WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JULIO BARRON, *Applicant*

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION; legally uninsured, *Defendant*

Adjudication Number: ADJ10816406
San Diego District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

Preliminarily, we note that a petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice …." (*Shipley v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied the applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.)

In this case, the Appeals Board failed to act on defendant's petition within 60 days of its filing on October 18, 2020, through no fault of defendant. Therefore, considering that the Appeals

Board's failure to act on the petition was in error, we find that our time to act was tolled. Nevertheless, while our time to act was tolled, we deny the petition for the reasons stated below.

In order to establish the compensability of a psychiatric injury under Labor Code[1] section 3208.3, an injured worker has the burden of establishing "by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury." (Lab. Code, § 3208.3(b)(1).) "Predominant as to all causes" means that "the work-related cause has greater than a 50 percent share of the entire set of causal factors." (*Dept. of Corrections v. Workers' Comp. Appeals Bd. (Garcia)* (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356, 1360]; *Watts v. Workers' Comp. Appeals Bd.* (2004) 69 Cal.Comp.Cases 684, 688 (writ den.); *Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241, 246 (Appeals Board en banc).)

In *Rolda*, we set forth the multilevel analysis for determining if a claimed psychiatric injury is compensable when the affirmative defense of lawful, nondiscriminatory, good faith personnel action has been raised: "The WCJ, after considering all the medical evidence, and the other documentary and testimonial evidence of record, must determine: (1) whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination; (2) if so, whether such actual events were the predominant cause of the psychiatric injury, a determination which requires medical evidence; (3) if so, whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith, a factual/legal determination; and (4) if so, whether the lawful, nondiscriminatory, good faith personnel actions were a "substantial cause" of the psychiatric injury, a determination which requires medical evidence." (*Rolda, supra*, 66 Cal. Comp. Cases at pp. 245-247.)

Based on our review of the record, we agree with the WCJ that based on the credible testimony of applicant and applicant's witnesses and on the substantial psychological opinion of panel qualified medical examiner (PQME) Shari Mednitsky, Ph.D., applicant met his burden of proof that actual events were the predominant cause of the psychiatric injury.

In her May 8, 2018 report, Dr. Mednitsky opined:

> Psychological factors were the primary focus of this evaluation. Based on my clinical interview, observations, medical/legal record review and psychological testing, with reasonable medical probability, it is my opinion that Mr. Barron's symptoms do meet the criteria for Major Depressive Disorder, Recurrent, Moderate with Industrial Aggravation and the actual events of employment:

[1] All further statutory references are to the Labor Code, unless otherwise noted.

alleged false allegations made against him for permitting unlawful use of a computer by an inmate, a resulting adverse action taken against him, being subjected to an investigation and interrogated for 2 hours in a small room, having a Skelly hearing and after that regular searches/ransacking of his room approximately monthly for several years, creating a potentially dangerous situation when an inmate he reported for illegal requests for contraband was returned to his classroom, being assaulted by an inmate in 2016 who "grabbed his buttocks", being forced to write a memo otherwise this inmate who assaulted him would be not be returned to his yard, having an adverse action taken against him because he did not report the assault immediately, and feeling harassed on his private email to send a memo that he had allegedly written and rewritten when he was already out on leave, are predominant (i.e. greater than 50%) as to all causes combined of the psychiatric history.

In that the causes may involve good faith personnel action, it is my opinion, with reasonable medical probability, that the specific incident also represents a substantial cause (35-40%) of the applicant's Major Depressive Disorder. However, it should be left to the trier of fact to determine if this was a good faith personnel action.

In 2011, the WCAB issued its en bane decision in Rolda vs. Pitney Bowes Labor Code 3208.3 which provides that, in order for a psychiatric injury to be compensable, certain conditions must be satisfied.

The multilevel analysis to be used by the Trier of Fact is as follows: 1) Whether the alleged psychological injury involves the actual events of employment - a legal determination, 2) If so, whether the actual events were the predominant cause (accounting for 51% or more of the psychological injury) - a determination that requires medical evidence, 3) If so, whether any of the actual employment events were personnel actions that were lawful non-discriminatory and made in good faith- a factual/legal determination, 4) if so, whether the lawful non-discriminatory, good faith personnel actions represents a substantial (accounting for at least 35%-40%) causation from all causes combined of the psychological injury - a determination that requires medical evidence.

There is a temporal relationship between the applicant's industrial exposure and current psychological conditions. During the course of his usual and customary duties, while working as a teacher at the California Department of Corrections culminating on 3/3/17, Mr. Barron experienced an aggravation of a prior depressive disorder that resulted in the applicant experiencing a notable increase in depressive and anxiety symptoms, requiring treatment with an anxiolytic along with an antidepressant. Mr. Barron's condition was such that he was placed on leave from work at that time.

As mentioned previously, according to the applicant, in 2012, an allegation was made against him because of unauthorized use of a computer by an inmate.

Specifically, it was alleged that Mr. Barron had brought in a modem to allow inmates to have access to pornography. The applicant denied the allegation, indicating that it was not possible as at that time inmate computers were not connected to the Internet and that the computers had not originated his classroom. Mr. Barron noted that this could have occurred when the computer was in another classroom.

The applicant indicated that there was an adverse action taken against him because of the computer incident. Following the allegation, Mr. Barron was subject to an investigation in Riverside that lasted for several hours. He was placed in a small room, with a tape recorder and a camera, and was interrogated for several hours by 2 investigators. The applicant felt as though he was treated like a criminal. After this, Mr. Barron participated in a Skelly hearing related to these allegations and despite being honest and forthcoming, the reprimand and the 10% reduction in salary remained in place.

After the allegation of pornography, regular searches of his classroom for several years, almost monthly, the investigative unit would ransack his room. On occasion, administration brought in drug sniffing dogs which Mr. Barron found very upsetting and "nerve racking".

Mr. Barron described another incident when he reported an inmate to investigative services for an illegal request for tattoo ink. The next day, this inmate was returned to his classroom, putting Mr. Barron in what he perceived to be a dangerous situation as he feared retaliation by this inmate. The applicant would later discover that the inmate was a confidential informant. He worried that he was "being set up".

The applicant described a disturbing incident that occurred in 2016 when he was assaulted by an inmate who "grabbed {his} butt". The applicant explained previously that he was hesitant to report this as he believed the inmate would be returned to his area as another inmate had been previously. Mr. Barron feared that the prison would not keep him safe from this inmate. His fears were reportedly validated, when one of the counselors tried to return the inmate who had assaulted him to the same yard as his. Mr. Barron had to write a memo to object to this.

According to the applicant, he received another adverse action against him because he did not report the assault immediately. His pay was reduced by 5% for 24 months as a consequence. After his previous experiences, the applicant decided to forgo the Skelly hearing. Mr. Barron had a hearing with the administrative law judge who questioned why he was being charged in that he "had been the victim". The judge found that his salary need not be reduced further. The applicant had already received a penalty for one month.
In February of 2017, Mr. Barron indicated that he was reprimanded for entering inmate transcripts. He agreed to discontinue doing this, but reportedly the matter

had been escalated to a higher level. According to the applicant, despite his compliance, he was chastised for writing the memo in the wrong font and for faxing the memo and was harassed on his private email to rewrite the email following his report of workplace injury.

Records provided after the initial PQME clearly indicated a prior history of depression related to reported work and non-work stressors and sleep problems and treatment with psychotropic medications prior to the date of the workplace injury, while not debilitating in terms of work, other than a few days off. In addition, there was a prior history of alcohol abuse as already discussed under reliability, although it appears from the medical records that concern regarding his intake was not discussed most recently.

The primary causes of his injury are allocated as follows:

2012 Allegations of allowing unauthorized use of computer by an inmate, specifically discovery of pornography on this computer, subsequent interrogation, Skelly hearing, reduction in salary, after which his classroom was subjected to regular searches, involving at times drug sniffing dogs, - 45%.

Reported an inmate for requesting illegal contraband. Administration allowed the same inmate to return to his classroom putting him in what he perceived to be a dangerous situation at risk of retaliation by inmate - 5%.

2016 assault by an inmate, "grabbed his butt"; applicant was hesitant to report as he felt he would again be put at risk by administration. Mr. Barron was reprimanded for not reporting the assault immediately and received a 5% reduction in pay, which would eventually be overturned - 20%.

2017 reprimand for assisting inmates by entering their transcripts, repeated demands to write and rewrite the memo, unauthorized calls regarding the matter following his report of workplace injury - 10%.

Non-industrial Stressors - Past history of depression, sleep problems and alcohol abuse -20%.

(Joint Exhibit 1, Dr. Mednitsky's 5/8/18 report, at pp. 23-26.)

Section 5705 specifies that the "burden of proof rests upon the party or lien claimant holding the affirmative of the issue." (Lab. Code, § 5705.) Accordingly, it is applicant's burden to prove injury to his psyche AOE/COE. However, once applicant met that burden of proof, the burden shifted to defendant to prove that the actual events of employment causing psychiatric injury were personnel actions and that these actions were lawful, nondiscriminatory and in good faith. (Lab. Code, § 3208.3(h).) Contrary to defendant's assertion, we did not find Dr. Mednitsky's

opinion not substantial for failure to review records pertaining to prior adverse actions. Dr. Mednitsky repeatedly noted the willingness to review additional records. (Exhibit 1, Dr. Mednitsky's 5/8/18 report, at p. 26; Exhibit 2, Dr. Mednitsky's 9/15/17 report, at p. 30.) Moreover, whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith is a factual/legal determination for the trier of fact to make. (*Rolda, supra*, 66 Cal.Comp.Cases at 247.) "The medical evaluator has no authority to decide what is or is not a personnel action." (*County of Sacramento v. Workers' Comp. Appeals Bd. (Brooks)* (2013) 215 Cal.App.4th 785, 797.) As noted by the WCJ in the Report, none of these records were offered into evidence at trial.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id*.)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 7, 2022

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

JULIO CESAR BARRON
HIDEN, ROTT & OERTLE
STATE COMPENSATION INSURANCE FUND

PAG/*pc*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION
ON PETITON FOR RECONSIDERATION

INTRODUCTION

Date of Injury:	January 31, 2006 through March 3, 2017
Age on DOI:	68
Occupation:	Teacher
Identity of Petitioner:	Defendant
Timeliness:	The petition is timely
Verification:	The petition is verified
Date of Decision	September 21, 2021

Petitioner's Contentions

1. That the Worker's Compensation Judge acted in excess of his powers;

2. That the evidence does not justify the Findings of Fact;

3. That the Findings of Fact do not support the Order or Decision or Award

FACTS

Julio Cesar Barron, born [ ], while employed during the period January 31, 2006 through March 3, 2017 as a teacher at San Diego California by the California Department of Corrections and Rehabilitation, claims to have sustained an injury arising out of and in the course of employment to the psyche, stress, and heart.

At trial, the parties stipulated on the record that the psychiatric disability, if industrial, will rate 45% after apportionment.

After hearing from witnesses on behalf of applicant and defendant the WCJ found:

1. Julio Cesar Barron, born [ ], while employed during the period January 31, 2006 through March 3, 2017 as a teacher, occupational group number 212 at San Diego California by the California Department of Corrections and Rehabilitation, sustained injury arising out of and in the course of employment to the psyche and heart.

2. Defendant has not met their burden of proof to establish that applicant's psychiatric injuries were substantially caused by lawful, nondiscriminatory, good faith personnel actions.

3. Applicant's psychiatric disability rates 45% after apportionment.

4. Applicant's hypertension has not resulted in end organ involvement or ventricular enlargement, and therefore does not meet the definition of "heart trouble" for the purposes of labor code section 3212.2. Hypertension, standing alone, without other end organ damage, is not heart trouble subject to the presumptions of labor code 3212.2. Therefore, after apportionment, applicant's permanent disability for hypertension rates 6%.

5. The combined disability for the psychiatric and hypertension injuries results in a permanent disability rating of 48%.

6. The employee will require further medical treatment to cure or relieve from the effects of this injury

7. The reasonable value of the lien for services of applicant's attorney is 15% of the permanent disability awarded, to be commuted from the far end of the award.

Defendant has filed a timely petition for reconsideration.

DISCUSSION

Applicant has claimed a psychiatric injury as a result of his job as a teacher at a state prison. The job required him to perform the extremely difficult task of controlling and educating a classroom filled with approximately 27 of the worst offenders in the prison, including rapists and murderers, without the direct assistance of any additional prison personnel. Having had the opportunity to observe applicant's demeanor at trial, the WCJ is convinced that applicant is a very credible witness in regards to the incidents that he has alleged to be the cause of psychiatric stress. In addition, the credible witnesses presented on behalf of applicant have further convinced the WCJ that applicant's job was extremely stressful, and that he was not provided the support and assistance by the prison which would have made his job less stressful.

The employer has raised the defense of good faith personnel actions pursuant to labor code section 3208.3(h). It is defendant's burden to provide substantial evidence in support of their defense. In the present matter, defendant did not present any documentary evidence in support of their claim of good faith personnel actions. **None of the alleged written personnel records or actions** were offered, and appear nowhere in any of defendant's trial exhibits. Therefore, the WCJ had only the testimony of the various witnesses to rely upon in reaching his decision. After having had the opportunity to observe the demeanor of the various witnesses and consider conflicting versions of the facts, the WCJ has concluded that applicant's witnesses were much more credible, and therefore defendant has failed to establish by a preponderance of evidence, the existence of any good faith personnel actions.

The only exhibits offered in regards to the psychiatric injury were the reports of the Qualified Medical Examiner, Shari Mednitsky (Joint exhibits 1 and 4). The reports of Dr. Mednitsky find that applicant has sustained a psychiatric injury; the injury was caused by the actual events of the employment; and these events of employment were the predominant cause of applicant's psychiatric injury. The WCJ finds that the QME reporting of Dr. Mednitsky complies with the requirements of labor code section 3208.3.

After considering applicant's credible testimony, the WCJ agrees with the opinions of the QME regarding industrial causation.

At trial, the parties stipulated that the psychiatric disability, if industrial, will rate 45% after apportionment. Therefore, the WCJ has awarded this percentage of disability to the applicant.

RECOMMENDATION

It is recommended that reconsideration be denied.

DATED: January 4, 2022
ANDREW J SHORENSTEIN
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE