WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GINA TETSCH, *Applicant*

vs.

ORANGE COUNTY SANITATION DISTRICT; permissibly self-insured, administered by KEENAN & ASSOCIATES, *Defendants*

Adjudication Number: ADJ11373743
Santa Ana District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the petition for removal, the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and as discussed below, we will treat the petition as one for reconsideration, and for the reasons stated in the WCJ's report and opinion, which are both adopted and incorporated herein, we will deny reconsideration.

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. When a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue.

Here, defendant challenges the WCJ's findings of injury to applicant's psyche and entitlement to future medical care for that injury, which are threshold findings and therefore final. Thus, defendant's petition was properly one for reconsideration, and we will treat it as such. (See Cal. Code Regs., tit. 8, § 10517 [pleadings amended to conform to proof]; see also § 10617(b).)

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Here, the WCJ's decision contains findings on threshold issues and determinations regarding interlocutory issues. However, defendant does not challenge the determinations regarding interlocutory issues, so that here, the removal standard does not apply to our review.

Accordingly, we deny the petition for reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings, Award and Order issued by the WCJ on November 27, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 24, 2024

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

GINA TETSCH
MEHR & ASSOCIATES
MICHAEL SULLIVAN & ASSOCIATES

AH/*cs*

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

WCAB Case No. ADJ11373743

GINA TETSCH	**-vs.-**	**ORANGE COUNTY SANITATION DISTRICT; KEENAN ASSOCIATES**
DATE OF INJURY:		**July 5th, 2012 through June 13, 2018**
WORKERS' COMPENSATION JUDGE:		**Oliver E. Cathey**
DATE:		**November 27, 2023**

OPINION ON DECISION:

The parties stipulated at trial that the Applicant Gina Tetsch, born [], while employed during the period of July 5th, 2012 through June 13, 2018, as an Occupational Health Nurse, Occupational Group Number 212, in Fountain Valley, California, by the Orange County Sanitation District, claims to have sustained injury arising out of and in the course of employment to her psyche, neuro, including headaches, internal, weight loss, and gastrointestinal.

At the time of injury, the Orange County Sanitation District was permissibly self-insured, and their claims are being administered by Keenan & Associates.

Issues presented for determination by the Court were:

1. Injury arising out of and in the course of employment.
2. Average weekly earnings
3. Disability rate
4. Permanent and stationary date with the applicant
5. Apportionment.
6. Permanent disability
7. Need for further medical treatment
8. Attorney fees.

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

The applicant has alleged injury to her psyche, neuro, including headaches, internal, weight loss, and gastrointestinal as a result of harassment and bad faith personnel action she was subjected to in the course of her employment with the Orange County Sanitation District. The defendant has denied the applicant's claim, asserting that the personnel actions were good faith personnel actions and that these good faith personnel actions are the predominant cause of her alleged psyche injury.

The initial medical reporting submitted was inadequate for the Court to make a determination on the issues raised. Unfortunately, the parties were unable to return to the initial evaluating physician.

As such, at the direction of the Court, the applicant was evaluated by Dr. David Davis as an appointed regular physician pursuant.

Dr. Davis evaluated the applicant and diagnosed the applicant with major depressive disorder, recurrent, mild (preexisting but subsequently aggravated by work circumstances with the Orange County Sanitation District), generalized anxiety disorder (preexisting but subsequently aggravated by employment at Orange County Sanitation District), panic disorder without agoraphobia preexisting but subsequently aggravated by employment at orange county sanitation district), and possible psychological factors affecting medical condition: stress-related physiological response affecting migraine headaches and irritable bowel syndrome.[1]

As to the applicant's migraine headaches and irritable bowel syndrome, Dr. Davis states that he is not an internist and was deferring the issue of causation. He recommends that the applicant be evaluated by a physician specializing in internal medicine. [2]

As to causation, Dr. Davis states that it is within reasonable medical probability that 80% of the active causation of the worsening of the examinee's major depressive disorder, recurrent, generalized anxiety disorder, and panic disorder is due to the work events listed in the November 18, 2022, Order Appointing Regular Physician. It is Dr. Davis's opinion that it is within reasonable medical probability that 20% of the worsening of the examinee's psychiatric illnesses was caused by concomitant personal stress.[3]

Based on the medical reporting of the appointed regular physician, Dr. Davis, the Court finds that the events of employment are the predominant cause of the applicant's psychiatric injury.

Having determined that the events of employment are the predominant cause of the applicant's psychiatric injury, it must be determined if those events are personnel actions and, if so, were those personnel actions lawful, non-discriminatory, and made in good faith.

If any of the personnel actions were lawful, non-discriminatory, and made in good faith, it then must be determined if those personnel actions were a substantial cause of the psychiatric injury.

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[1] COURT DD: Medical report of Dr. David Davis, dated 5-23-2023, Page 40 - 41
[2] COURT DD: Medical report of Dr. David Davis, dated 5-23-2023, Page 42
[3] COURT DD: Medical report of Dr. David Davis, dated 5-23-2023, Page 43

Of the industrial factors contributing to the applicant's psychological injury, the Court finds that the sexual harassment by Mr. George Rivera, the January 2016 incident in which the applicant was intentionally almost hit by a car driven by Mr. Wes Bauer, the harassment by Mr. Wes Bauer were not personnel actions.

For these causes, Dr. Davis states that it is within reasonable medical probability that 15% of the causation of the exacerbation of the examinee's psychiatric illnesses was caused by the sexual harassment by Mr. George Rivera, 10% was caused by the harassment by Mr. Wes Bauer, and 10% was caused by the January 2016 incident when Mr. Wes Bauer almost hit the examinee with his SUV.

The Court notes that these percentages are of the 80% industrial causation and, as such are adjusted to reflect the overall percentage of disability from all sources combined. As such, these events, after adjustment, equated to 28%.[4]

The remaining causes for the applicant's psychological injury are personnel actions.

As to the personnel actions, Dr. Davis states that it is within reasonable medical probability that 4% (3.2%)[5] of the causation of the applicant's psychiatric illnesses was caused by reprimand for failing to work cooperatively at the health fair.

The applicant testified that Mr. Collins asked her to work with Mr. Rivera in the Great Shake Out. The applicant advised Mr. Collins that she was uncomfortable working with Mr. Rivera.

The Court notes that Mr. Rivera has been said to have been sexually harassing the applicant and that the harassment ultimately led to his termination.[6]

Mr. Collins testified that, during the Great Shakeout exercise, an earthquake preparedness event, the applicant did not show any initiative and only participated as directed. Mr. Collins testified that the Great Shakeout is a mandatory event for all personnel.

The applicant had previously participated in this event and was significantly involved in its coordination. During the last event, she did not involve herself much and showed no initiative.[7]

He spoke to the applicant about her participation both before and after the event.

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[4] (15%x.8=12%)+(10%x.8=8%)+(10%x.8=8%)=28%
[5] 4% of 80% industrial causation equals 3.2% of the total causation from all sources combined.
[6] Further Minutes of Hearing and Summary of Evidence for hearing taken 3-10-2022, Page 9, Lines 9-10
[7] Further Minutes of Hearing and Summary of Evidence for hearing taken 3-10-2022, Page 11 Lines 1-7

The Court finds that it was not reasonable for the applicant to have been required to work with Mr. Rivera, given the interactions between them, of which the applicant was the unwilling participant. To require her to work directly with Mr. Rivera placed the applicant in a hostile situation in which it could not be expected that she would be enthusiastic. To then be reprimanded for her lack of enthusiasm is not reasonable, and the Court finds that it was not a good faith personnel action.

The Court finds the events concerning the Great Shakeout, and the expectation that the applicant enthusiastically participated with co-workers who were known to have harassed the applicant and were known to be creating a hostile work environment taints the lens through which the remaining personnel action must be viewed.

Dr. Davis states that it is within reasonable medical probability that 15% (12%)[8] of the applicant's psychiatric illnesses was caused by the discipline for the mold incident.

The mold incident involved six to seven employees who were reporting symptoms associated with what they believed to be mold exposure. The applicant provided them with a claim form and referred them to a physician for more medical care.[9]

The applicant testified that the employees were found to be suffering mold exposure. The applicant recalls being admonished for not standing up for the employer. This upset the applicant because it was her understanding that mold was found at the facility, which was causing problems with the employees.[10]

The defendant's witness acknowledged that there was wood in the bathroom with high levels of mold and that abatement and remediation of the mold were done out of concern for the employees.

He was unable to confirm that the applicant provided false information to employees.

Mr. Collins testified that he did not believe it was unreasonable to refer the employees to the medical clinic, only that there was a delay in the referral. His only disagreement with the applicant's handling was that the language of "black mold" placed in the claim form was not consistent with the mold report, as they did not find any black mold.[11]

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[8] 15% of 80% industrial causation equals 12% of the total causation from all sources combined.
[9] Minutes of Hearing (Further) and Summary of Evidence, 8-26-2021, Page 5, Lines 20 -22
[10] Minutes of Hearing and Summary of Evidence, 2-14-22, Page 4, Lines 25, Page 5 lines 1-3
[11] Minutes of Hearing and Summary of Evidence (Further), 4-28-22, Page 2, 23-25

The applicant testified that she does not recall if the term "black mold" was placed on the claim forms. She recalls only obtaining the documentation and putting the date that the document was received and the date of the injury.[12]

In the performance evaluation, it was stated that the applicant failed to collaborate with teammates during the mold incident. The Court finds that this statement is not supported by either the applicant's or Mr. Collins's testimony.

The Court finds that the discipline for the mold incident was not in good faith.

Dr. Davis states that it is within reasonable medical probability that 4% (3.2)[13] of the exacerbation of the examinee's psychiatric illnesses was caused by the reprimand regarding the DOT testing.

The DOT testing involved an employee who had had some drugs the evening before. She was told that she should lose the test or get rid of the urine by Mr. Bauer. She was advised by the union that the employee needed to take the test and that she would get in trouble if she followed Mr. Bauer's request. Mr. Bauer wrote her up for insubordination.[14]

The applicant challenged the write-up, and the disciplinary action was dismissed and pulled from her file.[15]

The Court finds that the reprimand regarding the DOT testing was not a good faith personnel action.

Dr. Davis states that it is within reasonable medical probability that 15% (12%)[16] of the applicant's psychiatric illnesses was caused by the family leave use investigations.

The applicant testified that her physician had informed her that the defendant had requested all her medical records.

The applicant testified that at the time of the request, the applicant's FMLA leave had already been approved. The applicant told Ms. Nguyen and Ms. Chandler about the request and asked why they had done it, advising them that she did not think they had a right. They told her that the employer always has the right to this information.[17]

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[12] Minutes of Hearing and Summary of Evidence (Further), 4-28-22, Page 5, lines 23-25
[13] 4% of 80% industrial causation equals 3.2% of the total causation from all sources combined.
[14] Minutes of Hearing and Summary of Evidence 3-24-21, Page 9, Lines 17-21
[15] Minutes of Hearing and Summary of Evidence 3-24-21, Page 9, Lines 21-24
[16] 15% of 80% industrial causation equals 12% of the total causation from all sources combined.
[17] Minutes of Hearing and Summary of Evidence, 2-14-22, Page 4, Lines 9-13

Mr. Collins testified he never thought that the applicant was improperly using her FMLA time, and she never failed to properly inform him that she was using it. He had no issues with her use of the FMLA time.[18]

Based on the uncontested testimony of the applicant and the testimony of Mr. Collins, the Court finds that the family leave use investigations were not a good-faith personnel action.

Dr. Davis states that it is within reasonable medical probability that 15% (12%)[19] of the applicant's psychiatric illnesses was caused by the Performance Improvement Plan (PIP).

The evidence submitted demonstrates that until her 11/7/2016 – 11/7/2017 Exempt Year End Employee Performance Appraisal, the applicant was found to work well in team settings and had good leadership qualities.

A subsequent performance appraisal found that the applicant seeks increased responsibility, takes independent actions, and shows a willingness to make decisions.

These appraisals do suggest that the applicant had a tendency to act without consultation and/or full approval of her supervisors. However, none of these actions appear to have caused the applicant to receive less than a proficient rating except in communication.

However, in her 11/7/2016 – 11/7/2017 Exempt Year End Employee Performance Appraisal, the applicant was found to need improvement in areas in which she had been previously proficient. This lack of proficiency centered around the mold incident, interpersonal skills, communication, teamwork, decision-making, problem-solving, initiative leadership, and commitment and professionalism. These identified deficiencies led to the development of a performance improvement plan.

In reviewing the performance appraisal, it is noted that between the performance appraisal in which the applicant was found proficient in almost all aspects of her job performance and the last in which her job performance was considered subpar, that applicant had been subjected to various forms of harassment and had been working in a hostile work environment.

The Court finds that the implementation of a performance improvement plan to address the lack of proficiency in the applicant's work performance, which appears to be related to the harassment and hostile work environment the applicant was working in, was unreasonable.

[18] Further Minutes of Hearing and Summary of Evidence for hearing taken 3-10-2022, Page 13 Lines 6-8
[19] 15% of 80% industrial causation equals 12% of the total causation from all sources combined.

Based on the above, the Court finds that the Performance Improvement Plan (PIP) was not a good faith personnel action.

Dr. Davis states that it is within reasonable medical probability that 4% (3.2%)[20] of the applicant's psychiatric illnesses was caused by the discipline for accommodating an injured worker without Mr. Collins' approval.

The applicant testified that there was an incident involving the provision of a keyboard to an employee who had a preexisting wrist injury.

The applicant testified that when she initially spoke with the employee, they advised her they had no pre-existing issues. She had provided the employee with the IT[21] department's contact information so he could inquire about the desired keyboard. Subsequently, the applicant was made aware that the employee had a prior wrist issue. She returned to discuss the issue with the employer only to find that the employee had already received the keyboard from IT. The applicant was advised that she had purchased the keyboard without approval. The applicant advised Mr. Collins that she had not purchased the keyboard.[22]

The applicant testified that prior to this, she had not previously been written up for any ergonomic evaluations.

Mr. Collins testified that no memo was created with regard to the evaluation; however, the keyboard was ordered anyway without the approval of IT. The memo should have been generated, and it should have gone to him for approval. Normally, once approved, the applicant would order the equipment. The applicant was written up for this incident, and it was part of her PIP.[23]

The actions and write-up were confirmed by both the applicant and Mr. Collins, though each had a different view and recollection of the event.

Based on the evidence submitted, the Court finds that the reprimand for this failure to follow procedure, even if inadvertently, was not unreasonable.

Based on the above, the Court finds the reprimand for this failure to follow procedure was not a bad-faith personnel action.

[20] 4% of 80% industrial causation equals 3.2% of the total causation from all sources combined.
[21] Information Technology
[22] Minutes of Hearing (Further) and Summary of Evidence, 8-26-2021, Page 5, Lines 20 -22
[23] Further Minutes of Hearing and Summary of Evidence for hearing taken 3-10-2022, Page 11 Lines 11-13

Dr. Davis states that it is within reasonable medical probability that 4% (3.2%)[24] of the applicant's psychiatric illnesses was caused by the reprimands for multiple ergonomic evaluation situations.

Mr. Collins testified that there were over ten ergonomic assessments that were not adequately documented. Mr. Collins testified that an ergonomic assessment is supposed to generate a memo that is to be prepared and sent saying what difficulty the employee is having and what is required to correct it. The memo is sent to the supervisor and the employee and then ultimately would have been sent to him for approval.

Mr. Collins testified that all ten incidents with regard to the ergonomic evaluations had the same deficiency. The applicant would create her notes about the deficiencies and corrections, but these would not end up in a report or a memo that was submitted as required.[25]

The applicant testified that there were policies with regard to the evaluations. These policies were fluid and did change while she was there. While Mr. Collins was her supervisor, the initial policy was for her to assess the employees' needs and what accommodations could be provided. These included providing keyboards, lighting, or additional mouses. She was provided with a company credit card (pro card) to make purchases for equipment that could not be provided through the HR representative.

The applicant testified that later, she was told that she was not to make any purchases with the pro card. She was written up with regards to the pro card by HR. She was also advised that she needed to refer the ergonomic report to Mr. Collins or Karen and that they would arrange for the evaluation to be done. Prior to this, she had not previously been written up for any ergonomic evaluations.

The applicant acknowledges that she had some issues with following some of the new procedures, and it appears that the new procedures may not have been made clear until after she had failed to follow them consistently.

Though it would have been better to communicate the change in procedure more effectively prior to reprimanding the applicant, the applicant did fail to follow the procedure. Taking into consideration the previously recorded tendency of the applicant to act without consultation and or

[24] 4% of 80% industrial causation equals 3.2% of the total causation from all sources combined.
[25] Further Minutes of Hearing and Summary of Evidence for hearing taken 3-10-2022, Page 9 Lines 17-25

full approval of her supervisors, the Court does not find the reprimands for the ergonomic evaluations to be unreasonable.

Based on the above, the Court finds the reprimands for the ergonomic evaluations were not bad faith personnel actions.

Dr. Davis states that it is within reasonable medical probability that 4% (3.2%)[26] of the applicant's psychiatric illnesses was caused by reprimand for failing to communicate her work schedule to her supervisor,

Mr. Collins testified that there was an incident where she did not report her work location, which was the policy that was in place at the time that he started. This policy required all staff to keep a calendar that stated where their location was. This was so that they could be located in case of a problem or an emergency.

Mr. Collins testified that it was only when they left the building or were with IT for more than 15 minutes that they would be required to update the calendar.[27]

The applicant testified that part of her performance improvement plan required the applicant to advise Mr. Collins every time she left the trailer. If she ever went to the second facility, she would have to check in when she got there, check out when she left, and let them know when she came and went. The applicant testified that she does not know of anyone else who was subjected to the same monitoring and that this was the only time in her employment that she was subjected to this type of monitoring.[28]

Based on the testimony provided by Mr. Collins, the reporting policy was not a personnel action directed specifically at the applicant but a general policy for all the employees under Mr. Collins' supervision. The quality of the policy is not before the Court, only the reprimand the applicant received for a failure to follow the procedure.

Based on the above, the Court finds that the reprimand the applicant received for a failure to report her location/schedule as required was not a bad faith personnel action.

An employer shall pay no compensation for a psychiatric injury if the injury was substantially caused by a lawful, non-discriminatory, good-faith personnel action. The burden of

[26] 4% of 80% industrial causation equals 3.2% of the total causation from all sources combined.
[27] Further Minutes of Hearing and Summary of Evidence for hearing taken 3-10-2022, Page 10 Lines 9-14
[28] Minutes of Hearing (Further) and Summary of Evidence, 8-26-2021, Page 7, Lines 14 -21

proof shall rest with the party asserting the issue.[29] "Substantial cause" means at least 35 to 40 percent of the causation from all sources combined.[30]

Based on the medical reporting of Dr. Davis, the percentage of the causes of the applicant's psychological injury, from all sources combined, that are a result of good faith personal actions is 9.6%.

Based on the above, the Court finds that the applicant's industrial physiological injury was not predominately caused by good faith personnel actions.

In addition to her psyche claim, the applicant has also alleged injury in the form of neuro (including headaches), internal, weight loss, and gastrointestinal.

Dr. Davis evaluated the applicant and diagnosed the applicant with possible psychological factors affecting medical condition: stress-related physiological response affecting migraine headaches and irritable bowel syndrome. However, Dr. Davis states that he is not an internist and was deferring the issue of causation. As such, Dr. Davis recommends that the applicant be evaluated by a physician specializing in internal medicine.[31]

The applicant testified to high blood pressure, irritable bowel syndrome, nausea, and migraines. The applicant acknowledged that these conditions preexisted her industrial exposure but that she was not required to take medication for these conditions.

The Court finds that the undisputed evidence submitted suggests that the applicant sustained an injury in the form of neuro (including headaches), internal, weight loss, and gastrointestinal. However, the evidence submitted is insufficient to determine if that injury is nonindustrial or industrial.

With the evidence suggestive of an industrial injury, the Court finds that in keeping with opinions and procedures in Tyler and McDuffie, further development of the record on the issues of causation of the applicant's neuro (including headaches), internal, weight loss, and gastrointestinal is necessary.

The Court further finds that returning to Dr. Davis will not cure the defect and insufficiencies of the medical reporting as Dr. Davis deferred the issue of causation of the applicant's neuro (including headaches), internal, weight loss, and gastrointestinal issues to an internist.

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[29] Cal Lab Code § 3208.3(h)
[30] Cal Lab Code § 3208.3(b)(3)
[31] COURT DD: Medical report of Dr. David Davis, dated 5-23-2023, Page 42

STATUTE OF LIMITATIONS, ESTOPPEL, AND LATCHES

The running of the period of limitations prescribed by this chapter is an affirmative defense and operates to bar the remedy and not to extinguish the rights of the employee. Such defense may be waived. Failure to present such defense prior to the submission of the cause for decision is a sufficient waiver.[32]

The period within which proceedings may be commenced for the collection of the benefits is one year from the date of injury, the date of the last indemnity benefits, or the last date of furnishing of medical benefits.[33]

The Court, in reviewing the Board file, finds that the applicant filed her Application for Adjudication on July 2, 2018.[34]

The parties stipulated that the continuous trauma was for the period of July 5th, 2012 through June 13, 2018.

Based on the evidence before the Court, the Court finds that the applicant's claim was filed within one year of the date of injury as stipulated by the parties.

As such, the applicant's claim is not barred by the statute of limitations, estoppel, and/or latches.

AVERAGE WEEKLY EARNINGS

The Court notes that no evidence or testimony was submitted on the issue of average weekly earnings.

However, the parties stipulated at trial that the applicant would be entitled to the maximum permanent disability rate of $290.00 per week.

The parties also stipulated at trial that the issue of the applicant's entitlement to temporary disability from June 18 through the present is being withdrawn at the time.

The determination of the applicant's average weekly earnings is required to determine the applicant's disability rates.

As the parties have stipulated the applicant's permanent disability rate and the applicant having withdrawn the issue of temporary disability entitlement, the issue of the applicant's average weekly earnings is now moot.

PERMANENT AND STATIONARY DATE

[32] California Labor Code Section 5409
[33] California Labor Code Section 5405
[34] EAMS Doc ID: 26688658, APPLICATION FOR ADJUDICATION, receive date 7/2/2018

The applicant is claiming that she is not permanent and stationary. However, the defendant asserts that the applicant was permanent and stationary on March 13, 2020, based on the QME report of Dr. Mohammad Hanizavareh.[35]

Dr. Davis stated that she would have been temporarily partially psychiatrically disabled after she started getting sexually harassed by Mr. George Rivera for approximately four weeks.

The applicant's condition would have been temporarily totally psychiatrically disabled again in June 2018, when she went out on administrative leave.

Dr. Davis stated that the applicant became temporarily partially psychiatrically disabled again in November 2018 when she began working for Johnson & Johnson.

Dr. Davis stated that the applicant probably reached Maximum Medical Improvement and Permanent and Stationary status by January 2020, which would have given her over a year to recover from what occurred with the OCSD.[36]

Dr. Hanizavareh declined to address the applicant's disability status on the grounds that he did not find that the industrial events predominately caused the applicant's psychological issues.[37]

The evidence suggests that the applicant's psychological injury had reached Permanent and Stationary status as of March 13, 2020.

However, with the applicant's claims of injury for her neuro (including headaches), internal, weight loss, and gastrointestinal needing development, the Court defers its final determination on the issue of the applicant's permanent and stationary date until that development of the record is completed.

APPORTIONMENT

Dr. Davis went through the records of Dr. Gray and Dr. Sleep. Dr. Davis stated he believed that Dr. Gray was rating the examinee's GAF score lower than warranted. Dr. Davis states that based on how the examinee functioned, as well as my interview with the examinee concerning her symptoms when she was hired and her current symptoms, he believed the applicant's preexisting GAF score when she was hired by the OCSD was 61, which indicates a 14% Whole Person Impairment.

Dr. Davis states that the applicant's current GAF score is 59, which corresponds to a Whole Person Impairment rating of 17%. Therefore, it is within reasonable medical probability that 80%

[35] JOINT Z: Medical report of Dr. Mohammad Hanizavareh dated April 10th, 2020.
[36] COURT DD: Medical report of Dr. David Davis, dated 5-23-2023, Page 44
[37] JOINT Z: Medical report of Dr. Mohammad Hanizavareh dated April 10th, 2020, Page 7

of the examinee's permanent psychiatric disability was caused by preexisting psychiatric illness, and 20% of the examinee's permanent psychiatric disability was caused by work stress at the OCSD between 2012 and 2018.

Dr. Davis states that it is within reasonable medical probability that 0% of the examinee's permanent psychiatric disability was caused by any other nonindustrial factors from July 2012 through the date of this evaluation (April 27, 2023).[38]

The Court finds the medical reporting of Dr. Daivs reasoned and supported by the evidence and the applicant's medical history.

The Court finds that 20% of the applicant's current psychological disability is a result of the continuous trauma of July 5th, 2012 through June 13, 2018.

The Court defers its final determination on the issue of apportionment for any potential disability for the applicant's claim of injury to her neuro (including headaches), internal, weight loss, and gastrointestinal until the development of the record is completed.

PERMANENT DISABILITY

Dr. Davis provides that considering the applicant's current psychiatric symptoms, the psychological testing results, the mental status examination, how the examinee's current psychiatric symptoms adversely impact upon the four parameters of permanent psychiatric impairment, activities of daily living, social functioning, concentration, and adaptation, and considering all these parameters as a comprehensive whole, the applicant had a Global Assessment of Functioning (GAF) score 59.[39]

A Global Assessment of Functioning (GAF) score of 59 converts to 17% whole person impairment.

Based on a 17% whole person impairment and taking into consideration the apportionment identified by Dr. Davis, the applicant's psychological permanent disability would rate as follows:

20% (14.01.00.00-17 - [1.4] 24 – [212J] 34 - 38) 8%

However, the Court defers its final determination on the issue of permanent disability until the development of the record on the industrial nature, or lack thereof, of the applicant's claim of injury to her neuro (including headaches), internal, weight loss, and gastrointestinal has been completed.

[38] COURT DD: Medical report of Dr. David Davis, dated 5-23-2023, Page 46-47
[39] COURT DD: Medical report of Dr. David Davis, dated 5-23-2023, Page 41

NEED FOR FURTHER MEDICAL CARE

Dr. Davis provides that the psychiatric treatment with Dr. Jen Kin, Dr. Lyons, and other mental health professionals that the applicant has seen since July 2012 was and still is clinically warranted. If the examinee has an industrial compensable injury, then the treatment is warranted on an industrial basis.

Dr. Davis provides that the applicant should continue to see Dr. Jen Kin once every three to six months for psychotropic medication management. The applicant should be entitled to this level of psychiatric care indefinitely on an industrial basis if the examinee has a compensable industrial psychiatric injury.

Based on the medical reporting submitted in this matter, the Court finds the applicant is in need of future medical care to cure or relieve the effects of the psychological industrial injury the applicant sustained between July 5, 2012 and June 13, 2018.

The issue of the applicant's entitlement to future medical care for her alleged neuro (including headaches), internal, weight loss, and gastrointestinal is deferred pending the development of the record.

ATTORNEY FEES

The issue of attorney fees is deferred pending the development of the record on the industrial nature of the applicant’s neuro (including headaches), internal, weight loss, and gastrointestinal claims.

DATE: November 27, 2023

Oliver Cathey

WORKERS' COMPENSATION JUDGE

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR REMOVAL

I.

INTRODUCTION

1. Applicant's occupation :	Occupational Health Nurse
Applicant's Age :	[]
Date of Injury :	July 5, 2012 through June 13, 2018
Parts of Body Injured :	psyche
Manner in which it occurred :	Continuous Trauma
2. Identity of Petitioner :	Defendant Orange County Sanitation District
Timeliness :	Petition is timely
Verification :	Petition is verified
3. Date of Order :	November 27, 2023

Petitioner contends that the WCJ erred in finding that:

a) The applicant sustained an industrial psychological injury and

b) That the actual events of employment were predominate as to all causes combined of the applicant's psychiatric injury.

II.

BACKGROUND

The applicant, Gina Tetsch, while employed during the period of July 5, 2012 through June 13, 2018, as an Occupational Health Nurse by the Orange County Sanitation District, claimed to have sustained injury arising out of and in the course of employment to her psych, neuro, including headaches, internal, weight loss, and gastrointestinal as a result of harassment and bad faith personnel actions.

The defendant, Orange County Sanitation District, denied the applicant's claim, asserting that the personnel actions were good faith personnel actions and that these good faith personnel actions were the predominant cause of her alleged psychological injury.

The trial began on November 12, 2020, at which time the stipulations and issues being present for determination were read into the record. The trial continued for multiple dates, on which testimony was taken of the applicant and the employer witness. The matter was submitted for determination on April 28, 2022.

Upon review of the records, the Undersigned Judge determined that the medical reporting was insufficient and that further development of the records was required. The submission of the matter was vacated on July 11, 2023, and the parties were instructed to return the applicant to the panel QME and treating physician and obtain further reporting consistent with the Undersigned Judge's instructions.

On November 1, 2022, the parties advised the Undersigned Judge that the panel QME was no longer available and requested that the court appoint a regular physician to evaluate the applicant.

On November 18, 2022, the Undersigned Judge appointed Dr. David Davis.

Dr. David Davis evaluated the applicant and issued his report on May 23, 2023.

The parties appeared before the Undersigned Judge on September 27, 2023. At that time, Dr. Davis' May 23, 2023, report was admitted into evidence, and the matter was re-submitted for determination.

On November 27, 2023, the Undersigned Judge issued a Findings and Award finding that the applicant sustained a physiological injury, that the events of the applicant's employment between July 5, 2012 and June 13, 2018 were the predominant cause of the applicant's psychiatric injury, that some of the employment events that caused the applicant's physiological injury were personnel actions, and that the applicant's industrial physiological injury was not predominately caused by good faith personnel actions,

The Undersigned Judge further found that the medical reporting submitted is insufficient to determine if the applicant sustained an industrial injury in the form of neuro (including headaches), internal, weight loss, and gastrointestinal.

The Undersigned Judge awarded the applicant medical care for her psychological injury and ordered the record developed on the issue of causation of the applicant's neuro (including headaches), internal, weight loss, and gastrointestinal claims.

The Undersigned Judge further deferred determination on the issues of the permanent and stationary date, apportionment, permanent disability, need for further medical care, and attorney fees until causation of the applicant's neuro (including headaches), internal, weight loss, and gastrointestinal claims can be made.

On December 11, 2023, the defendant filed its Petition for Removal, asserting that the Undersigned Judge errored in finding that the actual events of employment were predominate as to all causes combined of the applicant's psychological injury.

III.

DISCUSSION

REMOVAL vs. RECON

The defendant has filed a Petition for Removal to the Undersigned Judges, finding that the applicant sustained an industrial psychological injury.

"At any time within 20 days after the service of the order or decision, or of the occurrence of the action in issue, any party may petition for removal based upon one or more of the following grounds:

(1) The order, decision, or action will result in significant prejudice.

(2) The order, decision, or action will result in irreparable harm.

The petitioner must also demonstrate that reconsideration will not be an adequate remedy after the issuance of a final order, decision or award. Failure to file the petition to remove timely shall constitute valid ground for dismissing the petition for removal."[40]

Removal generally involves interlocutory or nonfinal orders such as discovery disputes.[41]

A petition for reconsideration is appropriately taken from a final order, decision, or award. A final order has been defined as one that either determines any substantive right or liability of those involved in the case[42] or determines a threshold issue that is fundamental to the claim for benefits.[43]

The defendant has filed its petition for removal to the Undersigned Judge's findings that the applicant sustained a psychological injury.

The Undersigned Judge's finding of injury is a final decision that determined a substantive right and liability of the parties and determined the threshold issue of whether or not the applicant's psychological injury arose out of and in the course of her employment with the defendant.

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[40] 8 CCR 10955
[41] Allison v. Workers' Comp. Appeals Bd., 72 Cal. App. 4th 654, 658
[42] Rymer v. Hagler (1989) 211 Cal.App.3d 1171, 1180
[43] Maranian v. Workers' Comp. Appeals Bd. (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].

As such, the defendant's petition for removal is not to address an interlocutory or nonfinal order but to overturn a final determination and is inappropriate and should be denied.

However, the Undersigned Judge will treat the petition for removal as if it was filed in error and, as such, will address the defendant's petition as a Petition for Reconsideration.

INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

The defendant asserts that the evidence does not support the Undersigned Judge's finding that the applicant sustained a psychological injury and that the psychological injury was predominantly caused by the events of the applicant's employment.

The defendant further asserts that Dr. Davis only found that the events of her employment had worsened the applicant's pre-existing psychological injury and that a worsening of a pre-existing injury or condition is, in and of itself, not an injury.

Dr Davis stated that "[i]t is within reasonable medical probability that 80% of the active causation of the worsening of the examinee's Major Depressive Disorder, Recurrent, Generalized Anxiety Disorder, and Panic Disorder was due to the work events listed in . . . November 18, 2022 Order Appointing Regular Physician." Dr Davis further stated that "[i] is within reasonable medical probability that 20% of the worsening of the examinee's psychiatric illnesses was caused by concomitant personal stress."

It has been well established that an employer takes the employee as he finds them at the time of employment and that when the events of employment aggravate a previously existing disease or condition resulting in disability, it is a compensable injury.[44]

Dr. Davis found that the applicant had a worsening of her pre-existing psychiatric conditions.

The term worsening is synonymous with to worsen, which is defined as to make worse.[45] To make worse is also the definition of to aggravate.[46] As such, Dr. Davis's finding that the applicant's events of employment caused a worsening of her pre-existing psychological injury is a finding that the applicant's pre-existing psychological injury was aggravated by her employment.

As such, the applicant's pre-existing psychological injury was aggravated by the events of her employment and, therefore, is a compensable injury.

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[44] Argonaut Insurance Co. v. IAC (Harries) (1964) 29 CCC 279; E.L. Yeager Construction v. WCAB (Gatten) (2006) 71 CCC 1687, 1690

[45] 2023 Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/worsen

[46] 2023 Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/aggravate

As to the events of her employment being the predominant cause of the worsening of her pre-existing psychological injury, Dr. Davis found that 80% of the active causation of the worsening of the applicant's major depressive disorder, recurrent, generalized anxiety disorder, and panic disorder was due to the events of employment.

The defendant implies that Dr. David Davis, by finding that the worsening of the applicant's pre-existing injury was 80% caused by all the events of employment, Dr. Davis ignores the causation from the pre-existing injury.

The Undersigned Judge believes that the defendant is mixing up the causation of injury with the causation of disability.

Industrial causation and apportionment of disability is not a single and undistinguishable concept and should be separately analyzed.[47]

"The issue of the causation of permanent disability, for purposes of apportionment, is distinct from the issue of the causation of an injury. Thus, the percentage to which an applicant's injury is causally related to his or her employment is not necessarily the same as the percentage to which an applicant's permanent disability is causally related to his or her injury. The analyses of these issues are different and the medical evidence for any percentage conclusions might be different."[48]

California Labor Code Section 3208.3(b)(1) requires a showing that the actual events of employment predominantly caused an applicant's psychological injury.

Dr. Davis stated that the events of employment caused 80% of the applicant's industrial injury.

The courts have interpreted the phrase "predominant as to all causes" as a requirement that more than 50 percent of the injury's causation must be work-related.[49]

Based on the medical reporting and the opinions of the regularly appointed physician, Dr. Davis, the applicant's industrial injury, the aggravation of her pre-existing psychological condition, was predominantly caused, 80%, by the actual events of her employment with the defendant.

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[47] Soberon v. Garibay, 2013 Cal. Wrk. Comp. P.D. LEXIS 453, *11-12 (Cal. Workers' Comp. App. Bd. September 6, 2013)

[48] Appis v. San Bernardino City Unified Sch. Dist., 2016 Cal. Wrk. Comp. P.D. LEXIS 365, *4-5 (Cal. Workers' Comp. App. Bd. July 25, 2016)/Escobedo v. Marshalls (2005) 70 Cal.Comp.Cases 604, 611

[49] Department of Corrections v. Workers' Comp. Appeals Bd. (1999) 76 Cal.App.4th 810, 816.

Based on the above, the Undersigned Judge was not in error in finding that the applicant sustained an industrial psychological injury and that the actual events of employment predominantly caused the injury.

IV.

RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the defendant's petition for removal (reconsideration) be denied.

DATE: December 27, 2023

Oliver Cathey

WORKERS' COMPENSATION JUDGE