record. (*McClune v.*
23 *Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].)
24 Ordinarily, we would return the parties to the original cardiology QME in order to further develop the
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26 ⁶ Either party may claim an industrial psychiatric injury by filing an application for adjudication, which is the preferred
27 method to place parties on notice of the claims and defenses. In cases, such as here, where no party has formally pled a
psychiatric injury, the WCAB may consider whether to amend the pleadings to conform to the facts of the case. (Cal. Code
Regs., tit. 8, § 10492.) The parties did list the issue of whether applicant suffered injury to his psyche, which is sufficient to
deem the pleadings amended. (*Id.*)

1 record. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138
2 (Appeals Board en banc).) However, given the inconsistencies in the QME's report, further development
3 of the record would best be accomplished by the parties agreeing to use an agreed medical examiner in
4 cardiology. If the parties are unable to reach such agreement, the WCJ should appoint a regular
5 physician in cardiology to examine applicant pursuant to section 5701.

6 Our clarification of the precise evidentiary burdens in presenting a *McCoy* defense is an issue of
7 first impression. Neither party properly developed the record using the analysis set forth herein.
8 Although we are specifically ordering development of the record regarding the cardiology QME's report,
9 upon remand, the parties should develop the record as needed on all issues relating to their respective
10 burdens of proof.

11 Accordingly, as our Decision After Reconsideration we rescind the Joint Findings of Fact and
12 Order issued on April 16, 2015, by the WCJ and return the matter for further proceedings and
13 development of the record and a new decision by the WCJ consistent with this opinion. After the WCJ
14 issues a new decision, any aggrieved party may timely challenge the new decision by appropriate
15 petition.

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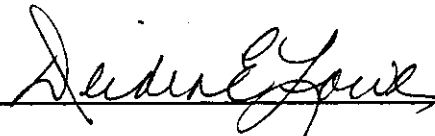
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1 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
2 Board that the Joint Findings of Fact and Order issued on April 16, 2015, by the WCJ is **RESCINDED**
3 and that the matter is **RETURNED** to the trial level for further proceedings and a new decision by the
4 WCJ in accordance with this opinion, from which any aggrieved party may timely seek reconsideration.

5 **WORKERS' COMPENSATION APPEALS BOARD**

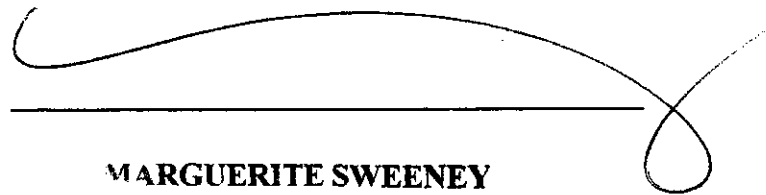
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8 DEIDRA E. LOWE

9 **I CONCUR,**

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13 **RONNIE G. CAPLANE**
I CONCUR, (See separate concurring opinion)

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17 **MARGUERITE SWEENEY**

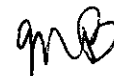


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19 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

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21 **AUG 28 2015**

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

24 **CANTRELL & GREEN, APC**
25 **SHIMO WANG**
26 **WAI & CONNER LLP**



27 **EDL:mm**

1 **CONCURRING OPINION OF COMMISSIONER SWEENEY**

2 I concur. I write separately to note that I would have gone further than the majority and found
3 that the *McCoy* holding does not apply to this case. Applicant suffered a physical injury to his heart, not
4 a psychiatric injury. Physical injury caused by stress and psychiatric injury caused by stress are two
5 separate and distinct conditions with differing burdens of proof. The requisite burden of proof for a
6 physical injury caused by stress is contributory causation to as little as one percent by the preponderance
7 of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291, 297-298,
8 302.) A person can suffer a physical injury from stress without ever having a psychiatric injury. (See
9 *Banuelos v. Acorn Engineering Company*, (ADJ6647815) 2015 Cal. Wrk. Comp. LEXIS 85 (writ. den.))
10 Where the physical injury is caused in part by work stress, it does not matter whether the stress was
11 subjective or objective; applicant has met his burden of proving a compensable physical injury. (*Ibid.*)
12 Although we are striking the cardiologist's report as insubstantial, we are not striking the psychiatrist's
13 report. The psychiatrist's report does not support a conclusion that 100% of applicant's injury to his
14 heart was caused by a diagnosed psychiatric condition. Thus, I would find *McCoy* inapplicable to the
15 facts of this case and remand for a new medical opinion from a cardiologist only.

16 In addition to the reasons set forth in the majority, I also reject the cardiologist's opinion because
17 he wrongly injected the issue of good faith personnel action into the analysis of this cardiac injury claim.

18 Good faith personnel action is an affirmative defense, amended into section 3208.3 as a shield
19 protecting defendants against fraudulent claims of psychiatric injury. This defense was never intended to
20 be used as a sword striking down liability for physical injuries. The good faith personnel action defense
21 is wholly inapplicable to the determination of liability for physical injuries.

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1 The holding in *McCoy* is limited by the facts of the case. The facts in *McCoy* are inapposite to
2 the facts of this case. For these reasons, I would hold that *McCoy* does not apply here. For these
3 reasons, I respectfully concur.



WORKERS' COMPENSATION APPEALS BOARD



MARGUERITE SWEENEY, Commissioner

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

11 **AUG 28 2015**

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

14 **CANTRELL & GREEN, APC**
15 **SHIMO WANG**
16 **WAI & CONNER LLP**

17 **EDL:mm**



1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

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4 **SHIMO WANG,**

5 *Applicant,*

6 *vs.*

7 **SOUTHERN CALIFORNIA EDISON;**
8 **SOUTHERN CALIFORNIA EDISON**
9 **ROSEMEAD,**

10 *Defendants.*

Case Nos. ADJ8674800
ADJ8674808
ADJ8674815
(Long Beach District Office)

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

11 Reconsideration has been sought by applicant with regard to the decision filed on April 16, 2015.

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

18 For the foregoing reasons,

19 **IT IS ORDERED** that Reconsideration is **GRANTED**.

20 **IT IS FURTHER ORDERED** that pending the issuance of a Decision After Reconsideration in
21 the above case, all further correspondence, objections, motions, requests and communications *relating to*
22 *the petition* shall be filed only with the Office of the Commissioners of the Workers' Compensation
23 Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA
24 94102) or its Post Office Box address (P.O. Box 429459, San Francisco, CA 94142-9459), and shall not
25 be submitted to the district office from which the WCJ's decision issued or to any other district office of
26 the Workers' Compensation Appeals Board, and shall not be e-filed in the Electronic Adjudication
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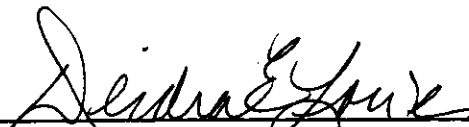
1 Management System (EAMS). Any documents relating to the petition for reconsideration lodged in
2 violation of this order shall neither be accepted for filing nor deemed filed.

3 All trial level documents not related to the petition for reconsideration shall continue to be e-filed
4 through EAMS or, to the extent permitted by the Rules of the Administrative Director, filed in paper
5 form.¹ If, however, a proposed settlement is being filed, the petitioner for reconsideration should
6 promptly notify the Appeals Board because a WCJ cannot act on a settlement while a case is pending
7 before the Appeals Board on a grant of reconsideration. (Cal. Code Regs., tit. 8, § 10859.)

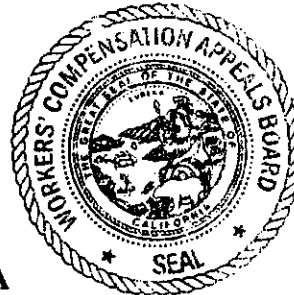
8 **WORKERS' COMPENSATION APPEALS BOARD**

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10 
11 **MARGUERITE SWEENEY**

12 **I CONCUR,**

13 
14 **DEIDRA E. LOWE**

15 
16 **RONNIE G. CAPLANE**



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

19 **JUL 10 2015**

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

22 **SHIMO WANG**
23 **CANTRELL & GREEN, APC**
24 **WAI & CONNER, LLP**

25 **EDL:mm**

26 ¹ Such trial level documents include, but are not limited to, declarations of readiness, lien claims, trial level petitions (e.g.,
27 petitions for penalties, deposition attorney's fees), stipulations with request for award, compromise and release agreements,
etc.)

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

CASE NUMBER: ADJ8674800; ADJ8674808; ADJ8674815

SHIMO WANG VS. SOUTHERN CALIFORNIA EDISON

WORKERS' COMPENSATION JUDGE: SIMON HOVAKIMIAN

DATES OF INJURY: 11/23/2011 (ADJ8674800);
01/11/2012 (ADJ8674808);
02/01/2012 (ADJ8674815)

JOINT REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Dates of Claimed Injury: 11/23/2011 (ADJ8674800); 01/11/2012 (ADJ8674808);
02/01/2012 (ADJ8674815)

Age on DOI: 50

Parts of Body Claimed Injured: Heart for all dates of injury

Identity of Petitioner: Applicant Attorney, Juliana Guerriero

Timeliness: The petition was timely filed and served on May 11, 2015.

Verification: The petition was verified.

Date of Finding of Fact and Order: April 16, 2015.

Petitioners Contentions: Petitioner contends the standard of compensability for a heart attack when there is no mental injury claimed should be the same as when a physical injury is claimed

II
FACTS

The applicant began working for Southern California Edison in 2006 and sometime in 2010 or 2011, Juan Castaneda became the applicant's manager. The applicant was given a mid-year performance evaluation in 2011 when it was

determined that the applicant needed improvement in certain areas. Based on this, he was placed on a Performance Improvement Plan (PIP) to improve the certain areas in need. Although the PIP would need to be completed within 60 days, the applicant testified that he did not believe the PIP was appropriate and refused to cooperate/participate in the PIP. As part of the PIP, the applicant was to attend monthly meeting with supervisors/managers to help guide the applicant toward finishing the PIP. The applicant as well as the witnesses testified that the applicant was more concerned with arguing about the necessity of the PIP rather than complying with it. At the second PIP meeting (11/23/2011) testimony was received that the applicant had made no progress to completing the PIP. Sometime during this meeting, the applicant felt ill and was taken via ambulance to the hospital. Although he was off work until the beginning of January, 2012 the applicant attended a work function in December. At this time, the employer increased the time to complete the PIP due to the applicant's absence from work. Soon after the applicant returned to work in January 2012, a third PIP meeting (01/11/2012) took place; the applicant again felt ill and was taken to the hospital. The applicant returned to work sometime later and at the fourth PIP meeting (02/01/2012), he again felt ill and was taken to the hospital. At all times, the applicant reiterated that the PIP was not needed and that he wanted to continue with his job. In addition to the applicant's testimony, defendant offered the testimony of several witnesses who had various interactions with the applicant for the time period prior to the first date of injury until after the last date of injury. Based on the testimony of applicant, defense witnesses, medical reports, and applicable case law, the undersigned found that the applicant did not sustain injury

arising out of and in the course of employment to his heart on the three alleged dates of injury. It is from this Finding of Fact, the Petition for Reconsideration is sought.

III DISCUSSION

THE STANDARD OF COMPENSABILITY FOR A HEART ATTACK WHEN THERE IS NO MENTAL INJURY CLAIMED SHOULD BE THE SAME AS WHEN A PHYSICAL INJURY IS CLAIMED

Petitioner contends that the standard of compensability for a heart attack when there is no mental injury claimed should be the same as when a physical injury is claimed. In the Opinion on Decision, the undersigned stated two ways in which a compensable injury could be found. The first involved using the method as stated in County of San Bernardino v. WCAB (McCoy) (77 CCC 219). Petitioner correctly states the finding in McCoy and as stated in the Opinion on Decision, McCoy maybe distinguishable from the case at hand as no psychiatric injury was pled by the applicant.

Assuming the using the standard set forth in McCoy is incorrect due to the absence of a pled psyche injury, Petitioner next contends that this standard for compensability for the applicant's heart attacks should be the same as a "physical injury." In the Opinion on Decision, the undersigned considered this approach and reviewed the medical report of panel QME Dr. Cao Van Pham dated 07/22/2013. Although Dr. Pham found issues with the applicant's heart, he also found that this injury would be industrial assuming the "allegations of retaliation – harassment – abusive management can be refuted by the examinee's employer or its agents,

namely the involved supervisor and managers.” (Joint Exhibit X, page 17-28, 30). Thus, the standard of compensability used by Dr. Pham was analogous to that of a physical injury. If the employer retaliated against, harassed, or abusively managed the applicant to comply with the PIP or there was stress at work other than that of compliance with the PIP, this decision may have been different. The credible testimony from defense witnesses show that the employer gave the applicant numerous attempts to comply with the PIP and the applicant failed to supply medical evidence to the employer showing how compliance with the PIP was detrimental to the applicant's health. Further, the applicant testified that he had no other stress while at work other than compliance with the PIP. Therefore, based on the perceived “physical injury” standard as set forth by Dr. Pham, the undersigned found that the applicant did not meet his burden of proving injury arising out of and in the course of employment to his heart on 11/23/2011, 01/11/2012, and 02/01/2012.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

DATE: May 21, 2015



Simon Hovakimian
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE: CANTRELL GREEN LONG BEACH, Email
SOUTHERN CAL EDISON ROSEMEAD, US Mail
WAI CONNOR LOS ANGELES, US Mail

ON: May 21, 2015 BY: 

SHIMO WANG

ADJ8674800
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