

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

ML DILLARD, *Applicant*

vs.

COUNTY OF TULARE; CORVEL, *Defendants*

**Adjudication Number: ADJ12529330
Fresno District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 9, 2021

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

**ML DILLARD
LAW OFFICES OF GARY J. HILL
YRULEGUI & ROBERTS
EMPLOYMENT DEVELOPMENT DEPT.**

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I
INTRODUCTION**

1. Applicant's Occupation: Systems Administrator
Age at Injury: 36
Date of Injury: 1/29/2019
Parts of Body Alleged Injured: Psyche
Manner in Which Injury Alleged Occurred: Photographed while using restroom stall by a co-worker

2. Identity of Petitioner: Defendant
Timeliness: The Petition was timely filed on 2/11/2021
Verification: The Petition was Verified.

3. Date of Award: 1/22/2021

4. Petitioner contends:
 - a. The interaction between Applicant and his co-worker does not amount to an actual event of employment as is required for a psychiatric injury to be industrial under Labor Code §3208.3(b)(1).

**II
FACTS**

The facts of this case are not in dispute and are set forth in Dr. Sanjay Agarwal's QME report dated 6/11/19. The doctor summarized that while the applicant was using one of the stalls in the restroom at work, he noticed an individual in the next stall was pointing a cell phone camera at him from under the wall dividing the two stalls. The applicant told the other individual that it was illegal to point a cell phone camera in a public restroom. The other individual immediately left but the applicant was able to identify him from his shirt and shoes as a co-worker that worked on the other side of the applicant's cubicle wall. The applicant confronted the individual who eventually admitted his involvement. (Exh. 1, QME report Dr. Sanjay Agarwal, 6/11/19, pgs. 9-10.)

Dr. Agarwal opined that Applicant's psychiatric injury appears to be a direct result of feeling that his privacy was violated by a coworker who allegedly recorded the applicant while he was using the restroom. The injury was predominantly the result of the applicant's perceived stress due to this single episode of harassment and mistreatment by his coworker. The doctor deferred to the Trier-of-Fact to determine whether or not this injury was caused by "actual events of employment." (Exh. 1, pg. 43-44.)

The matter proceeded to trial on the issue of injury AOE/COE. The undersigned found that the employer provided restroom facilities were constructed in such a way as to make possible the invasion of privacy that was the predominate cause of applicant's psychiatric injury and that the employment relationship between the applicant and the co-employee who committed the invasion of privacy played a positive role in the injury by providing the perpetrator the opportunity to select the applicant as a victim and the opportunity to follow him into the restroom facilities during working hours. The undersigned found that the applicant suffered a psychiatric injury that was predominately caused by the actual events of his employment and he was in need of further medical treatment. The defendant was ordered to provide Workers' Compensation benefits to be adjusted by the parties with jurisdiction reserved to resolve any disputes arising therefrom. It is from these findings and order that Defendant seeks reconsideration.

III **DISCUSSION**

Labor Code section 3208.3 requires that in order for a psychiatric injury to be compensable "actual events of employment" must be the predominant cause of the injury. In this case, the parties agreed that the only issue to be determined was whether or not the circumstances and events causing the applicant's injury qualify as an "actual event of employment".

The Court of Appeal has established that in determining whether there is an "actual event of employment," two conditions must be satisfied. First, that there must be an "event" that happened in the employment relationship. Second, the event must be "of employment," such that it must result from an employee's working relationship with his or her employer. In order to qualify as being "of employment," the employment must play some active or positive role in the development of the psychological condition and not merely provide a stage.

It has been established under the personal comfort doctrine that a physical injury incurred while using the bathroom during the normal work day is compensable as arising out of and occurring within the course of employment. The courts have held that such injuries are compensable because the employee's activity is considered to be reasonably contemplated by employment. These line of cases focus on the activity of the injured worker at the time of the injury. In this case, at the time of the alleged injury, the applicant was using the bathroom that was located on the employer's premises and presumably provided by the employer. There is no doubt that the employer reasonably anticipated that its employees would need to use the bathroom to attend to the wants of nature during the course of the work day.

Defendant contends that there needs to be some evidence of a connection between the employment and the injury beyond just putting the applicant in a position at employment where the injury could occur.

In this case, the psychiatric injury occurred as the result of an invasion of privacy that is not unlike cases involving a physical assault at the workplace.

When it is known that the assault was committed out of a personal motivation or grievance, then the chain of causation between the employment and the injury is broken. Thus, when an assault is personally motivated, it could conceivably occur anywhere, thus precluding employer contribution, resulting in noncompensability. In other words, the connection between the employment and the injury is so remote that the injury is not an incident of the employment. (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1982) 133 Cal.App.3d 643, 654 [184 Cal.Rptr. 111].)

However, if the assault is not personally motivated then the injury is compensable. This would comport with the general rule that an injury may still arise out of employment even if the cause of injury is unconnected with the employment in the sense that the employer neither anticipated nor had control over the cause of the injury. (*Madin v. Industrial Acc. Com.* (1956) 46Cal.2d 90, 92-93 [292 P.2d 892].) (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1982) 133 Cal.App.3d 643, 654 [184Cal.Rptr.111].)

As stated in *California Comp. & Fire Co. v. Workmen's Comp. App. Bd. (Schick)*, 68 Cal.2d 157, 160, citing *Madin, supra*, 46 Cal.2d 90: "In finding that the injury arose out of the employment, this court held that a sufficient causal connection between the injury and the employment is shown where the employment was a contributory cause of the injury, that where the injury occurs on the employer's premises while the employee is in the course of his employment the injury also arises out of the employment unless the connection is so remote from the employment that it is not an incident thereof, and that an injury can arise out of the employment even though the employer had no connection with or control over the force which caused the injury. It was also held that an injury is compensable where the employee is brought into a position of danger by the employment even though the risk could not have been foreseen by the employer, and, finally, that reasonable doubts as to whether an injury is compensable are to be resolved in favor of the employee." (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1982) 133 Cal.App.3d 643, 655 [184 Cal.Rptr. 111].)

The court concluded, if a third party assaults and injures the employee while in the course of employment and the third party acted out of purely personal motives there is no compensability. However, if the employee can show there was some employment connection or contribution, i.e., an industrial cause of the injury so as to establish the arising-out-of element, then there is compensability. Such cause need not be the sole cause and need only be a contributing cause. Finally, if the third party's assault causing the injury occurs in the course of employment and is committed for unknown motives or no motive at all, i.e., for nonpersonal motives, the injury is compensable. (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1982) 133 Cal.App.3d 643,655 [184 Cal.Rptr. 111].)

In this case, it appears to be undisputed that there was neither a personal nor an employment related motivation for the invasion of privacy what was perpetrated upon the applicant by the co-employee. The criminal behavior was committed for unknown or no motive at all which would bring it under the "neutral risk" category of cases where an assault has been found to be compensable.

Defendant contends that Applicant has failed to prove that the employment relationship had any contributory cause other than providing a location where the applicant could be assaulted. However, the employer in this case contributed more than just the stage for the incident. The employer provided the restroom facilities that were designed and constructed in such a way as to make the invasion of privacy possible. An individual facility or one with solid partitions down to the floor would have prevented the applicant's co-worker from reaching under the divider between the stalls to photograph the applicant. Furthermore, the perpetrator was not only a co-employee but worked in an adjacent cubicle to the applicant which allowed him the opportunity to know when the applicant would be using the restroom facilities and follow him in.

While the employment relationship may not have played a role in the motivation for the invasion of privacy, it did provide the means and opportunity for it to occur. The applicant's employment brought him into a position of danger, even if the risk could not have been foreseen, and as such, played a positive role in the development of the psychological condition.

IV **RECOMMENDATION**

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

DATE: 2/23/21

Debra Sandoval
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE