WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LIMIN GAO, *Applicant*

vs.

CHEVRON CORPORATION, self-insured and administered by BROADSPIRE, *Defendant*

Adjudication Number: ADJ10024232
Bakersfield District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant Limin Gao seeks reconsideration of the September 26, 2023 Findings & Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant's cumulative trauma psyche injury claim was barred by the good faith personal action (GFPA) provision of Labor Code[1] section 3208.3, subdivision (h). Applicant argues that the WCJ erred by mistakenly concluding that many of the factors that contributed to her injury were good faith personnel actions, when in fact they were either not in good faith, or not personnel actions at all.

We received an Answer from Chevron Corporation ("Chevron").[2] The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied. We also received a request from applicant to file a Supplemental Petition, which we will accept pursuant to WCAB Rule 10964 (Cal. Code Regs., tit. 8, § 10964).

We have considered the Petition for Reconsideration, the Answer, the Supplemental Petition, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition, rescind the Findings and Order and substitute

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[1] Further references are to the Labor Code unless otherwise specified.
[2] This Answer was accompanied by a petition for permission to exceed the page limit contained in WCAB Rule 10940, subdivision (d) (Cal. Code Regs., tit. 8, § 10940(d).) The WCJ granted the petition in an order issued October 13, 2023. Although this was error, as it was our decision whether to grant the petition, not the WCJ's, we hereby grant the petition, and do not consider the matter further.

a new order finding that applicant suffered an injury to her psyche arising out of and in the course of employment (AOE/COE) and that section 3208.3 does not bar applicant's claim, and return the matter to the WCJ for further proceedings consistent with this opinion.

FACTS

The following factual summary focuses on the parties' disagreement as to the appropriate characterization of elements of applicant's psyche injury for purposes of section 3208.3(h), and therefore omits a detailed discussion of testimony, evidence and procedural issues that do not directly relate to the parties' dispute, and where the parties are agreed as to the law and/or facts.

Applicant filed an Application for Adjudication, alleging a psyche injury sustained while employed by Chevron from May 2, 2014 to July 2, 2015. The matter proceeded to trial on a number of trial dates: March 10, 2020; May 4, 2021; July 20, 2021 and January 26, 2022, with testimony taken from applicant and two defense witnesses, along with voluminous documentary evidence. An initial Findings and Award issued on September 21, 2022 was later rescinded by the WCJ after both parties filed Petitions for Reconsideration. After further proceedings over a number of hearing dates,[3] the matter was ultimately submitted on the existing record on June 22, 2023 at the joint request of the parties.

On March 10, 2020, the issues listed for trial were as follows: (1) AOE/COE; (2) injured body parts; (3) permanent and stationary (P&S) date; (4) permanent disability and apportionment; (5) need for further medical treatment; (6) attorney fees; (7) defendant's assertion of the good faith personnel action defense under section 3208.3(h); other issues having to do with the particular application of that defense, and objections to particular items of evidence. (MOH/SOE, 3/10/2020, at pp. 3–4.)

Evidence was admitted, including, as most relevant here, the reports of Diane J. Weiss, M.D. and M.P.H., the Qualified Medical Examiner (QME) assigned to the case with regard to applicant's psyche injury, and three transcripts of depositions taken of Dr. Weiss. (Exs. 1–7.)

In particular, the last report of Dr. Weiss served as the focus of the parties' arguments as to the applicability of section 3208.3. In that report, Dr. Weiss provided the following list of

[3] In the interest of brevity, and given the parties' joint acquiescence to submitting the matter on the record as it existed after the January 26, 2022 hearing, we do not discuss these interim proceedings further.

factors which she opined contributed to applicant's psyche injury, along with a percentage value for each factor:

1.	Start of Injury After "April/May 2014" Project Meeting	(5%)
2.	Work Late to Complete Reports/Overwork in Hours	(1%)
3.	Unable to Complete Report	(1%)
4.	Supervisor's Complaints About Her	(5%)
5.	No Warning Regarding Supervisor's Dissatisfaction/ Not Following Proper Procedures	(5%)
6.	Job Termination in December 2015	(15%)
7.	"Retaliation, Anti-Discrimination"	(15%)
8.	Dissatisfaction with English Language Skills	(15%)
9.	Chinese Cultural Background Said to Be a Problem	(2%)
10.	February 2015	(2%)
11.	Written Evaluation April 13, 2015	(3%)
12.	Darrin Said It Was "'Your problem,' not work related"	(2%)
13.	"Hostile Working Environment"	(5%)
14.	Project Taken Away	(2%)
15.	"Jacquelyn Talk Behind My Back"	(1%)
16.	"Singled Out"	(1%)
17.	Vacation	(1%)
18.	Not Write PMP Herself	(1%)
19.	"No Team Want to Take You"	(1%)
20.	Performance Improvement Program (PIP)	(5%)
21.	Meeting with Darrin After PIP	(1%)
22.	Request for Extension PIP	(2%)
23.	June 9, 2015 Meeting	(1%)
24.	July 6, 2015 Letter RE: Downsizing	(1%)
25.	July 9, 2015 Presentation	(2%)
26.	Son	(5%)

(Ex. 5, at p 56.). Dr. Weiss' report also contained a detailed breakdown of each factor, along with a medical judgement that the predominant cause of applicant's psyche injury was her work. (*Id.* at pp. 28–55.)

Dr. Weiss was also deposed on three occasions by the parties, with the last two occurring after the preparation of her final report. (Exs. 2, 6, 7.) In those depositions, Dr. Weiss addressed her process in assigning percentage values to various factors, and clarified that her opinions were based upon an evaluation of applicant based on applicant's own representations, and were not intended to be definitive statements of what actually occurred.

Applicant was the first witness to testify at trial. Applicant explained that she was a resident of Canada and employed by defendant's Canadian subsidiary, but dispatched to its

Bakersfield office. (Transcript, 3/10/20, at p. 21.) Applicant confirmed that she had been truthful with Dr. Weiss, and that Dr. Weiss' report accurately described her symptoms and their relation to her work for defendant. (*Id.* at pp. 19–21.)

Applicant worked under four or five supervisors during her employment with Chevron. (*Id.* at p. 32.) One of those supervisors was Darrin Singleton, who supervised applicant for some period up until 2014. (*Ibid.*) Applicant got along with Singleton. (*Ibid.*) In January of 2014, applicant was transferred to a different supervisor, Jacquelyn Star, who herself reported to Singleton. (*Ibid.*) Applicant opined that it was "difficult to say" whether she got along with Star; when she stated in her deposition that they had got along, she meant in the beginning. (*Id.* at pp. 32, 38.) Later, she had an argument with Star about a negative performance review she received. (*Id.* at pp. 42.)

Applicant also testified at length with regard to her son, his mental health issues, the impact those issues did or did not have on her, and accommodations that were or were not provided to her in relation to her son. (*Id.* at pp. 42–56).[4]

Applicant had performance reviews every year, which resulted in the creation of Performance Management Plans (PMPs) and Employee Performance Summaries. (*Id.* at p. 62.) In 2013, while supervised by Singleton, applicant was told she needed to work on several areas, including leadership and taking the lead on projects. (*Id.* at p. 69.) Singleton would provide constructive feedback on how to build those skills. (*Ibid.*)

In April and/or May of 2014, applicant had a team meeting at which Singleton and Star were present, where she had to present her analysis and findings for a project on which she was team lead to a peer review board. (*Id.* at pp. 69–71.) After that meeting, concerns were raised about the analysis applicant provided; applicant denied this was down to any failure by her or by the team. (*Id.* at pp. 71–78.) According to applicant, neither Star nor Singleton stood up for her or the team during or after the meeting; instead they "talked behind [her] back" without providing a "single word" of support. (*Id.* at p. 79.)

Later in 2014, Star took away a project applicant was working on, the Premier Expansion Part 1 Project. (*Id.* at p. 83.) Applicant testified that she was not given a reason for why the project was taken away. (*Id.* at pp. 83–84.)

[4] Because neither party contests the 5% value Dr. Weiss assigned to applicant's issues with her son, this testimony is not reproduced in any further detail in this decision.

Applicant testified that comments were made to her about her English proficiency. (*Id.* at p. 113.) Applicant was also told by Singleton that her "Chinese background" might be holding her back from promotion, and she was encouraged to contact a Chevron "Chinese cultural counselor" to help change her "cultural behavior." (*Id.* at pp. 113–14.) Applicant believed that her communication "never caused any problem for my project" and that her issue was that she couldn't speak in an American way. (*Id.* at p. 117.) Applicant didn't know whether her communication could be called "excellent" but asserted that as an engineer she got the job done and had never had anyone raise any issues about her English proficiency prior to 2013–14. (*Id.* at p. 118.) 70% to 80% of her work was technical, with communication accounting for maybe 10% of her job. (*Id.* at p. 124.) Chevron knew her English abilities were not perfect when they hired her; if they had told her that perfect English was required she would not have applied for the job and they would not have given it to her. (*Id.* at p. 125–26.)

Applicant herself recognized her English was not perfect and had concerns about her ability to communicate in English; this was because English was not her first language and as a result she was very careful when she communicated in English to the team. (*Id.* at p. 128.) She acknowledged it was a weakness and worked on it all the time. (*Ibid.*)

Applicant denied that Singleton and Star's concerns were only with her communication skills, not with her English. (*Id.* at pp. 134–35.) Star told applicant that the reason she was given a poor performance review was because higher-level engineers didn't like her English; Star also said that she got a headache listening to applicant and couldn't understand her. (*Id.* at p. 135.)

On June 9, 2015, at a meeting, Star asked why a particular engineer had been invited to the meeting, and then asked the engineer if he understood what applicant was saying. (*Id.* at p. 131.) Applicant felt she was being humiliated for her English proficiency, which had never happened before during her employment. (*Ibid.*) It wasn't to help her, and the engineer confirmed he had understood her. (*Id.* at p. 133–34.)

In April 2015, applicant was placed on a 90-day Performance Improvement Plan ("PIP"). (*Id.* at p. 146.) Applicant didn't know why she was put on a PIP, other than that she had received a poor rating on a prior PMP. (*Id.* at p. 148.) The first element of the PIP involved applicant's communication and stated she needed to ensure that her written and verbal communications showed a commitment to action and a clear path forward. (*Id.* at p. 152.) Applicant felt this had nothing to do with her prior poor performance rating, in which she was told she had problems

doing complex tasks; as a result, she felt like the PIP had nothing to do with actually addressing her poor performance rating on the prior PMP. (*Ibid.*)

Applicant understood the contents of the PIP but disagreed with it. (*Id.* at p. 151.) Although Star asked for her input if there was anything about the PIP she disagreed with, applicant didn't provide any suggestions for modifying the PIP because she felt it was useless because what she said would not matter. (*Ibid.*)

Applicant believed that the PIP was an act of discrimination against her. (*Id.* at p. 158.) She acknowledged that not everyone who was put on a PIP was discriminated against, but believed that in her case, she had been, and that the PIP was not based on her performance. (*Id.* at p. 160.)

Nevertheless, applicant believed she could meet the requirements of the PIP. (*Ibid.*) She would meet with Star every two weeks as part of the PIP process. (*Ibid.*) When she did good work, Star would tell her she had done good work; Star would also identify areas where applicant could continue to improve and give suggestions. (*Id.* at p. 161-62.)

Applicant testified that she was given three months to complete the PIP. (Minutes of Hearing / Summary of Evidence, 5/4/21, at p. 4.[5]) In May of 2015, she took three weeks off for gallbladder surgery; when she returned, she continued working on the PIP. (*Ibid.*) She would have taken another month off if there had been no PIP. (*Ibid.*)

Applicant returned to work in early June 2015; the PIP was set to finish at the end of July 2015. (Minutes of Hearing / Summary of Evidence, 7/21/21, at p. 2.) She requested an extension on the PIP because she had been out for surgery for three weeks, but she was ultimately told that there would be no extension. (*Ibid.*)

On July 6, 2015, a company-wide announcement was sent out warning of layoffs. (*Id.* at p. 3.) Applicant understood that the layoffs would affect her team. (*Id.* at p. 4.) On July 10, 2015, she took a leave of absence for her psyche symptoms; this was before the PIP was due to be completed. (*Ibid.*) She never returned to work for Chevron. (*Ibid.*) Applicant was ultimately laid off. (*Id.* at p. 5.) No one told her why she was laid off. (*Ibid.*) She was informed of the layoff in December 2015 and given 30 days to return to Canada. (*Ibid.*)

[5] Although transcripts exist of the March 2020 and January 2022 trial dates, the record does not appear to contain transcripts of the May 2021 or July 2021 trial dates. Furthermore, the May 2021 Minutes of Hearing are mislabeled in the caption as the July 2021 Minutes of Hearing, while the July 2021 Minutes of Hearing are mislabeled as the Minutes of Hearing from the November 2021 trial date, which was continued to the January 2022 date.

Defendant elicited testimony from two witnesses, Singleton and Star. Singleton was applicant's direct supervisor from 2012 to the end of 2013. (Transcript, 1/26/22, at pp. 9–11.) In 2014 the team expanded and Star became applicant's direct supervisor, with Star reporting to Singleton. (*Id.* at p. 10.)

Singleton testified that he got along well with applicant, was supportive of her work, and granted her requests for time off related to her son and medical issues. (*Id.* at p. 12.) In addition to these accommodations, there were times that applicant arrived late to work; Singleton did not discipline her for these instances. (*Id.* at p. 22.)

Singleton considered applicant "a hard worker, very professional, accomplished a lot of things," but that "there were also some gaps in her performance." (*Id.* at p. 23.) Sometimes he had to prompt applicant to complete cost estimates. (*Id.* at p. 24.) In a November 12, 2013 performance review, Singleton identified applicant's strengths and weaknesses. (*Id.* at pp. 25–26; Ex. CCC.) In the section on weaknesses, Singleton identified applicant's communication skills, and in particular, her English proficiency. (*Id.* at pp. 27–28.) Applicant understood English fine, but sometimes he had difficult understanding her because she would have trouble articulating herself and getting her message across. (*Id.* at p. 28.)

In the performance review, Singleton suggested that applicant speak to a cultural consultant; the purpose of this was to provide a resource within Chevron to help people who are working in a country that's not their own and trying to understand a new culture. (*Id.* at p. 29.) It is not commonly used, but it is available, and it is for the employee's benefit. (*Ibid.*) It was meant to be a positive suggestion to help applicant. (*Id.* at p. 30.)

Communication was a key requirement for applicant's job, because her job involved making presentations to other portions of the company that approve large capital projects, and also because interacting with other team members and operational employees in the field was an important part of the job. (*Id.* at pp. 30–31.)

In one particular instance in March 2014, applicant struggled to give a presentation, and the feedback Singleton received from the peer review team was not very encouraging. (*Id.* at pp. 38–39; Ex. GG.)

At the end of 2014, applicant received a performance evaluation that ranked her performance at a "2 minus." (*Id.* at p. 44; Ex. VVVV.) A "2 minus" is not a good rating, and indicates performance below expectations. (*Id.* at p. 45.) As a result, applicant was placed on a

PIP. (*Id.* at pp. 45–46.) The purpose of the PIP was to help applicant improve her performance and to document those efforts. (*Id.* at p. 46.) Star administered the PIP because she was the direct supervisor. (*Id.* at p. 47.)

While on the PIP, some of applicant's identified weaknesses improved, while some did not. (*Id.* at p. 49.) Because an individual on a PIP has to improve all areas, Singleton did not consider applicant to have been successfully completing her PIP. (*Id.* at pp. 49, 60.)

Singleton did not observe Star ever treating applicant unfairly. (*Id.* at p.61.) Singleton never believed that applicant was the victim of any form of discrimination. (*Ibid.*) When applicant returned from gallbladder surgery in June 2015, she did not have any medical restrictions, and Singleton saw no need to extend her PIP as a result. (*Ibid.*)

Ultimately, applicant's non-completion of the PIP never had any impact, because late in 2015 Chevron laid off a large number of workers as a result of a fall in the price of oil, and as part of that process, all PIPs were suspended. (*Id.* at p. 62–63.) Shortly after the layoffs were announced, applicant took her leave of absence, which was abrupt and unscheduled. (*Id.* at pp. 65-66.)

Individuals considered for layoff were anyone who had been rated a "2 minus" or a "3" in their last three years, as well as currently underperforming employees who had not previously received such a rating. (*Id.* at p. 66.) Applicant qualified as both having received a poor prior rating and as having ongoing performance problems. (*Id.* at pp. 66–67.) There were many such employees, and the decision on who to lay off was based on a spreadsheet containing all the employees in question and their ratings. (*Id.* at pp. 67-73; Ex. UUUU.) Applicant's position was not backfilled after the layoff, meaning that the purpose was to reduce headcount, not to replace her. (*Id.* at p. 75.)

Singleton did not remember applicant's prior supervisor saying he had any problems with applicant's work, or trouble understanding her. (*Id.* at p. 94.) Singleton didn't remember whether applicant had told her when he began expressing concerns about her communication skills that no one had previously expressed such concerns. (*Id.* at p. 95.)

Star testified next. Star became applicant's direct supervisor in January of 2014. (*Id.* at p. 107.) Star got along "real well" with applicant, and had a "cordial and even friendly relationship." (*Ibid.*) She was supportive of applicant and applicant's job and never had any animosity towards her. (*Id.* at p. 108.)

Star considered applicant a hard worker, but opined that applicant sometimes had a hard time accepting the perspectives of others, especially when it came to feedback on her performance. (*Id.* at p. 108.) Applicant had been doing similar work for many years before Star became her supervisor, but she didn't seem to be growing her abilities. (*Ibid.*) Applicant seemed to struggle with her workload and would work really long hours. (*Id.* at p. 109.) Applicant sometimes struggled to communicate and lead others, and was not as proactive in moving forward past challenges in her work as her peers. (*Ibid.*)

Star did not consider that applicant's Chinese background was the reason for her struggles. (*Id.* at p. 110.) She did not consider the English language a roadblock for applicant. (*Ibid.)* Applicant herself brought up her accent and attributed her communication issues to her accent, but Star didn't think that was the case, and told applicant that her problem was in articulating her concepts and ideas more effectively. (*Id.* at p. 111.)

The decision to place applicant on a PIP was dictated by policy; anyone with a rating of "2 minus" was placed on a PIP. (*Id.* at p. 123.) Star put a lot of time and effort into deciding what exactly to put into applicant's PIP. (*Id.* at p. 124.) Star received feedback from others to make sure that what she was documenting wasn't just caused by bias due to her own proximity or personal experience. (*Id.* at p. 125.) Star testified that the PIP was not meant as a disciplinary action, it was intended to be an opportunity for professional improvement. (*Id.* at p. 148.)

No further testimony was taken. After extensive subsequent proceedings which are not reproduced here for the sake of brevity, the matter was taken under submission, and the WCJ ultimately issued his Findings & Order on September 26, 2023, finding that applicant's claim was barred by section 3208.3(h), with other issues rendered moot as a result of that finding. (F&O, at p. 1.) The appended Opinion on Decision explains that the WCJ concluded that actual events of employment were the predominant cause of applicant's psyche injury, but that 55% of the injury was caused by good faith personnel actions, rendering the claim barred. (Opinion on Decision, at p. 2.) The Opinion on Decision provided the following breakdown of factors the WCJ judged to be good-faith personnel actions:

The project meeting in April or May of 2014	(5%)
Working late and overwork	(1%)
Unable to complete report	(1%)
Job termination	(15%)
Dissatisfaction with English language skills	(15%)

Chinese cultural background problem	(2%)
Project taken away	(2%)
Vacation	(1%)
Performance Improvement Program (PIP)	(5%)
Request for extension of PIP	(2%)
July 6, 2015 letter on downsizing	(1%)
Her Son	(5%)

(F&O, at p. 2.)

This Petition for Reconsideration followed.

DISCUSSION

Section 3208.3 governs claims for psychiatric injury. As relevant herein, it provides that to establish a compensable psychiatric injury, an employee must demonstrate by a preponderance of the evidence that actual events of employment were the predominant cause of the injury. (§ 3208.3(b)(1).) However, a psychiatric injury is not compensable if it was substantially caused by a personnel action that was lawful, nondiscriminatory, and made in good faith. (§ 3208.3(h).) The burden of proof for each element lies with the party asserting it. (*Ibid.*)

As explained in *Rolda v. Pitney Bowes*, when an employer raises the affirmative defense contained in section 3208.3(h), a multilevel analysis is required to determine whether the claim is barred. (*Rolda v. Pitney Bowes, Inc. (Rolda)* (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc).) Under this analysis, the WCJ must first consider all the medical evidence and the other documentary and testimonial evidence of record and then determine: (1) whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination for the WCJ; (2) if so, whether such actual events were the predominant cause of the psychiatric injury, a determination which requires competent medical evidence; (3) if so, a further determination must be made establishing whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith - a factual/legal determination for the WCJ; and (4) if so, a determination must be made as to whether the lawful, nondiscriminatory, good faith personnel actions were a "substantial cause" of the psychiatric injury. (*Rolda, supra,* 66 Cal.Comp.Cases at p. 247; see also *San Francisco Unified School Dist. v. Workers' Comp. Appeals Bd. (Cardozo)* (2013) 190 Cal.App.4th 1 (writ den.).) Section 3208.3 defines “substantial cause” as “at least 35 to 40 percent of the causation from all sources combined.” (§ 3208.3(b)(3).)

Initially, we lay out the grounds upon which the parties are agreed. First, the parties agree that applicant's injury involved actual events of employment, the first prong of the *Rolda* test. Second, the parties also agree that applicant's injury was predominantly caused by those events of employment, the second prong of *Rolda.* Furthermore, neither party has taken issue with the breakdown of applicant's injury by the QME into 26 factors, or with the percentage values ascribed to each factor.[6]

Instead, the heart of the parties' dispute involves the third and fourth prongs of *Rolda* – i.e., which of the 26 factors identified by the QME are good faith personnel actions, and, assuming some factors are, whether such factors account for 35% or more of applicant's injury. Even here, however, the parties' disagreement is limited to only some of the factors in question. Specifically, the Petition and the Answer agree that the following factors were *not* good faith personnel actions per *Rolda*:

2.	Work Late to Complete Reports/Overwork in Hours	(1%)
3.	Unable to Complete Report	(1%)
7.	"Retaliation, Anti-Discrimination"	(15%)
9.	Chinese Cultural Background Said to Be a Problem	(2%)
10.	February 2015	(2%)
12.	Darrin Said It Was "' 'Your Own Problem, ' Not Work Related"	(2%)
13.	"Hostile Working Environment"	(5%)
15.	"Jacquelyn Talk Behind My Back"	(1%)
16.	"Singled Out"	(1%)
17.	Vacation	(1%)
19.	"No Team Want to Take You"	(1%)
25.	July 9, 2015 Presentation	(2%)
26.	Son	(5%)

(Petition, at p. 12; Answer, at p. 8.) Conversely, the parties agree that the following factors were personnel actions (though not necessarily that they were lawful, nondiscriminatory, and in good faith):

6.	Job Termination in December 2015	(15%)
11.	Written Evaluation April 13, 2015	(3%)
24.	July 6, 2015 Letter RE: Downsizing	(1%)

[6] Defendant does note in its Answer that the QME's factors were based upon applicant's self-reporting, and alleges that in some cases they were contradicted by testimony. (Answer, at p. 8.) Where they are made specific, these contentions are addressed later, in the sections corresponding to each factor.

(Petition, at p. 12; Answer, at p. 8.) Since there is no dispute as to whether these factors were personnel actions, we accept the parties' agreement and do not separately consider these factors.

As a result, the only true dispute between the parties is as to the characterization of the following factors:

1.	Start of Injury After "April/May 2014" Project Meeting	(5%)
4.	Supervisor's Complaints About Her	(5%)
5.	No Warning Regarding Supervisor's Dissatisfaction/ Not Following Proper Procedures	(5%)
8.	Dissatisfaction with English Language Skills	(15%)
14.	Project Taken Away	(2%)
18.	Not Write PMP Herself	(1%)
20.	Performance Improvement Program (PIP)	(5%)
21.	Meeting with Darrin After PIP	(1%)
22.	Request for Extension PIP	(2%)
23.	June 9, 2015 Meeting	(1%)

(Petition, at p. 12; Answer at p. 8.) Accordingly, this decision restricts its consideration to these factors. Because defendant is the one asserting that these factors were good faith personnel actions, defendant bears the burden of proof.

Previous panel decisions have provided guidance on what is and is not a personnel action for purposes of section 3208.3(h). As stated in *Ferell v. County of Riverside*:

> [I]n addressing how Labor Code 1 section 3208.3(h) applies, past Appeals Board panel decisions have recognized a distinction between general working conditions that cause psychiatric injury, such as heavy workloads, and a "personnel action" specifically directed toward an individual that involves his/her employment status. In *Larch v. Contra Costa County* (1998) 63 Cal. Comp. Cases 831 (Significant Panel Decision), the panel addressed the meaning of "personnel action" as used in section 3208.3(h) as follows:
>
> > [T]he 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' … . This would be too broad an interpretation that would preclude from consideration practically all events occurring such as work loads imposed in good faith …
> >
> > [A] personnel action is conduct either by or attributable to management including such things as done by one who had 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 a disciplinary action such as warnings, suspensions and terminations of employment.

(*Larch, supra,* 63 Cal. Comp. Cases at pp. 833–835.)

The distinction between the effect of working conditions, and the effect of an action directed towards an individual's employment status, has been recognized and applied by several Appeals Board panels in determining whether a psychiatric injury was substantially caused by lawful, nondiscriminatory, good faith personnel actions. (*Kaiser Foundation Hosp. v. Workers' Comp. Appeals Bd. (Berman)* (2000) 65 Cal. Comp. Cases 563 (writ den.) [corporate reorganization that increased workloads not "personnel action" for purpose of section 3208.3(h) even though it was nondiscriminatory and generally applied to all employees]; *Atlantic Mutual Insurance Companies v. Workers' Comp. Appeals Bd. (Brodsky)* (2001) 66 Cal. Comp. Cases 370 (writ den.) [increasing sales quotas, changing commission structure, reassigning applicant's sales accounts to other people, and offering applicant lower paying job at fixed salary, found not to be "personnel actions" for purpose of section 3208.3(h)]; *Sunsweet Growers Inc. v. Workers' Comp. Appeals Bd. (Milliron)* (1999) 64 Cal. Comp. Cases 1432 (writ den.) [announcement of a shift change to seven days per week/nine hours per day for an indefinite period not a "personnel action" within meaning of section 3208.3(h)]; *Neighborhood Legal Services of Los Angeles v. Workers' Comp. Appeals Bd. (Rivera)* (2002) 67 Cal. Comp. Cases 1367 [10] (writ den.) [assignment of new and increased work requirements not "personnel action" under section 3208.3(h)].)

We recognize that not every Appeals Board panel has recognized the distinction between a psychiatric injury caused by stressful working conditions and injury caused by an action specifically directed towards an individual's employment status. (See *Schultz v. Workers' Comp. Appeals Bd.* (1998) 63 Cal. Comp. Cases 222 (writ den.) [changes in the employment environment resulting from change in company ownership, frequent change of managers, alteration of sales territory, change in the pay structure, increased workload caused by reduction of sales staff, and requirement to maintain a neat desk construed by panel to be "personnel actions" that barred compensation because they were taken for reasonable and proper business purposes].)

However, we find 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 specifically towards an individual's employment status, is both important and necessary, and the contrary view of the panel in *Schultz* is not adopted here. Without 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 work loads." (*Larch, supra,* 63 Cal. Comp. Cases at

> p. 835; see also *County of Butte v. Workers' Comp. Appeals Bd. (Purcell)* (2000) 65 Cal. Comp. Cases 1053, 1058 (writ den.) [not all actions by management may be construed as personnel actions because such a construction would be overly broad and would result in the denial of compensation for injuries caused by management's criticism of an employee's conduct].)

(*Ferrell v. County of Riverside* (2016) 81 Cal. Comp. Cases 943, 945-947 (board panel decision).)

Here, we agree with *Ferrel* that the term "personnel action" must have a narrower meaning than any action taken by a supervisor towards a subordinate – to be a personnel action, an event of the employment must relate in some meaningful way to the worker's employment status, although that relationship need not be direct and the event need not have an immediate effect on the worker's employment status. (See *Larch, supra*, 63 Cal. Comp. Cases at pp. 833–835.) Criticism by management that does not relate to a worker's employment status is therefore not a personnel action for purposes of section 3208.3(h). *(Butte, supra,* 65 Cal. Comp. Cases at 1058.)

With these guidelines in mind, we turn to each of the disputed factors, including the explanation from the QME as to what was intended to be encompassed by that factor.

1. Start of Injury After "April/May 2014" Project Meeting (5%)

According to the QME, this factor was meant to encompass events of the employment connected to a meeting applicant attended in April or May of 2014. (Ex. 5, at p. 28.) This appears to correspond to the meeting referenced in applicant's testimony as occurring in that same time frame, and in the testimony of Singleton as occurring in March 2014, with documentary evidence appearing to substantiate that the meeting occurred in March 2014. (Transcript, 3/10/20, at pp. 69–79; Transcript, 1/26/22, at pp. 38–39; Ex. GG, at p. 1.)

The Answer does not explain why defendant believes this factor constitutes a good faith personnel action; instead, it more broadly states that "[b]egining in April of 2014, management noticed several shortfalls in Applicant's job performance including attendance, leadership, clear effective communication, and initiative." (Answer, at p. 12.)

Although we take no issue with this statement as a broad summary of events, it does not explain how the portion of applicant's injury attributable to the March 2014 meeting was the result of a personnel action. Instead, from the testimony and documentary evidence, it appears that the portion of applicant's injury attributable to this meeting was the result of what applicant perceived as harsh and unfair criticism from the peer review group, and her supervisors' failure to support

her in the face of such accusations.[7] Such actions cannot reasonably be characterized as personnel actions, as they – in contrast to some of the later actions by applicant's supervisors detailed below - bore no meaningful relationship to applicant's employment status. Holding that the statements of applicant's peers and supervisors during and in the immediate aftermath of this meeting constituted a "personnel action" would be to broaden the definition of that term to encompass essentially any action taken in the workplace that involved one's superiors in any way. (*Butte, supra,* 65 Cal. Comp. Cases at 1058.) We do not believe that this is what is intended by the term, and we therefore hold that the events included within this factor are not personnel actions under the meaning of section 3208.3.

4. Supervisor's Complaints About Her (5%)

The QME's report provides little detail as to what this factor relates to in precise terms, noting that the QME was unable to establish a precise timeline or specific complaints. (Ex. 5, at p. 33.) However, the QME reported that Gao's dissatisfaction began when Singleton and later Star were assigned to be supervisors, and that she felt "neither had an education at the higher level as did Ms. Gao" and it "seemed that they really did not understand the technical aspects of the work they had to supervise Ms. Gao on." (*Ibid.*)

As above, defendant does not specifically address this factor, either in its briefing or in the deposition of the QME. Instead, it appears that defendant's argument is that this factor, along with many others, should be categorized a personnel action because it – according to defendant – is a reaction of applicant towards actual personnel actions, citing *County of Sacramento v. Workers' Comp. Appeals Bd. (Brooks)* (2013) 215 Cal.App.4th 785, 796. In that case, an employee's injury was attributed partially to a personnel action, and partially to "feelings that he was unsupported by his supervisors," with the question being whether those feelings stemmed from the personnel action in question, or from more general causes. (*Ibid.*) The Court of Appeal returned the matter to the WCAB for further development of the record because it believed the existing evidence did not support the Board's conclusion that the QME had separated out applicant's feelings related to

[7] We emphasize here that the workers' compensation system is not a fault-based system. The question here is not whether applicant's reaction to the feedback provided was reasonable, whether the feedback provided was accurate, or even whether it was provided in good faith; the question is whether the events of the March 2014 meeting were a *personnel action*, because section 3208.3(h)'s defense applies only to good faith *personnel actions*.

the personnel action from those stemming from more general dissatisfaction with his supervisors. (*Id.* at p. 797.)

Brooks is inapposite here because defendant merely asserts that all of applicant's feelings were reactions to personnel actions, without actually proving it, or even addressing the factors on a factor-by-factor basis. *Brooks* stands for the proposition that a worker's negative feelings towards supervisors *can* be considered attributable to a personnel action if the reason for those negative feelings is a personnel action, not that *all* negative feelings towards supervisors *necessarily* stem from personnel actions. Defendant must actually prove that assertion, and here, it has not.

If anything, it appears from the QME's notes that this factor relates to more generalized dissatisfaction on applicant's part with what she felt as the indignity of being subject to complaints from supervisors who she did not consider as qualified as herself, not to specific instances related to personnel actions, which are addressed in other factors. Accordingly, we do not believe that defendant carried its burden to demonstrate that this factor should be considered as stemming from a personnel action.

5. No Warning Regarding Supervisor's Dissatisfaction/ Not Following Proper Procedures (5%)

According to the QME, this factor had to do with applicant's feeling that no warning was given "before they did this to me, not a single word," that it was getting worse in February or March of 2015, and that her project was given to a person she had been mentoring who had just graduated from university without warning or even letting her know it was happening. (Ex. 5, at p. 34.)

Again, defendant fails to address this factor on an individualized basis, and therefore to prove that these feelings stemmed from a personnel action, rather than other causes. As best as can be told from the QME's notes, this factor appears to relate primarily to the humiliation applicant felt as a result of no warning being given before one of her projects was taken away. We conclude below in the factor pertaining to that event that it does not constitute a personnel action because it was merely a reassignment of work; it therefore follows that applicant's reaction to that reassignment was not a reaction to a personnel action. Accordingly, we conclude that this factor is not attributable to a personnel action.

8. Dissatisfaction with English Language Skills (15%)

According to the QME, this factor is meant to encompass the stress applicant sustained as a result of feeling that her English proficiency was suddenly being unfairly questioned despite her having worked for the company for many years without it being an issue. (Ex. 5, at pp. 37–38.) Applicant was particularly incensed by the fact that Chevron employed many workers from different countries who spoke worse English than she did, which to her mind showed that her English proficiency could not have been the real issue. (*Id.* at p. 38.) This factor also encompassed such episodes as Star telling applicant that she did not understand her English and that listening to it gave her a headache. (*Id.* at p. 39.)

A recurring theme in the QME's explanation of this factor was that applicant was especially damaged by the feeling that the criticism was coming out of nowhere after many years on the job during which she did not face such criticism. (Ex. 5, at p. 39–40.) She also felt humiliated by reports from Star that other higher-ups, such as a general manager and an area manager, were unhappy with her English. (*Id.* at p. 39.)

As with the other factors, defendant does not specifically address this factor, or attempt to demonstrate how this portion of applicant's injury was a reaction to a personnel action, rather than to more generalized interactions with her superiors. This is especially relevant here because the factor appears to group together a number of different incidents, with varying degrees of relation to any identifiable personnel action.[8]

Because it was defendant's burden to demonstrate how this factor stems from a personnel action, we conclude that the failure to parse out which portions of this factor might plausibly relate to personnel actions must accrue to applicant's advantage. Accordingly, we conclude defendant has failed to carry its burden to demonstrate that this factor can be attributed to a personnel decision.

[8] We must emphasize again here that our inquiry is not into whether applicant's reactions were reasonable, or even whether she was correct that management was dissatisfied with her English. Therefore, defendant's efforts to explain that management was not actually concerned with applicant's English proficiency, but rather with more general communication skills, do not have any direct relevance to the question of whether this portion of applicant's injury – or any other, for that matter – arose from a personnel action, as opposed to from other acts of employment.

14. Project Taken Away (2%)

According to the QME, this factor is interrelated to factor 5, and relates to the decision to take a project away from her and assign it to a younger engineer who she had been mentoring, which applicant felt was embarrassing and humiliating. (Ex. 5, at p. 44.)

As with all other factors, defendant does not specifically address this factor or demonstrate why it should be considered a personnel action. However, caselaw establishes that increases to an employee's workload are not personnel actions for purposes of *Rolda* analysis. (See, e.g., *Berman, supra, 65* Cal. Comp. Cases 563; [corporate reorganization that increased workloads not "personnel action" for purpose of section 3208.3(h) even though it was nondiscriminatory and generally applied to all employees]; *Brodsky, supra ,* 66 Cal. Comp. Cases 370 [increasing sales quotas, changing commission structure, reassigning applicant's sales accounts to other people, and offering applicant lower paying job at fixed salary, found not to be "personnel actions" for purpose of section 3208.3(h)]; *Sunsweet Growers, supra,* 64 Cal. Comp. Cases 1432 [announcement of a shift change to seven days per week/nine hours per day for an indefinite period not a "personnel action" within meaning of section 3208.3(h)]; *Rivera, supra*, 67 Cal. Comp. Cases 1367 [10] [assignment of new and increased work requirements not "personnel action" under section 3208.3(h)].)

Given that *increases* in workload are not considered personnel actions, it would logically follow that *decreases* in workload are not personnel actions either. Accordingly, we conclude that this factor is not attributable to a personnel action.

18. Not Write PMP Herself (1%)

According to the QME, this factor accounts for applicant's dissatisfaction that she was not allowed to write her 2014 PMP and/or that her disagreement with that PMP was not memorialized in the PMP in writing in the correct way. (Ex. 5, at p. 47.)

Here, we agree with defendant that this constitutes a reaction to a personnel action, and, therefore, that it should be attributed to a personnel action. Employee evaluations have been held in the past to be personnel actions, and it is quite clear from the record in this matter that it was the 2014 PMP, and specifically the "2 minus" rating that applicant received on that PMP, which set in

motion the PIP process. Accordingly, we will consider this as attributable to a personnel action for purposes of the *Rolda* analysis.

20. Performance Improvement Program (PIP) (5%)

According to the QME, this factor relates to applicant's feelings that the PIP she was placed on did not adequately reflect the reality of her situation. (Ex. 5, at pp. 47–49.)

As Defendant notes in its post-trial briefing, placement on a PIP has previously been held to be a personnel action. (*Hingada v. Workers' Comp. Appeals Bd.* (2017) 82 Cal. Comp. Cases 281.) Applicant, conversely, asserts that "Chevron witnesses testified that a PIP is not a disciplinary action. Rather, it is Chevron's attempt to coach the Chevron employee and assist them in areas that need development." (Petition, at p 4.)

We believe defendant has the better of the argument here. The determination of whether a given event of employment is a personnel action is a question of law, and does not turn upon "magic words" recited by witnesses. In reality, it is abundantly clear from the record – and from applicant's own reaction and testimony – that the PIP constituted a personnel action taken by applicant's supervisors, and that it was a necessary result of applicant's low 2014 performance evaluation, itself a personnel action. Under the circumstances, we conclude that this factor should be considered attributable to a personnel action.

21. Meeting with Darrin After PIP (1%)

According to the QME, this factor relates to a meeting with Singleton after applicant was placed on the PIP, wherein they discussed why she had received such a poor performance rating, and wherein applicant was told she was not able to do complex work. (Ex. 5, at pp. 49–50.)[9]

Neither applicant nor defendant specifically address this factor in their briefing. However, to the extent that it appears clear from the QME's notes that this factor relates to a meeting with Singleton in which the PIP and/or PMP were discussed, it appears most fair to characterize it as relating to a personnel action. It is clear from the testimony of the parties that the PIP was an ongoing process involving regular meetings and consultation, and it would be arbitrary to draw a

[9] In fact, this meeting may have occurred after applicant received her "2-minus" rating on the PMP, not after she was placed on the PIP. (See Transcript, 3/10/20, at p. 152.)

line which marks the PIP itself as a personnel action but does not include meetings directly related to the PIP. Accordingly, we will consider this factor to stem from a personnel action.

22. Request for Extension PIP (2%)

According to the QME, this factor relates to applicant's denied request for an extension of her PIP. (Ex. 5, at p. 50.)

We will consider this to stem from a personnel action based on the same reasoning applied above to applicant's meeting with Singleton about the PIP; given that the PIP itself was a personnel action, supervisory decisions about the PIP, including any possible extension, are necessarily personnel actions as well.

23. June 9, 2015 Meeting (1%)

According to the QME, this factor relates to the meeting described in applicant's testimony where Star asked applicant why she had invited a particular engineer to the meeting, and questioned whether that engineer understood what applicant was saying. (Ex. 5, at p. 50–51; Transcript, 3/10/20, at pp. 131–34.)

Defendant does not provide any argument as to why it believes this factor related to a personnel action. The meeting in question was not a meeting relating to applicant's PIP, and it is not clear why comments made by Star at that meeting should be considered personnel actions. As noted above, not all statements by managers are personnel actions. Accordingly, we will not consider this factor as stemming from a personnel action.

CONCLUSION

Based on the above discussion, we conclude that the following factors noted in the QME's report are or are attributable to personnel actions for purposes of the *Rolda* analysis:

6.	Job Termination in December 2015	(15%)
11.	Written Evaluation April 13, 2015	(3%)
18.	Not Write PMP Herself	(1%)
20.	Performance Improvement Program (PIP)	(5%)
21.	Meeting with Darrin After PIP	(1%)

22. Request for Extension PIP (2%)
24. July 6, 2015 Letter RE: Downsizing (1%)

These factors add up to a total of 28%. Because this is lower than the 35% minimum threshold outlined in section 3208.3(h), we need not determine which of these personnel actions were in good faith, lawful, and for a nondiscriminatory purpose; even assuming for purposes of decision that every factor can be so characterized, applicant's claim would not be barred by that section.

Accordingly, we will rescind the WCJ's contrary finding, and substitute a new order finding that applicant suffered a psyche injury arising out of and in the course of employment that is not barred by section 3208.3, with all other issues deferred for the WCJ to address upon remand.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the September 26, 2023 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 26, 2023 Findings and Order is **RESCINDED,** that the following order is **SUBSTITUTED**, and that the matter is **RETURNED** to the trial level for further proceedings.

ORDER

1. Applicant has established that she suffered a psyche injury arising out of and in the course of employment;
2. Applicant's psyche injury is not barred by Labor Code section 3208.3(h);
3. All other issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I DISSENT. (See attached Dissenting Opinion.)

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 1, 2023

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

LIMIN GAO
GHITTERMAN & GHITTERMAN
MULLEN & FILIPPI

AW/pm

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

DISSENTING OPINION OF COMMISSIONER RAZO

I respectfully dissent. For the reasons outlined in the WCJ's Report, which is incorporated below, I would find that applicant's claim is barred by Labor Code section 3208.3(h) because applicant's psyche injury was substantially caused by lawful, nondiscriminatory, good faith personnel actions.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 1, 2023

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

LIMIN GAO
GHITTERMAN & GHITTERMAN
MULLEN & FILIPPI

AW/pm

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I. INTRODUCTION:

Petitioner, Applicant Limin Gao, seeks relief from the September 26, 2023, Findings and Order (Order) by filing a timely, verified Petition for Reconsideration (Petition).

Applicant, Limin Gao, 54 years old on the last day of injury, while employed over the period from May 2, 2014, to July 2, 2015, as a reservoir engineer, claimed injury to the psyche arising out of and in the course of employment by Chevron Corporation.

The Petition lists Labor Code §5903, sections (a), (c), and (e) as the statutory authority for its filing.

The Petition contends, generally, that the Order should be reversed, and new Findings of Fact be issued finding industrial injury. [1]

Specifically, the Petition claims:

that the findings in the Order are the opposite of the factual findings in the September 21, 2022 Findings and Award;[2]

that the Order includes some events in the good faith personnel analysis that were not included in the predominant threshold analysis;[3]

that the Order included a non-industrial event in the good-faith-personnel-action evaluation;[4]

that the Order did not identify those events that were deemed to be personnel actions;[5]

that the Order did not show how it was calculated that the personnel actions were a substantial cause of Applicant's psyche Injury;[6]

that the actual events of employment only amount to twenty-six percent (26%) of causation,[7] or nineteen percent (19%);[8]

that the Order did not explain why the prior factual findings on whether [78] the personnel actions were in good faith did not apply;[9]

that Petitioner is unable to intelligently address the Board's reasoning on the good-faith issue because none was provided;[10]

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[1] Petition, p. 17, lines 1-4.

[2] Petition, p. 1, lines 26-29; and p.2, lines 6-9. [Note: the line numerals end at 28, but the text extends for another line, which is being identified as line 29.]

[3] Petition, p. 1, line 29 to p. 2, line 2.

[4] Petition, at p. 2, lines 3-4.

[5] Petition, p. 2, lines 4-5.

[6] Petition, p. 2, lines 5-6.

[7] Petition, p. 15, lines 4-8.

[8] Petition, p. 15, lines 22-25.

[9] Petition, p. 15, lines 13-14.

[10] Petition, p. 15, lines 14-15.

II. FACTS:

Applicant claimed injury over the period from May 2, 2014, to July 2, 2015, to the psyche while working as a reservoir engineer for Defendant.

The case was initially tried on January 26, 2022. A Findings and Award issued on September 21, 2022. Both Defendant and Applicant petitioned for reconsideration of the Award. The Award was rescinded on October 10, 2022.

Further hearings occurred on November 3, 2022; February 9, 2023; March 24, 2023; and May 31, 2023. The matter was continued to a virtual trial at the May 31, 2023 hearing because the current pre-trial conference statement did not list all the exhibits to be offered, only referring to earlier Minutes/Summary of Evidence.[11]

Both Applicant and Defendant petitioned for removal and requested an order that the matter be resubmitted on the existing record on June 5, 2023.[12] On the same day, a Notice of Intention to resubmit the case on the existing record was issued.

A joint request to withdraw the Petition for Removal was made on June 21,2023, in light of the June 5, 2023 Notice of Intention. The hearing of June 20, 2023, was taken off calendar.

The case was submitted for decision on June 22, 2023, on the existing evidence and testimony.

The Board formally dismissed the Petition for Removal on July 20, 2023, based on the Petition having been withdrawn.

The Findings and Order issued on September 26, 2023.

Applicant filed the Petition for Reconsideration of this Order on October 2, 2023.[13]

III. DISCUSSION:

Opposite Findings of Fact

The Petition argues that the findings in the Order are the opposite of the factual findings in the September 21, 2022, Findings and Award.[14] Petitioner filed a petition for reconsideration of that Award and the Award was rescinded on October 10, 2022. [14]

Since Applicant petitioned to reconsider the earlier Award, Applicant did not accept the Findings in that Award.[15] Applicant should not now argue that the Findings in the earlier Award should have been duplicated in the September 26, 2023, Order.

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[11] Minutes of Hearing, May 31, 2023.

[12] Joint Petition for Removal and Reques [sic] to Order this Matter Resubmitted on the Existing Record, June 5, 2023.

[13] The Petition appears to have been filed twice; once at 12:27 p.m. and again at 12:30 p.m. Both Petitions are identical.

[14] Petition, p. 1, lines 26-29; and p.2, lines 6-9. [Note: the line numerals end at 28, but the text extends for another line, which is being identified as line 29.]

[15] Petition for Reconsideration, September 29, 2022, p. 1, lines 23-24; "(d) That the findings of fact do not support the order, decision, or award."

Missing Events

The Petition argues that the Order includes some events in the good-faith-personnel analysis that were not included in the predominant threshold analysis.[16] This appears to be also stated later in the Petition.[17] The missing events are listed as the project meeting of April/May 2014, dissatisfaction with English language skills. Chinese cultural background, "February 2015", Jacquelyn talking behind Applicant's back, being singled out, and that no team wanted to take Applicant. These were said to be in Dr. Weiss' report.

In the Opinion on Decision, both the predominate threshold analysis and the good-faith-personnel-action analysis were based on the August 4, 2018, report of Dr. Diane Weiss.[18]

Since these two analyses determine separate issues, the events considered in each analysis are different. While the events used in each analysis are different, this fact does not show any error in the Order.

Non-Industrial Event

The Petition argues that the Order included a non-industrial event in the good-faith-personnel-action evaluation.[19] This appears to be addressed later in the Petition as relating to her son.[20] The Opinion on Decision lists the factors used in the good-faith analysis which includes a five percent (5%) listing for Applicant's son.[21]

The Opinion then states that these events total fifty-five percent (55%).[22] Since this was above the percentage needed to find a substantial cause (35% to 40%) the claim was found to be barred by Labor Code section 3208.3(b)(3).[23]

Even if the five percent (5%) for the son is subtracted from the fifty-five percent (55%), it would still leave fifty percent (50%). That would still be above the substantial cause threshold (35% to 40%). The inclusion of the listing for Applicant's son does not show error in the Order.

Identification of Personnel Actions

The Petition argues that the Order did not identify those events that were deemed to be personnel actions.[24] This appears to be restated later in the Petition.[25] In the portion of the Opinion on Decision, the events being found to be personnel actions are listed.[26]

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[16] Petition, p. 1, line 29 to p. 2, line 2.
[17] Petition, p. 13, line 22 to p. 14, line 10.
[18] Opinion of Decision, September 26, 2023, p. 2, para. 4-9.
[19] Petition, p. 2, lines 3-4.
[20] Petition, p. 15, lines 28-29.
[21] Opinion on Decision, September 26, 2023, p. 2, para 8.
[22] *Id.* at p. 2, para. 9.
[23] *Id*.
[24] Petition, p. 2, lines 4-5.
[25] Petition, p. 16, lines 26-27.
[26] Opinion on Decision, September 26, 2023, p. 2, para. 8.

Calculation of Substantial Cause

The Petition argues that the Order did not show how it was calculated that the personnel actions were a substantial cause of Applicant's psyche Injury.[27]

The Opinion on Decision states how this was calculated.[28]

Actual Events of Employment

The Petition argues that the actual events of employment only amount to twenty-six percent (26%) of causation,[29] or nineteen percent (19%).[30]

The Petition states the twenty-six percent (26%) is what remains after elimination of the events the Order did not identify as actual events of employment.[31] The actual events of employment were listed in the Opinion on Decision.[32] The events listed add up to sixty-five percent (65%).[33]

The Petition states the nineteen percent (19%) is from what the Petitioner maintains are the only actions that may be deemed a personnel action.[34] This is an argument based on Petitioner's evaluation of what is a personnel action. The Petition has not shown why the listing of personnel action events in the Order was defective.

These arguments have not shown an error in the Order.

Prior Factual Findings

The Petition argues that the Order did not explain why the prior factual findings on whether the personnel actions were in good faith did not apply.[35]

The prior findings of fact did not apply because the prior decision was rescinded.

Since Applicant petitioned to reconsider the earlier Award, Applicant did not accept the Findings in that Award.[36] Applicant should not now argue that the Findings in the earlier Award should have been duplicated in the September 26, 2023, Order.

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[27] Petition, p. 2, lines 5-6.

[28] Opinion on Decision, September 26, 2023, p. 2, para. 8, to p. 3, para. 1.

[29] Petition, p. 15, lines 4-8.

[30] Petition, p. 15, lines 22-25.

[31] Petition, p. 15, lines 4-8.

[32] Opinion on Decision, September 26, 3023, p. 2, para. 4-5.

[33] *Id*.

[34] Petition, p. 15, lines 22-25.

[35] Petition, p. 15, lines 13-14.

[36] Petition for Reconsideration, September 29, 2022, p. 1, lines 23-24; "(d) That the findings of fact do not support the order, decision, or award."

Reasoning on the Good-Faith Issue

The Petition argues that Petitioner is unable to intelligently address the Board's reasoning on the good-faith issue because none was provided.[37]

The Board's reasoning on the good-faith issue is in the Opinion on Decision.[38] The Decision lists the factors in Dr. Diane Weiss' August 4, 2018, report, that they total fifty-five percent (55%), that this is greater than the Labor Code 3208.3(b)(3) bar of thirty-five to forty percent (35-40%) for psyche injuries, and that therefore the claim was barred.[39]

IV. RECOMMENDATION:

Based on the foregoing, it is recommended that the Petition for Reconsideration be denied.

DATE: OCTOBER 16, 2023

DONALD H. JOHNSON
Workers' Compensation
Administrative Law Judge

[37] Petition, p. 15, lines 14-15.
[38] Opinion on Decision, September 26, 2023, p. 2, para. 8, to p. 3, para. 1.
[39] *Id*.