

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

MELINDA PRISKIN, *Applicant*

vs.

**BANK OF AMERICA; XL INSURANCE AMERICA, INC.,
administered by, CORVEL CORPORATION *Defendants***

**Adjudication Number: ADJ11292320
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.¹

Applicant seeks reconsideration of the “Findings and Order” (F&O) issued on March 30, 2021, by the workers’ compensation administrative law judge (WCJ). The WCJ found, in pertinent part that defendant’s denial of applicant’s claim of cumulative injury to her psyche and in the form of headaches, insomnia, and internal complaints was untimely and that applicant was entitled to the presumption of compensability pursuant to Labor Code², section 5402(b)³; however, the WCJ further found that that applicant’s injury to psyche was predominantly caused by lawful, non-discriminatory, good-faith personnel actions per section 3208.3(h) and ordered that applicant take nothing on her claim.

Applicant contends, in pertinent part, that the WCJ improperly allowed testimony of an employer witness in violation of section 5402 and failed to provide a proper analysis per *Rolda v. Pitney Bowes, Inc.* (2001), 66 Cal.Comp.Cases 241, 245-246 (Appeals Board en banc) in finding that defendant met its burden of proof.

¹ Commissioner Lowe was on the panel that issued the order granting reconsideration. Commissioner Lowe no longer serves on the Appeals Board. A new panel member has been appointed in her place.

² All future references are to the Labor Code unless noted.

³ Although we are rescinding this decision, we note that defendant did not challenge the WCJ’s finding that applicant’s injury was presumed compensable under section 5402(b).

We have not received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration we will rescind the Findings and Order and return this matter to the trial level for further proceedings consistent with this opinion.

FACTS

Applicant worked as a team manager for defendant when she alleged a cumulative injury through the period ending on February 27, 2018, to her psyche, and in the form of headaches, insomnia, and internal complaints. (Minutes of Hearing and Summary of Evidence, September 10, 2020, p. 2, lines 3-6.)

Applicant filed her claim on April 26, 2018. (Applicant's Exhibit 3; Minutes of Hearing and Summary of Evidence, February 22, 2021, p. 3, line 20.) Defendant issued its denial letter on July 31, 2018, which was 96 days later. (Defendant's Exhibit G, Denial Letter, July 31, 2018.) The WCJ found that defendant's denial was untimely, and that applicant was entitled to the presumption of compensability per section 5402. (F&O, *supra* at Findings 2 through 5.) However, defendant also raised an affirmative defense that applicant's injury was substantially caused by lawful, nondiscriminatory, good-faith personnel actions.

In the F&O, the WCJ stated that "Applicant did not submit a psychiatric report in the form required by Labor Code section 3208.3(a)." (F&O, *supra* at p. 11.) However, applicant was evaluated by a qualified medical evaluator (QME) whose report is in evidence. The QME opined on industrial causation of psyche injury as follows:

In my opinion 30% out of 100% of her psychiatric injury was caused by actions of her supervisor, Mr. Neil Patak and later on his boss: Neil's animosity towards her, criticism towards her management style, imposing his management style on her, criticism for her team members being late from breaks, timeliness for employee's monthly performance evaluation cards preparation. At some point she also was criticized by Neil's boss in regards to timelines of performance cards preparation, was reportedly given a cold shoulder from him.

In my opinion 30% out of 100% of her psychiatric injury was caused by being subjected to personnel action: mid or end of 2017 negative performance review

which significantly affected her psyche, caused lots of anxiety in addition to depression which already developed by that time.

In my opinion 30% out of 100% of her psychiatric injury was caused by personnel action: termination from her employment which crashed her world, caused worsening of depression.

In my opinion 10% out of 100% of her psychiatric injury was caused by nonindustrial factors: developing and progression of menopause symptoms around same time in 2016 with it's associated mood swings.

(Defendant's Exhibit A, Report of Dmitriy Sherman, M.D., February 27, 2019, p. 43.)

Applicant also submitted a report of a primary treater, who generally opined that applicant's injury was 100% industrial to various employment events. (See Applicant's Exhibit 5, Report of Gayle Windham, Ph.D., May 2, 2018, p. 8.)

The WCJ's opinion did not address the medical evidence submitted. (See generally, F&O.)

DISCUSSION

Labor Code section 5313 requires a WCJ to state the "reasons or grounds upon which the determination was made." The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton, supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.)

Section 5402 states, in relevant part:

If liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this

division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 90-day period.

(Lab. Code, § 5402(b)(1).)

Section 3208.3(h), which provides for the "good faith personnel action" defense, states:

(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.

(Lab. Code, § 3208.3(h).)

We agree with the WCJ that defendant is permitted to raise the affirmative defense of lawful, non-discriminatory, good-faith personnel actions under section 3208.3(h). (See *Insalaco v. Workers' Comp. Appeals Bd. (Insalaco)* (1999) 64 Cal.Comp.Cases 1407 (writ den.), *Carrasco v. Cal. Dept. of Corrections and Rehab. (Carrasco)* (2018) 83 Cal.Comp.Cases 1931, and *Khachatryan v. State Attorney General's Office*, 2019 Cal. Wrk. Comp. LEXIS 37 (*Khachatryan*); *Zelnik v. Office of Statewide Health Planning*, 2023 Cal. Wrk. Comp. P.D. LEXIS 259.)⁴ The Appeals Board has repeatedly held that section 5402(b) does not preclude a defendant from asserting the good faith personnel action defense to bar compensation for a psyche injury. (*Ibid.*)

[W]hen a psychiatric injury is presumed compensable under section 5402(b), defendant is not precluded from asserting and presenting evidence on the good faith personnel action defense under section 3208.3(h), regardless of when the evidence was reasonably obtainable.

(*Khachatryan, supra*, 2019 Cal. Wrk. Comp. LEXIS at *7-8, citing *Carrasco, supra*, 83 Cal.Comp.Cases 1931 & *Insalaco, supra*, 64 Cal.Comp.Cases 1407.)

Accordingly, the WCJ was correct to allow the testimony of defendant's witness and defendant was permitted to present evidence of its affirmative defense. However, the WCJ did not complete the analysis required to determine whether defendant met its burden of proof.

⁴ Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [118 Cal. Rptr. 2d 105, 67 Cal.Comp.Cases 236].) While not binding, the Appeals Board may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc).) We find the reasoning in these cases persuasive given that the case currently before us involves the same legal issue.

In *Rolda v. Pitney Bowes, Inc.* (2001), 66 Cal.Comp.Cases 241, 245-246 (Appeals Board en banc), we addressed the factors that a psychological evaluator must consider in opining on causation of psychological injury and disability under section 3208.3. Per *Rolda*, the evaluator is required to list all factors causing psychological injury, address the percentage of causation that each factor contributes to psychological injury, list all factors causing psychological permanent disability, and address the percentage of causation that each factor contributes to permanent disability.

Once the evaluator issues a *Rolda* compliant report, the WCJ should then determine whether the alleged injury involved actual events of employment, and whether each actual event of employment constituted a lawful, non-discriminatory, good faith personnel action. (§ 3208.3(h).) If the psychological injury is predominantly caused (51% or more) by actual events of employment (or 35% or more in cases of injury caused by violent act or exposure to a violent act), the psychological injury is compensable, unless the injury is substantially caused by lawful, nondiscriminatory, good faith personnel actions, in which case the injury is not compensable. (§ 3208.3.)

Here the WCJ erred in stating that applicant did not submit a psychiatric report. Multiple reports are in evidence, including a QME report. It does not appear that the WCJ reviewed these reports. The testimony of defendant's witness is not sufficient to meet defendant's burden under section 3208.3(h). Defendant must present substantial medical evidence showing that applicant's injury to the psyche is predominantly caused by personnel actions. Then, the defendant must prove that the causative personnel actions were lawful, nondiscriminatory, and conducted in good faith.

No *Rolda* analysis was performed by the WCJ. The WCJ should have examined each element of psychiatric injury and determined whether it was an actual event of employment, whether it was a personnel action, and if it was a personnel action, whether it was conducted lawfully, without discrimination, and in good faith. Without such an analysis, the findings of fact must be vacated.

We would also note that applicant has plead both physical injury and psychological injury.

Where stress causes a physical injury, section 3208.3 does not apply. There is a limited area, where section 3208.3 may apply to mental-physical injuries, that is physical injuries that are solely caused by a psychiatric injury. This was discussed in *County of San Bernadino v. Workers' Comp. Appeals Bd. (McCoy)* (2012) 203 Cal. App. 4th 1469 [138 Cal. Rptr. 3d 328, 77 Cal.Comp.Cases 219].

In *McCoy*, applicant pled an underlying psychiatric injury and pled headaches as a compensable consequence of the psychiatric injury. The court held: "[T]hat section 3208.3, subdivision (h), precludes recovery for physical manifestations that are directly and *solely* resulting from the psychological injury suffered as a result of good faith personnel actions." (*McCoy, supra*, 203 Cal.App.4th at 1474 (emphasis in original).) *McCoy* expressed a limited exception for conditions that are solely the compensable consequence of a psychological injury, which is then found to be non-compensable.

(*Schulke v. Xerox Corp.*, 2016 Cal. Wrk. Comp. P.D. LEXIS 601, *12-13 (Cal. Workers' Comp. App. Bd. November 10, 2016).)

As explained in *Schulke*, physical injuries cannot simply be subsumed as sequelae of the psychological injury. Substantial medical evidence must establish that the physical injuries are sequelae. The present record is devoid of evidence of the alleged physical injuries. Again, further development of the record is warranted.

Accordingly, as our Decision After Reconsideration we will rescind the Findings and Order 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 Order issued on March 30, 2021, is **RESCINDED** and the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 22, 2024

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

**MELINDA PRISKIN
LAW OFFICES OF SOLOV & TEITELL
KEGEL TOBIN & TRUCE
FIONA WOON**

EDL/oo

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