WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

RUSSELL JACKSON, *Applicant*

vs.

COUNTY OF RIVERSIDE, permissibly self-insured, *Defendant*

Adjudication Number: ADJ10444379
Riverside District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of a workers' compensation judge's (WCJ) Findings and Order (F&O) issued on August 3, 2023, wherein it was found that applicant did not sustain injury arising out of and occurring in the course of employment (AOE/COE) to his circulatory system (heart – other than heart attack), blood, arteries and veins, upper and lower extremities, and psyche. The WCJ ordered that applicant take nothing from his claim.

Applicant contends that he met his burden that he sustained injury AOE/COE.

We received an Answer from defendant. The WCJ submitted a Report and Recommendation on Petition for Reconsideration (Report), recommending that reconsideration be denied.

We have reviewed the record in this case, as well as the contents of the Petition for Reconsideration, the Answer, and the WCJ's Report with respect thereto. Based upon our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&O, and return this matter to the trial level for further proceedings and a new decision by the WCJ.

FACTS

Applicant alleged cumulative injury to the circulatory system, blood, arteries and veins, upper and lower extremities, and psyche while employed as a Housing Program Assistant during the period October 1, 2005 through May 18, 2016.

Between April and August 2023, three trial hearings were held on the issues of: 1) whether applicant's alleged injuries arose out of and occurred in the course of his employment (AOE/COE), and 2) the application of the good faith personnel action defense set forth in section 3208.3(h).

The parties used Michelle Conover, Ph.D., as the Panel Qualified Medical Evaluator (QME) to evaluate applicant's alleged psychiatric injury. Dr. Conover outlined 18 separate stressful incidents described by applicant during the psychiatric evaluation. In a supplemental QME Report dated May 13, 2019, Dr. Conover opined that applicant sustained a psychiatric injury that was predominantly caused by industrial factors. (Supplemental QME Report of Michelle Conover, May 13, 2019, p. 5.) With respect to causation, Dr. Conover opined that: 43% of applicant's psychiatric injury was caused by seven industrial incidents that "[could] be construed as 'good faith' personnel actions by the trier of fact"; 22% of applicant's psychiatric injury was caused by seven other industrial incidents; and 35% of applicant's psychiatric injury was caused by four non-industrial incidents. (*Id.* at pp. 6-7.)

The parties selected Richard Hyman, M.D., as the QME in the field of internal medicine. In his QME Report, Dr. Hyman opined that applicant suffered from hypertension. With respect to causation, Dr. Hyman stated:

> If [applicant] does have a bona fide history of perceived stress, then there probably has been an industrial contribution to hypertension…the family history is probably his most significant cause and therefore there is more nonindustrial causation and 40% of his disability is work related.

(QME Report of Richard Hyman, M.D., February 25, 2021, pp. 6-7.)

On August 3, 2023, the WCJ issued the disputed F&O, finding, in full:

1. The Applicant, Russell Jackson, born [], while employed during the period 10/01/2005 through 05/18/2016, as a Housing Program Assistant, Occupation Group 11, at Riverside County, by the County of Riverside did not sustain injury arising out of and in the course of employment to his psyche, circulatory system, heart (other than heart attack), blood, arteries and veins, hypertension, upper and lower extremities.

2. All other issues are moot.

(F&O, pp. 1-2.)

In the Opinion on Decision, the WCJ concluded her discussion with the following remarks:

> Overall, the court did not find the applicant's testimony to be credible and many of the events that he reported as stressful were simply events that occurred during the course of his employment and did not consist of personnel actions. The court has addressed the personnel actions as documented by PQME Michelle Conover and does not find any credible claim of industrial injury…The personnel actions that were outlined by Michelle Conover PhD and as testified to by the parties are found to be good faith personnel actions in this case which bars applicant's claim pursuant to Labor Code § 3208.3(h).

(Opinion on Decision, p. 14.)

DISCUSSION

As stated in the Opinion on Decision, but not in the F&O, the WCJ's decision to deny applicant's claim for benefits is ultimately based on the good faith personnel action defense, which is set forth in Labor Code section 3208.3.[1] A multilevel analysis is required when a psychiatric injury is alleged and the defense of a lawful, nondiscriminatory, good faith personnel action has been raised under section 3208.3. This analysis was explained by the Appeals Board in *Rolda v. Pitney Bowes* (*Rolda*) (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc).)[2]

"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 that 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." (*Rolda, supra,* 66 Cal.Comp.Cases at p. 246.) "Thus, under Labor Code section 3208.3, the first determination to be made with respect to the compensability of an alleged psychiatric injury is whether actual events of employment are involved." (*Id.* at p. 245.)

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

[2] Appeals Board en banc decisions are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10325; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418 [67 Cal.Comp.Cases 236].)

If the threshold for compensable psychiatric injury has been met under section 3208.3(b), and the employer has asserted that at least some of the actual events of employment constituted good faith personnel actions, the WCJ must then determine whether section 3208.3(h) bars applicant's psychiatric injury claim. 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." (Lab. Code, § 3208.3(h).) The term "substantially caused" in section 3208.3(h) is defined in section 3208.3(b)(3) as follows: "For the purposes of this section, 'substantial cause' means at least 35 to 40 percent of the causation from all sources combined." (Lab. Code, § 3208.3(b)(3).)

In this case, the WCJ failed to properly perform the analysis set forth in section 3208.3 and as described in *Rolda*. First, the WCJ failed to find whether applicant's alleged psychiatric injury involved actual events of employment, i.e., injury AOE/COE, under section 3208.3(b)(1). In making this determination, the WCJ must go through all of the predicate events alleged in the history given to the QME(s), as well as the trial testimony and all other relevant record evidence. To the extent that any of the predicate events are contradicted, the WCJ should make express factual findings regarding each event and resolve any factual disputes. The WCJ should then determine which of the predicate events constitute actual events of employment and articulate this determination in a manner that satisfies sections 5313, 3208.3, *Rolda*,[3] and *Hamilton v. Lockheed Corp.* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473 (Appeals Board en banc).[4]

Here, in the Opinion on Decision, the WCJ analyzed only seven of the 18 predicate events described by applicant and outlined in Dr. Conover's supplemental QME Report. However, the WCJ was required to analyze and discuss *all* of the predicate events identified in the QME Report and issue a specific determination as to whether each event constituted an actual event of employment. (*Rolda, supra,* 66 Cal.Comp.Cases at p. 247 ["The WCJ, after considering *all* the...evidence of record, must determine: (1) whether the alleged psychiatric injury involves actual events of employment…."] [emphasis added].)

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[3] "[T]he WCJ must…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,* 66 Cal.Comp.Cases at p. 247.)

[4] "[T]he 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,* 66 Cal.Comp.Cases at p. 475.)

At this juncture, we find it important to note that, in assessing whether an applicant has demonstrated an actual event of employment, the WCJ is clearly entitled to take the applicant's credibility into account. However, we are somewhat concerned with the WCJ's conclusion that applicant failed to provide a credible work history because he could not recall "exactly" when each event occurred and because his testimony was "refuted" by the testimony of defense witnesses who stated that they could not remember certain events at all. (Opinion on Decision, pp. 4-5.) Applicant argues, and we agree, that the defense witnesses' inability to recall the events in question does not "refute" applicant's claim that said events occurred, nor does it necessarily undermine applicant's credibility regarding these events.

Based on the foregoing, we conclude that the WCJ must revisit the record evidence and issue specific findings on whether applicant demonstrated that one or more actual events of employment occurred under the first prong of *Rolda*. (Lab. Code, § 3208.3(b)(1).)

If it is determined that one or more actual events of employment are involved, under the second step of *Rolda,* it must be determined whether the actual event(s) were the predominant cause, i.e., greater than 50%, of the injury to the psyche, which requires medical evidence. Here, the WCJ failed to issue a determination on predominant cause and must do so using competent medical evidence upon return to the trial level. We note that Dr. Conover's supplemental QME Report contains a detailed discussion regarding causation.

If predominant cause is established, and defendant raises the good faith personnel action defense under section 3208.3(h), under the third step of *Rolda*, a determination must be made as to whether any of the actual employment event(s) were personnel actions that were lawful, nondiscriminatory, and done in good faith. (*Rolda*, *supra,* 66 Cal.Comp.Cases at p. 274.)

Here, despite improper analysis (or lack thereof) under the first two steps of *Rolda,* the WCJ *did* proceed to the third step of *Rolda*. As noted above, in the final sentence of her Opinion on Decision, the WCJ ultimately concluded that seven of the events described by applicant to Dr. Conover were "found to be good faith personnel actions...which bars applicant's claim pursuant to Labor Code § 3208.3(h)." (Opinion on Decision, p. 14.) However, earlier in the Opinion, the WCJ reached several conclusions that were entirely inconsistent with this final position, namely, that one such incident was *not* a personnel action and that two other incidents had never occurred, according to testimony from defense witnesses. (Opinion on Decision, pp. 5-6 & 9-10.) Thus, even if the WCJ had proceeded properly under the first two steps of *Rolda*, these inconsistent

conclusions render us unable to assess *which* actions the WCJ believed to be good faith personnel actions, which also makes it impossible to proceed to the final step of the *Rolda* analysis, namely, to determine whether good faith personnel actions were a "substantial cause," i.e., "at least 35 to 40 percent" (Lab. Code, § 3208.3(b)(3)), of applicant's alleged psychiatric injury.

Because the WCJ failed to properly perform the *Rolda* analysis, her decision that applicant's psychiatric injury claim was barred by section 3208.3(h) cannot stand.

We now turn to the WCJ's conclusion that applicant's claim for hypertension was barred by section 3208.3(h) pursuant to the logic set forth in *County of San Bernardino v. Workers' Comp. Appeals Bd*. (*McCoy*) (2012) 203 Cal.App.4th 1469 [77 Cal.Comp.Cases 219].) However, rather than discuss the case, the WCJ simply stated:

> Also, pursuant to Labor Code § 3208.3(h), an injured worker will be barred from receiving compensation for stress and/or any physiological manifestations substantially caused by legitimate, good faith, personnel actions. [County of San Bernardino v. Workers' Comp. Appeals Bd. (McCoy) (2012) 77 Cal. Comp. Cases 219, 221].

(Opinion on Decision, p. 1.)

As an initial matter, the WCJ misstated the standard for causation set forth in *McCoy*. In *McCoy*, the Court of Appeal held that section 3208.3(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 p. 1474, emphasis in original.)

Here, Dr. Hyman's QME Report evaluating applicant's internal condition contained only a cursory discussion of applicant's history and an insufficient analysis of causation, and, as a result, did not constitute substantial medical evidence upon which the WCJ could rely. (*Bufalino v. Countrywide Home Loans* (November 15, 2021, ADJ4709903) 2021 Cal. Wrk. Comp. P.D. LEXIS 323 ["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."]; *Insurance Co. of North America v. Workers' Comp. Appeals Bd*. (1981) 122 Cal.App.3d 905, 917 [46 Cal.Comp.Cases 913] [where a physician's report is "woefully inadequate" when measured against Cal. Code Regs., tit. 8, former § 10606, now § 10682 (eff. Jan. 1, 2020), it is not substantial evidence upon which a finding may be based].) To be substantial

evidence, a medical opinion must be based on pertinent facts, on an adequate examination, and it must set forth the basis and the reasoning in support of the conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) Medical evidence that industrial injury was reasonably probable, although not certain constitutes substantial evidence for a finding of injury AOE/COE. (*McAllister v. Workmen's Comp. Appeals Bd.* (*McAllister*) (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660].) The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a) & 3202.5.) The Supreme Court of California has long held that an employee need only show that the "proof of industrial causation is reasonably probable, although not certain or 'convincing.'" (*McAllister, supra*, at p. 413.) "That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].)

We observe that industrial stress can be the cause of physical injuries, such as hypertension and GERD. An evaluating physician must clearly indicate the cause of injury and indicate whether the stress of employment caused the physical injury or whether the physical injury was a compensable consequence of the psychiatric injury. This is particularly significant here because causation of physical injury is based on a 1% causation standard (see *South Coast Framing, supra*), and only a physical injury that solely arose out of (was caused by) the psychiatric injury is subject to *McCoy, supra*. Additionally, if a medical opinion supports that the stress of employment caused applicant's physical injuries, causation is not subject to the standards in section 3208.3 and *Rolda, supra*.

Without substantial medical evidence, the proper procedure is to develop the record. (*McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The typical procedure is to return the parties to the original QME in order to further develop the record. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Here, if the parties do not agree to return to Dr. Hyman, the WCJ should appoint a regular physician to examine applicant pursuant to section 5701.

In conclusion, we will grant reconsideration, rescind the F&O, and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the August 3, 2023 F&O is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 3, 2023 F&O is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 27, 2023

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

RUSSELL JACKSON
LAW OFFICES OF EDWARD J. SINGER
HANNA, BROPHY, MacLEAN, McALEER & JENSEN

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