

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

EDWARD RUFFALO, JR., *Applicant*

vs.

**CITY OF PASADENA, permissibly self-insured, administered by ADMINSURE,
*Defendants***

**Adjudication Number: ADJ11017097
Van Nuys District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order 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 & Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on November 19, 2020. By the F&O, the WCJ found that applicant did not sustain an injury arising out of and in the course of employment (AOE/COE) to his psyche. The WCJ ordered applicant to take nothing on his claim.

Applicant contends that the WCJ erred by not relying on substantial evidence in concluding that actual events of employment did not predominantly cause his psychiatric condition. He also contends that the WCJ erred in finding that certain incidents did not qualify as actual events of employment.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of applicant's Petition for Reconsideration, defendant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will affirm the F&O.

FACTUAL BACKGROUND

Applicant claims injury to his psyche through September 13, 2016 while employed as a firefighter by the City of Pasadena. Defendant has denied this claim in its entirety. (Defendant's Exhibit C, Denial notice, April 12, 2018; Defendant's Exhibit D, Denial notice, May 16, 2017.)

This claim was consolidated with applicant's two orthopedic claims against defendant: to the right shoulder on August 19, 2014 (ADJ9887039), and to the right shoulder and right elbow on November 25, 2015 (ADJ11017359). (Minutes of Hearing and Summary of Evidence, Order of Consolidation, January 23, 2019, p. 2.) Applicant's psychiatric claim is the sole case at issue here.

Applicant began receiving (self-procured) psychiatric treatment with Ramzi Kiriakos, M.D., Ph.D., around November 2016. (Applicant's Exhibit No. 5, Report of Dr. Ramzi Kiriakos, April 23, 2017, p. 1.) Dr. Kiriakos diagnosed applicant with post-traumatic stress disorder (PTSD) and stated:

He reported that his PTSD was triggered by excessive and brutal harassment by the other fire fighter following his accidental injury on the job. His PTSD started on 9/13/2016 as he could not function anymore and had to stop working due to the harassment. He continues to suffer from Severe Chronic PTSD and most likely he will have it for the rest of his life.

(Id.)

Patrick Link, M.D., evaluated applicant as the psychiatric panel qualified medical evaluator (QME). Dr. Link diagnosed applicant with a major depressive disorder. (Court's Exhibit Y2, PQME report of Dr. Patrick Link, March 15, 2018, p. 11.) Dr. Link found that applicant's "depression was caused by the following: perceived workplace harassment (85%, industrial); baseline personality factors (10%, nonindustrial); and the nonindustrial component of his financial and family stressors (5%, nonindustrial)." *(Id. at p. 19.)* Dr. Link found applicant's psychiatric condition to be predominantly caused by the workplace harassment, but deferred to the trier of fact if the events comprising the 85% of causation were actual events of employment. *(Id.)* He assigned applicant a GAF score of 62 with apportionment of permanent disability 85% due to industrial cumulative trauma and 15% to non-industrial factors. *(Id. at pp. 21 and 24.)* Applicant was considered temporarily totally disabled on a psychiatric basis from November 7, 2016 until February 15, 2018, when his condition was deemed permanent and stationary by Dr. Link. *(Id. at p. 23.)*

Dr. Link's observations of applicant included the following in relevant part:

He completed the MMPI-2 in a valid manner, although his results suggested possible mild symptom exaggeration due to his very negative self-image (i.e., he may have over-endorsed symptoms because he has a "woe is me" perspective, so to speak). His results showed that he is rigidly moralistic and tends to view

himself and others through this rigid, judgmental lens. This makes him gullible in the hands of people he trusts and suspicious towards people he does not trust. He has a difficult time trusting others and feels very socially alienated from most people. Because he is judgmental and harsh towards himself, he is sensitive to criticism and rejection. Because he is judgmental and harsh towards others, he is prone to blaming others and feeling angry towards others. His MMPI-2 results also confirmed his ongoing depression symptoms.

...

The history the applicant gave to me was essentially consistent with the available records, and he completed the MMPI-2 in a valid manner. He also appeared quite (if not overly) earnest at evaluation. As such, I find him highly credible with the only caveat being his tendency to view himself and others with excessive moral rigidity, as noted in the prior paragraph.

(Court's Exhibit Y2, PQME report of Dr. Patrick Link, March 15, 2018, p. 17.)

The matter initially went to trial on January 23, 2019 on all three claims. The issues for applicant's psychiatric claim included injury AOE/COE and defendant's objection to Dr. Link's reports "as not substantial evidence and for failure to a [*sic*] address apportionment, inaccurate history and non-compliance with Rolda analysis, and also failure to substantiate medical findings, conclusory opinions and defers to trier of fact."¹ (Minutes of Hearing and Summary of Evidence, Order of Consolidation, January 23, 2019, pp. 4-5.) Applicant testified on the first day of trial as follows in relevant part:

The applicant was employed by the City of Pasadena and is no longer employed. He last worked September of 2016 as a firefighter. He stopped because he could not emotionally perform the duties of a firefighter. He stopped working on a voluntary basis. He was asked if anyone at the fire department indicated he should not work. Applicant stated that on his last day of work, his captain, Chris Reno, told him to "go home sick."

...

Applicant was not under the care of a psychiatrist or psychologist at the time he stopped working in September of 2016. No doctor took him off work when he stopped working at that time, but in November of 2016 he did seek psychiatric medical treatment with Dr. Kiriakos, whom he found online, and he is still treating with Dr. Kiriakos once every three months. Dr. Kiriakos has prescribed medication for him, including Lexapro and Gabapentin, and the dosage has not changed in the past year. He did not take medication for psych problems before September 2016.

¹ "Rolda" refers to the en banc decision, *Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc).

Applicant recalled discussing a series of events with Dr. Link. One such event relates to Applicant's Exhibit 1, which includes a series of photos. He identified himself as the person in the photo, which depicts him falling asleep inside the engine when he was on duty in August 2014. Firefighter Todd Witt took the picture. There are also two more photos depicting him, with male anatomy drawn on the photos, and he identified the person in the photos as him. All the photos were sent to him that evening in August of 2014. He said the pictures were sent in a group text, and he was told that they would be traveling through an underground text railroad, and people would be seeing the pictures for a long time after. He said he wasn't sure if they were printed out and posted at work, but he does know that other firefighters and people in the Department had viewed them.

(Id. at pp. 8-9.)

Further testimony from applicant was given during the second day of trial on March 21, 2019 as follows in relevant part:

The applicant was asked how he knew that other firefighters had seen the pictures. He said that he knew they had seen them but didn't know whether they were printed out. He knew because the first person who told him was Todd Witt. He showed him the pictures late in the evening. He received the photoshopped pictures later that night and was referred to as going underground. The other firefighters said he was modeling pictures and made comments. When asked how he felt about the comments about modeling, et cetera, he said he felt terrible. They were gross pictures and it made him feel bad and upset.

He testified he was off work and had been injured. He was trying to get better and working light duty. People started bringing the photos up and he wanted to get back to work and finish probation.

He was asked about the incident described to the QME where he said he was interrogated by a supervisor and he said it happened in 2015 when he was running a tool from Station 32. They brought him into a room where gauges and apparatuses were. It was a dark room and the only light on was shining down on him. He was told to sit on a small stool and Captain Clark and Marquez stood over him and interrogated him and told him an interrogation was to take place. It went on for several minutes. There were questions about his injury and when he was going to return and whether or not he wanted to be a firefighter or if he wanted to be a secretary. There were several questions and he felt demeaned. They were questions about his injury and whether he could continue to do his job. Captain Marquez and Captain Clark and at least one other firefighter were in the room and they took pictures and sent them to him. The pictures of him were on a small stool in a dark room with two captains next to him. Rod Hutchinson took the pictures. He felt nervous and upset that they were trying to get him to quit and that he should go into administration.

He wasn't sure if that was his first panic attack, but he felt dizzy and ran out. He felt the start of a panic attack, but it didn't follow through. He was on light duty at the time.

As far as other incidents where he heard derogatory comments, he said Firefighter Francis said, get your sorry ass back to work or get fired. Firefighter Poraz said what other job could he do or else he would be fired. Firefighter Heraldez in front of Captain Washington said, they don't make them like they used to. An engineer screamed that he should be fired for being injured so long. Cortez said, he's costing too much money, and said it in front of another firefighter. Another firefighter said they need to take him with him to other fire stations so that he would act as a buffer for that type of behavior. The comments made him feel terrible.

He was nervous that if he returned to work, there were people that were so angry at him that it would be unsafe. For instance, if there was a fire, he felt concerned that people would help him in a dangerous situation. There was another incident with Captain Montgomery who took him to Station 36 and pointed at a trash wrapper and said he didn't know how to do his job. Later Montgomery criticized him for not washing someone's cups and said if he couldn't do that, how could he handle life safety equipment.

When asked if he advised a supervisor about the attitude of personnel, he said yes, he told Captain Josh Ward on three different occasions. He told Chief Trautwein in front of his supervisor that he was so ill from harrassment [*sic*] and he took out a work comp. claim form and gave it to him. He saw Captain Lesis when he was walking, as they lived in the same neighborhood, and he asked him how was it going and he said something was wrong. He invited him to his nearby home and told him about Captain Reno and what was going on. He told Captain Reno about the harrassment [*sic*]. He also told Captain Sorenson about it and he told Captain Sell about the harrassment [*sic*].

...

He was asked about the September 2015 incident. He didn't view it as a joke or a prank. The circumstances were that he was returning a tool to the station. It was a tool left behind from a truck. He was asked about a statement that on 8/19/16 Captain Reno told him he didn't know why they kept him, and he said it was correct. He was asked about a reference where Reno made a comment about a bum wing to a hospital employee. He mentioned it in front of a hospital employee and the three of them were there. He was asked about the testimony that the captain said it to him directly and he said he said it to the hospital employee and not to him.

He was also asked about the allegation that Captain Reno woke him up and yelled at him for leaving the lights on. He said it was true and said he forgot to turn the lights off. He was asked about his trouble with chores and he said they talked about not contributing with his share of the chores. He was also asked

about an incident with Captain Reno about going to sleep early and he said he wasn't sure. There was an incident about monthly reports. He said that it's true that as a probationary firefighter he'd have to do monthly reports. He didn't recall that Captain Reno had to do a monthly report on one occasion. He was asked about his testimony that he didn't think that they liked him and he said he didn't know what their exact feelings were, but when they were speaking to him or yelling at him that they did appear angry.

...

He was asked about the edited photo and he didn't think it was date and time stamped. He was asked how he knew it was him and he said because it's him, "that's my face." He was asked why he waited three years to turn over the August 2014 pictures, and he said he wanted to be a firefighter his whole life. He stopped working in 2016. Again he was asked why he waited until 2017 and he said he produced the pictures because he could not return to work. He never wanted to be retired. He was asked if it was true that Dr. Kiriakos told him that he would stand to make \$2,000 a month if he was medically retired and he said he had described the letter sent to him regarding a medical retirement. He said he would make 2,000 a month from a disability. He said it's true he waited two to three years to produce the note and pictures.

(Minutes of Hearing (Further) and Summary of Evidence, March 21, 2019, pp. 2-3 and 7-9.)

Ms. Shana Welch, a former employee, was called by applicant as a witness. She testified as follows in pertinent part:

She was employed by the City of Pasadena as a firefighter EMT from 2014 to 2016. She is no longer employed by the City. She left because of a shoulder injury and she was medically retired by the City. She knows the applicant because she went through the academy with him. After the academy, she did not work at the same station, but they were on light duty at the same time. She spoke to him during working hours.

She was aware that he also had a shoulder injury. She was aware that he had been off work for his shoulder. She was aware during that two-year period that there were comments that were made that were not favorable about him, such as, what is that guy still doing here, he's not really injured, he doesn't belong here. She's heard it more than once at the station. She was asked if she heard comments from a captain or high-ranking firefighters and she didn't recall comments from a captain, but they mostly came from other firefighters and engineers. The comments struck her as not great for someone with an injury. It was not a great working environment and not a positive working environment. She wondered what they also said about her.

She shared the comments with the applicant. She was asked if she also shared the comments with the supervisor, and she said the culture there as a

probationary employee was such that she didn't want to report it to a supervisor. It was a be-seen-not-heard environment, so she didn't feel comfortable going to a supervisor. The applicant's reaction to the comments was that he was upset and no one wants to hear that type of thing. She was asked about the photo with the applicant with male anatomy that appeared to be photoshopped and she said the applicant showed it to her. She was asked if he was upset and she said yes, it was justifiably so.

...

She filed a workers' compensation claim for shoulder injury. The result was that the City medically retired her. They filed papers with CalPERS and she found out about it. She has a pension of \$2,000 a month. She was employed for two years. The last date she worked was September 2016, but she's not exactly sure.

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She was asked about her testimony regarding the derogatory comments. She said it was said to her directly. Specifically one incident at Station 39 with a chief and it went on for several minutes. There were a lot of "F" bombs and that he's weak, why was he still working here. Then at Station 34 similar things were said and sometimes they were said about both of them at the same time. Sometimes at work they would say, why are you there, and they would make comments about a shoulder injury and that this is why women shouldn't work in the fire department and there were other comments. The comments were common occurrences; she didn't report it to a supervisor.

She could not recall the date the photos were shown to her, but she saw them.

(Minutes of Hearing (Further) and Summary of Evidence, March 21, 2019, pp. 3-5.)

Captain Christopher Reno, a fire captain employed by defendant, testified as follows in relevant part:

He did not recall any performance issues that the applicant had. He said at Fire Station 33 he was well liked, but he wasn't stationed with him there. He did supervise him at Station 33 and he was well liked. He saw him around the station and knew people liked him and fraternized with people, ate lunch with everyone, and laughed and looked like a "regular folk." He recommended that the applicant pass the probation early.

...

He didn't tell him he was seeing his private psychiatrist. He didn't know why he felt stressed. He was meeting standards and doing well on probation, and he told him it would be over before he knew it. He reassured him he was doing well. He said he was not aware of the harassment. He did not observe harassment either on a verbal or physical basis.

He was asked about his relationship with the applicant and he said they had a lot in common. They both owned trucks and they liked doing stuff outside. When asked if he ever witnessed the applicant laughing with co-workers or engaging in jokes, he said yes, on a daily basis; he was not isolated. The days of probationary employees being isolated was long gone. They're required to interact in daily training with probationaries [*sic*]. He helped him because he was eager and he asked him. He never texted a probationary employee except this applicant. The applicant had already been around the station for five years and he was part of the family, so he treated him as such.

He was asked if he was a witness to the interrogation incident, and he said yes, he was at the station. It was regarding a found pipe hole at Station 33 and was brought to headquarters. One of the chiefs saw the color code on it and said to return it to 33 and they returned it to 33 and Rick Clark was grateful. He found out. The back story was that it went to headquarters as they keep a count. On cross-examination at the moot court the applicant was asked what happened and it was a joke. They have someone acting as a judge with a mop on his head. He was asked if he got any complaints and he said he wasn't a captain at the time. He was asked if he saw the applicant after the incident and he saw him leave and he was shaking people's hands.

He was asked about the comments he made about a bum wing. He said it was in front of Huntington Memorial Hospital where ambulances pull in. A mutual friend, Anthony Cisneros, and he were engaged in a regular conversation and the applicant was back now and looking 100 percent. They were engaged in regular conversation. It's not true, no way that he said that to him. He spent time with him and said to him to stay positive. He said probation is over soon, the injury is in the past.

He was asked about the injury policy and he said that as a probationary employee he was required to print out two policies a day and had no relevance to his injury. He was asked if in his opinion the accusations are false and he said they're false. He was asked about the 8/21/16 incident when he was knocking on the door and yelling at him for sleeping too early and whether or not that had happened, and he was aware, but he said they presented it to him in HR and he became aware. He said that they had dinner at Fire Station 36 and he told the applicant he had to do the 135 monthly review and basically compare notes as to what he needed. He said he would call him in so he could turn them into the battalion chief and then the department of operations and then the head fire chief. So he told him to go into his office shortly and then he wanted to go over stuff with him. He tried to find him, walked into another office and the lights were out, and then in another room the TV was on. Then he was on the stairs and he was on the phone with his wife at the time and he knocked on the door. The applicant told him he was studying but there were no lights on. So he thought he was being lied to and he said to him, we'll talk tomorrow. He told his wife that he was bummed out that the applicant had gone to bed after he hadn't finished the monthly report.

There was a call into the fire station at 2:00 a.m. and he told him that they'll talk later. He never yelled at him and he asked HR to call every firefighter about it. He was asked why he would do that and he said he didn't know because he thought he was someone he could trust.

...

He was asked if he saw the pictures of the applicant and an ejaculating penis drawn on it and he said not until HR showed it to him in October 2018. He was shocked when he saw it. He was asked what would have happened had a superior such as himself learned of the pictures, and he said the pictures would have been confiscated and they would have gone to HR.

...

He was asked about the moot court exercise at the station and if he was in the room the entire time, and he said no. He admitted he really didn't know what happened. He was asked if that was the first time the applicant was subjected to mock court and he said yes. He was asked if in his experience could a probationary employee not find it an amusing event and he said he was one of the guys and everyone is different. On paper he was on probation. He was asked if he wasn't yet a full firefighter and he said correct. He was asked if the only light was the light on the table and he was surrounded by a captain and another firefighter and he said that's true. He said this is different than going to court; it can happen anywhere. It's a group of guys and someone gets called out for being lazy or messing up and they defend themselves and then they make a ruling and everyone laughs and everyone walks out. He wasn't in the room, he didn't witness it, and he can't comment as to how he perceived the event.

...

He was asked about his impression regarding the moot court and what he witnessed of the applicant exiting the room as far as his demeanor, and he said he looked like he was having fun with the guys, he smiled and shook hands.

(Minutes of Hearing (Further) and Summary of Evidence, March 21, 2019, pp. 10-15.)

The matter proceeded to a third day of trial for additional witness testimony on July 17, 2019. This included testimony from Captain Trey Sorensen, another fire captain employed by defendant, as follows:

The witness said the applicant confided to him about his employment at the city, but he was unaware of any issues with co-workers. There was a four- to five-year window when he knew the applicant, from the time he wanted to get hired through the time the applicant was injured. At one point when he was not assigned as the applicant's captain, the applicant asked his advice when the applicant came back to full duty after his recovery from his injury. He seemed very anxious about everything that he was dealing with at the station. As an example, he was anxious about messing up pulling hose, he thought he was too slow and thought he would get fired. The witness asked the applicant why he

thought so, and the applicant just said he just though he was going to get fired. The witness asked the applicant whether a captain had talked to him, and the applicant said no. The witness told the applicant that mistakes happen; that's why you're on probation and in training. It is common to make mistakes and it's absolutely not out of the ordinary to make them. The witness said that this was out of character for the applicant. The applicant would not let this go. He told the applicant that mistakes are normal, but the applicant said, "I messed up on the ladders too." The witness told the applicant that it would happen. The witness said he's a blunt person and he told the applicant it would happen, and to get over it and just do his job. When asked if mistakes impacted the applicant's ability to make probation, the witness said, "Not at all."

The witness wasn't aware of any harassment of Edward Ruffalo at work. When asked how the applicant was treated by co-workers, the witness said his impression was that everything seemed positive. He felt nothing was negative or inappropriate. He was not aware of any issues with Applicant's co-workers. He said other supervisors tried to help the applicant succeed as a firefighter, including Captains Reno and Ward, as well as himself. As far as the applicant's performance, he said the applicant was beneficial and an asset to the department; he had a positive attitude, with a smile on his face, and he worked hard and did what he was asked.

...

The witness saw the pictures last month in a separate civil suit, when he was called in to testify. He said he hadn't seen the pictures before.

...

The witness states that the anxiousness he witnessed from the applicant was not that someone was picking on him. The anxiousness was that the applicant was terrified about everything around him. The applicant said he got anxious when he put his mask on and he couldn't breath [*sic*], and that was out of character for Mr. Ruffalo. He was an animal, and whatever you asked of him to do, he would do, until he almost passed out; that was how hard he worked. For him for say he couldn't put his mask on and he was scared that someone wouldn't pull him out of a fire, that's all the witness meant by "out of character" and "anxious."

(Minutes of Hearing (Further) and Summary of Evidence, July 17, 2019, pp. 2-3 and 5.)

The matter was ordered submitted that day following completion of trial testimony. (*Id.* at p. 1.)

On August 15, 2019, the WCJ issued a Findings and Award & Orders on applicant's three claims. Two sets of findings of fact and award were issued regarding the disputed issues for applicant's two orthopedic claims (ADJ9887039 and ADJ11017359), but the WCJ found that Dr. Link's reporting was not substantial evidence for the psychiatric claim. Submission of this claim was vacated and the parties ordered to develop the record, including preparing a draft letter to Dr. Link. It was ordered that the parties explain *Rolda* to Dr. Link and that he "must assign a

percentage of causation separately to each individual work-related and/or non-industrial event(s) and/or issue(s) that, when added together, equal 100% of the causation of the Applicant's psychological injury." (Order Vacating Submission and Notice of Status Conference, August 15, 2019, emphasis in original.)

Applicant filed a petition seeking removal of the Order Vacating Submission. On November 1, 2019, the Appeals Board treated applicant's petition as one seeking reconsideration because the August 15, 2019 decision was a hybrid. The Appeals Board applied the removal standard to applicant's challenge to the WCJ's finding that the QME's report is not substantial evidence and the order vacating submission, and denied his petition.

Dr. Link issued a supplemental report dated May 1, 2020, wherein he parceled out causation for applicant's psychiatric condition as follows:

- 20%: derogatory comments from coworkers that led the applicant to believe that his coworkers did not like him because of his shoulder/elbow injuries and his need to have been away from work for extended periods;
- 20%: derogatory comments of a sexualized nature;
- 20%: his Captain making derogatory comments about his injury ("bum wing") and wondering why the applicant was still employed;
- 10%: the doctored photograph;
- 5%: the mock interrogation;
- 5%; being told by a supervisor that he was costing the department too much money;
- 5%: his coworkers reporting him for minor concerns;
- 10%, nonindustrial: baseline personality factors; and
- 5%, nonindustrial: the nonindustrial component of his financial and family stressors.

(Court's Exhibit Y3, PQME report of Dr. Patrick Link, May 1, 2020, p. 10.)

The matter proceeded to trial again on October 1, 2020. Dr. Link's May 1, 2020 supplemental report was admitted into evidence over defendant's objection that it was not substantial evidence and the matter was resubmitted. (Minutes of Hearing (Further), October 1, 2020, pp. 1-2.)

The WCJ issued the F&O as outlined above. In her Opinion on Decision, the WCJ explained the rationale for her conclusions as follows in relevant part:

The applicant's portrayal of workplace events was refuted by Capt. Sorenson and Capt. Reno. Defendant's witnesses appeared credible and their testimony

resonated. Although applicant's sole witness corroborated the negative comments, Ms. Welch showed that the applicant was not singled out for this treatment. It appears that the resentment and the comments were due to the fact that both she and the applicant sustained industrial injuries while on probation. The evidence showed that the applicant spent most of his time – nearly two years – from 8/2014 through 7/2016 as a probationary employee either off work or on light duty. In addition, defendant suggested that the applicant wanted to receive an industrial disability retirement and was not entitled based upon his orthopedic injuries as he was able to return to work full duty without restriction. Therefore, defendant suggests that applicant's desire for a disability retirement - as his former co-worker received for her shoulder injury - may have fueled the applicant's claim for the allegation of a workplace psyche injury. Comments made by Dr. Kiriakos back this up as was noted in the PQME's record review. In addition, it was noted that the applicant was upset when his raise was blocked by a supervisor during his employment.

Although it appeared that both defendants' witnesses corroborated applicant's anxiety, their version is that he experienced anxiety about not doing his job correctly i.e. he felt worried about the way he dealt with ladders and hoses as opposed to workplace harassment and that he was worried about passing probation and being fired as opposed to harassment.

Applicant's version of events appears inconsistent both from his demeanor and observations from the evidence e.g. after being diagnosed with PTSD by his private doctor and prescribed medication that he testified he had to take, the applicant attended an evaluation with the ortho PQME and denied taking any medication other than pain medication as well as denied any other illnesses. Conversely, when the applicant saw the psyche PQME, the applicant indicated that he took pain medication for his ortho injuries. In addition, when the applicant was asked why he did not report the incidents, the applicant testified that he did report them to Chief Trautwein however it appears that this was after his last date of work going by the notes contained in the interactive memos (Defendant's Exhibit F et. seq.).

There is no contemporaneous evidence that showed the applicant ever complained while he was employed of a hostile work environment or harassment to any of his supervisors nor was there any contemporaneous medical treatment. In addition, the PQME indicated that the applicant's innate personality characteristic suggested a moral rigidity which would render him more inclined to misinterpret events of employment.

(Opinion on Decision, November 19, 2020, p. 4.)

The WCJ went through each event identified by Dr. Link and addressed whether they constituted actual events of employment. The following were considered actual events of employment: derogatory comments from coworkers that led the applicant to believe that his coworkers did not

like him because of his shoulder/elbow injuries and his need to have been away from work for extended period (20%); and his coworkers reporting him for minor concerns (5%). (*Id.* at pp. 5 and 7.) With respect to the other incidents, the WCJ opined as follows with respect to each:

20%: derogatory comments of a sexualized nature;

There was no testimony from the applicant or any witness that suggested that comments of a sexual nature were made. Although the PQME mentioned this, the applicant did not testify to any of these comments at trial nor did any of the witnesses. Thus, there does not appear to be any basis for the alleged comments and as such they are not an actual event of employment.

20%: his Captain making derogatory comments about his injury (“bum wing”) and wondering why the applicant was still employed

One of the witnesses for defendant was Capt. Christopher Reno - the alleged perpetrator of the negative comments. Capt. Reno vehemently denied ever making these remarks and his testimony and demeanor appeared truthful. This is not an actual event of employment.

10%: the doctored photograph;

The photos were admitted into evidence over defendant’s objection. Applicant testified that the photo of him asleep in the fire truck was taken by a fellow firefighter in August, 2014 around the time of his first injury. However, the date on the pictures that was admitted into evidence showed a date of 11/29/2017 – nearly three years later. The applicant testified that he received the photos as part of a group text that would go underground for years however no evidence was submitted as to when the photos were “doctored” with disgusting images nor were any copies of the text messages submitted. Not one witness including Ms. Welch indicated that they ever received the photos as part of a text. In fact, Ms. Welch testified that the applicant showed her the pictures himself and she did not know when. Neither Capt. Sorensen nor Capt. Reno knew of their existence until the separate civil lawsuit was filed long after the applicant left his employment. (The civil settlement and investigation was not presented to the court.). No evidence was presented that the photo-shopped pictures were work-related other than the fact that the original picture depicted the applicant asleep at work in the fire truck. Thus, the applicant’s testimony that the pictures were sent to him in a group text and would be in an underground text “railroad text” for years appeared dubious. In

addition, there was no contemporaneous medical treatment or a record of any harassment claim until months after the applicant stopped working. Therefore, the photo-shopped pictures are not an actual event of employment.

5%: the mock interrogation;

The “mock” court wherein the applicant described that he nearly sustained a panic attack and ran out of the room after being confronted by two captains wearing a mop on their heads in 2015 does not appear credible. The applicant testified that pictures were taken of this event but none were produced depicting the bizarre scene that the applicant described. Further, the applicant’s testimony that he ran out of the room and started to have a panic attack was refuted by defendant’s witness who testified that he saw the applicant laughing and shaking hands shortly thereafter. Applicant’s attempt to rehabilitate himself appeared confusing and self-serving. This is not an actual event of employment.

5%; being told by a supervisor that he was costing the department too much money;

The applicant testified that that this statement was made and although his testimony lacked credibility, the remark appears to correlate with applicant’s witness’ testimony indicating that the applicant was criticized for missing so much time from work. It is not a personnel action although it is a criticism. It is unclear if this statement was made at the same time the applicant’s request for a raise was turned down as stated in his PTP’s notes. It could be considered an actual event of employment although whether it is an actionable event may be due to applicant’s perception.

(Opinion on Decision, November 19, 2020, pp. 5-6.)

Accordingly, the WCJ concluded that applicant did not show his psychiatric condition was predominantly caused by actual events of employment and applicant was ordered to take nothing on his claim.

DISCUSSION

The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers’ Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a); 3202.5.) With respect to psychiatric injuries, section 3208.3 provides, in relevant part, as follows:

(a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition–Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.

(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.

...

(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(a)-(b)(1) and (h).)

“Predominant as to all causes” for purposes of section 3208.3(b)(1) has been interpreted to mean more than 50 percent of the psychiatric injury was caused by actual events of employment. (*Dept. of Corr. v. Workers' Comp. Appeals Bd. (Garcia)* (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356].)² The Labor Code does not define “actual events of employment.” The Court of Appeals has analyzed this phrase and defined it as follows:

First, the factor must be an “event”; i.e., it must be “something that takes place” (American Heritage Dict. (4th ed. 2000) p. 616) in the employment relationship. Second, the event must be “of employment”; i.e., it must arise out of an employee's working relationship with his or her employer.

(*Pacific Gas & Electric Co. v. Workers' Comp. Appeals Bd. (Bryan)* (2004) 114 Cal.App.4th 1174, 1181 [69 Cal.Comp.Cases 21]; see also *Verga v. Workers' Comp. Appeals Bd.* (2008) 159 Cal.App.4th 174, 186 [73 Cal.Comp.Cases 63] [actual events of employment “can be interpreted’ as requiring the employee to establish ‘objective evidence of harassment, persecution, or other basis for the alleged psychiatric injury’.”].)

² Applicant has not claimed that his psychiatric condition was caused by “being a victim of a violent act or from direct exposure to a significant violent act,” which would decrease the causation threshold to “at least 35 to 40 percent of the causation from all sources combined.” (Lab. Code, § 3208.3(b)(2)-(3).)

If the threshold for a compensable psychiatric injury has been met under section 3208.3(b), and the employer has asserted that some of the actual events of employment were good faith personnel actions, the WCJ must determine whether section 3208.3(h) bars applicant's claim. A multilevel analysis is required when an industrial psychiatric injury is alleged and the employer raises the affirmative defense of a lawful, nondiscriminatory, good faith personnel action. The required multilevel analysis is as follows:

The WCJ, after considering all the medical evidence, and the other documentary and testimonial evidence of record, must determine: (1) whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination; (2) if so, whether such actual events were the predominant cause of the psychiatric injury, a determination which requires medical evidence; (3) if so, whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith, a factual/legal determination; and (4) if so, whether the lawful, nondiscriminatory, good faith personnel actions were a "substantial cause" of the psychiatric injury, a determination which requires medical evidence. Of course, the WCJ must then articulate the basis for his or her findings in a decision which addresses all the relevant issues raised by the criteria set forth in Labor Code section 3208.3.

(Rolda, supra, 66 Cal.Comp.Cases at p. 247.)

Pursuant to *Rolda*, whether the psychiatric injury involves actual events of employment is a factual/legal determination for the WCJ. Alternatively, whether actual events of employment meet the causation threshold for a psychiatric injury is a medical determination. Although the psychiatric QME Dr. Link found that applicant's psychiatric condition was predominantly caused by the alleged actual events of employment, whether these incidents constitute actual events of employment is for the trier of fact to determine.

With respect to the alleged derogatory comments of a sexualized nature, the WCJ found that this was not an actual event of employment because there was no testimony from applicant or any other witness that these comments occurred. Review of the trial testimony does not reveal discussion of any derogatory comments of a sexualized nature made to applicant. It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) In the absence of substantial evidence in support of this contention, we

agree with the WCJ's conclusion that this was not an actual event of employment.

Applicant contends in his Petition that Captain Reno did not deny commenting on his injury as a "bum wing" and wondering why the applicant was still employed. Captain Reno's summarized trial testimony states in response to this allegation: "It's not true, no way that he said that to him." (Minutes of Hearing (Further) and Summary of Evidence, March 21, 2019, p. 12.) Consequently, the record reflects that Captain Reno denied making this comment. The WCJ found Captain Reno to be a credible witness, but did not find applicant to be credible. (Report, February 10, 2021, pp. 10-11.) To the extent there is conflicting witness testimony regarding whether Captain Reno made these comments, we have given the WCJ's credibility determinations great weight because she had the opportunity to observe the witnesses' demeanor during their testimony. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id.*)

With regard to the doctored photographs, there is insufficient evidence in the record about when these photos were taken, altered and circulated. Applicant is wearing his uniform in the photos so it may be presumed that they were taken while he was still working for defendant. However, there is no evidence in the record showing when the photos were altered. Ms. Welch testified to applicant showing the doctored photos to her, but she could not recall when. The date on the photos in the exhibit is from November 2017, but it is not clear what this date is in reference to. Applicant last worked for defendant in 2016. He testified that these photos were texted around, but there is no evidence in support of this assertion. Both Captains Sorensen and Reno testified that they did not see these photos until years after applicant no longer worked for defendant. There is insufficient evidence to support a finding that the doctored photos constitute an actual event of employment.

The WCJ found applicant's depiction of the mock interrogation not to be credible. As discussed above, we give great weight to the WCJ's credibility determination because she observed applicant's demeanor during his testimony. Captain Reno testified that applicant was smiling and shaking people's hands after the incident. This conflicts with applicant's testimony that he ran out of the room and nearly sustained a panic attack from this incident. As discussed above, to the extent there is conflicting testimony about the mock trial, we defer to the WCJ's determinations regarding which witness was credible.

The two incidents that were considered actual events of employment by the WCJ add up to 25% of causation for applicant's psychiatric condition: the derogatory comments from coworkers that led the applicant to believe that his coworkers did not like him because of his shoulder/elbow injuries and his need to have been away from work for extended period (20%); and his coworkers reporting him for minor concerns (5%). Even including another 5% assigned by Dr. Link to the comment by a supervisor that he was costing the department too much money (the Opinion on Decision is tentative on whether this was an actual event of employment), this only adds up to 30% causation. Applicant therefore did not meet his burden of proving his psychiatric condition was predominantly caused (greater than 50%) by actual events of employment. The rest of the *Rolda* analysis is moot since the causation threshold was not met.

In conclusion, we will affirm the F&O.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact & Order issued by the WCJ on November 19, 2020 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 24, 2021

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

**EDWARD RUFFALO JR.
GLENN SILVERII & ASSOCIATES
LEWIS MARENSTEIN WICKE SHERWIN & LEE**

AI/pc

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