

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

MARIA CISNEROS, *Applicant*

vs.

**LOS ANGELES UNIFIED SCHOOL DISTRICT;
administered by SEDGWICK, *Defendants***

**Adjudication Number: ADJ16681782
Long Beach District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION AND
DECISION AFTER
RECONSIDERATION**

Applicant seeks reconsideration of the Findings and Order (F&O) of December 6, 2023, wherein the workers' compensation judge (WCJ) found in relevant part that defendant has met its burden of proof in establishing that applicant's industrial injury is barred by the good faith personnel action defense per Labor Code¹ section 3208.3(h) and *Rolda*. Applicant contends that her claim is not barred by the good faith personnel action defense.

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

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Reconsideration, rescind the F&O, substitute new Findings of Fact, and return this matter to the WCJ for further proceedings.

¹ All further statutory references are to the Labor Code unless otherwise noted.

FACTS

Applicant claimed industrial injury to her psyche from October 15, 2020, to October 15, 2021, while working as a health care assistant for defendant. Applicant testified that she worked for the defendant from 1983 until October 15, 2021. (10/3/23 Minutes of Hearing/Summary of Evidence (MOH/SOE), pp. 3, 5.) Following a hepatitis vaccine in 1998, she had a reaction that medical professionals concluded was a vaccine-related reaction. (MOH/SOE, p. 3.) She was taken off work and filed a workers' compensation claim related to that injury. (MOH/SOE, p. 3.) A nurse practitioner at the time told her not to finish the rest of the course of the hepatitis vaccine and to avoid all other vaccines. (MOH/SOE, pp. 3-4.)

Applicant received notification from defendant in August 2021, that she was required to receive a Covid-19 vaccine. (MOH/SOE, p. 4.) She saw Dr. Ashida in October 2021, who wrote a report outlining her issues with vaccines; he confirmed that applicant had an adverse reaction to the hepatitis B vaccine in 1998, and had not received any vaccinations since then. (MOH/SOE, p. 4; Ex. 6, Report of Dr. Ashida, dated 10/27/21, pp. 1-2.) Dr. Ashida further reported that the Covid-19 vaccine did not have any ingredients in common with the hepatitis vaccine and opined that applicant was unlikely to have anaphylaxis in response to the Covid-19 vaccine but she could easily get delayed reactions of rash, fatigue, arm pain, and headache. (Ex. 6, p. 2.) Applicant testified that she submitted Dr. Ashida's report to defendant but an accommodation was denied. (MOH/SOE, pp. 4-5.) She did not hear back about her initial submission but her accommodation was ultimately denied as were her appeals. (MOH/SOE, pp. 4-5.)

According to applicant, defendant told her that she either had to resign or retire but that she could keep her health benefits if she retired. (MOH/SOE, p. 4.) She separated from her employment but felt betrayed and worthless. (MOH/SOE, p. 4.) She had planned to continue to work for defendant while also pursuing a nursing degree; she was still in school for a degree. (MOH/SOE, pp. 4-5.) Her last day of work was October 15, 2021, but she was able to use illness time and leave time until May 2022. (MOH/SOE, p. 5.)

Juan Gonzalez, disability manager for defendant, testified that he had oversight of the Covid-19 accommodation program at LAUSD. (MOH/SOE, pp. 5-6.) There was a mandatory Covid-19 vaccination policy in 2021. (MOH/SOE, p. 6.) Being fully vaccinated was an essential job function at LAUSD at the time. (MOH/SOE, pp. 6-7.) Healthcare assistants had to be physically present at one or more school sites to provide services such as applying Band Aids,

addressing cuts, and doing temperature checks. (MOH/SOE, p. 6.) An individual requesting an accommodation would have to submit an Attachment A, an Attachment B, a medical document, and a job function explanation. (MOH/SOE, p. 6.)

According to Gonzalez, no policy was put into place to automatically deny medical accommodations and that medical accommodations were granted to some employees. (MOH/SOE, p. 6.) Gonzalez knew that applicant's accommodation request was not approved. (MOH/SOE, p. 6.) Gonzalez indicated that the problem with the note from Dr. Ashida was that it did not have a duration on it, which was required as part of the accommodation. (MOH/SOE, p. 6.) If duration had been included, it was possible that the accommodation could have been approved. (MOH/SOE, p. 6.) Additionally, remote work was possible if the documentation and notes were compliant but applicant did not submit compliant documents. (MOH/SOE, p. 7.) The interactive process was satisfied as applicant was informed that she needed a medical report with the duration of the accommodation. (MOH/SOE, p. 7.) A letter was sent to applicant asking for the duration but he did not have it with him at that time. (MOH/SOE, p. 7.)

Applicant stated that she filled out Attachment A and Attachment B but did not recall receiving any email from defendant requiring the need for duration or discussing it. (MOH/SOE, p. 7.) She would have accepted virtual work if it had been offered. (MOH/SOE, p. 7.)

Applicant's personnel file documents that Gonzalez contacted applicant by email on September 27, 2021, to notify her that Attachment B required additional information; the notification stated "You did not indicate if your accommodation request is due to a disability, serious medical condition, or a sincerely held religious belief." (Ex. 4, Personnel File Excerpts, p. 2.) The notice also indicated that applicant's request was missing the medical certification and medical report as the attachments she had sent in could not be opened. (Ex. 4, p. 2.) On October 12, 2021, the Reasonable Accommodations Program stated it had not received the missing documents requested in the September 27, 2021 email and therefore no further action would be taken on her request. (Ex. 4, p. 1.)

Dr. Howard Greils, panel qualified medical evaluator in psychiatry, stated in his January 31, 2023 report that applicant's psychiatric injury was due to work-related factors. (Ex. 1, Dr. Greils PQME report, dated 1/31/23, pp. 37, 40.) He found that 75% of the cause of applicant's psychiatric injury was due to the work-related events that could be considered in the realm of personnel action: 25% was due to stress from the repeated denials she received in her efforts to be

given the exemption from the Covid-19 vaccine and 50% was due to having to take a forced retirement and be separated from her employment due to her refusal to take the vaccine. Dr. Greils also opined that 10% of the cause of applicant's psychiatric injury was due to a major depressive episode in 2006, resulting from a work-related physician injury to her left ankle and heel, and 15% of the cause was due to a pre-existing major depressive episode from 2010 to 2012 or 2013, relating to the death of her mother. (Ex. 1, p. 41.)

DISCUSSION

Section 3208.3 governs claims for psychiatric injury. To establish that a psychological injury is compensable, an injured worker must show by a preponderance of the evidence that actual events of employment predominantly caused the psychological injury. (Lab. Code, § 3208.3(b)(1).)

Once the issue of industrial psychiatric injury has been established, an employer may seek to have the claim barred from compensation by proving that it was substantially caused by a lawful, nondiscriminatory, good faith personnel action. (Lab. Code, § 3208.3(h).) Again, the burden of proof rests with the party holding the affirmative of the issue. (Lab. Code, §§ 3208.3(h), 5705.) Thus, defendant holds the burden of proving the good faith personnel action defense.

When a psychiatric injury is alleged and the "good faith personnel action" defense has been raised, the WCJ must evaluate the defense according to a multilevel analysis. (*San Francisco Unified School Dist. v. Workers' Comp. Appeals Bd. (Cardozo)* (2013) 190 Cal.App.4th 1, 9 [75 Cal.Comp.Cases 1251] (writ den.); *Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241, 242 (Appeals Board en banc) (*Rolda*).)

Under this analysis, the WCJ must first consider all the medical evidence and the other documentary and testimonial evidence of record and then determine: (1) whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination for the WCJ; (2) if so, whether such actual events were the predominant cause of the psychiatric injury, a determination which requires competent medical evidence; (3) if so, a further determination must be made establishing whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith - a factual/legal determination for the WCJ; and (4) if so, a determination must be made as to whether the lawful, nondiscriminatory, good faith personnel actions were a "substantial cause" of the psychiatric injury. (*Rolda, supra*, 66

Cal.Comp.Cases at p. 247; see also *San Francisco Unified School Dist. v. Workers' Comp. Appeals Bd. (Cardozo)*, *supra*, 190 Cal.App.4th at p. 9.) Section 3208.3 defines "substantial cause" as "at least 35 to 40 percent of the causation from all sources combined." (Lab. Code, § 3208.3(b)(3).)

In the instant case, only the third factor is at issue: whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith. "To be in good faith, the personnel action must be done in a manner that is lacking outrageous conduct, is honest and with a sincere purpose, is without an intent to mislead, deceive, or defraud, and is without collusion or unlawful design." (*Larch v. Contra Costa County* (1998) 63 Cal.Comp.Cases 831, 837.) Personnel actions are not in good faith if they are "froth with problems of unclarity of rules and errors of management personnel not following proper procedures." (*City of Fresno v. Workers Compensation Appeals Bd. (Romero)* (2000) 65 Cal.Comp.Cases 1051, 1052.)

Disability manager Gonzalez testified that the problem with applicant's note from Dr. Ashida is that it did not have a duration on it, which was required as part of the accommodation. (MOH/SOE, p. 6.) However, Dr. Ashida stated in his report of October 27, 2021 that applicant had an adverse reaction to a previous hepatitis vaccine and that she could have a reaction to the Covid-19 vaccine. (Ex. 6, p. 2.) The duration of applicant's requested accommodation would presumably be the length of time that the Covid-19 vaccine was required by defendant; however, defendant has not shown that the need for a duration was appropriately communicated to applicant. (MOH/SOE, p. 7.)

Further, the evidence indicates that applicant filled out a reasonable accommodation form requesting remote work, such as maintaining and updating student records and vaccines and referrals, Spanish translations for special education individual education plans over zoom, translating documents for parents, and providing telephone and follow up support for the Student and Family Wellness hotline and the LAUSD pass portal. (Ex. 4, p. 6.) Defendant indicated in a notation from labor relations dated September 9, 2021, that while rare, it would consider remote work for some positions as part of reasonable accommodations. (Ex. 4, p. 11.) Defendant's notes stated that it would engage with employees in the interactive process and would consider multiple factors, such as the availability and feasibility of remote work, in determining if it could offer remote work as a reasonable accommodation. (Ex. 4, pp.14, 16.) While Gonzalez testified that remote work was possible if applicant had submitted compliant documents (MOH/SOE, p. 7), defendant-has not shown that it explored the possibility of applicant working remotely.

Finally, Gonzalez also stated that medical accommodations were granted to some employees. (MOH/SOE, p. 6.) However, there was no evidence presented as to the nature of the other exemptions.

Therefore, defendant has not met its burden that its personnel actions were implemented in a manner that was lawful, nondiscriminatory and in good faith. The rules regarding the duration of the accommodation, the consideration of remote work, and evidence as to why some accommodations were granted are unclear and show that management personnel may not have followed proper procedures. (See *City of Fresno v. Workers Compensation Appeals Bd. (Romero)*, *supra*, 65 Cal.Comp.Cases at p. 1052.)

Accordingly, we will rescind the F&O, substitute new Findings, and return this matter to the WCJ for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the December 6, 2023 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the December 6, 2023 Findings and Order is **RESCINDED** and the following Findings are **SUBSTITUTED** in its place, and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion:

FINDINGS OF FACT

1. MARIA CISNEROS, while employed during the period October 15, 2020, through October 15, 2021 as a health care assistant at Los Angeles, California, by LOS ANGELES UNIFIED SCHOOL DISTRICT, who was permissibly self-insured and administered by SEDGWICK GLENDALE, sustained injury arising out of and occurring in the course of employment to her psyche.

2. Defendant has not met its burden of proof in establishing that such injury is barred by the good-faith personnel action defense per Labor Code section 3208.3(h) and *Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241, 242 (Appeals Board en banc).

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER



I DISSENT. (See attached Dissenting Opinion.),

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 20, 2024

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

**MARIA CISNEROS
OZUROVICH, SCHWARTZ & BROWN
RUSSELL LEGAL GROUP**

JMR/ara

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

DISSENTING OPINION OF COMMISSIONER JOSÉ RAZO

I respectfully dissent. I would deny reconsideration for the reasons stated below and for the reasons stated by the WCJ in the Report, which I adopt and incorporate by reference. Defendant has met its burden for the good faith personnel action defense as described in section 3208.3(h) and *Rolda*.

First, primary treating physician Dr. Ashida's medical evidence regarding applicant's inability to receive the Covid-19 vaccine was conclusionary and defective, and applicant failed to cure these defects. Dr. Ashida reported that the Covid-19 vaccine did not have any ingredients in common with the hepatitis vaccine and opined that applicant was unlikely to have anaphylaxis in response to the Covid-19 vaccine but instead might have a delayed reactions of more minor reactions such as rash, fatigue, arm pain, and headache. (Ex. 6, p. 2.)

Further, Juan Gonzalez had oversight of defendant's Covid-19 accommodations program and the WCJ found Gonzalez to be straightforward, composed, and highly credible. (Opinion on Decision (OOD), p. 2.) Defendant's mandatory Covid-19 vaccination policy was communicated to the applicant in August 2021. (MOH/SOE, pp. 4, 6.) Applicant's medical evidence for accommodation was insufficient and she failed to remedy the missing documentation despite communication from defendant. Gonzalez contacted applicant by email on September 27, 2021, to notify her that Attachment B required additional information and clearly stated that she did not indicate if her accommodation request was due to a disability, serious medical condition, or a sincerely held religious belief. (Ex. 4, p. 2.) The notice also indicated that applicant's request was missing the medical certification and medical report as the attachments she had sent in could not be opened. (Ex. 4, p. 2.) Applicant failed to submit the necessary documentation requested in that email and on October 12, 2021, the Reasonable Accommodations Program stated no further action would be taken on her request. (Ex. 4, p. 1.) The interactive process was satisfied by this process between applicant and defendant. (MOH/SOE, p. 7.) Finally, Gonzalez testified that no policy was put into place to automatically deny medical accommodations, and medical accommodations were granted to some employees. (MOH/SOE, p. 6.) In sum, defendant did not have a blanket policy to deny accommodations to the Covid-19 vaccine policy and the interactive process extended over a lengthy period of time and complied with the requirements of the FEHA (Fair Employment and Housing Act) guidelines to engage in an interactive process with reasonable accommodations.

I have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id.*) Defendant has met its burden that its personnel actions were implemented in a manner that was lawful, nondiscriminatory and in good faith. Therefore, I would find that defendant met its burden of the good faith personnel action defense and applicant's claim is barred on this basis.



WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 20, 2024

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

**MARIA CISNEROS
OZUROVICH, SCHWARTZ & BROWN
RUSSELL LEGAL GROUP**

JMR/ara

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

**REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE
ON PETITION FOR RECONSIDERATION**

**I
INTRODUCTION**

- | | |
|------------------------------|---|
| 1. Applicant's Occupation: | Healthcare Assistant |
| Applicant's Age: | 56 at DOI |
| Date of Injury: | CT ending October 15, 2021 |
| Parts of Body Injured: | Psyche |
| 2. Identity of Petitioner: | Applicant |
| Timeliness: | Yes |
| Verification: | Yes |
| 3. Date of Order: | December 6, 2023 |
| 4. Petitioner's Contentions: | That Applicant's claim is not barred by the Good Faith
Personnel Defense |

**II
STATEMENT OF THE CASE AND FACTS**

The Applicant worked as a healthcare assistant for Los Angeles Unified School District (LAUSD). The COVID-19 pandemic unfolded during her time with LAUSD. As a result, LAUSD implemented a mandatory vaccination policy for employees against the virus; however, the policy allowed for exemptions. LAUSD communicated the policy to its employees and the Applicant received this information.

The Applicant initially submitted an incorrect initial request for accommodation. The administration later met with her following her second attempt at submitting the request. LAUSD communicated to the Applicant that her request was deficient as they needed more information about the accommodation and its duration. There was no policy to completely deny all medical accommodations. This communication between LAUSD and the Applicant went on for some time.

Eventually, time ran out for the Applicant to obtain approval for her accommodation request. The Applicant went onto a leave of absence and exhausted her leave time. Once she exhausted her leave time, LAUSD told her that she could resign and maintain her health benefits, otherwise she would lose her healthcare if terminated. Applicant chose to resign and maintain her benefits.

Subsequently, Applicant filed the claim herein. She obtained a PQME with Dr. Howard Greils. The matter went to a one day trial on October 3, 2023, where the Applicant and an LAUSD witness, Juan Gonzalez, testified; the matter was submitted. The undersigned issued a Findings and Order (F&O) and corresponding Opinion on Decision (Opinion) that the Applicant take nothing on this claim, dated December 6, 2023. It is from that F&O that Applicant, through counsel, files a Petition for Reconsideration (Recon), dated December 15, 2023, and filed December 19, 2023.

III **DISCUSSION**

The undersigned set forth the statutory and decisional authority in the underlying Opinion regarding the Good Faith Personnel Defense, so the undersigned will forego repeating that background herein. The undersigned does note that the Recon essentially asserts that LAUSD's actions were not lawful, nondiscriminatory, and were not done in good faith. The undersigned will focus on those assertions as the only challenge to the F&O.

LAUSD's witness, Juan Gonzalez, had oversight of the accommodation program at the time of the Applicant's requests. He testified in a very highly credible manner and the undersigned found his testimony incredibly persuasive.¹ His testimony was that LAUSD did not have a blanket policy to flat out deny medical accommodations.² The undersigned reasonably finds that this is a nondiscriminatory policy on its face.

The Recon seemingly asserts that LAUSD violated FEHA guidelines, and therefore the law, in how it implemented the policy vis-à-vis the Applicant; however, when applying the language of FEHA as indicated in the Recon to the facts at hand, that assertion fails. FEHA obligates LAUSD to "engage in the interactive process with, and reasonably accommodate, the employee [...]."³ The credible testimony of LAUSD's witness supports that LAUSD did just that. It should be noted that the Applicant acknowledges she submitted an incorrect initial request for accommodation, and LAUSD then continued a dialogue with the Applicant on what was needed.⁴ It appears that specifically a duration for the accommodation was needed.

The exhibits show that the information from Dr. Ashida, Applicant's personal care doctor, was lacking on its face. The prescription is a conclusory statement that the Applicant cannot get the COVID vaccine for "medical reasons."⁵ The undersigned notes that Dr. Ashida's own medical reporting prior to this prescription states that the conclusion of an adverse reaction to the hepatitis B vaccine years prior was "a little suspicious."⁶ It is unclear how the doctor's opinions from the medical report to the prescription change so dramatically. The undersigned notes that Dr. Ashida again on February 17, 2022 provides a conclusory statement that the Applicant be excused from the vaccine, with no duration for the accommodation.⁷ The documents from Dr. Ashida, which were submitted by the Applicant in support of accommodation, are clearly lacking in information. LAUSD engaged in the interactive process with the Applicant and requested more information; that information was clearly never provided. LAUSD complied with their obligation; nothing therein strikes the undersigned as being improper.

Petitioner also asserts that LAUSD failed in its FEHA obligations by failing to accommodate the Applicant; however, the undersigned is still uncertain how LAUSD can offer an accommodation

¹ Garza v. Workers' Comp. Appeals Bd., 3 Cal. 3d 312, 318-319; see also Schmidt v. Superior Court, 44 Cal. App. 5th 570, 582

² MOH & SOE, Page 6, Line 16

³ Recon, Page 5, Lines 12-17

⁴ MOH & SOE, Pages 4-5, Lines 25 & 1-3

⁵ Joint Exhibit 7

⁶ Joint Exhibit 6, Page 2

⁷ Joint Exhibit 3, Page 1

if the Applicant's initial request for the same was incomplete. This is why LAUSD continued to engage in the interactive process with the Applicant in obtaining more information for any potential accommodation. The credible testimony offered by LAUSD noted that if duration was part of the information, then the accommodation could have been approved.⁸ Remote work was possible if the Applicant had submitted compliant information.⁹ LAUSD was not able to get to this point, because the Applicant's request was lacking information, something she was informed about repeatedly.

Therefore, when taking into account that the Applicant acknowledges submitting incomplete information as part of her accommodation request, LAUSD communicated with the Applicant the need for additional information and continued to engage with the Applicant, and credible testimony support's LAUSD's actions, the underlying F&O should remain undisturbed.

IV **CONCLUSION**

The undersigned respectfully recommends that the Petition for Reconsideration be DENIED for the reasons set forth above.

DATE: December 28, 2023

Michael Joy
WORKERS' COMPENSATION JUDGE

⁸ MOH & SOE, Page 6, Lines 24-25

⁹ MOH & SOE, Page 7, Lines 5-8