

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

VYACHESLAV SIRETSKIY, *Applicant*

vs.

**GOOD SAMARITAN HOSPITAL, permissibly self-insured,
in care of ATHENS ADMINISTRATORS, *Defendants***

**Adjudication Numbers: ADJ14272035; ADJ15545697
Marina del Rey District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Findings of Fact and Award (F&A) issued by a workers' compensation administrative law judge (WCJ) on January 30, 2024.¹ In relevant part, the WCJ found that while employed during the period from June 1, 2003 to March 15, 2020 as a registered nurse for defendant, applicant sustained injury to his back, psyche, right knee and left knee; that applicant's injury caused permanent disability of 60%; and that 37% of applicant's permanent disability (PD) disability for his psychiatric injury was "directly caused by the impact of [his] shift work."

Defendant contends that the finding as to psychiatric permanent disability is not supported by the evidence, as the WCJ failed to analyze the compensability of applicant's psyche injury pursuant to the factual-legal analysis set forth in *Rolda v. Pitney Bowes, Inc.* (*Rolda*) (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc).

We received an answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny reconsideration.

We have considered the allegations in the Petition for Reconsideration, the answer, and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons discussed below, we will deny reconsideration.

¹ Commissioner Natalie Palugyai, who was on the panel that issued a previous decision in this case, no longer serves on the Appeals Board. Another panelist was appointed in her place.

FACTS

Applicant filed claims for: 1) cumulative injury arising out of and in the course of employment (AOE/COE) to his legs, back, stress, and psyche from June 1, 2003 to March 15, 2020 (ADJ14272035), and 2) specific injury AOE/COE to his back, shoulders, and knee on March 5, 2020 (ADJ15545697). The matters were consolidated for trial. (Minutes of Hearing, Order of Consolidation, and Summary of Evidence (MOH/SOE), February 14, 2023.)

A Mandatory Settlement Conference (MSC) took place on January 9, 2023, where the matter was set for trial. During the MSC, the parties filled out and signed a Pretrial Conference Statement (PTCS), which was uploaded into the Electronic Adjudication Management System (EAMS). Among the issues listed in the PTCS was the “good faith personnel action defense” to applicant’s psychiatric claim. (PTCS, January 9, 2023, p. 3.)

On February 14, 2023, the parties proceeded to trial on issues including temporary disability (TD), permanent disability (PD), and apportionment. (MOH/SOE, February 14, 2023, p. 3.) The MOH/SOE contained various stipulations relating to applicant’s cumulative trauma claim, including:

Vyacheslav Siretskiy, born [], while employed during the period 6/1/2003 to 3/15/2020, as a registered nurse...by Good Samaritan Hospital, sustained injury arising out of and in the course of employment to his back, psyche, right knee, and left knee.

(MOH/SOE, February 14, 2023, p. 2.) Defendant also raised the issue of whether applicant was entitled to psychiatric permanent disability based on Labor Code section 4660.1(c).

Applicant was the sole witness to testify at trial. He testified that he was hired by defendant in 2003 and that he had “always worked the night shift, 7:00 p.m. to 7:00 a.m.,” five to seven times per week. (MOE/SOE, February 14, 2023, pp. 5-6.) The parties submitted documentary evidence, including, but not limited to, a medical-legal evaluation by Dr. Vladimir Lipovetsky, M.D., as the panel Qualified Medical Evaluator (QME) in psychiatry.

Dr. Lipovetsky’s QME report provided the following information relating to applicant’s work on the night shift, as gathered from medical records reviewed by the doctor, as well as his own examination of applicant:

The claimant started his employment in June 2003 at Good Samaritan Hospital.... From the beginning, he worked at least on a full-time basis, typically working five nights in 12-hour shifts.... He worked mostly nights in order to earn more and to have fewer problematic interactions with doctors, which were more likely to

happen during daytime shifts. Sleep problems started within a few years of shift work.

* * *

Summary

...The claimant worked mostly nightshift, which initiated persistent sleep disturbance that lasted over much of the course of his employment.

(Exh. Z, pp. 5, 29, 35.)

Dr. Lipovetsky ultimately concluded that applicant sustained a 100% industrial psychiatric injury, and allocated 60% causation to the consequences of applicant's industrial spinal injury and 40% causation to the direct impact of applicant's "shift work." (Joint Exh. Z, p. 36.)

With respect to the issue of apportionment, Dr. Lipovetsky opined that:

The claimant's family relations do not represent a source of stress. There are some elements of stress that appear to be related to diagnosis of psoriasis with regard to his vacations. It is minor (3%) Impact on sex life appears to be mostly related to the physical injuries and associated pain. The claimant does complain of frustration over financial circumstances, particularly in the light of him needing to continue getting his daughter through her medical education, so small amount of contribution, i.e., 5% would be attributed to that factor. The remainder would at present be associated with impact of shift work and spinal injury in the same proportion (36.8% and 55.2% respectively).

On January 30, 2024, the WCJ issued the disputed F&A, finding, in relevant part, that applicant sustained industrial injury to his back, right knee, left knee, and psyche, resulting in a total permanent disability (PD) rating of 60%. With respect to the psychiatric portion of the PD award, the WCJ apportioned 37% of applicant's permanent disability to the direct impact of applicant's shift work, based upon the opinion of QME Dr. Lipovetsky. (F&A, p. 2; Opinion on Decision, p. 7.)

DISCUSSION

Defendant contends that the evidence does not support the WCJ's decision to apportion 37% of applicant's psyche PD to the direct impact of his shift work, because the WCJ failed to analyze the matter under *Rolda v. Pitney Bowes, Inc.* Specifically, defendant contends that the WCJ erroneously failed to analyze whether this portion of applicant's PD was the result of a lawful,

nondiscriminatory, good-faith personnel action, rendering it non-compensable under *Rolda*. For the reasons discussed below, we reject defendant's argument.

Labor Code section 3208.3² governs claims for psychiatric injury. As relevant herein, it provides that, to establish a compensable psychiatric injury, an employee must demonstrate by a preponderance of the evidence that actual events of employment were the predominant cause of the injury. (Lab. Code, § 3208.3(b)(1).) However, a psychiatric injury is not compensable if it was substantially caused by a personnel action that was lawful, nondiscriminatory and made in good faith. (Lab. Code, § 3208.3(h).) When an employer raises this defense, a multilevel analysis is required to determine whether the injury is compensable. (*Rolda, supra*, 66 Cal.Comp.Cases at pp. 245-246.) The WCJ must first determine whether actual events of employment are involved. (*Id.* at p. 245.) Competent medical evidence is required to make the next determination of whether the employee met the burden of proving that the injury was predominately caused by actual events of employment. (*Ibid.*; Lab. Code, § 3208.3(b)(1).) The WCJ then makes a third determination if the employee meets this burden of proof and the employer claims that the injury was substantially caused by personnel actions that were lawful, nondiscriminatory, and made in good faith. At this point, the WCJ must determine whether the employment events were personnel actions. (*Rolda* at p. 246.) Only if the events are personnel actions, will the WCJ make the next determination, which is whether any of the personnel actions were lawful, nondiscriminatory, and made in good faith. (*Ibid.*) Steps one and two of *Rolda* are applicant's burden, whereas the remaining steps, commonly known known as the "good faith personnel action defense" are defendant's burden. (*Id.* at pp. 245-247.)

Here, defendant failed to properly raise the good faith personnel action defense during trial. As a result, the WCJ was not required to perform the multilevel analysis set forth in *Rolda*.³ However, defendant asserts that it was sufficient that it listed the defense as an issue in the Pretrial Conference Statement filed in EAMS on January 9, 2023. Even if this was sufficient under *Rolda* (which it is not), defendant appears to overlook the fact that *it* bears the burden to prove the good

² All further statutory references are to the Labor Code unless otherwise stated.

³ We note that, in the Report, the WCJ states that she was not required to perform the *Rolda* analysis because the analysis "only applies when the parties have yet to determine causation of psychiatric injury. In the instant case, Defendant stipulated that Applicant sustained a psychiatric injury in his pretrial conference statement dated 1/9/2023 [] and at trial on 2/14/2023." (Report, p. 4.) However, as discussed above, if the employer raises the good faith personnel action defense at trial, the WCJ *must* apply *Rolda*. If the employer successfully establishes the defense under *Rolda*, that psychiatric injury, while industrially caused, is not *compensable*. (Lab. Code, § 3208.3(h).)

faith personnel action defense by a preponderance of the evidence and with substantial evidence. (Lab. Code, §§ 3208.3(h), 3202.5, 5952(d).)⁴ A mere reference to the defense in the Pretrial Conference Statement hardly satisfies this burden. Additionally, a review of the record shows that defendant failed to reference, or provide, any evidence that may have established the bona fides of its affirmative defense, despite myriad opportunities to do so. For instance, after receiving service of the February 14, 2023 MOH/SOE, defendant could have requested to modify the stipulations/issues to include the good faith personnel action defense.⁵ During trial, defendant also inexplicably failed to cross-examine applicant regarding his work on the night shift, nor did it call any witnesses of its own to testify regarding the issue. Defendant also failed to seek additional medical reporting from (or depose) Dr. Lipovetsky after receiving the psychiatric QME report, which discussed that the compensable PD attributable to applicant’s psyche injury was due to sleep issues developed while working the night shift, i.e., injury due to applicant’s general working conditions, rather than a “personnel action.”⁶ (*Ferrell v. County of Riverside* (2016) 81 Cal.Comp.Cases 943, 946-947 [distinguishing “general stressful working conditions” that cause psychiatric injury and “personnel action” specifically directed toward an individual that involves their employment status].)

Finally, we find it necessary to admonish counsel David Na for citing an unpublished Court of Appeal decision to support his arguments. (Petition, p. 6.) The WCAB Rules of Practice and Procedure and the California Rules of Court do not permit such conduct, and continued conduct of this nature may result in sanctions. (Cal. Rules of Court, rule 8.1115; Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421(b)(8) [sanctionable conduct includes “Asserting a position that misstates or substantially misstates the law, and where a reasonable excuse is not offered or where

⁴ Per section 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.*” (Lab. Code, § 3208.3(h), italics added.) Per section 3202.5, “All parties...shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence...” (Lab. Code, § 3202.5; see also *Whitmore v. Metro. State Hosp.* (September 8, 2015, ADJ3435222) [2015 Cal. Wrk. Comp. P.D. LEXIS 546, *18].)

⁵ Cal. Code Regs., tit. 8, § 10517.

⁶ We further note that, in a decision issued by the WCJ on May 23, 2023, the WCJ found that applicant was entitled to PD arising from his psychiatric injury. (Findings of Fact and Award, May 23, 2023.) Defendant sought reconsideration of the WCJ’s decision; however, it did *not* raise the good faith personnel action defense. Defendant only claimed that the WCJ erroneously found that applicant was not barred from an increase in his PD rating under section 4660.1(c). (Petition for Reconsideration, June 16, 2023.)

the offending party has demonstrated a pattern of such conduct.”].) We also caution Mr. Na against attaching documents to petitions for reconsideration that, as noted by the WCJ, are either already part of the adjudication file or are not part of the adjudication file at all. (Report, pp. 2-3; Cal. Code Regs., tit. 8, § 10945(c)(1) [“Copies of documents that have already been received in evidence or that have already been made part of the adjudication file shall not be attached or filed as exhibits to petitions for reconsideration....”].)

Based on the above, defendant’s Petition for Reconsideration of the WCJ’s January 30, 2024 F&A is denied.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact and Award issued on January 30, 2024 by the WCJ is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 23, 2024

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

**VYACHESLAV SIRETSKIY
HINDEN & BRESLAVSKY
DAVID JANE & ASSOCIATES
EMPLOYMENT DEVELOPMENT DEPARTMENT**

AH/cs

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

CS