

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

JOHN MORLEY, *Applicant*

vs.

**CITY OF PLEASANTON, LIVERMORE-PLEASANTON
FIRE DEPARTMENT, permissibly self-insured,
administered by INNOVATIVE CLAIMS SOLUTIONS, *Defendants***

**Adjudication Number: ADJ12524191
Oakland District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

On September 9, 2020, defendant filed a Petition for Removal regarding the August 21, 2020 Findings and Order issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant, while employed as a firefighter on February 13, 2019, claimed to have sustained psychiatric industrial injury. In Findings of Fact number 2, the WCJ found that "[t]he actions taken by the employer on November 2, 2018, November 18, 2018, and February 13, 2019, were lawful and nondiscriminatory;" and that "[t]he demands placed on this employee on those dates were not themselves in bad faith [but] [t]hey were presented in a manner that was in bad faith." Finally, the WCJ found that the issue of compensability could not be determined by means of the available record, ordered further development of the record, and deferred all other issues.

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and

statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, we treat defendant's petition as one seeking reconsideration. The WCJ's decision includes a finding regarding employment, a threshold issue. Moreover, it is not clear whether Findings of Fact number 2, which defendant challenges, is final or not. Given this lack of clarity and because a finding as to whether or not the employer's actions or the manner of those actions were in bad faith cannot be made independently from a complete analysis pursuant to *Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241, 246 (Appeals Board en banc),¹ we will rescind the WCJ's decision and substitutes it with a new Findings and Order and return this matter to the trial level for further proceedings. In the new Findings and Order, we strike Findings of Fact number two and otherwise restate the WCJ's decision.

While we note that the affirmative defense of "good faith personnel action" was raised at the mandatory settlement conference (MSC), it was not listed as an issue in the July 1, 2020 Minutes of Hearing and Summary of Evidence (MOH/SOE). However, despite not being listed, the parties are clearly litigating this issue and the WCJ adjudicating it. Upon this matter's return to trial, the WCJ and the parties should clarify the issues for trial.

¹ In *Rolda*, we set forth the multilevel analysis for determining if a claimed psychiatric injury is compensable when the affirmative defense of lawful, nondiscriminatory, good faith personnel action has been raised: "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." (*Rolda, supra*, 66 Cal. Comp. Cases at pp. 245-247.)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 21, 2020 Findings and Order is **RESCINDED** and **SUBSTITUTED** with a new Findings and Order, as provided below, and that this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

FINDINGS OF FACT

- (1) John Morley, while employed on February 13, 2019, in Livermore, California, as a firefighter, occupational group number 490, by the Livermore-Pleasanton Fire Department, permissibly self-insured for workers' compensation, its claims administered by Innovative Claims Solutions, Incorporated, claims to have sustained an injury arising out of and in the course of employment to his psyche.
- (2) The compensability of said injury cannot be determined by means of the available evidentiary record, and that record requires further development, consistent with the opinion on decision herein.
- (3) All other issues must be deferred.

ORDER

The parties to this matter are hereby ordered to develop the record consistently with the opinion on decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 30, 2022

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

**JOHN MORLEY
LAW OFFICES OF GOFORTH & LUCAS
LAUGHLIN, FALBO, LEVY & MORESI**

PAG/abs

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