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

**AM KANG,**

*Applicant,*

vs.

**RADIATOR U.S.A.; STAR INSURANCE  
COMPANY, Administered By ILLINOIS  
MIDWEST INSURANCE AGENCY,**

*Defendants.*

Case No. **ADJ7750590**  
(Los Angeles District Office)

**OPINION AND ORDER  
DENYING PETITION  
FOR RECONSIDERATION**

Defendant seeks reconsideration of the December 26, 2013 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a driver on December 24, 2010, sustained industrial injury to his back, psyche, and sleep.

Defendant contends that the WCJ erred in finding that applicant sustained industrial injury to his psyche and sleep.

We have reviewed applicant's Answer. No Report and Recommendation on Petition for Reconsideration was prepared as the WCJ was temporarily unavailable.

We have considered the Petition for Reconsideration and the Answer, and we have reviewed the record in this matter. For the reasons discussed below, we will deny defendant's Petition for Reconsideration (Petition).

**FACTS**

While employed by defendant as a driver/loader on December 24, 2010, applicant sustained an admitted industrial injury to his back. Applicant also claimed to have sustained an industrial injury to his psyche and sleep.

On June 27, 2012, applicant was examined and evaluated by Rodney Bluestone, M.D., a Qualified Medical Evaluator (QME) in rheumatology. Dr. Bluestone obtained a detailed history from

1 applicant, and noted that applicant "feels very depressed, stating, 'It's too much.' He has had some  
2 suicidal thoughts but has made no attempts." (July 2, 2012 QME Report, Def. Exh. A, p. 3.)  
3 Dr. Bluestone reported that over the past month, applicant had experienced poor sleep, requiring more  
4 than 60 minutes to fall asleep and usually awakening two or three times per night. (Def. Exh. A, p. 5.)  
5 Further, applicant reported that he was sleeping less than five hours per night and felt tired during the  
6 day. (*Ibid.*) Applicant's score on the Iowa Fatigue Scale was 40, which, Dr. Bluestone explained,  
7 "indicates a state of severe fatigue." (*Ibid.*) Dr. Bluestone opined that applicant was "suffering from  
8 significant depression, which probably lowers his pain threshold and which may impact the quality of his  
9 sleep, resulting in greater fatigue and a sleep-and-arousal disorder." (*Id.* at p. 7; see also August 25, 2012  
10 Agreed Medical Evaluator (AME) Supplemental Report, Bd. Exh. Z, p. 20 ["[Applicant] has sleep loss,  
11 anxiety, and he is depressed."].)

12 On August 14, 2012, applicant was examined and evaluated by Ana L. Nogales, Ph.D.  
13 Dr. Nogales described applicant's emotional state as follows:

14 "[Applicant] feels nervous, anxious, on edge, and easily startled. He is fearful of  
15 being outside his home and being around crowds of people. He stated that he  
16 does not want to live and is embarrassed of being unable to move freely. ... He  
17 feels depressed and explains that he cannot plan for the future. He also reported  
18 feeling discouraged, hopeless, helpless, and worthless. He feels irritable and  
19 easily angered, and is fearful that he will lose control of his anger. ... He feels  
20 that he will never recover from his physical injury as there has been no progress.  
... He has passing thoughts of wanting to be dead. He frequently thinks of  
killing himself. He last thought of this today because he lost confidence in his  
health. However, he has no plans or intent of killing himself." (September 14,  
2012 Secondary Treating Physician's Psychological Evaluation, App. Exh. 6, pp.  
4-5.)

21 In the section of her Report detailing her psychometric assessment, Dr. Nogales found that  
22 applicant's depression was moderate and clinical, and stated that there was "evidence suggesting a true  
23 depressive disorder may be present." (App. Exh. 6, p. 7.) Dr. Nogales also found that applicant had a  
24 moderate, clinical level of anxiety, and stated that there was evidence that applicant "may be suffering  
25 from a clinical anxiety state, or may be experiencing anxiety secondary to the emergence of another  
26 psychological disorder." (*Ibid.*) Discussing causation, Dr. Nogales noted that as a consequence of his  
27 industrial injury to his back, applicant developed anxiety and depression "that increased with the passage

1 of time and deteriorated ... when he saw that his condition is not improving,” and opined that “[t]he  
2 percentage of total causation of [applicant’s] current mental disorder is estimated at a higher level than  
3 the legal threshold of industrial causation of 50%.” (*Id.* at pp. 8, 9.) Additionally, with respect to  
4 applicant’s sleeping, Dr. Nogales reported that applicant “has problems sleeping because of fear, anxiety,  
5 and stress.” (*Id.* at p. 5.)

6 The parties appeared for trial on September 26, 2013, and applicant, who was the only testifying  
7 witness, testified in relevant part as follows. Applicant first visited Dr. Nogales because he was  
8 “nervous, dreadful, and [unable to] sleep.” (September 26, 2013 Minutes of Hearing and Summary of  
9 Evidence (MOH/SOE), p. 6:9-10.) Applicant told Dr. Nogales that he was unable to sleep, was nervous  
10 and sometimes wanted to die or end his life, and that he could no longer see a future for himself because  
11 of how his orthopedic injury had affected his quality of life. (MOH/SOE, p. 6:12-17.) Applicant  
12 reported having trouble sleeping to his doctors, and continues to have difficulty sleeping. (*Id.* at p. 7:21-  
13 22.) On cross-examination, applicant admitted that he and his wife divorced in 1996, was bitten by a dog  
14 in 2005, and has had limited contact with his grandchildren since 2008, but confirmed that he was not  
15 depressed before he sustained his industrial injury. (*Id.* at p. 7:9-19.)

16 On December 26, 2013, the WCJ issued her F&A, in which she found that applicant sustained  
17 industrial injury to his back, sleep, and psyche. In the accompanying Opinion on Decision, the WCJ  
18 explained that she had relied upon the medical reports from Dr. Bluestone, AME Dr. Pechman, and  
19 Dr. Nogales in finding injury, and upon “applicant’s credible testimony.”

20 Defendant timely sought reconsideration, contending that the WCJ erred in finding industrial  
21 injury to applicant’s psyche and sleep. Defendant argued that the medical reports upon which the WCJ  
22 relied did not constitute substantial evidence of injury to psyche and sleep.

### 23 DISCUSSION

24 A decision of the Workers’ Compensation Appeals Board must be supported by substantial  
25 evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-81  
26 [39 Cal.Comp.Cases 310].) To be considered substantial evidence, a medical opinion “must be  
27 predicated on reasonable medical probability.” (*E.L. Yeager Construction v. Workers’ Comp. Appeals*

1 *Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen's*  
2 *Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-17, 419 [33 Cal.Comp.Cases 660].) A medical  
3 opinion is not substantial evidence if it is based on "inadequate medical histories or examinations, on  
4 incorrect legal theories, or on surmise, speculation, conjecture, or guess." (*Escobedo v. Marshalls* (2005)  
5 70 Cal.Comp.Cases 604, 620-21; see also *Gatten, supra*, 145 Cal.App.4th at p. 928 ["a medical opinion  
6 is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or  
7 examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. Further, a  
8 medical report is not substantial evidence unless it sets forth the reasoning behind the physician's  
9 opinion, not merely his or her conclusions." (citations omitted)].) Here, the doctors who examined  
10 applicant based their opinions on extensive discussions with applicant regarding how he sustained his  
11 injury and his condition thereafter. Based on this, Dr. Nogales found that "[t]he percentage of total  
12 causation of [applicant's] current mental disorder is estimated at a higher level than the legal threshold of  
13 industrial causation of 50%" – that is, that "actual events of employment were predominant as to all  
14 causes combined of [applicant's] psychiatric injury." (Lab. Code, § 3208.3(b)(1).) Further, these doctors  
15 explained the reasoning behind their conclusions. By contrast, defendant has not offered any evidence,  
16 documentary or testimonial, rebutting or impeaching the medical reports regarding applicant's injury.  
17 We therefore agree with the WCJ that the reports on which she based her finding of industrial injury  
18 constitute substantial evidence.

19 Moreover, we note that a WCJ's findings on credibility are entitled to great weight, "because of  
20 the referee's opportunity to observe the demeanor of the witnesses and weigh their statements in  
21 connection with their manner on the stand." (*Garza v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 312,  
22 319 [35 Cal.Comp.Cases 500, 505].) Here, the WCJ has determined that applicant's testimony was  
23 credible. As with the reports, defendant did not rebut or impeach applicant's testimony, either through its  
24 own witness testimony or by offering contradictory medical reports. We therefore will not disturb the  
25 WCJ's finding on credibility.

26 Accordingly, we will deny defendant's Petition.

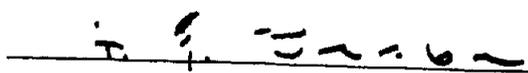
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For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the December 26, 2013 Findings and Award is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

  
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**FRANK M. BRASS**

**I CONCUR,**

  
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**RONNIE G. CAPLANE**

  
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**RICK DIETRICH**      **DEPUTY**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**MAR 17 2014**

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

**AM KANG  
SOLOV AND TEITELL  
FLOYD, SKEREN & KELLY, LLP**



**RB/sye**

**KANG, Am**