WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

OLIVIA PINKNEY, ***Applicant***

vs.

COUNTY OF LOS ANGELES/PARKS AND RECREATION DEPARTMENT, Permissibly Self-Insured, administered by SEDGWICK CLAIMS SERVICES, ***Defendants***

Adjudication Number: ADJ12129071
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER 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 grant reconsideration, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings and decision. This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of July 20, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of July 20, 2022 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 12, 2022

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

OLIVIA PINKNEY
SHATFORD LAW
LAW OFFICES OF BECERRA & ASSOCIATES

AS/*pc*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

The undersigned issued his Opinion on Decision and Findings & Award on 7/20/2022. Applicant, Olivia Pinkney, has filed a timely, verified, Petition for Reconsideration on 8/15/2022. The undersigned found that applicant's psychiatric injury claim was not compensable due to it being substantially cause by lawful, nondiscriminatory, good faith personnel actions, pursuant to L.C. §3208.3(h).

The undersigned has been on vacation since 8/11/22 and continuing and apologizes to the parties and the Board if this report and recommendation is delayed.

Applicant's sole contention on reconsideration is that "the evidence do (sic) not support the order, decision, or award". Although this is not a specified basis for reconsideration pursuant to L.C. §5903, the undersigned assumes that applicant's position is that the evidence does not justify Findings of Fact #2 that applicant's claim was barred by the good faith personnel action (GFPA) affirmative defense.

Much of applicant's Petition for Reconsideration, misinterprets the undersigned's findings as supported by the Opinion on Decision, raises issues about "chronic pain" which is not a part of the claim herein, and incorrectly states that the undersigned did not find that applicant's psychiatric injury was predominantly caused by actual events of employment, which is clearly erroneous. The undersigned specifically found that applicant's claim was predominantly caused by actual events of employment, but that the GFPA defense barred compensability, although the predominant cause finding requires further analysis as detailed below.

Applicant is correct, however, that the undersigned incorrectly attributed a 60% injury causation to an employee/employer meeting that the undersigned found to be a GFPA. Applicant is correct that this causation analysis was made by applicant's treating physician, not the PQME. The PQME merely summarized this conclusion in his reporting, but did not state that he agreed with, or disagreed with, the treater's conclusion, and left the issue of compensability up to the trier fact (Court Exhibits 1-2).

Based on this admitted err, the undersigned would recommend that reconsideration be granted, and the matter returned to the undersigned, so that detailed factual findings can be made relating to which claimed stressor events

were, or were not, actual versus incorrectly perceived events of employment, and which were subject to the GFPA defense, so that the PQME can issue a supplemental report on causation in compliance with Rolda.

II
FACTS

Applicant, Olivia Pinkney, began working for the County of Los Angeles, Department of Parks and Recreation, at Frank G. Bonelli Park, in 2013 as a maintenance person. Her job duties included tree trimming, lawn mowing/edging, digging, planting trees, pruning and cutting up tree branches, disposing of trash, event table/chair set up, and bathroom cleaning/maintenance duties.

On 5/18/17, while working at Frank G. Bonelli Park, applicant sustained a prior admitted injury to her right shoulder and neck when she picked up a backpack leaf blower. This injury was litigated under ADJ1088353. Applicant was off work following this injury for approximately nineteen months through the end of January 2018, when she was released to return to work with modifications. This claim resolved by way of compromise and release.

In early February 2018, applicant returned to work for the employer in a modified work position at Schabarum Park. Prior to her return to work applicant met with her new supervisors, as well as an employer return to work specialist, to discuss and sign off on the modified work position that she was being offered (Joint Exhibit C). The position was still in the maintenance department, but limited applicant's activities to ten pounds, no overhead work, limited neck bending/twisting and no repetitive arm movements, as well as having the ability to alternate her job tasks to avoid repetitive activities. Her primary responsibility was to clean/maintain the park's nine bathrooms, including restocking toilet paper/towels, sweeping and mopping and some office and general park clean up within the work restrictions. The restricted job duties were reviewed and signed off by the applicant, the return to work specialist, and applicant's supervisors, Gabriel Ortiz and Jaheel Dixon on 2/14/18. Applicant commenced the modified work duties contemporaneous with executing the return to work agreement.

There does not appear to have been any issues with applicant's work during her first few months after returning to work. At some unspecified time applicant requested to be provided with a co-worker who could follow her during her work day and assist her when required. The employer told the applicant that this was not possible, nor required by her work restrictions, but that she could use her portable radio and call into her supervisor if she had a specific task with which she felt she needed assistance. According to the credible employer witnesses, applicant never radioed requesting such assistance.

By late June or early July 2018, applicant's supervisor had received complaints about applicant's work effectiveness, including failure to replenish the bathroom toilet paper and towels, and failure to remove graffiti. Applicant was given an undocumented verbal warning relating to this issue. On 8/16/18 applicant had a follow up meeting with her supervisors relating to purported failure to correct the earlier complaints.

Applicant filed a stress related claim following the 8/16/18 meeting. She went off work a short time later and commenced treatment. On obtaining representation, she filed the continuous trauma injury stress claim herein, alleging injury from 8/16/18 through 3/19/19. It appears from the evidence presented, however, that applicant was off work since either 8/16/18 or 9/1/18, so the basis for the alleged continuous trauma period appears suspect. The undersigned notes that applicant's earlier 5/18/17 specific orthopedic injury claim was settled for $29,500.00 with an Order Approving issuing on 3/18/19, which might account for the following day being the alleged continuous trauma end date.

The parties in the instant matter originally came to trial before WCJ Craig Glass (now retired), on 5/12/20, on the limited issues of whether applicant's claim herein was barred by the prior compromise and release settlement in the 5/18/17 injury claim (ADJ1088353), and what the L.C. §5412 date of injury was for the continuous trauma claim herein.

Following trial, WCJ Glass issued his Opinion on Decision and Findings of Fact and Orders on 6/8/20 finding in relevant part that applicant's continuous trauma claim herein was not barred by the prior claim settlement, and that the record required further development on the L.C. §5412 date of injury.

Following development of the record, the parties returned to the trial calendar before the undersigned on the limited issue of whether applicant sustained a compensable psychiatric injury as alleged. No testimony was elicited at trial.

The parties submitted joint exhibits associated with applicant's annual performance reviews prior to the earlier 2017 specific injury (Joint Exhibits A & B), her performance review through 3/31/18 which only covered the first two months of her return to work period (Joint Exhibit D), and the return to work agreement referenced above from 2/14/18 (Joint Exhibit C). All the performance reviews found applicant's work "competent", scored as a three on a five point rating scale. he parties also jointly submitted, in lieu of live testimony, statements from applicant's two supervisors at her final return-to-work modified position at Schabarum Park, Jahell Dixon and Gabriel Ortiz. Both employer witnesses noted initial positive work compliance by the applicant, with an unexplained deterioration claimed by June/July of 2018. Complaints about applicant's job performance led to the first of two verbal

warnings in July 2018. Both witnesses denied any prior issues with the applicant. Both denied that applicant ever made any complaints relating to stress, harassment, or being overworked. Both acknowledged that she had requested a full time assistant to work with her, which had been denied. Both agreed that applicant was told to use her portable radio if a particular work situation arose with which she believed she needed assistance. Both agreed that applicant never made such a request. Both agreed that a second personnel meeting was held with the applicant on 8/16/18. She was again verbally counseled. No written reprimand, or progressive discipline was made.

Shortly after the 8/16/18 personnel meeting, applicant contacted the employer's return to work department and made a formal stress related complaint. From the history/record summary contained in the submitted medicals, it appears that applicant sought evaluation and treatment on 8/21/18 at Kaiser complaining about stress "over the past week, feeling like she is being singled out and over-worked over the last week". She was taken off work for a week at that time (Court Exhibit 1, page 8). On 9/11/18, applicant was seen for the first time by Fariba Kezel, Ph.D., who chronicled that applicant "…attributes physical symptoms and emotional distress to a personnel meeting of 8/16/18, during which she reportedly received negative feedback - was counseled about her work performance by her two supervisors" The doctor noted that applicant denied further disciplinary actions were discussed by her supervisors during the meetings.

The parties also submitted panel qualified medical evaluator (PQME) reporting from Abraham Argun, Psy.D. (Court Exhibits 1-2). The PQME noted in his reporting that applicant had received no written reprimands, but "thought harsher punishment would come next", and she "thought that her supervisors were trying to push her out". His testing analysis included findings that applicant was hypersensitive and somewhat suspicious and untrusting of others, and that she was easily hurt by even mild criticism. He concluded that applicant sustained a psychiatric injury requiring some treatment but left the issue of compensability up to the trier of fact. Although he noted that applicant's treating physician had concluded that 60% of applicant's psychiatric injury was due to the personnel meeting on 8/16/18, and that 40% was due to her feeling that her job was threatened, the PQME did not state that he concurred with that assessment. In addition, although the PQME noted that applicant claimed harassment, hostility, and that her work restrictions from a prior injury were not being honored by the employer, the undersigned did not make specific findings on whether applicant's claims were factually valid. The PQME concluded that his reporting was incomplete and the "The legal aspect of causation is a matter of trier of fact (sic) (Court Exhibit 2, page 15).

III
DISCUSSION

A. DID THE UNDERSIGNED COMMIT ERR IN FINDING THAT ACTUAL EVENTS OF EMPLOYMENT WERE NOT THE PREDOMINANT CAUSE OF APPLICANT'S PSYCHIATRIC INJURY?

This alleged err is erroneous, as the undersigned specifically found that actual events of employment were predominant. However, that finding was based on the undersigned's erroneous understanding that the PQME had found that 60% of applicant's psychiatric injury was due to the personnel meeting held on 8/16/18. As noted above, this causation analysis was only made by applicant's treating physician. The undersigned has requested that reconsideration be granted with the matter returned to the undersigned so that specific findings on actual events of employment can be made so that the PQME can complete a competent Rolda analysis.

B. DID THE UNDERSIGNED COMMIT ERR IN FINDING THAT APPLICANT'S PSYCHIATRIC INJURY CLAIM IS NON-COMPENSABLE?

Yes. The undersigned erroneously found that PQME, Dr. Argun had concluded that 60% of applicant's psychiatric injury was due to the personnel meeting on 8/16/18, which the undersigned concluded was a GFPA. However, although this causation analysis was noted by the PQME, it was actually made by applicant's treating physician. The PQME did not reject or incorporate that analysis in his reporting. The PQME stated that his reporting was incomplete and that the legal aspect of causation is a matter for the trier of fact. This is in part correct.

If the undersigned were to rely upon the treating physician's causation analysis, applicant's claim would be barred by GFPA. However, the parties agreed to utilize a PQME to address the issue of causation/compensability and his reporting is incomplete and not substantial. Both parties have an obligation to complete the reporting. If reconsideration is granted and the matter returned to the undersigned, findings of fact relating to applicant's claimed stressors (did they occur or not), and whether they were actual events of employment or not, and which, if any, were good faith personnel actions, would be made. Then the PQME can readdress his causation analysis in compliance with Rolda.

IV
RECOMMENDATION

It is respectfully recommended that applicant's Petition for Reconsideration be granted, and that the matter be returned to the undersigned in order to make specific findings of fact relating to actual events of employment, and which if any were good faith personnel actions.

Dated: August 29, 2022

S. MICHAEL COLE
Workers' Compensation Judge