WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

EVERETT RICE, *Applicant*

vs.

AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA;
OLD REPUBLIC INSURANCE COMPANY, ADMINISTERED BY CCMSI, *Defendants*

Adjudication Number: ADJ11317555
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant Everett Rice (applicant) seeks reconsideration of the May 14, 2020 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as an associate buyer for Automobile Club of Southern California, insured by Old Republic Insurance Company, administered by CCMSI (defendant), from May 10, 2017 through May 10, 2018, did not sustain industrial injury to the nervous system, stress and psyche. The WCJ found that compensation was barred pursuant to Labor Code section 3208.3(h), as the claimed psychiatric injury was substantially caused by lawful, nondiscriminatory, good-faith personnel action.

Applicant contends the F&O does not appropriately distinguish between stressful working conditions and personnel action.

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

We have considered the Petition for Reconsideration, the contents of the Report, and the record in this matter. Based on our review of the record and for the reasons set forth below, we

will rescind the Findings of Fact and Order and return the matter to the trial level for further proceedings consistent with this opinion.

FACTS

Applicant claimed injury to the nervous system, stress and psyche while employed as an associate buyer by defendant from May 10, 2017 through May 10, 2018. Defendant denies liability for the claim.

Applicant began his employment with defendant on October 6, 1994. (August 22, 2019 Minutes of Hearing and Summary of Evidence (MOH), at 5:23.) Applicant's job title became that of associate buyer in 2004. (*Id*. at 6:1.) Applicant began to experience difficulties at work in 2015, when Becky Lopez became his supervisor. (*Id*. at 6:6.) In 2015, applicant was tasked with additional job duties associated with ergonomic evaluations. (*Id*. at 7:11.) In 2017, applicant was tasked with additional job duties associated with photocopier toner and supplies. (*Id*. at 7:20.) This was known as the Xerox Project or the MPS Project. (December 9, 2019 MOH, at 3:11.) Thereafter, applicant was tasked with additional job duties involving the preparation of periodic office supply reports. (August 22, 2019 MOH, at 8:8.) Applicant sought guidance regarding how best to accomplish this, but was told that he needed to manage his time better. Applicant was further assigned to assist in the training of a fellow employee on the DMV desk, which caused applicant to feel additional stress. (*Id*. at 12:6.) Applicant's supervisor provided applicant with a list of job duties. Applicant attempted to discuss with his supervisor how best to accomplish his job, but he never received a plan in writing. (October 7, 2019 MOH, at 3:10.) When applicant received his performance review in 2017, he felt that he was not being provided with adequate guidance regarding how best to accomplish his work tasks. (*Id*. at 3:22; 4:4.) On March 8, 2018, applicant received an Overall Performance Summary that noted applicant's job performance needed improvement. (Ex. 20, Performance Review, dated March 8, 2018.) On March 29, 2018, applicant was assigned an Employee Action Plan, which identified areas for improvement in applicant's job functions. (Exhibit 21, Employee Action Plan, dated March 27, 2018.)

On May 15, 2018, applicant sought medical treatment for his anxiety and stress, and was taken off work by his primary care provider at Kaiser Permanente. (Ex. 9, Work Status Report, dated May 15, 2018.) Applicant did not return to work thereafter. (December 9, 2019 MOH, at 7:8.) On the same day, applicant filed the instant Application for Adjudication asserting psychiatric

injury due to alleged hostile work environment, stress, anxiety and sleep disorder. (May 15, 2018 Application for Adjudication.)

Yassi Zarrin, Psy.D. acted as the Qualified Medical Examiner (QME) in psychology, and issued an initial report November 12, 2018. Dr. Zarrin established a diagnosis of Major Depressive Disorder, Single Episode, Moderate, with industrial predominance. (Ex. 13, report of Yassi Zarrin, Psy.D., dated November 12, 2018 at p.42.) Dr. Zarrin issued a supplemental report and record review on March 18, 2019, but offered no new medical-legal opinions. (Ex. 14, report of QME Yassi Zarrin, Psy.D., dated March 18, 2019.) The parties deposed Dr. Zarrin on April 8, 2019. The QME agreed therein to issue a supplemental report addressing the analysis required under *Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc opinion) (*Rolda*) to address defendant's contention that the injury arose out of lawful, nondiscriminatory good faith personnel action. (Ex. 15, transcript of the deposition of QME Yassi Zarrin, Psy.D., dated April 8, 2019.)

Dr. Zarrin issued a supplemental on June 3, 2019. (Ex. 16, report of QME Yassi Zarrin, Psy.D., dated June 2, 2019.) The QME found that the "predominant cause (over 50%) of Mr. Rice's Major Depressive Disorder was the cumulative trauma work incident dated May 10, 2017 through May 10, 2018." (*Id.*, p. 6.) Dr. Zarrin did not identify specific factors of causation, or assign percentages to such factors. However, the QME opined that personnel action was a substantial cause of applicant's psychiatric injury:

> The fourth part of the Rolda analysis is a determination made as to whether the lawful nondiscriminatory good faith personnel actions were a "substantial cause" (35 to 40%) of the psychiatric injury. I find that personnel actions were substantial cause of Mr. Rice's psychiatric injury. As indicated above, it [is] left the trier of fact to determine whether or not these personnel actions were lawful, nondiscriminatory, and in good faith. (*Id*. at p.8.)

Dr. Zarrin further opined that the period of injurious exposure would have commenced in approximately 2015, through applicant's last day worked. (*Id*. at p.9.)

The parties appeared at trial on August 22, 2019 and raised issues of injury AOE/COE and whether compensation was barred pursuant to Labor Code § 3208.3(h). (August 22, 2019 MOH at 2:16.)

The WCJ issued her F&O on May 14, 2020, finding therein that the claimed psychiatric injury was substantially caused by good-faith personnel action. (F&O, Finding of Fact No.2.) The

WCJ found that a variety of actions constituted personnel action, including the transfer of various additional job duties to applicant, a performance review of August 30, 2017, a September 15, 2017 work requirements meeting, the transfer of job duties away from applicant, the Employee Action Plan of March, 2018, and an email from Mr. Richardson of May 15, 2018 noting applicant's dilatory response to a prior email request. (F&O, Opinion on Decision, pp.11-13.) The WCJ found that these actions all constituted personnel action, and that such actions was lawful, nondiscriminatory and in good faith. (*Id*. at pp.14-18.) The WCJ found that pursuant to the QME's assessment of substantial cause, compensation was barred by Labor Code section 3208.3(h). The WCJ ordered that applicant take nothing. (F&O, Order No. C.)

Applicant contends that several of the factors of causation identified in the Opinion on Decision do not constitute personnel action, but were rather "stressful working conditions." (Petition for Reconsideration at 2:21.) Applicant requests that the case be "remanded for a detailed assessment of the actual events of employment." (*Id*. at 15:14.) Applicant further asserts that since the WCJ "found all these events to be personnel actions, it is not possible to extrapolate between them for accurate percentages of causation of psychiatric injury." (*Id*. at 15:15.)

DISCUSSION

Labor Code section 3208.3 provides, in relevant part:

> 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. (Lab. Code, § 3208.3(b)(1).)

"Predominant as to all causes" means that "the work-related cause has greater than a 50 percent share of the entire set of causal factors." (*Dept. of Corrections v. Workers' Comp. Appeals Bd. (Garcia)* (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356, 1360]; *Watts v. Workers' Comp. Appeals Bd.* (2004) 69 Cal.Comp.Cases 684, 688 (writ den.).) 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. Section 3208.3(h) provides as follows:

> 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(h).) Section 3208.3(b)(3) defines substantial cause as "at least 35 to 40 percent of the causation from all sources combined." (§ 3208.3(b)(3).)

A multilevel analysis is accordingly required when an industrial psychiatric injury is alleged and the employer raises the affirmative defense of a lawful, nondiscriminatory, good faith personnel action. (*Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc).) 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*, at 247.)

In this matter, we are not persuaded that the Findings of Fact and Order is adequately supported in the record because a *Rolda* analysis requires the evaluating physicians to parse the factors of causation, and offer an opinion as to the percentage of causation for any alleged or apparent personnel actions. (*Rolda, supra*, at 246.) QME Dr. Zarrin's initial report of November 12, 2018 identifies a variety of potential factors of causation that contributed to the onset of applicant's psychiatric complaints. (Ex. 13, report of Yassi Zarrin, Psy.D., dated November 12, 2018, at pp.47-50.) These include the assignment of an increased workload, defendant assigning applicant to train others and then relieving applicant of those duties, applicant's difficulties in keeping up with work quotas, applicant's meetings with his supervisor, a work improvement plan, and an email from a supervisor regarding applicant's dilatory responses to email communications. However, Dr. Zarrin does not address each of the various factors individually, and importantly, does not assign percentages of causation to each factor. Rather, Dr. Zarrin appears to address all the factors of causation in the aggregate, and then opine that the

threshold of "substantial cause" (i.e. 35-40%) has been met. (Ex. 16, June 3, 2019 report of Yassi Zarrin, Psy.D., p. 8.)

The analysis required under *Rolda* requires the WCJ to determine whether the actual events of employment were personnel action, and if so, whether the personnel actions were lawful, nondiscriminatory and in good faith. *Rolda* then requires the WCJ to determine whether those lawful, nondiscriminatory and good faith personnel actions amount to a substantial cause (i.e. 35-40%) of the claimed injury. The failure of the QME to identify each individual event of employment, and to assess the corresponding percentages of causation, precludes the substantial cause analysis as required under *Rolda*.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121–1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Appeals Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id*. at p. 404.) While the QME has opined that the actual events of employment in the aggregate constitute a substantial cause of applicant's claimed psychiatric injury, the QME must identify each individual factor, and assess its corresponding percentage of causation.

Once the individual factors of causation have been identified with specificity, and percentages of causation assigned, the WCJ is then tasked with determining whether any of the actual employment events were personnel actions, as distinguished from administrative action or general working conditions. (*Larch v. Contra Costa County* (1998) 63 Cal.Comp.Cases 831 [1998 Cal. Wrk. Comp. LEXIS 4762]; *cf. Ferrell v. County of Riverside* (2016) 81 Cal.Comp.Cases 943 [2016 Cal.Wrk.Comp.P.D LEXIS 322] (writ denied).) Thereafter, the WCJ must determine whether those actions were lawful, nondiscriminatory and in good faith, and whether such actions reach the substantial cause threshold of 35-40%. (Lab. Code §3208.3(b)(3).)

Here, the WCJ has prepared an extensive discussion of the required *Rolda* analysis, and has further examined issues of causation at length. The WCJ has also stated she found the testimony of applicant and also employer witnesses Mr. Richardson and Ms. Martinez to be credible. (Opinion on Decision, p.5; p.14 and p.16.) We accord to the WCJ's determinations regarding witness credibility the great weight to which they are entitled. (*Garza v. Workmen's*

Comp. App. Bd. (1970) 3 Cal.3d 312, 317–319 (Garza) [33 Cal.Comp.Cases 500].) We further acknowledge the thorough analysis brought to bear on the issues at bar. However, absent an accounting of the specific percentages of causation attributed to each actual event of employment, the analysis required under *Rolda* is incomplete.

Additionally, we note that the date of injury herein has not been established. The date of injury in cumulative trauma cases is set by Labor Code section 5412, as the "date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." As part of the development of the record in this matter, the evaluating physician(s) should be provided with the correct date of injury under section 5412 and should further identify the applicable period(s) of injurious exposure.

Finally, we note that to the extent that applicant claims injury in the form of "stress," and/or injury to the nervous system, these are not psychiatric injuries, and would not fall under the rubric of a Labor Code section 3208.3 causation analysis. (See, e.g., *Banuelos v. Acorn Engineering Company* (2015) 80 Cal.Comp.Cases 736 [2015 Cal. Wrk. Comp. LEXIS 85] (writ. den); *Shimo Wang v. Southern California Edison* (August 28, 2015, ADJ8674800; ADJ8674808; ADJ8674815) [2015 Cal. Wrk. Comp. P.D. LEXIS 511].) To the extent that applicant is alleging injury to these body parts/systems, they will need to be evaluated by the appropriate medical-legal specialist.

Accordingly, and for the reasons described above, we will rescind the Findings and Order and return this matter to the trial level for development of the record, and for further proceedings consistent with this opinion. When the WCJ issues a new decision, any aggrieved party may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED, as the **DECISION AFTER RECONSIDERATION** of the Workers' Compensation Appeals Board, that the May 14, 2020 Findings and Order issued by the workers' compensation administrative law judge is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 15, 2022

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

EVERETT RICE
PARKER & IRWIN
LAW OFFICES OF SEF KRELL

SAR/abs

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