

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 **REMEDIOS LIRA,**

4 *Applicant,*

5 vs.

6 **PREMIUM PACKING, permissibly**
7 **self-insured, administered by SEDGWICK**
8 **CMS,**

9 *Defendants.*

Case No. ADJ8015423
(Salinas District Office)

OPINION AND DECISION
AFTER RECONSIDERATION

10 We previously granted defendant's Petition for Reconsideration on November 19, 2013, in order
11 to further study the factual and legal issues in this case. This is our Opinion and Decision After
12 Reconsideration.¹

13 Defendant sought reconsideration of the August 28, 2013 Findings and Award, wherein the
14 workers' compensation administrative law judge (WCJ) found that applicant, while employed on
15 September 24, 2011, as a tractor driver at Salinas, California, by Premium Packing, Inc., sustained injury
16 arising out of and in the course of employment to his psyche when he was hit by a train, and that he
17 alleges injury to his back, causing the need for medical treatment to cure or relieve from the effects of the
18 injury. The WCJ also determined that applicant's claim is not barred by the post-termination defense
19 pursuant to Labor Code section 3208.3² because applicant reported the injury to his employer on the date
20 that it occurred, and that all other issues (including whether applicant injured his back) are deferred.

21 In its Petition for Reconsideration, defendant contends: (1) the employer had no notice of a
22 psychiatric injury prior to applicant's termination; and (2) applicant's claim of psychiatric injury is barred
23 pursuant to section 3208.3(e)(2) because applicant did not report his psychiatric injury prior to his
24 termination. We have received an answer from applicant.

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26 ¹ Deputy Commissioner Gondak has substituted in this case in place of Commissioner Frank M. Brass, who
is currently unavailable.

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

1 The WCJ filed a Report and Recommendation on Petition for Reconsideration (report), in which
2 he clarified that the “sudden and extraordinary” exception under section 3208.3(e)(2) applies to
3 applicant’s injury, such that it is not barred by the post-termination defense. Accordingly, the WCJ
4 recommended that defendant’s petition be denied.

5 On December 9, 2013, defendant filed a Supplemental Brief on Petition for Reconsideration
6 which we have accepted and considered as a supplemental petition. (Cal. Code Regs., tit. 8, § 10848.) In
7 its supplemental petition, defendant contends that the injury was not sudden and extraordinary because it
8 was foreseeable that applicant could be hit by a train while crossing railroad tracks. Applicant also filed
9 a Supplemental Response to Petition for Reconsideration on December 9, 2013, which we have also
10 accepted and considered as a supplemental petition.

11 Based upon our review of the record, we will affirm the WCJ’s August 28, 2013 Findings and
12 Award with the following additional comments.

13 BACKGROUND

14 At trial, applicant testified that while driving a tractor at work on September 24, 2011, applicant
15 was struck by a train while crossing railroad tracks. The employer was informed about the accident, and
16 an employee representative observed the accident scene and talked to applicant about the accident. After
17 the accident, the employer took him to a company doctor. When applicant was examined by the doctor,
18 he told the doctor about pain in his low back. The doctor told him there was nothing wrong with him.
19 (Minutes of Hearing and Summary of Evidence (MOH/SOE), July 15, 2013, pp. 2-3.) On
20 cross-examination, applicant stated that the employer terminated him for failing to look both ways before
21 crossing the railroad tracks. (Summary of Evidence, *supra*, p. 3, lines 13-15.) Applicant admitted that he
22 did not have any anxiety or depression or sadness before he was terminated. (MOH/SOE, *supra*, at p. 3.)

23 Applicant was examined by Michael Meade, M.D., as the qualified medical evaluator (QME).
24 Dr. Meade submitted a narrative medical report dated January 9, 2013 (WCAB Exh. W-1), in which
25 Dr. Meade identified three stressors which caused applicant’s psychiatric injury. Dr. Meade apportioned
26 causation of the injury among the three factors as follows: (1) 60% to the tractor-train collision; (2) 25%

1 to applicant's termination and financial problems; and (3) 15% to chronic physical problems from the
2 injury. Dr. Meade concludes that the psychiatric injury is an industrial injury.

3 **DISCUSSION**

4 **A. Applicant's Sustained a Compensable Industrial Injury Because Applicant's Injury Was**
5 **Caused by Sudden and Extraordinary Employment Events, Pursuant to Labor Code**
6 **Section 3208.3(e)(1).**

7 Labor Code section 3208.3(e) sets out the requirements for the post-termination defense for
8 psychiatric injuries:

9 (e) Where the claim for compensation is filed after notice of termination of
10 employment or layoff, including voluntary layoff, and the claim is for an injury
11 occurring prior to the time of notice of termination or layoff, no compensation
12 shall be paid unless the employee demonstrates by preponderance of the
13 evidence that actual events of employment were predominant as to all causes
14 combined of the psychiatric injury and one or more of the following conditions
15 exist:

16 (1) Sudden and extraordinary events of employment were the cause of injury.

17 (2) The employer has notice of the psychiatric injury under Chapter 2 (commencing
18 with Section 5400) prior to the notice of termination or layoff.

19 (3) The employee's medical records existing prior to the notice of termination or
20 layoff contain evidence of treatment of the psychiatric injury.

21 (4) Upon a finding of sexual or racial harassment by any trier of fact, whether
22 contractual, administrative, regulatory, or judicial.

23 (5) Evidence of the date of injury, specified in Section 5411 or 5412, is subsequent
24 to the date of notice of termination or layoff, but prior to the effective date of
25 the termination or layoff.

26 In his report, the WCJ clarified that his determination that applicant's claim of injury is not barred
27 by the post-termination defense under section 3208.3 is based upon the "sudden and extraordinary"
exception of subsection (e)(1). Defendant's Petition for Reconsideration focused on subsection (e)(2). In
its supplemental petition, it addressed the WCJ's reliance on the "sudden and extraordinary" exception of
subsection (e)(1).

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1 In response to the WCJ's report, defendant alleges that the injury was not sudden and
2 extraordinary because it was foreseeable that applicant could be hit by a train while crossing railroad
3 tracks. We disagree, and for the reasons set forth below, we shall affirm the WCJ's decision.

4 The term "sudden and extraordinary" has been exhaustively analyzed in the context of section
5 3208.3(d), which bars claims of psychiatric injury brought within the first six months of employment,
6 unless the psychiatric injury is caused by a sudden and extraordinary employment condition.² As stated
7 in *Matea v. Workers' Comp. Appeals Bd.* (2006) 144 Cal.App.4th 1435 [71 Cal.Comp.Cases 1522],
8 "We believe that the Legislature intended 'employment conditions' in subdivision (d) of section 3208.3
9 to mean the same thing as the 'events of employment' condition in subdivision (e) of the same section."
10 (*Matea, supra*, at p. 1449.) Accordingly, the analysis of a "sudden and extraordinary employment
11 condition" under section 3208.3(d) is relevant and determinative of the meaning of "sudden and
12 extraordinary events of employment," as set forth in section 3208.3(e)(1).

13 The issue of what constitutes an "extraordinary" employment condition for purposes of Labor
14 Code section 3208.3(d) was addressed in numerous cases. In *Matea, supra*, for example, the injured
15 worker sustained an admitted injury while working in a Home Depot store when a rack of lumber fell on
16 his left leg. *Matea* also alleged a psychiatric injury as a compensable consequence. He had not been
17 employed for six months when the injury occurred, so the employer denied the psychiatric aspect of the
18 injury, contending that the injury was not a sudden and extraordinary employment condition. (*Matea,*
19 *supra*, at p. 1438.) The *Matea* court referred to the definition of extraordinary from Webster's Third
20 New International Dictionary (1993) as "going beyond what is usual, regular, common, or customary"
21 and "having little or no precedent and usu[ally] totally unexpected" (Webster's 3d New Internat. Dict.,
22 *supra*, at p. 807) and concluded that lumber falling from a rack and injuring the applicant at a Home
23 Depot store constituted an extraordinary employment condition, justifying an award of benefits for the
24 ensuing psychiatric injury. (*Matea, supra*, at pp. 1449-1450.)

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26 ² Defendant has not raised the defense of applicant's psychiatric injury as having occurred within the first six months of
27 applicant's employment for this employer. Accordingly, we do not address the section 3208.3(d) defense herein.

1 The *Matea* court determined that the injured worker met his burden of proof to establish that his
2 injury within the first six months of his employment was the result of a sudden and extraordinary
3 employment condition, stating:

4 As the WCJ stated, no testimony was presented regarding how often
5 lumber falls from racks into the aisles at The Home Depot, and there was
6 no evidence presented that such occurrences are regular and routine
7 events. We must assume, as the WCJ assumed, that they are uncommon,
8 unusual and totally unexpected events; otherwise, The Home Depot would
9 have presented testimony to the contrary. Therefore, in the absence of any
10 contrary evidence, when *Matea* presented evidence that he was injured as
11 a result of all the lumber from a rack falling onto him, he met his burden
12 of proving that he was injured as a result of a sudden and extraordinary
13 employment condition as required by section 3208.3, subdivision (d).
14 Accordingly, the Board erred in interpreting section 3208.3, subdivision
15 (d), to find otherwise. (*Matea, supra*, at p. 1450.)

16 In *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (Garcia)* (2012) 204
17 Cal.App.4th 766 [77 Cal.Comp.Cases 307], the Court of Appeal held that an avocado picker/high tree
18 worker's fall from a 24-foot ladder was not a sudden and extraordinary employment event because it
19 was a typical hazard of his occupation. (*Garcia, supra*, 204 Cal.App.4th at pp. 774.) The court further
20 noted that *Garcia's* fall from the ladder was indistinguishable from a roofer's fall from a roof or an
21 electrician's fall from a ladder while working at a height to install cable, and stated: "They are terrible
22 accidents, but they are hazards of performing work above ground level." (*Id.*, at p. 774.) We reject the
23 *Garcia* court's interpretation of "extraordinary" because it creates a distinction based upon how
24 hazardous an employee's occupation is. There is no basis for such a distinction in the legislative history
25 of section 3208.3. Whether an employment event is extraordinary does not depend on whether the event
26 is a known risk of the injury, and we find no indication that such results were intended by the legislature
27 when drafting or amending section 3208.3.

28 In *California Insurance Guarantee Association v. Workers' Comp. Appeals Bd. (Tejera)* (2007)
29 72 Cal.Comp.Cases 482 (writ den.), the WCJ, whose report was adopted and incorporated by the
30 Appeals Board, stated that motor vehicle accidents "generally" are not extraordinary events but

1 determined that the extremely unusual circumstances in the truck driver's accident in that case were
2 sufficient to be interpreted as extraordinary, within the meaning of section 3208.3(d):

3 Applicant had credibly testified that he had been driving a truck and trailer
4 on date of injury, that he lost control on the wet highway, that the trailer
5 jack-knifed, striking the cab of the vehicle numerous times, that Applicant
6 was thrown to the passenger side of the truck and then out the passenger
7 side door, that the vehicle's steering wheel came loose in Applicant's
8 hands, that Applicant saw the trailer coming toward him as he lay on the
9 ground and pavement, and that the trailer almost ran over Applicant's feet.
10 (*Tejera, supra*, at p. 484.)

11 In accordance with the reasoning and analysis of the *Matea, supra*, and *Tejera, supra*, we find
12 that Mr. Lira's claim arose from a sudden and extraordinary event of employment. There is nothing in
13 the record to suggest that his claim of injury arose from routine employment events. Although applicant
14 testified that he is familiar with working around railroad tracks, this does not support defendant's
15 contention that a collision with a train on the railroad tracks is an ordinary or routine employment event.
16 Furthermore, defendant presented no evidence that this type of collision constitutes an ordinary or routine
17 employment occurrence. The type of accident involved in this case where a train collides with a tractor
18 constitutes an uncommon and unexpected event. Therefore, applicant's claim of injury in this case is not
19 barred by Labor Code section 3208.3(e)(1).

20 **B. An Injury Need Not Be Unforeseeable in Order to Be a Sudden Extraordinary Event of**
21 **Employment**

22 In its Supplemental Response, defendant also contends that it was foreseeable that applicant
23 could be hit by a train while crossing railroad tracks, noting that California Vehicle Code section 22451
24 specifies that a train which is approaching is a hazard, and that a driver approaching a railroad crossing
25 may only cross the tracks when it is safe to do so. We disagree with this contention, as well.

26 By extension of defendant's argument, virtually any event would be foreseeable, including such
27 extreme events as a terrorist attack or a workplace shooting. Moreover, none of the cases which
analyzed the section 3208.3(d) require that a workplace event or condition be unforeseeable in order to
qualify as "sudden and extraordinary."

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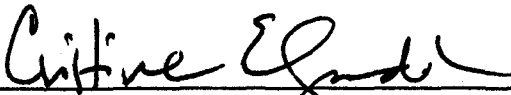
1 For the foregoing reasons,

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

4 **WORKERS' COMPENSATION APPEALS BOARD**

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8 **MARGUERITE SWEENEY**

9 **I CONCUR,**

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11 **DEPUTY CRISTINE E. GONDAK**

12 **PARTICIPATING, BUT NOT SIGNING**



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14
15 **DEIDRA E. LOWE**

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

18 **MAY 12 2015**

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

22 **REMEDIOS LIRA**
23 **SAVAGE FINETE**
24 **WILLIAM SORIA**

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27 **JG:mm:ebc** 