

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

MARLON JOHNSON, *Applicant*

vs.

MHX, LLC; ZURICH AMERICAN INSURANCE, *Defendants*

**Adjudication Number: ADJ12944107
Riverside District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings of Fact and Opinion on Decision (F&O), issued by the workers' compensation administrative law judge (WCJ) on February 11, 2021, wherein the WCJ found that Labor Code section 3208.3(d) exempts defendant from liability for applicant's psychiatric injury because applicant was employed by defendant for less than six months when he was injured and his injury was not caused by a sudden and extraordinary employment condition.

Applicant contends that the WCJ should have found that his injury was caused by a sudden and extraordinary employment condition within the meaning of section 3208.3(d).

We received an answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny Reconsideration.

We have considered the allegations in the Petition, the answer, and the contents of the Report with respect thereto.

As our decision after reconsideration, based on our review of the record and as discussed herein, we will rescind the February 11, 2021 F&O, substitute a new F&O finding that applicant's claim of injury to his psyche is not barred by Labor Code section 3208.3(d), that all other issues

are deferred, and we will return this matter to the trial level for further proceedings consistent with this opinion.

BACKGROUND

On January 31, 2020, applicant filed an application alleging that he sustained injury to various body parts, including left forearm, left elbow, left shoulder, left wrist, chest, neck, ribs, abdomen, left side, facial, lung left side, and injury to his psyche on January 10, 2020, while employed by defendant as a truck driver. On November 30, 2020 and April 13, 2021, applicant filed amended applications to add additional body parts.

On November 19, 2020, applicant filed a declaration of readiness (DOR), which states in pertinent part:

The claim is admitted. Defendant has failed to respond to the RFA dated 09/09/ for psychiatric evaluation and treatment. AA contacted defense counsel on 10/29/, 10/30/, 11/09/ and NCM on 11/17/ and 11/18/ regarding the status of the authorization. Applicant has also designated Richard Dorsey, MD as his secondary treating psychiatrist. To date, AA has not been served UR decision or auth. Applicant seeks WCJ order authorizing treatment with Dr. Dorsey.

Prior to trial, the parties stipulated that applicant had not completed six months of employment for defendant prior to his injury on January 10, 2020. (Pre-trial Conference Statement, p. 2.)

The matter proceeded to trial on January 19, 2021. In pertinent part, the following facts were admitted: applicant sustained injuries AOE/COE to his left forearm, left elbow, left shoulder, left wrist, chest, neck, ribs, abdomen left side, facial, lung left side, hypertension, vision, and headache; and claims to have sustained injury AOE/COE to his psyche, memory loss, speech, back, left fingers, left hand, and hearing. (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 19, 2021 trial, p. 2.)

At trial, the following issues were submitted:

- (1) Injury to the psyche;
- (2) Is the psych injury sudden and extraordinary under Labor Code Section 3208.3; and
- (3) Was the psyche claim timely denied per Labor Code Section 5402(b).

(MOH/SOE, January 19, 2021 trial, p. 2.)

Applicant testified at trial, in pertinent part, as follows¹:

Q. What was your assignment on that day?

A. Originally I am still in training. So originally I was supposed to ride with another driver, and when I got there, they gave me the keys and told me that I was going to follow the driver in another truck.

Q. What was the route that you were supposed to take that day? Did you know in advance?

A. No.

Q. Okay. And at some point did you begin following him on the road?

A. No.

Q. Okay. And why not?

A. Because he told me to go -- go ahead and he would catch up. And he gave me directions of how to get to the other -- the first spot, and that was the spot that we started from.

Q. Okay. And so you proceeded to that destination; correct?

A. Yes.

Q. And tell us what happened along the way to your destination.

A. Well, when I got to the -- to my pickup spot, I picked up, and then he showed up. And I waited on him, and he told me to go ahead and go. Well, he gave me directions to get to our first destination, and then he followed -- he followed behind me.

Q. Okay. At some point were you in traffic, bumper-to-bumper traffic, trying to get to the destination?

A. Yes.

Q. Okay. Let's start from that point.

A. Okay. Yes. I got to the stop sign or traffic light, and for some reason this day -- it was my first day back from three weeks -- for some reason traffic was very heavy. And I made the right turn, I think, on Napa, I think. I made the right turn into traffic, and cars were bumper to bumper.

As I proceeded toward the train tracks, I noticed three or four cars parked on the tracks, and it was kind of unusual because normally they have a sign on the right-hand side saying "Do not park on the tracks."

After that, all of a sudden I seen cars zooming off the tracks, and when I looked to the left, I saw a big bright light and saw that the train tracks start shaking, like rocking the truck, and I knew then that a train was coming.

I then proceeded to look to my left, and I saw the guard rails coming down on the back of the truck, which was odd. Normally the guard rails come down before me, you know, in front of you, not behind you. So I figured I was a little bit too close; so I started, like, you know, using a safety thing that they teach us in school. I took off my seat belt, and I was going to flag the driver in back, but they don't allow you to flag them back because you have to get out and look. That's the gold rule. I didn't have time to get out of the truck and to flag him down.

¹ We are citing to the transcript of applicant's trial testimony, therefore we do not refer to the summary of his testimony in the Minutes of Hearing. (Lab. Code, § 5313; Cal. Code Regs., tit. 8, § 10945.)

So, in my opinion, as fast as that train was coming, I took my best judgment and stay in the safe haven. Safe haven is when you –
THE COURT: Hold on. Hold on. We are getting a little too narrative. Break that up, if you can.

(Transcript, January 19, 2021 trial, testimony of Marlon Johnson, at 3:15-19, 22-24; 4:10-6:10.)

Q. So you were in bumper-to-bumper traffic, and you were approaching railroad tracks; is that correct?

A. Yes.

Q. And there were vehicles in front of you that were stopped on the railroad track; is that correct?

A. Yes.

Q. And was there a line of cars behind you?

A. Yes. In front and back, yes.

Q. Okay. At some point were you stopped in the traffic?

A. Yes.

Q. While you are waiting in traffic, do you hear a sound that is out of the ordinary?

A. No.

Q. Do you hear the siren? A bell? Do you hear a siren or anything?

A. No.

Q. Okay. What was your first warning that a train was approaching?

A. When the cars coming zooming off the tracks.

Q. Prior to the cars zooming off the track, you had no notice of a train approaching?

A. No.

Q. Okay. After the cars started zooming off the track, what happened then?

A. I saw the guard rails coming down behind me.

Q. Where did the guard rail exactly come down behind you? Can you be more specific?

A. In the back of my truck.

Q. And when the guard rail comes down, where does it come down in relation to the trailer that you are hauling and the cabin that you are in?

A. Yeah, it came on the back of -- back of my cab is my tractor and on top of the trailer. It's a flat-bed trailer.

Q. So it is in between your cab and the trailer?

A. Yes.

Q. And so when the arm comes down, what happens after that?

A. When I see the arm come down, I cursed, like, you know, because I looked on the left, I saw the train coming. And at that time I took my seat belt off and was going to proceed to back the people behind me up, but I didn't have time because the truck started shaking because that train was coming real fast.

Q. Were your tires on the railroad track at any time?

A. No.

Q. To your best estimation, was any part of your vehicle hanging over the railroad track?

A. No.

Q. Was it your belief that you were in the clear from the train?

A. In my belief, I was in a safe haven, yes.

Q. So let's take it from there. You are stopped, the arm comes down, and you believe you are in a safe haven. What do you see next?

A. I see a -- I see two lights coming in, and they coming at me real fast.

Q. Where are the lights coming from?

A. They are coming from the train.

Q. Do you have time to do anything at this point?

A. No, I didn't have time because, like I said, I originally thought, from my judgment, that I was clear of the train as it approached.

Q. Did you think about moving forward to get away from the railroad tracks?

A. No. Like I said, the whole time I thought that I was in a safe haven and that a train would miss me.

Q. Okay. Did you think about reversing to back up --

A. Yes. Yes, I thought about backing up but -- I am sorry.

Q. -- to distance your vehicle from the railroad tracks?

A. Yes.

A. I thought about backing up, but they teach us not to never back up because it is a safety hazard.

Q. So you are there, and the train is coming with a bright light. To the best of your recollection, what happens next?

A. My truck started shaking real -- real -- started shaking real hard, and I looked down to make sure I was out of the way of the train, and next thing I remember I was hit.

(Transcript, January 19, 2021 trial, testimony of Marlon Johnson, at 6:23-10:9.)

Footage from applicant's "dash cam" was viewed at trial and applicant provided detailed testimony throughout. (Transcript, January 19, 2021 trial, testimony of Marlon Johnson, at 11:3-11; 11:24-12:6; 12:20-13:15; 13:20-14:2.)

Q. BY MS. JONES: Mr. Johnson --

A. Yes.

Q. -- there's a video of the incident; is that correct?

A. Yes.

Q. And from where did the video come from?

A. It come from inside of my truck.

Q. Thank you.

I am going to play the video and stop it throughout, Mr. Johnson. You can explain what we are seeing.

Q. What are you doing there, Mr. Johnson?

A. I am -- I am looking left and right, scanning -- scanning the tracks, trying to see where the train is coming from.

(Transcript, January 19, 2021 trial, testimony of Marlon Johnson, at 11:3-11; 11:24-12:2.)

Q. Okay. And if we look on the right side of the screen, do you see the arm?

A. Yes. I see the arm come down, yes.

Q. And it came down behind your cab. Okay. Here we go.

Q. BY MS. JONES: The arm is coming down; is that correct, Mr. Johnson?

A. Yes.

Q. Okay. What did you just do there and why?

A. I just took my seat belt off. I was going to proceed to back the people up behind me.

(Transcript, January 19, 2021 trial, testimony of Marlon Johnson, at 12:3-6, 20-25.)

Q. What just happened there?

A. The train -- the lights are getting brighter and brighter, and I saw that it was coming too fast.

Q. Okay. And I saw some shaking. Is that what you were testifying to earlier?

A. Yes.

Q. Inside your truck?

A. Yes. Yes, the lights were getting brighter and the truck started shaking worse, start shaking real bad; so I know the train was coming. It was coming fast.

Q. Okay. What are you feeling there?

A. I am feeling blood. At first I didn't know where I was at until I start feeling the pain, and then I reached up and started -- something dripping from my head, and it was blood.

Q. BY MS. JONES: You were tossed from one seat to the next seat, from the driver's seat to the --

A. Yes.

Q. What is happening here, Mr. Johnson?

A. I am trying to figure out where I was at. I thought I was dreaming. I thought I was asleep, but I am still going back and forth, trying to picture the accident and see what had just happened.

(Transcript, January 19, 2021 trial, testimony of Marlon Johnson, at 13:1-15; 13:20-14:2.)

Applicant's sister Kawana Atkins and his girlfriend Brittany Chapman both testified that applicant was already in an ambulance when they arrived at the scene. (MOH/SOE, January 19,

2021 trial, at 6:13-7:19.) As such, they did not have first-hand knowledge of the events at issue here.

On February 11, 2021, the WCJ issued his Findings, as follows:

1. Marlon Johnson, born [], while employed on 1/10/2020, as a Truck Driver, by THX, LLC, did not sustain a compensable injury arising out of and in the course of employment to his psyche.
2. The incident on 1/10/2020 does not constitute a “sudden and extraordinary” incident.
3. The psyche claim was timely denied.

(F&O, February 11, 2021, p. 1.)

DISCUSSION

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

(a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association’s 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.

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

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

...

(d) Notwithstanding any other provision of this division, no compensation shall be paid pursuant to this division for a psychiatric

injury related to a claim against an employer unless the employee has been employed by that 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).)

Here, the parties stipulated that applicant sustained injuries AOE/COE to his left forearm, left elbow, left shoulder, left wrist, chest, neck, ribs, abdomen left side, facial, lung left side, hypertension, vision, and headache. The parties also stipulated that applicant was not employed by defendant for six months when he was injured. Additionally, applicant claims injury AOE/COE to other body parts, including to his psyche. Therefore, we must consider whether applicant sustained an injury to his psyche as a result of a “sudden and extraordinary employment condition,” within the meaning of section 3208.3(d).

Although the Legislature refers to the term “sudden and extraordinary” employment condition as coming within the meaning of section 3208.3, section 3208.3 does not define “sudden” or “extraordinary.” The Legislative and judicial history of section 3208.3, subdivision (d), shows that an “extraordinary” employment condition as described in that section is something that is other than regular and routine, and is uncommon and unusual.

Analysis of the decisions addressing whether an injury resulted from a “sudden and extraordinary employment condition” reveal that this is a primarily fact-driven inquiry.² As stated by the Court of Appeal in *Matea v. Workers’ Comp. Appeals Bd.* (2006) 144 Cal. App. 4th 1435:

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 v. Workers’ Comp. Appeals Bd.* (2006) 144 Cal. App. 4th 1435, 1450 [71 Cal.Comp.Cases 1522] (*Matea*), emphasis added.)

Consequently, appellate decisions heavily focus on the individual facts in determining whether an employment condition was sudden and extraordinary. In *Matea*, the Court of Appeal

² *Matea v. Workers’ Comp. Appeals Bd.* (2006) 144 Cal.App.4th 1435, 1450; *State Compensation Ins. Fund v. Workers’ Comp. Appeals Bd. (Garcia)* (2012) 204 Cal.App.4th 766, 774 [77 Cal.Comp.Cases 307]; *California Ins. Guarantee Assn. v. Workers’ Comp. Appeals Bd. (Tejera)* (2007) 72 Cal.Comp.Cases 482, 484; *Michael Wing v. Well Industries*, 2019 Cal. Wrk. Comp. P.D. LEXIS 42.

noted that Webster’s Third International Dictionary “defines ‘sudden’ as ‘happening without previous notice or with very brief notice : coming or occurring unexpectedly : not foreseen or prepared for.’” (*Matea, supra*, at p. 1448.) The Court further observed that “extraordinary” is defined “as ‘going beyond what is usual, regular, common, or customary’; and ‘having little or no precedent and usu[ally] totally unexpected.’” (*Id.*, citations omitted.)

Based on the evidence presented, applicant’s injury was the result of a “sudden” employment condition, as described in section 3208.3(d). Applicant, a truck driver, was traveling his assigned route when he was caught in bumper-to-bumper traffic near railroad tracks. He suddenly saw “cars zooming off the tracks...” Crossing guards came down between the cab and the trailer of his truck so applicant was unable to move, however, he believed his truck was clear of the tracks. He took off his seatbelt to get out of the truck, but, based on how quickly the train was approaching, applicant did not have time to leave the safe haven of his truck. He testified that his truck was shaking because the train was coming at him “real fast.” Applicant testified that he saw the bright lights of the train, his truck was shaking really hard, and the next thing he remembers is the train colliding with his truck. Based on these facts, the collision occurred suddenly, unexpectedly, and without previous notice. (*Matea, supra*, at p. 1448.)

Because the employment condition that caused applicant’s psychiatric injury was “sudden” within the meaning of section 3208.3(d), we turn to whether it was “extraordinary.” In light of the legislative and judicial history, the reference to an “extraordinary” employment condition in section 3208.3(d) is an event that is not regular and routine, going beyond what is usual, regular, common, or customary. (*Matea, supra*, at p. 1448, quoting Webster’s.)

In *Wal-Mart Stores, Inc. v Workers’ Comp. Appeals Bd. (Garcia)* (2003) 112 Cal.App.4th 1435 [68 Cal.Comp.Cases 1575], the Court described the worker’s injury as flowing “from the effects of an admitted routine physical injury,” but without any discussion of the circumstances in holding that compensation for the related injury to psyche was barred by section 3208.3(d). The Court did not explain how it reached the view it offered in dicta that “extraordinary” employment conditions would include “events which would naturally be expected to cause psychic disturbances even in a diligent and honest employee.”³

³ The Court’s reference in *Wal-Mart* to a “diligent and honest employee” has been cited in subsequent cases, but that phrase does not appear anywhere in the statute or legislative history.

In *Matea*, the injured worker sustained an admitted orthopedic injury while working in a Home Depot store when a rack of lumber fell on his left leg. (*Matea, supra*, at p. 1438.) A psychiatric injury was claimed as a compensable consequence. (*Id.*) The worker had not been employed for six months when the injury occurred, so the employer denied that any psychiatric injury was compensable, contending that the injury was not caused by a sudden and extraordinary employment condition. (*Ibid.*) The Court in *Matea* agreed with dicta in *Garcia* that gas main explosions and workplace violence could constitute extraordinary events, but found that Court's view of the issue to be too restrictive, writing as follows:

We also agree that the sudden and extraordinary employment condition language in Section 3208.3, subdivision (d), could certainly include occurrences such as gas main explosions or workplace violence. However, giving the language of the statute 'its usual, ordinary import' [citation], in light of its legislative history, and liberally construing the statute in the employee's favor (§3202), we believe that the Legislature intended to except from the six-month limitation psychiatric injuries that are caused by 'a sudden and extraordinary employment condition,' and not by a regular or routine employment event...

Gas main explosions and workplace violence are certainly uncommon and usually totally unexpected events; thus, they may be sudden and extraordinary employment conditions. However, we believe that there may also be other 'sudden and extraordinary' occurrences or events within the contemplation of section 3208.3, subdivision (d) that would naturally be expected to cause psychic disturbances even in diligent and honest employees. Therefore, if an employee carries his or her burden of showing by a preponderance of the evidence that the event or occurrence that caused the alleged psychiatric injury was something other than a regular and routine employment event or condition, that is, that the event was uncommon, unusual, and occurred unexpectedly, the injury may be compensable even if the employee was employed for less than six months... (*Matea, supra*, at pp. 1448-1449, emphasis added.)

In *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (Garcia)* (2012) 204 Cal.App.4th 766 [77 Cal.Comp.Cases 307], the Court agreed with the view expressed in *Matea* that an employment event is extraordinary if it is something that is not a regular and routine employment event, and further noted that "an accidental injury may be uncommon, unusual and totally unexpected" depending upon the circumstances. (*Id.*, at pp. 772-773.) The Court concluded that an avocado picker did not offer "particularly strong evidence on extraordinariness" to support his claim that his fall from a 24-foot ladder was unusual or extraordinary because the risk of falling

from a ladder was within the ordinary hazards of the occupation of picking avocados. (*Id.*, at p. 774.)

In some instances an ordinary occupational event may become extraordinary. (*Garcia, supra.*) In *Matea*, an injury caused by a rack of falling lumber in a store aisle was considered extraordinary because “no testimony was presented regarding how often lumber falls from racks into the aisles [], and there was no evidence presented that such occurrences are regular and routine events.” (*Matea, supra*, at p. 1450.)

In *Bayanjargal v. Workers’ Comp. Appeals Bd.* (2006) 71 Cal.Comp.Cases 1829 (writ den.), the WCAB found that, while a roofer’s fall from a roof was a *sudden* event, it could not be characterized as an *extraordinary* event. (*Bayanjargal v. Workers’ Comp. Appeals Bd.* (2006) 71 Cal.Comp.Cases 1829, 1830 (writ den.)) *Villicana v. Workers’ Compensation Appeals Bd.* (2008) 73 Cal.Comp.Cases 317 (writ den.) also involved a roofer who was injured when he fell off a ladder. Citing *Bayanjargal*, the WCJ in *Villicana* determined that although the fall was “clearly a sudden event, it is not an extraordinary employment event and, in turn, the psychiatric injury not compensable.” (*Id.*, at p. 319.) In *Travelers Casualty & Surety Co. v. Workers’ Comp. Appeals Bd. (Dreher)* (2016) 246 Cal.App.4th 1101 [81 Cal.Comp.Cases 402], the injured worker did not meet the burden of showing that a live-in maintenance supervisor’s slip-and-fall on rain-slicked concrete was extraordinary.

While automobile accidents generally are not extraordinary events for a truck driver, they may become extraordinary because of extremely unusual circumstances. In *Tejera*, the WCJ determined that it was not “frequent, regular or routine for a driver to fly or fall out of the passenger side of a vehicle after losing control of same while it is moving or stopped with a jackknifing trailer in pursuit as the driver tries to roll out of the way.” (*California Ins. Guarantee Assn. v. Workers’ Comp. Appeals Bd. (Tejera)* (2007) 72 Cal.Comp.Cases 482, 484.)

In *Lira v. Premium Packing* (2015) Cal. Wrk. Comp. P.D. LEXIS 299,⁴ a worker was injured when a train collided with tractor being operated by the worker. The issue in *Lira* was whether the driver’s claim was barred by Labor Code § 3208.3(e) as a post-termination claim. The

⁴ Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers’ Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers’ Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

WCAB found compensability based on the “sudden and extraordinary” exception in Labor Code § 3208.3(e)(1), and reasoned that (1) under *Matea*, “sudden and extraordinary” employment events are those events that are “uncommon, unusual and totally unexpected,” (2) although motor vehicle accidents are generally not extraordinary events, accidents that occur under extremely unusual circumstances, as described in *Tejera*, may be interpreted as extraordinary, (3) type of accident where a train collides with a tractor-trailer, such as occurred here, was not routine or ordinary but rather was uncommon and unexpected, so as to fall within “sudden and extraordinary” exception as interpreted in *Matea* and *Tejera*, and (4) as here, defendant presented no evidence that applicant’s accident was common or routine. (*Lira, supra.*) The *Lira* case is procedurally distinct, as the post-termination defense has not been raised here, but we find the *Lira* panel’s reasoning persuasive with respect to “extraordinary” and both cases involve collisions with trains. In *Peterson v. Downs Equip. Co.*, the brakes on the worker’s tractor-trailer failed on US Highway 5, causing the truck to careen downhill at a high speed and ultimately crash. The panel found that “‘extraordinary’ does not mean unprecedented but instead means not frequent, regular or routine.” (*Peterson v. Downs Equip. Co.*, 2016 Cal. Wrk. Comp. P.D. LEXIS 358, *13.)

Here, the weight of the evidence supports a finding that the employment condition causing applicant’s injury was sudden and extraordinary. Being hit by a commuter train is not a common or normal part of a truck driver’s employment conditions. In this case, defendant presented no evidence that other of its truck drivers have been hit by trains. Moreover, defendant presented no evidence that this type of collision is common, usual, expected, or frequent. Being hit by a commuter train at a railroad crossing is not a regular or routine employment event, even for truck drivers.

Rejecting liability pursuant to section 5402(b) is separate and distinct from raising an affirmative defense pursuant to section 3208.3(d). (Lab. Code, §§ 3208.3(d), 5402(b); *James v. Workers’ Comp. Appeals Bd.* (1997) 55 Cal.App.4th 1053, 1055 [62 Cal.Comp.Cases 757].) Section 5402(b) establishes a presumption that an injury is compensable under the workers’ compensation system if liability is not rejected “within 90 days after the date the claim form is filed.” (Lab. Code, § 5402(b); *Honeywell v. Workers’ Comp. Appeals Bd. (Wagner)* (2005) 35 Cal.4th 24, 29 [70 Cal.Comp.Cases 97].) Here, defendant is not precluded from asserting a defense under section 3208.3(d), but section 5402(b) is not applicable because liability was accepted.

Defendant's reference to a vehicle code violation introduces an element of blame, which is improper in our no-fault system. (See Lab. Code, § 3600(a) [liability for injury AOE/COE shall exist against an employer "without regard to negligence"]; see also *Mathews v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 719, 728-735 [37 Cal.Comp.Cases 124] [outlining the history of the state workers' compensation system and its no-fault provisions].)

Upon return to the trial level, we recommend that the parties conduct medical discovery on the issue of injury to psyche and it would be appropriate for the parties to obtain a comprehensive medical-legal evaluation. (Lab. Code, §§ 4060, 4061, 4062, 4062.2.) The issue of injury to the psyche is premature as the record before us does not contain substantial medical evidence.

Accordingly, we rescind the February 11, 2021 F&O, substitute a new F&O finding that applicant's claim of injury to his psyche is not barred by Labor Code section 3208.3(d) and that all other issues are deferred, and we return this matter to the trial level for further proceedings consistent with this opinion.

It should be noted that we express no final opinion on other outstanding issues.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Order, and Opinion on Decision issued by the WCJ on February 11, 2021 is **RESCINDED** and the following **SUBSTITUTED** in its place:

FINDINGS OF FACT

Finding 1: Applicant's claim of injury to his psyche is not barred by Labor Code section 3208.3(d).

Finding 2: All other issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 30, 2022

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

**MARLON JOHNSON
JONES LEGAL
LAW OFFICES OF TRACEY LAZARUS**

JB/abs

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