WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ASARULISLAM SYED, *Applicant*

vs.

STATE OF CALIFORNIA, KERN VALLEY STATE PRISON, LEGALLY UNINSURED; STATE COMPENSATION INSURANCE FUND/STATE CONTRACT SERVICES, ADJUSTING AGENCY, *Defendants*

Adjudication Number: ADJ8539095
Bakersfield District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration.[1] Having completed our review, we now issue our Decision After Reconsideration.

Defendant seeks reconsideration of the December 3, 2019 Evidentiary Ruling, Order, Findings of Fact and Opinion on Decision (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a Chief Psychiatrist from July 19, 2001 to July 26, 2012, sustained industrial injury to the psyche. The WCJ found that applicant's injury was not substantially caused by lawful, nondiscriminatory good faith personnel action.

Defendant contends that actual events of employment were not the predominant cause of the claimed injury because applicant misperceived reality. Defendant further contends lawful, nondiscriminatory, good faith personnel action was the substantial cause of applicant's injury, thus barring compensation.

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.

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[1] Commissioner Lowe, who was on the panel that granted reconsideration to study this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

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 affirm the F&O.

FACTS

Applicant claimed injury to the psyche while employed as Chief Psychiatrist by defendant CDCR-Kern Valley State Prison from July 19, 2001 to July 26, 2012. Defendant denied injury arising out of and in the course of employment.

Applicant, a licensed physician, began working at the Kern Valley State Prison in 2005. (September 24, 2013 Minutes of Hearing and Summary of Evidence (Minutes), at 3:33.) The prison health system is under a federal receivership, with the federal receiver, Mr. Hutchinson, appointed as "CEO" to oversee all medical aspects of the prison. (*Id*. at 5:20.) Applicant's job duties included psychiatric organization, recruitment of other psychiatrists and psychologists, and addressing healthcare issues for a prison population of approximately 5,000 inmates. (*Id*. at 3:36.)

In 2008, applicant's job title was changed to chief psychiatrist. Dr. Bindler, a former subordinate who was not a medical doctor, was promoted to Chief of Mental Health, and applicant was asked to report to him. There was no loss of pay or benefits to applicant. (*Id*. at 4:23.) Applicant was concerned about being required to report to a non-medical practitioner. (*Id*. at 4:38.) Applicant believed reporting to a psychologist violated the terms of the federal receivership and did not rise to the standard for community care for a licensed psychiatrist. (*Id*. at 5:28.)

In 2012, Dr. Bindler retired, and Mr. Mason, a social worker with three years' experience was promoted to be the new Chief of Mental Health. (*Id*. at 5:37.) The position was appointed, and applicant did not apply for the position. (*Id*. at 9:37.) Applicant felt that being required to report a non-medical practitioner violated community care and appropriate medical standards. Applicant felt frustration and disappointment because he had to explain reasonable medical standards to his boss, who did not understand. (*Id*. at 6:11.) Applicant attempted to make the best of the situation. On July 26, 2012, applicant was given a "Letter of Expectation" that he felt was unreasonable, and required that he perform job duties inappropriate to a chief psychiatrist. (*Id*. at 6:25.) Applicant felt the letter of expectation might subject him to professional liability, and that his medical credential might be jeopardized by full compliance with the letter. (*Id*. at 8:5.) On April 29, 2013,

applicant was provided with a modified letter of expectation to which applicant had no objection. (*Id*. at 7:16.)

The parties selected David Reiss, M.D. as the Agreed Medical Examiner (AME) in psychiatry. Dr. Reiss identified multiple psychiatric diagnoses, with industrial factors identified as the predominant cause of psychiatric injury. (Ex. 1, report of AME David Reiss, M.D., dated February 5, 2013, at p. 17.) The determination of whether there was good faith personnel action was deferred to the trier of fact. (*Ibid.*) Over the next four years, the parties requested multiple supplemental reports from Dr. Reiss in an attempt to elucidate the issue of whether good faith personnel action was a substantial cause of alleged psychiatric injury. On March 25, 2016, AME Dr. Reiss issued a report wherein he assigned 5% causation to applicant's usual and customary duties, 15% to perceived discrimination, and 5% to preexisting factors. (Ex. 6, report of David Reiss, M.D., dated March 25, 2016, p. 6.) Dr. Reiss felt that the remaining 75% causation arose out of the administrative actions of applicant's employer. (*Ibid.*) In a supplemental report of April 14, 2017, Dr. Reiss provided the following causation attribution:

1. Performance of usual and customary duties - 5%.
2. Pre-existing non-industrial emotional conflicts or psychopathology - 5%.
3. Applicant's perception that he and his wife had been personally mistreated - 15%
4. Expectation that applicant would be required to perform physical examination and to deal with blood tests - 10%.
5. Appointment of Dr. Bindler as Chief of Mental Health and requirement that applicant report to and take direction from Dr. Bindler - 30%.
6. Appointment of Mr. Mason as Chief of Mental Health and requirement that applicant report to and take direction from Mr. Mason - 30%.
7. July 26, 2012 letter of expectation - 5%.

   (Ex. 5, report of David Reiss, M.D., dated April 14, 2017, p. 5.)

The parties proceeded to trial, and on December 3, 2019, the WCJ issued the F&O, determining in relevant part that applicant sustained injury arising out of and in the course of employment (AOE/COE), and that the injury was not substantially caused by lawful, nondiscriminatory, good faith personnel action. (F&O, dated December 3, 2019, Findings of Fact Nos. 1 and 3.) In her Opinion on Decision, the WCJ explained that applicant's injury was predominantly caused by actual events of employment, and that the appointments of Dr. Bindler

and Mr. Mason as successive Chiefs of Mental Health were not personnel actions within the meaning of section 3208.3(h). (F&O, Opinion on Decision, at pp. 3-4.) Accordingly, the WCJ found that defendant had not met its burden of establishing that lawful, nondiscriminatory and good faith personnel action was a substantial cause of the alleged injury.

Defendant seeks reconsideration, averring that applicant's misperception of reality caused the injury, rather than actual events of employment. (Petition, at 5:26.) Defendant asserts that "[a]ll the reasons given by Applicant for his problems with his supervisors lacks [sic] any objective evidence of harassment, persecution, or other basis for his alleged psychiatric injury." (*Id*. at 6:14.) Defendant further avers the promotions of Dr. Bindler and Mr. Mason were personnel action, accomplished in good faith. (*Id*. ay 7:11.) Defendant asserts that because the good faith personnel actions of the employer were a substantial cause of the injury, compensation is barred. (*Id*. at 8:1; Lab. Code § 3208.3(h).)

Applicant's Answer asserts the employer's administrative appointments of other individuals to the position of Chief of Mental Health were not personnel actions under section 3208.3(h). Applicant asserts he was "was never demoted, transferred or subject to discipline, there was no adverse action," and that he was, "placed in a position that would have caused him to breach his ethical duties sworn to in the Hippocratic Oath." (Answer, dated January 9, 2020, at 7:1.)

The WCJ's Report observes that the incidents identified by AME Dr. Reiss as causative of the psychiatric injury were all actual events of employment, including the appointment of non-physicians to Chief of Mental Health, the work expectation letter, and the expectation that applicant would perform physical examination and deal with blood tests. (Report, at p. 6.) With respect to the assertion that injury was caused by good faith personnel action, the WCJ averred that the promotion of Dr. Binder and Mr. Mason were not personnel actions directed at applicant, and did not relate to applicant's performance as Chief Psychiatrist. (Report, at p. 8.)

DISCUSSION

The burden of proving injury AOE/COE by a preponderance of the evidence rests with the applicant. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a); 3202.5.) With respect to psychiatric injuries, section 3208.3 provides, in relevant part, as follows:

(a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition—Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.

(b) (1) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury.

(2) Notwithstanding paragraph (1), in the case of employees whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury.

(3) For the purposes of this section, "substantial cause" means at least 35 to 40 percent of the causation from all sources combined.

...

(h) No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. The burden of proof shall rest with the party asserting the issue.

(Lab. Code, § 3208.3(a)-(b) and (h).)

Thus, and pursuant to subdivision (b) of section 3208.3, applicant must establish that actual events of employment were predominant as to all causes combined. Defendant contends that applicant's psychiatric injury arose out of his misperceptions of reality, rather than actual events of employment. (Petition, at 6:1.) Defendant contends that all of applicant's problems with his supervisors lacked objective evidence of harassment, persecution, or other basis for the alleged psychiatric injury, and consequently the claimed psychiatric injury is non-compensable. (Petition, at 6:14.)

However, as is noted in the Report, Dr. Reiss' causation analysis included factors that were actual events of employment. (Report, at p. 6.) This included the appointment of Dr. Binder as Chief of Mental Health (30% causation), followed by the appointment of

Mr. Mason as Chief of Mental Health (30% causation), and the July 26, 2012 Letter of Expectation (5% causation). Combined these three factors represent 65% causation, which exceeds the predominant cause threshold of section 3208.3(b)(1).

We also observe that Dr. Reiss is the parties' chosen Agreed Medical Examiner. "[W]orkers' compensation law favors agreed medical examiners in resolving medical disputes fairly and expeditiously. Thus, strong policy supports the agreed medical examiners' opinions…" (*Green v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1444, fn. omitted [70 Cal.Comp.Cases 294].) Parties typically select an agreed medical examiner because of his expertise and neutrality. (See *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) Accordingly, an agreed medical examiner's opinion should be followed, unless there is good reason to find that opinion unpersuasive. (*Ibid.*)

Here, defendant contests the AME's causation analysis, but has declined to raise any of these contentions with the AME following the final report of April 14, 2017. Additionally, defendant offers neither persuasive argument nor a corresponding evidentiary basis for departure from the AME's well-considered opinions on causation, and we discern none in the record. Accordingly, we agree with the WCJ's determination that actual events of employment were the predominant cause of applicant's psychiatric injury.

Defendant next contends that the promotion of Dr. Bindler and Mr. Mason were lawful, nondiscriminatory, good faith personnel actions that were the substantial cause of applicant's psychiatric injury, barring compensation herein.

Section 3208.3(h) provides:

> No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. The burden of proof shall rest with the party asserting the issue.

Substantial cause is 35-40 percent of the causation from all sources combined. (Lab. Code § 3208.3(b)(3).)

Defendant maintains that the appointments of Dr. Bindler and Mr. Mason were personnel actions, as contemplated by section 3208.3(h), and interpreted in the significant panel decision in *Larch v. Contra Costa County* (1998) 63 Cal.Comp.Cases 831 [1998 Cal. Wrk. Comp. LEXIS 4762]. In *Larch*, the applicant was a sheriff's sergeant who was confronted by a fellow sergeant

about her handling of a conflict between her staff and the staff of another shift. (*Id.* at 832.) In assessing whether this confrontation by a fellow sergeant constituted personnel action, we observed that the legislature's 1993 amendments to section 3208.3 replaced the former, broader requirement of a "regular and routine employment event," in favor of the current "substantially caused by lawful, nondiscriminatory, good faith personnel action" requirement. (*Id*. at 833.) We also noted that "[w]hat constitutes a 'personnel action' depends on the subject matter and factual setting for each case. The term includes but is not necessarily limited to a termination of employment." (*Ibid.*) Our decision in *Larch* adopted the WCJ's analysis that "the term personnel action was not intended to cover all actions by any level of personnel in the employment situation or all happenings in the workplace done in good faith, as this would be too broad an interpretation that would preclude from consideration practically all events occurring such as workloads imposed in good faith." (*Id*. at 834.) In determining what constitutes personnel action for purposes of section 3208.3(h), we concluded:

> It is unnecessary, moreover, that a personnel action have a direct or immediate effect on the employment status. Criticism or action authorized by management may be the initial step or a preliminary form of discipline intended to correct unacceptable, inappropriate conduct of an employee. The initial action may serve as the basis for subsequent or progressive discipline, and ultimately termination of the employment, if the inappropriate conduct is not corrected. (*Id*. at 834-835.)

Defendant also cites to *City of Oakland v. WCAB (Gullet)* (2002) 99 Cal.App.4th 261 [67 Cal.Comp.Cases 705] (*Gullet*) for the proposition that the good faith personnel action exemption "is meant to furnish an employer a degree of freedom in making its regular and routine personnel decisions," and that "regular and routine personnel decisions include but are not limited to: discipline, work evaluation, transfer, demotion, layoff, or termination." (Petition, at 7:6.) In *Gullet*, the question presented was whether the employer's demotion of applicant was accomplished in good faith, when applicant was given false hope through a series of administrative mistakes and poor communication that his position would be spared from cost-cutting measures being taken by his employer generally. The Court of Appeal concluded although "'[g]ood faith personnel action' may elude precise definition or a precise set of rules," the employer had satisfied the definition because the demotion of applicant was "a regular and routine employment event was carried out in a reasonable manner with no hint of improper motive." (*Id*. at 712.)

We note, however, that in both *Larch, supra*, 63 Cal.Comp.Cases 831, and in *Gullet, supra*, 67 Cal.Comp.Cases 705, the claimed injury arose out of actions *directed at applicant*. In *Larch*, the precipitating event was applicant's direct confrontation by a colleague, and in *Gullet,* it was applicant's demotion. Here, the precipitating events were the administrative appointments of other individuals to the position of Chief of Mental Health. Neither appointment was remedial action taken against or otherwise directed at applicant. Although our decision in *Larch* acknowledged that the personnel action need not have a direct effect on applicant's employment, especially where such action was part of a larger continuum of progressive discipline, the action discussed was nevertheless directed at applicant. (*Larch, supra,* 63 Cal.Comp.Cases 831 at 835.)

The need to distinguish between generalized administrative activities and directed personnel action is well-established in California workers' compensation jurisprudence. In *County of Butte v. Workers Compensation Appeals Bd. (Purcell)* (2000) 65 Cal.Comp.Cases 1053 [2000 Cal. Wrk. Comp. LEXIS 6485] (writ denied), the employer directed multiple memoranda to applicant Deputy Chief Probation Officer concerning alleged deficiencies in work performance, as management sought to change the "culture" in the department. (*Id*. at 1054-1055.) In evaluating whether these administrative actions rose to the level of personnel action, we concurred with the WCJ's analysis that "every 'action by management' does not constitute a personnel action," and that an overly broad interpretation of managerial action as rising to the level of personnel action would effectively "deny compensability in any case involving an injury arising from management criticism of an employee's conduct." (*Id*. at 1058.)

Similarly, in *Kaiser Found. Hosps. v. Workers Compensation Appeals Bd. (Berman)* (2000) 65 Cal.Comp.Cases 563 [2000 Cal. Wrk. Comp. LEXIS 6298] (writ denied), applicant alleged increased workload and stress as a result of corporate reorganization. We adopted and incorporated the opinion of the WCJ, who opined that section 3208.3 "was aimed instead at precluding psychiatric injury claims flowing from *individual adverse personnel actions*, or ones the affected employee perceives as negative. Otherwise an employer could re-organize its enterprise to place crushing responsibilities on the remaining employees, all with impunity for any emotional stress they might suffer as a result. The legislature cannot have meant to sanction such a result." (*Id*. at 564-565, *emphasis added*.)

Further, in *Joe v. County of Santa Clara-Probation Department* (June 26, 2015, ADJ8788887 [2015 Cal. Wrk. Comp. P.D. LEXIS 352] (WCAB panel decision), applicant

requested additional resources from management to help manage her workload, a request which management ultimately denied, citing reasons of efficiency and the need for automation.[2] In assessing applicant's resulting claim for psychiatric injury, we found that "recognizing the distinction between a psychiatric injury caused by stressful working conditions, and an injury caused by a good faith nondiscriminatory 'personnel action' *directed towards an individual's employment status*, is both important and necessary," because "[w]ithout the distinction, the phrase 'personnel action' would encompass everything in the employment environment that stems from good faith management actions, and that 'would be too broad an interpretation that would preclude from consideration practically all events occurring such as workloads.'" (*Id*. at p. 11.)

We have applied similar reasoning to distinguish between administrative decisions and personnel action in a variety of subsequent WCAB panel decisions. (*Ferrell v. County of Riverside* (2016) 81 Cal.Comp.Cases 943 [2016 Cal. Wrk. Comp. P.D. LEXIS 322] (WCAB panel decision) [elimination of a department for budgetary reasons and reassignment of staff were general working conditions and not "personnel actions" within meaning of Labor Code § 3208.3(h)]; *Vayser v. Tarzana Treatment Centers* (September 22, 2016, ADJ9978575) [2016 Cal. Wrk. Comp. P.D. LEXIS 508] [change of work duties without adequate training not "personnel actions" within meaning of Labor Code § 3208.3(h).]; *Tiffany Merritt v. CDCR - Cal. Inst. for Women* (September 30, 2019, ADJ11125430) [2019 Cal. Wrk. Comp. P.D. LEXIS 420] [neither change in job responsibilities nor taking of applicant's keys was action directed towards applicant's employment status, but transferring applicant to new department was personnel action]; *Jose Garcia v. County of Riverside* (November 6, 2019, ADJ11160813) [2019 Cal. Wrk. Comp. P.D. LEXIS 447] [broadly applied change in job duties, not directed at applicant, constituted stressful working condition rather than "personnel action" under Labor Code § 3208.3(h)].)

Here, the precipitating actions taken by management were the appointments of two employees other than applicant to the position of Chief of Mental Health. There is no evidence that applicant applied for the position, or that the applicant was even considered in the appointment

[2] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to *Joe v. County of Santa Clara Probation Dept.* because it considered a similar issue.

process. There is no evidence that the appointments of applicant's co-workers were steps taken as part of a progressive discipline policy, directed at applicant or otherwise, or that the appointments were in any way designed to "review, criticize, demote or discipline an employee." (*Larch, supra,* 63 Cal.Comp.Cases 831, 834.) While we recognize that the chain of command required applicant to report to the Chief of Mental Health, the record does not establish that the appointments of persons other than applicant were akin to "transfers, demotions, layoffs, performance evaluations, and disciplinary actions such as warnings, suspensions, and terminations of employment." (*Ibid.*; *Stockman v. State/Department of Corr.* (1998) 63 Cal.Comp.Cases 1042 [1998 Cal. Wrk. Comp. LEXIS 5129].)[3]

We emphasize that each case must be decided on its own merits, and that this decision is limited to facts at bar. (*County of Butte v. Workers Compensation Appeals Bd. (Purcell), supra,* 65 Cal. Comp. Cases 1053, 1057], "what constitutes a personnel action depends on the subject matter and factual setting for each case.") However, on the facts before us we conclude that the employer's administrative appointments of persons other than applicant were not personnel actions as contemplated by section 3208.3(h). Because defendant has not established the administrative appointments of other individuals to the position of Chief of Mental Health were personnel actions within the meaning of section 3208.3(h), we agree with the WCJ that defendant has not met its burden of proving that lawful, nondiscriminatory good faith personnel action was a substantial cause of the claimed injury.

In summary, we are not persuaded that good cause exists to depart from the Agreed Medical Examiner's opinions regarding the identified factors of causation. Additionally, the specific facts of this matter lead us to conclude that the defendant's appointments of staff members other than applicant to the position of Chief of Mental Health were not personnel actions as contemplated by section 3208.3(h). Consequently, defendant has not established that lawful, nondiscriminatory and good faith personnel actions were a substantial cause of applicant's psychiatric injury. We will affirm the F&O, accordingly.

For the foregoing reasons,

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[3] Even were we to agree with defendant's characterization of the appointments of applicant's co-workers to the Chief of Mental Health position, we observe that the defendant carries the burden of proof with respect to establishing all aspects of the good faith personnel action defense. Consequently, defendant must establish the alleged personnel actions were taken in good faith. However, defendant offered no evidence, and has elicited no testimony, regarding how or why the decisions to promote Dr. Bindler and Mr. Mason were made. Accordingly, the record does not substantively address whether the alleged personnel actions were undertaken in good faith.

IT IS ORDERED, as the **DECISION AFTER RECONSIDERATION** of the Workers' Compensation Appeals Board, that the December 3, 2019 Evidentiary Ruling, Order, Findings of Fact and Opinion on Decision is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 10, 2022

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

ASARULISLAM SYED
ADAMS, FERRONE & FERRONE
STATE COMPENSATION INSURANCE FUND

SAR/abs

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