

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 **Case No. AGO 7555**

4 **CHRISTOPHER CRAWFORD,**

5 *Applicant,*

6 **vs.**

7 **SALEEN HIGH PERFORMANCE;  
8 TRANSAMERICA CORPORATION,**

9 *Defendants.*

**OPINION AND DECISION  
AFTER RECONSIDERATION**

10  
11 We granted reconsideration to study the factual and legal issues in this  
12 case. The following is our decision after reconsideration.

13 Applicant sought reconsideration of the Findings and Order issued  
14 June 28, 1993 in which a workers' compensation judge (WCJ) found that  
15 applicant failed to prove he had sustained industrial psychiatric injury as the  
16 result of having been terminated by defendant employer. The WCJ ordered  
17 that applicant take nothing further and disallowed all lien claims.

18 Applicant contended error, asserting that his due process rights were  
19 violated by the WCJ's admission of defendants' Exhibit E, "Introduction to  
20 Lien Collections, Inc.," into evidence over applicant's objection that the  
21 evidence was not properly served, that defendants failed to provide a  
22 foundation for considering it, and that it was newly discovered evidence.  
23 Applicant further contended that the WCJ erred in allowing Lewis James  
24 Riley, applicant's boss, to testify at hearing after he was not listed as a  
25 witness on the Mandatory Settlement Conference (MSC) Statement (see Lab.  
26 Code § 5502(d)(3). Applicant asserted that the WCJ erroneously cited  
27 evidence (i.e., the fact that applicant incurred a "purported \$2,000.00 in

1 traffic tickets") from a deposition transcript which was not in evidence.  
2 Applicant also alleged there is substantial evidence to justify finding that he  
3 sustained industrial psychiatric injury.

4 We have completed our study of the record. For the reasons set forth  
5 below and consistent with the reasoning in the WCJ's Report and Recom-  
6 mendation on Petition for Reconsideration (Report), we are persuaded that  
7 the WCJ did not commit reversible error in allowing applicant's employer to  
8 testify as a witness even though he was not specifically named in the MSC  
9 Statement. We are also persuaded that there is substantial evidence to justify  
10 the WCJ's decision which we will accordingly reinstate.

11 The record discloses that this case involves a post-termination stress  
12 claim. Applicant, a parts manager born November 11, 1967, claimed a  
13 continuous trauma psychological injury resulting from work stress and  
14 harassment from October 2, 1990 through October 2, 1991. Applicant  
15 pursued his claim after seeing a television advertisement about work-related  
16 stress claims. Defendants denied injury and paid no benefits.

17 A Mandatory Settlement Conference (MSC) was scheduled for April 2,  
18 1993. In 1993, the existing provisions in Labor Code section 5502(d)(3) (§  
19 5502(d)(3)) required the parties to file an MSC Statement 10 days prior to  
20 the MSC. The statute, which applied to all applications filed on and after  
21 January 1, 1991, regardless of the date of injury, but which was scheduled to  
22 become inoperative on January 1, 1994, required that in their the MSC  
23 Statements, the respective parties "not[e] the specific issues in dispute, list[]  
24 the exhibits, and disclos[e] witnesses" (*Id.*). The statute further provided  
25 that "[d]iscovery shall close on the date of the [MSC.]" and that "[e]vidence  
26 not disclosed or obtained thereafter shall not be admissible unless the  
27 proponent of the evidence can demonstrate that it was not available or could

1 not have been discovered by the exercise of due diligence prior to the  
2 settlement conference" (*Id.*). In 1993, however, the legislature deleted the  
3 provision requiring an MSC Statement 10 days before the MSC from the  
4 Labor Code.

5 In this instance, both parties herein timely filed their respective MSC  
6 Statements. In defendants' Statement, they indicated that at trial they "will  
7 or may call" Robert Yale Libbot (sic), Esq., Michael J. Lightman, Kevin  
8 Driscoll, Claims Administrator, and Steve Krelle (sic) as witnesses (see  
9 defendants' MSC Statement, dated March 22, 1993, at p. 3). Defendants also  
10 stated that they "reserve the right to call such additional witnesses as may be  
11 required to rebut testimony of the applicant herein" (*Id.*).

12 In seeking reconsideration, applicant strenuously objects to the WCJ's  
13 having allowed Mr. Riley, the owner of the business that employed applicant,  
14 to be a witness, and to his having allowed into evidence defendants' Exhibit  
15 E, a document entitled "Introduction to Lien Collections, Inc., and  
16 attachments thereto (see Minutes of Hearing [MH] and Summary of Evidence  
17 [SE], dated June 9, 1993, at p. 2<sup>1</sup>). Applicant argues that his evidence was in  
18 compliance with his MSC Statement, but defendants' evidence was not. He  
19 further alleges that defendants failed to comply with the WCJ's order to  
20 serve Exhibit E, that defendants did not establish any foundation for  
21 admitting Exhibit E, and that the WCJ violated his right to due process by  
22 taking Exhibit E into consideration. He asserts that the WCJ should not have  
23 permitted Mr. Riley to testify over applicant's attorney's objection and in

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25 1 The MH indicates that the WCJ admitted the Exhibit provisionally, subject to his  
26 order requiring defendants to serve and file "within 48 hours a proof of service  
27 indicating that said documents had been served upon applicant's attorney [and other  
relevant individuals and lien claimants], with the following notation: "Absent  
objection within seven days, the attachments will be received into evidence. If there  
is an objection, a hearing will be held on said objection on June 25, 1993, at 8:30 a.m."

1 light of the fact that Mr. Riley's name was not listed on defendants' MSC  
2 Statement. He also alleges that the testimony of his boss does not constitute  
3 newly discovered evidence because defendants could have obtained it  
4 immediately after applicant filed his claim.

5 In his Report, the WCJ acknowledges applicant's contentions but  
6 responds by indicating that "even without the evidence objected to, the  
7 award was and is appropriate. The evidence shows an applicant who was  
8 fired twice. Before the second firing[,] he responded to an ad and filed the  
9 instant case. He was also able to hold down not one but two jobs subsequent  
10 to the second firing" (*Id.*, at pp. 4-5). The WCJ notes that the "proffered  
11 evidence was used to impeach applicant and his evidence," indicates that it  
12 "is relevant regarding impeachment,"<sup>2</sup> and further indicates that it  
13 confirmed the WCJ's impression that applicant had not really sustained any  
14 work-related psychological trauma (*Id.*, at p. 4).

15 In discussing the grounds for his decision, the WCJ states that "even  
16 without any of the objected[-]to evidence, the other evidence clearly supports  
17 the award" (*Id.*, at p. 5). He indicates that applicant's medical reports were  
18 "unimpressive" (*Id.*). He further explains that "[i]n deciding the case  
19 defendant's medical reports [were] much more compelling, logical and  
20 convincing" (*Id.*). In particular, the WCJ states that applicant's "doctor[s]  
21 failed to convince, in part, because [they] fail to give credible weight to so  
22 many non-industrial stressors in applicant's life (such as his domestic and  
23 financial situations)" (*Id.*, at p. 6).

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25  
26 <sup>2</sup> The WCJ does not, however, deal with applicant's allegation that defendants  
27 failed to serve the evidence pursuant to the WCJ's instructions. Given our disposition  
that any error was harmless because the WCJ's decision was justified by substantial  
medical evidence on which he was entitled to rely, we need not reach the issue.

1 It is settled law that a WCJ has the power to resolve conflicts in the  
2 medical evidence (*Liberty Mutual Insurance Company v. I.A.C. (Serafin)*  
3 (1948) 33 Cal.2d 89 [13 Cal.Comp.Cases 267]). He may rely on the opinion of  
4 one physician even if it is inconsistent with other medical opinions in the  
5 record (*Smith v. Workers' Comp. Appeals Bd.* (1969) 71 Cal.2d 588 [34  
6 Cal.Comp.Cases 424]), provided it constitutes substantial evidence (*LeVesque*  
7 *v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 639 [35 Cal.Comp.Cases  
8 16, 22-23]). In this case, because the WCJ found defendants' medical  
9 evidence more persuasive and more compelling than applicant's medical  
10 evidence, he rejected applicant's claim of a cumulative trauma industrial  
11 injury to his psyche. He also found that applicant was not a particularly  
12 credible witness (Report, at p. 6).

13 Our review of the record, without taking Exhibit E into consideration,  
14 reveals applicant testified that the first time he was laid off, "the lay-off  
15 occurred because business was slow" (SE, *supra*, at p. 4). He indicated that  
16 there "were no two-week notices" but because the lay-off "was unexpected,"  
17 it "made him feel really uncomfortable" (*Id.*). The second and final time he  
18 was laid off, applicant testified "he knew ahead of time in his mind that they  
19 were going to lay him off when Steve [Crelle, his co-worker] got back" from a  
20 one-week vacation (*Id.*, at p. 5). He again complained, however, that he was  
21 not given any two-week notice, nor was he given severance pay (SE, at p. 5.).

22 On the other hand, applicant claimed that when he was re-hired, he  
23 attempted to obtain some written agreement of job security (SE, at p. 4). He  
24 alleged he received a "verbal promise" from Kevin Driscoll, who re-hired  
25 him, that "even if there was a lay-off or a slow-down," he "would not be laid  
26 off" (*Id.*). No corroboration of this account was provided. Applicant also  
27 claimed he "did not receive any criticism with regard to his job performance

1 but did get criticized for the one accident that he had" (*Id.*). He stated that  
2 the "accident was not his fault ..., and he was criticized harshly and was told  
3 he was not authorized to drive company vehicles any further" (SE, at p.5).

4 Applicant testified he suffered stress only as a result of the second lay-  
5 off in October 1991, and indicated that he had symptoms of "[f]ainting;  
6 difficulty sleeping; low self-esteem; finding it hard to eat because he did not  
7 know how to pay for his next meal; sometimes nausea, dizziness and  
8 occasional mild headaches" (*Id.*). At the time of trial in June 1993, he  
9 indicated that his present complaints were "low self-esteem, nausea and  
10 headaches." He acknowledged, however, that he had obtained another job in  
11 November 1991, although at a lower salary and without benefits or bonuses  
12 (see SE, at p. 6).

13 The record is contradictory on the issues of applicant's personal life,  
14 symptoms, driving record, and work performance. For example, at trial he  
15 claimed not to have had any problems at home with his girlfriend or as a  
16 result of the first lay-off, but in his August 7, 1992 deposition, he testified  
17 that he had "separated from his girlfriend from 1991 to the present and ...  
18 that separation was stressful" (SE, at p. 6).

19 At trial, he testified that he "never complained to anyone at work about  
20 any problems outside of work," but he also testified that "the first time he  
21 discussed problems at work was the night of the truck accident" (SE, at pp.  
22 1, 6, 7). He further stated at trial that all of his "complaints" came on after  
23 the second lay-off, but when directed to his deposition, he indicated that the  
24 statement that he had no complaints before the second lay-off "was not exact  
25 and the complaints could have been before the lay-off" (SE, at p. 7). He also  
26 testified that he had no problems (e.g., symptoms) while working (*Id.*).  
27

1 Applicant acknowledged inconsistency between his trial testimony,  
2 when he stated he stopped playing sports after the second lay-off, and his  
3 deposition testimony, when he stated "he did play sports" after the second  
4 termination (*Id.*). He also acknowledged that in the deposition, "when asked  
5 about other problems, he declared the break-up to be a problem" (*Id.*).

6 Applicant testified that he sought medical attention only after he saw  
7 the work-stress commercial on television (*Id.*). He indicated that the  
8 psychological counseling he received was "to rebuild self-esteem" and that it  
9 helped to some extent (SE, at p. 6).

10 Applicant's co-worker Steve Crelle also testified at trial. According to  
11 Mr. Crelle, applicant "had to be motivated by others" and "did not look for  
12 things to do" (SE, at p. 8). Mr. Crelle also testified that he was "familiar with  
13 the applicant's personal life," and, "more particularly," with applicant's  
14 relationship with his girlfriend (*Id.*). Mr. Crelle indicated that "applicant had  
15 girlfriend problems right from the start. She wrecked his BMW and  
16 damaged the motor" (*Id.*). Mr. Crelle further testified that applicant "never  
17 made complaints of injury to him as to his emotions[,] and indicated he  
18 "does not buy the so-called psyche claim" (*Id.*). As a lay-person, Mr. Crelle  
19 stated his opinion was that "what happened at work, if damaging, was not  
20 something that he was aware of. No one was guaranteed a job with this  
21 employer" (*Id.*).

22 Defendants called Lewis James Riley as a rebuttal witness to applicant's  
23 testimony, although he had not been identified as such on the MSC  
24 Statement. Mr. Riley testified that he owned defendant company, that it was  
25 a small business with a family atmosphere, and that applicant helped with  
26 shipping and ran errands (see SE, at p. 7). Mr. Riley indicated familiarity  
27 with applicant's driving problems, including problems with applicant's

1 driver's license (*Id.*). He stated that on several occasions applicant had  
2 asked for time off to go to court to deal with tickets, that he had offered  
3 applicant \$50.00 as a gift or loan to take care of the problem, but applicant  
4 had stated "the problem would take several thousand dollars to solve" (*Id.*).

5 Mr. Riley also testified applicant never reported complaints of  
6 depression, lack of self-confidence, or tension, either from the truck  
7 accident or from work (see SE, at p. 8). He stated that he had laid applicant  
8 off the first time because of a recessionary problem, that he told applicant to  
9 remain in contact, and that applicant called every three weeks (*Id.*). He  
10 further testified that he told applicant he could come back to work but he  
11 specifically stated that applicant would be given no guarantees (*Id.*).

12 As to work performance, Mr. Riley testified that applicant was laid off  
13 because he was the least-needed employee (*Id.*). Although applicant did  
14 everything asked of him, Mr. Riley stated applicant was not a self-starter  
15 (*Id.*). He noted that while Steve Crelle was on vacation he had to bring  
16 another person in to work in the warehouse, whereas the applicant  
17 continued to do the same work as he was doing before, thus implying that  
18 applicant did not extend himself in Mr. Crelle's absence (*Id.*).

19 The medical evidence reveals that Richard Wallace, M.D., applicant's  
20 reporting psychiatrist, and Daniel T. Shiode, Ph.D., applicant's reporting  
21 psychologist, concluded that applicant was suffering from an adjustment  
22 disorder with mixed emotional features which developed since his "recent  
23 layoff" (see applicant's Exhibit 1, report dated January 29, 1992, at p. 7).  
24 The report indicates that applicant felt his second lay-off was "sudden,"  
25 which is inconsistent with applicant's trial testimony (*Id.*, at p. 2).<sup>\*</sup> While  
26 applicant indicated distress because he was unprepared for the lay-off, at the  
27 same time, applicant claimed his employers "were looking for reasons to lay

1 him off," and "were specifically pressuring him after an accident that  
2 occurred in June of 1991" (*Id.*).

3 Dr. Wallace and Dr. Shiode, who were also applicant's treating  
4 physicians, explain that an adjustment disorder with mixed emotional  
5 features "is a disorder that develops following a stressor such as being laid  
6 off," and the resulting added financial pressures (*Id.*, at p. 8). They do not,  
7 however, explain how applicant's feelings after his lay-off resulted in  
8 impairment or constituted anything other than the normal consequences and  
9 feelings of an employee after being terminated from his job.

10 Diane J. Weiss, M.D., M.P.H., defendants' reporting psychiatrist, noted  
11 that when asked whether defendant employer provided a reason for his  
12 layoffs, applicant stated that both times he was laid off, his employer  
13 informed him that the layoffs were "due to the recession, and because  
14 business was slow" (defendants' Exhibit A, report dated June 18, 1992, at p.  
15 2). With respect to psychiatric issues, Dr. Weiss concluded that "there has  
16 been neither psychiatric injury, psychiatric disorder, nor work function  
17 impairment as a result of [applicant's] employment" (*Id.*, at p. 11). She  
18 diagnosed applicant as having a "phase of life problem or other life  
19 circumstance problem" as well as an "other interpersonal problem,"  
20 apparently in his relationship with Kevin Driscoll, his manager, and with his  
21 girlfriend (*Id.*).

22 Directing the reader to pages 359-361 of the DSM-III-R for further  
23 explanation, Dr. Weiss states that applicant's clinical presentation was  
24 "consistent with a condition 'not attributable to a mental disorder,' but  
25 which might be 'a focus of attention or treatment'" (*Id.*). Dr. Weiss indicates  
26 that applicant, a 24-year-old black male, has a history which reveals he is  
27 currently experiencing a particularly difficult period in his life, thus

1 supporting her diagnosis of "Phase of Life or Other Life Circumstance  
2 Problem" (*Id.*). Dr. Weiss reports that applicant disclosed much frustration  
3 over trying to decide what to do with his life and expressed current feelings  
4 of conflict over his accomplishments and future goals (*Id.*).

5 Dr. Weiss' evaluation of applicant is sympathetic, but she notes that  
6 applicant's "current life difficulties and problems with his manager,  
7 girlfriend and friends do not, however, constitute a psychiatric illness, or  
8 disability on a psychiatric basis," but rather "are all part of a normal human  
9 reaction to life circumstances" (*Id.*, at p. 12). Her 14-page report, which  
10 was made in close proximity to the events complained of, is thorough, well-  
11 reasoned, and persuasive.

12 Given this record, we are persuaded that the WCJ's decision is justified  
13 by substantial medical evidence. We are also persuaded that his findings as to  
14 applicant's credibility should be followed because there is no evidence of  
15 considerable substantiality to contradict his conclusion that applicant was not  
16 entirely credible (see *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d  
17 312 [35 Cal.Comp.Cases 500]).

18 With respect to the issue of error by the WCJ in allowing Mr. Riley to  
19 testify, we are persuaded that any error which may have occurred is an  
20 insufficient basis to reject the decision since the error had no impact on the  
21 WCJ's decision. We acknowledge that Mr. Riley was not listed on defendants'  
22 MSC Statement. We also acknowledge that it is important to preserve the  
23 intent of the MSC and MSC Statement, e.g., there should be no trial by  
24 surprise and the parties should know who will testify in advance so that they  
25 have the opportunity to depose them.

26 Nevertheless, the WCJ always has the responsibility for and authority to  
27 develop the record in order to make a proper decision (see *Raymond*

1 | *Plastering v. Workers' Comp. Appeals Bd. (King)* (1967) 252 Cal.App.2d 748  
2 | [32 Cal.Comp.Cases 287]]. In this case, defendants did reserve the right to  
3 | call rebuttal witnesses, although they were not specifically identified. Given  
4 | the fact that the legislature subsequently deleted the requirement of an MSC  
5 | Statement from the Labor Code, and given the equities, e.g., permitting the  
6 | applicant's "boss" to rebut his former employee's testimony, under the  
7 | narrow facts of this case, we are persuaded that any error that occurred was  
8 | essentially harmless. The WCJ specifically states that he relied on the  
9 | medical evidence and on his negative assessment of applicant's credibility  
10 | (or lack thereof) in reaching his decision. He did not rely on Mr. Riley's  
11 | testimony or Exhibit E. Furthermore, the record provides substantial  
12 | evidence to justify the WCJ's decision, without recourse to Mr. Riley's  
13 | testimony or to Exhibit E. Accordingly, we will reinstate the WCJ's decision  
14 | as our Decision After Reconsideration.

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For the foregoing reasons.

IT IS ORDERED that the Findings and Order of June 28, 1993 is REINSTATED as this Board's Decision After Reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

*Robert P. Plummer*

I CONCUR,

*Diana Marshall*

NOT PARTICIPATING

*Rick Dietrich*



DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

MAR 2 2 1995

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

e d *Concetta L. Loge*