

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

Case No. VNO 375695

EVELYN TACLUBAN,

Applicant,

vs.

BANK OF AMERICA, Permissibly Self-Insured,

Defendant.

OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION AND
DECISION AFTER
RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award issued February 14, 2000, in which a workers' compensation administrative law judge (WCJ) found that applicant, a legal loan administrator born November 27, 1948, sustained industrial injury to her psyche during the period August 10, 1988, to and including April 14, 1992. The WCJ further found, in pertinent part, that applicant's industrial psychiatric injury resulted in (1) temporary disability (TD) beginning August 2, 1990, to and including December 30, 1990, and April 15, 1992, to July 15, 1992; (2) 60% permanent disability (PD) without apportionment; and (3) a need for further medical treatment.

Defendant contends error, asserting that the record does not justify an unapportioned award because Dr. Brian Jacks, the Agreed Medical Examiner (AME), found apportionment to non-industrial pre-existing problems was appropriate. Citing Labor Code section 5703 (§ 5703), *McClune v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.App.4th 1117 (63 Cal.Comp.Cases 261), and *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 (62 Cal.Comp.Cases 924), defendant requests that the WCJ's decision be rescinded, and the matter returned to the trial level for further proceedings to take into consideration the factors of apportionment set forth by Dr. Jacks. Defendant further

1 suggests that the matter be referred back to Dr. Jacks for clarification, as appropriate,
2 with respect to apportionment, and/or that the WCJ develop the record fully and refer
3 the matter to an Independent Medical Examiner, if necessary.

4 Based on the record, we will grant reconsideration, rescind the WCJ's decision,
5 and return the matter to the WCJ for further proceedings to supplement the medical
6 record pursuant to *McClune, supra, Tyler, supra, and Raymond Plastering Co. v. Workers'*
7 *Comp. Appeals Bd. (King)* (1967) 252 Cal.App.2d 748 (32 Cal.Comp.Cases 287),

8 We note that this matter was previously before us when we granted applicant's
9 petition for reconsideration filed on May 7, 1999. In her petition, applicant argued that
10 the WCJ had erroneously apportioned 40% of her PD to pre-existing non-industrial
11 psychiatric disability. On September 12, 1999, we issued an Opinion and Decision After
12 Reconsideration (O&D) in which we returned the matter to the WCJ for further
13 proceedings with respect to the issue of apportionment.

14 We noted that the principles on apportionment under Labor Code sections 4663
15 and 4750 (§ 4663; § 4750) are well-settled (O&D, at pp. 2-3). We also discussed Dr. Jacks'
16 AME reports of March 14, 1998, August 31, 1993, June 24, 1993, and his deposition of
17 June 13, 1997 (*Id.*, at pp. 3-4). We further noted that Dr. Jacks had indicated applicant was
18 "depressed before the alleged work stress and strain began at the Bank of America," and
19 that he had listed 10 psychosocial stressors causing applicant's psychiatric problems, of
20 which eight were non-industrial (*Id.*).

21 We also discussed the Report and Recommendation on Petition for
22 Reconsideration which the WCJ had submitted in response to applicant's petition. The
23 WCJ had indicated he had based his finding that apportionment was warranted upon
24 Dr. Jack's opinion, applicant's testimony, and a review of the entire record (*Id.*, at p. 4).
25 While we found no error in the WCJ's apparent conclusions that apportionment was
26 inappropriate under § 4750, or in his reliance upon Dr. Jacks' opinion, we concluded he
27 had applied an incorrect legal standard under § 4663. We noted that under § 4663, there

1 need not be pre-existing disability, only disability at the time of the examination, due to
2 the normal progression of a non-industrial condition. We indicated the WCJ was not
3 required to determine whether applicant had a present or pre-existing disability at the
4 time of the work incident or exposure, or whether the natural progression of this
5 disability would have existed without the work incident/exposure. We therefore
6 returned the matter to the WCJ to allow him to hold further proceedings to reevaluate
7 the issue of apportionment under the proper standard, and instructed him that he could
8 obtain a supplementary report as necessary.

9 On remand, the matter moved forward. At conference on December 21, 1999,
10 defendant moved for a supplemental report or an opportunity to again depose the AME.
11 Applicant objected that further discovery violated Labor Code section 5502(d)(3) (§
12 5502(d)(3). The WCJ concluded that further discovery was closed, and determined he
13 could resolve the apportionment issue based upon the three reports submitted over
14 three years by the AME and by the AME's deposition in 1997.

15 In his present Report and Recommendation on Petition for Reconsideration
16 responding to defendant's petition for reconsideration of the unapportioned award, the
17 WCJ frames the issue as whether it was error to refuse to reopen the record on
18 apportionment. He notes that he pointed out to the parties prior to trial that the
19 apportionment language had been inadequate, but he concludes that further
20 development of the record with respect to apportionment, pursuant to Labor Code
21 sections 5701 and 5906, "cannot be used to circumvent the clear intent and language of §
22 5502(d)(3)." The WCJ states he "can find no basis for re-opening the record under
23 5503d(3) [sic] where Petitioner had over five years to resolve this evidence," and cannot
24 find any justification for allowing a second deposition of the AME or additional
25 supplemental reports. He explains, therefore, that although applicant's "testimony as to
26 the effects of the non-industrial stressors were not believable," defendant failed to satisfy
27 its burden on apportionment.

1 Under the facts of this matter, we are not persuaded that the WCJ has correctly
2 analyzed the issue of developing the record. The WCJ has acknowledged that the record
3 with respect to apportionment is inadequate. Under the long-established doctrine of
4 *Raymond Plastering Co. v. Workers' Comp. Appeals Bd. (King)* (1967) 252 Cal.App.2d 748 (32
5 Cal.Comp.Cases 287), the WCJ has the duty and obligation to develop the record where
6 it is inadequate. Moreover, the Courts of Appeal have recently addressed the importance
7 of developing the record, holding that there is a duty on the WCJ's part to order the
8 taking of additional evidence when the record is inadequate to support a finding of
9 industrial causation, and that failure to do so may violate a party's due process rights
10 (see *McClune, supra*; see also *Tyler, supra*; *M/A Com-Phi v. Workers' Comp. Appeals Bd.*
11 (*Sevadjian*) (1998) 65 Cal.App.4th 1020 [63 Cal.Comp.Cases 821]).

12 Here, legitimate questions were raised both by the WCJ and the Board with respect
13 to the issue of apportionment. Hence, under *McClune-Tyler* principles, we are persuaded
14 that the WCJ had the authority to supplement the medical record. The issue before the
15 WCJ is not that the parties are seeking to reopen discovery; rather, the Board is directing
16 that the record be supplemented so that the apportionment issue can be correctly
17 determined. Accordingly, § 5502(d)(3) does not govern this matter.

18 In light of the foregoing circumstances, we will grant reconsideration, rescind the
19 WCJ's decision, and return the matter for further proceedings as are appropriate and
20 necessary to supplement the record with respect to apportionment, in accordance with
21 this opinion and with our prior O&D. After all further proceedings are concluded, the
22 WCJ shall issue a new decision.

23 For the foregoing reasons,

24 **IT IS ORDERED** that defendant's Petition for Reconsideration filed March 6,
25 2000 is **GRANTED**.

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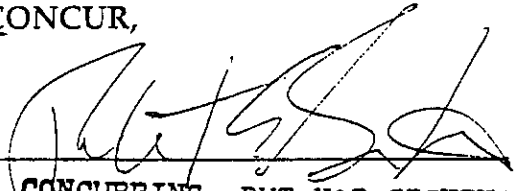
TACLUBAN, EVELYN

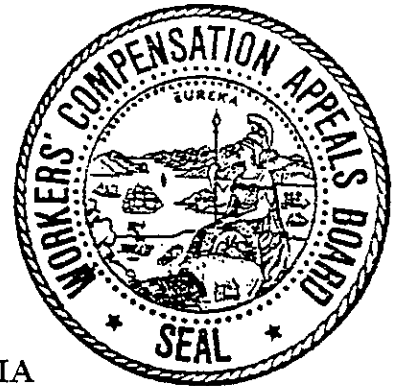
1 IT IS FURTHER ORDERED, as the Decision After Reconsideration of the
2 Workers' Compensation Appeals Board, that the Findings and Award issued February
3 14, 2000 is **RESCINDED**, and this matter is **RETURNED** to the hearing level for further
4 proceedings and decision consistent with this opinion.

5
6 **WORKERS' COMPENSATION APPEALS BOARD**

7  **DEPUTY**

8
9 I CONCUR,

10 
11 _____
12 **CONCURRING, BUT NOT SIGNING**
13 **ROBERT N. RUGGLES**

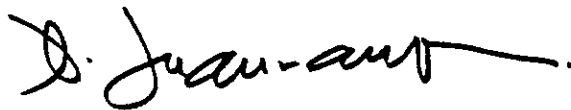


14
15 **DATED AND FILED IN SAN FRANCISCO, CALIFORNIA**

16 **MAY 05 2000**

17 **SERVICE BY MAIL ON SAID DATE TO ALL PARTIES**
18 **LISTED ON THE OFFICIAL ADDRESS RECORD EXCEPT**
19 **LIEN CLAIMANTS.**

20 csl

21 

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

PGS

Case No. VNO 375695

EVELYN TACLUBAN,

Applicant,

vs.

BANK OF AMERICA, Permissibly self-
insured,

Defendants.

FINDINGS AND AWARD

LAW OFFICES OF ALBERT I. KAUFMAN
By Albert I. Kaufman
Attorney for Applicant.

KEGEL, TOBIN & TRUCE
By Ted C. Hanf, Esq.
Attorneys for Defendants.

* * * * *

Application having been filed herein, all parties having appeared, and the matter having been submitted on the issue of apportionment, the Honorable BARRY R. GOLDMAN, Workers' Compensation Administrative Law Judge, finds and awards as follows:

FINDING OF FACT

1. Evelyn Tacluban, born November 27, 1948, while employed as a legal loan administrator, at Pasadena, California, during the period August 10, 1988 to and including April 14, 1992, by Bank of America, then permissibly self-insured, sustained injury arising out of and occurring in the course of her employment to her psyche.

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2. Applicant's earnings at the time of injury were stipulated to be \$507.46, producing a temporary disability rate of \$336.00 per week, and a permanent disability rate of \$140.00 per week.

3. This injury caused temporary disability beginning August 2, 1990 to and including December 30, 1990, and April 15, 1992 to July 15, 1992, entitling applicant to temporary disability indemnity at the rate of \$336.00 per week, less credit for time worked, or E.D.D. benefits paid, if any, and Temporary Disability Benefits paid with the unpaid periods to be paid at the rate of \$336.00 per week.

4. This injury caused permanent disability of 34.25 percent, entitling applicant to 155.75 weeks of disability indemnity at the rate of \$140.00, in the total sum of \$21,805.00, less credit to defendants for all sums heretofore paid, and less credit for attorney fees awarded herein.

5. It is found that there is legal basis for apportionment, proper apportionment of 40%.

6. Applicant is in need of further medical treatment to cure or relieve from the effects of the injury herein limited to her psyche.

7. Defendant is Ordered to pay all medical treatment per RVS for treatment prior to 1/1/94 and all medical treatment per CPT for treatment after 1/1/94.

8. The Employment Development Department is entitled to recover their lien during the above temporary disability period. The remainder of their lien is disallowed.

9. It appears from the record the defendant is entitled to credit for benefits paid under their long-term disability policy provided said policy was totally paid for by the employer. The court will retain jurisdiction over this matter.

10. Applicant's attorney, Albert Kaufman has performed valuable services herein and is entitled to a fee of \$3,000.00, and the prior attorney, Michael Lopiano is entitled to \$200.00.

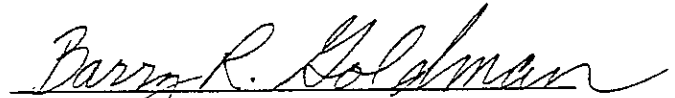
STATE OF CALIFORNIA
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A W A R D

AWARD IS MADE in favor of EVELYN TACLUBAN, against BANK OF AMERICA, Permissibly self-insured, of:

- a.) Temporary disability indemnity in accordance with Finding of Fact No. 3.
- b.) Permanent disability indemnity in accordance with Finding of Fact No. 4.
- c.) Need for further medical treatment in accordance with Finding of Fact No. 6.
- d.) Lien claims in accordance with Finding of Fact No. 7 & 8.
- e.) Less Attorney fees in accordance with Finding of Fact No. 10.

Dated: March 5, 2001



BARRY R. GOLDMAN

Workers' Compensation Administrative Law Judge

Service by mail on:

Evelyn Tacluban, 16603 Queenside Drive, West Covina, CA 91722.

Albert Kaufman, Esq., 17609 Ventura Blvd., #201, Encino, CA 91316.

Presidium, Inc., P.O. Box 7218, Pasadena, CA 91109-7318.

Kegel, Tobin & Truce, 3580 Wilshire Blvd., 10th Flr., Los Angeles, CA 90010-2511.

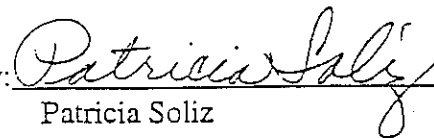
E.D.D., P.O. Box 990, Glendale, CA 91209-0990.

Sycamore Pharmacy, 5264 West Olympic Blvd., Los Angeles, CA 90036.

George Boris, 9700 Venice Blvd., Culver City, CA 90230.

Stuart Shipko, M.D., 110 1/2 N. Larchmont Blvd., Los Angeles, CA 90004.

Michael Lopiano, 711 S. Vermont #107, Los Angeles, CA 90005.

By: 
Patricia Soliz

"A Petition for Reconsideration from this decision shall be filed only at the Van Nuys district office of the Workers' Compensation Appeals Board"

APPORTIONMENT:

Based upon the medical report of Brian P. Jacks, M.D., which was found the better reasoned and more persuasive, applicant's testimony and a review of the entire medical record, it is found that there is legal basis for apportionment, proper apportionment of 40% has been set out in the rating instructions.

NEED FOR FURTHER MEDICAL TREATMENT:

Based upon the medical report of Brian P. Jacks, M.D., a review of the entire medical record, it is found that applicant is in need of further medical treatment to cure or relieve from the effects of the injury herein limited to her psyche.

SELF-PROCURED MEDICAL TREATMENT/MEDICAL-LEGAL COSTS:

Defendant is Ordered to pay all medical treatment per RVS for treatment prior to 1/1/94 and all medical treatment per CPT for treatment after 1/1/94.

LIEN OF EMPLOYMENT DEVELOPMENT DEPARTMENT:

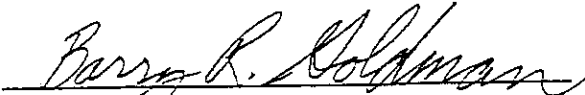
Based on the finding on temporary disability, the Employment Development Department is entitled to recover their lien during the above temporary disability period. The remainder of their lien is disallowed.

OTHER:

It appears from the record that defendant is entitled to credit for benefits paid under there long term disability policy provided said policy was totally paid for by the employer. The court will retain jurisdiction over this matter.

ATTORNEY FEES:

Based on the WCAB Rules of Practice and Procedure, Section 10775, the guidelines for awarding attorney fees found in Policy and Procedure Manual Index Number 6.8.4, an attorney fee is found to be \$3,000.00 to Albert Kaufman, and \$200.00 to Michael Lopiano, the prior attorney of record.


Barry R. Goldman
Workers' Compensation Administrative Law Judge

BRG:ps

Evelyn Tacluban
VNO 375695