

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

4 **JAIME CHAVEZ JR,**

5 *Applicant,*

6 **vs.**

7 **CUT IT RIGHT TREE SERVICE; STATE**  
8 **COMPENSATION INSURANCE FUND,**

9 *Defendants.*

**Case No. ADJ11067691**  
**(Fresno District Office)**

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

10  
11 Defendant seeks reconsideration of the Findings of Fact, Award, Order, and Opinion on Decision  
12 (F&A) issued by the workers' compensation administrative law judge (WCJ) on April 20, 2020. By the  
13 F&A, the WCJ found in relevant part that applicant sustained injury arising out of and in the course of  
14 employment (AOE/COE) to his left leg, right shoulder, bilateral knees and cervical spine on October 13,  
15 2017. In addition to this finding, the WCJ found that applicant is entitled to treatment and benefits for his  
16 psychological, vision and internal injuries.

17 Defendant contends that the WCJ violated its right to due process because he made findings  
18 regarding issues that were not set for trial including entitlement to benefits for certain body parts and  
19 whether the injury resulted from a violent act. Defendant also contends that applicant's injury did not  
20 result from a sudden and extraordinary employment condition and therefore, his claim for a psychiatric  
21 injury is barred by Labor Code<sup>1</sup> section 3208.3(d). (Lab. Code, § 3208.3(d).)

22 We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition  
23 for Reconsideration (Report) recommending that we deny reconsideration.

24 We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer  
25 and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the  
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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise stated.

1 reasons discussed below, we will grant reconsideration, rescind the F&A and issue a new decision with  
2 findings of fact that correspond with the issues identified at trial. We will include a finding of fact that  
3 applicant's injury resulted from a sudden and extraordinary employment condition and therefore, his claim  
4 of injury to his psyche is not barred by section 3208.3(d). The issue of injury AOE/COE for psyche will  
5 be deferred pending further development of the record.

## 6 **FACTUAL BACKGROUND**

7 Applicant claims injury to his left leg, right shoulder, bilateral knees, cervical spine, psyche, vision  
8 and internal system on October 13, 2017 while employed as a tree trimmer by Cut It Right Tree Service.  
9 Defendant has accepted all body parts except injury to the psyche, vision and internal system. (Minutes of  
10 Hearing and Summary of Evidence, February 3, 2020, p. 2.)

11 The parties do not appear to dispute how the injury occurred as described by applicant:

12 On the date of the incident, 10/13/17, he was assigned to cut multiple  
13 mulberry trees and a camphor tree. The crew arrived in the early morning.

14 Joe Peralta, the homeowner, Manuel, Jose, Victor, and he were there. He  
15 was given a harness that was missing the right thigh strap. His task was to  
16 strip the three mulberry trees, to clear and shape them, and to clear and shape  
17 the camphor tree. Jose was on the ground crew, responsible for keeping the  
18 chainsaw gassed, running the wood chippers, grinding brush, keeping the  
19 ground organized and clear.

20 Victor did the same work as Jose. Manuel was in the bucket truck working  
21 on the third mulberry tree, clearing branches from the electrical wires.

22 He was using a set of two ropes. The safety rope, five to seven feet long,  
23 with a steel core that allows him to connect to the main tree branch. The  
24 longer rope is used to help him get up and down the tree, and also used for  
25 lowering cut branches.

26 He relied on his ground crew to clear the fallen debris. He became  
27 concerned, however, with how the ground crew was handling the debris.  
The brush was being moved in a manner that tangled his rope. He spoke with  
both the members of the ground crew to "stop playing with his life." It  
appeared that they improved in their work. But after lunch, approximately  
3:00 p.m, he heard "an explosion." He thought that the chainsaw had blown  
or the wood chipper. But his harness had cinched up and he saw that his leg  
had been ripped off and was hanging. As he came to realize later, the rope  
had wrapped around his leg, pulled tight, and then noticed that the left pant  
leg was now hanging flat. He knew that his leg had been popped out of the

1 socket. As he understood later, the rope auto-amputated his leg from the  
2 knee down.

3 Immediately he began screaming, calling for help. It seemed to take several  
4 minutes before the ground crew showed up. They helped him get down from  
5 the 30- or 50-foot height that he was at. It took them nearly 20 to 30 minutes  
6 to get that done.

7 ...  
8 He was taken to the hospital where he stayed for nearly two months. The  
9 incident occurred on a Friday, but his leg was amputated on Sunday as the  
10 limb continued to die over the weekend.

11 (*Id.* at pp. 5-6.)

12 An investigation was conducted into applicant's injury by the state's Division of Occupational  
13 Safety and Health (DOSH). (Applicant's Exhibits Nos. 1-12.) Defendant was cited and penalties imposed  
14 by DOSH. (Applicant's Exhibit No. 1, Department of Industrial Relations Division of Occupational Safety  
15 and Health, Settlement Order, June 13, 2018.)

16 Applicant was evaluated by the neurological panel qualified medical evaluator (QME), Wayne  
17 Anderson, D.O. (Applicant's Exhibit No. 16, Medical report of Wayne Anderson, D.O., March 29, 2019.)  
18 In his review of applicant's medical records, it was noted that three days after the injury, UCSF's  
19 Psychosomatic Medicine department diagnosed applicant with an adjustment disorder with emotional  
20 disturbance. (*Id.* at p. 22.) Applicant's diagnoses included post-traumatic stress disorder (PTSD) and  
21 depression when he was discharged from the Community Medical Center in November 2017. (*Id.* at p.  
22 27.) Cognitive behavioral therapy was recommended for applicant in December 2017. (*Id.*) A 2018  
23 psychology evaluation included in Dr. Anderson's summary of records concluded that applicant has a pain  
24 disorder and major depressive disorder. (*Id.* at p. 17.)

25 Dr. Anderson made several diagnoses regarding applicant's orthopedic injuries. (*Id.* at p. 32.) With  
26 respect to applicant's psychiatric condition, Dr. Anderson commented in pertinent part:

27 [The] nature of the accident is one that would appear to potentially be  
psychologically traumatic above and beyond a simple slip and fall or  
twisting or lifting type injury, and therefore it is plausible that the applicant  
have a psychological evaluation.

Any psychological aspects would need to be deferred to the appropriate  
evaluator, which would be a psychologist or psychiatrist.

1 ...  
2 It is quite reasonable that this would represent a traumatic type of event, a  
3 traumatic event that may be considered greater than the usual type of  
4 workplace injury.

5 As such, it would not be unexpected that the applicant would have symptoms  
6 similar to posttraumatic stress disorder if not actually that syndrome itself.  
7 As such, it is appropriate that the applicant have a psychology qualified  
8 medical evaluation to address this particular issue.

9 (*Id.* at pp. 31 and 38.)

10 The matter proceeded to trial on February 3, 2020. The parties stipulated to injury AOE/COE to  
11 the following parts: left leg (amputation), right shoulder, bilateral knees and cervical spine. (Minutes of  
12 Hearing and Summary of Evidence, February 3, 2020, p. 2.) The issues for trial were identified as follows:

- 13 (1) Injury arising out of and in the course of employment to applicant's  
14 psyche.  
15 (2) Application of Labor Code Section 3208.3(d).  
16 (3) Applicant claims sudden and extraordinary event.  
17 (4) All other issues remain deferred.

18 (*Id.*)

19 In addition to testifying regarding how the injury occurred as outlined above, applicant also testified at trial  
20 as follows in relevant part:

21 Applicant stated he was employed as a tree climber for Joe Peralta.  
22 Previously he had 15 years working in the tree trimming business. He began  
23 working with his father. A tree climber gets up into the tree to trim, shape  
24 trees, and is responsible for the ground crew and any objects that fall from  
25 the tree to the ground.

26 Prior to what happened to him, he has not heard of anyone suffering a leg  
27 amputation.

28 ...  
29 While he was hospitalized for nearly two months, his mood became erratic.  
30 He became depressed, shocked, and angry. He began to experience  
31 nightmares, which he experiences to this day. The nightmares include  
32 images where he's grabbing his leg and looking at it. He also now dreams  
33 of bodies in rooms. These are crazy things that do not make sense to him.

34 He is also receiving psychiatric and psychological treatment. He has  
35 attended treatment at a residential health care program, follow-up care, and

1 some outpatient. He went to the CVC psych ward because he was having  
2 trouble coping. Applicant stated that he has lost more than just his leg. He  
3 is 31 years of age. He is having trouble coping with the situation, is  
4 emotional. He tends to stay indoors and feels like he is giving up. He is  
depressed. His nightmares occur whenever he feels stress. Sometimes the  
medication helps.

5 (*Id.* at pp. 5-6.)

6 Defendant's manager, Mr. Joseph Peralta, testified at trial in relevant part:

7 The witness stated he has never been injured on the job and never had an  
8 employee injured on the job before.

9 The witness stated he hired applicant. He reviewed applicant's job  
10 application and was familiar with his prior employers. He reviewed his  
11 experience. He knows the type of training that they provide at Mountain F.  
He believed that applicant was experienced.

12 ...  
13 There is always a danger of loose material getting caught in the wood  
chipper. He has heard about rope becoming tangled in chippers. Generally  
14 that risk can be avoided by keeping the climb line in the crotch of the tree or  
15 in the rope bag, that keeps it out of the brush area at the base of the tree.

16 By the date of injury, applicant had worked for Cut It Right for six to seven  
17 days.

18 ...  
19 There is always a danger of loose material getting caught in the wood  
chipper. He has heard about rope becoming tangled in chippers. Generally  
20 that risk can be avoided by keeping the climb line in the crotch of the tree or  
21 in the rope bag, that keeps it out of the brush area at the base of the tree.

22 ...  
23 He saw that applicant's blue rope had been damaged by the chipper. He had  
24 been away from the job site at an estimate when the incident happened.

25 He understands that the rope used was too long, became tangled in the brush,  
26 and was inadvertently pushed into the chipper.

27 ...  
The witness stated he has been in the business for more than 20 years. He  
has never experienced a leg amputation injury.

...  
...  
In his experience Cal OSHA does show up on job sites and performs  
investigations. They investigate serious injuries.

The witness stated he cooperated fully with the investigation. The company  
was cited for violations regarding what took place on the date of injury.

1 ...  
2 The witness stated in his deposition that he had never had an employee  
3 sustain similar injuries resulting in amputation.

4  
5 (*Id.* at pp. 7-10.)

6 In the resulting F&A, the WCJ found that applicant sustained injury AOE/COE to his left leg, right  
7 shoulder, bilateral knees and cervical spine on October 13, 2017. In addition to these body parts, the WCJ  
8 found that applicant is “further entitled to treatment and benefits relating to his psychological, vision and  
9 intern [*sic*] injuries.” (F&A, April 20, 2020, p. 2.) The F&A does not include a finding of fact regarding  
10 whether applicant’s injury resulted from a sudden and extraordinary employment condition. The F&A  
11 stated that an award was made in favor of applicant for medical treatment, temporary disability and  
12 permanent disability, although there are no findings of fact in the F&A regarding temporary disability or  
13 permanent disability. (*Id.* at p. 3.) In the Opinion on Decision, the WCJ commented in pertinent part:

14 The defense contends that Applicant’s injuries are, first, barred by the six-  
15 month rule. However, from a plain reading of the facts of this case, it is clear  
16 that this was both a “violent act” (as defined under Labor Code § 4660.1)  
17 and a “sudden and extraordinary” event (as defined under Labor Code §  
18 3208.3). Thereby, Applicant is entitled to benefits for his psychiatric  
19 injuries, including the possibility of impairment benefits.

20 (Opinion on Decision, April 20, 2020, p. 10.)

## 21 **DISCUSSION**

### 22 **I.**

23 Section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board  
24 acts on the petition within 60 days of filing. (Lab. Code, § 5909.) Section 5315 provides the Appeals  
25 Board with 60 days within which to confirm, adopt, modify or set aside the findings, order, decision or  
26 award of a workers’ compensation administrative law judge. (Lab. Code, § 5315.)

27 On June 5, 2020, the State of California’s Governor, Gavin Newsom, issued Executive Order N-  
68-20, wherein he ordered that the deadlines in sections 5909 and 5315 shall be extended for a period of

1 60 days.<sup>2</sup> Pursuant to Executive Order N-68-20, the time within which the Appeals Board must act on  
2 defendant's Petition was extended by 60 days. Therefore, this decision is timely.

3 **II.**

4 The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence.  
5 (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80  
6 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a) & 3202.5.) With respect to psychiatric injuries, section  
7 3208.3 provides, in relevant part:

8 (a) A psychiatric injury shall be compensable if it is a mental disorder which  
9 causes disability or need for medical treatment, and it is diagnosed pursuant  
10 to procedures promulgated under paragraph (4) of subdivision (j) of Section  
11 139.2 or, until these procedures are promulgated, it is diagnosed using the  
12 terminology and criteria of the American Psychiatric Association's  
13 Diagnostic and Statistical Manual of Mental Disorders, Third Edition—  
Revised, or the terminology and diagnostic criteria of other psychiatric  
diagnostic manuals generally approved and accepted nationally by  
practitioners in the field of psychiatric medicine.

14 (b) (1) In order to establish that a psychiatric injury is compensable, an  
15 employee shall demonstrate by a preponderance of the evidence that actual  
16 events of employment were predominant as to all causes combined of the  
17 psychiatric injury.

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

23 ...  
24 (d) Notwithstanding any other provision of this division, no compensation  
25 shall be paid pursuant to this division for a psychiatric injury related to a  
26 claim against an employer unless the employee has been employed by that  
27 employer for at least six months. The six months of employment need not  
be continuous. This subdivision shall not apply if the psychiatric injury is  
caused by a sudden and extraordinary employment condition.

(Lab. Code, § 3208.3(a)-(b) and (d).)

The legislative and judicial history of section 3208.3(d) show that a "sudden and extraordinary"

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<sup>2</sup> Governor Newsom's Executive Order N-68-20 may be accessed here: <https://www.gov.ca.gov/wp-content/uploads/2020/06/6.5.20-EO-N-68-20.pdf>. (See Evid. Code, § 452(c).)

1 employment condition means something that is not regular and routine, and is uncommon, unusual and  
2 unexpected. (See *Matea v. Workers' Comp. Appeals Bd.* (2006) 144 Cal.App.4th 1435, 1449 [71  
3 Cal.Comp.Cases 1522].) The Court of Appeal in *Matea* acknowledged that “[g]as main explosions and  
4 workplace violence are certainly uncommon and usually totally unexpected events; thus, they may be  
5 sudden and extraordinary employment conditions.” (*Id.*) However, the Court went on to conclude that:

6 [T]here may also be other “sudden and extraordinary” occurrences or events  
7 within the contemplation of section 3208.3, subdivision (d) that would  
8 naturally be expected to cause psychic disturbances even in diligent and  
9 honest employees. Therefore, if an employee carries his or her burden of  
10 showing by a preponderance of the evidence that the event or occurrence  
11 that caused the alleged psychiatric injury was something other than a regular  
12 and routine employment event or condition, that is, that the event was  
13 uncommon, unusual, and occurred unexpectedly, the injury may be  
14 compensable even if the employee was employed for less than six months.

15 (*Id.* at pp. 1448-1449.)

16 The Court of Appeal recently cited to *Matea* in defining the employee’s burden of proof to show a “sudden  
17 and extraordinary employment condition” as follows:

18 [T]he employee bears the burden of showing that the alleged psychiatric  
19 injury did not derive from the effects of a routine physical injury, and was  
20 not the result of the routine type of stress or employment event that all  
21 employees who work for the same employer may experience or expect  
22 within the first six months of the employer.

23 (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Guzman)* (2018) 20  
24 Cal.App.5th 796, 807 [83 Cal.Comp.Cases 185], citations omitted.)

25 Analysis of the decisions addressing whether an injury resulted from a “sudden and extraordinary  
26 employment condition” reveal that this is a primarily fact-driven inquiry. As stated by the *Matea* Court:

27 Each case must be considered *on its facts* in order to determine whether the  
alleged psychiatric injury occurred as a result of sudden and extraordinary  
events that would naturally be expected to cause psychic disturbances even  
in a diligent and honest employee.

(*Matea, supra*, 144 Cal.App.4th at p. 1450, emphasis added.)

Appellate decisions consequently heavily focus on the individual facts in determining whether an



1 employment condition was sudden and extraordinary. In *Matea*, an injury caused by a rack of falling  
2 lumber in a store aisle was considered extraordinary because “there was no evidence presented that such  
3 occurrences are regular and routine events.” (*Id.*) Alternatively, in *State Comp. Ins. Fund v. Workers’*  
4 *Comp. Appeals Bd. (Garcia)* (2012) 204 Cal.App.4th 766, 774-775 [77 Cal.Comp.Cases 307], an avocado  
5 picker falling from a ladder was not extraordinary since this fall was deemed a hazard of performing work  
6 above ground level. In *Travelers Casualty & Surety Co. v. Workers’ Comp. Appeals Bd. (Dreher)* (2016)  
7 246 Cal.App.4th 1101, 1108 [81 Cal.Comp.Cases 402], an employee’s slip-and-fall on rain-slicked  
8 concrete while walking to a building where he worked as a live-in maintenance supervisor was also not  
9 considered extraordinary. Most recently, the Court of Appeal found that an injury sustained while the  
10 employee was operating a compactor on a slope, which struck a rock in the soil causing the compactor to  
11 rise in the air and fall on top of the employee was not sudden and extraordinary. (*Guzman, supra*, 20  
12 Cal.App.5th at p. 810.)

13 In summary, the specific facts of the injury must show that the employment condition causing the  
14 injury was uncommon, unusual and unexpected, and did not result from a routine and regular event in order  
15 to qualify for the exception in section 3208.3(d).

16 The parties do not dispute that applicant was employed by defendant for less than six months at the  
17 time of his injury on October 13, 2017. The only dispute is whether the pulling of applicant’s climbing  
18 rope into the wood chipper causing applicant’s leg amputation and injury to other parts was a sudden and  
19 extraordinary employment condition. We conclude that it was.

20 In *Matea*, the Court of Appeal noted that the dictionary “defines ‘sudden’ as ‘happening without  
21 previous notice or with very brief notice : coming or occurring unexpectedly : not foreseen or prepared  
22 for.’ ” (*Matea, supra*, 144 Cal.App.4th at p. 1448.) Applicant’s un rebutted testimony reflects that the  
23 injury occurred so quickly that he did not initially realize what had happened until he saw his leg.  
24 Defendant’s contentions that applicant had “notice” that the injury would occur because of his warnings to  
25 co-workers to be careful with his rope are unpersuasive. The injury was caused by a sudden employment  
26 condition.

27 The Court in *Matea* observed that “extraordinary” is defined “as ‘going beyond what is usual,

1 regular, common, or customary'; and 'having little or no precedent and usu[ally] totally unexpected.' ”  
2 (*Matea, supra*, 144 Cal.App.4th at p. 1448.) The evidence shows that a tree trimmer’s rope being pulled  
3 into a wood chipper is uncommon, unusual and unexpected, i.e., not a routine and regular event of  
4 employment. Both applicant and defendant’s manager have worked in tree trimming for several years.  
5 Neither had ever heard of a tree trimmer suffering a leg amputation. (See e.g., *Production Framing Systems*  
6 *v. Workers’ Comp. Appeals Bd. (Dove)* (2012) 77 Cal.Comp.Cases 756 (writ den.) [balloon wall falling on  
7 a construction worker was sudden and extraordinary based in part on foreman’s testimony that he had never  
8 experienced a wall falling]; *Redwood Empire Sawmill v. Workers’ Comp. Appeals Bd. (Villanueva)* (2013)  
9 78 Cal.Comp.Cases 498 (writ den.) [amputation of several fingers in saw mill was sudden and  
10 extraordinary based in part on supervisor’s testimony that he had never seen a similar injury while working  
11 for the employer].) The evidence in this matter is therefore unlike in *Guzman*, where the Court concluded  
12 that applicant did not prove his injury was extraordinary in part because he did not have the experience to  
13 comment on how a compactor operates on a slope.

14 Defendant contends that the risk of a tree trimmer’s rope being thrown into a wood chipper is  
15 foreseeable and therefore, applicant’s injury did not result from an extraordinary employment condition.  
16 Defendant cites to evidence in the record of other injurious events resulting from ropes being pulled into a  
17 wood chipper.

18 Defendant misconstrues applicant’s burden of proof. Applicant must show that the employment  
19 condition causing injury was *uncommon, unusual and unexpected*. Applicant is not obligated to show that  
20 this type of employment condition has *never* occurred or is completely unforeseeable.<sup>3</sup> Auto-amputation  
21 of a tree trimmer’s leg from a climbing rope being pulled into a wood chipper is not akin to an avocado  
22 picker falling from a ladder. This was not a routine physical injury or the result of a routine employment  
23 event that all employees who work for the same employer may experience or expect within the first six  
24 months of their employment. (*Guzman, supra*.)

25 Therefore, we will amend the F&A to include a finding of fact that applicant’s injury resulted from  
26

27 <sup>3</sup> Additionally, the evidence submitted by defendant of other injurious events involving wood chippers are factually distinguishable from what occurred in this matter.

1 a sudden and extraordinary employment condition and consequently, his claim of injury to his psyche is  
2 not barred by section 3208.3(d).

### 3 III.

4 Decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903,  
5 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza*  
6 *v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's*  
7 *Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "Determination of causation of a  
8 psychiatric injury requires competent medical evidence." (*Wilson v. State of CA Cal Fire* (2019) 84  
9 Cal.Comp.Cases 393, 414 (Appeals Board en banc), citing *Rolda v. Pitney Bowes, Inc.* (2001) 66  
10 Cal.Comp.Cases 241, 245 (Appeals Board en banc).)

11 Although applicant's psychiatric claim is not barred by section 3208.3(d) pursuant to the discussion  
12 above, the current record is insufficient to address the issue of injury AOE/COE to the psyche. While the  
13 summarized medical records in Dr. Anderson's report suggest that applicant sustained an injury AOE/COE  
14 to his psyche, Dr. Anderson deferred the psychological aspect of applicant's claim to a psychologist or  
15 psychiatrist.

16 The Appeals Board has the discretionary authority to develop the record when appropriate to  
17 provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62  
18 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.*  
19 (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.) The Appeals Board  
20 also has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters  
21 undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals*  
22 *Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The "Board may act to develop the  
23 record with new evidence if, for example, it concludes that neither side has presented substantial evidence  
24 on which a decision could be based, and even that this principle may be appropriately applied in favor of  
25 the employee." (*San Bernardino Cmty. Hosp. v. Workers' Compensation Appeals Bd. (McKernan)* (1999)  
26 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].)

27 The record must be further developed regarding causation for applicant's psychiatric condition. Dr.

1 Anderson recommended an evaluation by a psychological QME. Upon return of this matter to the trial  
2 level, the parties may conduct further discovery regarding the claimed psychiatric injury, which may  
3 include an additional QME panel in another specialty. (See Cal. Code Regs., tit. 8, §§ 31.7, 35.5(c)(1) and  
4 (d).)

5 We will consequently defer the issue of injury AOE/COE to the psyche pending further  
6 development of the record.

#### 7 IV.

8 Defendant contends that the WCJ violated its right to due process by determining issues that were  
9 not identified by the parties as issues to be adjudicated at trial. We agree.

10 All parties to a workers' compensation proceeding retain the fundamental right to due process and  
11 a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp.*  
12 *Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) "Due process requires notice  
13 and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp.*  
14 *Appeals Bd.* (2005) 127 Cal.App.4th 625, 643 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers'*  
15 *Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].) A fair hearing  
16 includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect  
17 exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89  
18 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at pp. 157-158 citing *Kaiser Co. v.*  
19 *Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers'*  
20 *Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) A violation of a party's  
21 right to due process that prevents a party from having a fair hearing is reversible per se. (*Beverly Hills*  
22 *Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd. (Pinkney)* (1994) 26 Cal.App.4th 789, 806 [59  
23 Cal.Comp.Cases 461].)

24 The F&A included a finding that applicant is entitled to medical treatment and benefits for his  
25 psyche, vision and internal injuries. The issue of entitlement to benefits for these parts was not listed as  
26 among the issues for trial in the Minutes of Hearing. With respect to the psyche, further development of  
27 the record regarding injury AOE/COE is necessary in order to determine entitlement to benefits for

1 applicant's psychiatric condition.<sup>4</sup>

2 Defendant also contends that it was error for the WCJ to address whether applicant's injury was  
3 the result of a violent act under section 4660.1(c)(2)(A). Although this issue was discussed in the Opinion  
4 on Decision, there is no actual finding of fact regarding this issue. While the Opinion on Decision provides  
5 the rationale for the WCJ's decision, the F&A provides the findings of fact, award and orders with respect  
6 to the disputed issues. Defendant's contention regarding this "finding" is consequently moot.

7 We will therefore issue a new F&A with a finding that applicant's injury resulted from a sudden  
8 and extraordinary employment condition and therefore, his claim of injury to his psyche is not barred by  
9 section 3208.3(d). We will also find that further development of the record is necessary to address injury  
10 AOE/COE to the psyche. All other issues will be deferred.

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26 <sup>4</sup> It is acknowledged that applicant's date of injury is after January 1, 2013 and therefore, his permanent disability, if any, must  
27 be determined in accordance with section 4660.1. (Lab. Code, § 4660.1.) Although section 4660.1 precludes an increase in  
applicant's permanent impairment rating for a psychiatric disorder unless he shows that actual events of employment directly  
caused a psychiatric injury or he qualifies for one of the statutory exceptions in section 4660.1(c)(2), section 4660.1 does not  
preclude applicant from claiming a psychiatric injury. (*Wilson, supra*, 84 Cal.Comp.Cases at p. 403.)

1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant's Petition for Reconsideration of the Findings of Fact, Award,  
3 Order, and Opinion on Decision issued by the WCJ on April 20, 2020 is **GRANTED**.

4 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'  
5 Compensation Appeals Board that the Findings of Fact, Award, Order, and Opinion on Decision issued by  
6 the WCJ on April 20, 2020 is **RESCINDED** and the following is **SUBSTITUTED** in its place:

7 **FINDINGS OF FACT**

- 8 1. Applicant, Jaime Chavez, Jr., while employed on October 13, 2017, as a tree  
9 trimmer, Occupational Group Number 482, at Sanger, California, by Cut It  
10 Right Tree Service, sustained injury arising out of and in the course of  
11 employment to his left leg, right shoulder, bilateral knees and cervical spine,  
12 and claims injury arising out of and in the course of employment to his  
13 psyche, vision and internal system.
- 14 2. Applicant's injury resulted from a sudden and extraordinary employment  
15 condition and his claim of injury to his psyche is not barred by Labor Code  
16 section 3208.3(d).
- 17 3. Further development of the record is needed to address the issue of injury to  
18 the psyche.
- 19 4. All other issues are deferred.

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**ORDER**

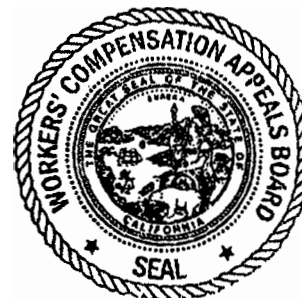
**IT IS HEREBY ORDERED** that the record must be further developed regarding the issue of injury to the psyche.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**



**/s/ JOSÉ H. RAZO, COMMISSIONER**

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

**JULY 13, 2020**

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

**JAIME CHAVEZ  
LAW OFFICES OF JONATHAN BRAND  
STATE COMPENSATION INSURANCE FUND**

***AI/pc***

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