

WJT

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

S. E. RYKOFF & COMPANY,

Petitioner,

v.

WORKERS' COMPENSATION APPEALS
BOARD et al.,

Respondents.

No. B074787

(W.C.A.B. No. 90PAS1819)

COURT OF APPEAL - SECOND DIST.

FILED

DEC 23 1993

JOSEPH A. LANE

Clerk

T. CARTER

Deputy Clerk

Proceeding to review a decision of the Workers' Compensation Appeals Board. Annulled and Remanded.

W. Joseph Truce and Kegel, Tobin & Truce for Petitioner.

No appearance for Respondents.

I. INTRODUCTION

The workers' compensation judge (WCJ) found that applicant, Betty Easley, sustained a cumulative industrial psychiatric injury during her employment by S. E. Rykoff and Company (Rykoff). Rykoff petitioned for reconsideration. In a decision after reconsideration, respondent, Workers' Compensation Appeals Board (the board), affirmed the WCJ'S finding of industrial injury and that Ms. Easley reasonably incurred expenses to prove a contested claim. However, the board returned the matter to the WCJ for further development of the record regarding whether the employer should be required to pay for psychotherapy that she received from a psychological intern. The employer petitioned for, and we have issued, a writ of review. We conclude that the board applied the incorrect burden of proof in finding that Ms. Easley sustained an industrial injury. We annul the board's decision. Further, we conclude that based on the present record, the medical-legal lien must be reduced in part.

II. FACTS AND PROCEDURAL HISTORY

A. Summary of proceedings

The application was filed on April 24, 1990. The trial commenced on May 11, 1992. The hearings concluded on October 6, 1992. On December 22, 1992, the WCJ issued his findings and award in which he found Ms. Easley's injuries to be compensable. Also, he made certain findings concerning a medical legal cost issue. On March 12, 1993, the board issued its opinion and order. On April 22, 1993, Rykoff filed its petition for writ of review.

B. Evidence concerning whether Ms. Easley sustained a compensable injury

Ms. Easley claimed that she sustained a cumulative industrial psychiatric injury from December 1986 to December 1989 during her employment as a data entry clerk by Rykoff. Her employment by Rykoff began in December 1986.^{1/} In May 1989, her employment was terminated because of horseplay, but

^{1/} Ms. Easley had previously been assigned to Rykoff by a temporary employment agency.

she was reinstated about one week later. She testified that after her reinstatement, she believed she was harassed by Rachel Kennon, her supervisor. Ms. Kennon: timed Ms. Easley's restroom breaks; did not allow her to take a vacation day she requested; complained to the personnel department that she had a poor attitude; and placed her paychecks on the keyboard. This latter act was distracting to Ms. Easley. She informed Ms. Kennon of the distracting nature of such conduct. Ms. Easley stated she was very nervous and cried when she went to lunch.

On September 28, 1989, following an investigation during which Ms. Easley and other employees were questioned by Rykoff's personnel and corporate security departments, she was arrested for grand theft. Her employment was terminated because she had cashed checks from Rykoff to which she was not entitled.

At a police station, Ms. Easley was advised of and waived her rights under Miranda v. Arizona (1966) 384 U.S. 436. In a signed statement, she stated that on or before April 6, 1988, Jane Navarro, a co-worker, told Ms. Easley she would "[g]et a surprise in [her] check." When she received her paycheck later that day, she found an additional check for \$420. Ms. Easley stated she knew she was not entitled to the extra check and that she assumed it was a computer error. She cashed the extra check, thinking it was a "'Blessing.'"

In the signed statement, Ms. Easley also said that on June 15, 1988, she received an extra check labelled vacation pay. She knew that, to get vacation pay, she needed to fill out a vacation request form and that she had not done so. She also knew that she did not have any vacation scheduled before December. She was confused as to why she was receiving a check for vacation pay in June and decided there had once again been a computer error. She cashed the second extra check. She stated she knew the funds from both checks were not earned by her or due to her. Los Angeles Police Officer Spencer Marks testified that he let Ms. Easley read her statement before she signed it. Criminal charges were later dropped.

John Mouzakis, Rykoff's director of corporate security, questioned Ms. Easley and others on September 28, 1989, about the extra checks. She offered to pay back the money she had received from cashing the extra checks because she knew her employment was being terminated. She initially testified that, when Mr. Mouzakis asked her if she received a paycheck to which she was not entitled, she said, "'[Y]es.'" On further questioning, she testified: "He asked me if I recall receiving a check that I wasn't supposed to. And I had told him, 'No. I have received a check that I wasn't entitled

to. I had mentioned it to Jane.' But when he asked me if I received a check that I wasn't entitled to receive, I told him that I didn't know that I had received a check that I wasn't entitled to receive." She stated she did not recall whether she told Mr. Mouzakis she thought the checks were bonuses.

Mr. Mouzakis testified that Ms. Fitzsimmons, the manager, said she was present when Ms. Easley admitted that she had received funds to which she was not entitled. When Mr. Mouzakis questioned Ms. Easley, she admitted that she knowingly cashed unauthorized checks. She stated she thought the checks were given to her as a "blessing." She was confused as to the amount of vacation time to which she would be entitled after three years of employment.

At trial, Ms. Easley testified that she did not say that Ms. Navarro had told her she would get a surprise in her paycheck. She said she had told the police that Ms. Navarro had said she would get a surprise without reference to the paycheck. In the past, when Ms. Navarro had told Ms. Easley that she would get a surprise, a gift would be involved. On those occasions, Ms. Navarro brought Ms. Easley a present. When she received the first extra check, she asked Ms. Navarro why she had received it. Ms. Navarro said she would check out the matter for Ms. Easley. However, Ms. Navarro never

explained why Ms. Easley received the check. Ms. Easley testified that she thought she took one week of vacation in April 1988 and she told Officer Marks that the first check also had a notation that it was for vacation pay.

About two weeks before her arrest, Ms. Easley attended a luncheon at which Joyce Fulton, a co-worker, and Pam Fitzsimmons, a manager, were present. At the luncheon, Ms. Fulton said that she was thinking of telling the personnel department that Ms. Kennon, Ms. Easley's supervisor, knew that Ms. Navarro was tampering with payroll. Also, Ms. Fulton said she was going to tell Ms. Kennon that Ms. Easley had "received a check." Ms. Fitzsimmons said the personnel department needed to know about that. When the conversation occurred, Ms. Easley did not comment on the matter. She testified that, shortly after she was reinstated in May, 1989, Ms. Fulton had told her that Ms. Kennon knew that Ms. Navarro was "tampering" with the payroll. Ms. Easley then told Ms. Fulton that she had received a paycheck and had spoken to Ms. Navarro about it.

Ms. Easley testified that she thought she had two weeks of vacation in 1988. She was not certain why she received the first extra check and therefore asked Ms. Navarro why she received it. Ms. Easley testified that she did not

know that the check was not due to her. Ms. Easley stated she told the director of corporate security that she thought the extra checks were bonuses because Ms. Navarro never told her why she was given the checks. However, in her deposition, Ms. Easley had testified that she never mentioned to Ms. Navarro that she received bonus checks.

Ms. Easley stated she told Officer Marks that she knew she was not entitled to the first extra check, because she was confused and upset. She gave conflicting testimony as to whether she made all the comments in her signed statement. She testified that she did not read the statement before signing it. Ms. Easley stated she never asked Ms. Kennon why she received the first extra check.

Ms. Easley gave conflicting testimony as to whether her husband had any earnings in 1988 when she received the extra checks. She initially testified that her husband was disabled and she did not think he was earning any money when she received the extra checks. However, she later testified that her husband was earning money as a pastor. On June 15, 1988, her regular paycheck was only \$75 because her wages were garnished for improper receipt of unemployment insurance benefits.

B. Evidence concerning the medical-legal
lien issue

Ms. Easley testified that, when she was arrested, she was shaking, had chest pains, and cried. She spent one night in jail. She sought psychiatric treatment at Professional Consultation Services, Inc. (PCS), because she had poor concentration, fatigue, headaches, chest pains, and nightmares about jail. She stated she remained shaky and nervous, she often cried, and her body ached. She testified that, because of her symptoms, she was no longer capable of working as a data entry operator. She stated she had symptoms before the September termination. She initially testified that, if her employment had not been terminated on September 28, 1989, she would have worked the next day. However, on further questioning, she testified that, even if her employment had not been terminated, she would not have worked the next day because she was under tremendous stress, had headaches, experienced chest pains and insomnia, and was nervous.

At trial, she testified that she went to PCS because of a radio or television advertisement. When she arrived at PCS, she told the receptionist that she had been terminated from her job and she wanted to file a workers' compensation claim. She also told the receptionist that she had stress and

was having headaches and other symptoms. In her deposition, she stated that she saw three professional persons at PCS on her first visit: her former attorney, Harold Glickman; her psychotherapist, Dorothy Malmstrom; and a male psychiatrist who appeared to be 48 years of age and had a mustache. At trial, Rykoff's counsel asked Ms. Easley whether she saw Dr. Byron Crawford at PCS. She testified: "Yes, I [saw] a doctor. I don't recall the name." She further testified that her attorney was the last person who she saw at PCS on her first visit. Ms. Easley stated that Ms. Malmstrom told her she was a psychiatrist. Ms. Easley stated she received psychotherapy from Ms. Malmstrom for three months.

When Rykoff's counsel questioned Ms. Easley further regarding whether she was interviewed by a male psychiatrist during her first visit to PCS, the following colloquy occurred: "Q Did you -- on that first visit, did you see a man at Professional Consultation Services that [said] he was a psychiatrist? [¶] A I don't recall. [¶] Q Well, what's your best estimate? [¶] A What do you mean? [¶] Q Did you or didn't you? [¶] MS. OWENS-MURRELL [Ms. Easley's attorney]: Did you or didn't you what? [¶] MR. TRUCE [defense counsel]: See a man who represented himself as a psychiatrist on her first visit at Professional Consultation Services. [¶] [Ms. Easley]: As I stated, I do not recall. I

[saw] a lawyer, Mr. Glickman. I did see another man. I did see a man, but I don't recall his title. [¶] Q [By Mr. Truce] How long did he speak to you -- the man whose title you can't recall? [¶] A Oh, I guess about 30 minutes. [¶] Q Did that man whose name you can't recall represent himself as a psychiatrist? [¶] A I don't remember what he represented himself as. [¶] Q Did you see Dorothy Malmstrom on that first occasion? [¶] A Yes, I think I did. If it wasn't, it was the next day I went. [¶] Q And that's when she represented herself as a psychiatrist? [¶] A Yes." According to a report by PCS, Ms. Malmstrom was actually a psychological intern who was supervised by a clinical psychologist.

Ms. Easley testified that, after Ms. Malmstrom released her from treatment, she did not return to PCS. Rykoff's counsel then asked: "Other than that first occasion when you saw the man whose name you can't recall and Dorothy [Malmstrom], did you see anyone else at Professional Consultation Services?" Ms. Easley responded, "No." Defense counsel then asked: "So, the two people you can recall seeing -- you said to me -- were Dorothy Malmstrom and this man on the first occasion whose name you can't recall?" Ms. Easley responded: "Yes, other than the lawyer Glickman."

Two psychiatric reports by PCS had been received in evidence, one dated April 6, 1990, and signed by Howard Greils, M.D., and the other dated July 20, 1990, and signed by Jeffrey L. Rausch, M.D. In the July 20, 1990 report, Dr. Rausch stated that he conducted a psychiatric examination of Ms. Easley on June 27, 1990. After she testified that the only persons she remembered seeing at PCS were Mr. Glickman, Ms. Malmstrom, and a man whose name she could not recall, Rykoff's counsel moved to strike the July 20, 1990, report. The WCJ stated he was reserving ruling on the motion until he decided the entire case.

On further questioning by Rykoff's counsel, she testified that she did not recall seeing a man with a mustache who was about 48 years of age after her first visit to PCS. On redirect examination by her attorney, she testified that she did not know the difference between a psychiatrist and a psychotherapist. She testified her last visit to PCS was in June 1990 and she saw a doctor at that time. She further testified that she thought he was the same doctor she saw on her first visit to PCS but that she did not remember his name. However, on further questioning by defense counsel, the following colloquy occurred: "Q Getting back to something you've testified to. On that visit to Professional Consultation Services, you testified [that] on the first

visit . . . the man who said he was a psychiatrist whose name you did not know was white, had a mustache and was

approximately 48 years old; is that correct? [¶] A One of the [men] looked [like] that description. [¶] Q And then you also testified in response to your lawyer's question that you think that was the same man you saw [on] the second occasion; is that correct? [¶] A I testified that -- I'm not sure.

[¶] Q Now, didn't you tell me in your deposition and this morning, or this afternoon, while I was [cross-examining], that the only people you remembered seeing at Professional Consultation Services [were] this man who you described as -- this man who was white, who had [a] mustache, and Dorothy [Malmstrom]; is that right[?]? [¶] A I did, but as I recall -- it has been three years. I do recall on my last visit seeing another person."

On August 6, 1990, PCS had served the employer with a bill for \$3,250 in medical-legal charges for the two PCS reports and \$1,200 in charges for psychotherapy. On August 30, 1990, the employer served PCS and Ms. Easley's attorney with an objection to the bill on grounds that: the bill was not for a legitimate medical-legal expense; Ms. Easley had provided a false history to the PCS doctors; and the charges were too high under existing law. At trial, liability for medical-legal costs was listed as one of the issues.

In PCS's initial medical-legal report, Dr. Greils stated that he examined Ms. Easley on March 30, 1990. As will be noted, the March 30, 1990, date is very important because the application for benefits was not filed until a later date. He stated she experienced stress at work because her supervisor: unfairly criticized her; yelled at her; and favoritism was shown to other employees. Dr. Greils stated that Ms. Easley's employment was terminated because she cashed two checks that she thought were bonus checks and she was arrested for grand theft. Dr. Greils stated that Ms. Easley trembled, felt shaky, and had headaches, palpitations, depression, as well as insomnia. Dr. Greils's diagnosis was that of an anxiety disorder. He found she was temporarily disabled, recommended psychotherapy, and concluded that industrial stress caused her disability. In PCS's July 20, 1990 report, Dr. Rausch stated that she trembled and had headaches, poor concentration, tearfulness, nervousness, and nightmares.

The PCS reports are disjointed and contain many quotations from Ms. Easley but little analysis. Several potentially stressful work-related conditions and numerous potential psychiatric symptoms and behavior patterns are listed. They are followed by brief notations that Ms. Easley did not experience those working conditions and does not have

the listed psychiatric symptoms and behavior patterns. Dr. Rausch's report is unusual in that, after each of several summaries of her alleged symptoms, there are the words "My impression of the patient:" followed by a brief comment. The first comment after those words is as follows: "She continues to experience residual symptoms after treatment." The second comment after the words "My impression of the patient:" is: "She does not drink alcohol." The third comment after the words "My impression of the patient:" is: "She is suffering from significant anxiety symptoms."

In Dr. Rausch's review of Ms. Malmstrom's therapy notes, the last session summarized was a session on June 5, 1990. In discussing the notes from that session, Dr. Rausch stated: "On June 5, 1990, the patient reported that her unemployment benefits had been denied. 'I'm not ready to go back to work.' Ms. Easley wanted to remain on disability, but Ms. Malmstrom felt this was unnecessary." Dr. Rausch diagnosed an anxiety disorder and stated Ms. Easley was 40 percent permanently disabled solely as the result of an industrial psychiatric injury. Dr. Rausch stated that Ms. Easley had a moderate impairment of the ability to comprehend and follow instructions. Further, he concluded she had a slight impairment of the abilities: to perform simple and repetitive tasks; maintain an appropriate work pace; perform complex or

varied tasks; influence people; and make generalizations, evaluations, or decisions without immediate supervision. Further, Dr. Rausch determined that she had a very slight impairment of the abilities to relate to other people beyond giving and receiving instructions and to accept and carry out responsibility for direction, control, and planning.

In a psychiatric report to Rykoff's counsel dated November 20, 1990, Dr. Raymond Friedman stated: "Although Ms. Easley reported being more irritable of late, upon further questioning she informed us that she actually loses her temper 'very rarely' and gets along well with friends and relatives. Ms. Easley disclaimed any symptoms of anxiety." Dr. Friedman stated that applicant had a minimal level of preexisting psychiatric disability. He concluded that there was no period of temporary disability. He determined that she had the same level of permanent disability that she had before her employment. He explained that she had a minimal impairment of the ability to make generalizations, evaluations, or decisions without immediate supervision and of the ability to accept and carry out responsibility for direction, control, and planning. He stated she suffered an industrial psychiatric injury.

In points and authorities filed on October 30, 1992, defense counsel noted that the WCJ's summary of evidence of May 11, 1992, did not reflect that she testified that she saw

Dr. Crawford on her first visit to PCS. Defense counsel stated the employer would request a transcript of that date of the trial. In the points and authorities, defense counsel stated that the reports of PCS are flawed and do not constitute substantial evidence. Defense counsel argued that the July 20, 1990, report appeared to have been generated by a word processor. Defense counsel did not expressly move to strike the initial PCS report. However, one of the headings in the employer's points and authorities reads: "Notwithstanding [the admissibility issue,] reports of Professional Consultation Services are based on an inaccurate history and therefore cannot be considered as substantial evidence."

C. The decision of the WCJ

On December 22, 1992, the WCJ denied the motion to strike PCS's second report. The WCJ found Ms. Easley sustained a cumulative industrial psychiatric injury from "December, 1986 through December [sic], 1989" that resulted in temporary total disability from September 28, 1989, through June 27, 1990, 9.25 percent permanent disability, and the need for self-procured medical treatment. The WCJ found there was no need for further medical treatment. The WCJ found that she reasonably and necessarily incurred an expense to prove a contested claim and

ordered Rykoff to reimburse her for those medical-legal costs and the costs of self-procured treatment "in amounts to be adjusted by the parties or determined herein upon the filing of a petition and supporting documents."

In his opinion on decision, the WCJ stated:

"[Defendant contends] that the reports of Professional Consultation Services should be stricken from the record because the applicant couldn't identify which doctors examined her. After reviewing the entire testimony of the applicant, it is clear that the applicant did not know one examining doctor from the other. This Workers' Compensation Judge has no idea what either Dr. Greils or Dr. Rausch [looks] like. [Defendant] provided no evidence that either or both do not look like the individual the applicant identified as being white [and] 48 years old with a mustache. Both doctors state unequivocally that they saw the applicant. This Workers' Compensation Judge accepts their representation. Said motion is denied."

The WCJ stated that he based the finding of industrial injury on Ms. Easley's testimony and Dr. Greils's report. The WCJ found that her work performance deteriorated after the initial employment termination and stated: "It appears obvious that this episode had an impact on her" The WCJ further stated: "In the case of Safeway Stores, Vons v. WCAB

(Willie J. Williams) 57 CCC 291 (1992), writ denied, the applicant knowingly took a battery without paying for it and was caught. The applicant's psychiatric injury due to his termination was found to be compensable. The Appeals Board was not persuaded that the applicant's activity was criminal with the requisite intent to steal his employer's property. The Board further held that his injury occurred during the applicant's regular work hours while he was performing his regular duties. [¶] Similarly, in the case at hand, the applicant received these unsolicited 'extra checks' from her employer during her regular employment hours. No intent to steal was ever proven. The record is equivocal as to whether the applicant knew she wasn't entitled to the money as opposed to whether she received the money instead of taking off all of her vacation days. The [defendant] failed to prove that the applicant was a criminal. The resulting sequelae and its impact aggravated an already existing psychiatric condition that was industrially caused. The applicant has met her burden of proof on this issue." (Original emphasis.)

The WCJ stated that he based the finding of temporary disability on Dr. Rausch's report. The WCJ indicated he based the finding of the extent of permanent disability on the range of medical evidence. The WCJ stated that he relied on Dr.

Greils's report in finding that she should be reimbursed for self-procured treatment and that she incurred a reasonable and necessary medical-legal expense.

D. Reconsideration proceedings
and the board's decision

Rykoff petitioned for reconsideration. In the reconsideration petition, Rykoff's counsel stated although Ms. Easley testified at trial that she saw Dr. Crawford, that testimony is not mentioned in the WCJ's summary of evidence. Rykoff indicated it had requested that a transcript be prepared. The employer also stated: "Petitioner [argues] that the transcript of testimony will show that after defense counsel made a motion to strike the medical/legal reports of Professional [Consultation Services], Inc. and once applicant was faced with the prospect of having the medical/legal reports . . . on which she relied for a finding of disability [stricken], she was put back on the stand and suddenly remembered that she actually had seen the 48[-]year[-]old man with a mustache on the first occasion that she went to Professional Consultation Services, Inc." (Original emphasis.) Rykoff contended that: the psychiatric injury was not compensable because it proved by a preponderance of the

evidence that Ms. Easley committed grand theft; even if she engaged in quasi-criminal conduct, any psychiatric injury resulting from that activity is not compensable; the WCJ erred in not striking the reports of PCS; the WCJ erred in finding that the cost of the first PCS report was a valid medical-legal expense; the WCJ erred in awarding reimbursement for the therapy, since the therapist was a psychological intern; and the reports of PCS do not constitute substantial evidence.

In his report on the reconsideration petition, the WCJ stated that the Rykoff did not meet its burden of proving that Ms. Easley committed grand theft. The WCJ explained that he based the finding of industrial psychiatric injury on the effects of the first employment termination and the arrest. The WCJ explained that he felt compelled to follow Safeway Stores, Vons v. Workers' Comp. Appeals Bd. (Williams) (1992) 57 Cal.Comp.Cases 291.

On the issue of whether the reports of PCS constitute substantial evidence, the WCJ stated: "[T]he applicant didn't know Dr. Crawford from Dr. Greils from Dr. Rausch. The applicant did remember seeing one other individual at Professional Consultation Services from that to which she originally testified. The applicant was not legally sophisticated to understand the defendant's 'Motion to Strike'

as the [petitioner contends]. [¶] The defendant's entire argument centers on whether the applicant actually saw Dr. Greils and Dr. Rausch. Both doctors state unequivocally that they saw the applicant. The applicant doesn't remember any doctor's names except Ms. [Malmstrom]. The applicant did recall seeing one unnamed professional at the clinic. Without further evidence, this Workers' Compensation Judge deducted that professional was Dr. Greils at the initial consult and Dr. Rausch at the final consult. [¶] The reports in question were of value, credible and reasonable. . . ." The WCJ further stated that the employer failed to prove that Ms. Malmstrom was not sufficiently supervised by a clinical psychologist.

The board: granted reconsideration; amended the WCJ's findings to defer the issue of the reasonableness of the expenses of the psychotherapy; affirmed the findings as amended; and returned the matter to the WCJ for further proceedings and a new decision on the claim for reimbursement for self-procured medical expenses. The board stated that applicant's testimony regarding her symptoms appeared consistent with the history she gave Dr. Greils, Dr. Rausch, and Dr. Friedman.

The board stated that Rykoff failed to prove that Ms. Easley intended to steal money from the employer. The board

stated that the evidence that Ms. Easley tried to talk to Ms. Navarro about the first extra check supported the WCJ's decision. The board stated that the dismissal of applicant's criminal case provided further support for the WCJ's decision. The board noted that in Pacific Tel. & Tel. Co. v. Workers' Comp. Appeals Bd. (Blackburn) (1980) 112 Cal.App.3d 241, 245-248, this court concluded that, to prove that a psychiatric injury resulting from discipline for engaging in criminal activity is not compensable because of such unlawful conduct, the employer has the burden of proving every element of the criminal activity by a preponderance of the evidence and all reasonable doubts must be resolved in favor of the employee. The board concluded that the WCJ was correct in finding that the employer did not meet its burden of proving intent in resolving all reasonable doubts in favor of Ms. Easley.

In the report on the petition for reconsideration, the WCJ did not discuss whether the PCS reports were admissible. However, the board stated that, for the reasons indicated in the WCJ's report, there was no merit to Rykoff's contention that the WCJ erred by allowing the PCS reports into evidence. The board failed to discuss the Rykoff's contention that the first PCS report was not a valid medical-legal expense. The board explained that it was returning the matter to the WCJ for

development of the record on the issue of the supervision and qualifications of Ms. Malmstrom. Despite Rykoff's assertion in the reconsideration petition that the WCJ's summaries of evidence did not accurately reflect Ms. Easley's testimony as to whom she saw at PCS, the board did not await preparation of transcripts of the trial before issuing its decision in response to the reconsideration.

B. The petition for writ of review

Rykoff petitioned for a writ of review, contending that: Ms. Easley's psychiatric injury is not compensable because it proved the elements of grand theft by a preponderance of the evidence and the cashing of the extra checks did not occur in the course of her employment; the reports of PCS did not constitute substantial evidence because her testimony indicated she was not examined by either Dr. Greils or Dr. Rausch; and PCS's medical-legal lien claim should be denied because there was no contested claim when she incurred the expense of Dr. Greils's report. We issued a writ of review and directed the board to include transcripts for each day of the trial in its return.

III. DISCUSSION

A. Burden of proof of work-related psychiatric injury and compensability of that injury

As noted previously, the board in its opinion relied upon our decision in Pacific Tel. & Tel. Co. v. Workers' Comp. Appeals Bd. (Blackburn), supra, 112 Cal.App.3d at page 247 which held all reasonable doubts must be resolved in favor of employees such as Ms. Easley. We respectfully conclude the board erred in doing so because Pacific Tel. & Tel. Co., a case decided in 1980, is no longer a valid statement of California Law.

Grand theft by embezzlement is committed if one cashes a check for more than \$400 for one's own use with knowledge that one is not entitled to receive the money. (Pen. Code, § 487, subd. 1; People v. Dubrin (1965) 232 Cal.App.2d 674, 678-679; also see People v. Newman (1975) 49 Cal.App.3d 426, 430-432.) In 1988, when she cashed the extra checks, and in 1989, when her employment was ultimately terminated, Labor Code section 3600,^{2/} subdivision (a), provided in pertinent part: "Liability for the compensation provided by this division, in

^{2/} Unless otherwise indicated, all future statutory references are to the Labor Code.

lieu of any other liability whatsoever . . . shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment . . . in those cases where the following conditions of compensation concur: . . . [¶] (8) Where the injury is not caused by the commission of a felonious act by the injured employee, for which he or she has been convicted. . . ." (Emphasis added.)^{3/} Since she was not convicted of a felony, it was necessary for the WCJ to determine whether she sustained a psychiatric injury that arose out of and occurred in the course of her employment.

In Pacific Tel. & Tel. Co. v. Workers' Comp. Appeals Bd. (Blackburn), supra, 112 Cal.App.3d at pages 245-248, an employee sustained a psychiatric injury because of an investigation and termination resulting from allegations that the forged signatures of customers on advertising contracts. In Blackburn, this division held that, if the employee forged signatures, the injury resulting from the ensuing investigation

^{3/} By Assembly Bill No. 119 (1993-1994 Reg. Sess.), the Legislature amended Labor Code section 3600, subdivision (a)(8), effective July 16, 1993, to read: "Where the injury is not caused by the commission of a felony, or a crime which is punishable as specified in subdivision (b) of Section 17 of the Penal Code, by the injured employee, for which he or she has been convicted." (Stats. 1993, ch. 118, § 2, No. 2 Deering's Adv. Legis. Service, p. 764.)

and discipline would not be compensable because it would not be "a consequence of his employment." (Id. at p. 247.) We further held that, on remand, the burden of proof would be on the employer to establish every element of forgery by a preponderance of the evidence. (Ibid.) Moreover, citing the then existing provisions of section 3202, we stated that all reasonable doubts were to be resolved in favor of the employee. (Ibid.) Section 3202 provides that division 4 of the Labor Code shall be liberally construed for the purpose of extending its benefits to persons injured in the course of their employment. In Blackburn, we concluded that if, as a result of prior job stress at Pacific Telephone, the employee developed a mental disease or defect that resulted in the alleged forgeries, the psychiatric injury resulting from the investigation and discharge would be compensable. (Id. at p. 248.)

Later, in Rockwell International v. Workers' Comp. Appeals Bd. (1981) 120 Cal.App.3d 291, 298, this division held that, if an employee is suspended from work for five days for conduct outside the course of employment, an injury sustained because of that discipline is not compensable under the Workers' Compensation Act. We stated that the employer had the burden of proving by a preponderance of the evidence that the conduct for which the employee was disciplined was outside the

course of employment. (Ibid.) Citing Blackburn, we further stated, however, that all reasonable doubts are to be resolved in favor of the employee. (Id. at p. 299.)^{4/}

In 1982, after the aforementioned decisions in Blackburn and Rockwell, the Legislature enacted section 3202.5. When trial was held in the present matter, section 3202.5 provided: "Nothing contained in Section 3202 shall be construed as relieving a party from meeting the evidentiary burden of proof by a preponderance of the evidence.

'Preponderance of the evidence' means such evidence as, when

^{4/} In Safeway Stores, Vons v. Workers' Comp. Appeals Bd. (Williams), supra, 57 Cal.Comp. Cases 291, the employee found four unwrapped but discarded batteries on the floor during his shift as a janitor. Halfway through his shift, he took the batteries to his truck. He was then questioned by security guards in a computer room for about two hours. The employee stated that, during the interrogation, the security guards used racial epithets and told him he had to quit his job before he could leave the room. He signed a statement of resignation without reading it. The security guards denied that they made any threats. The employee alleged that he sustained a cumulative industrial psychiatric injury because of stress and an "'unconscionable firing.'" (Id. at p. 291.)

The WCJ in Safeway determined that, because the employee's psychiatric injury was caused by his own criminal conduct, his injury was not compensable. The board granted reconsideration and determined that any injury was compensable because his misconduct occurred during regular working hours while he was performing his regular duties in an unauthorized manner. The board stated it was not persuaded that the employee had the intent to steal the employer's property. Safeway is distinguishable from the present case because the cashing of an unauthorized check was not one of Ms. Easley's duties.

weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."^{5/} Labor Code section 3202.5 abrogated this court's holdings in Blackburn and Rockwell that all reasonable doubts must be resolved in favor of the applicant. (See Rogers v. Workers' Comp. Appeals Bd. (1985) 172 Cal.App.3d 1195, 1199-1202 [construing Lab. Code, § 3202.5 as it applied to the burden of proving that an assault arose out of and occurred in the course of employment].)

By resolving all reasonable doubts in favor of Ms. Easley on the issue of whether she knew that she was not entitled to the additional checks when she cashed them, the board failed to apply the burden of proof set forth in section 3202.5. The board's decision must, therefore, be annulled and the matter remanded so that it can apply the correct burden of proof in determining whether Ms. Easley sustained a psychiatric injury that arose out of and occurred in the course of her employment.

^{5/} By urgency legislation signed by the Governor on April 3, 1993 (Sen. Bill No. 31 (1993-1994 Reg. Sess.)), section 3202.5 was amended to provide that Labor Code section 3202 also does not relieve lien claimants from meeting their evidentiary burden of proof by a preponderance of the evidence. (Stats. 1993, ch. 4, § 1.5, 1 Deering's Adv. Legis. Service, p. 24.)

In deciding whether she sustained an industrial psychiatric injury, the board must also review the transcript of the trial. Because the employer pointed out that the WCJ's summaries of evidence contained material omissions, the board should have obtained and reviewed a transcript of the trial before issuing its decision after reconsideration. (See Allied Comp. Ins. Co. v. Ind. Acc. Com. (1961) 57 Cal.2d 115, 120-121.) Those transcripts have now been prepared and will be available to the board.

B. Medical-legal costs

In its reconsideration petition, Rykoff contended that the cost of the first PCS report was not reasonably and necessarily incurred to prove a contested claim and medical-legal costs should not be awarded for that document. Rykoff did not contend in its reconsideration petition that the cost of Dr. Rausch's report (the second PCS report) was not reasonably and necessarily incurred to prove a contested claim. We, therefore, need not consider Rykoff's contention that the cost of Dr. Rausch's report was not a valid medical-legal expense. In finding that Ms. Easley reasonably and necessarily incurred an expense to prove a contested claim, the WCJ did not specify whether the expense of both PCS reports

was reasonable and necessary. The WCJ ordered the amount of reimbursement to be adjusted by the parties or determined based on the filing of a petition and supporting documents. In amending the WCJ's findings, the board left the finding on the extent of the compensability of the medical-legal expenses equally uncertain. The board did not directly address Rykoff's contention regarding PCS's first report. We conclude that the present record does not permit a finding that the first report is a proper basis for an award of medical-legal costs.

In 1990, when the reports of PCS were written, section 4620 provided in pertinent part that a medical-legal expense means "any costs and expenses incurred by or on behalf of any party . . . for . . . medical reports . . . for the purpose of proving or disproving a contested claim." Section 4621 provided in pertinent part: "[T]he employee . . . shall be reimbursed for his or her medical-legal expenses reasonably, actually, and necessarily incurred. The reasonableness of, and necessity for, incurring these expenses shall be determined with respect to the time when the expenses were actually incurred. . . ."

In Del Rio v. Quality Hardware (1993) 58 Cal.Comp.Cases 147 (in bank), the board stated that for injuries that occurred before January 1, 1990, "medical-legal costs were usually incurred at or after the

time of filing an application for adjudication"

(Id. at p. 152.) Regarding cases in which the injury occurred after 1989, the board stated: "Ordinarily, an employer's or carrier's liability for medical-legal costs under . . . section 4620, et seq., arises no earlier than the filing of a claim form . . . and/or notice or knowledge of the employer of the claimed industrial injury followed by a reasonable time to accept or deny the claim." (Ibid.)

By Senate Bill No. 31 (1993-1994 Reg. Sess.), which, as previously mentioned, became effective April 3, 1993, the Legislature amended sections 4620 and 4621 and stated those amendments were declaratory of existing law. (Stats. 1993, ch. 4, §§ 2, 3, 10, 1 Deering's Adv. Legis. Service, pp. 24, 25, 27.) The bill added subdivision (b) to section 4620. Section 4620, subdivision (b), provides: "A contested claim exists when the employer knows or reasonably should know that the employee is claiming entitlement to any benefit arising out of a claimed industrial injury and one of the following conditions exists: [¶] (1) The employer rejects liability for a claimed benefit. [¶] (2) The employer fails to accept liability for benefits after the expiration of a reasonable period of time within which to decide if it will contest the claim. [¶] (3) The employer fails to respond to a demand for payment of benefits after

the expiration of any time period fixed by statute for the payment of indemnity." (Stats. 1993, ch. 4, § 2, 1 Deering's Adv. Legis. Service, pp. 24-25.) Section 4621, subdivision (a), currently provides that costs for medical evaluations incidental to production of a medical report shall not be incurred before the employer or its insurer or attorney receives "all reports and documents required by the administrative director incidental to the services." (Stats. 1993, ch. 4, § 3, 1 Deering's Adv. Legis. Service, p. 25.)

One commentator has stated: "The question arises as to whether a cost is medical-legal if the evaluation and reporting process began either prior to or [concurrently] with the service of the pre-1990 application . . . in those cases in which the employer had no prior notice of the claimed injury and claimed entitlement to benefits. Typically applicant responds to an advertisement by a clinic which has him fill out a notice of claim and sign an attorney disclosure statement on the same day that the evaluation is performed in the clinic. Applicant is then referred to an attorney [¶] [I]t seems evident that there cannot be a true dispute or contest if one of the parties to the controversy is unaware of its existence." (Foust, Handling Medical-legal Issues: An Analysis &

Proposal (Conference of Cal. Workers' Comp. Judges 1992)
Reports of Evaluating Doctors, p. 27.)

In the present case, Dr. Greils's report was based on an examination of applicant on March 30, 1990. The application was dated March 30, 1990. The board's file stamp indicates it was filed on April 24, 1990. Dr. Greils's report is dated April 6, 1990. Defense counsel signed an answer to the application on April 11, 1990, and filed the answer with a cover letter dated April 17, 1990. Apart from the filing of the answer dated April 11, 1990, there is no evidence when Rykoff first learned of Ms. Easley's claim. There is no substantial evidence that Rykoff was aware of the claim or that the report was prepared after the application for benefits was filed. Under these circumstances and based solely upon the present record, the expense of the psychiatric evaluation on March 30, 1990, must, based on the present record, be deemed to have been incurred before Rykoff was aware of the application and it follows that that expense was not incurred to prove a contested claim. Therefore, to the extent that PCS's lien claim for medical-legal costs is for Dr. Greils's report, the employer may not be ordered to pay the lien claim for that report based upon the present record.