WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EZRA CENTENO, *Applicant*

vs.

HARBOR FREIGHT TOOLS; SAFETY NATIONAL CASUALTY CORPORATION, administered by CORVEL CORPORATION, *Defendants*

Adjudication Number: ADJ10434987
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the First Amended Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on January 4, 2019, which found, in pertinent part, that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her psyche, neck, jaw, teeth and injury in the form of headaches and sleep disorder and awarded future medical treatment. The WCJ also found that applicant's claim is not barred by Labor Code section 3208.3(h) [1] - the lawful, nondiscriminatory, good faith personnel action defense.[2]

Defendant contends that that the WCJ applied the wrong legal standard when he failed to determine that that applicant's psychiatric injury was not compensable because it was substantially caused by lawful, nondiscriminatory, good faith personnel actions under section 3208.3(h), that the personnel actions were a substantial cause of applicants psychiatric injury and that applicant's

[1] All future statutory references are to the Labor Code unless noted.

[2] Section 3208.3(h) states: "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."

orthopedic and temporomandibular joint disorder (TMJ) claims flowed solely from the psychiatric injury and therefore also barred.

We received no answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of defendant's Petition for Reconsideration and the WCJ's Report with respect thereto. Based on our review of the record and applicable law, we conclude that the WCJ must revisit the issue of lawful, nondiscriminatory, good faith personnel actions, including further development of the medical record on this issue. Therefore, we will rescind the WCJ's decision and return this matter to the trial level for further proceedings and new decision by the WCJ.

FACTS

In his Report, the WCJ sets forth the relevant factual background as follows:

> Trial hearings were held on May 11, 2017 and July 20, 2017, with testimony from both applicant Ezra Centeno and her former supervisor, Jarod Koenig. Applicant testified that she was hired to work as a manager for Harbor Freight Tools by George Zien, who was the procurement director for the company at the time, as shown in the June 7, 2012 offer of employment, admitted into evidence as Joint Exhibit 10 (MOH/SOE 05/11/2017, p. 4, lines 18-19). Ms. Centeno testified that she worked an average of 10 hours per day, but sometimes 12 hours or more, sometimes staying at the office until 10:00 pm. or even 2:00 a.m., which was "getting dangerous" for her (*Id.,* p. 4, lines 22-24). Soon she became a purchasing supervisor for over 300 stores, warehouses, and the office (*Id.,* p. 5, lines 1-2), which increased to 700 stores by the time she left work (*Id.,* p. 5, lines 4-5).
>
> Mr. Zien was applicant's supervisor and gave her very favorable performance reviews, finding that applicant "exceeds expectations" (*Id*., p. 5, line 6, to p. 6, line 3). After Mr. Zien was promoted to Senior Director, Jarod Koenig became applicant's manager, and when he wrote her 2015 and 2016 performance reviews, he found that she "meets expectations" (*Id*., p. 6, line 4, top. 7, line 7).
>
> Applicant testified that Mr. Koenig required her to bring her reviews to him, and he once told her that her review was written like she was doing it over a glass of wine, or like her husband, who was a boxer, wrote it while he was punch drunk (*Id*., p. 8, lines 11-12). Ms. Centeno wanted to be promoted, but at lunch she heard the company's Vice President of Finance say that "you have to be liked" to get promoted (*Id*., p. 8, lines 19-21).

Mr. Koenig testified that he met with applicant about coming to work earlier and not closing her door during procurement meetings (*Id*., p. 11, line 22, to p. 12, line 2). Mr. Koenig thought that Ms. Centeno was "very emotional" (*Id*., p. 12, line 4). He thought applicant had a problem with lateness, but not as much in fiscal year 2016 when it improved (*Id*., p. 12, lines 23-24). He was uncomfortable when applicant cried and raised her voice at his final meeting with her on April 14, 2016, when she told Mr. Koenig, "If you keep pushing, I'm going to walk out the door" (*Id*., p. 14, lines 10-15). At the time, a project called the "dashboard" was behind schedule, and Ms. Centeno was not close to getting a signed agreement with the legal department and vendors (*Id*.) In April 2016, applicant was behind on invoices, but Mr. Koenig did not write her up for this or give her a formal warning (MOH/SOE 07/20/2017, p. 5, line 24, top. 6, line 2). Mr. Koenig feels that he "had a good working relationship" with Ms. Centeno (MOH/SOE 05/11/2017, p. 14, lines 1-2).

A Findings and Award dated August 31, 2017 found that Ms. Centeno sustained injury arising out of and in the course of employment to her psyche. The Findings and Award were rescinded pursuant to California Code of Regulations, Title 8, Section 10859 after defendants filed a petition for reconsideration, and further proceedings were held to develop the record, culminating in further trial hearing on November 6, 2018, at which supplemental medical reports were taken into evidence and applicant testified about symptoms in the form of headaches, tightness in her neck and shoulders, and clenching her jaw, mainly at night (MOH/SOE 11/13/2018, p. 3, lines 5-14).

A First Amended Findings and Award dated January 4, 2019 found that applicant Ezra Centeno sustained injury to her psyche arising out of and occurring in the course of employment as a purchasing supervisor at Harbor Freight Tools during the period of June 30, 2012 through April 18, 2016, based on applicant's credible testimony and the medical reports of Agreed Medical Evaluator (AME) Myron Nathan, M.D., dated November 3, 2016 and January 25, 2017. Based upon applicant's credible testimony and the medical reports of Richard Scheinberg, M.D., dated June 22, 2016 and June 11, 2018, and the medical report of Dr. Ramin Hatami dated April 19, 2018, it was found that applicant Ezra Centeno also sustained injury to her neck, jaw, sleep, teeth, and headaches, arising out of and occurring in the course of employment as a purchasing supervisor at Harbor Freight Tools during the period of June 30, 2012 through April 18, 2016. Based upon the medical reports of AME Myron Nathan, M.D., Richard Scheinberg, M.D., and Dr. Ramin Hatami, it was also found that applicant is in need of further medical treatment to cure or relieve from the effects of the industrial injury to her psyche, neck, jaw, sleep, teeth, and headaches.

On January 24, 2019, counsel for defendants filed a timely, verified petition for reconsideration of the First Amended Findings and Award. Defendants' petition also requests a stay of the award of future medical care.

(WCJ's Report, pp. 2-3.)

DISCUSSION

Section 3208.3 provides, in relevant part, as follows:

> In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury.
> (Lab. Code, § 3208.3(b)(1).)

"Predominant as to all causes" means that "the work-related cause has greater than a 50 percent share of the entire set of causal factors." (*Dept. of Corrections v. Workers' Comp. Appeals Bd. (Garcia)* (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356, 1360]; *Watts v. Workers' Comp. Appeals Bd.* (2004) 69 Cal.Comp.Cases 684, 688 (writ den.).) Here, the WCJ concluded that based on the medical reports of Myron Nathan, M.D., dated November 3, 2016 and January 25, 2017, the actual events of employment are the predominant cause of injury to applicant's psyche.

However, after the threshold for a compensable psychiatric injury has been met under section 3208.3(b), if the employer has asserted that some of the actual events of employment were good faith personnel actions, the WCJ must determine whether section 3208.3(h) bars applicant's claim. Section 3208.3(h) provides as follows:

> 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.
>
> (Lab. Code, § 3208.3(h).)

Section 3208.3(b)(3) defines substantial cause as "at least 35 to 40 percent of the causation from all sources combined." (§ 3208.3(b)(3).)

A multilevel analysis is accordingly required when an industrial psychiatric injury is alleged and the employer raises the affirmative defense of a lawful, nondiscriminatory, good faith personnel action. (*Rolda v. Pitney Bowes, Inc.* (2001), 66 Cal. Comp. Cases 241 (Appeals Board en banc).) The required multilevel analysis is, 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. (*Rolda, supra*, at 247.)

Here, we find that the WCJ utilized too restrictive of a standard in determining whether the events were good faith personnel actions. The WCJ concluded in his opinion:

> Based on the medical reports of Myron Nathan, M.D., dated November 3, 2016 and January 25, 2017, it is found that actual events of employment are the predominant cause of injury to applicant's psyche. However, it is also found that none of the actual events of employment, as described by Dr. Nathan in his causation analysis, are "personnel actions" under Labor Code §3208.3(h), because they do not involve termination, formal disciplinary action, or any adverse action that would constitute a "personnel action" for purposes of §3208.3(h).

We note that it is not necessary that an event involve a termination, formal disciplinary or adverse action in order to be considered a personnel action for the purposes of section 3208(h). *County of Sacramento v. Workers' Comp. Appeals Bd. (Brooks)(* (2013) 215 Cal.App.4th 785, 790-791) more broadly provides:

> A personnel action has been defined as conduct attributable to management in managing its business, including such things as reviewing, criticizing, demoting, transferring, or disciplining an employee. (*Larch v. Contra Costa County* (1998)

63 Cal.Comp.Cases 831, 833–839; *Stockman v. State of California/Department of Corrections* (1998) 63 Cal.Comp.Cases 1042, 1044–1047.) "An employer's disciplinary actions short of termination may be considered personnel actions even if they are harsh and if the actions were not so clearly out of proportion to the employee's deficiencies so that no reasonable manager could have imposed such discipline. [Citation.]" (*Larch v. Contra Costa County, supra*, 63 Cal.Comp.Cases at p. 833.) "It is unnecessary, moreover, that a personnel action have a direct or immediate effect on the employment status. Criticism or action authorized by management may be the initial step or a preliminary form of discipline intended to correct unacceptable, inappropriate conduct of an employee. The initial action may serve as the basis for subsequent or progressive discipline, and ultimately termination of the employment, if the inappropriate conduct is not corrected." (*Id.* at pp. 834–835.) What constitutes a personnel action depends on the subject matter and factual setting for each case. (*Id.* at p. 833.)
(*County of Sacramento v. Workers' Comp. Appeals Bd. (Brooks)* (2013) 215 Cal.App.4th 785, 790-791 [156 Cal.Rptr.3d 326].)

In this case, the WCJ relied on the events described by AME Dr. Myron Nathan, MD who provided:

In regard to the cause of the applicant's psychiatric disorder, the employment events are the following.
Employment Event #1
Between October, 2014 and the time the applicant left work, it was the applicant's belief that Mr. Koenig felt that he needed to improve the overall working of her department - 2%.

Employment Event #2
Between 2014 and August, 2014, Mr. Koenig would reject her request that her team members be promoted - 2%.

Employment Event #3
Between August, 2014 and April, 2016, Mr. Koenig was critical of the performance of her subordinates - 2%.

Employment Event #4
In August, 2015 and January, 2016, Mr. Koenig re-wrote the six reviews that the applicant had completed of a subordinate which he had her sign even though she did not disagree with his comments and she was told she must have been drinking wine while she wrote these reviews or she had her husband write them - 4%.

Employment Event #5

In March, 2016, while given authorization to leave work at 12 noon to attend a memorial of a death of a friend, Mr. Koenig had the applicant's co-workers call and text her requesting the password to a software data base and he informed her co-workers that he did not know that she had left work which the applicant felt made her look bad in front of her co-workers and she felt that he did not listen to her - 4%.

Employment Event #6
Mr. Koenig had been reprimanded by calling three a "bunch of gangsters." Subsequently two of her team members left stating it was because of Mr. Koenig. After the second employee left, the applicant went to the Human Resources Department and the employees in her department were interviewed, but nothing occurred - 0%.

Employment Event #7
In January, 2015, Mr. Koenig told the applicant that until she was trusted by him she was not going to be promoted. Another time he told her that she was not being promoted because she was emotional. In April, 2016, the day before leaving work, Mr. Koenig informed the applicant that she would not be promoted as she only "met expectations." This had been in conjunction with his lowering her performance evaluations once he became her supervisor and her receiving a performance evaluation in January, 2016 that only "met expectations - 50%.

In February or March, 2016, the applicant consulted the Human Resources Department in order to request assistance in approaching Mr. Koenig in order that she could be promoted. In approximately February, 2016, a vice-president of the company with whom she had no difficulty informed the applicant that she would not be promoted as she had to be liked which the applicant interpreted to mean that Mr. Koenig did not like her - 4%.

Employment Event #8
Between October, 2014 and April, 2016, Mr. Koenig refused her request to hire one or two additional employees. When she began working there was a total of approximately 300 stores and when she stopped work there were almost 700 stores - 4%.

Employment Event #9
Mr. Koenig would give her a difficult time when she wanted a day off- 2%.

Employment Event #10

> Between January, 2015 and April, 2016, Mr. Koenig changed her work duties as she was only to focus on paying invoices on time and not working on larger projects - 26%.
>
> **TOTAL: 100%**

(AME Report Exhibit 1. Myron Nathan, M.D., dated November 3, 2016, pgs. 29-30.)

In his analysis, the WCJ failed to recognize that personnel actions include broader conduct attributable to management in managing its business, including such things as reviewing, criticizing, demoting, transferring, or disciplining an employee. For example, a performance evaluation where applicant was informed by her manager why she would not be promoted appears to involve reviewing and criticizing appears to fall within the broader definition of personnel action. Upon return, the WCJ should apply the broader standard to each identified employment event in determining whether the events were attributable to management in managing its business.

In addition to utilizing too narrow of a standard to determine good faith personnel action, it also appears that the required multilevel analysis outlined in *Rolda* was not adequate. The WCJ concluded only generally that the events described in Dr. Nathan's report were not good faith personnel actions. However, the WCJ must evaluate the employer's conduct by discussing each specific employer action during the alleged cumulative trauma period. He should then make a finding as to why each action either is, or is not, a good faith personnel action. On this record, the discussion regarding "good faith personnel action" and causation is incomplete.

Additionally, *Rolda* requires medical evidence to determine whether any lawful, nondiscriminatory, good faith personnel actions were a substantial cause (35-40%) of the injury. (*Rolda*, *supra*, at 246.) Here, while Dr. Nathan's report does assign percentages of causation for each of the events identified, Dr. Nathan fails to provide any explanation or analysis as to how those percentages were determined or calculated. Consequently, the record may need to be further developed as well. (AME Report Exhibit 1, pgs. 29-30.) Once the WCJ has utilized the correct standard and identifies which events, if any, were good faith personnel actions, the AME may have to comment on the assessment of percentage of causation for these actions in order to determine

whether they were a substantial cause of applicant's psychiatric injury, barring her claim(s) pursuant to section 3208.3(h).

Accordingly, as our Decision After Reconsideration, we rescind the F&A and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the First Amended Findings and Award issued by the WCJ on January 4, 2019 is **RESCINDED.**

IT IS FURTHER ORDERED that this case is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 6, 2023

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

EZRA CENTENO
LAW OFFICES OF SEF KRELL
SION AND ASSOCIATES, ATTN.: STEVEN M. SION

LN/pm

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