

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

SCOTT KNERL, *Applicant*

vs.

**CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,
ADMINISTRATION OF LEGAL AFFAIRS, legally uninsured and administered by
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ16468538
Sacramento District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on July 14, 2023, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and in the course of employment to the psyche.

Defendant contends that actual events of employment were not predominant as to all causes combined, and therefore applicant did not sustain a compensable psychiatric injury. In the alternative, defendant contends that the matter should be remanded for further discovery regarding what percentage of the injury was caused by good faith personnel actions.

We received an answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition, the answer, and the contents of the Report with respect thereto.

Based on our review of the record, for the reasons stated in the WCJ's Report, which is adopted and incorporated herein, and for the reasons discussed below, we will deny reconsideration.

We note that Labor Code section 3208.3¹ states that in order to establish industrial causation of a psychiatric injury, an injured worker must show by a preponderance of the evidence that actual events of employment predominantly caused the psychological injury.² (Lab. Code, § 3208.3(b)(1).) After considering all the medical evidence, and the other documentary and testimonial evidence of record, the WCJ must determine (1) whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination for the WCJ; and if so, (2) whether such actual events were the predominant cause of the psychiatric injury, a determination which requires competent medical evidence. (*Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241, 247 (Appeals Bd. en banc); *San Francisco Unified School Dist. v. Workers' Comp. Appeals Bd. (Cardozo)* (2013) 190 Cal.App.4th 1 [75 Cal.Comp.Cases 1251] (writ den.).)

A WCJ's decision must be supported by substantial evidence. (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].) To be substantial evidence, a medical opinion must be well-reasoned, based on an adequate history and examination, and it must disclose a solid underlying basis for the opinion. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Bd. en banc).) Here, applicant was examined by psychiatric Qualified Medical Evaluator (QME) Brian P. Jacks, M.D., F.A.A.C.P. Dr. Jacks examined applicant, performed diagnostic testing, took a detailed history, and articulated a solid basis for his opinions. Dr. Jacks opined that applicant's psychiatric injuries were predominantly work related. (Exhibit AA, Dr. Jack's December 1, 2022 report, p. 25.) Based on Dr. Jacks' reporting, the WCJ determined that applicant's psychiatric injury involved actual events of employment, which were the predominant cause of the psychiatric injury.

We further note that while the good faith personnel action defense is listed on the Pretrial Conference Statement, defendant did not raise it at trial. (Minutes of Hearing and Summary of Evidence (MOH/SOE), June 19, 2023 trial, pp. 2-3.) Moreover, pursuant to the WCJ's Report, defense counsel indicated they were no longer asserting the defense at the time of trial. (Report, p.

¹ All future statutory references are to the Labor Code unless otherwise specified.

² “[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. (Garcia)* (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356].)

3.) Because the issue was not raised at trial, we consider it waived and will not consider it on reconsideration. (See *Cottrell v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 760, writ denied.)

Accordingly, we deny the Petition.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Award, issued July 14, 2023, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 9, 2023

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

**SCOTT KNERL
MARCUS, REGALADO, MARCUS & PULLEY
STATE COMPENSATION INSURANCE FUND**

JB/cs

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I

<u>Date of injury:</u>	CT through February 14, 2022
<u>Age on DOI:</u>	45 years old
<u>Parts of Body Injured:</u>	Psyche
<u>Identity of Petitioner:</u>	Defendant
<u>Timeliness:</u>	Petition was filed timely
<u>Verification:</u>	Petition was verified
<u>Date of Order:</u>	July 14, 2023
<u>Petitioners Contentions:</u>	Defendant contends the Division of Workers' Compensation acted without or in excess of its powers by the order, decision, or award filed by the WCJ, the evidence does not justify the findings of fact, and the findings of fact do not support the order, decision, or award. Specifically, Defendant contends the claims of retaliation with investigation were not actual employment events and if they were then the case should be remanded for further discovery to determine what percentage of injury was caused by good faith personnel actions, [despite waiving the defense at trial.]

II
FACTS

Applicant, a Senior Special Agent for California Department of Corrections and Rehabilitation, claimed a cumulative trauma injury to the psyche. The matter went to trial on the issue of industrial causation, temporary disability, permanent and stationary date, permanent disability, apportionment, and attorney fees. The parties agreed if industrial causation was found that Applicant was entitled to future medical care and the voucher.

After trial, it was found that Applicant sustained injury arising out of and in the course of employment to the psyche. In addition, Applicant was found to be entitled to a period of temporary disability from February 14, 2022 through the permanent and stationary date of October 21, 2022 and permanent disability after apportionment of 27%. Applicant was awarded future medical care and the voucher. Attorney fees were also awarded of 15% of the permanent disability and retro-temporary disability.

Defendant filed a Petition for Reconsideration. Applicant filed an Answer.

III **DISCUSSION**

AOE/COE

Applicant claims injury arising out of and in the course of employment to the psyche.

Applicant was evaluated by psychiatrist Dr. Brian Jacks. In his report, Dr. Jacks provides a history where Applicant complained that the stress began in July 2019 after reporting a high-level misconduct by an attorney in the legal department. He reported it to the executive staff, but nothing was done so he reported it to the Inspector General's Office, and nothing was done. This continued for two years. He felt dirty and angry. In 2021, there was an investigation, and the attorney was suspended for just 30 days and then returned to the same job. Then that attorney accused him of harassment. He was not sleeping and felt bottled up for about 19 months. On January 5, 2022, he sent an email about all this. The next day he parked his car at work and was so upset that he thought he was having a heart attack or stroke. He went home and saw the doctor the next day. Dr. Jacks diagnosed Applicant with dysthymia, panic disorder, and generalized anxiety disorder. Dr. Jacks opines that more than 50% causation of the psychiatric injury is due to work stress. Dr. Jacks attributes 20% to preexisting and personal nonindustrial stress including divorce and family deaths. Dr. Jacks attributes 10% to frustration in reporting the misconduct and 70% to the retaliation with investigation of accusations made against him. (Joint Exhibit AA)

The retaliation relates to the situation where Applicant reported a co-worker / attorney for misconduct who then accused him of harassment. There is no dispute that the attorney made accusations against Applicant. In the Memorandum from the Office of Internal Affairs dated October 4, 2022, Applicant was notified that the administrative inquiry into allegations of misconduct against him was complete. The Memorandum lists the allegations made, names the attorney who made the allegations, and finds each to be not sustained. (Defendant Exhibit B)

The record supports a finding that applicant sustained injury to his psyche arising out of and occurring in the course of employment during the cumulative trauma period ending on February 14, 2022.

The good faith personnel action defense is listed on the Pretrial Conference Statement but at trial defense counsel indicated they were no longer asserting that defense. This is consistent with the Minutes of Hearing from trial that list the issues of "Injury arising out of and in the course of employment, with defendant contending applicant misinterpreted employment events and created his own stressful work environment and made the claim uncompensable per Verga v. WCAB, 159 Cal.App 4th 174." The remaining issues include temporary disability, permanent and stationary date, permanent disability, apportionment, and attorney fees, with the Petition for Finding of Fact being deferred. The Minutes of Hearing indicate "The parties confirmed the Stipulations and Issues were read correctly." There was no objection to the Minutes of Hearing. The good faith personnel action defense was waived however in the Petition for Reconsideration, Defendant contends

further discovery is needed to address what percentage of the injury was due to good faith personal actions, if an actual employment event is found.

RETRO-TEMPORARY DISABILITY

Applicant claims temporary disability from February 14, 2022, until he was permanent and stationary. This is supported by the record.

At trial, Applicant testified credibly. He testified in pertinent part as follows: He filed the claim on February 14, 2022, he may have done a Range Day on February 18, 2022, and then he went off work. He testified that he has been off work since then except that he has continued doing driver apps.

Dr. Jacks provides that Applicant went off work due to stress. Dr. Jacks finds Applicant totally temporarily disabled due to the emotional condition when Applicant was off work for anxiety and stress. (Joint Exhibit AA)

PERMANENT AND STATIONARY DATE

Applicant claims a permanent and stationary date of December 1, 2022, which is the date of the QME report. Defendant claims October 21, 2022, the date of the QME evaluation.

California Code of Regulations section 9785(a)(8) states as follows:

Permanent and stationary status is the point when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment.

Applicant was evaluated by Dr. Jacks on October 21, 2022. In the accompanying report, Dr. Jacks finds Applicant's emotional condition to have reached permanent and stationary status. (Joint Exhibit AA)

In his supplemental report dated March 14, 2022, Dr. Jacks responds to a question of whether the permanent and stationary date is October 21, 2022, the date of the evaluation. Dr. Jacks agrees. Dr. Jacks indicates that the permanent and stationary date is the earliest date of either the date of his reporting or the date provided by the treating provider. Dr. Jacks indicates if the treating provider did not provide a permanent and stationary date, then it is October 21, 2022, the date of his reporting. (Joint Exhibit BB)

The date of October 21, 2022, is when Dr. Jacks saw Applicant whereas December 1, 2022, appears to be an arbitrary date of when the report issued. Furthermore, there is no evidence establishing a substantial change in Applicant's condition between October 21, 2022, and December 1, 2022. The record supports a finding that the permanent and stationary date is October 21, 2022.

PERMANENT DISABILITY AND APPORTIONMENT

As the QME, Dr. Jacks performed a psychiatric evaluation and consultation with psychological testing and interview. Dr. Jacks found impairment and a GAF score of 58, which is 18% WPI. Regarding apportionment, Dr. Jacks describes Applicant’s history which includes marital problems and a divorce in 2015. Applicant was put on Lexapro and Ambien. Dr. Jacks opines this earlier breakdown with anxiety and depression made Applicant more vulnerable for a later breakdown and probably explains the extent of his reactions and current problems at work. Dr. Jacks indicates Applicant was divorced again in 2019 around the time of the claimed work difficulties. Dr. Jacks finds the divorce probably caused factors of permanent disability. Dr. Jacks indicates Applicant’s sister died in 2018 and his father died in 2020. Dr. Jacks highlights prior panic attacks in 2013 and 2015 and explains that panic attacks can relapse. Dr. Jacks finds but for the preexisting and personal nonindustrial stress, the disability would not be as great. Dr. Jacks apportions 30% to preexisting and personal nonindustrial stressors and 70% to work stress. (Joint Exhibit AA)

The findings of Dr. Jacks rate as follows:

Psyche .70 (14.01.00.00 - 18 [1.4] 25 - 490J - 36 - 38) 27%

The record supports a finding that Applicant is entitled to a permanent disability award of 27%, equivalent to 112.75 weeks of indemnity payable at the rate of \$290 per week, in the total sum of \$32,697.50.

ATTORNEY FEES

Based on California Code of Regulations section 10844 and the guidelines for awarding attorney fees found in the Policy and Procedural Manual, it is found that a reasonable attorney fee is 15% of the permanent disability and retro-temporary disability.

IV
RECOMMENDATION

For the reasons stated above, it is respectfully recommended that Defendant's Petition for Reconsideration be denied.

Date: August 17, 2023

/s/ *Ariel Aldrich*

WORKERS’ COMPENSATION
ADMINISTRATIVE LAW JUDGE