

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

GERARD ZELNIK, *Applicant*

vs.

**OFFICE OF STATEWIDE HEALTH PLANNING, legally uninsured,
administered by STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ11777251
San Francisco District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

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

Defendant sought reconsideration of the Findings of Fact and Award and Opinion on Decision (F&A) issued by a workers' compensation administrative law judge (WCJ) on August 15, 2022, wherein the WCJ found that applicant sustained an industrial injury to his psyche on or about August 31, 2018. The WCJ also applied Labor Code section 5402(b)¹ to bar defendant from asserting the section 3208.3(h) "good faith personnel action defense" against applicant's psyche claim.

Defendant asserts that the WCJ's decision to preclude it from raising the "good faith personnel action defense" using section 5402(b) directly conflicts with existing Appeals Board decisions on this issue.

We received an Answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the Answer and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will rescind the August 15,

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

2022 F&A and return the matter to the trial level for further proceedings and a new decision by the WCJ.

FACTS

During trial, the parties stipulated that applicant, while employed on August 31, 2018 as a regional compliance officer by defendant, sustained injury arising out of and in the course of employment (AOE/COE) to his psyche. (Minutes of Hearing (MOH), August 8, 2022, p. 2.)

The sole issue for adjudication at trial was whether defendant could raise the “good faith personnel action” defense to applicant’s psyche claim. The issue was framed in the Minutes of Hearing as follows:

Is defendant allowed to argue that the Labor Code section 3208.3 good faith personnel action can be asserted at trial to deny the psychiatric injury claim, even though Labor Code section 5402(b) provides that “If liability is not rejected within 90 days after the date the claim form is filed under Labor Code section 5401, the injury shall be presumed compensable...” and that “The presumption...is rebuttable only by evidence discovered subsequent to the 90-day period.”

(MOH, August 8, 2022, p. 4.)

According to the Minutes of Hearing, applicant submitted his injury claim form to defendant on September 4, 2018, and that defendant twice denied the claim more than 90 days thereafter, once on December 13, 2018 and again on January 2, 2019 based upon the “good faith personnel action defense.” (MOH, August 8, 2022, p. 3.)

After trial, the WCJ issued the contested F&A, concluding that, because defendant failed to reject liability for applicant’s psyche claim within 90 days of receiving the form, the psyche injury was presumed compensable under section 5402(b). The WCJ also found that section 5402(b) barred defendant from asserting the section 3208.3(h) “good faith personnel action defense” against applicant’s psyche claim, where there was no showing that the evidence was only discoverable outside of the initial 90-day period set forth in section 5402(b). The WCJ thus concluded that applicant sustained a psyche injury AOE/COE compensable under section 5402(b) and issued an award in applicant’s favor.

DISCUSSION

Defendant asserts that the WCJ erred in finding that section 5402(b) barred defendant from asserting the good faith personnel action defense against applicant's psyche claim under section 3208.3(h). Specifically, defendant asserts that the WCJ's finding conflicts with existing Appeals Board decisions on this issue. We agree with defendant. We note here that defendant raised the affirmative defense of good faith personnel action on January 2, 2019, within several weeks of issuing its untimely denial on December 13, 2018. (See Lab. Code, §§ 3208.3(h) ["The burden of proof shall rest with the party asserting the issue" of whether the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action.]; 5705 [..."burden of proof rests upon the party or lien claimant holding the affirmative of the issue."].) As explained below, we will rescind the F&A of August 15, 2022 and return this matter to the trial level so that defendant may try the good faith personnel action defense utilizing all competent evidence.

Section 5402 states, in relevant part:

If liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 90-day period.

(Lab. Code, § 5402(b)(1).)

Section 3208.3(h), which provides for the "good faith personnel action" defense, states:

(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(h).)

In *Insalaco v. Workers' Comp. Appeals Bd. (Insalaco)* (1999) 64 Cal.Comp.Cases 1407 (writ den.), *Carrasco v. Cal. Dept. of Corrections and Rehab. (Carrasco)* (2018) 83 Cal.Comp.Cases 1931, and *Khachatrian v. State Attorney General's Office* (March 6, 2019,

ADJ10908110) 2019 Cal. Wrk. Comp. LEXIS 37 (*Khachatrian*),² the Appeals Board held that section 5402(b) does not preclude a defendant from asserting the good faith personnel action defense to bar compensation for a psyche injury. In fact, in *Khachatrian*, we explicitly rejected the conclusion reached by the WCJ here, namely, that the section 5402(b) presumption of compensability bars evidence of a good faith personnel action unless that evidence was only discoverable outside of the initial 90-day period established by the statute. We stated:

[W]hen a psychiatric injury is presumed compensable under section 5402(b), defendant is not precluded from asserting and presenting evidence on the good faith personnel action defense under section 3208.3(h), *regardless of when the evidence was reasonably obtainable*.

(*Khachatrian, supra*, 2019 Cal. Wrk. Comp. LEXIS at *7-8, italics added, citing *Carrasco, supra*, 83 Cal.Comp.Cases 1931 & *Insalaco, supra*, 64 Cal.Comp.Cases 1407.)

Based on *Insalaco*, *Carrasco*, and *Khachatrian, supra*, we will rescind the WCJ's decision and return this matter to the trial level for further proceedings and a new decision by the WCJ on the merits of the good faith personnel action defense under section 3208.3(h).

² Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) While not binding, the Appeals Board may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc).) We find the reasoning in these cases persuasive given that the case currently before us involves the same legal issue.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the F&A of August 15, 2022 is **RESCINDED**, and this matter is **RETURNED** to the trial level for further proceedings and a new decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 22, 2023

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

**GERARD ZELNIK
BOXER GERSON
STATE COMPENSATION INSURANCE FUND**

AH/es

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