WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CAROLYN BUFALINO, *Applicant*

vs.

COUNTRYWIDE HOME LOANS;
ARROWOOD INDEMNITY COMPANY, *Defendants*

Adjudication Number: ADJ4709903 (VNO0454752)
Van Nuys District Office

OPINION AND ORDERS DENYING PETITION FOR RECONSIDERATION; GRANTING PETITION FOR RECONSIDERATION; AND DECISION AFTER RECONSIDERATION

Applicant and defendant each seek reconsideration of the August 31, 2021 Findings of Fact and Award issued by the workers' compensation administrative law judge (WCJ). We have considered the allegations of the Petitions for Reconsideration and the contents of the Report and Opinion on Decision 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 and Opinion on Decision, both of which we adopt and incorporate, we will grant reconsideration, amend the WCJ's decision as recommended in the report, and otherwise affirm the August 31, 2021 Findings of Fact and Award.

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 defendant's Petition for Reconsideration of the August 31, 2021 Findings of Fact and Award is **DENIED**.

IT IS FURTHER ORDERED that applicant's Petition for Reconsideration of the August 31, 2021 Findings of Fact and Award is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the August 31, 2021 Findings of Fact and Award is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

4. The injury resulted in temporary disability from August 9, 2002 to December 7, 2004 payable by defendant at the weekly rate of $1,014.66, less credit for time worked if any, less reimbursement to the Employment Development Department (EDD) during the period as set forth below, and less a reasonable attorney's fee as set forth below.

* * *

AWARD

AWARD IS MADE in favor of **CAROLYN BUFALINO** against **COUNTRYWIDE HOME LOANS; ARROWOOD INDEMNITY COMPANY,** payable as follows:

a. Temporary disability indemnity at the rate of $1,014.66 per week beginning August 9, 2002 to and including December 7, 2004, less credit for any sums heretofore paid on account thereof and less lien claims of the Employment Development Department which is hereby allowed as set forth in paragraph 8, above, and less 15% of the unpaid, accrued temporary disability net of EDD reimbursement, payable to the Law Office of Jerome Sklerov as attorney fees.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 15, 2021

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

CAROLYN BUFALINO
JEROME H. SKLEROV, ESQ.
EDD
MULLEN & FILIPI

PAG/abs

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 PETITIONS FOR RECONSIDERATION

I. INTRODUCTION

Both applicant Carolyn Bufalino (hereinafter, "applicant") and defendant Countrywide Home Loans, insured by Arrowood Indemnity Company (hereinafter, "defendant"), have filed timely, verified Petitions for Reconsideration from the August 31, 2021 Findings of Fact and Award. Applicant seeks a correction to the TTD rate on this 2002 cumulative trauma claim per Labor Code § 4661.5. Defendant argues that the treating psychologist's reporting which the court relied upon is not substantial medical evidence, that the analysis of Labor Code § 3208.3(h) is incomplete and flawed, that the undersigned has misrepresented the record, that the reporting of defense psychiatric QME Brian Jacks, M. D. should be relied upon, and that the record does not support injury to the gastroesophageal tract.

This Report recommends applicant's Petition for Reconsideration be granted to amend the TTD rate per Labor Code§ 4661.5. This Report further recommends that defendant's Petition for Reconsideration be denied on the merits. The matter is not presently on calendar.

II FACTS

Applicant Carolyn Bufalino, while employed during the cumulative trauma period July 31, 2000 through August 9, 2002, as a computer programmer, occupational group number 112, at Rosemead, California by Countrywide Horne Loans, then insured by Royal & Sun Alliance Insurance, now Arrowood Indemnity Company, claims to have sustained injury arising out of and in the course of employment to the psyche, and to the internal organs including irritable bowel syndrome, gastroesophageal reflux disorder, hemorrhoids and shingles.

Defendant has denied all liability for this claim. Applicant has treated in psychiatry with primary treating psychologist A. Joseph Glaser, Ph.D. Additionally on this 1997 Permanent Disability Rating Schedule (PDRS) case, applicant has selected Timothy Reynolds, M.D. to act as applicant's Qualified Medical Examiner (QME) in internal medicine. The defendant has selected H. William Winters, Ph.D., and later Brian P. Jacks, M.D. to act as its QME in psychiatry, and Mark Hyman, M.D. to act as the defense QME in internal medicine.

The matter has been the subject of multiple trial settings. As germane to this Report, the matter was most recently heard at trial on Mach 27, 2019. The parties stipulated to applicant's occupational title, group code, and earnings, and to the applicability of the 1997 Permanent Disability Rating Schedule. The matter was tried on issues of temporary and permanent disability, with defendant raising the affirmative defense compensation was barred because psychiatric injury was substantially caused by lawful, nondiscriminatory and good-faith personnel action. The testimony of the applicant and two defense witnesses was heard, and the matter submitted.

Following a review of the evidentiary record, the submission was ordered vacated on June 10, 2019. Multiple deficiencies were identified with both the applicant and defense medical reporting,

and with no reporting constituting substantial medical evidence, the record was ordered developed under Labor Code § 5701.

The matter was continued over the course of multiple subsequent conferences while the parties marshalled additional medical-legal reporting. The parties moved additional reports into evidence and jointly submitted the matter for decision from status conference held on April 15, 2021.

Following a review of the evidentiary record, the submission was again ordered vacated on May 10, 2021. Various issues were again identified with the medical-legal reporting in evidence, and the record ordered developed under Labor Code § 5701. The parties obtained additional supplemental reporting, which was received into evidence from status conference held on August 17, 2021. Per stipulation of the parties, the matter was submitted for decision directly from the August 17, 2021 status conference.

Findings of Fact and Award issued on August 30, 2021. Therein, it was determined that of the two primary bodies of psychiatric reporting in evidence, the reporting of treating psychologist A Joseph Glaser, Ph.D. better reflected the applicant's credible testimony as well as the timeline of events established in the record. Relying on this report, the court found that personnel action would not exceed 20% causation, and as such, that the defendant had not met its burden of establish that personnel action was a substantial cause (35%-40%) of the claimed psychiatric injury. Findings of psychiatric injury with concomitant TTD and PD were entered accordingly. The applicable TTD rate was entered as the maximum rate applicable at the time of injury, $490/week. The court further found the reporting of applicant's QME Dr. Reynolds to be the more thorough and persuasive, and found injury in the form of gastroesophageal reflux disorder (GERD) but not in the form of irritable bowel syndrome.

Applicant has filed a September 14, 2021 Petition for Reconsideration, averring that Labor Code§ 4661.5 allows for TTD paid more than two years after the date of injury to be paid at the maximum rate then in effect, subject to earnings limitations.

Defendant has filed a September 28, 2021 Answer to applicant's Petition averring the TTD rate change would not apply to indemnity previously paid, including any monies paid by the Employment Development Department (EDD) in the form of State disability Insurance (SDI).

Defendant has also filed a September 24, 2021 Petition for Reconsideration. Therein, the defendant avers that (1) treating psychologist Dr. A Joseph Glaser's opinions are not substantial medical evidence as he has not seen the applicant since 2013 and is not fully aware of her ongoing medical and employment history since 2013; (2) treating physician Dr. A Joseph Glaser failed to provide a complete *Rolda* analysis (*Rolda v. Pitney Bowes, Inc*) and as such it was error for WCJ Rasmusson to rely on his opinions; (3) WCJ Rasmusson failed in his duties as trier of fact in this matter by not properly analyzing this matter under the *Rolda* analysis (*Rolda v. Pitney Bowes, Inc*); (4) WCJ Rasmusson misrepresents Defense QME Dr. H. William Winters reports in his determination that Dr. Winters opinions are not substantial medical evidence; (5) The report and opinion of Defense QME Brian Jacks is the only report to properly do the Rolda analysis and provide a complete review and evaluation of the applicant up to 2019 and as such the WCAB should issue their Finding and Award based on his opinions; and (6) the record does not support a finding that GERD is an industrial injury.

As of the date of this writing, no Answer has been received from applicant's counsel.

III.
DISCUSSION

APPLICANT'S PETITION - TTD RATE AND LABOR CODE § 4661.5

The Findings of Fact awarded temporary total disability at $490/week, the maximum TTD rate in effect in 2002. Applicant asserts that Labor Code § 4661.5 provides for temporary indemnity paid more than two years from the date of injury to be paid at the rates then in effect, subject to earnings limitation.

Applicant is correct. Defendant has denied injury AOE/COE and has paid no TTD benefits. The parties have stipulated to average weekly wages of $1,522.00 per week, two thirds of which is $1,014.66. The maximum TTD rate in 2021 is $1,356.31.[1] Applicant's earnings are less than the maximum TTD rate now in effect, and Labor Code§ 4661.5 thus provides for TTD at the weekly rate of $1,014.66 per week.

Defendant responds that SDI payments made by the EDD during the awarded TTD payment are *de facto* TTD, and thus any change in rate would not apply to these periods of EDD SDI payment. There is no merit to this argument. Labor Code Section 4904(b)(l) provides:

> In determining the amount of lien to be allowed for unemployment compensation disability benefits under subdivision (f) of Section 4903, the appeals board shall allow the lien in the amount of benefits which it finds were paid for the same day or days of disability for which an award of compensation for any permanent disability indemnity resulting solely from the same injury or illness or temporary disability indemnity, or both, is made and for which the employer has not reimbursed the Employment Development Department pursuant to Section 2629.1 of the Unemployment Insurance Code.

Here, the amount *reimbursed* to the EDD under Labor Code § 4904 is limited to the rate of indemnity otherwise payable for the same day or days as the SDI payments were made. However, pursuant to Labor Code § 4909 applicant's receipt of EDD/SDI benefits in no way obviates her claim for the full measure of TTD benefits available during that interval. Where the TTD rate exceeds the EDD/SDI rate, the applicant is entitled to the difference.[2]

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[1] https://www.dir.ca.gov/DIRNews/2020/2020-95.htrn

[2] See the nonbinding but persuasive panel decision in *Moreno v. American Sunroof Corp*., 2011 Cal. Wrk. Comp. P.D. LEXIS 175, which observed: "[W]e find nothing in the language of section 4656(c)(1) that precludes a defendant from obtaining credit against the 104 compensable weeks limit when, as in this case, it reimburses EDD for the benefits it paid and also pays the injured worker any difference between the amount the worker received from EDD and the amount of temporary disability indemnity benefits due for that time period."

It is recommended that applicant's Petition be granted to amend the TTD rate to reflect $1,014.66 per week.

DEFENDANT'S PETITION - SUBSTANTIALITY OF THE REPORTING

Defendant's Petition for Reconsideration avers that it was error for the court to rely on the reporting of treating psychologist A. Joseph Glaser, Ph.D. Defendant avers that Dr. Glaser was not apprised of applicant's recent health and vocational developments and that his reporting was not substantial medical evidence as a result. Defendant avers that Dr. Glaser last assessed the applicant in a clinical setting in 2013, and that "it is unclear whether he was fully aware of the ongoing work activities and growing business or all the medical issues that Applicant had suffered since 2016."[3] Defendant submits that given this uncertainty, the reporting of Dr. Glaser cannot be considered substantial medical evidence.[4]

In and of itself, the passage of time does not render a report irrelevant. However, a medical-legal report must be grounded in a complete understanding of the appropriate and relevant vocational, medical and legal history in order to constitute substantial medical evidence. As defendant correctly points out, the undersigned has ordered development of the record in this matter on three separate occasions to ensure that the medical-legal reporting was complete and appropriately based in evidence. Following the initial trial in 2019, the court ordered development of the record with respect to nearly every medical-legal report submitted in evidence. Therein it was noted that the reporting of Dr. Glaser needed to better address the appropriate medical and vocational record prior to applicant's treatment with Countrywide.[5]

As part of that development, Dr. Glaser was then provided with a significant body of records including the summary of applicant's trial testimony in 2019, which included defendant's cross-examination of the applicant and testimony from both of the applicant's supervisors. The records reviewed by Dr. Glaser also included applicant's 2018 deposition transcript, wherein she testified to her seasonal work as a tax preparer for H&R Block, at approximately 25 hours per week from January through April. The applicant further testified regarding her recent medical history including a cancer diagnosis and treatment, as well as the installation and removal of a port/ catheter.[6] Dr. Glaser reviewed appropriate medical records from applicant's various non-industrial treating physicians through 2018, and various records of treatment and employment antedating applicant's employment with Countrywide.

A careful review of the medical record establishes that Dr. Glaser was, in fact, aware of the applicant's current condition, her medical history and developments, and her pre-and

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[3] September 24, 2021 Defense Petition for Reconsideration at 7:5.

[4] Despite its contentions that the reporting of Dr. Glaser must be rejected for lack of familiarity with applicant's recent vocational undertakings, defendant articulates a different perspective on the issue of substantiality in its trial briefing, averring therein that "[a]lthough DQME Dr. Hyman may not have reviewed treatment reports for the internal complaints, this does not mean his reporting is not, substantial medical evidence." (Defendant Arrowood Indemnity Company Trial Brief, dated April 22, 2021 at 8:18.)

[5] June 10, 2021 Order Vacating submission.

[6] Ex. 35, October 16, 2019 report of A. Joseph Glaser, Ph.D. at p.18; p.22.

post-Countrywide employment history. The record was ordered developed on May 10, 2021. Among the various issues to be developed, Dr. Glaser was directed to specifically address whether his prior assessment of the impairment under the eight categories of work function continued to be accurate, and in light of applicant's limited re-entry into the labor market with her tax preparation work.[7] Dr. Glaser acknowledged and discussed these issues, as well as amplified on his analysis of causation in two subsequent reports.

After a review of the totality of the reporting in evidence and following three orders for development of the record to address issues of substantiality, the undersigned was satisfied that the reporting of Dr. Glaser constituted substantial medical evidence. Dr. Glaser's reporting expressed familiarity with the applicant's medical and vocational history, and reflected a clear understanding of the claimed stressors in this matter.

Following the filing of the instant Petitions for Reconsideration, the undersigned has once again reviewed the totality of the evidentiary record. The undersigned continues to find that the reporting of Dr. Glaser is substantial medical evidence, and for reasons discussed in the good-faith personnel discussion, below, that the reporting of Dr. Glaser to be the more persuasive and reliable.

Finally, the undersigned notes defendant's assertions vis-a-vis Dr. Glaser's status as a licensed (but now inactive) psychologist and QME.[8] However, none of these issues were raised at trial or on resubmission for decision, or in trial briefing filed in 2021 or elsewhere in the record. The issue has been waived.

LABOR CODE § 3208.3(h) - GOOD FAITH PERSONNEL ACTION DEFENSE

Defendant further avers this court erred by failing to fully analyze whether lawful, nondiscriminatory and good-faith persom1el action was a substantial cause of applicant's psychiatric injury, as part of the larger analysis required under *Rolda v. Pitney Bowes, Inc*.[9]

Applicant's treating physician Dr. Glaser, and defense QME Dr. Jacks both identify various overlapping factors of causation. However, their assessments of the percentages of causation are markedly different. The Workers' Compensation Appeals Board is empowered to review the medical record and to choose among the conflicting medical reports and rely on that which is deems most persuasive. [10]

The opinion on decision describes at length why the court found the reporting of Dr. Glaser to be the more persuasive. The rationale therefore included the alignment of Dr. Glaser's medical and vocational history of the applicant with the applicant's credible trial testimony, a longitudinal understanding of the complex medical and medical-legal history in this matter, a thorough review of the available record, and a clear and well reasoned analysis of factors of causation. The undersigned felt that Dr. Glaser's reporting accurately reflected the applicant's credible testimony to a gradual accretion of industrial stressors over two years resulting in stress and a stress-induced

[7] May 10, 2021 Order Vacating Submission for Development of the Record.

[8] Defendant's September 24, 2021 Petition for Reconsideration at 6:10.

[9] *Rolda v. Pitney Bowes*, *Inc*., 66 Cal.Comp.Cases 241 (Workers' Comp. Appeals Bd. en banc).

[10] *Jones v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 476 (33 Cal. Comp. Cases 221)

physiological response, as reflected in contemporaneous medical records. It was further felt that Dr. Jacks' assessment of the July, 2002 performance improvement plan as the sole predominant factor in applicant's psychiatric injury, with the myriad of other industrial stressors relegated to a minor role, was not well-supported in the record. The factors that played a greater factor in Dr. Glaser's analysis, and a lesser part in that of Dr. Jacks, included the onset of panic attacks, severe IBS, shingles, seeking medical treatment for stress, and the need to work from home, all occurring prior to the performance improvement plan ever being instituted. On this record, the court found the reporting of Dr. Glaser to be the better-reasoned and more persuasive.

Defendant asserts that compensability of the claim is barred under Labor Code §3208.3(h), because the psychiatric injury was substantially caused by lawful, nondiscriminatory good-faith persom1el action.[11] Substantial cause is 35%-40%.[12]

The required analysis is set forth in *Rolda v. Pitney Bowes*[13] as follows:

> 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. Of course, the WCJ must then articulate the basis for his or her findings in a decision which addresses all the relevant issues raised by the criteria set forth in Labor Code section 3208.3.

As relevant to the *Rolda* analysis, Dr. Glaser identified three essential factors of causation:

1. Preexisting and nonindustrial factors (10%);
2. Disciplinary/persom1el action toward the end of applicant's employment (20%), and,
3. A comingled array of other industrial factors not amenable to individual attribution (70%).

With regard to the possible persom1el actions, including the performance improvement plan, Dr. Glaser asserted:

> It is my opinion based upon the above records, as well as years of work with Ms. Bufalino, that approximately 20 percent of Ms. Bufalino's permanent

[11] Per Labor Code §3208.3(h), "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."

[12] Labor Code §3208.3(b)(3)

[13] *Rolda v. Pitney Bowes, Inc*., 66 Cal.Comp.Cases 241, 247 (Appeals Board en bane).

> psychological disability can be apportioned to disciplinary actions, including the assignment of a performance improvement plan toward the end of her employment with Countrywide Home Loans. Twenty percent of causation is insufficient to rise to the level of a *Rolda* analysis, so the issue as to whether or not the performance improvement plan and related discipline were lawful, nondiscriminatory, good faith or otherwise would not affect the case in chief.[14]

Dr. Glaser also described the remaining 70%, opining that any attempt to parse out the array of causative factors not falling under the rubric of personnel action would be speculative:

> Approximately 70% of Ms. Bufalino's psychological injuries were due to factors which are so intermingled as to make apportionment between them speculative. These include problems with coworkers, an inability to obtain proper training for the "Merlin" program, an assignment to write an operations manual for the "Merlin" program (a program she was unable to master in the first place), problems related to her psychophysiological stress reactions and their impact thereof on her psychological injuries. All of these stressors were experienced by her over the course of approximately two to two and a half years of Ms. Bufalino's employment and are the predominant cause of her disability.

On this record, Dr. Glaser's reticence to ascribe individual percentages is understandable. Writing nearly 19 years after applicant's last day worked, Dr. Glaser asserts that any attempt to further parse individual percentages of causation would inherently involve some level of speculation. Moreover, the nature of the psychiatric distress experienced by the applicant involved multiple overlapping causative factors accreting over the length of her employment, which is why the undersigned felt the reporting of Dr. Glaser better reflected that causational nexus. Dr. Glaser reasonably identified and accounted for the discrete events near the end of applicant's employment, including the performance improvement plan, and assigned percentages that did not meet the substantial cause threshold. Accordingly, the court entered findings that the defendant had not met its burden of establishing that personnel action was a substantial cause of applicant's psychiatric injury.

Defendant takes issue with this assessment, asserting that two of the intermingled factors described by Dr. Glaser might possibly be deemed personnel action: the assignment to work on the Merlin manual, and decisions made regarding applicant's work from home accommodation.

The Appeals Board has provided guidance on how to determine whether a specific event of employment may be considered personnel action:

> The distinction between the effect of working conditions, and the effect of an action directed towards an individual's employment status, has been recognized and applied by several Appeals Board panels in determining whether a psychiatric injury was substantially caused by lawful,

[14] Ex. 35, October 16, 2019 report of A. Joseph Glaser, Ph.D. at p.35.

nondiscriminatory, good faith personnel actions. (*Kaiser Foundation Hosp. v. Workers' Comp. Appeals Bd*. (*Berman*) (2000) 65 Cal. Comp. Cases 563 (writ den.) [corporate reorganization that increased workloads not "personnel action" for purpose of section 3208.3(h) even though it was non-discriminatory and generally applied to all employees]; *Atlantic Mutual Insurance Companies v. Workers' Comp. Appeals Bd*. (Brodsky) (2001) 66 Cal. Comp. Cases 370 (writ den.) [increasing sales quotas, changing commission structure, reassigning applicant's sales accounts to other people, and offering applicant lower paying job at fixed salary, found not to be "personnel actions" for purpose of section 3208.3(h)]; *Sunsweet Growers Inc. v. Workers' Comp. Appeals Bd*. (*Milliron*) (1999) 64 Cal. Comp. Cases 1432 (writ den.) [announcement of a shift change to seven days per week/nine hours per day for an indefinite period not a "personnel action" within meaning of section 3208.3(h)]; *Neighborhood Legal Services of Los Angeles v. Workers' Comp. Appeals Bd*. (*Rivera*) (2002) 67 Cal. Comp. Cases 1367 (writ den.) [assignment of new and increased work requirements not "personnel action" under section 3208.3(h)].)

We recognize that not every Appeals Board panel has recognized the distinction between a psychiatric injury caused by stressful working conditions and injury caused by an action specifically directed towards an individual's employment status. (*See Schultz v. Workers' Comp. Appeals Bd*. (1998) 63 Cal. Comp. Cases 222 (writ den.) [changes in the employment environment resulting from change in company ownership, frequent change of managers, alteration of sales territory, change in the pay structure, increased workload caused by reduction of sales staff, and requirement to maintain a neat desk construed by panel to be "perso1rnel actions" that barred compensation because they were taken for reasonable and proper business purposes].)

However, we find that recognizing the distinction between a psychiatric injury caused by stressful working conditions, and an injury caused by a good faith nondiscriminatory "personnel action" directed specifically towards an individual's employment status, is both important and necessary, and the contrary view of the panel in *Schultz* is not adopted here. Without the distinction, the phrase "personnel action" would encompass everything in the employment environment that stems from good faith management actions, and that "would be too broad an interpretation that would preclude from consideration practically all events occurring such as work loads." (*Larch*, supra, 63 Cal. Comp. Cases at p. 835; see also *County of Butte v. Workers' Comp. Appeals Bd*. (*Purcell*) (2000) 65 Cal. Comp. Cases 1053, 1058 (writ den.) [not all actions by management may be construed as personnel actions because such a construction would be overly broad and would result in the

denial of compensation for injuries caused by management's criticism of an employee's conduct].)[15]

While panel decisions are not mandatory authority on this court, the above distinction between administrative action and personnel action is both cogent and persuasive. Applying this distinction to the facts at bar, both the (1) decision to have the applicant work on the "Merlin" manual, and (2) decisions made about her physical working location/work from home accommodation would be considered administrative actions rather than personnel actions. Neither event reasonably implicates applicant's employment status, or would otherwise qualify as personnel action within the meaning of Labor Code § 3208.3(h).

Having had the opportunity to review the reporting of Drs. Glaser and Jacks, the undersigned continues to be of the opinion that it was appropriate to rely on the reporting of Dr. Glaser. Moreover, after a review of the requirements set forth under Labor Code §3208.3(h) in assessing whether good-faith personnel action was a substantial cause of the claimed psychiatric injury, it is further submitted that the factors of causation identified by Dr. Glaser as susceptible to categorization as personnel action were limited to the 20% assessment associated with the PIP, precluding a finding of substantial cause.

To the extent that defense counsel takes exception to this characterization, it is further respectfully submitted that neither of the two additional factors identified by defendant (change in job duties, change in medical acco1mnodation) would reasonably constitute personnel action.

Under either analysis, the defendant has failed in its burden of establishing that lawful, nondiscriminatory, good-faith personnel action is a substantial cause of applicant's psychiatric injury, and compensation for the claimed psychiatric injury is not barred herein.

GASTROESOPHAGEAL REFLUX DISEASE

Defendant further asserts that the record does not support a finding that applicant sustained injury in the form of gastroesophageal reflux disease (GERD).[16] Defendant argues that defense QME Dr. Hyman found the condition to be nonindustrial. Defendant asserts that the findings of applicant's QME Dr. Timothy Reynolds are not substantial because applicant has symptoms of GERD before, during and after her employment with Countrywide.

As was detailed in the Opinion on Decision, however, the court did not find the reporting of Dr. Hyman to be convincing, substantial or even complete. Dr. Hyman never finished the analysis of the GERD issue for want of an *H. pylori* workup, treatment and return for MMI reporting. [17] The opinion further notes that Dr. Hyman failed to address whether there was a link between applicant's work stress and the aggravation of her GERD. Defendant's Petition for Reconsideration does not respond to any of these issues.

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[15] *Ferrell v. County of Riverside*, 2016 Cal. Wrk. Comp. P.D. LEXIS 322, *5-8, 81 Cal. Comp. Cases 943, 946- 947); see also *Carollyn Joe v. County of Santa Clara-Probation Department*, *PSI,* 2015 Cal. Wrk. Comp. P.D. LEXIS 352.

[16] September 24, 2021 Defense Petition for Reconsideration at 18:9.

[17] August 31, 2021 Opinion on Decision at p.18, para. 3.

Defendant's assertion that the GERD was preexisting (and co-existing) is addressed in Dr. Reynold's apportionment of 80% to nonindustrial causes.

As such, the court remains of the opinion that Dr. Reynolds' assessment of modest industrial contribution to applicant's GERD condition is appropriate and supported in the record.

ADDITIONAL CONSIDERATIONS

The defense Petition for Reconsideration offers the rather remarkable assertion that the undersigned has discounted the *totality* of the reporting of former defense QME Dr. Winter by misrepresenting the reports in evidence. Without unduly belaboring the issue, the undersigned wishes to point out that in weighing the reporting of Dr. Winter, Dr. Jacks and Dr. Glaser, the opinion discusses at some length the events and medical reports adduced close *in time* to the alleged injury. The undersigned noted that among the first reports authored was the October 3, 2002 report of Dr. Winter, which was six to eight weeks after applicant stopped work for Countrywide. However, the report of October 3, 2002 appears to be preliminary nature, is not a complete medical-legal report, does not disclose or summarize the records received and reviewed in arriving at the conclusions reached, and does not contain the mandatory disclosures required in Labor Code § 4628. The report indicates a follow-up report would issue, but no such report was ever offered into evidence. As such, the undersigned found "the report" was not substantial medical evidence.[18] It appears that defendant has mistaken this finding regarding the specified report of October 3, 2002 as a wholesale rejection of all ensuing reports. Defendant further asserts that this wholesale rejection was achieved by applying the deficiencies of the 2002 report to all of Dr. Winters' numerous subsequent reports.

The opinion on decision does not state, at any point, that all of defense QME Winters' reports are being rejected for want of record review or § 4628 disclosure. Defense counsel's assertions of inappropriate conduct by this court are equally misplaced and unsupported.

IV.
RECOMMENDATION

It is respectfully recommended that the applicant's Petition for Reconsideration be GRANTED, and the Findings of Fact AMENDED as follows:

FINDINGS OF FACT

4. The injury resulted in temporary disability from August 9, 2002 to December 7, 2004 payable by defendant at the weekly rate of $1,014.66, less credit for time worked if any, less reimbursement to the Employment Development Department (EDD) during the period as set forth below, and less a reasonable attorney's fee as set forth below.

It is further respectfully recommended that the Award be AMENDED as follows:

[18] Ibid.

AWARD

a. Temporary disability indemnity at the rate of $1,014.66 per week beginning August 9, 2002 to and including December 7, 2004, less credit for any sums heretofore paid on account thereof and less lien claims of the Employment Development Department which is hereby allowed as set forth in paragraph 8, above, and less 15% of the unpaid, accrued temporary disability net of EDD reimbursement, payable to the Law Office of Jerome Sklerov as attorney fees.

Finally, it is respectfully recommended that the defense Petition for Reconsideration be denied in its entirety.

Dated: October 6, 2021

SHILOH ANDREW RASMUSSON
Workers' Compensation Administrative Law Judge

OPINION ON DECISION

BACKGROUND

Applicant Carolyn Bufalino, while employed during the cumulative trauma period of July 31, 2000 through August 9, 2002, as a computer programmer, occupational group number 112, at Rosemead, California by Countrywide Home Loans, then insured by Royal & Sun Alliance Insurance, now Arrowood Indemnity Company, claims to have sustained injury arising out of and in the course of employment to the psyche, and to the internal organs including irritable bowel syndrome, gastroesophageal reflux disorder, hemorrhoids and shingles.

Defendant has denied all liability for this claim. Applicant has treated in psychiatry with primary treating psychologist A Joseph Glaser, Ph.D., whose reporting has been received in evidence. Additionally, on this 1997 Permanent Disability Rating Schedule (PDRS) case, applicant has selected Timothy Reynolds, M.D. to act as applicant's Qualified Medical Examiner (QME) in internal medicine. The defendant has selected Brian P. Jacks, M.D. to act as their QME in psychiatry, and Mark Hyman, M.D. to act as the defense QME in internal medicine. The reporting of both physicians has also been received and reviewed.

The matter has been the subject of multiple trial settings. As germane to this decision, the matter was most recently heard at trial on Mach 27, 2019. The parties stipulated, inter alia, to applicant's occupational title, group code, and earnings. The parties stipulated that the 1997 Permanent Disability Rating Schedule applied to this case, and that issues of self-procured medical costs/liens were bifurcated and deferred. Placed in issue were the following:

1. Injury arising out of and in the course of employment.
2. Parts of body injured to include psyche, internal organs, shingles, and hemorrhoids.
3. Temporary disability with the employee claiming the period of August 9, 2002 through December 7, 2004, less periods for which the applicant received EDD benefits.
4. Permanent and stationary date with the employee alleging December 7, 2004 based on the report of A Joseph Glaser, Ph.D., also dated December 7, 2004, and the· employer/ carrier indicating that injury herein is not industrial pursuant to defense QME Dr. Winter.
5. Permanent disability.
6. Apportionment.
7. The need for further medical treatment.
8. The lien of the Employment Development Department for state disability for the period of August 17, 2002 through and including August 15, 2003 at the weekly rate of $490.00 for a total of $25,480.00.
9. Attorney fees.
10. Whether compensation is barred under Labor Code § 32083(h) as substantially caused by lawful, nondiscriminatory good-faith personnel action.

The applicant's testimony was adduced under direct and cross-examination, and the matter continued. Trial resumed on May 15, 2019, with continued cross and direct examination of the applicant, and wih1ess testimony from defense wih1esses Moses Esparza and Seth Goldman. The matter was submitted for decision the same day.

Following a review of the evidentiary record, the submission was ordered vacated on June 10, 2019. Multiple deficiencies were identified with both the applicant and defense medical reporting, and with no reporting constituting substantial medical evidence, the record was ordered developed under Labor Code§ 5701.

The matter was continued over the course of multiple subsequent conferences, until the parties marshalled additional medical-legal reporting, received into evidence from status conference held on April 15, 2021.

Following a review of the evidentiary record, the submission was again ordered vacated on May 10, 2021. Various issues were again identified with the medical-legal reporting in evidence, the record ordered developed under Labor Code§ 5701. The parties obtained additional supplemental reporting, which was received into evidence from status conference held on August 17, 2021. Per stipulation of the parties, the matter was submitted for decision directly from the August 17, 2021 status conference. This opinion now follows.

INJURY AOE/COE; LABOR CODE § 3208.3(h)

Applicant alleges injury as a result of workplace exposure on a cumulative trauma basis during the period July 31, 2000 through August 9, 2002. Defendant denies all liability for this claim. Defendant further avers that compensation is barred under Labor Code § 3208.3(h) as substantially caused by lawful, nondiscriminatory good-faith personnel action.

Trial Testimony

The applicant testified that she was hired by Countrywide after an interview with Seth Goldman, to work in a position that involved a "Rules" computer program called "Merlin".[1] The applicant would train with Mr. Moses Esparza, a team leader. The applicant would also work with Richard Ryan, a non-employee contractor for Countrywide. The name of the work group was "Rules Implementers."[2] The applicant's position primarily entailed creating rules and establishing test cases for another person to run to see if the Rules would work.[3] The applicant was provided with an hour of training with Mr. Esparza, which was insufficient, and the applicant would need to seek clarification with Mr. Esparza. However, applicant found her interactions with Mr. Esparza were difficult and stressful.[4] The applicant testified:

> The applicant felt very frustrated and felt insufficient. The applicant felt she could not do her job because she didn't know the system and was worried that they were going to let her go. The applicant felt degraded. When she couldn't get her questions answered, she was very frustrated. It would make the

[1] March 27, 2019 MOH/SOE at 9:13.

[2] Id. at 10:1.

[3] Id. at 12:10.

[4] Id. at 10:10.

> applicant nervous. Mr. Esparza answered the applicant's questions less than half the time she asked them.[5]

The applicant experienced a worsening in her pre-existing Irritable Bowel Syndrome (IBS). As her condition worsened, the applicant addressed her concerns to the group supervisor Mr. Goldman:

> The applicant spoke with Mr. Goldman about her interactions with Mr. Esparza, who was being short with the applicant and not answering questions. The applicant related that she wasn't learning the program the way she should have. Mr. Goldman indicated that he hired Mr. Esparza in a managerial position and that he should not have done so because Mr. Esparza was not capable of it. The applicant related her problems with IBS to Mr. Goldman. It was not comfortable to talk about it. The applicant asked if she could work at home in the mornings. Mr. Goldman indicated they would try this approach.[6]

Six months into her employment with Countrywide, applicant developed shingles. Applicant's treating physicians Dr. Kuraishi and Dr. Bitar attributed the shingles onset to work stress.[7]

The applicant continued to experience stress as a result of her interactions with her coworkers, including Mr. Esparza and Mr. Ryan. In January, 2002, the applicant was given an assignment to create a manual for the Merlin computer program. The applicant was tasked with placing the files she created in a shared network drive, where they could be reviewed by her supervisors. The applicant requested, and was granted, accommodation to partially work from home due to her worsening IBS and related health issues. The applicant began to experience anxiety attacks. In July, 2002, the applicant was informed that her work accommodations would be discontinued.[8]

In approximately July, 2002, Mr. Goldman informed the applicant that the manual the applicant had prepared was "not what they were looking for." The applicant received a Performance Evaluation from Moses Esparaza, which included a Performance Improvement Plan regarding the implementation of the Rules. The applicant felt she had 30 days to learn all the things she hadn't learned previously.[9]

Under cross-examination, the applicant noted her one year review was generally positive, but noted a few areas applicant should have known more about, but which were attributed to inadequate training. The applicant was unclear whether the Performance Improvement Plan related to Rules Training or the Merlin manual. The applicant was never told that the Performance Improvement Plan might put her job in jeopardy.[10]

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[5] Id. at 10:17.

[6] Id. at 11:16.

[7] Id. at 11:22.

[8] Id. at 13:6.

[9] Id. at 13:13.

[10] May 15, 2019 MOH/SOE at 2:19.

Called to testify for the defense, Mr. Esparza noted that although the applicant's work was slow, he had no concerns about her ability to complete the assigned Merlin manual. Mr. Esparza instituted the Performance Improvement Plan in an effort to improve applicant's hours, to inform her supervisors of absences, and to improve work product generally.[11] Under cross-examination, Mr. Esparza did not know if a copy of the Performance Improvement Plan still existed. After 17 years, Mr. Esparza did not recall the specifics of the Performance Improvement Plan.[12]

Called to testify for the defense, Seth Goldman recollected a Performance Improvement Plan, but few specifics in that regard. Mr. Goldman indicated that after 15 years, he had no independent recollection of the plan, or whether it still exists.[13] Mr. Goldman testified that there was a" disconnect" between commonly used terms in the mortgage industry and applicant's knowledge of those terms.[14]

On or about August 9, 2002, the applicant was taken off work by her primary care physician for work stress, IBS and shingles.

Medical-Legal Reporting

Although the date of filing of the application in this matter predates the EAMS/Filenet system, an application is reflected as having been filed on August 9, 2002, the date the applicant was taken off work by her primary care physician.

Defendant retained H. William Winter, Ph.D., to evaluate the applicant. A brief "initial report" dated October 3, 2002 is in evidence as Exhibit A. The report indicates applicant to be a poor historian who disclaimed harassment, discrimination, unreasonable work load, impossible working condition or job stress. According to Dr. Winter, the applicant was furious about her "write-up" by Moses, and was taken off work on August 9, 2002. Dr. Winter ascribed all of applicant's medical conditions to her own "rather narrow comfort zone, personal prejudices, misperceptions and the 7/23/02 disciplinary action which seemed to have some basis in reality and did not impress me ae vindictive or capricious."[15] Dr. Winter indicated a follow-up report would be forthcoming, however, that report has not been offered into evidence. It is unclear what documentary or other basis the doctor based his reporting on.

The defendant also selected Richard Hyman, M.D. to act as the internal medicine defense QME. Dr. Hyman evaluated the applicant on October 10, 2002, and noted applicant's stress leave. Dr. Hyman opined that "if, as stated in your 10/02 letter she has warnings for unsatisfactory performance and is not happy with a new manager, she probably does not have a bona fide history of perceived stress-which could have affected any of her medical conditions."[16]

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[11] Id. at 4:20.

[12]Id. at 6:21.

[13] Id. at 10:14; 10:22.

[14] Id. at 9:22.

[15] Ex. A, October 3, 2002 report of H. William Winter, Ph.D. at p.2.

[16] Ex. G, October 10, 2002 report of Richard Hyman, M.D.

Applicant selected A. Joseph Glaser, Ph.D. to act as her treating psychologist. Dr. Glaser prepared an October 31, 2002 initial comprehensive evaluation.[17] Therein, the applicant was noted to be experiencing job stress, difficulty interacting with her colleagues, and work in a chaotic environment, all superimposed on a worsening IBS and shingles condition. The applicant's condition had progressively worsened until she began to experience anxiety attacks. The applicant was worried that she might be replaced. Applicant was deeply concerned that her employer was dissatisfied with the Merlin manual she had worked on for seven months. The applicant was placed on temporary total disability due to the severity of her symptoms. The applicant was certified for State disability benefits, paid per the EDD for the period August 17, 2002 through August 15, 2003.

Follow-up treatment obtained through psychologist Richard North, Ph.D. in 2003 indicates the applicant was experiencing sequelae of her work stress, but makes no mention of stress or anxiety arising out of applicant's performance improvement plan.[18]

Defense QME Dr. Hyman, in internal medicine, prepared a supplemental report wherein applicant's condition was ascribed to nonindustrial factors. Dr. Hyman opined:

> The medical records make it quite clear that this patient has long standing preexisting psychological difficulties and the inability to get along at work. Therefore any problems she encountered are created by herself based on her own psychological issues. The work place is passive and she did not have a bona fide history of perceived work related stress and experiences the same problems at each employer she goes to. She creates her own difficulties. The work place is passive and has not in any way actively contributed. Therefore, she does not have any bona fide history of perceived stress which could affect any internal medicine conditions.[19]

Treating psychologist Dr. Glaser deemed applicant to have reached a permanent and stationary status as of December 7, 2004. Dr. Glaser noted "Ms. Bufalino has been unable to work since 8/9/02, a period of approximately two years and four months as of this report. She continues to experience numerous significant physical and psychological complaints, which continue to impair her capacity to work."[20] Disability was quantified using the Eight Categories of Work Impairment, while the applicant's condition was noted to be 70% industrial, with 30% attributed to pre-existing factors or comorbidities.

Defense QME Dr. Winter then authored a January 13, 2005 report in which he opined that the applicant's condition might arise out of personnel action. Dr. Winter wrote:

> Ms. Bufalino was upset that Seth limited her with regards to working at home, furious about Moses' warning on July 23, 2002, and again angered on August 9th when Seth remarked that the Merlin Manual did not meet his

[17] Ex. 27, October 31, 2002 report of A. Joseph Glaser, Ph.D. at p.12.

[18] Ex. 31, November 11, 2003 report of Richard North, Ph.D.

[19] Ex. H, November 26, 2003 report of Richard Hyman, M.D.

[20] Ex. 25, December 7, 2004 report of A. Joseph Glaser, Ph.D. at p. 2.

> expectations. These three matters had a profound impact on the patient as they contributed to her notion that she was being treated unfairly. These events, however, are more than likely good faith personnel and disciplinary actions, so do not provide the basis for compensable psychiatric condition.[21]

Subsequent record review reports from Dr. Winter in 2006, 2008 and 2013 reaffirm prior opinions. Similarly, subsequent reporting from Dr. Glaser between 2006 and 2014 essentially confirms prior levels of disability with little interval change.

Trial was held in this matter in 2019, at which time the record was deemed not substantial medical evidence in multiple respects. Supplemental reporting was ordered pursuant to Labor Code § 5701.

Dr. Glaser authored a supplemental report of October 16, 2019, wherein he reviewed interim records, finding no good cause to change his prior opinions as to disability levels. However, Dr. Glaser explicated the causation analysis as it related to the issue of whether personnel action was a substantial cause of applicant's alleged psychiatric disability.

> It is my opinion based upon the above records, as well as years of work with Ms. Bufalino, that approximately 20 percent of Ms. Bufalino's permanent psychological disability can be apportioned to disciplinary actions, including the assignment of a performance improvement plan toward the end of her employment with Countrywide Home Loans. Twenty percent of causation is insufficient to rise to the level of a *Rolda* analysis, so the issue as to whether or not the performance improvement plan and related discipline were lawful, nondiscriminatory, good faith or otherwise would not affect the case in chief. Should a trier-of-fact make a determination that the disciplinary actions as documented were lawful, nondiscriminatory and good faith, then 20 percent apportionment of permanent psychological disability to non-industrial may be appropriate. If a trier-of-fact makes a determination that the personnel actions referenced in the above records were either unlawful, discriminatory or in bad faith, then there would be no apportionment due to personnel actions. Given the dramatic change in Ms. Bufalino's level of functioning per the reviewed records, approximately 10 percent of permanent psychological disability is reasonably apportioned to the natural progression of preexisting medical and psychological conditions, inclusive of depression, to a lesser extent anxiety, and a lengthy history of irritable bowel syndrome which had been relatively benign compared to that subsequent to her industrial exposure. In the absence of her exposure to continuous emotional trauma at countrywide she would probably still be capable of full time employment, would probably not have developed panic attacks and self-mutilation, and would probably not have developed exacerbations of her preexisting conditions.[22]

[21] Ex. B, January 13, 2005 report of H. William Winter, Ph.D. at p.4.

[22] Ex. 35, October 16, 2019 report of A Joseph Glaser, Ph.D., at p. 35.

Applicant also selected Timothy Reynolds, M.D. to act as the applicant's QME in internal medicine. The applicant was evaluated on October 22, 2019, with a report issuing with the same date.[23] The report reflects a clinical examination coupled with an extensive records review. After a discussion of that medical record, superimposed on applicant's post-injury course of treatment, Dr. Reynolds opines that applicant's IBS was pre-existing, and irrespective of psychiatric injury, would not have an industrial nexus.[24] Dr. Reynolds also reviewed the reporting of Dr. Rodas which explained that applicant's prior hemorrhoid condition was derivative of the IBS.[25]

However, Dr. Reynolds did find that the applicant's multifactorial GERD diagnosis had a nexus with industrial stress. After noting a significant array of nonindustrial comorbidities, and the applicant's medical history, Dr. Reynolds opined to 20% industrial causation of the GERD.

Supplemental reporting from defense QME (internal medicine) Dr. Hyman dated November 1, 2019 reiterated prior opinions of nonindustrial causation, observing that the "only way GERD would be work related would be if she had work related orthopedic problems and was taking nonsteroidal anti-inflammatories for these."[26] Dr. Hyman further opined, however, that "if there is a question of a work related contribution, she is H. pylori positive and would need to be heated for this before she could be considered permanent and stationary and impairment addressed."

The defendant selected Brian Jacks, M.D. to act as the defense QME in psychiatry A March 2, 2020 report of Dr. Jacks addressed factors relevant to the issue of whether lawful, nondiscriminatory good-faith personnel action was a substantial cause of applicant's alleged psychiatric injury. After rev1ewmg the medical record, and specifically the reporting of Drs. Glaser and Winter, Dr. Jacks opined:

> In summary, then, there are extreme disagreements between William Winter, Ph.D., as finding no compensable predominant causation of the psychiatric injury to be industrial whereas the applicant's treating psychologist Joseph Glaser does find significant psychiatric disability in the range of about 45. Unfortunately, here, I find both of these reporters to be flawed in terms of discussion of the causation of psychiatric injury. They have not discussed the requirements mandated by the Rolda versus Pitney Bowes case. They have discussed part of this indicating their conclusions concerning whether the predominant, more than 50%, cause of the psychiatric injury is related to work stress or not, but they have not indicated actual percentages for the various issues and parts. After that, it is legal determination whether or not there were actual events of employment as described, first of all, and, secondly, whether more than a substantial, 35% to 40% cause of the

[23] Ex. 34, October 22, 2019 report of Timothy Reynolds, M.D.

[24] Id. at pp. 26-27.

[25] Id. at p.11.

[26] Ex. 0, November 1, 2019 report of Richard Hyman, M.D. at p. 5.

> psychiatric injury is related to lawful, good faith, nondiscriminatory personnel actions or not.[27]

Dr. Jacks framed his analysis as a tripartite discussion of applicant's difficulties at Countrywide:

> As far as the work stress is concerned, there are three basic issues. The first was her difficulties with Moses as far as her supervisor, whom she claims was cold to her, not communicating and did not help her train or answer her questions. One of the problems I have with this, however, is that he was her supervisor only for a few months. She complained about this and then was transferred to Seth Goldman although she had to work at times with Moses. She continues to cling to her upset with her supervisor, but this again seemed to be minimal as far as I can determine because it was only a very brief period of time.
>
> Secondly, she had been working from home because of her IBS and would come late at times. This was of concern to work. This bothered her as well and she felt she should be accommodated.
>
> Then, finally, the thing that really upset her most and got her to be off work was a write-up 7/23/2002 in which there was a warning that she was late to work too much and that she had problems with completing the Merlin Manual and working on it as was requested.[28]

Dr. Jacks concludes that 30% of the applicant's psychiatric injury was preexisting and nonindustrial, with 70% industrial. Of the 70%, 10% was caused by interpersonal conflict with supervisor Moses, 10% to work from home accommodation issues, and 50% to the "final write-up, 07 /30/2002."[29]

Additionally, Dr. Glaser has authored two supplemental medical-legal reports in 2021. The first, dated May 14, 2021 again noted 10% apportionment to preexisting causes.[30] Dr. Glaser further authored an extensive supplemental report of June 29, 2021. Therein, Dr. Glaser reiterated his opinion that the applicant's psychiatric claim met industrial predominance requirements under Labor Code § 3208.3.[31] Dr. Glaser further reiterated his opinion of 10% nonindustrial causation. Dr. Glaser then noted an array of "intermingled factors," so intertwined that apportionment would be inherently speculative. These factors included difficulties with coworkers Seth Goldman, Moses Esparza, Richard Ryan, horseplay near applicant's work station, and her physiological response to the stress including aggravated IBS, hives and shingles and associated pain and discomfort. These factors were then superimposed on applicant's assignment to write the manual for the Merlin program, with the stresses inherent to the process. The intermingled industrial factors accounted

[27] Ex. P, March 2, 2020 report of defense QME (psychiatry) Brian P. Jacks, M.D., at p.28.

[28] Id. at p.30.

[29] Id. at p.31; the 50% figure was originally listed as 55% due to clerical error, and was corrected by Dr. Jacks in a supplemental report of June 10, 2021, in evidence at Exhibit Q.

[30] Ex. 36, May 14, 2021 supplemental report of A. Joseph Glaser, Ph.D.

[31] Ex. 37, June 29, 2021 supplemental report of A. Joseph Glaser, Ph.D. at pp.3-4.

for 70% causation. The final 20% of the industrial causation of applicant's psychiatric injury was ascribed to performance improvement plan and the changes to her work from home accommodations in July, 2002.[32]

Finding that potential perso1mel action could not account for more than 20% causation, Dr. Glaser opined that perso1mel action did not rise to the level of substantial cause (i.e. 35%-40%) of applicant's psychiatric injury.

Analysis

Applicant alleges injury arising out of and in the course of her employment with Countrywide. Both defense QME Dr. Jacks and applicant's treating psychologist Dr. Glaser find industrial predominance (greater than 50% causation) under Labor Code § 3208.3. Both doctors identify factors including difficulties with work product, pace, interpersonal difficulties, and an adverse response to the July, 2002 Performance Improvement Plan.

Where the two opinions diverge is how the factors of causation are assessed. Dr. Jacks finds that 50 % of the applicant's industrial injury is a direct outgrowth of her response to the performance improvement plan, with modest contribution from other industrial and nonindustrial factors. Dr. Glaser finds applicant's ongoing stress at work from a variety of factors to be so intermingled as to defy discrete analysis, which in the aggregate accounted for 70% causation. Dr. Glaser identified the events at the end of applicant's employment, including the Performance Improvement Plan and the changes to work from home accommodation at only 20% causation.

The applicant's sworn testimony in this regard is germane. The applicant testified to a gradual but continuous process of accumulative work stress arising out of a multitude of factors. This included her difficulties in communicating with co-workers and her supervisor; with a difficult job assignment and feeling she did not possess the understanding to perform the job at maximum efficiency; and from external factors such as having a dartboard (or something similar) that encouraged horseplay adjacent to her workstation.[33] The applicant did testify to the Performance Improvement Plan, but only as one of multiple factors. The multiple and overlapping factors of causation are reflected in applicant's contemporaneous correspondence to her supervisors. Applicant's emails to Seth Goldman dated August 9, 2002 reflect significant stress arising out of the response to the manual applicant had been working on for seven months:

> I have been working on the Merlin Users Guide for 5 months. Throughout the entire time, preliminary changes, corrections, additions, deletions have been made. I have been placing the document on AT s shared drive every step of the way for reviewing. As late as the last weeks of July changes were being given to me. Never has there been a comment or statement of a major change or dissatisfaction with the content.
>
> At the end of July the final draft was given to the office for everyone's review. I am totally confused as to why there are major changes at this late date since I have been working closely under yours and Moses' supervision. I am so

[32] Id. at p.3.

[33] March 27, 2019 MOH/SOE at pp.10-13.

> stressed and upset that we now have to look at additional major changes that my medical condition has worsened and I feel that I must see my physician today. I will go as early as possible and will try to be in the office as quickly as possible.[34]

On the other hand, the applicant also emailed her supervisor Moses Esparza on August 5, 2002 that her medical condition had gotten worse from "stress I've have [sic] had since you gave me the Written Counseling."[35]

Contemporaneous medical reporting also reflects a wide variety of causal factors. The initial report of Dr. Glaser, dated October 31, 2002, reflects difficulties with communication with Moses Esparza, perceived difficulties with a lack of on the job training, difficulties navigating a proprietary application interface, a chaotic work environ11ent, and a generally difficult work experience. The applicant experienced the onset of anxiety attacks in early 2002. While the applicant related to Dr. Glaser that she did receive a 30-day warning in July, 2002, she also noted that it was when Mr. Goldman indicated the user manual she had been working on was "not what they had in mind" that her psychophysiological issues became overwhelming.

It is acknowledged that the also contemporaneous reporting of Dr. Winter describes the applicant as "furious" about the Performance Improvement Plan.[36] However, given the lack of a record review, the missing follow-up report, the failure of appropriate Labor Code § 4628 declaration, or any substantive indication of how the doctor arrived at this opinion, the report is not accorded any evidentiary weight.

The Workers' Compensation Appeals Board is empowered to review the medical record and to choose among the conflicting medical reports and rely on that which is deems most persuasive.[37] Here, the applicant's credible trial testimony reflects a multitude of causative factors accreting over the course of the claimed cumulative trauma period, causing her preexisting physiological co-morbidities to become aggravated to the point where applicant began to experience anxiety attacks. The applicant sought, and was granted, the work accommodation allowing her to work from home in 2002. The applicant's frequent and increasing physiological response to work stress, including hives, shingles, more frequent and daily bouts of !BS, and the development of anxiety attacks all speak to an ongoing process of accruing work stress and the physiological response to that stress.

There is no dispute that events of employment were the predominant cause of applicant's psychiatric injury. There is no question that the applicant had an adverse reaction to the Performance Improvement Plan authored by Mr. Esparza in July, 2002. However the greater weight of the admitted evidence does not support Dr. Jacks' finding that applicant's dissatisfaction with the July, 2002 Performance Improvement Plan was the predominant factor of causation of her psychiatric injury. Rather, the evidence supports Dr. Glaser's interpretation of the Performance Improvement Plan as but one of a multitude of accreting factors which in concert resulted in the

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[34] Ex. J, Various Emails from Applicant, email to Seth Goldman dated August 9, 2002, p.5.

[35] Id. at p.37 (email dated August 5, 2002).

[36] Ex. A, October 3, 2002 report of William Winter, Ph.D.

[37] *Jones v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 476 (33 Cal. Comp. Cases 221).

development of applicant's psychiatric injury, and its sequelae. Having reviewed the totality of the evidence before the court, including the reporting of treating psychologist Dr. Glaser and defense QME Dr. Jacks, the court finds the reporting of Dr. Glaser to be the more well-reasoned and persuasive.

Pursuant to Labor Code § 3208.3(h), however, compensation may be barred if the psychiatric injury was caused by lawful, nondiscriminatory and good-faith personnel action. Substantial cause is defined as 35%-40%. Per the reporting of Dr. Glaser, which the court finds to be the more well-reasoned and persuasive, persom1el action ca1mot account for more than 20% causation. Because persom1el action is not a substantial cause of the injury, compensation is not barred by Labor Code § 3208.3(h).

Based upon applicant's credible testimony, and the medical report of treating psychologist A Joseph Glaser, Ph.D., dated June 29, 2021, the applicant has met her burden to establish injury arising out of and occurring in the course of employment on cumulative trauma period July 31, 2000 through August 9, 2002.

INJURY: PARTS OF THE BODY

In addition to claimed psychiatric injury, applicant further alleged injury to her internal system in the form of Irritable Bowel Syndrome, gastroesophageal reflux disorder (GERD), hemorrhoids and shingles.

The applicant has selected QME Dr. Timothy Reynolds, while defendant relies on its QME Richard Hyman, M.D. The reporting of both physicians has been received in evidence.

The court has carefully reviewed the reporting of Dr. Hyman. However, Dr. Hyman's reporting of 2020 does not fully answer the question of industrial contribution to GERD. Dr. Hyman observes that "if there is a question of a work related contribution, [applicant] is H. pylori positive and would need to be treated for this before she could be considered permanent and stationary and impairment addressed." The record reflects no follow-up reporting or additional opinions in this regard. Moreover, Dr. Hyman limits the possible universe of industrial aggravation of GERD to anti-inflammatory medication. Given the credible testimony of the applicant, and the reporting of Dr. Glaser herein, the failure to discuss the interaction between work stress and GERD aggravation significantly impairs weight of the reporting of Dr. Hyman.

Dr. Reynolds accomplishes a competent clinical examination and a thorough record review. The record review of Dr. Reynolds led him to opine to causation at odds with the applicant's stated lay attribution of her IBS to work exposures. Moreover, Dr. Reynolds ably discusses the interplay between stress and applicant's longstanding GERD. As such, the court finds the reporting of Dr. Reynolds to be the more well-reasoned and persuasive.

Based upon applicant's testimony and the report of applicant1s Qualified Medical Examiner (internal medicine) Timothy Reynolds, M.D. dated October 22, 2019, it is found that applicant sustained injury to the psyche and internal system in the form of gastroesophageal reflux disorder (GERD), arising out of and occurring in the course of employment, and did not sustain injury to the irritable bowel syndrome, hemorrhoids or shingles.

TEMPORARY DISABILITY

Applicant claims temporary disability for the period beginning August 9, 2002 to and including December 7, 2004.

Based upon applicant's testimony and the medical reports of treating psychologist A. Joseph Glaser, Ph.D., dated June 29, 2021, it is found that applicant is entitled to temporary disability for the period beginning August 9, 2002, to and including December 7, 2004, payable at the weekly rate of $490.00, less credit for time worked, less credit for EDD benefits (below).

PERMANENT DISABILITY

The factors or permanent disability as set forth in the rating instructions are based upon applicant's testimony with due consideration to her credibility and demeanor as a witness and the medical report(s) of treating psychologist A. Joseph Glaser, Ph.D., dated June 29, 2021, and applicant1s Qualified Medical Examiner (internal medicine) Timothy Reynolds, M.D. dated October 22, 2019. In accordance with the rater's recommendation, it is found that applicant is entitled to a permanent disability award of 70 percent, equivalent to 426.5 weeks of indemnity payable at the rate of $230.00 maximum per week, in the total sum of $98,095.00, payable forthwith, less attorney fees.

APPORTIONMENT

Based upon the medical report of treating psychologist A. Joseph Glaser, Ph.D., dated June 29, 2021, and applicant's Qualified Medical Examiner (internal medicine) Timothy Reynolds, M.D. dated October 22, 2019, based upon applicant's testimony, it is found that there is legal basis for proper apportionment of 10% of the psychiatric disability to nonindustrial factors, and 80% of the GERD-related disability to nonindustrial factors, as set forth in the formal rating instructions.

NEED FOR FURTHER MEDICAL TREATMENT

Based upon the medical report of treating psychologist A. Joseph Glaser, Ph.D., dated June 29, 2021, and applicant's Qualified Medical Examiner (internal medicine) Timothy Reynolds, M.D. dated October 22, 2019, it is found that applicant is in need of further medical treatment to cure or relieve from the effects of the injury herein.

SELF-PROCURED MEDICAL TREATMENT AND MEDICAL-LEGAL COSTS

Deferred per stipulation of parties.

LIEN OF EMPLOYMENT DEVELOPMENT DEPARTMENT

Based on the finding of temporary and permanent disability, the Employment Development Department is entitled to recover the entirety of its lien, plus statutory interest.

ATTORNEY FEES

Applicant's counsel has shepherded this case through nearly twenty years of litigation. At this juncture, the award of permanent disability has fully accrued, in addition to more than eight additional years of life pension for the applicant. The court finds a reasonable attorney fee to be 15% of the temporary disability indemnity awarded herein, 15% of the awarded permanent

disability, and an additional 15% of all *accrued* life pension indemnity benefits. All remaining life pension benefits are to be paid to the applicant without deduction.

15% of the award of permanent disability of $98,095.00 yields $14,714.25. Since the end of Permanent Disability, approximately 446 weeks have accrued, at the life pension rate of $38.65, or $17,237.90, 15% of which yields $2,585.66. $14,714.25 and $2,585.66 sum to $17,299.91.

Based upon the Workers' Compensation Appeals Board Rules of Practice and Procedure, California Code of Regulations, Title 8, Section 10844, and the guidelines for awarding attorney fees found in the Policy and Procedure Manual Index §1.140, a reasonable attorney fee is found to be $17,299.91 which shall be commuted accrued benefits, plus 15% of any accrued, unpaid monies awarded to applicant as a result of the award of temporary disability indemnity after deduction for EDD reimbursement.

Dated: August 31, 2021

SHILOH ANDREW RASMUSSON
Workers' Compensation Administrative Law Judge