

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

**DYANA YANNY, *Applicant***

**vs.**

**GIROUX GLASS, INC., and LIBERTY MUTUAL INSURANCE, *Defendants***

**Adjudication Number: ADJ11340244  
Los Angeles District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings of Fact and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on June 7, 2019, wherein the WCJ found that applicant did not sustain a compensable psychiatric injury arising out of and occurring in the course of employment (AOE/COE); and the WCJ Ordered that applicant take nothing by way of her injury claim.

Applicant contends that her psychiatric injury was caused by her increased work load and was not the result of personnel actions.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petition and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Opinion on Decision and the Report, both of which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will affirm the F&O.

**BACKGROUND**

Applicant claimed to have sustained a psychiatric injury while employed by defendant as an Accounts Payable Clerk, during the period from June 17, 2015, through May 22, 2018. The injury claim was denied by defendant. (Def. Exh. C, Correspondence, August 18, 2018.)

Psychiatric qualified medical examiner (QME) Susan L. Marusak, M.D., evaluated applicant on December 6, 2018. (App. Exh. 1, Dr. Marusak, January 4, 2019.) Dr. Marusak took a history, reviewed the medical record, and conducted various psychiatric diagnostic tests. The diagnoses included clinical psychiatric syndrome, and chronic adjustment disorder with anxiety and depressed mood. (App. Exh. 1, p. 47.) Dr. Marusak assigned a Global Assessment of Function (GAF) score of 62, and regarding causation, she stated:

Causation is 90% industrial and made up of 70% to the perceived versus actual stress, harassment and mistreatment, which is deferred to the Trier-of-Fact; with 20% to personnel actions. ... ¶ Following careful psychiatric evaluation, I have determined that the events of Ms. Yanny's [sic] employment were the predominant cause of the mental disorder and need for treatment. I have also determined that her injury was never the result of any personnel actions. Therefore, Labor Code section 3208.3(h) does not come into play.

(App. Exh. 1, p. 58.)

I find that personnel actions were not a substantial cause of her psychiatric injury.

(App. Exh. 1, p. 59.)

It appears that the psychiatric injury is compensable, but the perceived versus actual harassment and mistreatment requires input from a Trier-of-Fact to determine its true compensability.

(App. Exh. 1, p. 60.)

Following careful psychiatric evaluation, I have determined that the applicant's injury was predominantly the result of alleged stress and alleged excessive workload and alleged harassment/mistreatment by her supervisor, CEO and coworkers. I defer to the Trier-of-Fact determinations of whether or not these events a) actually occurred, b) constitute stress/harassment/excessive workload (i.e. actual vs. perceived stress). I ultimately defer to the Trier-of-Fact whether this injury was caused by "actual events of employment" and thus whether or not it is compensable."

(App. Exh. 1, p. 61.)

The parties proceeded to trial on May 13, 2019. (Minutes of Hearing and Summary of Evidence (MOH/SOE), May 13, 2019.) The WCJ's summary of applicant's testimony included:

Regarding the reconciliation deadline that was enforced between February and March of 2018, she indicated she was not able to comply with this deadline. She felt the company was more lenient with others with the deadline. The deadline was not realistic and the deadline required cooperation from other persons in management like the project managers.

(MOH/SOE, p. 8.)

Defendant called the director of finance, Haik Khatchatrian, and applicant's supervisor, Marisela Abad-Miranda, to testify. The WCJ's summary of Mr. Khatchatrian's testimony included:

They evaluated her workload. Her position was unique. She did a different type of work from other people but not any more than other people. For example, the accounts payable person has more work than Applicant does, but the accounts payable person is all right with it. The current person in the same position as Applicant has no trouble meeting the deadline. Punctuality has always been an issue. She would call in sick. She would not show up. In the last 6 months, she was not at work once a week.

(MOH/SOE p. 10.)

The summary of Ms. Abad-Miranda's testimony included:

When asked whether she assessed her [applicant's] workload, the answer was I personally did the same job before I became a manager, so she knew that the work was not, not doable. She believes that Applicant was a very bright young lady. Her attendance got worse, but Marisela did not attribute it to any lack of skill.

(MOH/SOE p. 13.)

The issues submitted for decision included psychiatric injury, permanent disability, and good faith personnel action. (MOH/SOE, pp. 2 – 3.)

## DISCUSSION

It is well established that a WCJ's opinions regarding witness credibility are entitled to great weight because of the WCJ's, "opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand." (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500, 505]; *Sheffield Medical Group v. Workers' Comp. Appeals Bd. (Perez)* (1999) 70 Cal.App.4th 868 [64 Cal.Comp.Cases 358]; *Nash v. Workers' Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1793 [59 Cal.Comp.Cases 324]; *Greenberg v. Workmen's Comp. Appeals Bd.* (1974) 37 Cal.App.3d 792 [39 Cal.Comp.Cases 242].)<sup>1</sup>

Applicant argues that her inability to meet the time deadlines required by her work as an accounts payable clerk was due to her increased work load and was the cause of her claimed psychiatric injury. As noted above, Mr. Khatchatrian testified that the accounts payable employee

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<sup>1</sup> It is important to note that the trial in this matter occurred prior to the District Office being closed due to COVID - 19, so it was conducted in person, not via telephone and/or videoconference.

has more work to do than applicant did, but the accounts payable person is all right with it, and the person currently working in applicant's position has no trouble meeting the deadlines. (MOH/SOE p. 10.) Also, Ms. Abad-Miranda testified that she had previously done the same work as applicant, "so she knew that the work was not, not doable." (MOH/SOE p. 13.)

The WCJ found the testimony of Mr. Khatchatrian and Ms. Abad-Miranda to be credible. (Report p. 2; see Opinion on Decision p. 7.) However, the WCJ clearly stated, "The trier of fact found applicant not to be credible..." (Report, p. 4.) The WCJ set forth his decision, with his reasoning thereon. We accept his determination regarding applicant's and the defense witnesses' credibility, and we do not disturb his decision that applicant did not sustain injury AOE/COE.

Accordingly, we affirm the F&O.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 7, 2019 Findings of Fact and Order **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ DEIDRA E. LOWE, COMMISSIONER**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



**I DISSENT,**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**FEBRUARY 25, 2022**

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

**DYANA YANNY  
LAW OFFICES OF JACOB BORENSTEIN  
LAW OFFICES OF KIRK & MYERS**

**TLH/pc**

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

## **DISSENTING OPINION OF COMMISSIONER MARGUERITE SWEENEY**

For the reasons discussed below, it is my opinion that the trial record likely supports a finding that the increasing amount of work assigned to applicant resulted in a work overload and her repeated requests for help, which in turn caused her psychiatric injury. Under these circumstances, I believe it is appropriate to further develop the record, and based thereon, I respectfully dissent.

Applicant testified that she had increasingly more work assigned to her, that the project managers did not timely approve the invoices applicant needed in order to meet the payment timelines, and that over time, there was more strict enforcement of those timelines. (MOH/SOE, pp. 6 – 9.) Her testimony is consistent with the email exhibits (App. Exhs. 6, 7, 9, and 11), and the reports from treating physicians Heath Hinze, Psy.D., and William C. Sim, M.D. (See App. Exhs. 2, 3 and 4.)

It appears that although QME Dr. Marusak determined applicant's psychiatric injury was predominantly caused by stress, excessive workload, and the harassment/mistreatment by her supervisor, she could not determine whether applicant's injury was caused by "actual events of employment." (App. Exh. 1, p. 61.) The Appeals Board has previously held that that increased workloads, reassignment of work tasks, and the change of work hours are not "personnel action" and are instead actual events of employment. (See *Kaiser Foundation Hosp. v. Workers' Comp. Appeals Bd. (Berman)* (2000) 65 Cal.Comp.Cases 563 (writ den.); *Atlantic Mutual Insurance Companies v. Workers' Comp. Appeals Bd. (Brodsky)* (2001) 66 Cal.Comp.Cases 370 (writ den.); *Larch v. Contra Costa County* (1998) 63 Cal.Comp.Cases 831, 833 - 835; 1998 Cal. Wrk. Comp. LEXIS 4762 (Panel Decision).) Therefore, Dr. Marusak should be made aware that stress, excessive workload, and the harassment by a supervisor are actual events of employment, and she should be asked to submit a supplemental report clarifying her opinion as to whether applicant's psychiatric injury constitutes an injury AOE/COE. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

For these reasons, I would rescind the F&O and return the matter to the WCJ for development of the record and a new decision based thereon.



**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**FEBRUARY 25, 2022**

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

**DYANA YANNY  
LAW OFFICES OF JACOB BORENSTEIN  
LAW OFFICES OF KIRK & MYERS**

**TLH/pc**

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

**REPORT & RECOMMENDATION ON PETITION FOR  
RECONSIDERATION**

**I.**  
**INTRODUCTION**

1. Identity of Petitioner: Applicant  
Timeliness: The Petition for Reconsideration is timely.  
Verification: Verification is provided.
2. Date of Issuance of Findings and Order: 6/7/2019
3. Petitioner Contends that: "the Court's Opinion that Applicant did not present credible evidence [to establish a continuous trauma injury to her psyche] is incorrect."

**II.**  
**DISCUSSION**

The trier of fact found that Applicant was not credible, and not motivated to return to any kind of work. The WCJ's findings, if supported by substantial evidence, are entitled to great weight because the WCJ can observe demeanor and weigh the statements in connection with the manner on the stand. *Garza v WCAB* (1970) 56 Cal. Comp Cases 500, 504-505. The WCJ cited the evidence that supported the findings in the Findings and Order ("F&O"). Applicant was not credible and had no motivation to work was based on Applicant's own testimony. Applicant complained about every aspect of her work. She admitted that currently, she cannot even fill out an application to work. In her own words - playing with her son, taking walks, cooking and seeing friends - is better. F&O pp 4-5.

*A. The Findings Are Supported by Credible and Substantial Evidence*

The finding by the trier of fact that applicant had no motivation to work is supported by the credible testimony of her supervisors, Haik and Marisela. Both supervisors testified that initially, Applicant received excellent reviews and evaluations. Applicant received a pay raise. After she returned from maternity leave, applicant was absent on a regular basis. She lacked focus. She was frequently late. When her managers saw her lack of focus, her continued tardiness and absence, the managers developed a plan to assist in improving work performance. Her performance didn't improve. F&O p. 6.

The entire record supported the findings. The proper scope of judicial review in workers' compensation cases shall not extend further than to determine, based upon the entire record, whether the order, decision or award was not supported by substantial evidence. *Le Vesque v WCAB* (1970) 1 Cal 3d 627, 35 Cal. Comp Cases 16.



*B. Applicant Failed To Show, Under Step One, That The Alleged Psychological Injury*

*Involves Actual Events of Employment*

In order for a psychiatric injury to be compensable, certain conditions must be satisfied<sup>1</sup>, Comp Cases 241. The first step in the *Rolda* multilevel analysis, set forth in Labor Code § 3208.3(b)(1), requires Applicant to show that the psychological injury involves **actual events of employment**.

Where the trier of fact finds applicant not to be credible and did not believe that alleged work related incidents and stressors were actual events of employment, the applicant does not meet the burden under Labor Code § 3208.3(b)(1) and *Rolda* of demonstrating that actual events of employment predominantly caused psychiatric injury *Fujimoto v. Cabber Collision Centers* 2014 Cal. Wrk Comp P.D. LEXIS 118,

The trier of fact found that her supervisors invested in applicant by engaging her in meetings and dialogues, and developed "system in place" to assist in improving her work performance. What applicant perceived as "stress, harassment or mistreatment" were in fact, actions to assist her in coping with the changes in the organization and maintaining the level of excellence she showed before returning from maternity leave. F&O p. 5. Examples of these actions include giving her an intern to assist in filing to reduce her workload, work done by her temporary replacement which applicant believed of poor quality was taken over by her supervisor to give her a "clean slate," Marisela assisted by enlisting supervisors of Project Managers who did not turn in required paperwork to applicant.

The trier of fact found applicant not to be credible and without motivation to work. Legitimate actions to assist her in keeping up and maintaining the quality of work were perceived as stressors. Applicant failed to meet the burden under Step 1 of the *Rolda* analysis of show that the psychological injury involves "**actual events of employment**".

*C. Step Three: Good Faith Personnel Actions*

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<sup>1</sup> Under *Rolda*, a [WCJ], must use the following analysis:

1. Whether the alleged psychological injury involves actual events of employment, a factual/legal determination;
2. If so, whether such actual events were the predominant cause (51 % or more), a determination which requires medical evidence;
3. If so, whether the actual events were personnel actions that were lawful, non-discriminatory and in good faith, a factual/legal determination;
4. If so, whether the lawful, non-discriminatory and in good faith, personnel actions were a substantial cause (35 to 40% of causation from all sources combined) of the psychological injury, a determination which (35 to 40% of causation requires medical evidence;

Even if these personnel actions perceived as stressors were found to be "**actual events of employment**", the factual/legal determination under Step 3 of the *Rolda* analysis would lead to the same result. The actions were lawful, non-discriminatory and done in good faith, as the actions were done to assist her in keeping up and maintaining the excellent quality of work that she displayed in the past.

The Petition fails to show how the finding of the WCJ is not supported by substantial evidence, and for that matter fails to meet the requirement to support a Petition for Reconsideration. 8 CCR 10852.

### **III.** **RECOMMENDATION**

It is respectfully recommended that the Petition for Reconsideration be DENIED.

Date: July 1, 2019  
ISABEL LALLANA  
Worker's Compensation Law Judge

## OPINION ON DECISION

This case involves a claim for a psychiatric injury and the defense of a lawful, nondiscriminatory, good faith personnel action.

Applicant did not provide credible evidence to establish a continuous trauma injury to her psyche. As an Accounts Payable Clerk, her job duties involved entering information from pre-approved bills and invoices in the computer, for payment.

Significant changes occurred in Applicant's life during the three years she worked for defendant, and specifically during the last six months of her employment.

She took time off to go to Egypt for 2 ½ weeks, for her January 17, 2016 wedding. While at work, she engaged in numerous telephone calls to Egypt, some of which lasted 45 minutes. When she returned in February 2016, her work hours switched from 7:00 to 3:30. The following year, around April 2017, Applicant took over some of the duties associated with Verizon bill when an employee named Kaitlin left the company. During the latter part of 2017, Applicant went on maternity leave. She returned from her leave in December of 2017. In January 2018, applicant received a pay raise.

### *QME Findings*

Applicant was evaluated by the QME Susan Marusak. (Exhibit 1). Applicant told Dr. Marusak that "her job was always stressful, but it was January or February of 2018 when she started noticing the major symptoms". Exh 1, p. 13. Applicant testified that during this time, her stomach was in knots and she felt like throwing up.

Dr. Marusak found 12 WPI, and causation is 90% industrial. The industrial components made up of: 70% perceived versus actual stress, harassment and mistreatment, *which is deferred to the trier of fact*; with 20% to personnel actions. Exh 1, p. 58-59.

Dr. Marusak broke up the factors into two: the "alleged stress, harassment, mistreatment" (70%) and the "verbal warnings and write-up" (20%). She found that "actual events of employment -the alleged stress, harassment, mistreatment- were the predominant cause of the injury to the psyche. ***A further determination must be made establishing whether any of the actual employment events were personnel actions that were /awful, nondiscriminatory and in good faith.*** Exhibit 1 p. 59. With respect to the verbal warnings and write-up (which makes up the assigned 20%), Dr. Marusak indicates that "these personnel actions were not a substantial cause of the mental disorder."

### *Perceived vs Actual Stress, Harassment and Mistreatment*

The court finds Applicant was not credible, and is not motivated to return to any kind of work. On an average day, she plays with her son, she takes walks, she cooks, she sees her friends." According to Applicant, "this is better." Minutes of Hearing 9:16-18. This lack of motivation is clear from her statement that currently, she cannot return to any kind of work due to her experience with the company. She cannot even fill out an application. "I feel I'm going to be treated the same way." MOH 9:2-4.

Applicant received excellent reviews and evaluations. MOH 9: 1 0. She even received a pay raise when she came back from maternity leave. MOH 6:1-2. Applicant's supervisors testified that during the last six months of her employment, applicant had absentee and punctuality problems. She frequently did not get to work on time. Applicant was absent on a regular basis. She lacked focus when she was at work. When her managers saw that her lack of focus, tardiness and absence affected her work performance, her managers engaged her in meetings and dialogues, and developed "system in place" to assist in improving her work performance. Exh .9. Her managers engaged her in a dialogue to improve her performance given that she had excellent reviews and evaluations prior to leaving for maternity leave. But applicant had no motivation to work. She lacked focus. The court finds that what applicant perceived as "stress, harassment or mistreatment" were in fact, personnel actions to assist her in coping with the changes in the organization and maintaining the level of excellence she showed before returning from maternity leave.

### *Lawful, Non-Discriminatory and Good Faith Personnel Action*

While Dr. Marusak stated that 70% was attributable to the "alleged stress, harassment, mistreatment" and assigned 20% to verbal warnings and write-up, the court finds that these are two components to the good faith personnel action taken. As discussed above, what she believed as stress, harassment and mistreatment were in fact personnel actions taken to address absentee and punctuality problems. The remedial actions taken by management in response to the absentee and punctuality problems are personnel actions. A personnel action is conduct attributable to management and includes such things as done by one who has the authority to review, criticize, demote or discipline. *Stockman v Dept of Corrections* (1998) 63 Cal Comp Cases 1042, 1045.

There is credible testimony that the organization underwent significant changes when it became an ESOP (Employee Stock Ownership Plan) company. The banks required stricter timelines for financing, and deadlines were tightened across the organization. Applicant complained that deadlines were strictly enforced. Her two supervisors, Haik and Marisela, jointly met and "strategized" with Applicant to address her complaints and difficulty with the deadlines. For example, when Applicant complained about the workload, an intern was

provided to assist her in filing. When she complained about the quality of work of the person who took over while she was on leave, the work was transferred to Marisela, her supervisor, in order for Applicant to start have a "clean slate". When Applicant complained about the delays caused by Project Managers, her supervisor, Marisela asked her to loop her in so Marisela could, in turn, involve the Project Managers' supervisors. While applicant perceived these actions as stressful, harassing and mistreatment -these were done to support applicant and improve her performance. Applicant continued to miss deadlines. Her tardiness continued, and this affected her work. She was written up.

All of the above resulted from good faith personnel action.

*Personnel Action Were Substantial Cause of Injury*

The court also finds that the events -the meetings and communications between Applicant and her supervisors at about this time -was not harassment. Rather, the evidence indicates that management acknowledged her difficulties meeting deadlines and made good faith efforts to provide Applicant the support needed. Applicant failed to improve. When Applicant continued to miss deadlines, continued to be late, she was given verbal and written warnings. The good faith element encompasses the [sic] two parts of the personnel action taken. *Stockman v Dept of Corrections* 63 Cal Comp Cases at 1046.

*Good Faith Personnel Action Defense*

Based on the credible testimony of defense witnesses, defendant met their burden of showing that there was no harassment and mistreatment. Rather the remedial personnel actions were made to improve her performance, reduce tardiness and absenteeism (70%). Likewise, the verbal warnings and write-ups (causing 20% of psyche injury) were all made after her performance didn't improve.

Therefore, 90% of applicant's injury resulted from a lawful, nondiscriminatory good faith personnel action. Labor Code section 3208.3(h). No compensation shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory good faith personnel action. Labor Code action 3208.3(h).

DATE: June 7, 2019

Isabel Lallana

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE