WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LISA LACY, *Applicant*

vs.

COUNTY OF LOS ANGELES HEALTH SERVICES;
administered by SEDGWICK, *Defendants*

Adjudication Numbers: ADJ15800868, ADJ15719224
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award (F&A) of January 23, 2024, of the workers' compensation administrative law judge (WCJ) finding in relevant part that applicant sustained injury arising out of and in the course of her employment on October 21, 2021 and during the period December 30, 2020 to December 30, 2021 to her psyche and awarded applicant permanent disability of 24% less reasonable attorney fees, and future medical treatment. Defendant contends that applicant's claim was barred by the good faith personnel action defense.

We have received an Answer from applicant. 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. Based on our preliminary review of the record, we will grant the Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a

final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

We highlight the following facts that may be relevant to our review of the matter. In case number ADJ15800868, applicant claimed industrial injury of headaches, stomach aches, stress, and psyche while employed on October 21, 2021, as an information systems analyst, by defendant. (10/26/23 Minutes of Hearing/Summary of Evidence (MOH/SOE), p. 2.) In case number ADJ15719224, applicant claimed industrial injury to psyche, stress, depression, and sleep while employed during the period December 30, 2020, to December 30, 2021, as an information systems analyst, by defendant. (MOH/SOE, p. 3.) The cases were consolidated for trial. (MOH/SOE, p. 2.)

Applicant began working for defendant on September 17, 2012. (MOH/SOE, p. 6.) Applicant had good performance reviews with defendant. (MOH/SOE, p. 7.) Defendant informed its employees on October 21, 2021, that it would require weekly Covid testing through a company called Fulgent. (MOH/SOE, p. 6.) Applicant did not want to test with Fulgent because registering with Fulgent would require her to share her genetic information. (MOH/SOE, p. 6.) She did most of her work at home at the time of this meeting. (MOH/SOE, p. 6.) She was informed if she did not test she would be suspended and eventually fired. (MOH/SOE, p. 6.) She requested to be tested at Kaiser but her request was denied. (MOH/SOE, pp. 6-7.) After her request was denied, she started experiencing headaches, stomachaches, and stress. (MOH/SOE, p. 7.) She was suspended, returned to work, and had a "second melt down" due to stress in December 2021. (MOH/SOE, p. 7.) She was then suspended without pay from January 24 through January 28, 2022, for "failure to register in the Fulgent System." (Ex. G, HR Notice of Suspension dated 1/7/22, p. 1.) She then went out of work on disability and retired in September 2022. (MOH/SOE, p. 7.)

In her report of September 14, 2022, Panel Qualified Medical Evaluator (PQME) Dr. Erika Holiday found that with regard to AOE/COE causation, the predominant cause of the development of her mental disorders were caused (greater than 50%) by the threat of being suspended, subsequent suspension and sequelae while working for County of Los Angeles. He deferred whether or not this would be an industrial injury to the Trier of Fact.

Dr. Holiday stated that the threat of suspension and being terminated for not registering with Fulgent accounted for 30% causation and the five-day suspension without pay also accounted for 30% of her injury. (Ex. AA, PQME Report of Dr. Holiday, dated 9/14/22, pp. 33-34, 38.) Further, applicant received a second suspension letter in error that accounted for 20% of her injury. (Ex. AA, pp. 34, 38.) Finally, Dr. Holiday found that 20% of the injury was due to non-industrial stressors: psychological vulnerability accounted for 15% of her injury and concurrent stressors comprised 5% of her injury. (Ex. AA, pp. 34-35, 38.) Dr. Holiday also recommended further medical care. (Ex. AA, pp. 36, 38.). He opined that the predominant (greater than 51% at 80%) cause of the development of her mental disorders was the combined personnel actions she experienced while employed by County of Los Angeles. (Ex. AA, p. 37).

No separate analysis was provided for each of the claimed dates of injury, as he found all the personnel issues to be inextricably intertwined. He deferred further findings regarding the personnel issues to the trier of fact. (Ex. AA, p. 35).

At the hearing on January 23, 2024, the WCJ concluded in relevant part that applicant had suffered injury AOE/COE to her psyche as a result of both dates of injury and awarded her permanent disability of 24%, less reasonable attorney fees, and further medical care. (F&A, pp. 1-2.)

II.

We highlight the following legal principles that may be relevant to our review of the matter. Labor Code[1] 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.

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

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).)

"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.) The term "personnel action" must have a narrower meaning than any action taken by a supervisor towards a subordinate; to be a personnel action, an event of the employment must relate in some meaningful way to the worker's employment status, although that relationship need not be direct and the event need not have an immediate effect on the worker's employment status. (*Id*. at pp. 833-835; see also *Ferrell v. County of Riverside* (2016) 81 Cal.Comp.Cases 943, 945-947.) 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.)

III.

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id*. at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]).)

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924] ["The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims."]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *Rucker v. Workers' Comp. Appeals Bd.*

(2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

Labor Code section 5310 states in relevant part that: "The appeals board may appoint one or more workers' compensation administrative law judges in any proceeding, as it may deem necessary or advisable, and may refer, remove to itself, or transfer to a workers' compensation administrative law judge the proceedings on any claim. . . ." (See also Lab. Code, §§ 123.7, 5309.)

Here, it is unclear from our preliminary review whether the existing record is sufficient to support the decision, order, and legal conclusions of the WCJ; and/or whether further development of the record may be necessary.

IV.

Finally, we observe that under our broad grant of authority, our jurisdiction over this matter is continuing.

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].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal.2d 360, 364) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case." (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650]) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra,* at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Labor Code section 5901 states in relevant part that:

> No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

Accordingly, we grant defendant's Petition for Reconsideration and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the January 23, 2024 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the January 23, 2024, Findings and Award is **DEFERRED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 16, 2024

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

LISA LACY
LEVIN & NALBANDYAN, LLP
FULLER LAW 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*