WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GERALD MILLER, *Applicant*

vs.

CITY OF FRESNO, Permissibly Self-Insured; Administered by RISICO CLAIMS MANAGEMENT, *Defendants*

Adjudication Numbers: ADJ8076231, ADJ7548354, ADJ8286584, ADJ8286596
Fresno District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award of October 18, 2021, in which the workers' compensation judge (WCJ)[1] found that applicant, while employed as a police officer on March 16, 2010 (ADJ7548354), on January 14, 2011 (ADJ8286596), on September 27, 2011 (ADJ8286584), and during the period October 25, 2010 through October 25, 2011 (ADJ8076231), sustained injury arising out of and occurring in the course of employment to his psyche, and that applicant is entitled to further medical treatment and self-procured medical treatment, with the issues of temporary and permanent disability deferred by the WCJ. In addition, the WCJ found that the medical opinions of Dr. Marcel Ponton, the Panel Qualified Medical Evaluator (PQME) in the specialty of psychology, constitute substantial evidence, that applicant's claims of psychiatric injury are not barred by the lawful, nondiscriminatory, good faith personnel action defense under Labor Code section 3208.3(h), and that applicant is not estopped from pursuing his workers' compensation claims of psychiatric injury.

Defendant contends that in her decision, the WCJ did not address "issue preclusion estoppel but forum and remedy estoppel," and that the WCJ erred in failing to find applicant barred from re-litigating the good faith personnel action defense based on the doctrine of estoppel, because defendant allegedly prevailed on the defense in the U.S. District Court and before the Fresno Civil Service Board. Defendant further contends that applicant failed to meet his burden

[1] The presently-assigned WCJ is Angelique Scott.

of proving that he sustained any industrial injury to his psyche, that Dr. Ponton's medical opinion is not substantial evidence because the doctor relied "on facts barred by issue preclusion estoppel," and that it is error to consider applicant a credible witness in light of Dr. Ponton's findings that he suffers from severe suspiciousness.

Applicant Gerald Miller, who is self-represented, filed an answer.

The WCJ submitted a Report and Recommendation (Report).[2]

We have considered the allegations of defendant's Petition for Reconsideration, the contents of the Report of the WCJ with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinion, both of which are adopted and incorporated herein, we will deny defendant's Petition for Reconsideration.

We further note that in the section of the WCJ's Report entitled "CCR 10945,"[3] the WCJ states that various statements of fact in Section II of defendant's petition for reconsideration should be "discarded" because they are inconsistent with the evidence actually found in the record. Although we do not "discard" or disregard defendant's statements of fact, we agree with the WCJ that the conflict between the would-be statements of fact and the actual evidence significantly detracts from the persuasiveness of the petition. (See *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 923 (50 Cal.Comp.Cases 104) ["Instead of a fair and sincere effort to show that the trial court was wrong, appellants brief…is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness […]. An appellant is not permitted to evade or shift [its] responsibility in this manner."].)

We also note that defendant alleges applicant's claims of stressful employment events are not credible and are rebutted by defendant's witnesses. However, we accord WCJ Scott's

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[2] In her Report, the WCJ explains that defendant's petition included various instances of confused exhibit identification, which the WCJ took pains to correct in the contents of her Report. After the WCJ issued her Report, defendant filed a "Notice of Errata," which referred to its previously-filed petition for reconsideration and included a series of corrections to the petition's wrongly-identified exhibit numbers and letters. We have accepted, reviewed and considered the Notice of Errata, although it unhelpfully put the burden on the Board to make sense of the petition for reconsideration originally filed by defendant.

[3] The WCJ's reference to "CCR 10945" is to Rule 10945 of the WCAB's Rules of Practice and Procedure. (Cal. Code Regs., tit. 8, § 10945.) The Rule is entitled, "Required Content of Petitions for Reconsideration, Removal, Disqualification and Answers." Subdivision (a) of Rule 10945 states in relevant part: "A failure to fairly state all of the material evidence may be a basis for denying the petition."

credibility determinations the great weight to which they are entitled, consistent with *Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500]. Furthermore, because of defendant's failure to identify specific instances of applicant's supposed incredibility in the record, there is no evidence of considerable substantiality that would warrant rejecting WCJ Scott's credibility determinations. (*Id*.)

In connection with defendant's invocation of the good faith personnel action defense, we note that Labor Code section 3208.3(h) provides that an industrial psychiatric injury is not compensable "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."

In this case, defendant attempts to meet its burden of establishing the personnel action defense by asserting that applicant is collaterally estopped from re-litigating the issue because it was previously tried in U.S. District Court, and before the Fresno Civil Service Board, and defendant prevailed in both instances.

We do not find merit in defendant's reliance upon collateral estoppel.

In the recent case of *State Comp. Ins. Fund v. ReadyLink Healthcare, Inc.* (2020) 50 Cal.App.5th 422, 446 [264 Cal.Rptr.3d 68] ("*ReadyLink*"), the Court of Appeal explained that "collateral estoppel" encompasses the defense of "issue preclusion." In order to establish the defense of "issue preclusion," the party relying upon the doctrine must establish (1) there was a final adjudication of the issue in question; (2) the issue was identical in the other forum(s); (3) the identical issue was actually litigated and necessarily decided in the other forum(s); and (4) the identical issue was litigated between the same parties or parties in privity. (See *ReadyLink, supra*, 50 Cal.App.5th at 447-448.)

Here, defendant's reliance on issue preclusion to establish the good faith personnel action defense fails because the issue of whether applicant's psychiatric injury was substantially caused by lawful, nondiscriminatory, good faith personnel actions is not identical to the issues raised before the Fresno Civil Service Board and the U.S. District Court.

That is, the issues raised and decided against applicant before the Fresno Civil Service Board were whether (1) he should be removed from his job as a police officer for "malfeasance, misconduct, incompetence, inefficiency, or for failure to perform the duties of his position or to observe the established rules and regulations in relation thereto, or to cooperate reasonably with his superior or fellow employees;" and (2) whether applicant should be relieved of his job because

he had "any permanent or chronic physical or mental ailment or defense which incapacitates an employee for the proper safe, and efficient performance of his duties of his position." (Worker's Compensation exhibit BB.) Manifestly, it is clear that neither of the above issues is identical to whether applicant's psychiatric injury in this case was substantially caused by lawful, nondiscriminatory, good faith personnel actions, pursuant to Labor Code section 3208.3(h).

As for applicant's action against the City of Fresno in U.S. District Court, the jury verdict shows that the issue actually litigated and decided was whether applicant "proved by a preponderance of the evidence that defendant City of Fresno engaged in conduct that taken as a whole, materially and adversely affected the terms and conditions of [applicant's] employment because of any complaint [applicant] made about racial discrimination." (Workers' Compensation exhibit Z.) In deciding the foregoing issue, the jury conceivably may have touched upon the issue of whether applicant's psychiatric injury in his workers' compensation case was substantially caused by lawful, nondiscriminatory, good faith personnel actions taken by the City. But again, the issue is not identical, and defendant's petition for reconsideration references no evidence that the jury actually did consider the latter issue. In short, defendant cannot prevail on its claim of issue preclusion in connection with the good faith personnel action defense, because the issue in the U.S. District Court was not identical to the good faith personnel action defense raised in this case.[4]

Defendant also alleges that applicant is precluded from re-litigating the good faith personnel action defense here because early in 2015, the City of Fresno's Department of Personnel Services investigated and rejected applicant's claim that other City employee(s) violated the City's policy of discrimination and harassment. (Workers' compensation exhibit 66.) As with its other attempts to assert collateral estoppel or issue preclusion, defendant's reliance on the results of this investigation by the City fails because there is no showing that the details of the investigation involved issues identical to the good faith personnel action defense raised in this case. For instance, defendant refers to no evidence establishing that the City investigated whether the other employees' actions were "personnel actions" within the meaning of section 3208.3(h), e.g.,

[4] Referencing workers' compensation exhibit X, defendant similarly contends that in the same federal case, the U.S. District Judge's granting of defendant's motion for partial summary judgment as to applicant's "federal claims" and "FEHA claim for discrimination" establishes that applicant is precluded from litigating the good faith personnel action defense in this case. We reject the contention because defendant fails to cite evidence detailing the issues at stake in the "federal claims" and the "FEHA claim for discrimination" raised in applicant's federal case, which prevents a finding that any such issues were identical to the good faith personnel action defense at stake in this case.

transfers, demotions, layoffs, performance evaluations, and disciplinary actions such as warnings, suspensions, and terminations of employment; or whether any such actions were done in a manner that is lacking outrageous conduct, is honest and with a sincere purpose, is without an intent to mislead, deceive, or defraud, and is without collusion or unlawful design. (See *Larch v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 831; *Stockman v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 1042 [Appeals Board Significant Panel Decisions].)

Finally, to the extent defendant claims Dr. Ponton's medical opinion is not substantial evidence because the doctor failed to address the good faith personnel action defense, we do not find merit in the claim. Even though defendant has the burden of proof to establish the personnel action defense, there is no indication in the record that defendant sought to buttress the doctor's opinion by taking his deposition.

For the foregoing reasons,

IT IS ORDERED, that defendant's Petition for Reconsideration of the Findings and Award of October 18, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 3, 2022

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

GERALD MILLER
PARKER, KERN, NARD & WENZEL

JTL/ara

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. Date of Injury: 3/16/2010, 1/14/2011, 9/27/2011, CT~10/25/2011
   Applicant's Occupation: Police Officer
   Parts of Body Injured: Psyche

2. Date of Issuance of Award/Order: October 15, 2021

3. Identity of Petitioner: Defendant
   Petition Dated: 11/4/2011
   Timeliness: The Petition is timely.
   Verification: The Petition is verified.

4. Answer: No Answer was filed.

5. Defendant (hereinafter Petitioner), contends

   (a) By the Findings, Award, Order, the Court acted without or in excess of its powers;
   (b) The evidence does not justify the findings of fact; and
   (c) The Findings of Fact does not support the Order, Decision or Award.

6. It is recommended the Petition be denied.

II

BACKGROUND

Facts

Applicant, while employed as police officer for Fresno County Police Department, alleged four industrial injuries to his psyche. Marcel Ponton, Ph.D., serving as the panel qualified medical evaluator, initially evaluated Applicant August 10, 2010, and August 20, 2020, which consisted of a comprehensive clinical interview and a battery of objective psychological tests. Dr. Ponton issued a report dated August 30, 2010. *[Joint Exhibit 1]* A review Dr. Ponton's initial report demonstrates he documented Applicant's history and alleged mechanism of injury. Applicant alleged injury occurring arising from an incident occurring subsequent to a burglary call on March 16, 2010, wherein Applicant reported a hostile work environment causing him stress after Sergeant Joe Alvarez, although a superior ranked officer, was not Applicant's supervisor, issued Applicant a "write up" for insubordination when Applicant refused to speak to him about why he was upset. Captain Greg Garner, a supervisor in Applicant's chain of command, agreed that the incident between Applicant and Sgt. Alvarez did not warrant Applicant being written up, however, no corrective action was taken to change the write up, which caused Applicant stress. [*Defendant*

Exhibit DD, Trial Transcript, 2/3/2014, p. 8, line 18, through p. 9, line 6] Applicant was sent for therapy treatment with Jana Price-Sharps, PhD and also treated with his primary treating physician, Jere Ozaeta, M.D. Dr. Price-Sharps determined Applicant was temporarily disabled due to industrially caused psyche injury. Further consideration Dr. Ponton's medical report demonstrates he reviewed and summarized a litany personnel documents and medical records, including treatment reports of Dr. Price-Sharps. Based on the findings from his evaluation, Dr. Ponton diagnosis included generalized anxiety disorder and psycho-social stressors, with a determination that at least 51% of Applicant's emotional difficulties industrially caused. Dr. Ponton also recommended Applicant not be supervised by Sgt. Alvarez and that Sgt. Alvarez not have any input over Applicant's job conditions or performance. *[Joint Exhibit 2, Ponton, 9/20/2010, p. 2]*

On January 18, 2011, Applicant filed a DWC-1 Claim form alleging specific industrial injury to his psych for stress due to retaliation by the department occurring January 14, 2011. Applicant continued treatment with Dr. Price-Sharps and Dr. Ozaeta, with Dr. Price-Sharps again determining Applicant was temporarily disabled due to industrially caused psyche injury.

Dr. Ponton re-evaluated Applicant April 25, 2011, which consisted of a comprehensive clinical interview and a battery of objective psychological tests, issuing a report dated April 29, 2011. *[Joint Exhibit 3, Ponton, 4/29/2011]* A review Dr. Ponton's medical report demonstrates he documented Applicant's interval history with newly alleged psychiatric injury. On January 7, 2011, Applicant received information from a colleague with the County of Fresno, Sheriff's Department, Sgt. Hayes, about a credible death threat made against Applicant, by the father of a victim in a case Applicant was involved and also informed Applicant that that the father was seeking Applicant's home address. *[Joint Exhibit 3, Ponton, 4/29/2011, .p 2; Defendant Exhibit DD, Trial Transcript, 2/3/2014, p. 9, lines 16 – 23]* According to Sgt Hayes, Fresno Police Department was informed about the threat and were supposed to notify him, however Petitioner never informed Applicant about the threat. *[Defendant Exhibit DD, Trial Transcript, 2/3/14, p. 10, lines 1 – 10]* On January 14, 2011, Lydia Carrasco, the acting Deputy Chief of Fresno Police Department, contacted Applicant to instruct him not to come to work on January 15, 2011, because Petitioner would not accommodate Dr. Ponton's recommended work restriction that Applicant not be under the supervision of Sgt. Alvarez, however, Petitioner did not inform Applicant about the threat against his life. *[Joint Exhibit 3, Ponton, 4/29/11, p. 2]* Defendant's failure to notify Applicant or conduct an investigation into the threat caused Applicant stress, requiring him to seek medical treatment. [*Joint Exhibit 3, Ponton, 4/29/11, p. 3; Defendant Exhibit DD, Trial Transcript, 2/3/14, p. 11, lines 2 – 4]* Further consideration of Dr. Ponton's medical report demonstrates he documented reviewed and summarized a litany personnel documents and medical records, including ongoing treatment reports of Dr. Price-Sharps. Based on the findings from the re-evaluation, Dr. Ponton determined Applicant was totally temporarily disabled from the time of the initial injury in 2010, and again opined Applicant sustained a psychiatric injury with causation entirely industrial. *[Joint Exhibit 3, Ponton, 4/29/11, p. 23]*

Dr. Ponton re-evaluated Applicant a third time February 27, 2013, and March 7, 2013, which consisted of another comprehensive clinical interview and a battery of objective psychological tests. *[Joint Exhibit 4, Ponton, 4/1/2013]* Dr. Ponton documented Applicant's interval history, including newly alleged psychiatric injuries. Applicant reported significant stress by November 2011, initially resulting from Petitioner's refusal to return Applicant back to work, then stress after

returning back to work April 2011 because the employer would not accommodate Applicant's work restriction, thereby requiring Applicant to see Sgt. Alvarez on an ongoing daily basis despite the work restrictions. *[Joint Exhibit 4, Ponton, 4/1/13, p. 2]* Applicant also reported experiencing an upsetting incident resulting from an incident wherein coworker Officer Bustos, interrupted a conversation between Applicant and another unidentified coworker, which occurred after Applicant filed a federal discrimination lawsuit based on Officer Bustos issuing Applicant a ticket in 2007, when Applicant was driving off duty, in plain clothes. *[Joint Exhibit 4, Ponton, 4/1/13, p. 2]* Applicant filed a claim alleging industrial injury to his psych occurring September 27, 2011 and was sent for treatment with Richard Blak, PhD. *[Joint Exhibit 4, Ponton, 4/1/13, p. 2]* Based on the findings from this evaluation, Dr. Ponton diagnosis included generalized anxiety disorder, panic disorder with agoraphobia and stressful work environment. Dr. Ponton opined having reviewed the preponderance of the evidence, none of his prior opinions changed; and that it as his reasoned opinion that Applicant sustained a psychiatric injury arising out of employment and that the events from work were the substantial and preponderant cause as to all factors combined of the Applicant's psychological diagnosis and disability.

In supplemental report dated December 9, 2015, Dr. Ponton addressed percentage of causation of injury as to each of the three specific dates of injury, as well as alleged injurious cumulative trauma exposures throughout his reports, as to the events he determined to be the predominant cause, accounting for 51% or more, of Applicant's alleged psyche injury. *[Applicant Exhibit 39, Ponton, 12/9/2015]*

Defendant issued a Notice of Proposed Removal dated September 16, 2016, and an Order of Removal dated November 10, 2016. *[Defendant Exhibit BB, City of Fresno Civil Service Board, Finding, Decision, and Order of Dismissal, 5/14/2017, p. 1, lines 21 – 15]* While neither the Notice of Proposed Removal or Order of Removal were offered into the record in the current trial, the Fresno Civil Service Board issued a *Finding, Decision, and Order of Dismissal*[1] dated May 4, 2017, in response to litigated of Applicant appealing Petitioner's removal of Applicant as a police officer in 2016, thereby seeking to maintain his employment. The *Finding, Decision, and Order of Dismissal* notes Applicant had a recognized disability, which was communicated to Defendant, with Defendant determining it was unable to reasonably accommodate Applicant. *[Defendant Exhibit BB, Finding, Decision, and Order of Dismissal, 5/14/17, p. 7, lines 20 – 22; p. 11 lines 8 - 17]* The Fresno Civil Service Board read and considered the Second Amended Joint Findings of Fact. Award and Opinion on Decision, dated April 7, 2017, issued by WCJ Ellis, of which they took judicial notice. *[Defendant Exhibit BB, Finding, Decision, and Order of Dismissal, 5/14/17, p. 6, lines 24 – 27; p. 8, lines 6 – 18; p. 9, lines 1-8]* The Fresno Civil Service Board found Applicant could not perform the essential duties of his position as a result of Sgt. Alvarez promoting to a lieutenant, and found Applicant to be permanent disabled from performing police offer duties based on the evidence of the Workers' Compensation Appeal Board. *[Defendant Exhibit BB, Finding, Decision, and Order of Dismissal, 5/14/17, p. 15, lines 1 – 7; p. 16, lines 7 - 8]* The Fresno Civil Service Board found Applicant had a permanent mental defect which incapacitates him from proper, safe, an efficient performance of the duties of his potion, and hat a medical separation was appropriate. *[Defendant Exhibit BB, Finding, Decision, and Order of Dismissal, 5/14/17, p. 16, lines 4 -15]* The Fresno Civil Service Board further found Applicant's

[1] Numerous documents were entered into evidence during the Fresno Civil Service Board trial, which were not offered by Defendant in the current evidentiary record, nor accompanied the *Finding, Decision, and Order of Dismissal*.

assertion that he should be returned to his position as a police officer as credible because Applicant concurrently sought disability retirement through the Retirement Board, which requires Applicant to demonstrate he is incapacitated for the performance of is normal duties. *[Defendant Exhibit BB, Finding, Decision, and Order of Dismissal, 5/24/17, p. 15, lines 8 -17; p. 16, line 3]* The Fresno Civil Service Board upheld Defendant's action of removing Applicant. *[Defendant Exhibit BB, Finding, Decision, and Order of Dismissal, 5/14/17, p. 17, lines 1 - 3]*

Procedural History

These matters initially proceeded to trial February 3, 2014, with a Joint Findings of Fact, Award, and Opinion on Decision issuing May 12, 2014, and an Order Amending the Findings of Fact, Award, and Opinion on Decision, issuing May 27, 2014, opining in relevant part that Applicant established that the actual events of employment were involved in Applicant's psychiatric injury and that Dr. Ponton's opinion was sufficient to meet the requirement that such actual events be the predominant cause of the injury. However, the WCJ found in pertinent part that Applicant failed to prove injury to the psyche concluding the supervisory discussion with Sergeant Alvarez and actions by others in the department, were lawful, nondiscriminatory, good faith personnel actions.

Upon Applicant filing a Petition for Reconsideration June 4, 2014, the WCAB issued an Opinion Granting Reconsideration and Decision after Reconsideration August 1, 2014, finding the WCJ failed to fully consider all factors involved in the analysis required by the factors as set forth in *Rolda v. Pitney Bowes (2001) 66 Cal.Comp.Cases 241 [Appeals Board En Banc]* by failing to adequately address whether actual events of employment which qualified as personnel actions were lawful, nondiscriminatory and in good faith, and if so whether they were a substantial cause of the psychiatric injury. The WCAB amended Finding of Fact number one, to defer a determination of Applicant's claim of injury to his psyche and returned the matter to trial level for the WCJ to provide a complete analysis of the good faith personnel action affirmative defense.

On November 25, 2014, the WCJ issued an Amended Joint Findings and Award and Opinion, again, opining in relevant part that Applicant established that the actual events of employment were involved in Applicant's psychiatric injury, again finding Applicant failed to prove injury to the psyche, concluding two thirds of the problems Applicant complained of at trial were lawful, non-discriminatory, good faith personnel actions, which were a substantial cause of Applicant's psychiatric injury.

Upon Applicant filing another Petition for Reconsideration December 19, 2014, the WCAB issued an Opinion Granting Reconsideration and Decision after Reconsideration February 13, 2015, finding that the WCJ did not properly consider the issue of whether Defendant met its burden of proof to establish the affirmative defense that Applicant's injury was substantially caused by good faith personnel actions, as set forth in Rolda. As the WCJ did not identify the medical evidence relied on to conclude that the good faith personnel actions were a substantial cause of Applicant's psychiatric injury. The WCAB advised that WCJ should develop the medical record to make this finding, by obtaining a supplemental report from Dr. Ponton addressing the extent to which Defendant's good faith personnel actions or other actual events of employment, were responsible for Applicant's psychiatric injury. The WCAB then rescinded the Amended Joint Findings and Award and Opinion, and reinstated its prior order amending Finding of Fact number one in the

Joint Findings of Fact, Award, and Opinion on Decision issuing May 12, 2014, to defer a determination of Applicant's claim of injury to his psyche and returned the matter to trial level for the WCJ to provide a complete analysis of the good faith personnel action affirmative defense.

On April 7, 2017, the WCJ issued a Second Amended Joint Findings of Fact, Award, and Opinion on Decision, which comprised solely of an Opinion on Decision seeking to cure the prior defects. Citing Dr. Ponton's statement that Applicant was hypersensitive to criticism, and opining that the Fresno Police Department being a quasi-military type of agency requiring officers to accept authority, concluded Defendant met its burden of establishing Applicant's psychiatric injury was caused by lawful, non-discriminatory, good faith personnel actions.

Applicant, *in propria persona* filed a Petition for Reconsideration May 1, 2017. On November 13, 2019, the WCAB issued an Opinion and Decision After Reconsideration finding both Dr. Ponton's supplemental report and the WCJ Opinion on Decision problematic and concluding that once again the matter is to be remanded back to a WCJ to render a new determination as to whether Applicant's claim is barred by lawful nondiscriminatory good faith personnel action defense pursuant to Labor Code § 3208.3(h). The WCAB rescinded the Second Amended Joint Findings and Award, and substituted the findings of fact to (1) whether Applicant sustained industrial psyche injury arising out of and occurring in the course of employment while employed a police officer by the City of Fresno on March 16, 2010 (ADJ7548354), January 14, 2011 (ADJ8286596), September 27, 2011, (ADJ8286584), and during the period of October 25, 2010, through October 25, 2011 (ADJ8076231), is deferred pending further proceedings, and for a new decision by the newly assigned WCJ, and (2) whether compensation for psyche injury is barred by lawful, nondiscriminatory, good faith personnel action defense pursuant to Labor Code § 3208.3(h), is deferred pending further proceedings and new decision by the assigned WCJ, jurisdiction reserved. It is apparent from the filing of a Dismissal of Attorney, that Applicant discharged his prior counsel, and is now proceeding as his own counsel.

Findings, Award, Order

On October 15, 2021, the undersigned issued a Findings of Fact, Award, and Opinion On Decision (hereinafter *Findings and Award*), finding in pertinent part that the medical opinions of Dr. Ponton constitute substantial medical evidence, Applicant sustained injury arising out of and occurring in the course of employment to the psyche, on March 16, 2010, January 14, 2011, September 27, 2011, and during the cumulative period of October 25, 2010, through October 25, 2011, Applicant's psyche claims are not barred pursuant to Labor Code § 3208.3, subdivision h, good faith personnel action affirmative defense, and Applicant is not estopped from pursuing his workers' compensation claims alleging industrially caused psychiatric injury. It is from this *Findings and Award* that Petitioner seeks reconsideration. As of the writing of this Report, no answer to the Petition has been filed by Applicant.

CCR 10945

All evidentiary statements must be supported by specific references to the record. (*CCR 10945*) A party may not assert "factual statements" in a petition for reconsideration that are not part of the evidentiary record. (*Hill v. County of San Bernardino,* 2012 Cal. Wrk. Comp. P.D. LEXIS 74;

Redden v. MJT Enterprise, Inc., dba Blue Ribbon Personnel, 2015 Cal. Wrk. Comp. P.D. LEXIS 263; *Ruiz v. Wahoo's Fish Tacos,* 2015 Cal. Wrk. Comp. P.D. LEXIS 266.) If the evidence cited is not contained in the record, it will not be considered and the party may be sanctioned for citing it. (*Deza v. The Home Depot,* 2008 Cal. Wrk. Comp. P.D. LEXIS 228; *Navarro v. Lockheed,* 2011 Cal. Wrk. Comp. P.D. LEXIS 388*; Arends v. URS Federal Support Services, Inc.,* 2014 Cal. Wrk. Comp. P.D. LEXIS 143; *Moore v. Jemico, LLC,* 2017 Cal. Wrk. Comp. P.D. LEXIS 294.) A party also may be sanctioned for failing to refer to documents by their proper exhibit numbers or letters. (*Castaneda v. Pico Rivera Pallet*, 2010 Cal. Wrk. Comp. P.D. LEXIS 524; *Solorio v. Christopher Watkins dba Watkins Services Construction Landscape*, 2014 Cal. Wrk. Comp. P.D. LEXIS 741; *Wallace v. Long Beach Unified School District,* 2017 Cal. Wrk. Comp. P.D. LEXIS 524.) Documents that are in the adjudication file but have not been received or offered as evidence are not part of the record of proceedings. (*CCR 10803*) Here, the Petition either inaccurately references the evidentiary record and or makes references to documents which do not appear to be either admitted or even offered into the evidentiary record, as delineated below:

Page 2, lines 26 - 28, of the Petition states Applicant's psychiatric treatment began as early as January 25, 2005, with his primary concern being racial discrimination at work, referencing Applicant Exhibit 21 as source of purported fact. This exhibit does not support Petitioner's stated fact, thus purported statement of facts should be discarded.

Page 3, lines 1 - 2, of the Petition states Dr. Ponton evaluated Applicant August 31, 2010, referencing "Defendant Exhibit I" as source of purported fact. Dr. Ponton's report dated August 31, 2010, is marked as Joint Exhibit 1, not Defendant Exhibit I." On page 3, lines 6 - 8 of the Petition states Dr. Ponton noted Applicant had a series of negative interactions, but the most notable was he felt subject of racial profiling. This Court finds the summarization of Dr. Ponton's opinion, to inaccurately summarize the findings, when in totality, on page 16, Dr. Ponton reported "… [Applicant] had a series of negative interactions with is employer, most notably during his arrest by another officer when he was wearing plain clothes. The [Applicant] felt he was the subject of racial profiling and that the department violated his rights. … The [Applicant] is currently pursuing that issue through federal court and he is very sensitive about his work environment".

Page 3, lines 9 - 10 of the Petition states Applicant wrote an email to the Defendant, requesting a letter, with lines 11 - 20 going on to discuss what appears to be the content of said letter, referencing Applicant Exhibit 38 as source of alleged facts. This exhibit does not support Petitioner's stated fact, thus purported statement of facts should be discarded. Page 3, lines 21 - 23 of the Petition states content of a letter Applicant wrote, again, referencing Applicant Exhibit 38 as source of purported fact. This exhibit does not support Petitioner's stated fact, thus purported statement of facts should be discarded. Page 3, lines 24 - 26, of the Petition states Dr. Ponton evaluated Applicant April 29, 2011, referencing "Applicant Exhibit 14" as source of purported fact. Dr. Ponton's report dated April 29, 2011, is marked as Joint Exhibit 3, not Applicant Exhibit 14.

Page 4, lines 15 - 20, of the Petition states Dr. Richard Black evaluated Applicant November 22, 2011, referencing "Applicant Exhibit 28" as source of purported fact. Dr. Blak's report dated November 22, 2011, is marked as Applicant Exhibit 45, not Applicant Exhibit 28.

Page 4, lines 21 - 25, of the Petition states Dr. Ponton evaluated Applicant April 1, 2013, referencing "Applicant Exhibit 15" as source of purported fact. Dr. Ponton's report dated April 1, 2013, is marked as Joint Exhibit 4, not Applicant Exhibit 15. Lines 25-26 of the Petition states on page 15 of Dr. Ponton's report, Applicant admitted to losing his Federal Discrimination case. This Court finds the summarization of Dr. Ponton's report to inaccurately summarize Applicant's acknowledgment, when recited in totality, on page 15, Dr. Ponton reported "When asked about the Federal Discrimination case in retaliation to Bustos, the [Applicant] reported that he lost the case because some evidence was allowed in." Page 4, line 27 through page 5, line 1 of the Petition inaccurately recites Dr. Ponton's opinions on page 44 of the report. This exhibit does not support Petitioner's stated fact, thus purported statement of facts should be discarded.

Page 7, line 27, through page 7, line 2, states WCJ Ellis issued a Joint Findings of Fact, Award and Opinion on Decision, referencing "Applicant Exhibit1". Judge Ellis report is not marked for identification purposes, but judicial notice of the Findings, Award and Opinion as it is a part of Applicant's adjudicative file.

Page 7, lines 3 - 4, of the Petition states a Notice of Proposed Disciplinary Action was sent to Applicant on February 5, 2015, with lines 11 - 20 going on to discuss what appears to be the content of said Notice regrading a training session on October 10, 2014, in which Sgt. Alvarez was an instructor, referencing "Applicant Exhibit 41, pages 14, 15 and 22, as the source of alleged facts. This exhibit does not support Petitioner's stated fact, thus purported statement of facts should be discarded. [The undersigned notes a Notice of Proposed Disciplinary Action, dated February 5, 2015, marked as Applicant's Exhibit 65, not Applicant Exhibit 14, pertaining to event occurring five years after the last alleged date of injurious exposure, and which is only 6 pages long, therefore, does not support facts summarized lines 4-15, purported to be on pages 14, 15, and 22 of the Notice, therefore purported statement of facts should be discarded.]

Page 7, lines 20 - 21, of the Petition states Dr. Ponton evaluated Applicant December 9, 2015, referencing "Applicant Exhibit 36" as source of purported fact. Dr. Ponton's report dated December 9, 2015, is marked as Applicant Exhibit 39, not Applicant Exhibit 36.

Page 7, line 26 of the Petition states Defendant sent Applicant a letter on April 12, 2016, with page 7, lines 26 through page 8, line 3, appearing to discuss the contents of said letter, referencing "Applicant Exhibit 39" as the source of purported fact. This exhibit does not support Petitioner's stated fact, thus purported statement of facts should be discarded. [The undersigned notes Defendant sent Applicant a letter dated April 12, 2016, pertaining to a March 30, 2016, meeting and Defendant's inability to assign Applicant to a full time position due to Sgt Alvarez' promotion discussion, which is marked as Applicant's Exhibit 54, not Applicant Exhibit 39, pertaining to event occurring five years after the last alleged date of injurious exposure, and which is only 2 pages long, therefore, does not support facts summarized purported to be on page 11 of the letter, therefore purported statement of facts should be discarded.

Page 8, lines 4-12 of the Petition states Defendant sent Applicant a letter on June 1, 2016, regarding interactive process referencing "Applicant Exhibit 41" as the source of purported fact. This exhibit does not support Petitioner's stated fact, thus purported statement of facts should be discarded.

Page 8, lines 13 - 16 of the Petition states Dr. Jana Price-Sharps treated Applicant June 3, 2016, referencing "Applicant Exhibit 37" as the source of purported fact. This exhibit does not support Petitioner's stated fact, thus purported statement of facts should be discarded. [The undersigned notes Dr. Price-Sharps issue a letter/note dated April 12, 2016, stating Applicant unable to return to work, which is marked as Applicant's Exhibit 41, not Applicant Exhibit 37, occurring five years after the last alleged date of injurious exposure, and which is only 1 page long, therefore, does not support facts summarized purported to be on page 4 of the letter, therefore purported statement of facts should be discarded.

III
DISCUSSION

Petitioner requested the undersigned address whether Applicant is estopped from litigating alleged discrimination of whether the employer's conduct was lawful, nondiscriminatory, good faith personnel action in light of the jury verdict in Gerald Miller v. City of Fresno, and the City of Fresno Civil Service Board's Order of Dismissal. *[Minutes of Hearing and Summary of Evidence, August 11, 2021, p. 3, enumerated issue number 7]* The undersigned found Applicant was not estopped from pursuing his workers' compensation claims alleging industrially caused psychiatric injury, upon determining Petitioner, bearing the burden of proving estoppel, failed to present evidence to demonstrate the issues adjudicated either before the Fresno Civil Service Board, or United States District Court, are the same issues litigated here before the Workers' Compensation Appeals Board. (*Finding and Award, 10/15/21, pp. 2 and 10*) Petitioner avers the undersigned acted without or in excess of its powers by failing to find Applicant barred from re-litigating issues of discrimination, lawful, nondiscriminatory, good faith personnel actions issues.

A. Collateral Estoppel/Res Judicata - Issue Preclusion Not Addressed

Petitioner avers the undersigned's *Findings and Award* addressed "remedy estoppel" but failed to address issue preclusion, with the undersigned erring in its determination that Petitioner failed present evidence demonstrating its personnel actions were lawful, non-discriminatory and made in good faith. (*Petition, 11/4/2021, page 11, lines 26 – 28*) The doctrine of res judicata precludes parties or their privies from re-litigating a cause of action that has been finally determined by a court of competent jurisdiction." (*Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 972, reciting *Bernhard v. Bank of America* (1942) 19 Cal. 2d 807, 810). The doctrine rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. (*Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 972) The doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy. (*Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 973)

Petitioner contends the issues of whether Petitioner's conduct constitutes lawful, non-discriminatory, good faith personnel actions have already been adjudicated before both the Fresno Civil Service Board, or United States District Court, are the same issues litigated here before the WCAB, estopping Applicant from re-litigating the identical issues against the identical parties, and therefore bars Petitioner's liability for psychiatric injury. *[Petition, 11/4/21, p. 12, lines 7 –*

12] Petitioner asserts "The record reflects the issue of personnel action(s) being lawful, non-discriminatory, and in good faith were clearly litigated previously against the same party defendant, include the same witnesses and evidence if not more, and prod to have been upheld as such by the Fresno Civil Service Board (Defendant's Exhibit "BB"); the August 12, 2011 jury verdict (Defendant Exhibit "Z"). *(Petition, 11/4/21, p. 12, lines 15-18).* Merely asserting that evidence clearly exist, does not obviate a litigant's duty actually proffer evidence to demonstrate the assertion, as alleged, is factually accurate and true. The burden of proof rests upon the party or lien claimant holding the affirmative of the issue. (*Labor Code § 5705*) Here, the burden rested on Petitioner to prove the issues adjudicated before the Fresno Civil Service Board and United States District Court, were identical to the issues currently being adjudicated before the WCAB and involved identical parties. Petitioner failed to meet its burden to prove the issues adjudicated before the Fresno Civil Service Board and United States District Court, were identical to the issues currently being adjudicated before the WCAB, and failed to prove that the United States District Court case involved identical parties.

1. Fresno Civil Service Board

As to the Fresno Civil Service Board, Petitioner offered the *Finding, Decision, and Order of Dismissal* which demonstrates that case involved Applicant's appeal before the Fresno Civil Service Board, litigating Petitioner's October 3, 2016, removal of Applicant as a police officer, due to the Petitioner's inability to (continue to) reasonably accommodate a work restriction of unspecified date, from non-specified medical provider, caused by Applicant's preclusion from working under the supervision of Sgt. Alvarez, once Alvarez was promoted to a lieutenant. While it appears the case before the Fresno Civil Service Board, involved both Applicant and petitioner, neither Applicant's 2016 removal as a police officer, or the appropriateness of the Petitioner's removal are issues currently before the WCAB. Therefore, the *Finding, Decision, and Order of Dismissal*, fails to demonstrate issue(s) adjudicated in the Fresno Civil Service Board are in fact identical to the issues currently before the WCAB.

2. United States District Court

As to federal lawsuit Case 1:08-CV-01062-OWW, filed in the United States District Court, Petitioner offered the Verdict of Trial Jury dated August 12, 2011, and Judgment In a Civil Case dated August 17, 2011, which identifies Applicant and Defendant as named parties in case 1:08-CV-01062-OWW. *(Defendant Exhibits Z and AA)* Petitioner also offered the *Order Granting Motion for Summary Judgement in the Miller Action on Behalf of Defendant' Temjuin "Tony" Bustos ad Stuart Riba and Partial Summary Judgement as to the City of Fresno*, in case 1:08-CV-01062-OWW, dated July 15, 2011, which demonstrates the federal lawsuit was actually filed by multiple plaintiffs, with Applicant identified as a named plaintiff, against numerous named defendants, with Petitioner, City of Fresno identified as a named defendant, as well as Tony Bustos and Stuart Riba. *(Defendant Exhibit X)* Petitioner did not offer the complaint and/or accusation filed in case 1:08-CV-01062-OWW, to demonstrate issues being adjudicated in that federal case, or more pertinent, issues Applicant raised against the City of Fresno.

The *Order Granting Motion for Summary Judgement in the Miller Action on Behalf of Defendant' Temjuin "Tony" Bustos and Stuart Riba and Partial Summary Judgement as to the City of Fresno*,

demonstrates named defendant's Bustos and Riba's Motion for Summary Judgement was granted in its entirety, and named defendant City of Fresno's Motion for Partial Summary Judgement as to "federal claims" and "FEHA claim for discrimination" were granted, with named defendant City of Fresno's partial summary judgement as to "claim for retaliation" was denied. Petitioner failed to offer the Motion for Summary Judgement to demonstrate what/which issues as alleged by Applicant against defendant Bustos were granted summary judgement in its entirety which is of significance as the evidence demonstrates Applicant filed a lawsuit against City of Fresno police alleging police officer Tony Bustos pulling him over while he was driving off-duty in plain clothes, and writing him a ticket, was the result of racial discrimination. And, while Dr. Ponton was aware of lawsuit, Dr. Ponton did not find Officer Bustos pulling Applicant over as a factor either causing or contributing to the alleged psyche injury, but rather found Applicant's interactions with Officer Bustos after the incident and specifically Officer Bustos intervening in conversation Applicant was engaged in with another co-worker, as a causative actor to the psyche injury. Petitioner also failed to offer the Motion for Partial Summary Judgement to demonstrate what "federal claims" and "FEHA claim for discrimination" Applicant alleged against defendant City of Fresno in which partial summary judgment was granted. Therefore, the *Order Granting Motion for Summary Judgement in the Miller Action on Behalf of Defendant' Temjuin "Tony" Bustos and Stuart Riba and Partial Summary Judgement as to the City of Fresno* fails to demonstrate issue(s) adjudicated in the United States District Court are in fact identical to the issues currently before the WCAB.

A Jury Verdict, issued August 12, 2011, with judgement summarily rendered in reliance thereof on August 17, 2011, demonstrates that a jury determined Applicant did not prove by a preponderance of the evidence that defendant City of Fresno engaged in conduct that taken as a whole, materially and adversely affected the terms and conditions of Applicant's employment because of any complaint Applicant made about racial discrimination. However, no evidence was offered to demonstrate what conduct of City of Fresno the jury considered, when rendering its determination, nor was any evidence offered to demonstrate what Applicant alleged to be racial discrimination, which again is relevant because the evidence demonstrates Applicant filed a lawsuit against City of Fresno police alleging police officer Tony Bustos pulling him over while he was driving off-duty in plain clothes and writing him a ticket, was the result of racial discrimination, which Dr. Ponton did not find as a factor either causing or contributing to the alleged psyche injury. Therefore, neither the jury verdict, nor civil judgement demonstrate issue(s) adjudicated in the United States District Court are in fact identical to the issues currently before the WCAB.

3. Conclusion

And, while Petitioner further contends record reflects Applicant "***continued to make the same allegations***" as to claims of retaliation, without merit until March 20, 2015, when Petitioner notified Applicant there was no evidence to indicate Petitioner violated its Policy of Discrimination and Harassment. (***Emphasis added***) (*Petition, 11/4/2021, page 12, line 26 through page 13, line 2)*. However, the March 20, 2015, letter fails to set forth what/which of Petitioner's action(s) Applicant alleged to be retaliatory, and e Applicant's complaint as referenced in the letter is not offered into the evidence to demonstrate what/which "***same allegations***" Petitioner contends Applicant alleged. (***Emphasis added***) *(Applicant Exhibit 66, T.J. Miller, 3/20/2015).* Moreover, the evidence at minimal demonstrates Petitioner's Motion for Partial Summary Judgement as to

Applicant's claim for retaliation, was denied, therefore, to the extent the retaliation referred to in Petitioner's letter dated March 50, 2015, is the same retaliation Applicant argues in the federal complaint/accusation, in which defendant City of Fresno's Motion for Partial Summary Judgement was denied, Applicant is not estopped from litigating matter here. As such, the undersigned's finding that Applicant's claim for psyche injury is not estopped because Petitioner failed to meet its burden of presenting evidence to demonstrate identical issues previously litigated before the Fresno Civil Service Board and in United States District Court, between Applicant and Petitioner involve identical issues before the WCAB.

B. Issue Preclusion Estops Finding Applicant's Psyche Claim Not Barred by GFPA

Petitioner asserts Applicant cannot re-litigate issues before the WCAB already adversely decided against him, contending "Dr. Ponton's reported ***clearly reflects*** applicant litigated the same issues before several tribunals", referencing Applicant Exhibit 15, pages 2, 5, 12, 28, 29, 31, 34, 41. (***Emphasis added.***) *(Petition, 11/4/2021, page 13, lines 20 - 24)* As explained *supra*, merely stating that evidence clearly exist, does not obviate a litigant's duty to actually proffer evidence to demonstrate the statement, as alleged, is factually accurate and true. Applicant Exhibit 15, a two paged report issued by Dr. Price-Sharps, dated January 5, 2011, which Petitioner relies on as evidence demonstrating clearly reflects Applicant litigated the same issues before several tribunals, does not support Petitioner's contention thus should be disregarded. And, Petitioner's contention that Applicant cannot re-litigate issues before the WCAB already adversely decided against him, is premised on purported statements of facts, which Petitioner failed to demonstrate are substantiated by the evidentiary record.

As discussed *supra*, the parties adjudicated Applicant's 2016 removals as a police officer before the Fresno Civil Service Board, while the issues currently before the WCAB in relevant part are whether Applicant's alleged psychiatric injury occurring March 16, 2010, January 14, 2011, September 27, 2011, and during the cumulative period of October 25, 2010, through October 25, 2011, are industrial and whether Petitioner is able to meet its burden of proving conduct alleged to have caused psyche injury were lawful, nondiscriminatory, good faith personnel actions. The evidence does not support Petitioner's contention the Fresno Civil Service Board previously adjudicated causation of Applicant's alleged psychiatric injury issues occurring March 16, 2010, January 14, 2011, September 27, 2011, and during the cumulative period of October 25, 2010, through October 25, 2011. Nor does the evidence support Petitioner's contention the Fresno Civil Service Board previously adjudicated whether Petitioner met its burden of proving that the employer conduct, alleged to have caused Applicant's psyche injury, was lawful, nondiscriminatory, good faith personnel actions, this barring Applicant from recovery in the psyche claim. Moreover, Petitioner did not proffer any evidence to demonstrate Applicant alleges the 2016 removal, occurring 5 years after the last date of injury, either caused and/or contributed to his psyche injury, nor proffer any evidence to demonstrate Dr. Ponton found Applicant's removal from employment as a police officer Dr. Ponton as a contributing factor. As such, the *Finding, Decision, and Order of Dismissal* does not demonstrate the incidents subject to. Additionally, to the extent the Fresno Civil Service Board's *Finding, Decision, and Order of Dismissal*, relies on the Second Amended Joint Findings of Fact, Award and Opinion on Decision, dated April 7, 2017, issued by WCJ Ellis, since the WCAB issued an Opinion and Decision After Reconsideration rescinded the Second Amended Joint Findings of Fact, Award and Opinion after

finding it to be problematic. *(WCAB Opinion and Decision After Reconsideration, 11/13/2019)*. Therefore, the *Finding, Decision, and Order of Dismissal*, is premised on a finding and opinion determined to be invalid.

Also discussed *supra*, the neither the jury verdict, civil judgment, nor *Order Granting Motion for Summary Judgement in the Miller Action on Behalf of Defendant' Temjuin "Tony" Bustos and Stuart Riba and Partial Summary Judgement as to the City of Fresno* offered as evidence pertaining to the federal lawsuit filed in case 1:08-CV-01062-OWW identify what issues were adjudicated in United States District Court to demonstrate Applicant's alleged psychiatric injury occurring March 16, 2010, January 14, 2011, September 27, 2011, and during the cumulative period of October 25, 2010, through October 25, 2011, are industrial and whether Petitioner is able to meet its burden of proving conduct alleged to have caused psyche injury were lawful, nondiscriminatory, good faith personnel actions, were previously adjudicated therein to estop Applicant from litigating those issues before the WCAB. As such, Petitioner failed to demonstrate the undersigned's finding that Applicant's claim for psyche injury is not estopped because Petitioner failed to meet its burden of presenting evidence to demonstrate identical issues previously litigated before the Fresno Civil Service Board and in United States District Court, between Applicant and Petitioner involve identical issues currently before the WCAB.

C. AOE/COE – ACTUAL EVENTS OF EMPLOYMENT

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," unless the injury resulted from a violent act as discussed below. (*Labor Code §3208.3(b)(1)*) Predominant as to all causes requires that the work-related factors constitute more than 50 percent of the causal factors. (*Department of Corrections/State of California v. WCAB (Garcia)* (1999) 64 CCC 1356) An employee who does not meet threshold for establishing industrial causation has not demonstrated a compensable injury and cannot receive a workers' compensation award for the injury.*(Sonoma State University v. WCAB (Hunton)* (2006) 71 CCC 1059, 1061)

The Petition appears to intimate that Applicant failed to meet his burden of proving his psyche injury arose out of and occurred in the course of employment. *[Petition, 11/4/2021, p. 14, lines 26 – 28]* Petitioner then asserts "Applicant" confused the concepts of causation and apportionment and of injury, and further asserts Applicant's "position" reflects a fundamental misperception of his burden of proof. [*Petition, 11/4/2021, p. 15, lines 2-3, and 11.*] However, Petitioner fail to identify from which exhibit in the evidentiary record, Petitioner's assertions rely. Petitioner also *appears* to argue Applicant failed establish actual events of employment supported psychological injury by a preponderance of the evidence, because Dr. Ponton's medical opinions are precluded by estoppel. *[Petition, 11/4/2021, p. 15, lines 17 – 21]* Dr. Ponton determined causation of injury to be entirely industrial in nature. *[Joint Exhibit 3, 4/29/11, p. 2]* As such, Dr. Ponton opined that at least 51% of Applicant's emotional difficulties were industrially caused. *[Joint Exhibit 1, Ponton, 8/31/10, p. 17; Joint Exhibit 3, 4/29/11, p. 17; Joint Exhibit 4, 4/1/13, p. 53]* The undersigned found Dr. Ponton's reporting, supplemented by way of the medical record through treatment reports issued by Dr. Price-Sharps and Dr. Ozaeta. *[Joint Exhibit 1, Ponton, 8/31/10, p.*

2 – 5, 7 – 13, and 15 – 16; Joint Exhibit 3, 4/29//11, pp. 1 – 3, 5 – 18; Joint Exhibit 4, 4/1/13, pp. 2 – 6, 7 – 39] demonstrated these incidents to be actual events of employment.

1. March 16, 2010

Here, Applicant, while employed as police officer for Fresno County Police Department, alleged four industrial injuries to his psyche; three specific dates of injury, as well as alleged injurious cumulative trauma exposures. Dr. Ponton, serving as the panel qualified medical evaluator, took a history of all events, as reported Applicant by Applicant giving rise to his claims of industrially caused psyche injury, starting with the first evaluation documenting the incident of March 16, 2010, wherein Applicant suffered work related stress secondary to hostile work environment after Sgt. Alvarez wrote Applicant with the captain failing to intercede although he agreed the incident did not rise to the level of action taken by Sgt. Alvarez. Applicant also treated with Drs. Price-Sharps' and Ozaeta. The undersigned determined the incident to be an actual event of employment. Petitioner fails to present evidence demonstrating how the incident of March 16, 2010, as reported by Dr. Ponton, is issue precluded, based on the same issue being previously adjudicated.

2. January 14, 2011

Dr. Ponton took a history of new injuries Applicant alleged arose in the interval between Dr. Ponton's evaluations, including the incident of January 14, 2011, documented in Dr. Ponton's report dated April 29, 2011, wherein Petitioner failed to inform Applicant of threat against his life, which caused Applicant stress and made Applicant believe Petitioner was retaliating against him. Petitioner contends Applicant's prior trial testimony, February 3, 2014, wherein he explains learning of the threat against his life on January 7, 2011, acquired by way of communication from Sgt Hayes, a friend who worked for the County of Fresno, Sheriff Department, and Applicant's January 17, 2011, email to Petitioner noting it had been 11 days since he learned from his friend, Sgt Hayes, of the threat, yet Petitioner had not contacted him to notify him of the threat, "refutes" Dr. Ponton's statement that Petitioner ignored the threat. *[Petition, 11/4/2021, p. 16, lines 3 - 5]* However, the evidence proffered by Petitioner fails to explain and/or demonstrate the statement is not accurate. Petitioner failed to proffer evidence to demonstrate Petitioner did in fact inform Applicant of the threat against his life. Petitioner failed to proffer evidence to demonstrate how Petitioner responded to the threat, or to demonstrate what action Petitioner took in response thereto. Moreover, the undersigned determined the incident to be an actual event of employment. Petitioner fails to present evidence demonstrating how the incident of January 14, 2011, as reported by Dr. Ponton, is issue precluded, based on the same issue being previously adjudicated.

3. September 17, 2011

Dr. Ponton took a history of the incident wherein Officer's Bustos interruption of Applicant's conversation with a coworker caused Applicant stress and need to seek medical treatment with Dr. Blak. Petitioner contends applicant did not offer any proof of bullying. *[Petition, 11/4/2021, p. 17, line 5]* Dr. Ponton described the incident of Officer' Bustos as bullying. While Dr. Ponton report as early as April 1, 2013, of Applicant alleging incident between Applicant and Officer Bustos, Petitioner failed to proffer evidence to demonstrate the incident as alleged by Applicant did not occur. Nor did Petitioner call Officer Bustos, or any other witness to proffer rebuttal evidence

refuting the event. The undersigned determined the incident to be an actual event of employment. Petitioner fails to present evidence demonstrating how the incident of September 17, 2011, as reported by Dr. Ponton, is issue precluded, based on the same issue being previously adjudicated.

4. CT October 25, 2010, through October 25, 2011

Dr. Ponton took a history of the incident wherein Applicant alleged cumulative trauma causing significant stress as of November 2011, from Petitioner initially refusing to return Applicant back to work, then Petitioner failing to comply with work restrictions when Applicant was returned back to work April 2011. Petitioner's contention as to the alleged cumulative trauma psyche injury through October 25, 2011, is not clear to the undersigned. Petitioner argues "Dr. Ponton's reporting summarizing applicant's' restrictions as of 10/25/2011 are clearly, as well as refute any 10/25/2011 violation of work restrictions existed as a matter of actual events of employment or medicine. *[Petition, 11/4/2021, p. 17, lines 9 - 13]* Petitioner references Applicant's Exhibit 15, page 25 to prove its contention. Applicant Exhibit 15, is a two page report of Dr. Price-Sharps dated January 5, 2011, and does not support Petitioner's contention. The Petition also recites what appears to be summaries of reports of Dr. Ozaeta's reports dated October 7, 2011, and October 21 2011 *[Petition, 11/4/2021, p. 17, lines 14 - 28]* Petitioner further asserts the summaries of Dr. Ozaeta's reports demonstrate Applicant had no work restrictions as of October 25, 2011. *[Petition, 11/4/2021, p. 18, line 1]* The evidence demonstrates Dr. Ponton's reports proposed work restrictions, precluding Applicant from working with Sgt. Alvarez and Officer Bustos. Petitioner fails to present evidence demonstrating how the incidents between October 25, 2010, and October 25, 2011, as reported by Dr. Ponton, is issue precluded, based on the same issue being previously adjudicated.

D. Credibility

Petitioner contends Applicant's history is reliable which is supported by diagnostic testing, based on "Supra. pgs 17 – 19" and "Supra. Pg. 5". *[Petition, 11/4/2021, p. 18, lines 5 - 7]* First, Petitioner's supra reverts back to Applicant Exhibit 15, the report of Dr. Price-Sharps dated January 5, 2011. Applicant Exhibit 15, is a two page report of Dr. Price-Sharps dated January 5, 2011, and does not support Petitioner's contention. Petitioner contends Dr. Ponton's summary [of an unidentified report date] states "The most significant element of [Applicants] objective psychodiagnostic evaluation of the MMPI-2 profile, which suggest the presence of severe suspiciousness. The elevation is such that it borders in paranoia and brings up the question of reality testing". The evidence demonstrates Dr. Ponto evaluated Applicant on several occasions with each examination consisting of a comprehensive clinical interview and a battery of objective psychological tests, inclusive of Beck Depression II, Beck Anxiety Inventory, Beck Hopelessness Inventory, Patient Pain Profile (P-3), Epworth Scale, Oswetry Scale, Barthel Disability Index, Posttraumatic Diagnostic Scale (PDS), Symptom Check List 90 – Revised (SCL 90-R), and Minnesota Multiphasic Personally Inventory (MMPI-2) along with the completion of a Health History Questionnaire. Dr. Ponton determined Applicant answered the MMPI test in a valid manner, with a straightforward approach, making the results valid for clinical interpretation each time. Therefore it is found that Petitioner's contention that the diagnostic testing demonstrates Applicant's history of events is not reliable.

IV
RECOMMENDATION

Based on the evidence discussed above, it is respectfully requested that the Petition for Reconsideration be DENIED.

DATE: November 29, 2021

Angelique Scott
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

These matters proceeded to trial before the undersigned on August 11, 2021, to adjudicate principally whether Applicant sustained an industrial psyche injury arising out of and occurring in the course of employment while employed as a police officer by the City of Fresno on March 16, 2010 (ADJ7548354), January 14, 2011 (ADJ8286596), September 27, 2011, (ADJ8286584), and during the cumulative period of October 25, 2010, through October 25, 2011 (ADJ8076231), and whether such claims are barred pursuant the good faith personnel action affirmative defense. While this matter was previously remanded to address those limited issues, Defendant seeks a trial de novo to relitigate body parts, permanent disability, apportionment, future medical treatment, liability for self-procured medical treatment, whether Dr. Marcel Ponton, PhD's medical opinions constitute substantial medical evidence, and whether Applicant is estopped from litigation claims of discrimination. Medical reports, documents and testimony were previously received into evidence February 3, 2014, with additional medical opinions and documents received into the evidentiary record at trial, August 11, 2021. The matter was submitted, after additional witness testimony.

BACKGROUND

These matters initially proceeded to trial February 3, 2014, with a Joint Findings of Fact, Award, and Opinion on Decision issuing May 12, 2014, and an Order Amending the Findings of Fact, Award, and Opinion on Decision, issuing May 27, 2014, opining in relevant part that Applicant established that the actual events of employment were involved in Applicant's psychiatric injury and that Dr. Ponton's opinion was sufficient to meet the requirement that such actual events be the predominant cause of the injury. However, the WCJ found in pertinent part that Applicant failed to prove injury to the psyche concluding the supervisory discussion with Sergeant Alvarez and actions by others in the department, were lawful, nondiscriminatory, good faith personnel actions.

Upon Applicant filing a Petition for Reconsideration June 4, 2014, the WCAB issued an Opinion Granting Reconsideration and Decision after Reconsideration August 1, 2014, finding the WCJ failed to fully consider all factors involved in the analysis required by the factors as set forth in *Rolda v. Pitney Bowes (2001) 66 Cal.Camp.Cases 241[Appeals Board En Banc]* by failing to adequately address whether actual events of employment which qualified as personnel actions were lawful, nondiscriminatory and in good faith, and if so whether they were a substantial cause of the psychiatric injury. The WCAB amended Finding of Fact number one, to defer a determination of Applicant's claim of injury to his psyche and returned the matter to trial level for the WCJ to provide a complete analysis of the good faith personnel action affirmative defense.

On November 25, 2014, the WCJ issued an Amended Joint Findings and Award and Opinion, again, opining in relevant part that Applicant established that the actual events of employment were involved in Applicant's psychiatric injury, yet again finding Applicant failed to prove injury to the psyche, concluding two thirds of the problems Applicant complained of at trial were lawful, non-discriminatory, good faith personnel actions, which were a substantial cause of Applicant's psychiatric injury.

Upon Applicant filing another Petition for Reconsideration December 19, 2014, the WCAB issued an Opinion Granting Reconsideration and Decision after Reconsideration February 13, 2015, finding that the WCJ did not properly consider the issue of whether Defendant met its burden of proof to establish the affirmative defense that Applicant's injury was substantially caused by good faith personnel actions, as set forth in *Rolda*. As the WCJ did not identify the medical evidence relied on to conclude that the good faith personnel actions were a substantial cause of Applicant's psychiatric injury. The WCAB advised that WCJ should develop the medical record to make this finding, by obtaining a supplemental report from Dr. Ponton addressing the extent to which Defendant's good faith personnel actions or other actual events of employment, were responsible for Applicant's psychiatric injury. The WCAB then rescinded the Amended Joint Findings and Award and Opinion, and reinstated its prior order amending Finding of Fact number one in the Joint Findings of Fact, Award, and Opinion on Decision issuing May 12, 2014, to defer a determination of Applicant's claim of injury to his psyche and returned the matter to trial level for the WCJ to provide a complete analysis of the good faith personnel action affirmative defense.

On April 7, 2017, the WCJ issued a Second Amended Joint Findings of Fact, Award, and Opinion on Decision, which comprised solely of an Opinion on Decision seeking to cure the prior defects. Citing Dr. Ponton's statement that Applicant was hypersensitive to criticism, and opining that the Fresno Police Department being a quasi-military type of agency requiring officers to accept authority, concluded Defendant met its burden of establishing Applicant's psychiatric injury was caused by lawful, non-discriminatory, good faith personnel actions.

Applicant, *in propria persona* filed a Petition for Reconsideration May 1, 2017. On November 13, 2019, the WCAB issued an Opinion and Decision After Reconsideration finding both Dr. Ponton's supplemental report[1] and the WCJ Opinion on Decision problematic and concluding that once again the matter is to be remanded back to a WCJ to render a new determination as to whether Applicant's claim is barred by lawful nondiscriminatory good faith personnel action defense pursuant to Labor Code § 3208.3(h). The WCAB rescinded the Second Amended Joint Findings and Award, and substituted the findings of fact to (1) whether Applicant sustained industrial psyche injury arising out of and occurring in the course of employment while employed a police officer by the City of Fresno on March 16, 2010 (ADJ7548354), January 14, 2011 (ADJ8286596), September 27, 2011, (ADJ8286584), and during the period of October 25, 2010, through October 25, 2011 (ADJ8076231), is deferred pending further proceedings, and for a new decision by the newly assigned WCJ, and (2) whether compensation for psyche injury is barred by lawful, nondiscriminatory, good faith personnel action defense pursuant to Labor Code § 3208.3(h), is deferred pending further proceedings and new decision by the assigned WCJ, jurisdiction reserved.

AOE/COE

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," unless the injury resulted from a violent act as discussed below. (*Labor Code §3208.3(b)(1)*) Here, Applicant, while employed as police officer for Fresno County Police

[1] The WCAB issued an Opinion Granting Reconsideration and Notice of Intent to Admit Evidence, on June 30, 2017, as Dr. Ponton's supplemental report dated December 9, 2015, obtained after remand was not moved into the evidentiary record.

Department, alleged four industrial injuries to his psych. Marcel Ponton, PhD, serving as the panel qualified medical evaluator, initially evaluated Applicant August 10, 2010, and August 20, 2020, which consisted of a comprehensive clinical interview and a battery of objective psychological tests. Dr. Ponton issued a report dated August 30, 2010. A review Dr. Ponton's initial report demonstrates he documented Applicant's history and alleged mechanism of injury. Applicant's alleged injury occurring March 16, 2010, arising from an incident occurring subsequent to a burglary call on March 16, 2010, wherein Applicant reported a hostile work environment causing him stress after Sergeant Joe Alvarez, although a superior ranked officer, was not Applicant's supervisor, issued Applicant a "write up" for insubordination when Applicant refused to speak to him about why he was upset. Captain Greg Garner, a supervisor in Applicant's chain of command, agreed that the incident between Applicant and Sgt. Alvarez did not warrant Applicant being written up, however, no corrective action was taken to change the write up, which caused Applicant stress. Applicant was sent for therapy treatment with Jana Price-Sharps, PhD and also treated with his primary treating physician, Jere Ozaeta, M.D. Dr. Price-Sharps determined Applicant was temporarily disabled due to industrially caused psych injury. Further consideration Dr. Ponton's medical report demonstrates he reviewed and summarized a litany personnel documents and medical records, including treatment reports of Dr. Price-Sharps. Based on the findings from his evaluation, Dr. Ponton diagnosis included generalized anxiety disorder and psycho-social stressors, with a determination that at least 51% of Applicant's emotional difficulties industrially caused. Dr. Ponton also recommended Applicant not be supervised by Sgt. Alvarez and that Sgt. Alvarez not have any input over Applicant's job conditions or performance.

On January 18, 2011, Applicant filed a DWC-1 Claim form alleging specific industrial injury to his psych for stress due to retaliation by the department occurring January 14, 2011. Applicant continued treatment with Dr. Price-Sharps and Dr. Ozaeta, with Dr. Price-Sharps again determining Applicant was temporarily disabled due to industrially caused psych injury. Dr. Ponton re-evaluated Applicant April 25, 2011, which consisted of a comprehensive clinical interview and a battery of objective psychological tests, issuing a report dated April 29, 2011. A review Dr. Ponton's medical report demonstrates he documented Applicant's interval history with newly alleged psychiatric injury. Dr. Ponton's report documents that on January 7, 2011, Applicant received information from a colleague with the Sheriff's Department, Sgt. Hayes, about a credible death threat made against Applicant, by the father of a victim in a case Applicant was involved and also informed Applicant that that the father was seeking Applicant's home address. According to Sgt Hayes, Fresno Police Department was informed about the threat and were supposed to notify him. Defendant's failure to notify Applicant and refusal to investigate the threated caused Applicant stress. Dr. Ponton's report further documents on January 14, 2011, Lydia Carrasco, the acting Deputy Chief of Fresno Police Department, contacted Applicant to instruct him not to come to work on January 15, 2011, because Defendant would not accommodate Dr. Ponton's recommended work restriction that Applicant not be under the supervision of Sgt. Alvarez. Dr. Ponton explained Applicant became distraught and upset when he realized Defendant did not call to warn him about the death threat but did call to tell him he could not return to work due to the work restriction. Further consideration of Dr. Ponton's medical report demonstrates he documented reviewed and summarized a litany personnel documents and medical records, including ongoing treatment reports of Dr. Price-Sharps. Based on the findings from the re-evaluation, Dr. Ponton determined Applicant was totally temporarily disabled from the time of the

initial injury in 2010, and again opined Applicant sustained a psychiatric injury with causation entirely industrial.

Dr. Ponton re-evaluated Applicant a third time February 27, 2013, and March 7, 2013, which consisted of another comprehensive clinical interview and a battery of objective psychological tests. A review Dr. Ponton's medical report demonstrates he documented Applicant's interval history, including newly alleged psychiatric injuries. Applicant alleged industrial injury to his psych occurring September 27, 2011, resulting from an incident wherein coworker Officer Bustos,[2] interrupted a conversation between Applicant and another unidentified coworker. Dr. Ponton also documented stress resulting from cumulative trauma from ongoing incidents at work including Defendant's initial refusal to return Applicant back to work because the employer would not accommodate Applicant's work restriction, as well as stress having to see Sgt. Alvarez on an ongoing basis when Applicant was returned to work. Applicant was sent for treatment with Richard Blak, PhD. Based on the findings from his evaluation, Dr. Ponton diagnosis included generalized anxiety disorder, panic disorder with agoraphobia and stressful work environment. Further consideration of Dr. Ponton's medical report demonstrates he reviewed and summarized more personnel documents and medical records, including ongoing treatment reports of Dr. Price-Sharps and Dr. Blak. Dr. Ponton reiterated Applicant was totally temporarily disabled from March 16, 2010, to the time of the exam.[3] Dr. Ponton opined having reviewed the preponderance of the evidence, none of his prior opinions changed; and that it as his reasoned opinion that Applicant sustained a psychiatric injury arising out of employment and that the events from work were the substantial and preponderant cause as to all factors combined of the Applicant's psychological diagnosis and disability.

Here, Applicant has pled four injuries to his psyche. Dr. Ponton addresses each of the three specific dates of injury, as well as alleged injurious cumulative trauma exposures throughout his reports, which are found to be actual events of employment by the Court. Dr. Ponton further supplemented his opinion December 9, 2015, to delineate the four alleged industrial actual events he found to be injurious and having caused Applicant's psychiatric injury and further expounded that he found these actual events from work to be predominant cause, accounting for 51% or more of Applicant's psychological injury. Dr. Ponton's medical opinions are found to constitute substantial medical evidence. Based on Applicant's testimony, a review of the evidence, including the medical reports of Dr. Ponton, Dr. Price-Sharps, and Dr. Blak, it is found that Applicant sustained psychiatric injury arising out of and occurring in the course of employment.

GOOD FAITH PERSONNEL ACTION

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. (*Labor Code § 3208.3, subdivision h.*)

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[2] In 2007, Officer Bustos issued Applicant a ticket when Applicant was off duty. Officer Bustos did not know Applicant was an officer at the time. Applicant alleges Officer Bustos racially profiled him. It appears Officer Bustos is a defendant in a civil lawsuit in which Applicant is a plaintiff.

[3] Based on the medical evidence supporting the finding that Applicant sustained industrial injuries to the psyche, it appears Applicant may entitled to an award of temporary disability.

In *Rolda v. Pitney Bowes, Inc.* (2001) 66 CCC 241, 246 (Appeals Board En Banc), the WCAB established factors to analysis psychiatric claims where in a defendant has raised affirmative defense of good faith personnel action and also distinguished the roles of the medical evaluator and the WCJ in determining the compensability of such psyche claims. The evaluating physician required to take a history of all events alleged to have contributed to the psychiatric injury, to render an opinion as to causation in terms of first whether the employment events were a predominant, or greater than fifty percent, cause of the injury. Then, where it has been claimed, the applicant's injury is the result of a lawful, nondiscriminatory, good faith personnel action, the evaluating physicians must also offer an opinion as to the percentage of causation for any such alleged or apparent actions. The WCJ, after considering all the medical evidence, and the other documentary and testimonial evidence of record, must first determine whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination and if so, whether such actual events were the predominant cause of the psychiatric injury, a determination which requires medical evidence. As discussed *supra*, it is found that the alleged psychiatric injuries involve actual events of employment and that such actual events were the predominant cause of the psychiatric injury.

Next, the WCJ must decide whether any actual events of employment were personnel actions, and if so, whether the Defendant presented sufficient evidence to demonstrate the personnel actions were lawful, nondiscriminatory and made in good faith. Finally, the WCJ must determine whether competent medical evidence demonstrates the personnel actions were a substantial cause (accounting for at least 35% to 40%) of the psychiatric injury. While Sgt. Alvarez was not Applicant’s supervisor, Sgt Alvarez was a superior to Applicant and empowered to write Applicant up, therefore the write up is attributable to management. This Court finds the event of March 16, 2010, Sgt. Alvarez writing Applicant up combined with Cpt. Garner’s inaction, constitute personnel action. It is also found that Defendant failed to present evidence demonstrating these personnel actions of Sgt. Alvarez and Cpt Garner were lawful, nondiscriminatory and made in good faith. This Court finds the event of January 14, 2011, Defendant failing to notify Applicant about the credible death threat to constitute. Defendant’s failure to contact Applicant about the death threat, but instead contacting Applicant to direct him not to report to work due to work restrictions, constitute personnel action. Again, it is also found that Defendant failed to present evidence demonstrating these personnel actions were lawful, nondiscriminatory and made in good faith. This Court does not find the event of September 27, 2011, wherein Officer Bustos interrupted Applicant’s conversation with a coworker, to constitute personnel action. This Court does find the cumulative trauma through October 25, 2011, caused by Defendant placing Applicant back in work environment resulting in daily contact with Sgt. Alvarez to constitute personnel action. Defendant failed to present evidence demonstrating this personnel action was lawful, nondiscriminatory and made in good faith. Therefore, while three of the four actual events of employment were found to be personnel actions, none were proven to be lawful, nondiscriminatory and made in good faith, necessitating the Court to assess whether there is competent medical evidence to demonstrate whether the personnel actions constitute substantial cause of Applicant’s psyche injury, thereby barring recovery.

ESTOPPEL

Defendant contends Applicant should be estopped from alleging psychiatric injury due to discrimination because of the Findings, Decision, and Order of Dismissal After Hearing, issued by the Fresno Civil Service Board on May 24, 2017, and the jury verdict issued August 12, 2011, in a civil lawsuit filed in the United States District Court wherein Applicant is a named plaintiff, and the City of Fresno is a named Defendant. Defendant, bearing the burden of proving estoppel, failed to present evidence to demonstrate the issues adjudicated either before the Fresno Civil Service Board, or United States District Court, are the same issues litigated here before the Workers' Compensation Appeals Board. Applicant is not estopped from pursuing his workers' compensation claims alleging industrial psychiatric injury.

APPORTIONMENT

Apportionment of permanent disability shall be based on causation. A physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall address causation of the permanent disability by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries, to be considered complete on the issue of permanent disability. Dr. Ponton reported Applicant suffers from paranoia which likely due to medication Applicant takes for a pituitary tumor, contributing to his psychiatric disability. Dr. Ponton therefore opined 40% of disability resulting from Applicant's psychiatric injury apportioned to nonindustrial factors. Based on the medical reports of Ponton, it is found that there is no legal basis for apportionment to non-industrial factors.

PERMANENT DISABILITY

Dr. Ponton determined Applicant's psychiatric injury resulted in a Global Assessment Function of 60, equivalent to 15% WPI. Relying on Dr. Ponton's assessments, Applicant's permanent disability rates as follows:

Psyche 60 (14.01.00.00 – 15 – [5] 19 – 490J – 28 – 30) 18% PD

However, while Dr. Ponton addressed apportionment to nonindustrial factors, he did not render an opinion as to the percentage of disability attributed to each of Applicant's four separate dates of injury. The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence. (*Lab. Code, §§ 5701, 5906; Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117) Dr. Ponton's medical opinion as to apportionment between Applicant's four separate dates of injury is incomplete. A final determination as to permanent disability is deferred until further opinion from Dr. Ponton addressing percentage of apportionment between the four dates of injury.

FUTURE MEDICAL TREATMENT

At the time of Dr. Ponton's re-evaluations on February 22, 2013, and March 7, 2013, he prescribed a course of future medical treatment for Applicant, including therapy, medication and a sleep study. Based on the medical reports of Ponton, it is found that Applicant is in need of further medical treatment to cure or relieve from the effects of the psyche injuries.

SELF-PROCURED MEDICAL TREATMENT

Applicant's psych injury having been found industrial, Applicant is entitled to reimbursement for out-of-pocket expenses incurred for self-procured medical treatment to cure or relieve Applicant from the effects of the industrial psyche injury, payable by Defendant in amounts to be adjusted by the parties, with jurisdiction reserved.

DATE: October 15, 2021

Angelique Scott
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE