

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

MICHAEL PIRRO, *Applicant*

vs.

**RAPID7, LLC; CONTINENTAL INSURANCE COMPANY,
administered by CNA CLAIMS PLUS, INC., *Defendants***

**Adjudication Number: ADJ14327332
Van Nuys District Office**

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

Applicant seeks reconsideration of the Findings of Fact and Order (F&O) of August 14, 2023, wherein the workers' compensation administrative law judge (WCJ) found that applicant did not sustain injury arising out of and during the course of employment (AOE/COE) in the form of injury to his psyche and ordered that he take nothing.

Applicant contends that he met his burden of proof that he sustained injury AOE/COE.

We have 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 Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Reconsideration, rescind the WCJ's Order, and return this matter to the WCJ for further proceedings.

FACTS

Applicant claimed industrial injury to his psychiatric system during the period of January 5, 2020, to February 12, 2021, while employed by the defendant as a Senior Technical Support Engineer.

In the report by Panel Qualified Medical Evaluator (PQME) and licensed psychologist Stefanie Peters, Ph.D., Dr. Peters reported that applicant's job responsibilities were to troubleshoot and resolve issues for customers who purchased defendant's software product. (Ex. A, PQME Report, 2/27/22, p. 4.) About two years after he started working for defendant, he was working 11-12 hours days, was dealing with difficult cases and customers, and was having problems with his boss. (Ex. A, pp. 4-5.) When discussing applicant's diagnoses, Dr. Peters stated that "I would be interested in having the opportunity to review the records of Dr. Thomas Fera, to see what information these records provide." (Ex. A, p. 14.) Dr. Peters further stated that "It may be helpful to review his work records from Rapid7. These may provide additional information that would be helpful in determining whether there are underlying personality problems." (Ex. A, p. 15.)

Dr. Peters noted that following his termination in early February 2021, applicant applied for unemployment insurance, and received it until he was put on State Disability by Dr. Fera. (Ex. A, p. 15.) However, Dr. Peters had not had the opportunity to review any of Dr. Fera's records so she was not aware of the basis for his decision. (Ex. A, p. 15.) Specifically, she stated that "No other psychological or psychiatric reports or records have been made available for my review at this time. I would appreciate the opportunity to review any reports or records that can be obtained from the office of Dr. Fera." (Ex. A, p. 16.)

Dr. Peters concluded that:

"The predominant cause of Mr. Pirro's Unspecified Anxiety Disorder and Unspecified Depressive Disorder was the allegedly unmanageable workload he experienced, particularly starting in the spring of 2020. . . . According to his account, he began experiencing symptoms of anxiety and depression about two months before he sought medical attention in June 2020."

(Ex. A, p. 15.)

However, under the section titled "**Apportionment**," she stated that:

Mr. Pirro's current psychological impairment is apportioned 35% to the alleged work stress and 65% to his termination. Although the alleged work stress was the predominant cause of the onset of his psychological condition, Mr. Pirro has been out of the work environment and so no longer subjected to the alleged stress for a full year now. By contrast, as he described his current emotional distress in my evaluation, it was clear that this stems primarily from his termination, which he repeatedly said has caused him to feel like a loser.

(Ex. A, p. 17.)

In the report by Primary Treating Physician (PTP) Dr. Thomas Fera, Dr. Fera noted that:

Mr. Pirro was TTD for a significant amount of time (detailed below) as driven by industrial factors as incurred within the course and scope of his employment at Rapid?, LLC. He qualified for State Disability Insurance (SDI) which I certified, and at that time I had him as suffering from anxiety and depression within the context of chronic psychological maladjustment (now revised to Depressive Disorder NOS and Anxiety Disorder NOS, with respective coding of 311 and 300.00, DSM-IV-TR).

(Ex. 1, PTP Medical-Legal Report, 9/11/22, p. 4.)

Dr. Fera concluded that applicant “Mr. Pirro's psychopathology is 100% derivative of injuries sustained within the course and scope of his employment at Rapid7, LLC.” (Ex. 1, p. 11.)

He also found that the injury was

95% due to continuous trauma in the form of having little to no training, where the customers had control of his schedule, that he was scapegoated by customers, that many of his customers were condescending toward him, that a new manager (Jeff Ma) was verbally disparaging about him to a manager from another department that was interested in working with Mr. Pirro, that he had an unreasonable caseload, that he was verbally castigated by managers in front of a senior manager and in front of his peers, that he was unfairly treated in regards to earning uQ-Days" off (detailed above), along with non-support by management; with 5% due to his layoff from this company.

(Ex. 1, p. 11.)

On August 14, 2023, the WCJ issued the F&O finding that applicant did not sustain an industrial injury to his psychiatric system and took nothing from the claims based on the PQME report of Dr. Peters dated February 27, 2022. In his Opinion, he stated that he used Dr. Peters reporting to conclude that 65% of causation of applicant’s injury was due to his termination, so that applicant did not meet his burden to show that his injury was predominantly caused by his employment.

DISCUSSION

The employee bears the burden of proving the injury arose out of and in the course of employment 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.)¹ Whether an employee’s injury arose out of and in the course of employment

¹ All further statutory references are to the Labor Code unless otherwise noted.

is generally a question of fact to be determined in light of the particular circumstances of the case. (*Wright v. Beverly Fabrics* (2002) 95 Cal.App.4th 346, 353 [67 Cal.Comp.Cases 51].)

Section 3208.3(b)(1) states that: “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.” “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.

Section 3208.3(b)(3) defines substantial cause as “at least 35 to 40 percent of the causation from all sources combined.” (Lab. Code, § 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 their findings in a decision which addresses all the relevant issues raised by the criteria set forth in Labor Code section 3208.3. (*Id.* at p. 247.)

A WCJ's decision must be supported by substantial evidence in light of the entire record. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Medical evidence is required if there is an issue regarding the compensability of the claim. (Lab. Code, §§ 4060(c)(d), 4061(i), 4062.3(l).) A medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Bd. en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) Defendant holds the burden of proof on apportionment of permanent disability. (Lab. Code, § 5705; see also *Escobedo, supra*, 70 Cal.Comp.Cases at p. 613.)

Here, applicant claimed a cumulative injury but the WCJ found that he did not meet his burden of proof to support industrial causation and ordered that he take nothing. (F&O, p. 1.) The WCJ based this conclusion on the report of the PQME Dr. Peters instead of PTP Dr. Fera. (Opinion on Decision (OOD), p. 2.) However, Dr. Peters noted that no other psychological or psychiatric reports or records had been made available for her review at the time of her report and that she would appreciate the opportunity to review any reports or records that could be obtained from Dr.

Fera. (Ex. A, pp. 14-16.) Dr. Peters also believed it would be helpful to review applicant's employment records. (Ex. A, p. 15.) Therefore, Dr. Peters' report was based on an inadequate medical history and examinations. (See *Heggin v. Workmen's Comp. Appeals Bd.*, *supra*, 4 Cal.3d at p. 169.)

However, we observe that in reviewing Dr. Peters' conclusions, her opinion is that the cause of applicant's industrial psyche injury was applicant's "unmanageable workload" (Ex. A, p. 15), and her opinion, set forth in the section titled **Apportionment**, is that 65% of applicant's current psychological state (impairment) could be attributed to his termination. (Ex. A, p. 17.) If it appeared to the WCJ that Dr. Peters conflated the legal standards for causation and apportionment, development of the record to clarify Dr. Peter's opinions would have been appropriate.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on a threshold issue. (Lab. Code, §§ 5701, 5906; *Nunes (Grace) v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 752; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; *McDonald v. Workers' Comp. Appeals Bd., TLG Med. Prods.* (2005) 70 Cal.Comp.Cases 797, 802.) 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.)

Sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141-143 (Appeals Bd. en banc).) The Appeals Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.*, *supra*, 79 Cal.App.4th at p. 404.) Therefore, upon return to the WCJ, we recommend that the medical record be developed to cure the deficiencies in Dr. Peters' report.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the August 14, 2023 Findings of Fact and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the August 14, 2023 Findings of Fact and Order is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ NATALIE PALUGYAI, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 6, 2023

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

**MICHAEL PIRRO
LAW OFFICE OF ANDERSON & CHANG**

JMR/ara

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