Peña, Samuel

SUBSEQUENT CONDITION TRACEABLE TO ORIGINAL INJURY

***Maphet* acceptance**

The holding in *Clark County v. Maphet,* 10 Wn. App. 2d 420 (2019) was not simply that payment equals acceptance. ***....In re Samuel Peña,* BIIA Dec., 19 14287 (2021)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 21-2-04974. The court disagreed with the Board on the facts, and found the Board majority was incorrect in part and the dissenting Board member was incorrect in part. The court didn't reach the *Maphet* issue. Instead, it credited the worker's attending physicians, and weighed the evidence on causation differently. The court held by a preponderance of the evidence that the worker's bipolar condition was proximately caused or aggravated by the industrial injury.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: SAMUEL P. PEÑA	**)**	**DOCKET NOS. 19 14287, 19 16783, 19 17584,**
	)	**19 17585 & 19 17589**
	)	
CLAIM NO. AR-33020	**)**	**DECISION AND ORDER**

Mr. Peña was injured working as a janitor for Pacific Building Services, Inc., at a T-Mobile building in Factoria, Washington. He had been cleaning floors with a scrubbing machine and felt pain in his back as he threw out a full bucket of water. The Department allowed Mr. Peña's claim and provided treatment, but ultimately issued a series of orders segregating Mr. Peña's anxiety and bipolar disorders and closing Mr. Peña's claim with time-loss compensation paid and without an award for permanent partial disability. Mr. Peña seeks acceptance of his bipolar, anxiety and attention deficit disorders, and he requests treatment, specifically, medication to treat his bipolar disorder. Our industrial appeals judge affirmed the Department orders. Mr. Peña petitioned for review, seeking acceptance of the mental health conditions because the conditions were caused or aggravated by the industrial injury and because, pursuant to *Clark County v. Maphet,*[1] the Department has accepted one or more of the mental health conditions. Although we agree the evidence is insufficient to support acceptance under either analysis, we grant review to explain why we find the record is insufficient, even after consideration of the court's holding in *Maphet*. The Department orders are **AFFIRMED.**

DISCUSSION

Samuel Peña[2] was born in El Salvador in 1965. He attended school until he was in the fourth grade, when he began to work because the need for his economic support of his family outweighed his need for education.

By the time Mr. Peña was 15, El Salvador was at war. Mr. Peña saw the bodies of people who had been killed in the conflict. The medical records indicate that one day, soldiers interrogated Mr. Peña outside his home. He would have been killed if it were not for a family friend, a sergeant, who left the home in time to vouch for Mr. Peña. Mr. Peña left El Salvador following this encounter.

In 1987, at 22, Mr. Peña moved to the United States. He ultimately found work as a machine operator with ValPac Coupons. After a few years Mr. Peña moved to Washington. Here, he

[1] 10 Wn. App. 2d 420 (2019).
[2] The record at hearing indicated Mr. Peña's last and middle names are spelled with a tilde. We have employed that spelling throughout this Decision and Order. Within the case caption and in the findings and conclusions, however, we retain the spelling from the orders on appeal, in order to maintain consistency. No disrespect is intended.

maintained steady employment as a janitor and, later, as a floor cleaner for his employer of injury, Pacific Building Services, Inc. (PBS).

On December 22, 2013, Mr. Peña was injured working as a PBS janitor at a T-Mobile building in Factoria. He had been cleaning floors with a scrubbing machine and felt pain in his back as he was throwing out a full bucket of water. Although he expected to recover, the next day Mr. Peña noticed numbness and tingling in his left leg and could not bend to put on his socks.

Mr. Peña filed a claim and received conservative treatment, including chiropractic and medical care for his low back. In mid-2019, the Department issued orders segregating Mr. Peña's anxiety and bipolar disorder, finalizing time-loss compensation, and closing Mr. Peña's claim without permanent partial disability awards.

Narrowing of the Issues

The appealing party, Mr. Peña, bears the burden of establishing his entitlement to further benefits under the Industrial Insurance Act. Although Mr. Peña could not return to his job of injury, his former attending physician, Kelvin Franke, D.O., testified that Mr. Peña was at least physically capable of working as an office cleaner by January 13, 2017. Moreover, because the only treatment for Mr. Peña's mental health conditions is ongoing (that is, non-curative[3]) medication,[4] Mr. Peña argued that claim closure was appropriate even if the conditions were accepted. As a result, the following issues remain before us:

a. Whether Mr. Peña's anxiety, bipolar, and attention deficit hyperactivity disorders were proximately caused or aggravated by his industrial injury;

b. If so, whether those conditions prevented him from reasonably continuous gainful employment as of February 6, 2017; and

c. If not, whether Mr. Peña is entitled to further permanent partial disability, for example, an award consistent with Category 2 lumbar impairment.

Segregation of Mental Health Conditions

Mr. Peña is entitled to benefits under the Act if his December 22, 2013 industrial injury was a cause of his aggravated anxiety, bipolar, and/or attention deficit disorders. Assuming the conditions were accepted, those benefits would include proper and necessary treatment, like medication.

Addressing the first two conditions, Mr. Peña presented Consejo Medical Director, Psychiatrist Romelia Perez, M.D. Dr. Perez began treating Mr. Peña on November 2, 2016, contemporaneous

[3] Perez Dep. at 40; Hart Dep. at 44-45.
[4] Perez Dep. at 19; Hart Dep. at 30-31.

to his hospitalization for symptoms of bipolar disorder. Based on her observations of Mr. Peña, as well as on Mr. Peña's weekly sessions with his Consejo therapist, Dr. Perez explained that Mr. Peña's inability to provide after the industrial injury increased his anxiety and aggravated his preexisting bipolar disorder. Factors underpinning her diagnoses included having personally observed Mr. Peña in a manic state, noting symptoms such as hearing voices, severe mood swings, and espousing beliefs that were not real.

Dr. Perez prescribed quetiapine and lithium carbonate to stabilize Mr. Peña's mood and to avoid manic episodes. And, although she said the Department provided the medications at first, it stopped paying for them, and Mr. Peña's time-loss compensation was cut off in February 2017. Dr. Perez explained that this decision to end Mr. Peña's medications caused him to decompensate and remain in that state since that point. Although Dr. Perez was not familiar with and would not speak to whether Mr. Peña could perform any specific position,[5] she did agree that when he is decompensated, Mr. Peña cannot sit still or control his emotions or his movement.

Mr. Peña also presented Psychiatrist Jeffrey Hart, M.D., an independent medical examiner. Dr. Hart evaluated Mr. Peña on August 19, 2019, and testified with certainty that Mr. Peña did not suffer from bipolar disorder. Instead, he felt the claimant suffered from preexisting ADHD, a condition that was aggravated by the industrial injury because, due to the injury, Mr. Peña was no longer able to function in a job setting, to be productive, or to be financially secure.

Dr. Hart reached this conclusion in part based upon characteristics revealed by a battery of psychological tests he administered (for example, the MMPI-2, MCMI-3, and the MBMD). Dr. Hart said the tests revealed that Mr. Peña was highly reactive, experienced high levels of depression and fearfulness, and often experienced feelings of inadequacy, resentment, guilt, and dejection. He said the tests also indicated a propensity to experience a loss of energy and efficiency, and an inability to communicate.

The Department presented psychiatrist and independent medical examiner Douglas Robinson, Ph.D., M.D., who examined Mr. Peña in December 2018. Dr. Robinson testified that although Mr. Peña had normal levels of anxiety surrounding his claim-related inability to work and lack of finances, he suffered from neither aggravated bipolar or anxiety disorder.

Our industrial appeals judge determined that although Mr. Peña established a prima facie case of entitlement to benefits, the evidence that Mr. Peña had bipolar disorder or anxiety disorder

[5] Carl Gann, VRC, provided this testimony.

aggravated by the industrial injury was undermined by the disagreement among doctors and the discrepancies in reports of Mr. Peña's history. As a result, he failed to establish by a preponderance of the evidence that the appealed orders were incorrect. We agree. Mr. Peña's case would have been much stronger had he opted not to present Dr. Hart.

Maphet Analysis

As a second approach, and citing *Clark County v. Maphet,*[6] Mr. Peña argues that the Department accepted his bipolar disorder when it paid for his bipolar medication. *Maphet* is a Division II decision that ultimately held that a self-insured employer who had authorized a surgery had accepted responsibility for the condition that necessitated the surgery. Mr. Peña argues that once the Department paid for medications to treat a mental health condition the only conclusion is that the Department had determined that the treatment is proper and necessary treatment of an accepted condition.

We disagree that *Maphet* requires us to make such a conclusion. In *Maphet* the issue addressed by the court was whether the self-insured employer had accepted a condition when it had authorized multiple surgeries to treat the condition, the issue was not whether a self-insured employer had accepted a condition merely because it had paid for treatment for that condition. In fact, the court upheld the trial court's ruling that that evidence of payment was excluded by ER 409. The court held that after the self-insured employer had authorized surgery for a condition, that condition had been accepted by the self-insured employer. In *Maphet*, the self-insured employer had authorized a sixth, seventh, and eighth surgery to her knee required to treat Ms. Maphet's patellofemoral instability. Because of the authorization of the three surgeries addressing the patellofemoral instability, the self-insured employer was deemed to have accepted the patellofemoral instability. It was found responsible for the ninth surgery, which would also treat the condition. The *Maphet* court found that according to the plain language of the statute, acceptance must come before authorization; therefore, if the self-insured employer has authorized treatment, then it has accepted the underlying condition.

Unlike the surgery found by the court in *Maphet* to have been authorized by the self-insured employer when it expressly authorized and reimbursed surgeries for a specific condition, there has not been express authorization for medicinal treatment of Mr. Peña's mental health conditions. Simple assertion that the Department paid for the medicine is not sufficient. The holding in *Maphet* was not simply that payment equals acceptance. The court noted that it is undisputed that the

[6] 10 Wn. App. 2d 420 (2019).

self-insured employer authorized the surgeries and stated, "This case involves more than just payment for treatment—it involves the County authorizing the surgeries."[7] Here Mr. Peña has not established authorization. We do not interpret the court's decision in *Maphet* as requiring acceptance of a condition merely because the Department may have paid for medicine.

Although Mr. Peña has furnished mixed evidence indicating that the Department may have **paid for** medication at some point during the administration of the claim, no evidence was furnished regarding the circumstances surrounding those payments. Certainly, the record contains no definitive evidence that the Department ever **authorized** Mr. Peña's bipolar medication for treatment of a claim-related condition. Rather the payments could have been made for reasons other than payments made after authorization for treatment of an accepted condition. The payments could have been made, for example, for treatment for a condition inhibiting recovery under WAC 296-20-055 or could have been a payment made due to adjudicator error. Without a showing of authorization for the treatment of the mental health conditions, the record is insufficient to support acceptance of Mr. Peña's bipolar, anxiety, or attention deficit disorders. The record does not establish that treatment for bipolar disorder, anxiety, or attention deficit disorders was authorized by the Department.

DECISION

1. In Docket No. 19 14287, the claimant, Samuel P. Peña, filed an appeal with the Board of Industrial Insurance Appeals on April 5, 2019, from an order of the Department of Labor and Industries dated February 6, 2019. In this order, the Department denied time-loss compensation for the period February 3, 2017, through April 25, 2018. This order is correct and is affirmed.

2. In Docket No. 19 16783, the claimant, Samuel P. Peña, filed an appeal with the Board of Industrial Insurance Appeals on May 31, 2019, from an order of the Department of Labor and Industries dated April 24, 2019. In this order, the Department segregated the condition known as anxiety disorder as of December 12, 2018. This order is correct and is affirmed.

3. In Docket No. 19 17584, the claimant, Samuel P. Peña, filed an appeal with the Board of Industrial Insurance Appeals on June 19, 2019, from an order of the Department of Labor and Industries dated June 13, 2019. In this order, the Department segregated the condition known as bipolar disorder as of December 12, 2018. This order is correct and is affirmed.

[7] *Maphet* at 437-438.

4. In Docket No. 19 17585, the claimant, Samuel P. Peña, filed an appeal with the Board of Industrial Insurance Appeals on June 19, 2019, from an order of the Department of Labor and Industries dated June 14, 2019. In this order, the Department closed Mr. Peña's claim with time-loss compensation paid through February 5, 2017, and without an award of permanent partial disability. This order is correct and is affirmed.

5. In Docket No. 19 17589, the claimant, Samuel P. Peña, filed an appeal with the Board of Industrial Insurance Appeals on June 20, 2019, from an order of the Department of Labor and Industries dated April 22, 2019. In this order, the Department ended time-loss compensation as paid through February 5, 2017. This order is correct and is affirmed.

FINDINGS OF FACT

1. On November 21, 2019, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Samuel Pena sustained an industrial injury on December 22, 2013, when he was emptying a bucket of water while working for Pacific Building Services and he felt a sharp pain in his back, resulting in cervical, thoracic, and lumbar sprains or strains.

3. Mr. Pena's condition diagnosed as anxiety disorder was not proximately caused or aggravated by his industrial injury.

4. Mr. Pena's condition diagnosed as bipolar disorder was not proximately caused or aggravated by his industrial injury.

5. Mr. Peña's condition diagnosed as attention deficit hyperactivity disorder was not proximately caused or aggravated by his industrial injury.

6. Mr. Peña is 55 years old and has worked for approximately 20 years as a janitor or floor cleaner. He left school after the fourth grade in El Salvador.

7. As of February 6, 2017, Mr. Peña was limited to lifting 15 pounds frequently, lifting 20 pounds occasionally, and pulling or pushing up to 80 pounds, and he was capable of frequently sitting, standing, bending, walking, and reaching, and occasionally climbing, twisting, squatting, and kneeling.

8. As of February 6, 2017, Mr. Peña was able to work as an office cleaner.

9. As of February 6, 2017, Mr. Peña was able to perform and obtain gainful employment on a reasonably continuous basis.

10. Mr. Peña's conditions proximately caused or aggravated by the industrial injury were fixed and stable as of February 6, 2017.

11. On February 6, 2017, Mr. Peña did not have a permanent partial disability proximately caused by the industrial injury.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in these appeals.
2. The Department order dated February 6, 2019, is correct, and it is affirmed.
3. The Department has not accepted the conditions known as anxiety disorder, bipolar disorder, or attention deficit hyperactivity disorder by authorizing treatment for these conditions under the industrial insurance claim. *Clark County v. Maphet*, 10 Wn. App. 2d 420 (2019).
4. The Department order dated April 24, 2019, is correct, and it is affirmed.
5. The Department order dated June 13, 2019, is correct, and is affirmed.
6. Mr. Peña was not a permanently totally disabled worker within the meaning of RCW 51.08.160 as of February 6, 2017.
7. The Department order dated June 14, 2019, is correct, and it is affirmed.
8. The Department order dated April 22, 2019, is correct, and it is affirmed.

Dated: March 22, 2021.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

JACK S. ENG, Member

DISSENT

The majority holds that Mr. Peña did not prove by a preponderance of the evidence that his bipolar disorder was causally related to his industrial injury under analysis of the evidence presented, or under the standard set in *Maphet*. Because Mr. Peña has met his burden under both analyses, I dissent.

Contrary to the majority's opinion that Dr. Hart's testimony undercuts that of Dr. Perez, it is good evidence of why the Supreme Court has long given special consideration to the opinions of attending physicians.[8] Of the five doctors who testified in this appeal, only Dr. Franke and Dr. Perez saw Mr. Peña more than once. Because both physical and mental conditions do not necessarily present the same way on every visit, there is always the danger that a one-time examiner will miss

[8] *Clark Cty. v. McManus*, 185 Wash. 2d 466, 471 (2016).

symptoms that an attending physician would have the opportunity to observe. Add to that the fact that the testimony of either party is available to both parties even if they were not the one who propounded the evidence.[9] Each witness's credibility should be determined based on their testimony and their credentials and not on whether they were called by one side or the other. Dr. Hart's testimony is in disagreement with Dr. Perez's. Rather than canceling each other out, as suggested by the majority, it should be determined which one is more credible and not compare it to the other because all of the testimony is available to either side.

There were three mental health professionals who testified. Dr. Perez's testimony was the most credible for several reasons. First, as his attending psychiatrist, she had the greatest knowledge and experience with Mr. Peña. She is the one who diagnosed his bipolar disorder, prescribed the medication for his bipolar disorder, and witnessed his behavior while on the medication as well as after he stopped taking the medication and decompensated.

Second, Dr. Perez explained why Dr. Hart's diagnosis of ADHD could make sense because when a bipolar person is unmedicated, it looks like ADHD.[10] She also allowed that Mr. Peña could have both. The reverse is not true, however. Dr. Hart never explained why he thought that Mr. Peña was not bipolar. Dr. Hart's and Dr. Perez's descriptions of Mr. Peña's behaviors were very similar--speaking fast, jumping from subject to subject, fidgety, anxious. But that one-time meeting was Dr. Hart's sole experience with Mr. Peña's behaviors and he did not have the opportunity to witness the way in which, as Dr. Perez said, bipolar differs from ADHD, not the least of which is psychotic episodes. But Dr. Perez did and, in fact, prescribed medication for those psychotic episodes.

Third, Dr. Perez prescribed medication for bipolar disorder for Mr. Peña and testified that when he was on medication his symptoms improved. Dr. Robinson stated that the fact that Mr. Peña was on medication for bipolar disorder and his symptoms had improved was not necessarily indicative that Mr. Peña actually had bipolar disorder. One of the reasons that Dr. Robinson's testimony is not credible, however, is that when he was testifying about Mr. Peña's prescribed drugs he went on a tangent about the fact that Seroquel is used sometimes as a sleep aid and Mr. Peña was actually sleeping better, intimating that perhaps Mr. Peña's issue arose simply from a lack of sleep. Yet Dr. Robinson completely glossed over any mention of the fact that Mr. Peña was also on lithium

[9] WA pattern Jury Instructions 1.02.
[10] Perez Dep. at 21.

carbonate that was prescribed specifically for bipolar disorder. He also seems to affirm Mr. Peña's belief that unusually high energy episodes that Mr. Peña reported might be related to sugar intake. Furthermore, Dr. Robinson stated he had no idea if Mr. Peña did or did not have bipolar disorder.

Finally, Dr. Franke, the only other doctor to actively treat Mr. Peña, is the one who recognized that Mr. Peña was having mental health issues and tried to get him into psychiatric care. He also tried to put Mr. Peña on an antidepressant that sent him into a manic state.[11] Dr. Franke went on to say that "people with just straight depression don't tend to get mania when they take an antidepressant."[12] He tried to get Mr. Peña in to see a psychiatrist for a long time. Eventually, Mr. Peña began seeing Dr. Perez. Later, Dr. Franke realized it was likely bipolar all along.

> I wasn't having much success with the psychiatric meds I was doing. But at this stage, I completely misread the situation. Although, looking back, it's obvious it was bipolar, given these flares and I put him on antidepressants, these manic flares. At this stage, I wasn't really thinking of a psychiatrist, I was just trying to calm the symptom of depression. I think Romelia Perez was right on when she called it bipolar.[13]

Dr. Franke felt that Mr. Peña's bipolar was likely temporarily aggravated by the industrial injury, and he wasn't sure how it could be still aggravated, but deferred to Dr. Perez regarding Mr. Peña's psychiatric conditions.

In light of the fact that the two doctors who actively treated Mr. Peña for a long period of time both agree that he has bipolar and it is related to the industrial injury, Mr. Peña has met his burden to show that his bipolar condition is related to his industrial injury.

Maphet Analysis

The majority also finds that Mr. Peña's *Maphet* argument fails because merely paying for medication for Mr. Peña is not evidence of "authorization" of his mental health condition, distinguishing that from the numerous surgeries already authorized in the *Maphet* case as proof that the self-insured employer had accepted the condition. There are a couple of reasons why this reasoning is misplaced in the instant case.

Injured workers need to get authorization for treatment under an L&I claim for pretty much one reason only, so that treatment will get paid for under the claim. Contrary to the majority's assertion that authorization and payment are two different things, payment is authorization. Division I reads Division II's Maphet decision in the same way. In *Magdaleno v. Department of Labor & Industries*,

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[11] Franke Dep. at 17.
[12] Franke Dep. at 17.
[13] Franke Dep. at 26.

Division I cited WAC 296-20-01002's definition of "authorization" as notification by the self-insured employer that "proper and necessary treatment" of an accepted condition will be reimbursed.[14] Division I stated the Maphet holding as "when an employer authorizes treatment for a condition, it accepts responsibility for that condition."[15]

In the *Maphet* case the treatment was physical, and it was more than conservative, it was surgery, which is often something that is a last resort after other treatment modalities have failed. If the Department had paid for pain relievers after surgery that would not necessarily be an indication that they authorized the surgery because that medication is not the treatment for the condition, the surgery is. However, in this case the condition is a mental health condition and there are no physical treatments. The only treatment for bipolar disorder is medication, so the medication is the treatment and if it was paid for, then, under the Department's own WACs, such payment is tacit authorization. The *Maphet* court saw it the same way. The payment testimony was not being used to show "liability," but rather "authorization," which is why it was allowed.

The majority also notes that whether the Department actually paid for the medication for Mr. Peña is an unknown because of the paucity of testimony on the issue. But it was the Department's attorney who specifically asked if the Department had paid for Mr. Peña's bipolar medication during the deposition of Dr. Perez and when Dr. Perez confirmed it, there was no contradiction or other proof offered. During his testimony Dr. Robinson also stated that Mr. Peña told him the Department had paid for the medication for a period as well and then stopped paying. Dr. Franke stated that the Department wasn't covering the medications in his testimony, but that was right before the claim closed, and Dr. Perez testified that she was doing medication management for Mr. Peña on the meds she was prescribing.

Mr. Peña has provided the evidence required to find that his bipolar condition was causally related to his industrial injury and that the Department had accepted the condition by paying for his medication. Therefore, I dissent.

March 22, 2021.

BOARD OF INDUSTRIAL INSURANCE APPEALS

ISABEL A. M. COLE, Member

[14] *Magdaleno v. Dep't of Labor & Indus*., No. 79833-2-1, 2020 WL 6870503 (November 23, 2020) at 5.
[15] *Magdaleno,* at 5.

Addendum to Decision and Order
In re Samuel P. Peña
Docket Nos. 19 14287, 19 16783, 19 17584, 19 17585 & 19 17589
Claim No. AR-33020

Appearances

Claimant, Samuel P. Peña, by Foster Law, P.C., per Sara A. Kincaid

Employer, Pacific Building Services, Inc. (did not appear)

Department of Labor and Industries, by Office of the Attorney General, per William F. Henry

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on August 11, 2020, in which the industrial appeals judge affirmed the orders of the Department dated February 6, 2019; April 24, 2019; June 13, 2019; June 14, 2019; and April 22, 2019.

Evidentiary Rulings

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.