WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EYANA SPENCER, ***Applicant***

vs.

OAKLAND UNIFIED SCHOOL DISTRICT, permissibly self-insured, administered by HAZELRIGG CLAIMS MANAGEMENT. ***Defendants***

Adjudication Numbers: ADJ13057141
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the "Findings and Award" (F&A) issued on October 12, 2020, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant sustained industrial injury to her psyche, but that the injury did not cause compensable permanent disability as the entirety of permanent disability was apportioned under Labor Code[2] section 4664.

Applicant argues that her 2019 injury to the psyche caused permanent disability independent from her prior injury to psyche in 2008 and that defendant failed to meet its burden of proving overlap under section 4664.

We have not received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, and the contents of the WCJ's Report. Based on our review of the record and for the reasons stated in the WCJ's Report, which we adopt and incorporate, and for the reasons stated in the WCJ's Opinion on

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[1] Commissioners Sweeney and Lowe were on the panel that issued the order granting reconsideration. Commissioners Sweeney and Lowe no longer serves on the Appeals Board. New panel members have been substituted in their place.
[2] All future references are to the Labor Code unless noted.

Decision issued on October 12, 2020, which we adopt and incorporate, as our Decision After Reconsideration we will affirm the WCJ's October 12, 2020 F&A.

The essence of applicant's argument is that applicant's disability to the psyche in 2008 does not overlap with the current disability to psyche in 2019, and thus defendant failed to prove apportionment. The injury to psyche in both cases was post-traumatic stress disorder. Applicant's disability was rated the exact same way, using the Global Assessment of Functioning (GAF). The diminished future earnings capacity modifier for both cases was 1.4. It is the same body part, same diagnosis, and same rating method in both cases. On these facts the two disabilities clearly overlap. (See, *Kopping v. Workers' Comp. Appeals Bd.*, (2006), 142 Cal. App. 4th 1099.) The WCJ was correct to apply apportionment under section 4664.

There may be cases where separate and independent disabilities occur to the same body part and the analysis of overlap is more intricate. The record here does not support such a finding.

Accordingly, as our Decision After Reconsideration we will affirm the WCJ's October 12, 2020 F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued on October 12, 2020 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 16, 2024

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

EYANA SPENCER
LAW OFFICES OF ARJUNA FARNSWORTH
SHAW JACOBSMEYER CRAIN & CLAFFEY

EDL/oo

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

By timely, verified petition filed on November 4, 2020, applicant seeks reconsideration of the decision filed herein on October 13, 2020, in this case, which arises out of injury, admitted then denied, to the psyche of a school principal at the hands of a parent of one of her students. Petitioner, hereinafter applicant, contends in substance that, although I found her injury compensable, I erred in not awarding her permanent disability because the current ratable impairment does not overlap with that awarded in a previous case. Defendant has not filed an answer.[1] I will recommend that reconsideration be denied.

BACKGROUND

The facts are summarized in the opinion on decision:

> The claim stems from an incident at applicant's elementary school, when the mother of a third-grader (and, also, a former student) confronted her over her treatment of those children. This parent was reportedly "known to be using drugs (crack and marijuana and alcohol)" and was familiar to Ms. Spencer from the time the older child began at the school in 2005. Applicant called the police, who came and escorted the mother from the school.[2] Ms. Spencer left work early, called Kaiser's mental health facility and, thereafter, her own therapist, who took her off work. Defendant paid temporary disability benefits beginning May 4, 2019, through January 6, 2020, when applicant returned to a modified position with the school district.
>
> This is set against a background that includes an earlier incident in which a custodian, disguised with wig and sunglasses and reportedly armed with a

[1] Although a party is not required to file an answer to a petition for removal or reconsideration, it is commonly viewed as an appropriate practice. See, California Workers' Compensation Practice, Continuing Education of the Bar, section 21.44; State Farm Fire and Cas. Co. v. Wkrs. Comp. Appeals Bd. (Felts) (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622]. The appeals board and appellate courts are "not required to search the record in an attempt to develop answers to the contentions of the petitioner and [are] entitled to assume that the petitioner's statement of facts is accurate and that the contentions advanced are meritorious." Id., citations omitted. Any answer must be filed within ten days of service of the petition (§ 5905), and if service is by mail five days are added (Code Civ. Proc. § 1013, imported into workers' compensation law by § 5316). However, the judge's report and recommendation is due 15 days after the filing of the petition, so as a practical matter if the responding party uses all of the allotted time to file an answer, including the extension, it is impossible for the trial judge to consider it when preparing that report. All statutory references not otherwise identified are to the California Labor Code.

[2] This history comes from the report of Dr. James Robbins dated September 23, 2019, Exh. 103, at pg. 5. He presumably took it, in turn, from Ms. Spencer.

semi-automatic weapon, attacked her from behind and pistol-whipped her, causing lacerations and lasting psychological trauma diagnosed as post-traumatic stress disorder or PTSD. Applicant missed relatively little time from work, however, though she did continue in therapy and took prescription medications for a time. The parties engaged an agreed medical evaluator (AME), Dr. Richard Lieberman, who reported on November 10, 2009, that applicant's injury had stabilized, with a GAF[3] score of 60 or 15% permanent impairment, of which he apportioned 10% to nonindustrial causes. The workers' compensation case resolved by a stipulated award of 27% permanent disability with a need for further medical treatment. It appears that defendant came to question its ongoing liability for medical care (no other issue remained), and Dr. Lieberman reëxamined Ms. Spencer in 2016, concluding in his report of June 16, 2016, that she no longer showed signs of PTSD. The AME at this point did find a GAF score of 64 and recommended limiting further treatment.

In the current matter, the parties have engaged a qualified medical evaluator (QME), Dr. Robbins, who has authored three reports. In the first, dated September 23, 2019, he equivocated about permanent and stationary status, clarifying in a supplemental report dated November 13, 2019, that applicant's condition had not stabilized and he would need to see her again after some months had passed after her return to work. In his ultimate report, dated March 4, 2020, the QME found her maximally improved, with a GAF score of 65, plus additional impairment for sleep difficulties, amounting to 11% whole-person impairment, of which 75% stems from the 2019 injury and the rest from that in 2008. His diagnoses are "chronic posttraumatic stress disorder, in partial remission," "major depressive disorder, recurrent episode in partial remission," and obesity.

After trial, I concluded that applicant had established that the predominant-cause threshold required by section 3208.3 had been met, on the basis of Dr. Robbins's reporting, but that the impairment found by this QME did indeed overlap, and thus did not "[affect] different abilities to

[3] Global Assessment of Functioning

compete and earn." (Sanchez v. County of Los Angeles (2005) 70 Cal.Comp.Cases 1440 (appeals board en banc) (cited in the petition). The result was a finding of injury and need for treatment, but no permanent disability.

DISCUSSION

Applicant points out, correctly, that by the time of her evaluation by Dr. Lieberman in November, 2009, she had returned to work as a school principal, "without," he reported, "subsequent disruption." In his later report, in 2016, that AME disagreed with the continuing diagnosis by a treating psychologist of PTSD, which is central to Ms. Spencer's contention that her current diagnosis is in fact a new one, that her current condition impairs her "abilities to compete and earn" in a new way. This is addressed in the opinion:

The problems with this argument begin with the conclusions of the later QME, Dr. Robbins, who quite clearly believes that Ms. Spencer's current diagnosis of PTSD first took shape in 2008, and the 2019 injury "aggravated her previous PTSD" (Exh. 103, report of September 23, 2019, pg. 7) and "reactivated her original PTSD" (Exh. 101, report of March 4, 2020, pg. 10). Even the sleep-related difficulties, for which the QME now adds 3% impairment, were reported following her 2008 injury.

Applicant distinguishes the two injuries and the two cases by emphasizing certain facts, including, as mentioned, the years during which she continued to work as a school principal between the 2008 event and that in 2019, and her later inability to do so. She also highlights differences in the diagnoses offered by treating and evaluating physicians in their aftermaths. However, I do not believe that it is accurate to infer that she had recovered from her 2008 injury when she received an award of permanent disability for that injury, or to imply that that award was not for psychological disability, or that that disability was not rated on the basis of PTSD. As stated above, the record suggests otherwise. Moreover, the legislature effectively eliminated the possibility that an employee can recover from a work injury, for purposes of an award of permanent disability for a later injury, when it enacted section 4664, with its conclusive presumption that the previous disability "exists at the time of any subsequent industrial injury."

Applicant cites several cases in support of her argument that her permanent impairment and resultant disability award following her 2008 injury was rated differently than that from her 2019 injury, and thus cannot be the subject of apportionment under section 4664. Factually,

however, that would not appear to be the case here: Not only did the physician evaluating the psychological effects of Ms. Spencer's 2008 injury rate those effects with the PTSD diagnosis predominating, but the evaluator engaged for the 2019 injury specifically found that the impairment he rated, using the GAF scale, constituted an aggravation of the earlier condition. In sum, I remain persuaded that the disabilities fully overlap.

RECOMMENDATION

I recommend that reconsideration be denied.

Dated: November 23, 2020

Christopher Miller
Workers' Compensation Judge

OPINION ON DECISION

This case arises out of an admitted injury,[4] on May 3, 2019, to the psyche of a school principal who now seeks compensation for permanent disability arising therefrom.

The claim stems from an incident at applicant's elementary school, when the mother of a third-grader (and, also, a former student) confronted her over her treatment of those children. This parent was reportedly "known to be using drugs (crack and marijuana and alcohol)" and was familiar to Ms. Spencer from the time the older child began at the school in 2005. Applicant called the police, who came and escorted the mother from the school.[5] Ms. Spencer left work early, called Kaiser's mental health facility and, thereafter, her own therapist, who took her off work. Defendant paid temporary disability benefits beginning May 4, 2019, through January 6, 2020, when applicant returned to a modified position with the school district.

This is set against a background that includes an earlier incident in which a custodian, disguised with wig and sunglasses and reportedly armed with a semi-automatic weapon, attacked her from behind and pistol-whipped her, causing lacerations and lasting psychological trauma diagnosed as post-traumatic stress disorder or PTSD. Applicant missed relatively little time from work, however, though she did continue in therapy and took prescription medications for a time. The parties engaged an agreed medical evaluator (AME), Dr. Richard Lieberman, who reported on November 10, 2009, that applicant's injury had stabilized, with a GAF[6] score of 60 or 15% permanent impairment, of which he apportioned 10% to nonindustrial causes. The workers' compensation case resolved by a stipulated award of 27% permanent disability with a need for further medical treatment. It appears that defendant came to question its ongoing liability for medical care (no other issue remained), and Dr. Lieberman reëxamined Ms. Spencer in 2016, concluding in his report of June 16, 2016, that she no longer showed signs of PTSD. The AME at this point did find a GAF score of 64 and recommended limiting further treatment.

In the current matter, the parties have engaged a qualified medical evaluator (QME), Dr. Robbins, who has authored three reports. In the first, dated September 23, 2019, he equivocated about permanent and stationary status, clarifying in a supplemental report dated November 13, 2019, that applicant's condition had not stabilized and he would need to see her again after some months had passed after her return to work. In his ultimate report, dated March 4, 2020, the QME found her maximally improved, with a GAF score of 65, plus additional impairment for sleep difficulties, amounting to 11% whole-person impairment, of which 75% stems from the 2019 injury and the rest from that in 2008. His diagnoses are "chronic posttraumatic stress disorder, in partial remission," "major depressive disorder, recurrent episode in partial remission," and obesity.

The two issues submitted for decision are compensability and permanent disability.

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[4] Injury was admitted, and temporary disability indemnity and medical treatment were provided by defendant. At the mandatory settlement conference (MSC), however, on August 12, 2020, defendant raised the issue of the "[statutory] threshold for compensability," and argued at trial that applicant had failed to establish, through medical evidence, that "actual events of employment were predominant as to all causes combined" of the injury. This is discussed *infra*.

[5] This history comes from the report of Dr. James Robbins dated September 23, 2019, Exh. 103, at pg. 5. He presumably took it, in turn, from Ms. Spencer.

[6] Global Assessment of Functioning

DISCUSSION

Defendant's contention regarding compensability amounts to this: While Dr. Robbins has concluded that applicant's psychological condition was substantially caused by her 2019 injury, and that 75% of her permanent impairment results from that event, he has not stated that the injury itself was predominantly caused by that incident.[7]

Section 3208.3[8] provides, in relevant part, as follows:

> (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.
> (3) For the purposes of this section, "substantial cause" means at least 35 to 40 percent of the causation from all sources combined.
> (c) It is the intent of the Legislature in enacting this section to establish a new and higher threshold of compensability for psychiatric injury under this division.

Here, defendant focuses on subdivision (b)(1), applicant on (b)(2). Applicant contends that her injury should be seen as one arising from a violent act, finding support for her theory in Larsen v. Securitas Security Services (2016) 81 Cal.Comp.Cases 770 [2016 Cal.Wrk.Comp. P.D. Lexis 237] (board panel decision deemed "noteworthy" by the editors of LexisNexis). There, the commission used the definition of "violent" found in Black's Law Dictionary:

> 1. Of, relating to, or characterized by strong physical force <violent blows to the legs>. 2. Resulting from extreme or intense force <violent death>. 3. Vehemently or passionately threatening <violent words>.

There being no contrary evidence of the circumstances and events of May 3, 2019, I must measure the applicability of the "violent act" exception by the description provided by the QME

[7] It is well established that causation of injury and of permanent disability are distinct concepts: Clearly, some injuries get better, leaving the second question moot; just as clearly, some do not (and some get worse), justifying the continued employment of people such as myself.
[8] All statutory references not otherwise identified are to the Labor Code.

of an angry parent whose behavior was alarming enough to get her escorted away by police, and on that basis can only conclude that her words were "violent" and "vehemently or passionately threatening." Presumably, defendant understood them that way, up until the time of the MSC, and paid benefits accordingly. (Defendant also stated at trial that it had not ceased providing medical treatment. It did not specify whether this was for the 2019 injury, or that in 2008, or both.) The injury is compensable.

Permanent disability is another matter. Defendant contends that applicant's earlier award must be accounted for, under section 4664.

Section 4664 provides as follows:

> (a) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.
>
> (b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.
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> (c)(1) The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662. As used in this section, the regions of the body are the following:
>
> (A) Hearing.
>
> (B) Vision.
>
> (C) Mental and behavioral disorders.
>
> (D) The spine.
>
> (E) The upper extremities, including the shoulders.
>
> (F) The lower extremities, including the hip joints.
>
> (G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive.
>
> (2) Nothing in this section shall be construed to permit the permanent disability rating for each individual injury sustained by an employee arising from the same industrial accident, when added together, from exceeding 100 percent.

If defendant is correct, the earlier 27% award, based on 90% of 15% whole-person impairment, would eviscerate any permanent disability resulting from Ms. Spencer's 2019 injury. She counters that defendant has not met its burden of proving that the impairments from the two injuries overlap, citing Kopping v. Workers' Comp. Appeals Bd. (2006) 142 Cal.App. 4th 1099 [71 Cal.Comp.Cases 1229] and contending that she had largely recovered from her 2008 injury by the time of the second event, and specifically that Dr. Lieberman found essentially no symptoms of the PTSD at the time of his reëvaluation in 2016, so the current PTSD diagnosis cannot overlap with the problems that had emanated from the earlier assault.

The problems with this argument begin with the conclusions of the later QME, Dr. Robbins, who quite clearly believes that Ms. Spencer's current diagnosis of PTSD first took shape

in 2008, and the 2019 injury "aggravated her previous PTSD" (Exh. 103, report of September 23, 2019, pg. 7) and "reactivated her original PTSD" (Exh. 101, report of March 4, 2020, pg. 10). Even the sleep-related difficulties, for which the QME now adds 3% impairment, were reported following her 2008 injury.

I cannot, on the basis of this record, conclude that applicant has sustained compensable permanent disability as a result of her 2019 work-related injury, because I must find that defendant has met its burden of proving overlap between the effects of that injury and those resulting from her 2008 assault, for which she received an award of 27% disability.

Dr. Robbins has clearly indicated that applicant is in need of further treatment for the effects of her 2019 injury.

Because I have not awarded further indemnity, beyond what has been paid, there is no fund from which to award an attorney fee.

Date: October 12, 2020

Christopher Miller
Workers' Compensation Judge