WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LEE SHEPPARD, *Applicant*

vs.

COUNTY OF KERN, PERMISSIBLY SELF-INSURED, *Defendants*

Adjudication Number: ADJ12683274
Bakersfield District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant County of Kern (defendant) seeks reconsideration of the December 28, 2021 Rulings on Evidence, Findings of Fact, Awards & Order (F&A) wherein the WCJ found, in relevant part, that applicant met the burden of establishing injury arising out of and in the course of employment (AOE/COE), and that defendant did not meet the affirmative burden of establishing that applicant's claim for psychiatric injury was filed after receipt of a notice of termination or layoff. The F&A further determined that the statutory exceptions to the post-termination bar for a "sudden and extraordinary" event and for employer knowledge of the injury prior to notice of termination or layoff were both applicable.

Defendant contends the August 28, 2018 Notice of Disciplinary Action seeking the termination of applicant's employment is tantamount to a Notice of Termination or Layoff under Labor Code section 3208.3(e), and that none of the exceptions to the post-termination defense are applicable.[1]

We have not received an Answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto, and

[1] All further statutory references are to the Labor Code unless otherwise stated.

the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated in the WCJ's report and opinion, which are both adopted and incorporated herein, we will deny reconsideration.

Applicant claimed injury to the psyche and left shoulder while employed as a human services technician by defendant County of Kern on February 7, 2018. Applicant alleged injury as the result of a supervisor grabbing his arm and escorting applicant back to his work area. (October 8, 2021 Minutes of Hearing and Summary of Evidence (Minutes), at 5:4.) Defendant denied injury as not arising out of and in the course of employment (AOE/COE), and because the claim was filed on September 26, 2018, after notice of termination on August 28, 2018.

Kimberly Tangen, Ph.D., was initially selected to act as the Qualified Medical Examiner in psychology. (Ex. F, report of Kimberly Tangen, Ph.D., dated March 15, 2019.) Dr. Tangen issued two reports, and identified both psychiatric injury and factors of causation. (Ex. F, report from Kimberly Tangen, Ph.D., dated March 15, 2019, p.34.) A replacement panel was ordered by the WCJ on December 24, 2019. (Minutes of Hearing, dated December 24, 2019; see also Petition, at 3:13.)

Azadeh Rahimi, Ph.D. was selected to act as the QME in psychology, and issued a report dated November 5, 2020, which found industrial injury and predominance. (Ex. 1, report of Azadeh Rahimi, Ph.D., dated November 5, 2020, p.64.)

The parties proceeded to trial on October 8, 2021, framing issues of injury AOE/COE, temporary disability, the need for further medical treatment, and the affirmative defense of a post-termination filing of the claim under section 3208.3(e). Applicant asserted the exceptions of section 3208.3(e)(1) and (2) were applicable, averring sudden and extraordinary events of employment had given rise to the injury, and that the defendant had knowledge of the injury prior to notice of termination or layoff. (October 8, 2021 Minutes, at 2:32.)

Applicant testified that on February 7, 2018, the building where applicant worked lost power. Applicant was walking some paperwork over to a former supervisor when his current supervisor Ms. Banuelos grabbed his arm. (October 8, 2021 Minutes, at 5:6.) Applicant told his supervisor to let go, but the supervisor "yanked him and holding his arm escorted him back to his work area." (*Ibid.*) Applicant felt "mortified, humiliated, disgusted, and angered." (*Id*. at 5:8.) Applicant reported the incident to supervisors Charise Curry and Tameika Cannon the same day, and supervisor Jeaniene Reneau the next day. (*Id*. at 5:27.) Applicant had further difficult

interactions with Ms. Banuelos, and asked to be transferred to another supervisor. The request was granted 12 days later. (*Id.* at 6:34.) Applicant also reported the incident to the human resources department. (*Id.* at 7:5.)

After applicant had transferred to another supervisor, he received notice of jury duty. Applicant was selected as a juror on a trial expected to last two to three months. On one occasion, applicant was released early from jury duty for the day. Applicant contacted former supervisors Ms. Cannon and Ms. Curry, who indicated he would be free for the day. (*Id*. at 7:26.) When the trial concluded, applicant returned to work. On August 28, 2018, applicant was asked to see the Human Resources department, at which time he was given a notice of proposed disciplinary action which included a "proposal of termination." It was explained to applicant that on days he was released early from jury duty he should have returned to work. Applicant was escorted off the premises, and was placed on paid administrative leave. (November 19, 2021 Minutes, at 4:18.)

On September 17, 2018, applicant attended a *Skelly* hearing regarding the defendant's notice of proposed disciplinary action.[2] Also in attendance was a representative from human resources, an attorney for the County, and a hearing officer. (November 19, 2021 Minutes, at 4:32.) Applicant was given an offer to be terminated or resign, and applicant chose to resign because he was being told he could be arrested, prosecuted or terminated. (*Id.* at 4:38.) On September 18, 2018, applicant tendered his resignation letter. (*Id.* at 8:17.) On September 26, 2018, applicant filed a DWC-1 claim with defendant. (*Id.* at 4:30.)

Defense witness Debra Davis testified that she was a senior human resources manager for defendant until she retired on June 30, 2021. (November 19, 2021 Minutes, at 6:15.) Ms. Davis hand-delivered to applicant a notice of proposed disciplinary action on August 28, 2018, and placed applicant on paid administrative leave. The proposed disciplinary action was termination of applicant's employment. (*Id.* at 8:26.) Ms. Davis advised applicant of his right to a *Skelly* hearing, and applicant accepted the offer. (*Id.* at 6:21.) Ms. Davis testified that as the human resources manager, she could only recommend disciplinary action, but the final determination would come from the hearing officer at the *Skelly* hearing. (*Id.* at 9:12.) Ms. Davis denied that applicant reported an injury at the September 17, 2018 Skelly hearing, but also acknowledged that

[2] *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215 [124 Cal. Rptr. 14, 539 P.2d 774]: "[A] public entity must accord constitutional procedural due process before depriving [a civil service employee] of any significant property interest in his or her employment."

she completed a written report shortly after the February 7, 2018 incident, with applicant "at that time reporting shoulder, knee and chest pain." (*Id.* at 9:2.)

The WCJ issued the F&A on December 28, 2021, finding applicant had sustained injury AOE/COE. (F&A, Findings of Fact No. 1.) The WCJ further determined, in pertinent part, that applicant resigned his employment with defendant on September 18, 2018, that the events of February 7, 2018 involving the supervisor grabbing applicant's arm constituted a "sudden and extraordinary" event of employment, and that the employer was aware of the injurious event prior to applicant's resignation. (F&A, Findings of Fact Nos. 5, 8, 9.) In the opinion on decision, the WCJ explained that the compensation bar of section 3208.3(e) was inapplicable because the defendant had never effectuated *actual notice* of termination or layoff. The notice of proposed disciplinary action that was conveyed to applicant was, by its own terms, preliminary and subject to an evidentiary hearing. As such, the defendant had not met its affirmative burden under section 3208.3(e) of establishing actual notice of termination. (F&A, Opinion on Decision, p.7, para. 3.) The Opinion on Decision further observed that the exception to the post-termination defense of a sudden and extraordinary employment event was met when applicant was "walking through a worksite darkened by a power outage and was suddenly grabbed by his supervisor and paraded in front of his coworkers as she physically led him back to his workstation." (*Id.* at pp.7-8.) The WCJ also found that applicant had proved by a preponderance of the evidence that the incident was contemporaneously reported to multiple supervisors. (*Id. at p.8.)* Thus, the exceptions to the post-termination bar found in section 3208.3(e)(1) and (2) were applicable, obviating the post-termination filing defense. (*Ibid.*)

Defendant contends the WCJ improperly applied the post-termination defense by conflating a "notice of termination" with actual termination. (Petition, at 5:4.) However, the WCJ correctly observed in the Report that "the notice of proposed disciplinary action was not a notice of termination." (Report, at p.3.) The court of appeal has observed in *North County Transit District v. Workers' Comp. Appeals Bd. (Lerma)* (1996) 61 Cal. Comp. Cases 727, 732 [1996 Cal. Wrk. Comp. LEXIS 3239] (writ denied), the post-termination defense requires an actual notice of termination or layoff, not just "an 'expectation' or 'likelihood' of termination arising from evidence derived from an ongoing investigation."

Additionally, subdivision (g) of section 3208.3 provides:

> (g) A notice of termination or layoff that is not followed within 60 days by that termination or layoff shall not be subject to the provisions of this subdivision, and this subdivision shall not apply until receipt of a later notice of termination or layoff. The issuance of frequent notices of termination or layoff to an employee shall be considered a bad faith personnel action and shall make this subdivision inapplicable to the employee.

Thus, even assuming, *arguendo*, that the August 28, 2018 Notice of Proposed Disciplinary Action satisfied the definition of a Notice of Termination or Layoff, it is undisputed that defendant never terminated applicant's employment. Rather, applicant tendered a voluntary resignation on September 18, 2018. (November 19, 2021 Minutes, at 8:17.) Additionally, the court of appeal has held that the post-termination defense is inapplicable to claims following a voluntary resignation of employment. (*CJS Co. v. Workers' Comp. Appeals Bd. (Fong)* (1999) 74 Cal.App.4th 294 [66 Cal.Comp.Cases 954].)

The WCJ further determined that the events of February 7, 2018, where applicant's supervisor physically grabbed applicant's arm and forcibly directed applicant back to his work area were both "sudden" and "extraordinary," and thus served as an exception to the post-termination defense under section 3208.3(e)(1). The court of appeal has observed that an event may be considered sudden and extraordinary if "the event or occurrence that caused the alleged psychiatric injury was something other than a regular and routine employment event or condition, that is, that the event was uncommon, unusual, and occurred unexpectedly." (*Matea v. Workers' Comp. Appeals Bd.* (2006) 144 Cal.App.4th 1435, 1446 [71 Cal. Comp. Cases 1522].) Here, we agree with the WCJ's analysis that the supervisor's physical handling of applicant on February 7, 2018 was something other than a routine employment event, and was clearly uncommon and unusual.

The WCJ also appropriately determined that the employer was advised of the February 7, 2018 injury incident prior to the notice of termination or layoff, based on the unrebutted testimony of both applicant and Ms. Davis. (October 8, 2021 Minutes, at pp. 5-6; November 19, 2021 Minutes, at 9:1.) Additionally, the defendant initiated an investigation into Ms. Banuelos' behavior following the February 7, 2018 incident, and transferred applicant to another supervisor. (October 8, 2021 Minutes, at 6:34.) We agree that these actions, coupled with the trial testimony of applicant and Ms. Davis, are sufficient to establish that applicant reported the injury.

In summary, we agree with the WCJ that applicant has met his burden of establishing injury AOE/COE, and that compensation is not barred by section 3208.3(e). We deny the January 21, 2022 Petition for Reconsideration, accordingly.

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/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I DISSENT, (See Dissenting Opinion)

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 25, 2022

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

LEE SHEPPARD, IN PRO PER
COUNTY COUNSEL-COUNTY OF KERN

SAR/abs

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. I would rescind the F&A and substitute findings that defendant has met its burden of establishing that compensation is barred because applicant filed a claim after receiving notice of termination.

Labor Code section 3208.3 describes the criteria necessary to establish a compensable psychiatric disorder. Subsection (e) states:

> (e) Where the claim for compensation is filed after notice of termination of employment or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury and one or more of the following conditions exist:
>
> (1) Sudden and extraordinary events of employment were the cause of the injury.
>
> (2) The employer has notice of the psychiatric injury under Chapter 2 (commencing with Section 5400) prior to the notice of termination or layoff.
>
> (3) The employee's medical records existing prior to notice of termination or layoff contain evidence of treatment of the psychiatric injury.
>
> (4) Upon a finding of sexual or racial harassment by any trier of fact, whether contractual, administrative, regulatory, or judicial.
>
> (5) Evidence that the date of injury, as specified in Section 5411 or 5412, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.

The language of section 3208.3(e) is similar to that used in section 3600(a)(10), in that there is an express prohibition of claims occurring after notice of termination or layoff, subject to limited exceptions. The evident legislative intent informing the enactment of both sections was "to bar claims made in retaliation for a personnel action involving termination or lay off." (*Dover v. Fresh Start Bakeries* (August 24, 2006, LAO 853740) [2006 Cal. Wrk. Comp. P.D. LEXIS 53] (Appeals Bd. Panel Decision).)

Here, the employer tendered a "notice of proposed disciplinary action" to applicant on August 28, 2018. The notice detailed the allegations of wage theft and further notified applicant that his employer sought to terminate his employment. (November 19, 2021 Minutes at 3:18; 6:21.) The letter was hand delivered to applicant, who was then placed on paid administrative leave. (*Id.* at 7:24.)

A "Skelly" hearing was held on September 17, 2018, which applicant attended.[3] (*Id*. at 8:20.) The hearing officer did not make a decision at the hearing, and informed applicant that he could voluntarily resign prior to a final decision. (*Id*. at 8:29.) Applicant tendered his resignation the following day, September 18, 2018. (*Id*. at 8:16.) Applicant then filed a DWC-1 claim form on September 26, 2018. (Ex. A, DWC-1 claim form, dated September 26, 2018.)

Applicant was informed of a decision by his employer to terminate his employment, subject to the due process protections afforded civil service employees in California. (*Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568 [257 Cal.Rptr. 427].) Accordingly, when the claim form was filed on September 26, 2018, it was filed only after the employer had taken "personnel action involving termination of applicant's employment." (*Dover, supra,* 2006 Cal. Wrk. Comp. P.D. LEXIS 53.) Under these facts, defendant has met its burden of establishing a prima facie showing of a claim filed after notice of termination or layoff. (Lab. Code § 3208.3(e).)

The F&A further determines that even if the claim was filed following notice of termination or layoff, the exception for "sudden and extraordinary" events of employment under section 3208.3(e)(1) would apply. (F&A, Findings of Fact No. 8.) However, the events of February 7, 2018, wherein applicant's supervisor grabbed his arm and escorted him back to his work area do not lend themselves to such a characterization within the meaning of subdivision (e)(1). The court of appeal has determined that "sudden and extraordinary" events are akin to gas main explosions and workplace violence, and are events that "would naturally be expected to cause psychic disturbances even in diligent and honest employees." (*Matea, supra*, 144 Cal.App.4th at 1446, citing *Wal-Mart Stores, Inc. v. Workers' Comp. Appeals Bd.* (2003) 112 Cal.App.4th 1435, 1441, fn. 9 [68 Cal. Comp. Cases 1575].) Here, the actions of the supervisor might be characterized as unprofessional, but fall short of an event that would be expected to cause a psychiatric disturbance in a diligent and honest employee. (*Matea, supra*, 144 Cal.App.4th at 1448.)

The F&A further asserts that the employer knowledge exception available under section 3208.3(e)(2) applies, because the employer "was shown to have been aware of the industrially injurious event on February 7, 2018 and to have modified applicant's job duties within two weeks as a result of the event." (F&A, Findings of Fact No.7.) However, the applicant testified only to

[3] *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215 [124 Cal. Rptr. 14, 539 P.2d 774] requires, before a permanent employee is disciplined, that the employee be given "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline."

providing notice to management of the events of February 7, 2018, and his ensuing strained relations with Ms. Banuelos. (October 8, 2021 Minutes, pp. 6-8.) Applicant has not demonstrated that he reported an *injury* prior to his resignation. Awareness of applicant having strained relationships at work without more, is insufficient to confer knowledge of a psychiatric injury as required by statute, which requires a medical diagnosis. (Lab. Code, § 3208, subd. (a).)

For these reasons, I would find that the defendant has met its burden of establishing that the claim for psychiatric injury was filed only after notice of termination or layoff, and that none of the exceptions of section 3208.3(e) are applicable herein. Accordingly, I would grant defendant's Petition for Reconsideration, rescind the December 28, 2021 Rulings on Evidence, Findings of Fact, Award & Orders, and substitute findings of fact that applicant's claim is barred by section 3208.3(e) as filed after notice of termination or layoff.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 25, 2022

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

LEE SHEPPARD, IN PRO PER
COUNTY COUNSEL-COUNTY OF KERN

SAR/abs

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

Trial in the primary proceedings of the above-captioned case was held on October 8, 2021 and November 19, 2019. The matter was thereafter submitted on December 9, 2021 to Workers' Compensation Judge Christopher M. Brown. A Rulings on Evidence, Findings of Fact, Awards & Orders; Opinion on Decision was issued on December 28, 2021. Defendant filed a timely,verified and sufficiently served Petition for Reconsideration on January 24, 2022.[4]

The Petition does not state the legal basis for its filing but the arguments are consistent withLabor Code § 5903 (a), (c) and (e). Specifically Petitioner contends Applicant's claim is barred by the post-termination defense created by Labor Code § 3208.3(e), that Applicant failed to prove by a preponderance of the evidence that actual events of employment were the predominant cause of hispsychiatric injury and that Applicant is not entitled to Temporary Disability Indemnity because he resigned from his employment.[5]

II STATEMENT OF FACTS

Applicant was at work for the County of Kern, Department of Human Resources on February7, 2018 when he was grabbed by his supervisor and physically led back to his work station. The building dark as it was in the midst of a power outage at the time Applicant was assaulted by his supervisor.

Applicant reported the incident to several supervisors and filed a complaint which led to an investigation of the supervisor that assaulted him. Based on this investigation Applicant was reassigned to a new supervisor. He credibly testified that he reported ongoing harassment by the supervisor that assaulted him after the reassignment.

Applicant has been evaluated by two psychiatric Panel Qualified Medical Examiners. Applicant was first examined by Dr. Kimberly Tangen, Ph. D. Dr. Tangen's reports were not foundto be substantial medical evidence because they were based on mistaken facts such as reliance on hearsay reports of several deaths in Applicant's family including his father. The only death mentioned in the evidence was Applicant's step-father. (Def. Ex. G Pages 17 – 18) Dr. Tagen also had a mistaken history regarding how the incident of February 7, 2018 was reported to and handled by Defendant. (OOD pages 4 – 5)

[4] January 22, 2022 was a Saturday so Defendant has until January 24, 2022 to file a timely Petition for Reconsideration.

[5] The Petition is silent on the Award of medical care, but that issue may be viewed as a lesser included part of the aoe/coe issue.

Applicant was then evaluated Dr. Azadeh Rahimi. Ph.D. as a Panel Qualified Medical Examiner based on the WCJ's December 24, 2019 Minute Order for a new panel in Psychology. (MOH 12-24-19) Dr. Rahimi gave his expert medical opinion that Applicant suffered a psychiatricinjury as a result of the assault of February 7, 2018. Dr. Rahimi's opinion was based on his examination of Applicant, an accurate history, his review of the records provided and diagnostic testperformed. The WCJ determined that Dr. Rahimi's expert medical opinion outweigh the expert medical opinion of Dr. Tangen. (OOD Pages 5 – 6)

Applicant was never terminated by Defendant. Applicant was given a notice of proposed disciplinary action on August 28, 2018 by Debbie Davis, Defendant's Human Resources Manager atthat time. The proposed action was termination based on a claim of wage theft related to jury duty. Ms. Davis did not have authority to terminate Applicant and the document was not a notice of termination.

Applicant appealed the proposed disciplinary action and a *Skelly* hearing was held on September 17, 2018. No final determination was issued by Defendant, and Applicant resigned onSeptember 18, 2018.

Dr. Rahimi gave his expert medical opinion that Applicant was totally temporarily disabledfrom September 18, 2018 and continuing in his report dated November 5, 2020. Based on Dr. Rahimi's expert medical opinion and the parties' stipulation to Applicant's Average Weekly WageApplicant was Awarded 104 weeks of Temporary Disability Indemnity at the rate of $520.44 per week.

III
DISCUSSION

PETITIONER FAILED TO ESTABLISH A BASIS FOR RECONSIDERATION PURSUANTTO LABOR CODE § 5903(a)

The basis for Petitioner asserting a Labor Code § 5903(a) argument is unclear. The Board has jurisdiction over controversies between an employer and employee and shall resolve the disputes upon request of either party.[6] The parties clearly submitted the issues of injury aoe/coe, the post-termination defense created by Labor Code § 3208.3(e), temporary disability and need for medical treatment to the WCJ for decision. (MOH Page 2 Lines 24 - 34) Title 8 CCR § 10330 states:

In any case that has been regularly assigned to a workers' compensation judge, the workers' compensation judge shall have full power, jurisdiction and authority to hearand determine all issues of fact and law presented and to issue interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case, including the fixing of the amount of the bond required in Labor Code section 3715. Orders, findings and decisions and awards issued by a workers' compensation judge shall be the orders, findings, decisions and awards of the Workers' Compensation Appeals Board unless reconsideration is granted. (Title8,

[6] Labor Code §4604.

CCR § 10330)

Petitioner has not established that the issuance of a finding that Applicant suffered an industrial injury entitling him to disability benefits and medical care exceeds the authority of the WCJ. Therefore, Petitioner failed to establish a basis for granting reconsideration pursuant to Labor Code §5903(a).

DEFENDANT'S PETITION MISSTATES THE EVIDENCE AS APPLICANT RESIGNED AND DEFENDANT NEVER ISSUED A NOTICE OF TERMINATION

The notice of proposed disciplinary action was not a notice of termination. Petitioner's continued multiple references to the notice of proposed disciplinary action as a notice of terminationare misrepresentations of the evidence. Debbie Davis credibly testified that she conducted an investigation as Defendant's Human Resources Manager that led her to conclude Applicant had improperly reported going to jury duty on 13 days he was not required to report for jury duty, and that he filed for 7.5 hours of jury duty time on each of those days. Ms. Davis also credibly testified that she did not have authority to terminate Applicant or issue a notice of termination. She credibly testified that only the department's Director, or Deputy Director could issue a termination of Applicant. The *Skelly* hearing was conducted by Cindy Uetz, the Deputy Director. Applicant resigned before Ms. Uetz issued a final determination. A notice of termination was never issued byDefendant. (SOE 11-19-21 Pages 6 – 9, OOD Pages 6 – 8) Therefore, based on application of legalprecedents established in Labor Code § 3600(a)(10) post-termination defense cases the WCJ foundApplicant's claim was not barred by post-termination defense found in Labor Code § 3208.3(e). (OOD Page 7)

BEING ASSAULTED BY A SUPERVISOR IN A DARKENED BUILDING AND PYSICALLY MARCHED BACK TO A WORKSTATION IS A SUDDEN AND EXTRAORDINARY EVENT

There is no dispute regarding the events of February 7, 2018. Defendant does not dispute that Applicant reported the event, filed a complaint or that he was assigned to a new supervisor as a result of its investigation. Defendant offered no evidence to explain why a supervisor felt inclined to lay hands on a subordinate and then continue to harass him after he was reassigned. This behavior byApplicant's supervisor is both sudden and extraordinary making Labor Code § 3208.3(e)(1) applicable. (OOD Page 8)

MODIFICATION OF APPLICANT'S JOB DUTIES AFTER HE REPORTED THE ASSAULT AND CONTINUED HARASSMENT BY HIS SUPERVISOR PROVED BY A PREPONDERANCE OF THE EVIDENCE DEFENDANT WAS AWARE OF APPLICANT'SCLAIM PRIOR TO HIS RESIGNATION

Defendant's modification of Applicant's job by assigning him to a new supervisor based onhis formal complaints and its investigation proved by a preponderance of the evidence that Defendant

knew the assault and harassment conducted by Applicant's supervisor was affecting Applicant negatively. The WCJ determined that Applicant proved by a preponderance of the evidence that Defendant was aware of his claim that he had been assaulted by and was being harassed by a supervisor to the point they modified his job duties. Defendant's argument that Applicant "being upset and wanting to work under a different supervisor is not knowledge of a psychiatric injury under any reasonable standard." lacks merit. (Petition Page 11)[7] Therefore the exception found in Labor Code § 3208.3(e)(2) would apply. (OOD Page 8)

THE REPORTING OF DR. RAHIMI WAS MORE PERSUASIVE THAN THE REPORTINGOF DR. TANGEN

The WCJ provided a detailed analysis of the reporting of Dr. Tangen and Dr. Rahimi in the Opinion on Decision. (OOD Pages 4 – 6) A medical expert's opinion needs to be based on accuratefacts to constitute substantial medical evidence. Dr. Tangen's expert medical opinion was found to be based on mistaken facts. An expert medical opinion based on an inaccurate history is not substantial medical evidence. Dr. Tangen also expressly stated, "it is not possible for me to determine within a reasonable degree of medical probability what has caused his psychological distress." (Def. Ex. G Page 22)

Dr. Rahimi's expert medical opinion was found to be based on a logical analysis of the factsand history as presented by both parties that explained both how and why he reached his expert medical opinion that Applicant's psychiatric injury was predominately caused by actual events that occurred at work. Therefore, Applicant did prove by a preponderance of the evidence that he suffered a psychiatric injury arising out of and in the course of his employment with Defendant. (OOD pages 4 – 6)

APPLICANT IS ENTITLED TO TEMPORARY DISABILITY INDEMNITY FROM SEPTEMBER 19, 2018 THROUGH SEPTEMBER 18, 2020 BECAUSE HE WAS TEMPORARILY TOTALLY DISABLED NOT TEMPORARILY PARTIALLY DISABLED

Dr. Rahimi gave his expert medical opinion that Applicant was totally temporarily disabled from the date of his resignation on September 18, 2018 through at least the date of his report dated November 5, 2020. (App. Ex. 1 Page 73) Applicant's entitlement to Temporary Disability Indemnity is limited to 104 weeks by Labor Code § 4656(c)(2). His weekly benefit rate is established by the parties' stipulations to Applicant's Average Weekly Wage and benefit rates. (MOH 10-8-21 Page 2 Lines 12 – 15)

[7] When an employee reports being assaulted by and harassed by a supervisor, and the employer conducts an investigation and then provides modified duty, which reflects disability, a manager of the Human Resources Department should know an injury as defined by Labor Code § 3208.1 is present and proceed with meeting the statutory obligation to provide a claim form. Instead, of offering a claim form, Ms. Reneau laughed at Applicant. (SOE 10-8-21 Page 5 Lines 33 – 41)

Defendant argued that, "There is zero evidence to support that a psychiatric injury is the cause of his wage loss since the wage loss so clearly and unequivocally relates to his resignation inlieu of termination for cause and the wage loss cannot reasonably be attributed to anything else." (Petition Page 14 Lines 12 – 15) This argument misstates the evidence as Dr. Rahimi's expert medical opinion clearly states that Applicant's temporary total disability was predominantly caused by industrial factors. The Petition goes on to state that a notice of termination was issued which is an additional misrepresentation as no notice of termination was ever issued. (Petition Page 15 Line 2) Ms. Davis credibly testified that Ms. Uetz never issued a final determination. Petitioner is speculating when they assert Applicant was going to be terminated.[8]

Petitioner argues that, "The Dr. Rahimi's report is also not substantial medical evidence on the issue of injury aoe/coe because he was prevented from reviewing any non-medical records. The Dr. Rahimi report is also not substantial evidence on the issue of temporary disability since he did not know that Applicant resigned in lieu of termination for cause." (Petition Page 14) This once again misrepresents the evidentiary record. Dr. Rahimi identified the specific event of February 7, 2018 along with other factors of industrial causation including personnel actions he identified when he reviewed Applicant's personnel file as contributing to Applicant's industrial psychiatric injury.[9] (OOD Pages 5 – 6) Dr. Rahimi did review Applicant's personnel file, which is a non-medical record, and was aware of the resignation. He actually starts Applicant's period of temporary total disability based on the resignation. He expressly identifies the possibility that based on his review of Applicant's personnel file some of the industrial factors contributing to Applicant's psychiatric injury were good faith personnel actions.[10]

Dr. Rahimi explained both how and why he reached his expert medical opinion that Applicant became temporarily totally disabled as a result of his industrial psychiatric injury. Employers are not able to limit liability for Temporary Disability Indemnity by offering modified duty to an injured worker who is temporarily totally disabled. Ms. Davis testified that Applicant wason paid administrative leave until the day of the Skelly hearing, September 18, 2018. Therefore, Applicant is entitled to Temporary Disability Indemnity from September 19, 2018 through September 18, 2020. (104 weeks) The rate of weekly payments is properly based on the stipulationsof the parties.

IV
CONCLUSION

Petitioner's repeated referral to the notice of proposed disciplinary action issued by Ms.

Davis as a notice of termination appears to be an intentional misrepresentation of the evidence.

[8] Petitioner's argument that Applicant resigned in lieu of termination clearly contradicts its earlier argument that Applicant was terminated. It is also based on speculation as the Skelly hearing officer may have decided on a lesser punishment than termination. Defendant did not present Ms. Uetz as a witness.

[9] Dr. Rahimi's report included an Adendum of Records reviewed that includes a summary of investigative reports, and a detailed review of Applicant's personnel file. Petitioner should be aware that these documents are not medical records. (App. Ex. 1 Pages 76 – 159)

[10] Defendant's decision to waive the affirmative defense of Good Faith Personnel Action is detailed in the Opinion on Decision and not raised as an issue in the Petition. (OOD Pages 8 – 9)

Ms. Davis testified she did not have the authority to issue a notice of termination. Petitioner's later arguments concede that Applicant resigned. They assert he resigned in lieu of termination. However,Ms. Davis credibly testified the Ms. Uetz, the *Skelly* hearing officer, never issued a final decision.

The record establishes by a preponderance of the evidence that Applicant resigned before the disciplinary action concluded, and that he was never terminated. Therefore, based on the precedents set in cases litigating Labor Code § 3600(a)(10) post-termination defenses, as discussed in the Opinion on Decision, Applicant's claim is not barred by the Labor Code §3208.3(e) post-terminationdefense.

Dr. Rahimi's explained clearly how and why he reached his expert medical opinions that Applicant has a psychiatric injury that was predominantly cause by his employment with Defendant.He has also explained how and why he determined Applicant became temporarily totally disabled at the time of his resignation. Dr. Rahimi's reporting constitutes substantial medical evidence that outweighed the reporting of Dr. Tengen. Therefore, Applicant proved by a preponderance of the evidence that he suffered a psychiatric injury arising out of and in the course of his employment withDefendant and that he is entitled to Temporary Disability Indemnity from September 19, 2018 through September 18, 2020.

DATED: January 26, 2022

CHRISTOPHER BROWN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE