

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

**KATHY ROBINSON, *Applicant***

vs.

**BERKELEY UNIFIED SCHOOL DISTRICT, permissibly self-insured, administered by  
INTERCARE HOLDINGS INSURANCE SERVICES, INC., *Defendants***

**Adjudication Number: ADJ9425810  
Oakland 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, Orders, and Opinion on Decision (F&O), issued by the workers' compensation administrative law judge (WCJ) on June 9, 2021, wherein the WCJ found that pursuant to Labor Code section 3208.3, applicant did not sustain a psychiatric injury arising out of and occurring in the course of employment (AOE/COE), nor did she sustain an injury AOE/COE to her neck/thyroid gland in the form of goiter.<sup>1</sup>

Applicant contends that the evidence submitted into the trial record does not justify the finding that applicant did not sustain injury AOE/COE.

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

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&O except that we will amend the F&O to defer the issue of whether applicant's psychiatric injury claim is compensable or is barred by the provisions of section 3208.3 (Finding of Fact 1). Based thereon, we will amend the Orders and return the matter to the WCJ for further proceedings consistent with this opinion.

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise noted.

## BACKGROUND

Applicant claimed a psychiatric injury and injury to her thyroid gland in the form of goiter while employed by defendant as a teacher on January 3, 2012.

On June 18, 2014, applicant was evaluated by toxicology qualified medical examiner (QME) James Lessenger, M.D. (Def. Exh. C, Dr. Lessenger, July 7, 2014.) Based on his examination of applicant, the history he was given, and his review of the medical record, Dr. Lessenger concluded that applicant had “Benign multinodular goiter” and that the goiter was “not work related.” (Def. Exh. C, p. 12.) The doctor's deposition was taken on March 11, 2015. (Def. Exh. D, Dr. Lessenger, March 11, 2015, deposition transcript.) During the deposition, Dr. Lessenger repeatedly explained the basis for his conclusions as stated in the July 7, 2014 report. (Def. Exh. D, pp. 13 – 41 [EAMS pp. 4 – 11].)

Applicant was evaluated by psychology QME Boukje Eerkens, Psy.D., on August 9, 2014. (Def. Exh. E, Dr. Eerkens, August 9, 2014.) Dr. Eerkens took a history, reviewed the medical record, and performed various psychology tests. The diagnoses included “Generalized Anxiety Disorder” and the assigned Global Assessment of Function (GAF) score was 60 [15% WPI]. (Def Exh. E, p. 26.) Dr. Eerkens determined that applicant's condition had not become permanent and stationary. (Def Exh. E, p. 29.) Dr. Eerkens re-evaluated applicant on February 20, 2016. (Def. Exh. Q, Dr. Eerkens, 2/20/2016.) He found that applicant's condition had reached maximum medical improvement/permanent and stationary status, and that her GAF score was 65 [8% WPI]. (Def. Exh. Q, p. 19.) Regarding the cause of applicant's psychiatric injury, Dr. Eerkens stated:

The remaining 60% of her disability is attributed to cumulative work events and is divided equally over the described injuries: 1) experience of unfair supervisor reprimand on September 27, 2013, 2) physical intimidation and bullying on the part of the parents of the children she cares for with no proper help from management to alleviate the situation (i.e., supervisor neglect), 3) being humiliated in front of others (management allowing things to get out of control), and 4) being assigned an excessive workload with a coworker who could not assist her properly due to her lack of mobility and time not working with the children while on the job.

(Def. Exh. Q, p. 20.)

The parties proceeded to trial on September 20, 2016. (Minutes of Hearing and Summary of Evidence (MOH/SOE) 9/20/ 2016.) They stipulated that applicant claimed to have sustained a psychiatric injury and an injury to her thyroid gland. Injury AOE/COE was identified as the issue

to be submitted for decision, and defendant asserted "... and maintains, a good faith personnel action defense as to allegations of psychiatric injury;" all other issues were deferred. (MOH/SOE, 9/20/ 2016, p. 2.) The matter was continued and applicant testified at the December 13, 2016 trial. (MOH/SOE, 12/13/2016.) On March 3, 2017, the WCJ issued an Order Suspending Proceedings and ordered that Dr. Eerkens be provided additional records and that he be requested to submit a supplemental report after reviewing those records.

Dr. Eerkens received the additional records to review and he issued a supplemental report on May 23, 2017. (Def. Exh. R, Dr. Eerkens, May, 23, 2017.) In the report Dr. Eerkens reiterated his earlier opinion as to the cause of applicant's condition as follows:

As to more specific percentages of causation attributed to the various factors, causes, and conditions, I would continue to assert that 40% of her disability is apportioned to her non-industrial personality features as described at length in my August 2014 report; and the remaining 60% of her disability is attributed to cumulative work events, divided equally over the following described injuries: 1) 15% to the supervisor reprimand of September 27, 2013; 2) 15% to her experience of supervisor neglect during the physical intimidation and bullying on the part of the parents of the children she cares for (program supervisor Zachary Pless simply encourages her in an email that " ... we cannot let this stress interfere with the wonderful teacher I know you to be" but takes no further action to protect her, per the patient); 3) 15% to Zachary Pless allowing parents to vent and scream at her during the 2013 meeting with parents, which caused her humiliation, and 4) 15% to being assigned an excessive workload with a coworker who could not assist her properly due to this coworker's lack of mobility.

(Def. Exh. R, pp. 2 – 3.)

The parties again proceeded to trial on November 7, 2017, and applicant gave further testimony. (MOH/SOE, November 7, 2017.) The matter was continued and at the April 17, 2018 trial applicant was cross-examined by defense counsel. (MOH/SOE, 4/17/2018.) Based on applicant's refusal to answer questions regarding case number ADJ3428282, defendant made a Motion to have the injury claim in this matter (ADJ9425810) dismissed. (MOH/SOE, 4/17/2018, pp. 14- 18.) The trial was continued for further proceedings. On April 26, 2018, defendant filed a Petition to Dismiss applicant's injury claim based on her refusal to answer defendant's questions at the April 17, 2018 trial. At the June 1, 2018 trial, after an on-the-record discussion with the parties, the WCJ ordered the matter taken off calendar. (MOH/SOE, 6/1/2018, pp. 1 - 2.) The WCJ issued the Findings and Order dismissing applicant's injury claim on July 20, 2018. Applicant filed

a Petition for Reconsideration, we granted the Petition, rescinded the Order and returned the matter to the WCJ for further proceedings.<sup>2</sup> At the April 6, 2021 trial, the matter was again submitted for decision.

## DISCUSSION

In the Petition applicant makes many arguments but makes no reference to the trial record. As noted by the WCJ:

Substantively, the petition fails to state any argument against the findings. Neither exhibits nor any evidence is cited. ... ¶ The record shows that the Findings of Fact rely on the opinions of QME Dr. Eerkens and QME Dr. Lessenger. Notably, applicant's Petition for Reconsideration is not critical of the medical evaluators.

(Report, p. 4.)

We agree with the WCJ that in the Petition applicant does not identify or describe any factual or legal support for her arguments. However, it has long been the law that once reconsideration has been granted, the Appeals Board has the authority to address issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (Lab. Code, §§ 5906, 5908; (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]); *State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) As noted above, Dr. Eerkens concluded that 60% of applicant's psychiatric disability was "attributed to cumulative work events" (Def. Exh. R, p. 2), injury AOE/COE was the issue submitted for decision, and defendant asserted that applicant's psychiatric injury claim was barred by the section 3208.3(h) good faith personnel action defense. (MOH/SOE, 9/20/ 2016, p. 2.) Thus, it is appropriate that we address that issue.

Section 3208.3 states in part:

(b) (1) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury. ... (3) For the purposes of this section, "substantial cause" means at least 35 to 40 percent of the causation from all sources combined. ...

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<sup>2</sup> Commissioner Sweeney, who previously served as a panelist in this matter is unavailable to participate further. Another panel member was assigned in her place.

(h) No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. The burden of proof shall rest with the party asserting the issue. (Lab. Code, § 3208.3.)

The Appeals Board has previously identified and explained a four-step analysis that WCJs' are to follow in order to determine whether a claimed psychiatric injury is compensable or is barred by section 3208.3(h) as having been caused by a lawful, non-discriminatory, good-faith personnel action. (*Rolda vs. Pitney Bowes* (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc) (*Rolda*).) The four steps delineated by the Appeals Board were: (1) A determination must be made that actual events of employment are involved. This is a factual/legal determination for the WCJ to determine, not a medical one. (2) There must be competent medical evidence establishing that the actual events of employment were the predominant cause -- i.e., greater than 50% -- of the injury to the psyche. (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. 4) Finally, a determination must be made as to whether the lawful, nondiscriminatory, good faith personnel actions were a “substantial cause” accounting for at least 35 to 40 percent of the psychiatric injury as stated in section 3208.3(b)(3). (*Id.* at 247; see also *County of Sacramento v. Workers' Comp. Appeals Bd. (Brooks)* (2013) 215 Cal.App.4th 785 [78 Cal.Comp.Cases 379]; *San Francisco Unified School District v. Workers' Comp. Appeals Bd. (Cardozo)* (2010) 190 Cal.App.4<sup>th</sup> 1 [75 Cal.Comp.Cases 1251].)

In his May 23, 2017 report, Dr. Eerkens stated that regarding the 60% of applicant's psychiatric disability attributed to cumulative work events, there were four separate factors that caused the disability. He assigned the disability caused by each factor as follows:

- 1) 15% to the supervisor reprimand of September 27, 2013;
- 2) 15% to her experience of supervisor neglect during the physical intimidation and bullying on the part of the parents of the children she cares for (program supervisor Zachary Pless simply encourages her in an email that "... we cannot let this stress interfere with the wonderful teacher I know you to be" but takes no further action to protect her, per the patient);
- 3) 15% to Zachary Pless allowing parents to vent and scream at her during the 2013 meeting with parents, which caused her humiliation; and
- 4) 15% to being assigned an excessive workload with a coworker who could not assist her properly due to this coworker's lack of mobility.  
(Def. Exh. R, pp. 2 – 3.)

Regarding the issue of what factors should be considered when determining whether the section 3208.3(h) defense is applicable, the First District Court of Appeal explained:

The plain language of section 3208.3 is determinative. Section 3208.3(b)(3) directs us to consider "all sources combined" in calculating the percentage of psychiatric injury caused by good faith personnel actions. "All sources combined" can only reasonably be interpreted to mean industrial and nonindustrial sources. In addition, as we noted above, the similar phrase "all causes combined" in section 3208.3(b)(1) has been interpreted to mean "the entire set of causal factors." Clearly, the entire set of causal factors includes the industrial and nonindustrial causes of the psychiatric injury. ... ¶ ... Newly enacted section 3208.3(b)(1) elevated the level of industrial causation of a psychiatric injury from 10 percent of all causes to "predominant as to all causes," and section 3208.3(h) added the good faith personnel action defense. But the legislative package also limited this defense by providing that it applied only where the personnel action "substantially caused" the psychiatric injury. ... ¶ ... [W]hen read together, the plain meaning of section 3208.3(b)(3) and section 3208.3(h) is that the entire set of industrial and nonindustrial causal factors must be taken into consideration in determining whether or not a psychiatric injury was substantially caused by "good faith personnel actions."

(*San Francisco Unified School District v. Workers' Comp. Appeals Bd.* (*Cardozo*) (2010) 190 Cal.App.4<sup>th</sup> 1, pp. 10 – 11, citation omitted [75 Cal.Comp.Cases 1251].)

Several Appeals Board panel decisions have addressed the meaning of "personnel action" as used in section 3208.3(h).<sup>3</sup> For example, in *Larch v. Contra Costa County* (1998) 63 Cal.Comp.Cases 831, 1998 Cal. Wrk. Comp. LEXIS 4762, the panel stated:

What constitutes a "personnel action" depends on the subject matter and factual setting for each case. The term includes but is not necessarily limited to a termination of employment. (*Bray v. Workers' Comp. Appeals Bd.* (1994) 26 Cal.App.4th 530 [59 Cal.Comp.Cases 475, 484] [31 Cal. Rptr. 2d 580].) An employer's disciplinary actions short of termination may be considered personnel actions even if they are harsh and if the actions were not so clearly out of proportion to the employee's deficiencies so that no reasonable manager could have imposed such discipline. (Cf. *Clutts v. Workers' Comp. Appeals Bd.* [1997] 62 Cal.Comp.Cases 1142, 1143 (writ den.).) In *Clutts*, the applicant had alleged psychiatric injury as a result of letters written to him by his employer warning of disciplinary action for his failure to perform certain job duties. ¶ ... [T]he

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<sup>3</sup> Although panel decisions of the Appeals Board are not binding precedent and have no stare decisis effect, they are citable to the extent they point out the contemporaneous interpretation and application of the workers' compensation laws by the Board. (*Smith v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 530, 537, fn. 2 [65 Cal.Comp.Cases 277]; *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145, 147]; *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 [Appeals Board en banc].)

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... ¶ ... We conclude that a personnel action is conduct either 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 v. Contra Costa County*, *supra* at pp. 833 - 835.)

As we stated above, Dr. Eerkens concluded that 60% of applicant's psychiatric disability was the result of work events, that there were four different factors, and each factor caused 15% disability. (Def. Exh. R, pp. 2 – 3.) If three of the factors were good faith personnel actions, then 45% of applicant's disability would have been caused by those actions and the claim would be barred pursuant to section 3208.3(h). If only one or two of the factors were good faith personnel actions, the claim would not be barred. However, after reviewing the entire trial record, it appears to be necessary that we return the matter to the WCJ to conduct the four-step analysis described in *Rolda*, *supra*, and to conduct further proceedings as appropriate.

The Appeals Board has the discretionary authority to develop the record when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) Thus, we return the matter to the WCJ to determine whether the four factors described by Dr. Eerkens are good faith personnel actions, to determine the percentage of applicant's overall level of psychiatric disability (if any) caused by the good faith personnel actions, and finally, to determine if 35% - 40% of applicant's psychiatric disability was the result of good faith personnel actions. It is left to the WCJ's discretion to decide if the *Rolda* analysis can be completed based on the existing trial record, or if the record needs to be further developed.

Accordingly, we affirm the F&O except that we amend the F&O to defer the issue of whether applicant's psychiatric injury claim is compensable or is barred by the provisions of section 3208.3 (Finding of Fact 1). Based thereon, we amend the Orders and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings, Orders, and Opinion on Decision issued by the WCJ on June 9, 2021, is **AFFIRMED** except that it is **AMENDED** as follows:

#### **FINDINGS OF FACT**

1. The issue of whether Applicant KATHY ROBINSON, while employed on January 3, 2012, and during the alleged cumulative trauma period as a teacher at Berkeley, California, by BERKELEY UNIFIED SCHOOL DISTRICT, permissibly self-insured and administered by INTERCARE HOLDINGS INSURANCE SERVICES, INC., sustained a compensable psychiatric injury pursuant to Labor Code section 3208.3, is deferred.

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#### **ORDERS**

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**IT IS ORDERED** that the issue of whether applicant is to receive benefits based on her psychiatric injury claim is deferred.

**IT IS FURTHER ORDERED** that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



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

**January 14, 2022**

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

**KATHY ROBINSON, IN PRO PER  
LAW OFFICES OF RICHARD K. GREEN**

**TLH/*pc***

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