WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CLAYTON LARSON, *Applicant*

vs.

COUNTY OF LOS ANGELES DEPARTMENT OF REGIONAL PLANNING, permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ13242052
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact issued by the workers' compensation administrative law judge (WCJ) on March 15, 2022, wherein the WCJ found in pertinent part that applicant sustained injury to his nervous system/psyche arising out of and occurring in the course of employment (AOE/COE), that applicant's injury claim was not barred by the provisions of Labor Code section 3208.3(h), and that the issues of permanent disability/ apportionment and attorney fees were deferred.

Defendant contends that the evidence submitted at trial does not support the finding of injury AOE/COE, that the portion of applicant's injury claim based on the 2016 denial of promotion is barred by the statute of limitations, that applicant's injury claim/complaints arise from lawful good faith personnel actions, and that applicant did not meet his burden of proof showing that he suffered a compensable psychiatric injury.

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

We have considered the allegations in the Petition and the Answer and the contents of the Report 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.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact issued by the WCJ on March 15, 2022, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 8, 2022

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

CLAYTON LARSON
ROSE, KLEIN & MARIAS
COLEMAN CHAVEZ

TLH/*pc*

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 DEFENDANT'S PETITION FOR RECONSIDERATION

I
INTRODUCTION

1.	Date of Injury	9/21/2009 – 2/12/2020
2.	Identity of Petitioner Timeliness: Verification:	Defendant filed the Petition. The Petition is timely filed. The Petition is verified.
3.	Date of Findings of Fact	3/15/2022
4.	Petitioner's contentions:	

(a) The evidence does not justify the findings of fact; and or
(b) The findings of fact does not support the Order, Decision or Award.

II
FACTS

Applicant pled a psychiatric/stress claim. (Minutes of Hearing/Summary of Evidence "MOH/SOE" at p. 2). The claim is denied. (Defendant Exhibit "A"). This claim stems from several events at work that led to Applicant's psychiatric injury to wit: 1) denial of a promotion to HR Analyst IV in 2016; 2) being characterized as racist at work; 3) a negative performance evaluation; and 4) failure to secure a promotion to Assistant Administrator. The latter of these three events all occurred subsequent to what became known as the 'whistleblowing letter' discussed *infra*.

At trial, Applicant testified that he was hired in September of 2009. (MOH/SOE at p. 4:6-7). The parties stipulated that Applicant was employed during the period September 21, 2009 to February 12, 2020, by County of Los Angeles, Department of Regional Planning. (*Id*. at p. 2:6-8). Applicant testified that his psychiatric injury began in approximately 2017 after he was passed over for a position.[1] (*Id*. at 4:9-16). The position was offered to Ms. Hayward even though he had scored higher on the exam. *Id*. He also testified that Ms. Hayward obtained the position even before the examination. (*Id.* at p. 4:17-18). His supervisor at the time, Robert Meyers, informed him that Ms. Hayward would be promoted even if she had not taken the exam. (Applicant Exhibit 1, at p. 4). After this event, he had difficulty sleeping, felt doomed, stressed, and unable to focus at work. (*Id*. at p. 5:13-14). Next, he testified that he attended a regional planning meeting and felt uncomfortable with some of the proposed

[1] Although the position was not described during testimony, based on review of the records, the undersigned notes the position in question was for HR Analyst IV.

management practices. (*Id*. at p. 5:19-20). Mark Ridley Thomas was being termed out of political office and each department was asked to hire two to three of his staff contrary to civil service rules. (*Id*. at p. 5:20-22). Applicant and other managers objected to the hiring of political appointees since it undermines the civil service system. (*Id*. at p. 5:23-25).

After this meeting, he sent a letter to the Director of Personnel, Mr. Larson, and his supervisor, Joseph Horvath, explaining why this hiring process was unfair and weakened the culture of fair play. (*Id*. at p. 6:6-9).[2] At about the time of the whistleblowing incident, Applicant was interested in a position for Assistant Administrator that was ranked at a higher salary level. (*Id*. at p. 6:10-12). He believes that after the whistleblowing letter, he lost the support of his supervisor, Mr. Horvath, for this position. Mr. Horvath told him that the CEO yelled, that the Director of the Department, Amy Bodeck, was angry and would not support a manager who did not take the county's position. (*Id*. at p. 6:12-17). He was also informed that the letter was construed as racially motivated. (Id.).

He met with Dennis Loven, a deputy director, who tried to convince him that he had no whistleblower protection, and shared with Applicant an experience of someone else who went contrary to the department and was fired. (*Id*. at p. 7:16-23). He also testified to another meeting with Rodney Collins (manager over multiple divisions) and Michael Stewart (Principal Analyst for the Civil Service Advocacy Division) wherein Mr. Collins explained that he too was a political appointee and a good worker and that while Applicant's letter itself may not have been racially motivated, that there were other instances of racial conduct. (*Id*. at p. 8:1-6).

At trial, the only rebuttal evidence was that of Mr. Horvath who testified that the Assistant Administrator position has always been open and was used for budget purposes. (*Id*. at p. 10:1-4). He also testified that other departments are not fans of the process of hiring political appointees because he has heard other people vent, (*Id*. at p. 10:15-17) but that this hiring practice is outside his purview. (*Id*. at 20-22). Upon probing by the court, Mr. Horvath testified generally about the hiring practices and civil service rules. (*Id*. at p. 12: 2-21).

Applicant saw QME, Dr. Lou Ellen Sherrill, who issued two reports. (Defendant Exhibit "B & C"). Dr. Sherrill was deposed on January 22, 2021. (Joint Exhibit "T"). Dr. Marc Nehorayan also issued a report of February 16, 2021. (Applicant Exhibit "1").

Dr. Sherrill's reports did not take an accurate or complete account of the events occurring at work that precipitated this claim. The majority of Applicant's history obtained by Dr. Sherrill was through a psychological history questionnaire. (Defendant Exhibit "B", at p. 2, 5, 7, 8; see also Defendant Exhibit C, at p. 16). Applicant testified that Dr. Sherrill did not ask about his

[2] This letter ultimately became known as the 'whistleblowing' letter.

history and did not want to hear about events prior to when he went out on leave. (MOH/SOE at p. 8:11-13). Related to her battery of tests, Dr. Sherrill found that Applicant has a long-standing personality disorder (likely beginning in adolescence) associated with his perceptions that he works in a hostile work environment. (Defendant Exhibit "B", at p. 34). She discounted the few events relayed by the Applicant about his experiences at work indicating that she had no evidence to support the events. For example, she wrote "there are no personnel records to explain why the Applicant did not receive the promotion he sought." *Id*. at p. 9; "I have received no records or any evidence that proves allegations that a stressful work environment caused the Applicant to experience symptoms of stress." *Id*. at p. 30; "I have received no records or any evidence that provide the Applicant had a justifiable reason to be fearful of retaliatory actions by County and Regional Planning Management." *Id*. at p. 31; "I have no records that prove that his work environment is hostile." (Defendant Exhibit "C", at p. 31). In numerous sections of her reports and in cross-examination, she indicated that if Applicant was being treated unfairly, he should simply have searched for another job where he was valued. Dr. Sherill reviewed records of Applicant's treating physician with Southern California Mental health Associates, Dr. David Kauss.[3] (Defendant Exhibit "B", at p. 21:28-30).

Dr. Nehorayan disagreed with Dr. Sherrill's opinion and found that a predominant cause of Applicant's psychiatric injury was related to his employment, specifically, four events assigned as follows:

1. Event 1 (55%) denial of promotion in 2016 to Human Resources Analyst IV.
2. Event 2 (15%) defamation of character being identified as racist.
3. Event 3 (10%) negative work evaluation in February 2020.
4. Event 4 (10%) non-promotion to position of Assistant Administrator.

He attributed the remaining 10% to non-industrial causes.

III
DISCUSSION:

Defendant filed a Petition for Reconsideration arguing that: 1) the evidence does not justify the findings of psychiatric injury on an industrial basis; 2) Defendant met its burden of proof of a lawful, non-discriminatory, good faith personnel action pursuant to Labor Code section 3208.3(h); and 3) permanent disability, apportionment and attorney fees should not be awarded on the current findings. While these three items are listed as the crux of the issues presented, the Petition is replete with various other arguments that the undersigned addresses within each section *infra*.

[3] Dr. Kauss was a treating physician and found that "actual events of employment clearly are predominant as to all causes combined of the psychiatric injury." (Applicant Exhibit "2", at p. 20).

I. THE EVIDENCE DOES NOT JUSTIFY THE FINDINGS OF FACT

Defendant raised two issues in this regard (a) there was no objective evidence to support a finding of industrial injury;[4] (b) Applicant provided inaccurate and inconsistent histories to the various doctors; and (c) Event #1 should be excluded based on the statute of limitation. It should be noted that while not argued at any length, Defendant states that Applicant began employment with Department of Regional Planning in 2018.[5]

a. Objective Evidence

Defendant argues that Applicant did not provide any objective evidence of harassment, persecution, or defamation for the alleged psychiatric injury relying on *Verga v. WCAB*, 73 Cal. Comp. Cases 63. In *Verga*, the issue before the court was whether the disdainful reactions of a supervisor and co-workers to an employee's mistreatment of them constituted actual events of employment. *Id.* at 64. The evidence at trial showed that the applicant was a difficult person to get along with, impolite, and unpleasant. *Id*. The court noted that Labor Code section 3208.3 subdivision (b)(1) was enacted to set a higher threshold of compensability for psychiatric injury and that the Legislature disapproved a ruling permitting such benefits based on an employee's *subjective misperception that the employment was stressful. Id.* at 64-65. This change "in the statutory scheme constituted an intent to require the claimant to establish objective evidence of harassment, persecution, or other such basis for alleged psychiatric injury." *Id.* at 65. In *Verga*, the court relied largely on *testimonial evidence* from several witnesses that the applicant was a very difficult employee and upheld the WCJ's finding that the applicant was not actually subject to harassment or persecution, *Id*. at 69, but rather misperceived as harassment her co-workers' disdainful response to her mistreatment of them. *Id.*

The question thus presented is the definition of objective evidence. Objective evidence refers to evidence that can be externally verified. Objective evidence is not synonymous with tangible evidence. Applicant testified credibly to Events 1, 2, and 4. These Events could be externally verified and Defendant should have presented testimony to rebut Applicant's testimony. It is also noted that at no point did Defendant raise the issue of the validity as to the Events occurring during cross-examination. Instead, Defendant argued at trial and continues to argue in its Petition for Reconsideration that these Events were good faith personnel actions. This case is not like *Verga*, there is no evidence to

[4] This issue was summarized under the section "Argument with Points and Authority" in Defendant's Petition for Reconsideration.

[5] The parties stipulated at trial that Applicant was employed by the Department of Regional Planning beginning in 2009 as discuss *supra*. Any efforts to rebut his time in this department should have been raised at the time of trial. Further, even if Applicant changed departments through his employment, the employer remained the same.

suggest that the events of workplace were a result of the Applicant's honest misperception.

Objective evidence can also consists of medical records or expert opinion. Objective medical evidence is evidence based on objective symptoms within the knowledge of a doctor in that they are perceptible to persons other than the patient. Here, there is objective medical evidence by both Dr. Kauss and Dr. Nehorayan through medical evaluations and an extensive battery of tests finding that actual events of employment were the substantial cause of Applicant's injury. Therefore, the undersigned finds that Applicant's credible testimony, lack of rebuttal thereof, and medical evidence support that injury was caused by actual events of employment.

b. Inaccurate and Inconsistent Histories

Defendant argues that Applicant provided inaccurate and inconsistent testimony when he told Dr. Kauss that despite being thwarted in his attempts for a promotion,[6] there were good promotion opportunities at the County of Los Angeles purportedly contradicting what he told Dr. Nehorayan. Defendant also argues that while Applicant testified that Dr. Sherrill did not want to hear about events prior to when he went on leave, that Dr. Sherrill testified in her deposition that she felt it would be important to be provided with further information regarding the alleged whistleblowing activities.

The undersigned disagrees that the record is inconsistent or inaccurate in this regard. The statement in the report of Dr. Kauss was that "Mr. Larson reports that there were good promotional opportunities, but that he was thwarted in his attempts to promote."[7] This statement is consistent with his testimony at trial and that given to all the doctors. With respect to the claims of inconsistent statements to Dr. Sherrill, Applicant was not present at Dr. Sherrill's deposition and what she said to the Applicant at the evaluation is not refuted by a subsequent deposition. Finally, the fact that Applicant was later offered a promotion opportunity does not in and of itself negate Event #1.

c. Event #1 is Barred by the Statute of Limitation

Several events during one period of cumulative trauma may be combined to determine whether the predominant cause requirement is met. The appeals board has also held that the predominant cause requirement may be met by combining two separate industrial causes of a psychiatric injury with the same employer. *Sears v. County of Fresno*, 2021 Cal. Wrk. Comp. P.D. Lexis 356. Here, the Defendant is arguing that one of the several events in the medical report of Dr. Nehorayan, to wit, Event #1 (denial of promotion in 2016 to Human Resources Analyst IV) is barred by the statute of limitation pursuant to Labor

[6] *See* Applicant Exhibit "2", at p. 11.
[7] *See* Applicant Exhibit "2", at p. 11.

Code section 5405 since Applicant previously filed a stress claim that was denied in 2016/2017.

The burden of proving that a claim is barred by the statute of limitations and that estoppel does not apply belongs to the employer. *Sidders v. WCAB*, 53 Cal. Comp Cases, 445. Additionally, the statute of limitations defense must be specifically raised by the employer and does not apply automatically even if its conditions are met. This defense is a "use it or lose it" defense. Thus, an extensive discussion of Labor Code section 5405 or *Reynolds v. WCAB*, 12 Cal. 3d 726 is not warranted. Defendant did not raise this affirmative defense at trial as such the issue is waived.

II. DEFENDANT MET ITS BURDEN OF PROOF OF LAWFUL NON- DISCRIMINATORY GOOD FAITH PERSONNEL ACTION

Defendant further argues that it met its burden of proof that Events 1-3, were lawful non- discriminatory good faith personnel actions. For Event #1, Defendant argues that there was no evidence of personnel records to explain why the Applicant did not receive the promotion or that the promoted candidate did not score as well. This argument appears to be a recitation of the argument related to objective evidence discussed *supra*. Suffice it to state that it would be highly unlikely that Applicant would have been able to obtain records of another employee not a party to this case even if he requested it. Moreover, Defendant was best suited to provide that rebuttal evidence at trial through exhibits or testimony but failed to do so. Defendant's statement that its witness provided testimony that County procedures regarding hiring were followed is distorted. Defendant's witness, Mr. Horvath, did not rebut any of the Applicant's testimony related to Event #1. Instead, his testimony regarding the hiring and promotion was a general response to a question by the court as outlined *supra*.

Defendant argues that it successfully rebutted Event #2 as related to Applicant being blocked for a promotion within his current department as this was rebutted by Mr. Horvath who testified that the position had not been open for recruitment. Defendant appears to have mixed up Event 2 with Event 4. The undersigned did find that Event #4 related to the failure to hire Applicant to the position of Assistant Administrator was successfully rebutted by Mr. Horvath. Defendant did not provide any rebuttal evidence to Event #2.

Finally, Defendant argues that there is no evidence of any negative work evaluation to support Event #3. Again, this appears to be a recital of arguments *supra*. The undersigned would again reiterate that Defendant raised a good faith personnel defense but failed to provide any rebuttal evidence.

III. THE EVIDENCE DOES NOT SUPPORT THE FINDINGS OF FACT THAT PD, APPORTIONMENT AND ATTONEY FEES SHOULD BE DEFERRED

Here, Defendant begins by arguing that Dr. Sherrill found no industrial injury; however, the undersigned did not rely on the report of Dr. Sherrill as outlined in the Findings of Fact. Defendant also raised two additional issues: a) Dr. Nehorayan did not review treatment records between 2016 through 2020 and b) Dr. Nehorayan is not a treating physician and was used for an AOE/COE evaluation.

a. Failure to Review Treating Reports

Defendant's argument that Dr. Nehorayan's report does not meet the threshold for a compensable report for failure to review some treating reports would also negate the report of the QME, Dr. Sherrill, upon which Defendant relies for the same reasons. While a medical report may not have an accurate medical history if the doctor has not reviewed all of the medical reports, it is not dispositive that failure to review every medical report results in an inaccurate medical history. In Kyles, the court found that a report was not accurate when a doctor concluded certain rehabilitative treatment probably would be ineffective. *Kyles v. WCAB*, 195 Cal. App.3d 614, 621. The doctor, however, had not reviewed the medical records of the employee's treatment to that point. *Id*. The Court of Appeal found that the opinion "made in the absence of a review of all of the medical records, particularly those of petitioner's treating orthopedist, could not be accepted as substantial evidence." *Id*. However, a failure to review some medical records will not render an opinion insubstantial if the opinion is otherwise supported by substantial evidence. *Brand v. Mt. Diablo Unified School Dist*., 2017 Cal. Wrk. Comp. P.D. Lexis 406.

Here, Dr. Sherrill reviewed medical reports from Southern California Mental Health Associates where applicant treated with Dr. David Kauss. Dr. Nehoryan, in turn, reviewed Dr. Sherrill's report, which included the summary of medical records from Dr. Kauss. Additionally, Dr. Nehorayan administered a battery of tests and engaged in an extensive discussion and review of Applicant's history. Accordingly, the undersigned finds that failure to review some treating records does not render his opinion insubstantial.

b. Dr. Nehorayan is not a Treating Physician

Defendant appears to be arguing for the first time in its Petition for Reconsideration that Dr. Nehorayan's report is inadmissible and was obtained for the purposes of rebutting an AOE/COE opinion. In *Batten*, the Court of Appeal held that Labor Code section 4605 does not permit the admission of a report by an expert who is retained solely for the purpose of rebutting the opinion

of the agreed medical expert's opinion. *Batten v. WCAB*, 241 Cal. App. 4th 1009.

The court went on further to state that Labor Code section 4605 means "a doctor who is consulted for the purposes of discussing proper medical treatment, not one who is consulted for determining medical-legal issues in rebuttal to a panel QME." *Id*. at 1016. The court further explained that when an employee consults with a doctor at his or her own expense, in the course of seeking medical treatment, the resulting report is admissible. *Id*. This is because Labor Code section 4061(i) permits admission of an evaluation prepared by a treating physician. The court, however, concluded that neither Labor Code section 4605 nor 4061(i) "permits the admission of a report by an expert who is retained solely for the purpose of rebutting the opinion of the panel qualified medical expert's opinion.

Applicant submitted only one report of Dr. Nehorayan, which states "Mr. Larson was seen in our Van Nuys office for psychiatric examination and psychological testing on January 5, 2021 and February 16, 2021, to assess current status, factors, if any, of psychiatric work impairment, relationship if any, to employment, and the need for treatment with respect to the psychiatric component of his workers' compensation case." [8] It goes on further to state that "a Doctor/Patient relationship may exist depending on the result of the evaluation." *Id*. It would appear that as of this evaluation, there was a valid question as to Dr. Nehorayan's role in this case and whether his report is admissible.

The issue herein is broader and implicates due process and waiver. This is not an issue that is so inextricably intertwined or one that goes to the weight of the evidence, which must be factored by the Judge. This issue of admissibility of the report of Dr. Nehorayan should have been raised at the MSC or at a minimum at the time of trial when the undersigned asked for objections to the admissibility of exhibits. Had Defendant done so then, the court would have taken this issue under submission. Considering issues that are not so inextricably intertwined, *sua sponte*, could be an abuse of authority. The objection at this point of the litigation appears to be either an oversight or perhaps a 'tactical surprise' that if allowed is unfair and inconsistent with reasonable trial procedures. *Saldana v. WCAB*, 59 Cal. Comp. Cases 1109 (writ den.). It was prudent for Defendant to raise objections to the admissibility of evidence at trial. Defendant clearly understood this requirement as it objected to the admission of Applicant's Exhibit 2 at the time of trial. Raising objections after the conclusion of trial proceedings will not work. *Thompson v. County of Tulare*, 2015 Cal. Wrk. Comp. P.D. Lexis 451.

[8] Applicant Exhibit "2" at p. 2.

IV.
RECOMMENDATION

For the reasons stated above, it is respectfully requested that Defendant's Petition for Reconsideration be denied.

DATE: 4/25/2022

Josephine Broussard
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE