

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

MARCO MADERO, *Applicant*

vs.

**FOSTER FARMS, permissibly self-insured,
administered by GALLAGHER BASSETT, *Defendants***

**Adjudication Number: ADJ13400126
Los Angeles District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION AND DECISION
AFTER RECONSIDERATION**

Applicant filed a petition seeking reconsideration, or, alternatively, removal, of a workers' compensation administrative law judge's (WCJ) Findings and Order and Opinion on Decision (F&O) of May 10, 2023, wherein it was found that, while employed as a plant supervisor between the period June 6, 2019 to March 13, 2020, applicant experienced five actual events of employment that may have contributed to his alleged psychiatric injury (Lab. Code, § 3208.3(b)(1)), that three of said events were lawful, nondiscriminatory, good faith personnel actions (Lab. Code, § 3208.3(h)), and that two of the events contained some non-industrial factors that contributed to applicant's "psychiatric diagnosis." The WCJ also ordered the parties to serve the panel qualified medial evaluator (QME), psychologist Kevin J. McCullough, Ph.D., with the Minutes of Hearing and Summaries of Evidence (MOH/SOEs) produced during trial, and ordered Dr. McCullough to issue a supplemental medical-legal report determining: 1) whether applicant had a psychiatric diagnosis under the Diagnostic Statistical Manual, and, if so, 2) whether applicant's psychiatric injury was predominantly caused by industrial or non-industrial factors.

Applicant contends that in analyzing whether he had a compensable psychiatric injury, the WCJ did not properly perform the analysis required by *Rolda v. Pitney Bowes, Inc. (Rolda)* (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc).

We did not receive an Answer from defendant. The WCJ provided a Report and Recommendation on Petition for Reconsideration or in the Alternative Removal (Report). In the Report, the WCJ states that the F&O is not a “final order” subject to reconsideration and recommends that the petition for reconsideration should therefore be dismissed. The WCJ also recommends that the petition for removal be denied.

We have reviewed the Petition and the Report, as well as the record in this matter. For the reasons discussed below, we will rescind the F&O of May 10, 2023 and return the matter to the trial level for development of the record, further proceedings, and a new decision by the WCJ. Any aggrieved party may timely seek reconsideration of the new decision issued by the WCJ.

FACTS

Applicant claims to have sustained cumulative injury arising out of and occurring in the course of employment (AOE/COE) to his psyche, head, headaches, sleep disorder, internal organs, neck, back, hands, and feet while employed as a plant supervisor during the period June 6, 2019 to March 13, 2020.

On May 12, 2022, the parties proceeded to trial on the issues of injury AOE/COE, temporary disability, liens, attorney’s fees, and whether applicant was under the influence of marijuana/THC at the time of the alleged injury. (MOH/SOE, May 12, 2022, pp. 2-3.)

During trial, applicant testified regarding multiple specific interactions with his supervisor, Ms. Erica Graves, between June 6, 2019 and March 13, 2020 that he claimed were the “main reason” for his workers’ compensation claim. (MOH/SOE, May 12, 2022; MOH/SOE, July 11, 2022, p. 4.) Applicant testified that, in one instance near the end of 2019, he appeared for a self-performance evaluation with Ms. Graves without having completed the necessary self-evaluation form. Applicant explained that he had intended to ask Ms. Graves for assistance with the form, but rather than assist applicant, Ms. Graves called applicant “dumb” and “stupid” and stated that he was “not competent to be a supervisor.” (MOH/SOE, May 12, 2022, p. 8.) Applicant described another incident in December 2019, when roughly 200 pounds of refried beans were left on the production floor for an extended period and had to be thrown away. Applicant stated that Ms. Graves had interrogated him after the incident and that he felt “attacked” and “harassed” by the way that Ms. Graves had spoken to him. (MOH/SOE, May 12, 2022, pp. 8-9.) Applicant also testified that the stress caused by his interactions with Ms. Graves negatively impacted his home

life. Specifically, applicant stated that he was a single father of two boys, and that when he arrived home, he treated his children “like crap” because he was tired and under a “lot of pressure.” (MOH/SOE, July 11, 2022, pp. 8-9.) Applicant explained that, although he felt tired and stressed due to the pressures of his job before Ms. Graves became his supervisor, “Ms. Graves made it worse.” (MOH/SOE, July 11, 2022, p. 8.)

The panel QME, Dr. McCullough, initially evaluated applicant on October 22, 2020. In a report dated November 20, 2020, Dr. McCullough discussed the causes of applicant’s alleged psychiatric injury, stating, in pertinent part:

Medical Causation (AOE/COE)

* * *

In my opinion, the predominant AOE/COE cause (or greater than 50%) for all causes combined, of the development of Mr. Madero’s mood disorder was the emotional sequelae to his allegedly (sic) exposure to undue supervisor harassment in the course of his employment with Foster Farms in the cumulative trauma period March 13, 2014 to June 6, 2019.¹

(Exh. Z, QME Report, November 20, 2020, pp. 45-46; see also Exh. X, QME Follow-Up Evaluation, May 7, 2021, p. 34.)

DISCUSSION

A petition for reconsideration may properly be taken only from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd.* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a “threshold” issue that is fundamental to the claim for benefits. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’

¹ The period March 13, 2014 to June 6, 2019 was the original date of alleged injury listed in the initial Application for Adjudication filed on July 14, 2020. In the Amended Application for Adjudication filed on March 23, 2021, the date of alleged injury was changed to the period June 6, 2019 to March 13, 2020.

compensation proceedings, are not considered “final” orders. (*Id.* at p. 1075 [“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’”]; *Rymer, supra*, at p. 1180 [“[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”]; *Kramer, supra*, at p. 45 [“[t]he term [‘final’] does not include intermediate procedural orders”].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

As explained below, the WCJ rendered a final decision on the issue of injury AOE/COE, which is a threshold issue. Thus, we will treat applicant’s petition as a Petition for Reconsideration.

Labor Code section 3208.3² states that in order to establish industrial causation of a psychiatric injury, i.e., psychiatric injury AOE/COE, an injured worker must show by a preponderance of the evidence that actual events of employment predominantly caused the psychological injury.³ (Lab. Code, § 3208.3(b)(1).) However, it also provides that a claim for psychiatric injury will not be compensable if an employer proves that the psychiatric injury was substantially caused by lawful, nondiscriminatory, good faith personnel actions. (Lab. Code, § 3208.3(h).)⁴

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, supra*, 66 Cal.Comp.Cases at p. 242.) As the Appeals Board explained in *Rolda*, under this analysis, the WCJ must first consider all the medical evidence and the other documentary and testimonial evidence of record and then determine:

- (1) whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination for the WCJ;
- (2) if so, whether such actual events were the predominant cause of the psychiatric injury, a determination which requires competent medical evidence;

² All future statutory references are to the Labor Code unless otherwise specified.

³ “[T]he phrase ‘predominant as to all causes’ is intended to require that the work-related cause has greater than a 50 percent share of the entire set of causal factors.” (*Department of Corrections v. Workers’ Comp. Appeals Bd.* (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356].)

⁴ The term “substantial cause” is defined in section 3208.3(b)(3) as “at least 35 to 40 percent of the causation from all sources combined.” (Lab. Code, § 3208.3(b)(3).)

(3) if so, a further determination must be made establishing whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith - a factual/legal determination for the WCJ; and

(4) if so, a determination must be made as to whether the lawful, nondiscriminatory, good faith personnel actions were a “substantial cause” of the psychiatric injury.

(*Rolda, supra*, 66 Cal.Comp.Cases at p. 247; see also *San Francisco Unified School Dist. v. Workers’ Comp. Appeals Bd. (Cardozo)* (2013) 190 Cal.App.4th 1 [75 Cal.Comp.Cases 1251] (writ den.).)

Under section 3208.1, an injury may be either a specific injury or a cumulative injury. Subdivision (b) defines a “cumulative” injury as “occurring as repetitive mentally . . . traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment.” (Lab. Code, § 3208.1(b).) The number of injuries and the nature of those injuries are questions of fact for the WCJ or the Appeals Board. (See *Western Growers Ins. Co. v. Workers’ Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323]; see also *Sears v. County of Fresno (Sears)* (December 24, 2021, ADJ9920866) [2021 Cal. Wrk. Comp. P.D. LEXIS 356, *12] [several actual events of employment may have occurred during one period of cumulative trauma].)

In this case, applicant testified regarding multiple specific interactions with his supervisor, Ms. Erica Graves, between June 6, 2019 and March 13, 2020, wherein Ms. Graves “went off” on applicant, called him names, and used profanity towards him. Based on applicant’s testimony, the WCJ found that five “actual events of employment” occurred under the first prong of *Rolda*. (F&O, p. 2-5, Findings of Fact Nos. 1-5.) We note that, upon review, these findings are not proper Findings of Fact, but rather, a summary of the evidence justifying those findings, which belongs in the Opinion on Decision. Although the WCJ clearly believed that there was substantial evidence that actual events of employment were involved, thereby potentially satisfying the first prong of *Rolda*, because we are rescinding the F&O and returning the matter for a new decision, we remind the WCJ to discuss the evidence supporting her findings in the proper section of that decision. (See Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, §§ 10761, 10787; *Blackledge v. Bank of America, ACE American Insurance Co.* (2010) 75 Cal.Comp.Cases 613, 621-622 (Appeals Board en banc).)

After identifying five actual events of employment, the WCJ found that three of these events constituted lawful, nondiscriminatory, good faith personnel actions. (F&O, p. 5.) In doing so, however, the WCJ ignored the required sequence of the *Rolda* analysis. Under *Rolda*, after the WCJ determines that an alleged psychiatric injury involves actual events of employment, the WCJ must determine “whether competent medical evidence establishes the required percentage of industrial causation,” i.e., injury AOE/COE. (*Cardozo, supra; Rolda, supra*, 66 Cal.Comp.Cases at pp. 245-247; Lab. Code, § 3208.3(b)(1).) The reason for this sequence of analysis is as follows: If there is no industrial injury, there is no liability and no need to determine whether any of the events were lawful, nondiscriminatory good faith personnel actions, which is an *affirmative defense* to liability that must be raised by the defendant to be considered. Here, the WCJ found that there was insufficient medical evidence to support a finding of industrial causation and thus ordered the parties to supplement the record on the issue. Yet, by finding that some of the events were lawful, good faith personnel actions, the WCJ acted as if there *was* sufficient evidence of industrial causation and continued her analysis under *Rolda* to determine whether defendant had established its affirmative defense to liability. This finding is contradictory to her order for additional evidence on industrial causation, and unless applicant adequately provides said evidence, whether any of the events were lawful, nondiscriminatory, good faith personnel actions under *Rolda* is irrelevant and has no legal significance in the case.

Based on the foregoing, it is appropriate to rescind the May 10, 2023 F&O and return the case to the trial level for further development of the record and a new decision by the WCJ that properly applies the *Rolda* analysis. We note that, although the WCJ ordered Dr. McCullough to utilize the MOH/SOEs to prepare a supplemental medical-legal report, the Electronic Adjudication Management System (EAMS) contains certified copies of the transcripts from each of the hearings held in the case, except for the hearing on May 12, 2022. Under *Rolda*, it is the WCJ’s duty to review all medical evidence *and* testimonial evidence of record prior to rendering a decision. (*Rolda, supra*, 66 Cal.Comp.Cases at p. 247.) Because certified copies of the transcripts exist, we find it appropriate for the WCJ to admit them into evidence and that they be provided to Dr.

McCullough for his review and use.⁵ Upon return to the trial level, the WCJ shall address the transcript issue accordingly.

We hereby rescind the May 10, 2023 F&O and return the case to the trial level for development of the record and a new decision by the WCJ that includes complete findings based upon substantial evidence and a reasoned decision based upon those findings. It is important to note that, because the May 10, 2023 F&O is rescinded, none of the issues raised by the parties at trial have been finally decided.

⁵ Although the preferred procedure to develop a deficient medical record is to return to the existing physician who has already reported in the case, if the existing physician cannot cure the need for development of the record, the selection of an agreed medical evaluator (AME) should be considered by the parties. If the parties cannot agree to an AME, the WCJ can then appoint a physician to evaluate applicant's alleged injury pursuant to section 5701. (*McDuffie v. L.A. County Metro. Transit Auth.* (2002) 67 Cal.Comp.Cases 138, 142-143 (Appeals Board en banc).)

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the F&O issued by the WCJ on May 10, 2023 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the F&O issued by the WCJ on May 10, 2023 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings, development of the record, and a new decision by the WCJ in accordance with this decision.

IT IS FURTHER ORDERED that the WCJ shall admit the certified trial transcripts into evidence and order the parties to provide the certified transcripts to the medical evaluator.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER



ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 4, 2023

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

**MARCO MADERO
LAW OFFICES OF MOISES VAZQUEZ
ME LAW**

AH/cs

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