

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

**JENNIFER MCKEITHAN, *Applicant***

**vs.**

**UNITED PACIFIC and ZURICH AMERICAN INSURANCE COMPANY, administered  
by ZURICH NORTH AMERICA, *Defendants***

**Adjudication Number: ADJ11116788  
Los Angeles District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on November 18, 2019, wherein the WCJ found in pertinent part that applicant did not sustain a psychiatric injury arising out of and occurring in the course of employment (AOE/COE), that non-industrial events were the predominant cause of any psychiatric injury, and that the employer's personnel actions were lawful, nondiscriminatory, and were made in good faith so applicant's claim was barred by Labor Code section 3208.3(h).

Applicant contends that the workplace harassment and discriminatory actions imposed on her by two of her coworkers were actual events of employment that caused her psychiatric injury, so her injury arose out of and occurred in the course of her employment, and is compensable.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will rescind the F&O and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

**BACKGROUND**

Applicant claimed a psychiatric/nervous system injury while employed by defendant as an accountant during the period from November 3, 2016, through September 22, 2017.

On August 10, 2018, applicant was evaluated by psychiatric qualified medical examiner (QME) Eric Levander, M.D. (Joint Exh. X, Dr. Levander, September 7, 2018.) Dr. Levander interviewed applicant, took a history, reviewed the medical record, and performed various psychiatric tests. He diagnosed applicant as having a major depressive disorder and assigned a Global Assessment of Function (GAF) score of 50. (Joint Exh. X, p. 54.) The Summary of Reported Injury section of his report included the following:

Ms. McKeithen became very upset when the coworkers reported to Human Resources that she was absent from her desk when she was supposed to be there. She also states that they took pictures of her desk, apparently in an attempt to document her absences. Ms. McKeithen states that she was always on site when she was scheduled to work. ¶ Ms. McKeithen complained about this to her supervisor, and she indicates that the two coworkers were reprimanded in her presence. She felt that the two were not adequately punished. Ms. McKeithen was promoted in 2017, but the coworker who touched her was also promoted, and this upset her a great deal. Ms. McKeithen did not receive any write-ups or other adverse personnel actions, but she became convinced that the two coworkers were attempting to get her fired. She was upset because she received conflicting stories from her supervisor, the Vice President, and the CEO about whether the coworkers had been written up, or merely “notated.” Ms. McKeithen felt that they should have been fired and it bothered her that her coworker was promoted a month after being reprimanded for harassing her. After she had a conversation with the company CEO, the applicant became very upset, and eventually was placed on medical leave. (Joint Exh. X, p. 38.)

Regarding the cause of applicant’s psychiatric injury, Dr. Levander stated:

The psychiatric injury was 55% due to the alleged harassment that occurred in the workplace after the incident of November 3, 2016; 10% is due to the actual touching incident that occurred outside of work on November 2, 2016; 30% is attributed to preexisting psychiatric vulnerability and need for treatment, including pre-existing depressive episodes and a rigid personality style; 5% is due to the history of financial problems. (Joint Exh. X, p. 43.)

Dr. Levander’s deposition was taken on January 15, 2019, and further testimony was taken on June 6, 2019. (Joint Exh. Y, Dr. Levander, deposition transcripts: January 15, 2019, EAMS pp. 2 – 37; June 6, 2019, EAMS pp. 66 – 91.) Dr. Levander did not change his opinions that he had previously stated in the September 7, 2018 report. During the depositions he reiterated those opinions and he explained the factual basis and the reasoning for his conclusions.

The parties proceeded to trial on September 12, 2019. (Minutes of Hearing and Summary of Evidence (MOH/SOE), September 12, 2019.) Applicant's testimony, as summarized by the WCJ, included the following:

Applicant's claims of harassment by co-workers Brenda and Jemmily resulted from a social outing that occurred outside of work sometime in October or November 2017. The co-workers committed actions while applicant was driving a car which made her uncomfortable. (MOH/SOE, p. 4.) The harassment by her co-workers continued at their workplace. On Black Friday, the two co-workers went to HR and reported that applicant had clocked in, and then left for the day. Although the allegation was not true, HR investigated the incident. Applicant felt uncomfortable because her co-workers attempted to get her fired. (MOH/SOE, p. 4.) A second incident occurred on Christmas Eve when the two co-workers were seen taking pictures of applicant's desk while she was out of the office. (MOH/SOE, p. 4.) Applicant arranged a meeting with the two co-workers and their supervisor, Colin. Colin told the co-workers to stop taking pictures. (MOH/SOE, p. 4.) Although Colin told applicant that he was going to report the incident to HR, (MOH/SOE p. 4), Applicant later found out from another manager, Mansour, that Colin had not reported the incident. Mansour indicated that he would investigate the issue and would submit his report. Mansour also told applicant that Brenda and Jemmily were written up, but applicant later found out that they in fact had not been written up. (MOH/SOE, p. 8.) All of these incidents increased applicant's anxiety. (MOH/SOE, p. 8.)

The issues submitted for decision included injury AOE/COE, temporary disability and permanent disability. (MOH/SOE, p. 2.)

## DISCUSSION

The Appeals Board has previously laid out a four-step analysis that WCJs are to follow in order to determine whether a claimed psychiatric injury is compensable or is barred by Labor Code Section 3208.3(d) as having been caused by a lawful, non-discriminatory, good-faith personnel action. (*Rolda v. Pitney Bowes* (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc) (*Rolda*)). The four steps delineated by the Appeals Board were: (1) A determination must be made that actual events of employment were involved. This is a factual/legal determination for the WCJ to determine, not a medical one. (2) There must be competent medical evidence establishing that the actual events of employment were the predominant cause -- i.e., greater than 50% -- of the injury to the psyche. (3) If so, a further determination must be made establishing whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith - a factual/legal determination for the WCJ. 4) Finally, a determination must be made as to whether

the lawful, nondiscriminatory, good faith personnel actions were a “substantial cause” of the psychiatric injury. (*Id.* at 247; see also *County of Sacramento v. Workers’ Comp. Appeals Bd. (Brooks)* (2013) 215 Cal.App.4th 785 [78 Cal.Comp.Cases 379]; *San Francisco Unified School Dist. v. Workers’ Comp. Appeals Bd.* (2013) 109 Cal.App.4th 1 [75 Cal.Comp.Cases 1251].)

As to the issue of whether actual events of employment are involved, applicant testified that the harassment by her co-workers continued at their workplace, that her supervisor Colin had not reported the incident, and that although supervisor Mansour told her that Brenda and Jemmily were written up, she later found out that they had not been written up. “All of these incidents increased applicant's anxiety.” (MOH/SOE, p. 8.) Applicant’s testimony was not rebutted and no evidence to the contrary was submitted at the trial. Also, as noted by Dr. Levander, “After she had a conversation with the company CEO, the applicant became very upset, and eventually was placed on medical leave.” (Joint Exh. X, p. 38.) Clearly, these incidents were events of employment.

In determining whether an injury arose out of the employment, a sufficient causal connection between the injury and the employment is shown where the employment was a contributory cause of the injury. (*State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd.* (1982) 133 Cal.App.3d 643, 655 [47 Cal.Comp.Cases 729].) Also, if the injury occurred on the employer's premises while the employee was engaged in the course of his or her employment, then the injury occurred in the course of the employment. (*Id.* at 655.)

Here, it appears that there is no dispute as to whether applicant’s interactions with her co-workers and supervisors, as she described to Dr. Levander and testified at trial, actually occurred. As noted above, Dr. Levander stated that after her conversation with the CEO, “applicant became very upset, and eventually was placed on medical leave” (Joint Exh. X, p. 38), and he later concluded that applicant’s “psychiatric injury was 55% due to the alleged harassment that occurred in the workplace after the incident of November 3, 2016.” (Joint Exh. X, p. 43.) Thus, the trial record contains substantial evidence that the actual events of employment were involved, i.e. were a cause, of applicant’s psychiatric injury; and that the actual events of employment were the predominant cause of applicant’s injury. (*Rolda, supra*, at 247.)

Regarding the issue of whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith:

No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful,

nondiscriminatory, good faith personnel action. The burden of proof shall rest with the party asserting the issue.  
(Lab. Code, § 3208.3(h).)

It is quite unlikely that the “harassment” by applicant’s co-workers could be considered to be good faith personnel actions. However, Dr. Levander stated that receiving inconsistent information from her supervisor, the Vice President, and the CEO about her co-workers, was a contributing cause of her psychiatric injury. (Joint Ex. X, p. 38.) The WCJ did not address the issue of the good faith personnel action defense and although Dr. Levander said the work harassment was the predominate cause of applicant’s injury, he did not indicate what portion of the injury was a result of applicant’s interactions with her supervisor, the Vice President, and the CEO, as opposed to the harassment by her co-workers. Thus, the record as it exists, does not contain the evidence that is necessary to determine whether the good faith personnel action defense is applicable in this matter.

Although it appears that defendant did not meet its burden of proof pursuant to Labor Code section 3208.3(h), the Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924].)

Under the circumstances of this matter it is necessary that we rescind the F&O and return the matter to the WCJ for further development of the record. Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (see *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) We therefore recommend that the parties provide Dr. Levander additional information as appropriate, and request that he submit a supplemental report that addresses and clarifies the issues discussed herein.

Accordingly, we rescind the F&O and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on November 18, 2019, is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

I CONCUR,

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**



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

**April 1, 2021**

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

**BLANCO ARIAS  
JENNIFER MCKEITHAN  
MICHAEL SULLIVAN & ASSOCIATES**

**TLH/pc**

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