WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROSA GARNER, ***Applicant***

vs.

COMMUNITY ACTION PARTNERSHIP OF KERN;
CYPRESS INSURANCE COMPANY administered by
BERKSHIRE HATHAWAY HOMESTATE COMPANIES, ***Defendants***

Adjudication Number: ADJ12418883
Bakersfield District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the Findings and Order (F&O) issued on November 3, 2021, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that applicant did not sustain injury to her psyche arising out of and in the course of her employment (AOE/COE) with defendant from June 19, 2018 to June 19, 2019 and that the good faith personnel action defense bars this claim.

Applicant contends that the psychiatric qualified medical examiner (QME) found that actual events of employment were the predominant cause of her psychiatric injuries and that the WCJ should have found her injuries AOE/COE because defendant failed to meet its burden to show that compensation was barred by the good faith personnel action defense.

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

We have considered the allegations in the Petition, the Answer, and the contents of the

[1] Commissioner Lowe was on the panel that issued the order granting reconsideration. Commissioner Lowe no longer serves on the Appeals Board. A new panel member has been appointed in her place.

Report with respect thereto. Based on our review of the record, and for the reasons discussed below, we will rescind the F&O and return the matter to the WCJ for further proceedings consistent with this decision. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

BACKGROUND

While employed by defendant as a Head Start teacher up to June 19, 2019, applicant claimed industrial injury to psyche.

QME Michael S. Kesselman, Ph.D., evaluated applicant on September 20, 2019 and issued a report (Exhibit 1); he reviewed additional information and issued two supplemental reports on March 15, 2020 (Exhibit 2) and October 5, 2020 (Exhibit 3). He was deposed on July 20, 2020. (Exhibit B.)

In his September 20, 2019 report, Dr. Kesselman took the following history from applicant. (Exhibit 1.) In August 2018, applicant was assigned a new supervisor, Ms. Audelo. Applicant began having conflict with Ms. Audelo including a write-up for failing to supervise the changing of a child's diaper. On December 4, 2018, applicant was put on paid administrative leave through January 8, 2019, after she was accused of harassing three co-workers. On January 8, 2019, there was a meeting after which applicant was told she could go back to work. Applicant stated she would report back to work later because she had surgery scheduled for January 9, 2019. Then, when applicant got home, there was a telephone message indicating applicant could not go back to work. From January 9, 2019, up to April 1, 2019, applicant was off work due to a non-industrial medical issue. On April 1, 2019, applicant returned to work. The investigation concluded that applicant had harassed three of her co-workers. Applicant continued to work through June 19, 2019, when she went off on a stress leave. (*Id*. at pp. 2-6.)

In his March 15, 2020 report, Dr. Kesselman stated that: "It is the disciplinary write-up for not watching the children and the leave of absence on December 4, 2018 which are the substantial and predominant causal factors in Ms. Garner's alleged psychological injury." (Exhibit 2, p. 2.) He further stated that: "It is my opinion that it is within reasonable medical probability that it was the disciplinary write-up and the paid administrative leave which were the substantial and predominant causal factors." (*Id.* at p. 5.) Dr. Kesselman concluded:

> In my opinion that it is within reasonable medical probability the underlying dynamics in the onset of Ms. Garner's developing a psychological injury was first the reprimand she received for not watching an assistant changing a diaper which

resulted in a disciplinary write-up. Ms. Garner refused to sign this write-up indicating she could not watch the children outside and watch the person changing the diaper inside. These were both her responsibilities. This, in combination with Ms. Garner being placed on administrative leave on December 4, [2018] for presenting a hostile work environment to her co-workers, were both a substantial causal factor and the predominant cause of Ms. Garner's injury. These two disciplinary actions interact and cannot be separated out. Whether they are in good faith or not would be up to a judge to determine.

I am unable to give exact causal percentages to the incidents listed previously with Ms. Audelo, nor am I able to give specific causal percentages to the other items listed in Mr. Perry's letter. These events are intertwined with one another and cannot be separated out as described earlier in this letter.

I believe that it is within reasonable medical probability that the ten incidents I listed at the time they occurred were more of an annoyance whose impact accumulated over time. By themselves, they were not significant causal factors. However, their psychological impact increased after Ms. Garner believed she was unfairly being disciplined and written up for not following orders watching a co-worker change a diaper and for being accused of presenting a hostile work environment.

. . .

It is my opinion that it is within reasonable medical probability that the incidents which are predominant and substantial causal factors in Ms. Garner's overall psychological condition are the disciplinary actions which include the write-up for not watching the children and for being placed on leave December 4, [2018] for presenting a hostile work environment. I believe the interactions with Ms. Rios, Mr. Rowell, and Ms. Gonzalez play relatively minor roles. The incident with Ms. Angela occurred after the onset of the injury.

I also believe the incidents with Ms. Rios, Mr. Rowell, and Ms. Gonzalez may have occurred after the onset of the injury and, therefore, not play a causal role.

(*Id.* at p. 6.)

In his report of October 5, 2020 (Exhibit 3), Dr. Kesselman opined that:

I believe the correct onset of date of injury is January 8, 2019. However, I continue to hold the opinion that the preponderance of the evidence would suggest that the predominant cause of Ms. Garner's medical condition on January 8, 2019 is a result of the personnel actions in which she was given a disciplinary write-up for not watching a co-worker who was changing a child's diaper and being placed on administrative leave on December 4, [2018] after being accused by co-workers of harassment.

. . .

> In my opinion, the June 19, 2019 injury is not a new injury but an aggravation of the January 8, 2019 injury.

(Exhibit 3, at p. 13.)

Ultimately, Dr. Kesselman seems to determine a single date of injury and that two events were the predominant cause of applicant's psychiatric injury. Although Dr. Kesselman found a date of injury of January 8, 2019, with predominant cause being the write-up for not watching the co-worker changing the child's diaper then being placed on administrative leave on December 4, 2018, he did not assign a percentage of causation to each incident. Dr. Kesselman indicated that in his best medical opinion he was unable to give a percentage of causation to each individual instance. (Exhibit 2, at pp. 1, 6.)

On July 29, 2021, the parties proceeded to trial. They stipulated that while employed by defendant "during the period from June 19, 2018 to June 19, 2019," applicant claimed injury to her psyche. The issues for trial were injury arising out of and in the course of employment to the psyche and the good faith personnel action defense. (Minutes of Hearing and Summary of Evidence (Minutes), July 27, 2021, at p. 2:20-23.)

Applicant testified on direct examination in relevant part as follows:

> Vanessa Aduelo started as her supervisor in August of 2018. The interactions with Ms. Aduelo caused the applicant stress. Ms. Aduelo would belittle applicant. She told applicant she was to clean up applicant, that the applicant had to go through Ms. Aduelo for everything, and Ms. Aduelo would throw the applicant's food and items away. She would also put applicant's personal items 11 feet high. She would no longer have applicant be an acting supervisor and would put younger persons as acting supervisors. Ms. Aduelo told applicant she was there to keep applicant in line.
>
> At a meeting in August of 2018, she accused applicant of grabbing children and putting them forcibly into their seats. Applicant stood up at this accusation saying that she had never seen that.
>
> Months later, applicant was put on administrative leave. She believes this was on December 4, 2018. She believes this was due to the applicant having reported Ms. Aduelo. Applicant was told that she had to do what Ms. Aduelo told her to do. She felt she had been targeted for standing up to Ms. Aduelo. She was asked if there was any investigation report given to her for the administrative leave. She testified that on [December 4, 2018], she had a meeting with the area manager and the area supervisor, but she was given no investigation report copy until 11 days later. She

> was given nothing on the day she was escorted out. She was told at that time that there would be an investigation.
>
> She believes the leave has caused her stress to this day. She believes the investigation and being put on leave targeted her for her interactions with Ms. Aduelo.

(*Id*. at p. 3:12-41.)

On cross-examination, applicant testified about the write-up for not watching the co-worker changing the child's diaper and then being placed on administrative leave on December 4, 2018, as follows:

> She was asked if she had ever received the investigation report, and she replied that she got it in January. She was asked if the report told her that the purpose of the leave was from complaints of her bulling [sic] and harassing other employees. She was asked what the result of the investigation was. She replied that she was read the policy, but she feels they only investigated certain people, not all of them.
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> …
>
> She was asked if there was a policy of watching the children when the children's diapers were being changed, and the applicant replied that she did not think this was necessary. She was asked if there was ever a policy change, and she replied that she did not know.

(*Id*. at p. 5:5-14; 5:18-22.)

The only Exhibits presented by defendant were the deposition transcript of Dr. Kesselman (Exhibit B); the deposition transcript of applicant (Exhibit A); and a printout of benefits (Exhibit C). It presented no witnesses.

The matter proceeded to trial on July 27, 2021 and the WCJ ordered that the applicant take nothing by way of the claim filed herein. It is from this decision that applicant petitions for reconsideration.

DISCUSSION

In order 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).) "[T]he phrase 'predominant as to all causes' is intended to require that the work-related cause has greater than a 50 percent share of the entire set of causal factors." (*Department of Corrections v. Workers' Comp. Appeals Bd.* (*Garcia*) (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356].)

Once an employee has established an industrial psychiatric injury, an employer may seek to have its liability for compensation barred by proving that the injury was substantially caused by lawful, nondiscriminatory, good faith personnel actions. (Lab. Code, § 3208.3(h).) The burden of proof rests with the party holding the affirmative of the issue, and thus, defendant holds the burden of proving the good faith personnel action defense.

Here, as explained below, because Dr. Kesselman's opinions are not clear with respect to the date of injury, the medical evidence is not sufficient to support that applicant sustained an industrial injury. *Nevertheless, we must emphasize that when a WCJ determines that an employee did not sustain an industrial injury to psyche, there is no compensation owed, and there is no need to analyze whether compensation is barred by good faith personnel actions.* Here however, once the record is further developed with respect to the medical evidence, if it is sufficient to support that applicant's claimed injury to psyche was industrially caused, defendant will have to meet its burden to show that compensation is barred.

Hence, 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.).) This is often referred to as a *Rolda* analysis, based on *Rolda v. Pitney Bowes, Inc*. (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc). After considering all the medical evidence and the other documentary and testimonial evidence, the WCJ must make the following determinations:

> First, the [WCJ] must determine whether the alleged psychiatric injury involves actual events of employment and, if so, whether competent medical evidence establishes the required percentage of industrial causation. If these first two conditions are met, the [WCJ] must then decide whether any of the actual employment events were personnel actions. If so, the [WCJ] must next determine whether the personnel action or actions were lawful, nondiscriminatory, and made in good faith. Finally, if all these criteria are met, competent medical evidence is necessary as to causation; that is, whether or not the personnel action or actions are a substantial cause, accounting for at least 35 to 40 percent of the psychiatric injury as defined by section 3208.3(b)(3).

(*Cardozo*, *supra*, at p. 9; *Rolda*, *supra*, at pp. 245-247; see also *County of Sacramento v. Workers' Comp. Appeals Bd.* (*Brooks*) (2013) 215 Cal.App.4th 785 [78 Cal.Comp.Cases 379].)

Here, as explained below, the medical record requires development of the record as to whether applicant sustained an industrial injury to psyche. *We also must emphasize however, by its choice not to bring any witnesses to testify and submit any relevant evidence, defendant utterly failed its burden on the record before us. This means that if substantial medical evidence had supported that applicant sustained an industrial injury, defendant would have been liable for compensation.*

Under section 3208.1, an injury may be either a specific injury or a cumulative injury. Subdivision (a) defines a specific injury occurs "as the result of one incident or exposure which causes disability or need for medical treatment. Subdivision (b) defines a "cumulative" injury as "occurring as repetitive mentally … traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment." The number of injuries and the nature of those injuries are questions of fact for the WCAB. (See *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd*. (*Austin*) (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323].)

Applicant did offer some testimony about the write-up for not watching the co-worker changing the child's diaper and being placed on administrative leave on December 4, 2018. (Minutes, July 27, 2021, at p. 5:5-14; 5:18-22.) Additionally, applicant reported the two events to Dr. Kesselman who accounted for them in his history of injury. (Exhibit 1, at pp. 4, 6.) Hence, it appears that there is no dispute that the write-up for not watching the co-worker changing the child's diaper and being placed on administrative leave on December 4, 2018, actually occurred. Thus, we are persuaded that the trial record contains substantial evidence that actual events of employment were involved, thereby potentially satisfying the first prong of the *Rolda* analysis. (See *Cardozo*, *supra*; *Rolda*, *supra*, at 247.) However, upon return, the WCJ must specifically identify the events of employment, bearing in mind that more than one event may have occurred during one period of cumulative trauma.

The overview in *Cardozo* regarding the sequence of the *Rolda* analysis and the roles of the WCJ and the medical evaluator is particularly instructive. After the WCJ determines that an alleged psychiatric injury involves actual events of employment, the WCJ must determine "whether competent medical evidence establishes the required percentage of industrial causation." (*Cardozo*, *supra; Rolda*, *supra*, at pp. 245-247.) To be substantial evidence, a medical opinion must be well-reasoned, based on an adequate history and examination, and it must disclose a solid

underlying basis for the opinion. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Bd. en banc).) A medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, and not merely their conclusions. (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workmen's Comp. Appeals Bd*. (1970) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *Escobedo*, *supra*.) The WCJ has the authority to order additional medical evidence when required so that the decision is supported by substantial evidence. (Lab. Code, §§ 5701, 5906; *Old Republic Ins. Co. v. Workers' Comp. Appeals Bd*. (*Cortes*) (2020) 85 Cal.Comp.Cases 504, 508 (writ den.); *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924].)

As noted, Dr. Kesselman evaluated applicant in person, took a history of injury, reviewed extensive records, issued supplemental reports and was deposed. (Exhibits 1-3; Exhibit B.) However, there is no basis in the evidentiary record to support Dr. Kesselman's conclusion that applicant suffered an industrial injury as described. Specifically, applicant alleged a cumulative injury through June 19, 2019. Dr. Kesselman assigned a January 8, 2019, "onset" date of injury, which was the last day worked before applicant was on leave from January 9, 2019 until April 1, 2019, but it is not clear whether he meant that January 8, 2019 was the end date. (Exhibit 3, at p. 13.) His reporting seemed to indicate that events that occurred after applicant returned to work from April 2, 2019 to June 18, 2019 were outside of the claimed cumulative injury period. Dr. Kesselman indicated that the predominant cause of psychiatric injury is between two specific events, both of which precede his assigned onset of date of injury, January 8, 2019: the write-up for not watching the co-worker changing the child's diaper and then being placed on administrative leave on December 4, 2018. It seems that Dr. Kesselman misunderstood the legal definition of a cumulative injury and misunderstood that a number of events occurring within a continuous period of time could constitute a single cumulative injury. Thus, Dr. Kesselman's reports do not constitute substantial medical evidence. Accordingly, once the WCJ has clarified the events of employment, the record must be further developed for medical evidence to determine whether the events of applicant's employment were the predominant cause of her injury.

As discussed above, upon return of this matter, we recommend that the WCJ clarify the events of employment and that thereafter, the medical record can be further developed by way of further opinion from Dr. Kesselman. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 139, 142 (Appeals Bd. en banc).) Alternatively, the

parties may wish to agree to an agreed medical evaluator or the WCJ may appoint a regular physician pursuant to section 5701.

Accordingly, as our decision after reconsideration, we rescind the F&O and return the matter to the WCJ for further proceedings consistent with this opinion. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order of November 3, 2021 is **RESCINDED** and the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 7, 2026

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

ROSA GARNER
YAZDCHI LAW
YRULEGUI & ROBERTS

SL/abs

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