

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

CUONG LY, *Applicant*

vs.

**KAISER FOUNDATION HOSPITAL, Permissibly Self-Insured,
Administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ11018856
San Jose District Office**

**OPINION AND ORDER
DISMISSING PETITION FOR
RECONSIDERATION**

Applicant, in pro per, filed a Petition for Reconsideration of the March 10, 2021 Findings and Order issued by the workers' compensation administrative law judge (WCJ). We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, the petition will be dismissed as skeletal.

The Labor Code requires that:

The petition for reconsideration shall set forth specifically and in full detail the grounds upon which the petitioner considers the final order, decision or award made and filed by the appeals board or a workers' compensation judge to be unjust or unlawful, and every issue to be considered by the appeals board. The petition shall be verified upon oath in the manner required for verified pleadings in courts of record and shall contain a general statement of any evidence or other matters upon which the applicant relies in support thereof.

(Lab. Code, § 5902, emphasis added.)

Moreover, the Appeals Board Rules provide in relevant part: (1) that “[e]very petition for reconsideration ... shall fairly state all the material evidence relative to the point or points at issue [and] [e]ach contention contained in a petition for reconsideration ... shall be separately stated and clearly set forth” (Cal. Code Regs., tit. 8, former § 10842, now § 10945 (eff. Jan. 1, 2020)) and (2)

that “a petition for reconsideration ... may be denied or dismissed if it is unsupported by specific references to the record and to the principles of law involved” (Cal. Code Regs., tit. 8, former § 10846, now § 10972 (eff. Jan. 1, 2020).)

In accordance with section 5902 and WCAB Rules 10945 and 10972, the Appeals Board may dismiss or deny a petition for reconsideration if it is skeletal (e.g., *Cal. Indemnity Ins. Co. v. Workers' Comp. Appeals Bd. (Tardiff)* (2004) 69 Cal.Comp.Cases 104 (writ den.); *Hall v. Workers' Comp. Appeals Bd.* (1984) 49 Cal.Comp.Cases 253 (writ den.); *Green v. Workers' Comp. Appeals Bd.* (1980) 45 Cal.Comp.Cases 564 (writ den.)); if it fails to fairly state all of the material evidence, including that not favorable to it (e.g., *Addecco Employment Services v. Workers' Comp. Appeals Bd. (Rios)* (2005) 70 Cal.Comp.Cases 1331 (writ den.); *City of Torrance v. Workers' Comp. Appeals Bd. (Moore)* (2002) 67 Cal.Comp.Cases 948 (writ den.); or if it fails to specifically discuss the particular portion(s) of the record that support the petitioner's contentions (e.g., *Moore, supra*, 67 Cal.Comp.Cases at p. 948; *Shelton v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 70 (writ den.)) The Petition for Reconsideration filed herein fails to state grounds upon which reconsideration is sought or to cite with specificity to the record. Therefore it is subject to dismissal.

If we were not dismissing the petition as skeletal, we would have denied it on the merits for the reasons stated in the WCJ's report, which we would adopt and incorporate. We would also give 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].)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 26, 2021

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

**CUONG LY
ALBERT AND MACKENZIE**

PAG/ara

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

REPORT AND RECOMMENDATION
ON DEFENDANT'S PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. Applicant's Occupation: Pharmacist
Applicant's Age: 44 years old at time of injury
Date of Injury: CT 2/14/2017 – 3/30/2017
Parts of Body Injured: alleged injury to psyche

2. Identity of Petitioner: **Applicant** filed the petition.
Timeliness: The petition was timely filed on 03/29/2021.
Verification: The petition was verified.

3. Date of Issuance of Order: 03/05/2021

4. Petitioner's Contends: Applicant, *in pro per*, contends the undersigned acted without and in excess of her powers, and that evidence did not justify the findings and Order and Opinion on Decision and that he has discovered new evidence material to him which could not with reasonable diligence have discovered and produced at the hearing.

Defendant filed its response.

II
FACTS

Given the extensive evidence and volume of this case, the undersigned will set forth the basis for the 3/5/2021 decision as well as restate pertinent portions of said decision.

Mr. Cuong Ly, in pro per applicant, alleged psychiatric injury as a result of non-disciplinary meetings that occurred on 2/14/2017, 3/9/2017 and 3/24/2017 while working as a pharmacist for Kaiser. Mr. Ly alleged that because of being targeted by Ms. Ian Lei, the outpatient pharmacy director for Kaiser, wherein she demoralized him during these meetings, he suffered psychiatric injury. Defendant asserted good faith personnel action per Labor Code Section 3208.3(h). Matter proceeded to trial, a total of 11 days of trial of which 9 days of testimony from 10 individuals.

On 2/13/2017, a stock check incident occurred between Mr. Ly and a pharmacy technician, Ms. Catherine Shauri. Ms. Shauri initially inquired about a Humira medication, which turned out to be the wrong medication. When Ms. Shauri realized she asked for the wrong medication, she called Mr. Ly again. During the second inquiry, Ms. Shauri inquired about Humira Pen starter kit. Although Mr. Ly confirmed that he had the medication in the fridge, as it was for Crohn's disease and two other diagnosis, and because Ms. Shauri asked for the wrong medication during the first call, he made professional judgement and advised Ms. Shauri he did not have the drug. Mr. Ly

testified that he did not have the patient's information but because of the diagnosis on the box and Ms. Shauri not asking for the correct medication the first time, he made a judgement call to not lend the medication. Whether NDC # was given to Mr. Ly was in dispute. Mr. Ly initially admitted that he made a simple mistake on a stock check saying he didn't have the Humira Pen starter kit when he had it, but this was a simple miscommunication.¹ The following day, Ms. Ian Lei asked him to step into Mr. Bob Sabin's office, a pharmacy service supervisor, and behind closed door, questioned Mr. Ly about the stock check incident. Mr. Ly felt Ms. Lei hostilely interrogated him, he was humiliated and demoralized. Two separate meetings took place on 2/14/2017. Towards the end of the meeting, Ms. Lei advised Mr. Ly that this was a coaching session, which was a non-disciplinary session.²

As a result of these meetings, Mr. Ly alleged that he was emotionally distraught and made a dispensing error later that day. Initially, Mr. Ly acknowledged that he made a dispense error where he dispensed six (6) Lovenox syringes rather than sixty (60).³ Mr. Ly reasoned that the trauma from the 2/14/2017 caused him to make dispensing error. Mr. Ly subsequently alleged during trial that he did not believe he made this mistake but rather the entire incident was fabricated by Kaiser.

Subsequently to the Lovenox dispensing error, a fact-finding meeting took place on 3/9/2017 and a follow up meeting on 3/24/2017 to discuss the outcome of the 3/9/2017 meeting took place. Mr. Ly was offered a union representation on 3/9/2017, which he declined. Mr. Ly had his union representative, Mr. Howard Hertz present on 3/24/2017. The 3/24/2017 meeting stayed as a coaching which was non-disciplinary. Subsequently, Mr. Ly experienced a number of symptoms and filed a workers compensation claim against the employer.

Matter proceeded to trial wherein an entire day was set aside to go over the issues and exhibits as well as list of witnesses. Matter was finally submitted for decision on 1/5/2021. Mr. Ly requested an opportunity to submit post trial brief, wherein said request was granted.

After reviewing the entire evidence, including 9 days of testimony and in excess of approximately 5 inches of exhibits, the undersigned found that Mr. Ly's claim is barred by good faith personnel action pursuant to Labor Code Section 3208.3(h) as discussed below.

It is from this decision that applicant filed his petition for reconsideration.

III **DISCUSSION**

Applicant's allegation on his Petition for Reconsideration

Despite Mr. Ly's allegation that the undersigned did not take applicant's evidence into consideration when determining credibility of witnesses, the undersigned went above and beyond

¹ Applicant's Exhibit C1; Defendant's Exhibit P, Q, R

² Mr. Ly appears to allege that "coaching session" was made up either by Ms. Lei or her attempt to cover up her violation of Mr. Ly's rights to be represented by his Union representative. However, the undersigned did not find any convincing evidence to support Mr. Ly's allegation, as supported by Mr. Cabalu and Mr. Howard Hertz.

³ Joint Exhibit G3

to accommodate applicant's requests throughout the trial and combed through rather extensive evidence offered by both parties.

Mr. Ly makes numerous allegations in his Petition, which once again, supports his unwillingness to accept facts, but rather insists his unilateral belief constitutes facts and evidence. Mr. Ly was advised many times prior to and throughout the trial that his statements alone do not constitute facts nor evidence, that corroborating documents, evidence or testimony would be required, but Mr. Ly ignored such instruction throughout the trial.

Mr. Ly alleges that he provided "numerous proofs that Ms. Lei lied under oath" and that he provided "overwhelming evidence" to show that events at issue were likely manufactured by the defendant. The undersigned did not find any convincing evidence to support Mr. Ly's allegation. Mr. Ly was advised to list and call witnesses to corroborate his statements, person with most knowledge of Kaiser software to confirm whether the DFI had been doctored, but failed to do so. Mr. Ly's position was that he had engineering degree which qualified him to be an expert on Kaiser system and ignored the undersigned's advise and recommendation. Mr. Ly also stated that as his testimony contradicts that of the witnesses', it proved other witnesses were lying and not credible. Again, most of the witness testimony corroborated each other or were supported by submitted evidence.

Mr. Ly alleges he has proven that defendant provided false information to the panel QME. There isn't even any slight evidence to support such allegation. In fact, Mr. Ly himself provided 26 typed pages of addendum in addition to lengthy evaluation with the Panel QME. He questioned the Panel QME at her deposition. He did not question nor object to any documents being sent to the Panel QME.

My. Ly alleges he cooperated with all discovery by the defense counsel, which again, is false. On day one of trial, significant amount of time was spent on explaining the procedure including allowing additional evidence. The undersigned was informed that one of the issues at the 6/21/2018 hearing was defendant's demand for Mr. Ly to produce recordings. Apparently, Mr. Ly secretly recorded subsequent meetings wherein Mr. Ly alleged these recordings supported hostile meeting and discriminatory acts against him. Defendants agreed to waive any conflict or any criminal actions against Mr. Ly, but Mr. Ly refused to produce said recordings. It was pointed out that if in fact the recordings confirmed Ms. Lei yelling at Mr. Ly, defendant would admit liability and not proceed with extensive trial. Mr. Ly refused.⁴

Mr. Ly also alleges that his witnesses disclosed new evidence but he was not allowed to conduct discovery. Again, this allegation is false. Witnesses did not disclose any new evidence. The undersigned recalled Mr. Ly wishing to conduct further discovery in relations to the 132a claim and pending civil case against the employer, not relevant to the issue of AOE/COE. Right from the beginning of the trial, the undersigned offered the parties to depose each witnesses rather than these witnesses testifying in court. Parties declined and wished to go forward with trial, with the

⁴ It is relevant to note that defendant also offered to settle at full value with Thomas findings but applicant refused, insisting that his purpose of proceeding with trial was to bring Kaiser to Justice, that he was seeking punitive results against. Mr. Ly continued to take this position despite the undersigned informing him over and over again that WCAB will only determine industrial injury, causation and benefits, not punitive damages. This is another example of Mr. Ly inability to listen.

understanding that discovery remains closed. Also, at no time did Ms. Bobchick admit or essentially admit that dispensing error was fabricated.

Credibility of Witnesses

Ten witnesses testified. While the undersigned found all witnesses to be credible for the most part, there was a slight exception as to Mr. Ly's credibility, which will be explained below. The undersigned found Mr. John Cabalu, HR Consultant, and Ms. Jun Lin, applicant's direct supervisor to be most credible. In particular, Ms. Lin testified in a straight forward, honest, intelligent and professional manner. Her testimony corroborated evidence and other witness' testimony. It appeared that Mr. Ly places him at a higher status over technicians and other non-pharmacist supervisors as he himself is a pharmacist as he challenges their inputs or criticism.⁵ He also believed he had superior knowledge over other pharmacists as he had an engineering degree and he received Board Certified Pharmacy Specialist certification. However, Ms. Jun Lin's testimony that applicant was "mediocre pharmacist at best" was supported by the evidence of past performance reviews. All the performance reviews from 2009 through 2017 all confirmed that Mr. Ly needed to improve on decision making and problem solving as he took too long to resolve issues when he is the troubleshooter. Mr. Ly on the other hand, rejected and even failed to not acknowledge these 8 years of performance review reciting the same problem regarding his performance.

While the undersigned found that Mr. Ly to be a pleasant, intelligent individual, Mr. Ly's narrow perception and inability or perhaps unwillingness to follow instructions as well as getting hung up on minor insignificant details lead the undersigned to determine Mr. Ly's statements cannot be relied upon entirely. This is not to say that Mr. Ly's behavior was intentional. The undersigned agreed with the Panel QME, Dr. Claire Baum that it is most likely not intentional, but most likely due to other factors, including Mr. Ly's personality traits.⁶

Mr. Ly's unusual perception also needs to be taken into consideration.⁷ Mr. Ly had hard time accepting simple explanation and instructions. Despite the undersigned taking extensive measure to accommodate Mr. Ly over the entire trial, Mr. Ly appeared easily frustrated and agitated when things did not go as he wished or anticipated.

For instance, Mr. Ly made allegation during trial that defense attorney deliberately sat on the right side of the court (facing the judge) in order to prevent the applicant from seeing the employer

⁵ He testified that the stock check error was entirely Ms. Shauri's fault. He made a professional judgement that Ms. Shauri did not know which drug she was asking for. MOH dated 2/18/2020, p. 7, L18-19. He testified that he felt Ms. Linh Nguyen, a non pharmacist supervisor, unnecessarily wasted too much of his time when he could have been doing other important pharmacist duties. Mr. Ly also expressed that Mr. Sabin, as a pharmacy supervisor, did not have the ability comment on when a pharmacist can say yes or no to technicians.

⁶ Joint Exhibit G3, Panel QME report from Dr. Clare Baum. Joint Exhibit H1. Dr. Baum stated that someone with OCPD feels the need to be in control of things and have things in certain way, otherwise, causes them anxiety. She also testified that avoiding anxiety is part of disorder.

⁷ While the eye contact issue was not the basis of any of the meetings, Mr. Ly spent extensive time trying to establish that he did have said problem. Mr. Ly was hung up on this issue. Interestingly, the undersigned personally observed Mr. Ly not making eye contact majority of the time during the 11 days of trial. The only times he made conscious efforts to make an eye contact with a witness was when he was asking whether the witness found Mr. Ly to have eye contact at that moment. Mr. Ly asserted that because he was making eye contacts a few times during trial when making his point, he did not have eye contact issues.

witness coaching his witnesses on the stand. Such behavior was not observed by the undersigned. It was explained to Mr. Ly that there was not a set rule in WCAB as to seating, but traditionally, defendants usually sat on the right side facing the bench and applicant on the left. However, in order to address Mr. Ly's concerns and unfounded accusation, Mr. Ly was asked to select the seat he wished to sit in. This did not satisfy Mr. Ly however, as he requested that his spouse be present at trials to observe any improper conduct by the defendant, which was allowed.

While Mr. Ly alleged that all the other witnesses are not credible, Mr. Ly himself made contradicting testimony. Mr. Ly testified that Ms. Ian Lei's testimony that applicant assumed the patient's diagnosis was incorrect as diagnosis is irrelevant in stock check. Yet, he testified that while he knew that he had the correct drug on 2/13/2017, because of the diagnosis listed on the box, he made a professional judgment call and told Ms. Shauri he did not have the drug. He testified that he made professional judgment that Ms. Shauri did not know which drug she was asking for. Such assumption is illogical and difficult to understand.

Throughout the trial, Mr. Ly challenged trial procedures and rejected instructions or explanations. Personal observation of Mr. Ly during various days of trial supported various witness testimony that Mr. Ly overanalyzed simple concepts and appears to have unreasonable perception of what occurred when he perceived his intelligence or status was being questioned.

Injury AOE/COE

Pursuant to Labor Code Section 3202.5, applicant has the burden to prove by preponderance of evidence that he suffered an injury meeting the criteria of Labor Code Sections 3208 and 8208.1 causing disability or need for medical treatment within the diagnostic criteria set forth therein.

Given the issue at trial, criteria of *Rolda v. Pitney Bowes, Inc.* were considered.⁸ Based on the review of the file, it was found that applicant's psychiatric injury involved three dates at issue identified as personnel action, which constitute actual events of employment. Dr. Baum found industrial events to be predominant cause to applicant's psychiatric injury. The three incidents, 2/14/2017 coaching, 3/09/2017 fact-finding meeting and 3/24/2017 follow up of fact-finding meeting events were personnel actions. Dr. Baum further opined the personnel actions themselves in this case constitute a greater than 50% share of the entire set of causal factors.

Having considered voluminous exhibits as well as 9 days of testimony and post-trial briefs, the undersigned determined the personnel actions to be lawful, nondiscriminatory and made in good faith, wherein applicant's claim is barred.

GOOD FAITH PERSONNEL ACTION

Labor Code Section 3208.3 (h) provides, states in pertinent part, "No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, non-discriminatory, good faith personnel action. The burden of proof shall rest with the party asserting this issue."

⁸ *Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241 (*en banc*)

Personnel actions have been defined by a number of judicial decisions, including significant panel decision *Larch v. Contra Costa County* (1998) 63 Cal. Comp. Cases 831, which stated as follows: “We conclude that a personnel action is conduct either by or attributable to management, including such things as done by one who has the authority to review, criticize, demote, or discipline an employee. It is not necessary for the personnel action to have a direct or immediate effect on the employment status. Personnel actions may include but are not necessarily limited to transfers, demotions, layoffs, performance evaluations, and disciplinary actions such as warnings, suspensions, and terminations of employment.”⁹ In *Northrop Grumman Corp. v. WCAB* (2002) 67 Cal.Comp.Cases 1415, Court of Appeals held that investigation into claims that resulted in finding of baseless was a good-faith personnel action and the fact that the investigation resulted in baseless claim did not remove the investigation from the realm of a good faith personnel action.

In the present case, Mr. Ly perceived he was subject to verbal criticism during the 2/14/2017 “coaching” session. The 2/13/2017 incident that ignited the 2/14/2017 session lead to the 3/9/2017 “fact-finding” meeting wherein Mr. Ly once again felt he was criticized and demoralized. The 3/24/2017 meeting was to discuss the outcome of the fact-finding meeting. None of these meetings were punitive nor disciplinary in nature. These actions taken by Ian Lei, regional director, constitute a personnel action.

Mr. Ly initially admitted that he made an error when he advised Building D that he did not have the Humira starter kit. He testified that he reported this as communication error to management. While Mr. Ly may have felt that the stock check was a minor error, it would have been reasonable for Ms. Lei to inquire as to why the medication was not lent to Ms. Shauri, as it was related to patient delay in service. Ms. Lei was acting in good faith when she inquired about the Humira Starter Kit incident 3/9/2017 fact-finding meeting resulted from a dispense error of Lovenox syringe of 2/14/2017 as well as patient complaint that occurred 8 months prior, coupled with the Humira Kit incident. Mr. Ly initially admitted to the dispensing error of Lovenox.¹⁰ Again, regardless of Mr. Ly’s subsequently refuted position, the 3/9/2017 was not unreasonable and was conducted in good faith, based on Kaiser Policy. Ms. Lei testified that during the fact-gathering meeting, she understood when Mr. Ly did not recall a consult that took place while ago. It was not unreasonable for management to ask about his general practice with the consult and it was quite understandable that management was concerned when Mr. Ly provided inconsistent response. It would have been alarming to hear a licensed pharmacist to respond that he would alter his consultation based on patient’s age, which he determined by patient’s appearance.

Mr. Ly testified that he was made aware that the 3/24/2017 meeting was a follow up meeting. His union representative, Mr. Howard Hertz was present at the meeting. Mr. Hertz testified that when he was present to ensure that the union contract was respected, member’s rights were respected, management was not being inappropriate and to ensure that these were not fishing expedition. Mr. Hertz testified that he did not feel that Mr. Ly was being treated unfairly as compared to other

⁹ *Larch v. Contra Costa County, supra*, adopted by Court of Appeals in *County of Sacramento v. WCAB* (Brooks) (2013) 78 Cal.Comp.Cases 379.

¹⁰ More than three years after admitting to his dispense error, Mr. Ly now believes that the Humira starter kit stock check was entirely Ms. Shauri’s fault. He also now believes the Lovenox dispense error was entirely fabricated by Ms. Lei. Nothing in the evidence presented showed the Lovenox dispense error was fabricated by Kaiser. Mr. Ly did not produce any witnesses nor convincing evidence to support such allegation. This behavior supports other witness’s testimony that applicant’s tendency to overanalyze.

meetings and he could not say that Mr. Ly was being singled out.

Number of applicant's witnesses corroborated testimony confirmed these meetings were non-disciplinary, standard procedure within the department. Mr. John Cabalu, Kaiser HR consultant was brought in when Mr. Ly filed a complaint against Ms. Lei's actions during these three meetings. Mr. Cabalu conducted full impartial objective investigation and concluded that Mr. Ly's allegations against Ms. Lei were unsubstantiated. If anything, Mr. Cabalu thought management was being lenient with the applicant. Mr. Cabalu testified that based on his investigation, these meetings were consistent with the practice and procedures within the department.

Various witnesses confirmed that Ms. Lei could have escalated to disciplinary process. Both Ms. Jun Lin and Mr. Andy Nguyen felt Ms. Lei should have progressed to disciplinary process. However, Ms. Lei's decision to remain as coaching and non-disciplinary supported her intent to give applicant an opportunity to learn from the meeting and give him a chance to improve, in good faith.

Based on review of relevant evidence and various testimony, these sessions and meetings were lawful, non-discriminatory, good faith personnel actions. Therefore, the undersigned found Mr. Ly's claim is denied under LC Section 3208.3(h).

IV
RECOMMENDATION

It is respectfully recommended that the applicant's Petition for Reconsideration be denied for the reasons stated above.

Pauline H. Suh
WORKERS' COMPENSATION JUDGE

DATE: 04/08/2021