

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

SOPHIA SALAS, *Applicant*

vs.

**INNOVATIVE WORK COMP SOLUTIONS, LLC, leased coverage for
SYNCTRUCK, LLC, insured by UNITED WISCONSIN INSURANCE COMPANY,
administered by NEXT LEVEL ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ16112899
Sacramento District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings of Fact and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on March 28, 2023, wherein the WCJ found in pertinent part that applicant's industrial psychiatric (psyche) injury is denied pursuant to Labor Code section 3208.3(d).¹

Applicant contends that the WCJ should have found that her injury was caused by a sudden and extraordinary employment condition within the meaning of section 3208.3(d).

We have not received an answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition and the contents of the Report with respect thereto.

Based on our review of the record, and for the reasons discussed below, we will amend the March 28, 2023 F&O to find that the motor vehicle accident on November 25, 2020 was a sudden and extraordinary event (Finding 5) and that applicant's claim of injury to her psyche is not barred by Labor Code section 3208.3(d). Otherwise, we will affirm the March 28, 2023 F&O.

¹ All statutory references are to the Labor Code unless otherwise noted.

BACKGROUND

We will briefly review the relevant facts.

Applicant claimed injury to various body parts, including her head, lumbar spine, neck, and psyche, while employed by defendant as a delivery driver on November 25, 2020. Defendant accepts compensability for neck, head, and back.

On September 26, 2022, applicant was evaluated by Trevor B. Mackin, Psy.D., Panel Qualified Medical Evaluator (PQME) in psychology. (Report by Trevor Mackin, Psy.D., dated October 26, 2022, Exhibit 1, Minutes of Hearing and Summary of Evidence, March 9, 2023 trial (MOH/SOE), p. 3 (Dr. Mackin's Report, Exh. 1).) Dr. Mackin evaluated applicant, took a detailed history, reviewed extensive medical records, and performed psychological assessments. (Dr. Mackin's Report, Exh. 1, at pp. 4-8, 36-42, 43-47.)

Dr. Mackin states, in pertinent part, as follows:

This injury-PTSD-was predominantly (over 50%) the result of a serious motor vehicle accident which occurred while Ms. Salas was employed by Synctruck, LLC. This is a primary injury which resulted as the result of a specific work-related incident (e.g., serious motor vehicle accident).

Ms. Salas satisfies DSM-5 criteria PTSD. On November 25, 2020, Ms. Salas was working at Synctruck, LLC, in her capacity as a delivery driver when she was "t-boned" by a truck. She described the impact as significant, "... he hit the rear right passenger side of the van. And it caused it to spin and roll and it landed facing the complete opposite side of the way I was going and landed on the driving side ... I had my seatbelt on so that saved me ..." She described having to crawl up the vehicle to exit on the passenger's side with the help of bystanders. Ms. Salas was taken via ambulance to a hospital (Harris, 11/25/2020) and received treatment for a closed head injury. In the following weeks and months Ms. Salas has described a series of symptoms related to her experience of trauma. ... (Rockers, 02/24/2022 & 03/31/2022; and Chitnis, 04/25/2022).

(Dr. Mackin's Report, Exh. 1, pp. 52-53.)

Dr. Mackin opined as follows:

In my opinion, based on my review of the medical records, the psychological testing and clinical interview I conducted on 09/26/2022, Ms. Salas' PTSD is exclusively related to the motor vehicle accident she sustained on 11/25/2020. ***In my opinion, 100%***

of Ms. Salas' development of PTSD is related to the serious motor vehicle accident she suffered on 11/25/2020.

(Dr. Mackin's Report, Exh. 1, p. 54 (emphasis in original).)

The parties stipulated that applicant sustained injury arising out of and in the course of employment (AOE/COE) to her head, lumbar spine, and neck. (January 13, 2023 pre-trial conference statement (PTCS), p. 2; MOH/SOE, p. 2.)

On March 9, 2023, the matter proceeded to trial on the following issues:

1. Injury arising out of and in the course of employment to applicant's psyche;
2. Defendant asserts applicant's psyche claim is barred pursuant to Labor Code section 3208.3(d), the Six-Month Rule.

3. Applicant asserts the sudden and extraordinary exception applies.
(MOH/SOE, p. 2.)

In pertinent part, applicant testified to the following:

Q. Ms. Salas, I'm going to go through some background real quick. But, can you describe to me what you were doing on November 25th, 2020, when you were involved in the motor vehicle accident?

A. I was driving my work vehicle.

Q. Okay.

A. Delivering packages.

Q. And when you were in your vehicle delivering work packages, how do you know where to go?

A. They give us a device which shows like a map, like kind of a -- directions. Like a MapQuest kind of.

(Applicant's trial testimony, March 9, 2023, p. 12:11-21.)

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Q. And when you were in your vehicle delivering work packages, how do you know where to go?

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(Applicant's trial testimony, March 9, 2023, p. 12:11-21.)

Q. Do you recall what time you started working then?

A. My shift started at 11:00 a.m.

Q. So your shift has already started. And are you delivering -- have you delivered some packages already that day?

A. Yes.

Q. And before this accident occurred, were you traveling to the next location?

A. Yes.

Q. And what were you planning on doing in that next location?

A. Delivering packages.

Q. As you -- do you recall about what time the accident occurred?

A. It was early afternoon. It was not too far after starting my shift.

Q. Now, take me to that day, at that time. You're driving through the intersection, and what happens?

A. Um, I look both ways, approach an intersection. There was no cars. So, I proceeded through the intersection. Um, and I still look both ways just in case, and I seen a truck approaching on my right side, um, through the right intersection.

Q. When you see the truck, are you already into the

(Applicant's trial testimony, March 9, 2023, p. 13:2-25.)

intersection?

A. Yes.

Q. When you see that truck, what do you think?

A. Um, that he's still approaching the intersection and doesn't see me. So I get scared, and I start honking as a warning to let him know that I was still crossing that intersection. I was still going through it.

Q. And what happened next?

A. That's when I was hit.

Q. What did it feel like?

A. Uh, it felt like an immediate jerk. I just remember hearing it, then feeling it. Hearing it, it sounded like a big boom. Feeling it, definitely felt like a big jerk, and, um, it happened so fast.

Q. When the vehicle hit yours, did your vehicle move at all?

A. Yes, it did.

Q. How?

A. It spun -- the vehicle spun.

THE COURT: I'm going to go back just a second. You said vehicle. What kind of -- what were you driving?

THE WITNESS: It was a white van.

THE COURT: Okay. Thank you. Go back.

Q. So I want to take you to the time the

(Applicant's trial testimony, March 9, 2023, p. 14:1-25.)

-- the other vehicle has now hit your van, and your van starts to spin?

A. Yes.

Q. What's that feel like to you?

A. I was scared, because it was unexpected. And I was hit, and I'm still in the vehicle, and I don't -- I don't know what's going on. I just remember feeling the hit, and hearing it, and seeing everything spin around me; happening so fast, but it happening so slow. Because I could see that I was spinning, but I couldn't see where I was or anything beyond that.

Q. Did the van roll at all?

A. Yes, it did.

Q. How?

A. After it spun, I ended rolling to the driver's side, and that's when the vehicle landed.

Q. So while you were -- were you wearing your seat belt at this time?

A. Yes, I was.

Q. Do you recall the feeling of the van rolling onto its side?

A. Yes, I do. I remember feeling it spin. And then, once the van rolled to the left, it smacked the concrete; the floor of the street. Um, and I remember hearing glass shatter, and being jerked to the left, and hitting my head on -- I'm not

(Applicant's trial testimony, March 9, 2023, p. 15:1-25.)

sure if it was the window, the door or the asphalt.

Q. What part of your head hit the van or the asphalt?

A. It was the left side of my head. So right about the area of my like temple.

Q. Did any of your face get hurt or scraped up by the glass of the van?

A. At first, I didn't know. Because once I hit, my face became numb and flushed, and hot, and tingly, and very tight. So I know I hit. I just didn't know the extent of my injury on my head or if there was bleeding or cuts or anything. It wasn't until a few days after is when I was seeing that there was scrapes and there was like patches on my face of like where my skin was peeling.

Q. I want to take you again to that moment. You're in the van. It's already tipped over. You've hit your head. And you hear the glass breaking. Is anything inside the cab moving?

A. Uh, I see glass -- once the glass shattered, and I'm already looking around, there's glass kind of falling. Um, I remember feeling liquids on my leg like if something was broken. There was nothing in the van with me in the front seat besides my belongings. So, I didn't know where those fluids came from, so I had --

Q. I want to talk about that in a second. But I want to, again, take you to the moment. The van is now on its side. Is

(Applicant's trial testimony, March 9, 2023, p. 16:1-25.)

the van still moving when you're on the side and the street is so close to you? Do you recall that at all?

A. I was at a complete stop. When it landed, it landed, and it was just on its side. We didn't move. There was like -- that's like the end of the accident, of being hit.

Q. Did you -- do you think you had any sort of moment where you were -- not unconscious -- but where you had sort of a lack of perception?

A. Uh, I believe I blanked out once we hit -- after we hit -- um, well, after it landed on the driver's side where I blanked out for a second because of shock and it happening.

Q. Have you reviewed the video of the accident?

A. Yes, I have.

Q. Well, I will offer to you that the video shows the van spinning after it did roll onto its side. But you don't really recall perceiving that?

A. No.

Q. What's the next thing you remember?

A. I remember looking around and trying to figure out where I was. And, um, I began -- start getting really scared and freaking out because there was liquids on my legs, and I didn't know where it came from. And I was just like, Oh, my gosh. Like, I'm going to catch on fire. I need to get out of here. So then, I'm like screaming and looking around. And I

(Applicant's trial testimony, March 9, 2023, p. 17:1-25.)

see somebody approach the front of the vehicle, and I hear them saying they're going to get me out. And I'm yelling and screaming, and telling them, You got to get me out of here. Because I was so scared. I thought this was it.

Q. Did you know what the liquid was on your body?

A. No, I don't.

Q. What do you think it was?

A. I thought it was like either gas or some kind of fluid coming from the car. Because I know the accident was bad. I just didn't know how bad it was. So that's -- that made me freak out. Because I didn't want to catch on fire. I didn't want anything else to happen.

Q. Did you think you were going to die?

A. Yeah, I did.

Q. How did you exit the vehicle?

A. Um, I was pulled through the passenger side. The gentlemen that approached the vehicle -- there was two gentlemen. One ended up climbing his way on top of the vehicle and, um --

Q. But the "top" is really the driver's side; right? "Up" is the side of the van? So you're climbing out of the van up through the driver's side door?

A. Up through the passenger door.
Q. I'm sorry. Up through the passenger door?
A. Yes, because the driver's side was on the floor.

(Applicant's trial testimony, March 9, 2023, p. 18:1-25.)

So I took off my seat belt, and I tried to climb, but I couldn't reach it for some reason. So, he -- the gentleman reached in and helped pull me up. And I just remember kicking and trying to use my feet to step on whatever to get out of the vehicle.

Q. What happened next?

A. Uh, the gentleman took me out of the vehicle. And, um, the other gentleman that came to help, um, helped me get off the vehicle by holding me and guiding me down. And once I was on the ground, he guided me to the curb where I sat.

Q. I'm sorry for having to go back into this. But, when you're -- when the vehicle's on its side -- I want to take you back to when the vehicle is on its side, and you sort of finally start to perceive things and you perceived a liquid on your body. Is there any smell that you have -- that you remember when you're in the van?

A. Yeah, the smell was really strong. Um, it didn't smell -- it had an odor to it. I couldn't tell you what color because I had black pants on. But, the smell was very distinctive. It smelled -- I thought it was gas, but I wasn't sure, but it smelled something like that.

Q. Now, after the injury, do you recall being transported in the ambulance?

A. Yeah.

Q. On the way to the hospital, how were you feeling?

(Applicant's trial testimony, March 9, 2023, p. 19:1-25.)

A. I was crying. I was scared. Because my head was still tingly and still feeling burning. Um, and I didn't -- I didn't know to the extent of my injuries, because I was scared, and I was in shock, and I was freaking out. Because I knew the accident had just happened, and I felt like I was -- I felt like I was -- that was it. That was going to be the end of it. But then, being in the ambulance just confirmed like it really happened, and I was just crying.

Q. Now, I know that you have had -- sustained some injuries to other parts of your body, some physical injuries. But for the sake of brevity today, I want to focus on your psychiatric symptoms. Can you tell me what symptoms you think you are experiencing or had experienced as a result of this injury -- as a result of the car crash?

A. I am too scared to drive. That's -- that's something I will not do.

Q. What does it feel like when you try to operate a vehicle?

A. It makes me sick to my stomach. Like, just sitting here thinking about me having to get in a car and drive somewhere, it makes me

sick to my stomach. I get nauseated and I want to throw up. Because, I can't stomach driving. And it's so bad that even being a passenger gets me like that. Like, I could be driving with a friend, or a family member, or

(Applicant's trial testimony, March 9, 2023, p. 20:1-25.)

my significant other, and I have to be on my phone or reading something to keep my mind off of being in the car, because I feel like no matter what, I'm going to get hit again even if I'm not driving. Which I'm not. I'm a passenger, and it freaks me out.

Q. Have you had nightmares?

A. Yeah, plenty of nightmares. Nightmares where I just re-enact the whole accident and see it happening all over again.

(Applicant's trial testimony, March 9, 2023, p. 21:1-9.)

Q. Okay. Real quickly I would like to talk about your psychiatric treatment. You treated with Dr. Daniel Rockers

(Applicant's trial testimony, March 9, 2023, p. 22:24-25.)

right?

A. Yes.

Q. What did Dr. Rockers do for you?

A. Um, he helped me to understand the accident. You know, knowing that it wasn't something that I can get over overnight, but working my way towards trying to get through it and trying to expose myself to getting in a vehicle and taking baby steps to try and drive. Um, he also made me feel like I was okay to feel the way I felt. You know, that I -- I was able to feel the way that I was feeling and that I wasn't crazy. Or, that it was normal after what I had been through, and he helped.

Q. Did he help you understand the diagnosis of PTSD?

A. Yes, he did. He really did. Because there's a stigma behind that PTSD that I -- I learned that I thought it was only geared towards a certain specific person or peoples, you know, like somebody in the military and stuff like that. So I thought everything that I went through was like, Oh, that's not it. That's not what I have. I'm just really freaked out and traumatized. But when he explained to me in one of our sessions, This is what it is and this is what you have, then it made a lot of sense, and I felt a little bit more relief to know that there was something to it. It wasn't just me.

(Applicant's trial testimony, March 9, 2023, p. 23:1-24.)

Q. Did you find your treatment with Dr. Rockers helpful?

A. Yes, I did.

Q. If you were able to seek more treatment with Dr. Rockers or another mental health professional, would you do so?

A. Yes, I would.

Q. I see you crying right now. Why?

(Applicant's trial testimony, March 9, 2023, p. 24:18-25.)

A. Because of this accident, my life has just not been the same. I don't drive. And I used to be the type of girl that would just go for drives and enjoy life. Now, I don't. I have to have people take me to and from, and being scared of being in the car in general is just a lot. And then sitting here and going over the accident, you know, it just reminds me that that was -- that was close; that was a close call. Even though I was being as safe as I could, you know, it still happened. And it was -- I never experienced something so scary to the point where I felt like I was going to die. Like, going over that just really hits, you know. I would never want anybody to ever feel that way or go through what I went through, or still going through what I went through.

Q. Ms. Salas, earlier you testified that the motor vehicle accident was unexpected, but you also said that you did see the truck coming on your right side and that you honked at the other vehicle. Was it your impression that you were going

(Applicant's trial testimony, March 9, 2023, p. 25:1-14, 22-25.)

to get hit?

A. No. It was my impression that this gentleman did not pay attention, or was not seeing me, or possibly preoccupied on something else other than driving to approach an intersection and not see a big white van already across it and you're still coming into the intersection.

Q. Do you know approximately how fast you were driving at the time of the collision?

A. How fast I was driving?

Q. Yes.

A. Um, I believe 20 miles per hour. It was a residential area, so not very fast.

Q. And do you recall bracing yourself through the impact?

A. No.

Q. Do you recall if you lost consciousness?

A. I feel like I did, um, when the vehicle landed on the driver's side for a split second. Like, I blanked out.

Q. How long have you -- had you been working for that employer prior to the motor vehicle accident?

A. A little under two months.

(Applicant's trial testimony, March 9, 2023, p. 26:1-20.)

No other witnesses were called to testify at trial.

The WCJ issued the following F&O:

FINDINGS OF FACT

1. Sophia Salas (Applicant) was thirty-five (35) years old and employed as a Delivery Driver at Woodland, California by Innovative Work Comp Solutions, LLC (Employer) on November 25, 2020 when suffered an injury arising out of and in the course of employment to her head, lumbar spine, neck and psyche.
2. Employer was insured for workers' compensation by United Wisconsin Insurance Company (Defendant) at the time of Applicant's industrial injury.
3. Applicant was shown to have sustained a psychiatric injury arising out of and in the scope of her employment as a result of the industrial injury.
4. Applicant was shown to have been working for Employer for less than six months at the time of her industrial injury.
5. The auto accident on November 25, 2023 was not shown to be an extraordinary event.

(F&O, pp. 1-2.)

ORDER

1. Applicant's claim for compensation for the industrial psychiatric injury is denied pursuant to Labor Code Section 3208.3(d).
2. All other issues are deferred at this time.

(F&O, p. 2.)

DISCUSSION

The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a), 3202.5.) With respect to psychiatric injuries, section 3208.3 provides, in relevant part:

(a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition–Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.

(b) (1) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury.

(2) Notwithstanding paragraph (1), in the case of employees whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury.

...

(d) Notwithstanding any other provision of this division, no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous. This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition.

(Lab. Code, § 3208.3(a)-(b) and (d).)

Here, it is undisputed that applicant was employed by defendant for less than six months at the time of her injury and applicant claims that she sustained an industrial injury to her psyche. Defendant asserts applicant's psyche claim is barred by section 3208.3(d). Therefore, we must consider whether applicant's psyche injury was the result of a "sudden and extraordinary employment condition," within the meaning of section 3208.3(d).

The WCJ found "[a]pplicant's credible testimony at trial established by a preponderance of the evidence that the auto accident was a sudden event" (Opinion on Decision, p. 2) and we will not disturb the WCJ's determination. Because the employment condition that caused applicant's psychiatric injury was "sudden" within the meaning of section 3208.3(d), we turn to whether it was "extraordinary."

Although the Legislature refers to the term “sudden and extraordinary” employment condition in section 3208.3, section 3208.3 does not define “sudden” or “extraordinary.” In *Matea v. Workers’ Comp. Appeals Bd.*, the Court of Appeal noted that Webster’s Third International Dictionary “defines ‘sudden’ as ‘happening without previous notice or with very brief notice : coming or occurring unexpectedly : not foreseen or prepared for.’” (*Matea v. Workers’ Comp. Appeals Bd.* (2006) 144 Cal.App.4th 1435, 1448 [71 Cal.Comp.Cases 1522] (*Matea*).) The Court further observed that “extraordinary” is defined “as ‘going beyond what is usual, regular, common, or customary’; and ‘having little or no precedent and usu[ally] totally unexpected.’” (*Id.*, citations omitted.)

Analysis of the decisions addressing whether a psychiatric injury resulted from a “sudden and extraordinary employment condition” reveal that this is a primarily fact-driven inquiry. “Each case must be considered **on its facts** in order to determine whether the alleged psychiatric injury occurred as a result of sudden and extraordinary events that would naturally be expected to cause psychic disturbances[.]” (*Matea, supra*, at 1450, emphasis added.) Consequently, appellate decisions focus heavily on the individual facts in determining whether an employment condition was sudden and extraordinary. By extension, the determination of whether an event is “sudden and extraordinary” within the meaning of section 3208.3(d) also hinges on the evidence in the record, or lack thereof.

For example, in *Matea*, the injured worker sustained an admitted orthopedic injury while working in a Home Depot store when a rack of lumber fell on his left leg and psychiatric injury was claimed as a compensable consequence. (*Matea, supra*, at 1438.) The worker had not been employed for six months when the injury occurred, so the employer denied that any psychiatric injury was compensable, contending that the injury was not caused by a sudden and extraordinary employment condition. (*Ibid.*) However, the injury caused by a rack of falling lumber in a store aisle was considered extraordinary because “no testimony was presented regarding how often lumber falls from racks into the aisles [], and **there was no evidence presented that such occurrences are regular and routine events.**” (*Matea, supra*, at 1450 (emphasis added).) The Court allowed that while gas main explosions and workplace violence may constitute extraordinary events, the Court found these examples too restrictive, writing as follows:

We also agree that the sudden and extraordinary employment condition language in Section 3208.3, subdivision (d), could certainly include occurrences such as gas main explosions or workplace violence. However,

giving the language of the statute ‘its usual, ordinary import’ [citation], in light of its legislative history, and liberally construing the statute in the employee’s favor (§3202), we believe that the Legislature intended to except from the six-month limitation psychiatric injuries that are caused by ‘a sudden and extraordinary employment condition,’ and not by a regular or routine employment event....

Gas main explosions and workplace violence are certainly uncommon and usually totally unexpected events; thus, they may be sudden and extraordinary employment conditions. However, we believe that there may also be other ‘sudden and extraordinary’ occurrences or events within the contemplation of section 3208.3, subdivision (d) that would naturally be expected to cause psychic disturbances even in diligent and honest employees. Therefore, if an employee carries his or her burden of showing by a preponderance of the evidence that the event or occurrence that caused the alleged psychiatric injury was something other than a regular and routine employment event or condition, that is, that the event was uncommon, unusual, and occurred unexpectedly, the injury may be compensable even if the employee was employed for less than six months....

(*Matea, supra*, at 1448-1449, emphasis added.)

In *State Compensation Ins. Fund v. Workers’ Comp. Appeals Bd. (Garcia)* (2012) 204 Cal.App.4th 766 [77 Cal.Comp.Cases 307], the Court agreed with the view expressed in *Matea* that an employment event is extraordinary if it is something that is not a regular and routine employment event, and further noted that “an accidental injury may be uncommon, unusual and totally unexpected” depending upon the circumstances. (*Id.*, at 772-773.) The Court concluded that an avocado picker did not offer “**particularly strong evidence on extraordinariness**” to support his claim that his fall from a 24-foot ladder was unusual or extraordinary because the risk of falling from a ladder was within the ordinary hazards of the occupation of picking avocados. (*Garcia, supra*, at 774 (emphasis added).) Similarly, in *Travelers Casualty & Surety Co. v. Workers’ Comp. Appeals Bd. (Dreher)* (2016) 246 Cal.App.4th 1101 [81 Cal.Comp.Cases 402], the injured worker did not meet the burden of showing that a live-in maintenance supervisor’s slip-and-fall on rain-slicked concrete was extraordinary. (*Travelers Casualty & Surety Co. v. Workers’ Comp. Appeals Bd. (Dreher)* (2016) 246 Cal.App.4th 1101, 1108-1109 [81 Cal.Comp.Cases 402].)

While an automobile accident is not necessarily an extraordinary event for a driver, it may become extraordinary because of unusual circumstances. In *Tejera*, the WCJ determined that it was not “frequent, regular or routine for a driver to fly or fall out of the passenger side of a vehicle after losing control of same while it is moving or stopped with a jackknifing trailer in pursuit as

the driver tries to roll out of the way.” (*California Ins. Guarantee Assn. (Tejera) v. Workers’ Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases 482, 484 (writ den.).)

These divergent decisions demonstrate the extent to which determination of whether an employment condition is sudden and extraordinary heavily depends on the individual facts of each case. Here, applicant provided the only testimony at trial. In pertinent part, applicant testified that:

A. Um, that he’s still approaching the intersection and doesn’t see me. So I get scared, and I start honking as a warning to let him know that I was still crossing that intersection. I was still going through it.

Q. And what happened next?

A. That’s when I was hit.

Q. What did it feel like?

A. Uh, it felt like an immediate jerk. I just remember hearing it, then feeling it. Hearing it, it sounded like a big boom. Feeling it, definitely felt like a big jerk, and, um, it happened so fast.

Q. When the vehicle hit yours, did your vehicle move at all?

A. Yes, it did.

Q. How?

A. It spun -- the vehicle spun.

(Applicant’s trial testimony, March 9, 2023, p. 14.)

-- the other vehicle has now hit your van, and your van starts to spin?

A. Yes.

Q. What’s that feel like to you?

A. I was scared, because it was unexpected. And I was hit, and I’m still in the vehicle, and I don’t -- I don’t know what’s going on. I just remember feeling the hit, and hearing it, and seeing everything spin around me; happening so fast, but it happening so slow. Because I could see that I was spinning, but I couldn’t see where I was or anything beyond that.

Q. Do you recall the feeling of the van rolling onto its side?

A. Yes, I do. I remember feeling it spin. And then, once the van rolled to the left, it smacked the concrete; the floor of the street. Um, and I remember hearing glass shatter, and being jerked to the left, and hitting my head on -- I’m not

sure if it was the window, the door or the asphalt.

(Applicant’s trial testimony, March 9, 2023, p. 15-16.)

Q. I want to take you again to that moment. You’re in the van. It’s already tipped over. You’ve hit your head. And you hear the glass breaking. Is anything inside the cab moving?

A. Uh, I see glass -- once the glass shattered, and I'm already looking around, there's glass kind of falling. Um, I remember feeling liquids on my leg like if something was broken. There was nothing in the van with me in the front seat besides my belongings. So, I didn't know where those fluids came from, so I had --

(Applicant's trial testimony, March 9, 2023, p. 16:1-25.)

Q. What's the next thing you remember?

A. I remember looking around and trying to figure out where I was. And, um, I began -- start getting really scared and freaking out because there was liquids on my legs, and I didn't know where it came from. And I was just like, Oh, my gosh. Like, I'm going to catch on fire. I need to get out of here. So then, I'm like screaming and looking around. And I see somebody approach the front of the vehicle, and I hear them saying they're going to get me out. And I'm yelling and screaming, and telling them, You got to get me out of here. Because I was so scared. I thought this was it.

Q. Did you know what the liquid was on your body?

A. No, I don't.

Q. What do you think it was?

A. I thought it was like either gas or some kind of fluid coming from the car. Because I know the accident was bad. I just didn't know how bad it was. So that's -- that made me freak out. Because I didn't want to catch on fire. I didn't want anything else to happen.

Q. Did you think you were going to die?

A. Yeah, I did.

Q. How did you exit the vehicle?

A. Um, I was pulled through the passenger side. The gentlemen that approached the vehicle -- there was two gentlemen. One ended up climbing his way on top of the vehicle and, um --

(Applicant's trial testimony, March 9, 2023, p. 17-18.)

Q. On the way to the hospital, how were you feeling?

A. I was crying. I was scared. Because my head was still tingly and still feeling burning. Um, and I didn't -- I didn't know to the extent of my injuries, because I was scared, and I was in shock, and I was freaking out. Because I knew the accident had just happened, and I felt like I was -- I felt like I was -- that was it. That was going to be the end of it. But then, being in the ambulance just confirmed like it really happened, and I was just crying.

Q. What does it feel like when you try to operate a vehicle?

A. It makes me sick to my stomach. Like, just sitting here thinking about me having to get in a car and drive somewhere, it makes me sick to my stomach. I get nauseated and I want to throw up. Because,

I can't stomach driving. And it's so bad that even being a passenger gets me like that.

(Applicant's trial testimony, March 9, 2023, p. 19-20.)

And then sitting here and going over the accident, you know, it just reminds me that that was -- that was close; that was a close call. Even though I was being as safe as I could, you know, it still happened. And it was -- I never experienced something so scary to the point where I felt like I was going to die.

Q. Ms. Salas, earlier you testified that the motor vehicle accident was unexpected, but you also said that you did see the truck coming on your right side and that you honked at the other vehicle. Was it your impression that you were going to get hit?

A. No. It was my impression that this gentleman did not pay attention, or was not seeing me, or possibly preoccupied on something else other than driving to approach an intersection and not see a big white van already across it and you're still coming into the intersection.

(Applicant's trial testimony, March 9, 2023, p. 25-26.)

Based on the evidence presented, including applicant's testimony, the motor vehicle accident at issue was an "extraordinary" employment condition, e.g., it was not regular and routine, going beyond what is usual, regular, common, or customary. (*Matea, supra*, at 1448, quoting Webster's.) Moreover, defendant presented no contrary evidence. Here, we are persuaded that the weight of the evidence supports a finding that the employment condition causing applicant's injury was sudden and extraordinary. We also note that the severity of any associated physical injuries are not dispositive of whether an event constitutes a sudden and extraordinary employment condition.

Accordingly, we amend the March 28, 2023 F&O to find that the motor vehicle accident on November 25, 2020 was a sudden and extraordinary event (Finding 5) and applicant's claim of injury to her psyche is not barred by Labor Code section 3208.3(d). Otherwise we affirm the March 28, 2023 F&O.

It should be noted that we express no final opinion on other outstanding issues.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the March 28, 2023 Findings and Order is **AFFIRMED**, except that **EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

5. The motor vehicle accident on November 25, 2020 was a sudden and extraordinary event.

ORDER

1. Applicant's claim for compensation for the industrial psychiatric injury is not barred by Labor Code Section 3208.3(d).

2. All other issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I DISSENT (see separate dissenting opinion),

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 29, 2023

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

**SOPHIA SALAS
EASON & TAMBORNINI
PARK GUENTHART**

JB/cs

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

DISSENTING OPINION OF COMMISSIONER RAZO

I respectfully dissent. My colleagues in the majority recognize that a claim of injury to psyche by an employee with less than six months of employment, like the injured worker in this case, is not compensable unless applicant proves that the injury was caused by a sudden and extraordinary employment condition. (Lab. Code, § 3208.3(d); *Garcia, supra*; *Dreher, supra*.)

The determination of whether a psychiatric injury resulted from a “sudden and extraordinary employment condition” is a primarily fact-driven inquiry. (*Matea, supra*.) While the majority finds that applicant’s psyche injury is a result of a sudden and extraordinary employment event, I find that the evidence supports a contrary conclusion. In this case, a delivery driver, driving at reduced speed through residential area, engaged in regular and routine duties when she was injured, i.e., delivering packages. In my view, applicant failed to establish that this motor vehicle accident was not an unusual or uncommon occurrence for a delivery driver. Thus, while applicant’s motor vehicle accident was “sudden,” it was not an “extraordinary” event and the “sudden and extraordinary” exception to the section 3208.3(d) requirement of six months employment does not apply. I find the WCJ’s analysis persuasive:

The party holding the affirmative on an issue bears the burden of proving it by a preponderance of the evidence.² Applicant holds the affirmative on the issue of industrial injury to her psyche, and that the injury was the result of a sudden and extraordinary accident as required by Labor Code Section 3208.3(d) when the employment is less than six months.

It is undisputed that on November 25, 2020 Applicant was driving a delivery van that was struck by a pick-up truck hard enough to spin the van and flip it onto the driver’s side.

Applicant exited the disabled van with assistance by climbing out through the window on the passenger side of the van. The orthopedic aspects of the injury have been accepted by Defendant.

Applicant submitted the report of PQME Trevor Mackin, Psy. D. dated October 26, 2022 to establish the accident caused a psychiatric injury. Dr. Mackin gave his expert medical opinion that Applicant suffered a psychiatric injury as a result of the accident and diagnosed her with Post Traumatic Stress Disorder (PTSD). He expressly states that the auto accident was the predominant cause of Applicant’s PTSD. (App. Ex. 1 Page 52) Dr. Mackin’s expert opinion is based on the history taken from Applicant, psychological testing, his examination of Applicant and his

² Labor Code Sections 3202.5 and 5705.

review of the records provided. Dr. Mackin explains how and why he reached his expert medical opinion on causation. Dr. Mackin's report is found to be substantial medical evidence on the issue of causation of Applicant's psychiatric injury pursuant to Labor Code Section 3208.3(b).

Applicant also submitted treatment reports from Daniel Rockers, Ph. D that support the reasoning and conclusions of Dr. Mackin. (App. Ex. 2, 3, 4 & 5) There is no evidence contradicting the findings of Dr. Mackin. Therefore, Applicant proved by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment to her psyche as a result of the accident on November 25, 2020.

Defendant asserted Applicant's claim is barred by Labor Code Section 3208.3(d) as she worked for Employer for less than six months. The evidence in this case established that Applicant worked for Employer for less than six months at the time of the industrial injury and that she has not returned to work for Employer since the industrial injury. (MOH-SOE Pages 4 – 6) Therefore, Applicant holds the affirmative on the issue of proving an exception applies.

Applicant asserted that the auto accident was a sudden and extraordinary event that meets the requirements of Labor Code Section 3208.3(d).³ Applicant's credible testimony at trial established by a preponderance of the evidence that the auto accident was a sudden event. (MOH-SOE Pages 4 – 6) Applicant's description of the accident is confirmed by the video of constitutes an extraordinary event.

Applicant was working as a delivery driver for employer at the time of the accident. (MOH-SOE Pages 4 – 6) Applicant was performing her usual and customary duties at the time of the accident, and being in an auto accident is one of the expected types of events that would lead to an injury for a professional driver. The Traffic Collision Report with Supplements indicates it was a clear day, the road was dry, neither driver was using a cell phone, and neither driver was found to be impaired or under the influence of alcohol or drugs. The roadway had no unusual condition. The other driver was found to be at fault for failure to yield.⁴ Neither driver was found to be operating at excessive speed. The report confirms that the delivery van had rolled onto its side. (Def. Ex. D) The record does not establish any unusual factors leading to the accident. The record does not establish that Applicant suffered an extraordinary physical injury as a result of the accident. (Joint Ex. 1, 2 & 3; App. Ex. 7, 9, 10, 11, 12, 13 & 14) Therefore, it is found that Applicant did not prove by a preponderance of the evidence that given her employment as a delivery driver the accident was an unusual or unexpected event rising to the level of extraordinary that

³ Labor Code Section 3208(d): Notwithstanding any other provisions of this division, no compensation shall be paid pursuant to this division for psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous. This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition.

⁴ The initial find was that applicant was at fault for failure to yield. The finding was changed in the supplemental report.

would create an exception to the limitation created by Labor Code Section 3208.3(d).

(Opinion on Decision, pp. 1-2.)

For the reasons stated above, I would amend Finding 5 solely to correct a typographical error in the date to reflect that the injury occurred November 25, 2020. Otherwise, I would affirm the WCJ's March 28, 2023 Findings and Order.



WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

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