

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3  
4 **NARMINA ALESKEROVA**

5 *Applicant,*

6 **vs.**

7 **US BANK; OLD REPUBLIC INSURANCE,**  
8 **administered by SEDGWICK CMS,**

9 *Defendants.*

**Case No. ADJ3048900 (VNO 0555886)**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

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11 We previously granted the Petition for Reconsideration filed by lien claimant,  
12 Dr. Azadeh Rahimi, Ph.D., to further study the factual and legal issues in this case. This is our Opinion  
13 and Decision After Reconsideration.

14 Lien claimant seeks reconsideration of the November 4, 2011 Findings and Order issued by the  
15 workers' compensation administrative law judge (WCJ). The WCJ found that applicant sustained injury  
16 arising out of and in the course of employment to her back, and claimed to have sustained injury arising  
17 out of and in the course of employment to her psyche, while employed by US Bank during the period  
18 from April 7, 2007 through December 7, 2007. The WCJ further found that Dr. Rahimi failed to prove  
19 that applicant sustained an injury to her psyche as alleged, that the treatment which Dr. Rahimi provided  
20 was not reasonable and necessary, and that Dr. Rahimi failed to establish that his billed charges for  
21 treatment were reasonable. As a result, the WCJ ordered that Dr. Rahimi take nothing on his lien.

22 Lien claimant contends: (1) the March 10, 2009 report of the Panel Qualified Medical Evaluator,  
23 Dr. Michael Glaser, M.D., established that applicant sustained an industrial injury to her psyche;  
24 (2) defendant did not raise the issue of the "good faith personnel action" defense as set forth in Labor  
25 Code section 3208.3(h); and (3) the charges of Dr. Rahimi for psychiatric treatment are reasonable and  
26 should be ordered payable by defendant. Defendant filed an Answer, contesting lien claimant's  
27 contentions. In his Report, the WCJ stated that he agreed with lien claimant that the evidence supports a

1 finding that the injury is compensable, but that lien claimant failed to prove that the treatment was  
2 reasonable and necessary to cure or relieve from the effects of the psychiatric injury, and that the charges  
3 for treatment were not reasonable. Therefore, the WCJ recommended that reconsideration be denied.

4 Based on our review of the entire record, we shall deny reconsideration, with the following  
5 additional comments.

## 6 I. BACKGROUND

7 In the underlying case, an Order Approving Compromise and Release was issued on  
8 February 3, 2010, resolving applicant's claim of injury to her psyche, chest, shoulder, back, sleep  
9 deprivation, heart, headaches, stomach, and sexual dysfunction. The lien of Dr. Rahimi was not not  
10 resolved as part of the settlement. At the time of October 31, 2011 trial, the parties stipulated to the issues  
11 for determination, including the lien of Dr. Rahimi, and specified that injury to the psyche was not  
12 admitted. (Minutes of Hearing and Summary of Evidence, October 31, 2011 at p. 2.)

13 In his March 10, 2009 report (Exh. 8), the psychiatric Qualified Medical Evaluator,  
14 Dr. David Glaser, M.D., determined at page 64 that applicant's depressive disorder was predominantly  
15 caused by her stressful employment experience at US Bank, where she last worked on December 7, 2007.  
16 At page 74 of the same report, Dr. Glaser recommended that applicant continue to receive psychiatric  
17 treatment and medications, and that the treatment that she had been receiving with Dr. Rahimi was  
18 "reasonable and warranted." Dr. Glaser further recommended 8-12 visits over the following year.

19 No testimony was presented at the trial, and no deposition testimony was offered regarding the  
20 claim of injury to the psyche.

## 21 II. DISCUSSION

### 22 A. Lien Claimant Has Not Met Its Burden of Proof That Applicant Sustained An Industrial 23 Psychiatric Injury

24 Labor Code section 3208.3(b)(1) states:

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

1 It is the injured worker's burden to establish a psychiatric injury under Labor Code section  
2 3208.3(b), and then the burden shifts to defendant to establish the "good faith personnel action" defense  
3 as set forth in Labor Code section 3208.3(h). (*County of Contra Costa v. Workers' Comp. Appeals Bd.*  
4 (*Aliotti-Scearcy*) (2006) 71 Cal.Comp.Cases 1857 (writ den.); see also *San Francisco Unified School*  
5 *District v. Workers' Comp. Appeals Bd. (Cardozo)* (2010) 190 Cal.App.4th 1 [75 Cal.Comp.Cases  
6 1251].) Labor Code section 3202.5 states, "All parties and lien claimants shall meet the evidentiary  
7 burden of proof on all issues by a preponderance of the evidence . . . ." (Lab. Code, § 3202.5.) Labor  
8 Code section 5705 states, "The burden of proof rests upon the party or lien claimant holding the  
9 affirmative of the issue." (Lab. Code, § 5705, emphasis added.) Accordingly, it is Dr. Rahimi's initial  
10 burden of proof to show that the alleged injury to the psyche is industrial. (*Torres v. AJC Sandblasting*  
11 (2012) 77 Cal.Comp.Cases 1113 (Appeals Board en banc).)

12 Lien claimant offered the March 10, 2009 report of Dr. Glaser, which determined that applicant  
13 sustained a psychiatric injury as alleged through December 7, 2007. Lien claimant did not, however,  
14 provide any direct evidence of the allegations which upon which applicant's claim of psychiatric injury is  
15 based. At page 4 of Dr. Glaser's report, he stated that applicant claimed supervisory and co-worker  
16 harassment and discrimination. (Exh. 8 at p. 4.) When describing applicant's allegations of harassment  
17 and discrimination in detail, however, Dr. Glaser provided descriptions of workplace events that are not  
18 objectively verifiable. Applicant's recitation of harassment and discrimination was documented by  
19 Dr. Glaser as: her belief that she was being retaliated against by her employer because her son reported a  
20 supervisor's alleged alcohol problem to the human resources department during her son's brief  
21 employment with US Bank; feeling singled out because she was not allowed to eat lunch with other  
22 employees; being spoken to in a "loud and rude voice" by a supervisor; feeling relegated to the role of a  
23 housekeeper or mother within the bank branch; feeling singled out after receiving a phone call from a  
24 co-worker telling her that, in his opinion, applicant was being "disrespected" by bank management;  
25 feeling singled out when she was written up for a dress code violation; and her statement that her  
26 supervisor was "lying" when the supervisor "verbally cited" her for providing customer information  
27 without the proper verification. (Exh. 8 at pp. 65-67.) In regard to all of these allegations, there was no

1 testimony from applicant, no deposition testimony presented, and no offer of proof to authenticate  
2 applicant's narrative of these events described in Dr. Glaser's report. This lack of any corroborating  
3 evidence to support applicant's allegations of workplace harassment and discrimination is mentioned by  
4 Dr. Glaser at page 73 of his report, where he stated that he did not review any "additional, corroborative  
5 evidence regarding the claimant's charges of discrimination and harassment." (Exh. 8 at p. 73.)

6 Although hearsay may be admitted into evidence in workers' compensation proceedings when "it  
7 is best calculated to ascertain the substantial rights of the parties" (*Skip Fordyce Inc. v. Workers' Comp.  
8 Appeals Bd. (Barry)* (1983) 149 Cal.App.3d 915 [48 Cal.Comp.Cases 904]), we decline to rely on the  
9 report of Dr. Glaser because there is no direct evidence to substantiate the factual allegations that form  
10 the basis of Dr. Glaser's opinion that applicant sustained a psychiatric injury.

11 Lien claimant correctly points out that defendant did not raise the good faith personnel defense  
12 under Labor Code section 3208.3(h). As indicated above pursuant to *Aliotti-Scearcy, supra*, and  
13 *Cardozo, supra*, the good faith personnel defense must only be proven *after* the injured worker or lien  
14 claimant has met its burden of proving an industrial psychiatric injury. Therefore, we need not reach this  
15 issue.

16 **B. Lien Claimant Has Not Met Its Burden of Proof Regarding the Reasonableness and**  
17 **Necessity of Its Treatment and Charges for Psychiatric Treatment.**

18 Since we find that applicant has not sustained a compensable psychiatric injury, we need not  
19 reach the issues of the reasonableness and necessity of the treatment provided by Dr. Rahimi, and the  
20 reasonableness of Dr. Rahimi's charges. Because the WCJ addressed these issues in his decision and in  
21 his Report, however, we shall comment on these issues.

22 In *Torres, supra*, we held that lien claimants are required to meet the evidentiary burden of proof  
23 on all issues by a preponderance of the evidence, and that a prima facie showing is not enough to shift the  
24 burden of proof from the lien claimant to the defendant. Specifically, we stated, that Labor Code  
25 sections 3202.5 and 5705 "require that [a] lien claimant prove that the treatment rendered was reasonable  
26 and necessary to cure or relieve the effects of the injury." (*Torres, supra*, 77 Cal.Comp.Cases at p. 1121.)

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1 In meeting this burden of proof in such a situation, lien claimant stands in the shoes of the injured  
2 worker. (*Kunz v. Patterson Floor Coverings, Inc.* (2002) 67 Cal.Comp.Cases 1588, 1592 (Appeals  
3 Board en banc.) Thus, the burden of proof to establish the reasonableness of its lien by a preponderance  
4 of the evidence rests with lien claimant. (*Kunz v. Patterson Floor Coverings, Inc.*, (2002) 67  
5 Cal.Comp.Cases 1588 (Appeals Board en banc); *Zenith Ins. Co. v. Workers' Comp. Appeals Bd. (Capi)*  
6 (2006) 138 Cal.App.4th 373, 376-377 [71 Cal.Comp.Cases 374, 376-377]; *Boehm & Associates v.*  
7 *Workers' Comp. Appeals Bd. (Brower)* (2003) 108 Cal.App.4th 137, 150 [68 Cal.Comp.Cases 548,  
8 557].)

9 Labor Code section 4604.5 provides that the American College of Occupational and  
10 Environmental Medicine's Occupational Medicine Practice (ACOEM) Guidelines or any Medical  
11 Treatment Utilization Schedule (MTUS) adopted by the Administrative Director are presumed to be  
12 correct. The same section also states that this presumption may be controverted by scientific medical  
13 evidence establishing that a variance from the ACOEM Guidelines or MTUS is reasonably required.  
14 (Lab. Code, § 4604.5.) Therefore, in order to meet his burden of proof, Dr. Rahimi was required to show  
15 that the disputed medical treatment was reasonably necessary to cure or relieve from the effects of the  
16 injury and that his treatment was consistent with ACOEM Guidelines or the MTUS. There is no  
17 discussion in the report of Dr. Glaser or either of the reports of Dr. Rahimi that the recommended  
18 psychiatric treatment was consistent with ACOEM Guidelines or the MTUS. Therefore, Dr. Rahimi has  
19 not met his burden of proof to show the treatment was reasonable and necessary, and in accord with  
20 ACOEM Guidelines or the MTUS.

21 In regards to whether or not the amounts charged by Dr. Rahimi were reasonable, this issue was  
22 addressed in *Tapia v. Skill Master Staffing* (2008) 73 Cal.Comp.Cases 1338 (Appeals Board en banc):

23 It is not a defendant's burden to prove that an outpatient surgery center's  
24 claimed fee is not reasonable. To the contrary, the outpatient surgery  
25 center has the affirmative burden of proving that its lien is reasonable, and  
26 it must carry this burden by a preponderance of the evidence. (Lab. Code,  
27 § 5705 ("[t]he burden of proof rests upon the party or lien claimant  
holding the affirmative of the issue" (emphasis in original); Lab. Code,  
§ 3202.5 ("[a]ll parties and lien claimants shall meet the evidentiary  
burden of proof on all issues by a preponderance of the evidence"  
(emphasis in original). (*Tapia, supra*, at pp. 1342-1343.)

1 Here, Dr. Rahimi provided his initial report of March 14, 2008, a permanent and stationary report  
2 of January 14, 2010, along with an itemized bill for 74 treatment visits from March 6, 2008 through  
3 December 30, 2009, and for the reports of March 14, 2008 and January 14, 2010. Dr. Rahimi did not,  
4 however, provide any reports of the 74 treatment visits, nor did he present any testimony or evidence of  
5 the reasonableness of any of the charges. As pointed out by the WCJ, although the bills offered by lien  
6 claimant are prima facie evidence of what it charges for services, the bills by themselves and without any  
7 corroborative evidence or testimony, do not establish that the charges are reasonable. Accordingly, even  
8 if the claim of injury to the psyche was compensable, we agree with the WCJ's determination that  
9 Dr. Rahimi failed to prove the reasonableness of his charges.

10 Lastly, with respect to the WCJ's reference to utilization review of Dr. Rahimi's charges, the fact  
11 that a defendant does not undertake utilization review does not necessarily mean that the defendant is  
12 liable for the prescribed treatment, or that the lien claimant is relieved of its burden of proof (see Lab.  
13 Code, §§ 3202.5, 5705). To the contrary, in *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.*  
14 (*Sandhagen*) (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981], the Supreme Court expressly declared:

15 The Legislature amended [Labor Code] section 3202.5 to underscore that  
16 all parties, including injured workers, must meet the evidentiary burden of  
17 proof on all issues by a preponderance of the evidence. (Stats. 2004, ch. 34,  
18 § 9.) Accordingly, notwithstanding whatever an employer does (or does  
19 not do), *an injured employee must still prove that the sought treatment is*  
20 *medically reasonable and necessary.* That means demonstrating that the  
21 treatment request is consistent with the uniform guidelines ([Labor Code]  
22 § 4600, subd. (b)) or, alternatively, rebutting the application of the  
23 guidelines with a preponderance of scientific medical evidence ([Labor  
24 Code] § 4604.5). (*Sandhagen, supra*, 44 Cal.4th at p. 242, (emphasis  
25 added).)

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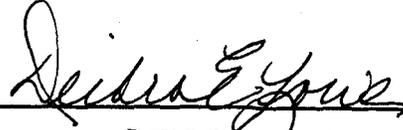
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1 For the foregoing reasons,

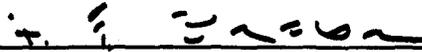
2 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals  
3 Board, that the November 4, 2011 Findings and Order are **AFFIRMED**.

4 **WORKERS' COMPENSATION APPEALS BOARD**

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7 **DEIDRA E. LOWE**

8 **I CONCUR,**

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12 **FRANK M. BRASS**

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14 **I DISSENT. (See attached dissenting opinion.)**



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18 **RONNIE G. CAPLANE**

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

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21 **SEP 09 2014**

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

24 **AZADEH RAHIMI**  
25 **MICHAEL RAMEZANI**  
26 **STOCKWELL, HARRIS, WOOLVERTON & MUEHL**

27 **JG:mm**





1 standard. (*Id.* at p. 187.) But by requiring objective evidence of workplace stress, *Verga* does not require  
2 the applicant to testify if the medical evidence supports the conclusion that applicant's perceptions of  
3 workplace stress were objectively reasonable.

4 Here, Dr. Glaser stated at page 73 that applicant's Depressive Disorder was predominantly caused  
5 by workplace events. (Exh. 8 at p. 73.) The report supports a conclusion that applicant's perceptions of  
6 workplace stress were objectively reasonable.

7 As noted by the majority, the history of workplace stress contained in Dr. Glaser's report is  
8 hearsay. We are not, however, bound by the statutory or common law rules of evidence (Lab. Code,  
9 § 5708), and a WCJ's decision cannot be overturned merely because it relied on evidence not admissible  
10 under the common law or statutory rules of evidence as proof of any fact in dispute (Lab. Code, § 5709).  
11 Although hearsay evidence is admissible in workers' compensation proceedings, and the weight to be  
12 given hearsay evidence is to be determined by the Workers' Compensation Appeals Board (WCAB), the  
13 WCAB should rely only on probative hearsay evidence, i.e., hearsay evidence upon which responsible  
14 persons would customarily rely in the conduct of serious affairs. (*Skip Fordyce v. Workers' Comp.*  
15 *Appeals Bd. (Barry)*, 149 Cal.App.3d at pp. 926-927 [48 Cal.Comp.Cases 904].)

16 Here, it is reasonable to rely on the hearsay history of applicant's workplace stress contained in  
17 Dr. Glaser's report. Moreover, defendant did not offer any witnesses or documentary evidence to rebut  
18 the history of workplace stress contained in Dr. Glaser's report or to show that the workplace was not  
19 stressful. Accordingly, I would find that applicant met her burden of proof that she sustained a  
20 psychiatric injury pursuant to Labor Code section 3208.3(b)(1).

21 With applicant having established a psychiatric injury, the burden shifts to defendant to establish  
22 the "good faith personnel action" defense as set forth in Labor Code section 3208.3(h). (*Aliotti-Searcy*,  
23 *supra*, at p. 1857.) Defendant, however, did not raise this defense, nor provide any evidence of this  
24 defense. Accordingly, applicant's psychiatric injury is not barred by the "good faith personnel action"  
25 defense.

26 Furthermore, defendant did not raise the issue of injury to the psyche as an issue to be determined  
27 at trial, according to the October 31, 2011 Minutes of Hearing and Summary of Evidence. The

1 February 3, 2010 Compromise and Release does not indicate that the claim of injury to the psyche was in  
2 dispute. In the "Comments" section at page 7, the Compromise and Release indicates that the settlement  
3 was based, in part, on "the AME findings of Dr. Glaser . . ." Moreover, although the Comments section  
4 specifies that defendant disputed injury to the neck, there is no mention that defendant disputed injury to  
5 the psyche. Based upon the report of Dr. Glaser and defendant's failure to raise the issues of injury to the  
6 psyche and the "good faith personnel action" defense, I would find that applicant sustained an injury  
7 arising out of and in the course of employment to the psyche through December 7, 2007.

8 **2. Reasonableness of the Treatment and Charges of Dr. Rahimi**

9 The treatment recommended by Dr. Glaser was reasonable and consistent with his finding of  
10 industrial injury, and defendant did not provide any evidence to rebut the treatment recommendation of  
11 Dr. Glaser. Although Dr. Glaser did not specifically reference the ACOEM Guidelines, his  
12 recommendation of psychiatric treatment on a monthly basis with Dr. Rahimi is consistent with treatment  
13 recommendations for stress-related conditions in Chapter 15 of the ACOEM Guidelines.

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1 Although no evidence was presented on the reasonableness of the charges of Dr. Rahimi, there is  
2 support for payment on the lien of Dr. Rahimi, consistent with the treatment recommended by Dr. Glaser.  
3 Dr. Glaser indicated at page 74 of his report that the treatment provided by Dr. Rahimi "approximately  
4 once a month" was reasonable. The WCJ noted at page 3 of his Report that the charges of Dr. Rahimi at  
5 \$200.00 per visit were excessive, but that the Official Medical Fee Schedule amount for his charges  
6 would appear to be \$98.40 per visit billed. Accordingly, I would return the matter to the trial level for  
7 the WCJ to determine the amount of Dr. Rahimi's visits allowed pursuant to Dr. Glaser, and the amount  
8 due per each visit.



9 **WORKERS' COMPENSATION APPEALS BOARD**

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12 **RONNIE G. CAPLANE, Commissioner**

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

14 **SEP 09 2014**

15  
16 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**  
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25 **JG:mm**