WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

QUINTON THORN, *Applicant*

vs.

FORBIX CAPITAL CORP.; EMPLOYERS COMPENSATION INSURANCE FUND; THE HARTFORD, *Defendants*

Adjudication Number: ADJ12248957
Pomona District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to further study the legal and factual issues raised in the Petition for Reconsideration filed by applicant. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings of Fact issued by the workers' compensation administrative law judge (WCJ) on April 23, 2021, wherein the WCJ found that "Applicant did not suffer injury arising out of and occurring in the course of employment, based upon post-termination defense under Labor Code Section 3600(a)(10) and Labor Code Section 3208.2(c)[1] specifically determinative of whether a psychiatric case is industrially related when filed after notice of termination."[2]

Applicant contends that the WCJ erred in finding that his psychiatric claim was barred under section 3600(a)(10).[3]

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[1] We note that Labor Code section 3208.2(c) does not exist. We assume that this was a typographical error by the WCJ, and that the WCJ intended to reference section 3208.3(c). (See Opinion on Decision, p. 6.)

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

[3] Applicant's Petition for Reconsideration contains documents that were either already part of the adjudication file or were not admitted into evidence. This is a violation of section 10945(c) of the Workers' Compensation Appeals Board's Rules of Practice and Procedure. (Cal. Code Regs., tit. 8, § 10945(c)(1)-(2).) Applicant is therefore admonished to follow the Board's Rules of Practice and Procedure, including, but not limited, to WCAB Rule 10945 in all future matters.

We received Answers from defendants Employers Compensation Insurance Fund and The Hartford. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny reconsideration.

We have considered the Petition, the Answers, and the contents of the Report, and we have reviewed the record in this matter. As explained below, as our Decision After Reconsideration, we will rescind the WCJ's Findings of Fact and return the matter to the trial level so that the WCJ may analyze applicant's psychiatric claim under the proper legal standard set forth in section 3208.3.

This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

BACKGROUND

On June 3, 2019, applicant filed an Application for Adjudication alleging cumulative injury to the back, neck, stress, depression, and anxiety while employed by defendant Forbix as a receptionist from June 11, 2018 to April 24, 2019. Applicant subsequently withdrew the allegations of injury to the neck and back, thus limiting the claim to psychiatric injury. Applicant claimed that the psychiatric injury resulted from multiple instances of sexual harassment or discrimination because of his gender identity.

On October 12, 2020 and March 18, 2021, the parties proceeded to trial on the following issue:

1. Injury arising out of and in the course of employment, due to post-termination defense under Labor Code section 3600(a)(10).

(Minutes of Hearing (MOH), October 12, 2020, p. 2.)

According to applicant's testimony at trial, the alleged harassment and discrimination began around July 2018, when the vice president of Forbix, Ron Ross, told applicant that his attire, so-called "culotte" pants, was not "good for the company." Applicant testified that Mr. Ross told him to "dress more straight, meaning more masculine," which "made applicant feel uncomfortable, but [he] remained passive as [he] just started working there." (Minutes of Hearing (Further) and Summary of Evidence (MOH/SOE), March 18, 2021, p. 2.) Applicant testified that, on a separate occasion, Mr. Ross asked whether applicant was attracted to him or "bears" like the Forbix

president, Emil Khodorkovsky. Applicant testified that he asked Mr. Ross to stop and that he cried in the office hallway after the conversation. (*Id.* at p. 4.)

Applicant also testified that, in January 2019, he had a conversation with Mr. Ross following the company Christmas party, when Mr. Ross "pulled [applicant] into the office and handed [him] an email saying to dress appropriate as applicant had worn a dress to the Christmas party." (MOH/SOE, March 18, 2021, pp. 3-4.)

Forbix president, Emil Khodorkovsky, testified on behalf of the defense and disputed applicant's testimony. Mr. Khodorkovsky stated that Forbix was a "diverse group, and everyone gets along with one another," that company dress code policies were indiscriminately enforced, and that "[w]hen applicant was hired, they understood [he] was openly gay...and no one cared but just wanted all to do their jobs." (MOH/SOE, March 18, 2021, pp. 7-9.)

Applicant's employment records admitted into evidence contained a series of emails exchanged between applicant and his supervisor and HR representative, Marie Garcia, regarding applicant's manner of dress and his feelings of sexual harassment and discrimination.

On March 28, 2019, Ms. Garcia emailed applicant, stating:

> Hi Quinton, Per our dress code, May I ask for you not to wear that [sic] pants in the office please….

(App. Exh. 2, Forbix Employment Records, p. 37.)

On March 29, 2019, applicant responded to Ms. Garcia, requesting additional information regarding the dress code. Applicant's email stated, in pertinent part:

> Good morning Marie,
>
> I don't mean for this to come off combative, I'm just curious and want to make sure I understand. I pulled up the dress code area of the handbook that was sent out awhile back and after reading it again, I'm confused as to what exactly was wrong with my culotte dress pants. From what I read and highlighted in the attachment – it's to my understanding that the pants were OK to wear since I was dressed "neat, clean (and to my understanding) tasteful". I especially felt this way since I was complimented by quite a few co-workers in the office…Again, I'm just wanting to make sure I understand where I missed the mark with the dress code so I'm not in violation of anything, as I am very grateful for my position here at Forbix. And being HR, I feel you could help me better understand the rules in the handbook.
>
> Thank you for your help!
>
> Quinton Thorn

(App. Exh. 2, p. 37.)

On April 12, 2019, applicant followed up with Ms. Garcia regarding his March 29, 2019 email, stating:

> Hello Marie,
>
> I wanted to follow up with this email I sent as I haven't heard anything back yet. Unless the email you sent on the 3rd was the official response to my email. It wasn't clear. But in regards to that email (HR Concerns) I am curious as to why I received the initial email from you on 3/28 where you said, "*Per our dress code, May I ask for you not to wear that [sic] pants again in the office please….*" In the photo guidelines you sent a few of us in the office on the 3rd, you have one titled 'business casual women' and in the photo there's an individual wearing the same culotte pants you told me not to wear anymore. This is confusing to me since before this example you sent me an email to not wear those same pants anymore. I hate to ask for assume, but is this in regards to the assumption that I identify solely as male and I wore pants that are considered to be 'women's pants'? It's just confusing since again, I was told not to wear pants that were sent to us in 3 different versions of a woman wearing the same said pants as a 'guideline to help' with understanding the dress code. I unfortunately can't help but to think that the initial email on 3/28 is perhaps in regards to my gender identity and expression….I also want to make note that this is not the first time I've had to face this situation within the company (as I told you verbally during a private conversation you had with me at the time you were first hired on). I also want to request that this is a conversation I only have with you and not Emil or Ron. The last time Ron had a private conversation with me, I was asked incredibly inappropriate questions that I made clear to him made me very uncomfortable to be asked. I didn't want to speak about the situation with Ron to you as I was afraid and uncomfortable, but at this point the entire situation is starting to take Its toll on me.
>
> Thank you for your help,
>
> Quinton Thorn

(App. Exh. 2, p. 36, emphasis in original.)

On April 15, 2019, Ms. Garcia responded to applicant, stating that the "HR Concerns" email was sent to all employees. Ms. Garcia stated that she did not want applicant to feel "confused…uncomfortable and afraid." Ms. Garcia stated, "I was not suggesting that you should not wear whatever clothes you feel comfortable wearing and identify with so long as the clothes are professional and business oriented (similar to the examples I emailed out) and conform to our company policy." (*Id.* at p. 34.)

Ms. Garcia also created a log documenting various interactions with applicant and actions taken in response to his claims. (App. Exh. 2, pp. 34-38.) In a log entry dated February 25, 2018, Ms. Garcia noted the following, as relevant:

> February 25, 2018
>
> Issues/Concerns:
>
> - Unhappy at work because he feels there are group (sic) of people who intentionally makes him feel uncomfortable.
> - Lack of teamwork
> - No respect among each other
>
> * * *
>
> Recommendation:
>
> - Ask if anyone needs help when there is downtime
> - Stop using his personal cell phone while at work….
> - Mainly the person to greet clients. Needs to lower his monitor so guests can see him.
> - Dress codes and attendance – he asked if he can wear a dress? NO DRESS
>
> Actions taken:
>
> Marie:
>
> - Discussed with Quinton why there is a feeling of harassment? About what comments? He said it was just a conversation amongst his co-workers. Explained to him that if he feels or hears anything to let HR know right away.
>
> April 16, 2019 – 4:30-5:00 pm
>
> Re: Quinton Thorn
>
> Re: Conversation with Quinton regarding his email
>
> Quinton had been sending emails about dress codes, I explained to him that he is getting it wrong or too personal as I sent the email to all (email showing break times and dress codes). I asked him what is it that we can do to end this? And his attitude towards me recently were awkward and makes me feel uneasy. I feel that his actions says that "watch me I will make an issue about this", he deliberately does not say anything to me but his actions speaks like he is trying to make me feel uncomfortable letting me feel that he is up to something and that he is going to give me this attitude whenever he feels like it, I mentioned this to him and he said "well it is what it is!"

> I also told Quinton I did not reply right away due to workload and that I was out sick for a week and trying to catch up, I verbally told him that I will get back to him for sure but he kept sending me email insisting on the dress code issue, again and again. I have mentioned to him that as long as it is within the company policy its okay. There was a culottes issue as it was because that day he was wearing his culottes pants, boots, and a sheer sleeve top which I think was not appropriate for office and asked him to please not wear it to work again. (Note: after sending the email about the dress code, Quinton then came in in slacks and long sleeves top for two days, which I thought so he can dress business casual so why making it a big issue?)
>
> I have a feeling that Quinton is testing the system about his GENDER even we are not even seeing any issues about it.
>
> * * *
>
> Also mentioned that he feels that he is harassed and discriminated by the company…I asked if anyone here is harassing or bullying him, as he already mentioned this to me before and I have been observing this claim, I have not seen anyone made such actions against him. He said sometimes that he was cool with it as they are just joking around. Then he mentioned he was asked by management if he likes any of them? With this I had to ask what happened, he said Jan. 26, he was asked by Ron if he was attracted to him or Emil? My question to him was why did you not tell me this when [] I had my first meeting with him? Why was this not reported to previous admin? He did not say anything or told me any other details, I told him that I have to do a thorough investigation.

(App. Exh. 2, pp. 34-37.)

On April 24, 2019, applicant's employment was terminated. (*Id.* at p. 38.)

On March 2, 2020, applicant was seen by qualified medical evaluator (QME) David Taylor, M.D., who authored one report in evidence. (Joint Exh. 1, Report of David Taylor, M.D., March 2, 2020.) Dr. Taylor took the following history of injury as alleged by applicant:

> He began his employment at Forbix Capital Corp on June 11, 2018. His last day of work there was on April 24, 2019. As a Receptionist, his job duties included answering phones, sorting mail, assisting clients, handling insurances for property and general clerical work. He was subjected to sexual harassment and discrimination at work. He was criticized for his manner of dress being too feminine. Both clients and coworkers made fun of his mannerisms and voice. He overheard his coworkers talking about his sexuality. As well, after he wore a dress to the company Christmas party, the company's co-owner, Ron, lectured him, saying he should not have worn a dress, as he was not a woman. He became distraught and felt discriminated against. Ron asked the patient, "Do you like me like that?" The patient stated that he was not comfortable with this conversation and told Ron that he did not like him like that. He began to cry. On about April 3,

> 2019, an HR representative told him that he could not wear culotte pants at work. HR sent out an email specifying what men and women should be wearing. He felt discriminated. A coworker, Nancy, picked a fight with him. One week later, he was fired. He remained symptomatic.

(*Id*. at p. 8.)

Dr. Taylor diagnosed applicant with "Adjustment Disorder with Mixed Anxiety and Depressed Mood" with a diagnosis date of April 24, 2019, the date of applicant's termination. (*Id.* at p. 24.) Dr. Taylor concluded that applicant's psychiatric injury was nonindustrial and that it was also barred by section 3208.3(e) because defendant did not have pre-termination notice of the injury.[4] Specifically, Dr. Taylor stated:

> Causation
>
> [Applicant] denied any past psychiatric history or previous mental health treatment (although Dr. Schwafel's report indicated otherwise). He attributed the onset of his psychiatric condition to the hostile work environment and cumulative trauma that he experienced during the entirety of his employment with Forbix Capital Corp.
>
> Despite these allegations, [applicant] denied any impairment in the performance of his usual and customary job duties, and he denied seeking treatment while employed by Forbix Capital Corp. Several months after his termination on 4/24/19, the applicant said that he hired an attorney who filed his Workers' Compensation claim.
>
> However California Labor Code § 3208.3 specifically excludes compensation for post-termination claims except under limited circumstances for example when "Sudden and extraordinary events of employment were the cause of the injury" or "The employer has notice of the psychiatric injury…prior to the notice of termination or layoff" neither of which apply in this case.
>
> Therefore it is my opinion with reasonable medical probability that [applicant's] psychiatric condition is not a compensable injury.

(*Id.* at p. 26.)

[4] We observe that Dr. Taylor concluded in his QME report that section 3208.3(e)(2) was inapplicable to applicant's case. (Joint Exh. 1, p. 26.) A QME's role is limited to providing expert medical opinions within the scope of their medical expertise. A QME is not permitted to interpret statutes, determine the applicability of legal standards or exceptions, or render conclusions on matters of law, as these functions rest solely with the WCJs and the WCAB. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 607 (Appeals Board en banc); *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 233 [58 Cal.Comp.Cases 323].) Upon return to the trial level, we remind Dr. Taylor or any other designated QME to avoid infringing upon the authority held by the WCJs and the WCAB to decide questions of law.

Dr. Taylor concluded that applicant did not sustain temporary or permanent disability as a result of his psychiatric injury, that apportionment was not necessary, and that applicant had no need for future medical treatment or work restrictions. (*Id.* at pp. 27-28.)

Applicant was also seen by his primary treater, Judith Schwafel, Ph.D., who issued a report on August 22, 2019, which found that applicant sustained temporary partial disability and that 85% of the cause of the disability was attributed to the work events described by applicant. (App. Exh. 3, Report of Judith Schwafel, Ph.D., August 22, 2019, p. 9.)

On April 23, 2021, the WCJ issued the Findings of Fact disputed herein, finding that applicant's psychiatric claim was barred by the post-termination defense provided under section 3600(a)(10). (Findings of Fact, April 23, 2021, p. 1.)

DISCUSSION

I. The WCJ applied the incorrect post-termination defense to applicant's psychiatric injury claim.

As noted above, the WCJ found that applicant's psychiatric injury claim was barred by the post-termination defense set forth in section 3600(a)(10), which states:

> Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:
>
> (A) The employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff.
>
> (B) The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.
>
> (C) The date of injury, as specified in Section 5411, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.
>
> (D) The date of injury, as specified in Section 5412, is subsequent to the date of the notice of termination or layoff.

(Lab. Code, § 3600(a)(10)(A)-(D).)

The WCJ erroneously applied section 3600(a)(10) to applicant's claim. As clearly stated in the statute's first sentence, the post-termination defense applicable to *psychiatric* claims is provided in section 3208.3(e). Section 3208.3(e) states:

> e) Where the claim for compensation is filed after notice of termination of employment or layoff, including voluntary layoff, and **the claim is for an injury occurring prior to the time of notice of termination or layoff,** no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury and one or more of the following conditions exist:
>
> (1) Sudden and extraordinary events of employment were the cause of the injury.
>
> (2) The employer has notice of the psychiatric injury under Chapter 2 (commencing with Section 5400) prior to the notice of termination or layoff.
>
> (3) The employee's medical records existing prior to notice of termination or layoff contain evidence of treatment of the psychiatric injury.
>
> (4) Upon a finding of sexual or racial harassment by any trier of fact, whether contractual, administrative, regulatory, or judicial.
>
> (5) Evidence that the date of injury, as specified in Section 5411 or 5412, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.

(Lab. Code, § 3208.3(e), emphasis added.)

While applicant has the burden of proving industrial causation of psychological injury per section 3208.3, the defendant has the burden to establish a post-termination bar under section 3208.3(e). Defendant must establish that the claim was filed *after* a notice of termination or layoff and that the claim is for *a psychiatric injury occurring prior to the time of notice of termination or layoff*. (Lab. Code, § 5705 [burden of proof rests upon the part holding the affirmative of the issue].) Once the defendant has made this threshold showing, the burden shifts to applicant, who must establish one or more of the exceptions listed in section 3208.3(e)(1)-(5).

Date of injury for cumulative injury claims is established under section 5412, which states: "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (Lab. Code, § 5412.)

As used in section 5412, "disability" means either compensable temporary disability or permanent disability. (*Chavira v. Workers' Comp. Appeals Bd*. (1991) 235 Cal.App.3d 463 [56 Cal.Comp.Cases 631]; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th 998 [69 Cal.Comp.Cases 579].) Medical treatment alone is not "disability" for purposes of determining the date of a cumulative injury pursuant to section 5412, but it may be evidence of compensable permanent disability. (*Rodarte*, *supra*, 119 Cal.App.4th at p. 1005.) Likewise, modified work is not a sufficient basis for finding compensable temporary disability, but it may be indicative of a compensable permanent disability, especially if the worker is permanently precluded from returning to their usual and customary job duties. (*Id*.)

The existence of disability is a medical question beyond the bounds of ordinary knowledge, and, as such, will typically require medical evidence. (*City & County of San Francisco v. Industrial Acc. Com*. (*Murdock*) (1953) 117 Cal.App.2d 455 [18 Cal.Comp.Cases 103]; *Bstandig v. Workers' Comp. Appeals Bd*. (1977) 68 Cal.App.3d 988 [42 Cal.Comp.Cases 114].) Knowledge requires more than an uninformed belief. Because the existence of disability typically requires medical evidence, an "applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability." (*City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985) 163 Cal.App.3d 467, 473 [50 Cal.Comp.Cases 53].)

Here, we cannot apply section 3208.3(e) without first knowing the date of applicant's alleged psychiatric injury, as defined by section 5412. In other words, the date of alleged injury is an essential requirement of section 3208.3(e); if defendant cannot prove that applicant's alleged psychiatric injury occurred *prior to* his termination, the post-termination defense under section 3208.3(e) does not apply. This issue should be decided at the trial level in the first instance, affording the parties to address the issue and to provide additional evidence at the WCJ's discretion.

II. The WCJ failed to properly apply the good faith personnel action defense to applicant's psychiatric injury claim.

In the Opinion on Decision, the WCJ opined, in one sentence, that applicant's interactions with his superiors regarding compliance with company dress code "appeared to be a good faith personnel action[.]" (Opinion on Decision, p. 5.) We can assume that, in so stating, the WCJ was

referring to the so-called "good faith personnel action defense" to compensability, pursuant to which an employer may seek to avoid liability for an injury by proving that it was substantially caused by "lawful, non-discriminatory, good faith personnel action." (Lab. Code, § 5705.) The good faith personnel action defense to psychiatric claims is contained in section 3208.3(h) and defendant carries the burden of proof for that defense.

The standard for applying the good faith personnel action defense is set forth in *Rolda v. Pitney Bowles* (*Rolda*) (2001) 66 Cal.Comp.Cases 241, 242 (Appeals Board en banc). Under *Rolda*, the WCJ's determination of the employer's affirmative defense of a lawful, nondiscriminatory personnel action requires the following multilevel analysis:

> The WCJ, after considering all the medical evidence, and the other documentary and testimonial evidence of record, must determine: (1) whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination; (2) if so, whether such actual events were the predominant cause of the psychiatric injury, a determination which requires medical evidence; (3) if so, whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith, a factual/legal determination; and (4) if so, whether the lawful, nondiscriminatory, good faith personnel actions were a 'substantial cause' of the psychiatric injury, a determination which requires medical evidence. Of course, the WCJ must then articulate the basis for his or her findings in a decision which addresses all the relevant issues raised by the criteria set forth in Labor Code section 3208.3.

(*Id.* at pp. 246-247; *San Francisco Unified School Dist. v. Workers' Comp. Appeals Bd*. (*Cardozo*) (2013) 190 Cal.App.4th 1 [75 Cal.Comp.Cases 1251] (writ den.).)

The WCJ did not perform the *Rolda* analysis in this case, beginning with the identification of the actual events of employment. This is likely because the *Rolda* defense was not raised by the parties at any point prior to, or during, trial. The parties were only made aware that the good faith personnel action defense was at issue when the WCJ issued her Findings of Fact. It is not surprising, then, that the parties did not present any specific argument, or medical evidence, on the issue. A decision based on different legal theories or issues than presented by the parties, without affording a meaningful opportunity to be heard or present evidence, violates due process. (*Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker v. Workers' Comp. Appeals Bd*. (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].)

A WCJ's decision must also be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) It is also essential that the WCJ apply the correct legal standard to the facts of the case. (Lab. Code, § 5313.) In evaluating the WCJ's decision, the WCAB has the authority to remand the matter for further development of the record when the record lacks substantial medical or factual evidence necessary to resolve the issues. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393 [62 Cal.Comp.Cases 924].)

To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) Here, as noted above, the QME opined as to whether applicant's claimed injury was barred by the post-termination defense. As the QME, the QME must render medical opinions, and legal decisions as to whether a case is barred by the post-termination defense are solely the province of the WCJ. We also note that in addition to the concerns regarding *Rolda* and the WCJ's failure to identify the actual events of employment discussed above, the QME does not appear to have been provided with the records of applicant's employment.

Because we have noted the existence of some evidence suggesting 1) potential pre-termination notice of applicant's injury[5] and 2) sexual harassment allegations, issues of fact, it would be prudent to allow the parties to present additional evidence on these issues insofar as they are relevant to section 3208.3(e). Additionally, if the parties raise the good faith personnel action defense under section 3208.3(h), the WCJ must make specific findings on the *Rolda* factors, and,

[5] See, e.g., Joint Exh. 3, pp. 2-3; App. Exh. 2, pp. 26-38.

if necessary, further develop the record by asking the QME additional questions (such as clarifying whether any alleged personnel actions contributed to the injury, and to what degree.) In sum, a determination of industrial injury in this case must be based upon a proper *Rolda* analysis based upon substantial medical evidence. To the extent that defendant may continue to raise a post-termination bar to the claim, defendant must first establish that the date of injury under section 5412 pre-dated the date of applicant's termination. (Lab. Code, § 3208.3(e).) If such evidence is produced, the WCJ must then analyze whether applicant's claim falls within an exception to section 3208.3(e), e.g., whether applicant's injury was the product of sexual harassment. (Lab. Code, § 3208.3(e)(4).) We will return this matter to the trial level to conduct the appropriate analyses.

Based on the foregoing, we rescind the WCJ's Findings of Fact and return the matter to the trial level for further development of the record and a new decision by the WCJ.

For the foregoing reasons,

IT IS ORDERED, as the Decision after Reconsideration of the Workers' Compensation Appeals Board, that the WCJ's Findings of Fact of April 23, 2021 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG L. SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 6, 2025

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

QUINTON THORN
SOLIMON RODGERS
TOBIN LUCKS

AC/md

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