

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

ELAINE LISTER, *Applicant*

vs.

**STATE OF CALIFORNIA, DEPARTMENT OF PUBLIC HEALTH; legally uninsured,
adjusted by STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ13076996
Riverside District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration, the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated in the WCJ's report and opinion, which are both adopted and incorporated herein, we will deny reconsideration.

All decisions by a WCJ must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566].) To constitute substantial evidence "...a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board 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.” (*Hegglin v. Workmen’s Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Here, the WCJ determined that the medical reporting of the panel Qualified Medical Evaluator (QME) in psychology, Dr. David Brendel, Ph.D., constituted substantial medical evidence of predominant causation, as part of the larger analysis required under *Rolda v. Pitney Bowes, Inc.* (*Rolda*) (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc).

In *Rolda*, the Appeals Board addressed the factors that a psychological evaluator must consider in opining on causation of an alleged psychological injury under Labor Code section 3208.3, stating that the evaluating physician must “take a history of all events alleged to have contributed to the psychiatric injury, to render an opinion as to causation in terms of first whether the employment events were a predominant, or greater than fifty percent, cause of the injury.” (*Rolda, supra*, 66 Cal.Comp.Cases at p. 246.)

In the instant case, Dr. Brendel identified the actual events of employment identified by the WCJ and assigned percentages of causation accordingly. Furthermore, as explained by the WCJ, Dr. Brendel’s medical opinion was consistent with applicant’s credible trial testimony and was based upon a thorough review of applicant’s medical history, the available record, and a well-reasoned analysis of factors of causation. (Report, p. 7; Opinion, p. 8.)

Based on the foregoing, we decline to disturb the WCJ’s decision that the collective reporting of Dr. Brendel constitutes substantial medical evidence in accordance with *Rolda*.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 12, 2024

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

**ELAINE LISTER
INJURY COMPENSATION LAW
STATE COMPENSATION INSURANCE FUND**

AH/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

INTRODUCTION

Date of injury: Cumulative trauma from 08/13/2018-06/10/2019. The applicant alleged injury to nervous system, stress, and psyche. The application was filed on 03/18/2020

Hearings set: None set.

Age on date of injury: []

Identity of Petitioner: Matthew Rumishek, attorney for defendant State of California Department of Public Health, legally uninsured, adjusted by State Compensation Insurance Fund, Petitioned for Reconsideration of Findings and Orders and Opinion on Decision issued 01/25/2024.

Parts of body injured: The applicant claimed injury to nervous system, stress, and psyche and defendant denied injury.

Occupation: Supervising Investigator I

Date of Decision: 01/25/2024

Date Petition for Reconsideration was filed: 02/13/2024

Timeliness: The petition was timely.

Verification: The petition was verified by an attorney.

Petitioner's Contentions: Petitioner contends that the evidence does not justify the Findings of Fact and by the order, decision, or award, the Board acted without or in excess of its powers, and the Findings of Fact do not support the Order, Decision or Award.

Defendant, by and through their attorneys of record, has filed a timely Petition for Reconsideration (EAMS DOC ID 50430059) challenging the Findings of Fact, Orders, and Opinion on Decision dated January 25, 2024.

The applicant has not filed an answer, but it is anticipated that the applicant attorney will respond.

The petition lacks merit. It is recommended that reconsideration be denied.

II

FACTS AND PROCEDURAL HISTORY

The application was filed and served by applicant on March 18, 2020 (EAMS DOC ID 31932021). The applicant alleged injury due to stress, harassment and hostile work environment that caused her to have metabolic disorders, headaches, stress and all compensable consequences according to the application due to a cumulative trauma from 08/13/2018-06/10/2019.

Trial originally started with WCALJ Thorne on 10/18/2022 (MOH, SOE 76058358). Another trial date by Judge Thorne was held on 12/21/2022 (EAMS DOC ID 76276941; 76279784). Thereafter Judge Thorne left his DIR position for a position at another agency.

Trial began with the undersigned as a new trial on 04/06/2023 (See SOE, MOH EAMS DOC 76625343). There were 5 more trial dates: 05/17/2023 (EAMS DOC ID 76777793), 06/14/2023 (EAMS DOC ID 76866725, 07/27/2023 (EAMS DOC ID 77016505), 08/31/2023 (EAMS DOC ID 77126957) and 11/3/2020 (EAMS DOC ID 77420263).

The applicant, Elaine Lister, and two employer witnesses, John Beardsley and Eric Morikawa testified.

The matter was considered submitted on 11/30/2023. Findings and Orders issued finding industrial psychiatric injury on 01/25/2024. This WCALJ made determinations that the applicant was credible and the two witnesses for defendant were not credible.

The defense attorney has filed a timely verified Petition for Reconsideration on 02/13/2024.

III

DISCUSSION

The petitioner argued that the applicant failed to establish that actual events of employment were predominant to all causes of any psychiatric injury, (Reconsideration, p. 9, lines 7-9), the applicants claims were not supported (Reconsideration p. 12, lines 23-27), the evidence does not justify the findings of fact or the findings of fact do not support the order and decision (Reconsideration, p.16, lines 3-6), the comments regarding Tamir Rice are not actual events of employment (Reconsideration, p. 16, lines 7-14), the Judge's credibility determinations are not supported by the evidence (Reconsideration, p. 17, lines 26-27; p. 21, lines 3-10).

PREDOMINANT CAUSE

The petitioner argued that the applicant failed to establish that the actual events of employment were predominant to all causes of alleged psychiatric injury.

Pursuant to Labor Code 3208.3(b) (1) an employee shall demonstrate by a preponderance of evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury.

In the August 10, 2021 report of Dr. Brendel (Joint Exhibit 14), Dr. Brendel determined causation as follows:

1. 35% to racism
2. 35% to false allegations
3. 15% to being set-up
4. 10% to harassment and disparagement
5. 5% to non-industrial financial concerns

Dr. Brendel amended his causation findings in his August 17, 2022 report (Joint exhibit 17) as follows:

1. 30% to racism
2. 30% to false allegations
3. 15% to being set-up
4. 10% to harassment and disparagement
5. 10% to past industrial claim
6. 5% to non-industrial financial concerns

In a report dated June 11, 2020 (Joint Exhibit 13), page 7, Dr. Brendel concluded that the applicant's psychological injury was predominantly cause by her employment.

Using the August 17, 2022 report of Dr. Brendel regarding causation but also using information from the August 10, 2021 report, Dr. Brendel assigned 30% causation to racism. It was found that the applicant was consistent with regards to instances that she construed as racism by her supervisor John Beardsley: that Tamir Rice deserved to die after being shot by police, accusing Ms. Lister of selecting a non-qualified applicant for open position (who was African-American), and suggesting the candidate ran away from another state instead of choosing California for treatment of child, and Ms. Lister felt as if they also involved racially motivated comments or suggestions. The actions are construed as actual events of employment. There has also been a finding of the required predominant cause. The actions were by management or person in management, John Beardsley. It was found that the actions by Mr. Beardsley were not objectively reasonable and in good faith.

Dr. Brendel assigned 30% to there being false allegations. Most of the allegations are included in the 01/25/2019 probation report (Applicant exhibit 4). There were statements that

Elaine Lister was overbearing and demanding, feedback from staff was negative, that there were many last minute requests for time off, making unapproved policy changes, failure to de-escalate or diffuse negative situations. Staff and Mr. Beardsley reportedly filed a workplace violence report against her. There was also another incident in which Patton State Hospital was investigated at request of Mr. Beardsley and Ms. Lister was blamed for the unauthorized actions. Applicant's testimony and statements made to Dr. Brendel were considered credible. These are considered actual events of employment as they were in a probation report or occurred at work and were directly aimed at Ms. Lister.

They were considered personnel actions as they were completed by or by Ms. Lister's direct supervisor, John Beardsley. On the one hand a supervisor should be able to perform functions of being a supervisor such as preparing performance reviews. On the other hand the reports should be authored in a careful and honest manner and be as accurate as possible. Mr. Beardsley was not considered credible and the statements and assertions in the probation report although appeared lawful, they did not appear nondiscriminatory or in good faith. Elaine Lister was considered credible and her testimony was consistent with the medical records in the case.

Dr. Brendel attributed 10% of the cause of the psychiatric claim to harassment and disparagement after being embarrassed. Mr. Beardsley was behind in his work 1.5 years. Elaine Lister helped by getting the backlog tasks completed. Mr. Beardsley was angered and upset and he had growing resentment towards her. This would be considered an event of employment and may have been a personnel action as it was due to action of the supervisor, John Beardsley. This did not appear to constitute lawful, non-discriminatory good faith personnel action.

The applicant was considered credible and consistent. The defense witnesses were not considered credible. There is sufficient direct evidence and circumstantial evidence to find injury AOE/COE. (*Guerra v. Workers' Comp. Appeals Bd.* (2016) 246 Cal.App.4th 1301, p. 1307) Based upon the reasonable inferences from the evidence in the case, including applicant's testimony, the medical reporting of Dr. Brendel, it was determined. The applicant carried the burden of proving the actual events of employment were the predominant cause of her psychiatric injury.

It should also be noted that within applicant exhibit 2 there is also an admitted medical report of Errinn Bixby, Ph.D. dated 07/22/2019, beginning at page 74 of 270. Dr. Bixby concluded that within a reasonable medical certainty, that the patient's work environment (hostility from her subordinates, including yelling at the patient, berating her, and refusing to complete work she

assigned, as well as hostility from her supervisors, including Mr. Beardsley treating her differently than the other supervisors, threatening her., and refusing to support her, as well as Mr. Morikawa, speaking negatively about her in front of her subordinates, and refusing to support her) was the predominant (greater than 51%) factor as to all causes combined of the psychiatric injury.

WHETHER APPLICANT'S CLAIMS WERE SUPPORTED

The petitioner argued that the opinion on decision did not detail contentions asserted by applicant and noted by Panel QME Brendel. They were not substantiated and specifically racism was not supported.

Dr. Brendel in his August 10, 2021 report noted that Elaine Lister spoke of Jamie Masuda being promoted and Ms. Beal passing probation (Joint exhibit 14, page 3). Mr. Beardsley complained that they did not work up to standard yet passed probation. There were additional statements that the work she was confronted with was "simple and uncomplicated." This as construed as veiled discrimination or racism.

Additionally there was a job opening in which she received 99 applications. She proceeded with her selection using due diligence and she selected an African-American. Mr. Beardsley accused her of selecting less than qualified applicants and forced her to obtain 5 more applicants. Mr. Beardsley became quite angry and chastised her and advised her that the candidate was not the best selection and that the candidate probably ran away from another state and that the applicant not pass reference and background checks. He also stated that the candidate was probably accused of criminal activity and drug abuse and probably ran away from Louisiana to escape prosecution.

The applicant started her testimony stating she was subjected to some harassment and discrimination (MOH, SOE 04/06/2023, P. 2, lines 140-15). Further, she discussed an incident concerning Tamir Rice that was widely publicized and made national news. He made specific comments that Tamir Rice needed to die and even though he was a child with a gun, he deserved to die. Mr. Beardsley also commented that he didn't know why there was rioting and people that were upset as he [Tamir Rice] got what he deserved (MOH, SOE 04/06/2023, P. 9, lines 21-24). It should also be noted that the comments regarding Tamir Rice were made during the review of the applicant's probation report (according to Dr. Brendel's 08/10/2021 report, page 3). The applicant was devastated.

Eric Creer is an African-American and he applied to be an investigator (MOH, SOE 04/06/2023, P. 10, lines 3-8). Ms. Lister was involved in the interview process on the telephone.

She felt he was qualified for the position. Mr. Beardsley told her how to score the interview. Mr. Creer did not get the job and Mr. Beardsley said that Mr. Creer would never get a job in his unit and Mr. Beardsley did not explain.

It could also be construed to be a form of discrimination or racism that she was not given high profile investigations and that she was not allowed to participate in management meetings and planning (MOH, SOE 04/06/2023, P. 10, lines 23-25; P. 11 lines 1-2).

The applicant's claims were supported by applicant's credible testimony and the collective reporting of Panel QME David Brendel.

WHETHER THE EVIDENCE SUPPORTED THE FINDINGS OF FACT

The petitioner asserted that either the evidence does not justify the findings of fact or the findings of fact do not support the order/decision (Reconsideration, P. 16, lines 3-6).

The Findings of Fact included the following in total:

1. Elaine Lister, born [], while employed during the period 8/13/2018 through 6/10/2019, as a Supervising Investigator I, at San Bernardino, California, by the Department of Public Health, sustained injury arising out of and in the course of employment to her psychiatric system.
2. At the time of injury the employer was legally uninsured and administered by State Compensation Insurance Fund.
3. The employer has furnished some medical treatment.
4. The applicant carried the burden of proving the actual events of employment were the predominant cause of her psychiatric injury.
5. The defendant failed to carry the burden of proving that injury was substantially caused by a lawful, nondiscriminatory, good faith personnel actions.

It is presumed that the petitioner is disputing findings 1, 4, and 5. Essentially the petitioner is arguing that the applicant did not sustain an injury arising out of and in the course of employment, the applicant did not carry the burden of proof regarding her employment being the predominant cause of her psychiatric injury, and petitioner challenged that the defendant failed to carry the burden of proving the that the injury was substantially caused by lawful nondiscriminatory, good-faith personnel actions.

Dr. Brendel concluded in his June 11, 2020 (Joint exhibit 13, P. 7, first full paragraph) report that the evidence available substantiated the applicant's psychiatric injury and the

applicant's psychological injury was predominantly caused by her employment and specifically in response to her work environment.

Dr. Brendel was asked to break down causation pursuant to the *Rolda* case in his 08/10/2021 report (Joint 14). He did break it down and justified his findings. Dr. Brendel further clarified his causation findings in his August 17, 2022 report (Joint exhibit 17).

It was concluded that the applicant carried the burden of proving predominant cause for racism (30%), false allegations (30 %), and harassment and disparagement consequent to being embarrassed (10%).

This WCALJ did not find sufficient justification for employee event number 3 (being set-up). Also a past industrial claim and non-industrial financial concerns would be non-industrial.

The reporting of Dr. Brendel and the credible testimony of the applicant supported Findings of Fact 1, 4, and 5.

The applicant was found to be credible and the collective reporting of Panel QME David Brendel were considered substantial medical evidence.

COMMENTS REGARDING TAMIR RICE

The petitioner argued that the comments regarding Tamir Rice are not actual events of employment (Reconsideration, P. 16, lines 7-26; P. 17, lines 1-25). The petitioner cited the case of *Verga v. WCAB* (2008) 73 CCC 63, 71 for the proposition that it was Legislature's intent to curtail fraudulent workers' compensation claims for psychiatric injury. The petitioner also raised *Pacific Gas and Electric Co. v. WCAB (Bryan)* (2004) 69 CCC 21, 25; *Georgia-Pacific Corp. v. WCAB (Byrne)* (1983) 48 CCC 443; *Antouri v. WCAB* (2016) 81 CCC 604 (writ denied) for the argument that the Tamir Rice comment was a personal issue and not work related, the harassment perception was subjective, was not an actual event of employment, that Elaine Lister's employment merely provided a stage, that the applicant's perception of racism by Mr. Beardsley could not have been racism because neither Mr. Beardsley nor Dr. Brendel never mentioned the race of Tamir Rice. It can be inferred that the comments were racially motivated.

In the present case it was determined that Elaine Lister's testimony and specific findings by Dr. Brendel show that the employment was an active factor in development of Elaine Lister's psychiatric injury (*Georgia-Pacific Corp. v. WCAB (Byrne)* (1983) 48 CCC443). Many of the comments were made during the review of the applicant's probation report dated 01/25/2019.

This WCALJ determined that Ms. Lister was credible in her testimony. It is believed that the comments regarding Tamir Rice were made by Mr. Beardsley. The facts regarding Tamir Rice being shot and killed were so widely publicized that most people in our country would understand that Tamir Rice was an African American. In the totality of the evidence, including the testimony of Elaine Lister, the testimony of John Beardsley and the reporting of David Brendel, It is believed that Mr. Beardsley did make the comments during the review of the probation report.

Even if it was construed that the comments were not an actual event of employment, there were other events such as Elaine Lister's discussion of Jamie Masuda being promoted and Ms. Beal passing probation (Joint exhibit 14, page 3) even though Mr. Beardsley complained that they did not work up to standard, and additional statements that the work she was confronted with was "simple and uncomplicated." This was construed as veiled discrimination or racism. Additionally there was job opening in which she received 99 applications. She proceeded with her selection using due diligence and she selected an African-American in which Mr. Beardsley accused her of selecting less than qualified candidates and forced her to obtain 5 more applicants. Mr. Beardsley became quite angry and chastised her and advised her that the candidate was not the best selection and that the candidate probably ran away from another state and that the applicant not pass reference and background checks. He also stated that the candidate was probably accused of criminal activity and drug abuse and probably ran away from Louisiana to escape prosecution.

Additionally, there was the events surrounding a candidate, Eric Creer, an African-American who applied to be an investigator (MOH, SOE 04/06/2023, P. 10, lines 3-8). Mr. Beardsley said that Mr. Creer would never get a job in his unit.

It was felt that the Tamir Rice comments were personnel action. It has been determined that "a personnel action is conduct either by or attributable to management and includes such things as done by one who has the authority to review, criticize, demote, or discipline an employee." *Larch (Fleming) v. Contra Costa County* (1998) 63 CCC 831 (significant panel decision); *Stockman v. State of California/Department of Corrections* (1998) 63 CCC 1042 (significant panel decision).

CREDIBILITY DETERMINATIONS

The petitioner argued that the determinations regarding credibility are not supported by the evidence. It was argued that the judge's findings on credibility can be rejected by the board on the basis of contrary evidence of considerable substance *Lamb v. WCAB* (1974) 39 CCC 310, 314

(Reconsideration, P. 19, lines 14-5). Additionally, if there are contradictions in applicant's testimony or the applicant gives a false history to the doctors, the Board may find that the applicant is not credible (*Los Angeles Unified School District v. WCAB (Henry)* (1981) 46 CCC 94). It was further argued that applicant contradicted own testimony regarding Wendell Turner and the applicant failed to advise the Panel QME regarding prior stress claim with similar allegations to the current claim. The petitioner that there were no instances where Mr. Beardsley had difficulty remembering material fact or where Mr. Morikawa lacked knowledge.

The applicant testified regarding Wendell Turner and comments by Mr. Beardsley (MOH, SOE, 04/06/2023, P. 10, lines 11-16). On that same page there is testimony regarding Eric Creer (MOH, SOE, 04/06/2023, P. 10, lines 3-8). It appears that the petitioner may have confused the discussion of these two events or that there possibly was an error in Dr. Brendel summarizing the two events. This WCALJ could discern no contradiction from the applicant in this regard. In either case Mr. Beardsley made comments in the process of two candidates that were negative, demeaning, and perceived as racially motivated. The applicant did not contradict herself.

The applicant may not have told Dr. Brendel about a prior claim of harassment or treatment for a psychiatric condition, but she told the doctor she had not prior claims of harassment not hostile work environment. She testified to never having a claim like this one on a previous occasion (MOH, SOE, 04/06/2023, P. 10, lines 5-9). At trial she did testify to having time off and some claims in 1993-1994 (MOH, SOE, 04/06/2023, P. 10, lines 9-12). She also recalled being sexually harassed and she did not know if she treated or took medications, but she talked about it with Dr. Brendel and in deposition. She did not remember details as it was 30 years ago (MOH, SOE, 04/06/2023, P. 10, lines 14-17). The applicant testified truthfully at trial and appears to have discussed with Dr. Brendel. Additionally, Dr. Brendel was sent records that were considered in his determinations on causation in his August 17, 2022 report (Joint exhibit 17). The applicant reasonably, accurately, and honestly testified and she did not try to hide anything.

With regards to testimony by Mr. Beardsley, in cross-examination (MOH, SOE, 06/14/2023, P. 13, lines 7-10) Mr. Beardsley testified that within Elaine Lister's Personnel file (regarding an earlier job) there was a very negative evaluation and there was mention of manic behavior, being confrontational, and missing days and assignments. In cross-examination on day 4 on remote basis, Mr. Beardsley testified (after reviewing prior probationary report in exhibit A) that manic, confrontational, and unexcused absences did not appear in those documents, but that

she had trouble completing work due to personal issues (MOH, SOE, 07/27/2023, P. 2, lines 23-25).

Mr. Beardsley testified that he could not recall if there was only one probationary report from August 2018-June 10, 2019 (MOH, SOE, 08/31/2023, P. 2, lines 16-18). I believed that he should have remembered that there was only one probationary report. Only after he was provided with a probationary report dated 01/25/2019 did he remember only one report was prepared.

Mr. Beardsley could not recall if four of 5 staff members had applied for the position of supervisor (that Elaine Lister eventually was assigned to) and could not recall after the four names that the applicant counsel read to him had applied to the position (MOH, SOE, 08/31/2023, P. 4, lines 1-3) and couldn't recall if there was no supervisor for a year and could not recall if Ms. Lister replaced a supervisor (MOH, SOE, 08/31/2023, P.4, lines 3-4). After he was shown an e-mail dated 10/05/2018 did he state that after a full year of employees not having a direct supervisor in southern California and being partly supervised from Northern California unit, he started hearing complaints from employees (MOH, SOE, 08/31/2023, P.4, lines 10-12).

Mr. Beardsley stated he was not 1.5 years behind on his work (MOH, SOE, 08/31/2023, P. 9, lines 11-12). Mr. Morikawa confirmed that he informed supervisors that Mr. Beardsley was behind in his work. It was noted that Dr. Brendel in his 08/10/2021 report (Joint exhibit 14, last paragraph) noted that Mr. Beardsley was 1.5 years behind in his work. Mr. Morikawa may have said that Mr. Beardsley was 1.5 years behind in his work, but he was not sure (MOH, SOE 11/30/2023, P. 7, lines 12-13). There is sufficient direct and circumstantial evidence to infer and conclude that Mr. Beardsley was behind approximately 1.5 years in his work.

With regards to finding that Mr. Morikawa was not credible due to lack of knowledge, the following analysis is offered:

Mr. Morikawa testified on the final day of trial, 11/30/2023 (EAMS Doc ID 77420263). Mr. Morikawa did not observe Ms. Lister's methods she tried to implement, he could not speak to Ms. Lister being untimely (MOH, SOE 11/30/2023, P.4, lines 2-4). Mr. Morikawa testified that applicant tended to aggravate situations based on limited exposure he had with her (MOH, SOE11/30/2023, P.5, lines 12-13). Mr. Morikawa worked in the Sacramento and visited the Riverside office where Ms. Lister worked only once and he could not recall if he met with her then (MOH, SOE11/30/2023, P. 6, lines 10-12). Mr. Morikawa did not witness interaction between Ms. Lister and her staff at meetings (MOH, SOE 11/30/2023, P.5, lines 20-21). He did not recall if Ms.

Lister sent him an e-mail regarding feeling sick and he did not recall an e-mail sent to him dated February 22, 2019.

Mr. Morikawa did not recall if there was a staff meeting that was to take place and did not recall her [Ms. Lister] claim of hostile work environment or hostility from the staff members. He did not recall if Ms. Lister asked for a performance management representative to be present at the meeting (MOH, SOE 11/30/2023, P. 8, lines 19-21). He was aware that Ms. Lister filed a workers' compensation claim but did not recall the details or allegations ((MOH, SOE 11/30/2023, P. 8, lines 10-12).

There were two instances that involved Mr. Beardsley reportedly interfering with Elaine Lister hiring an African American after selecting that person and he was not aware of an instance where Mr. Beardsley may have assigned staff member a task to investigate Patton Hospital ((MOH, SOE 11/30/2023, P. 11, lines 7-9, 13-15).

It was determined that Mr. Morikawa had insufficient independent knowledge of the fact that would help in the determination of causation in light of findings from panel QME Dr. David Brendel.

The trial judge's credibility determination should be given great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505].) There was also no evidence of considerable substantiality that should warrant rejecting the WCJ's credibility determination.

V

RECOMMENDATION

It is respectfully recommended that the applicant's Petition for Reconsideration be denied.

Respectfully submitted,

DATE: 02/26/2024

Eric Thompson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

PROCEDURAL HISTORY

The case started trial with Judge Thorne on 10/18/2022. The stipulations, issues, and exhibits were confirmed as being accurate and correct. The exception was applicant's exhibit 4, EAMS DOC ID 45795573. The exhibits listed from the October 18, 2022 were considered admitted and the case started as a new trial on April 6, 2023.

There were 6 days of trial with the undersigned: 04/06/2023, 05/17/2023, 06/14/2023, 07/27/2023, 08/31/2023, and 11/30/2023. The case was considered submitted on 11/30/2023.

STIPULATIONS

Elaine Lister, born [], while employed during the period 8/13/2018 through 6/10/2019, as a Supervising Investigator I, at San Bernardino, California, by the Department of Public Health, claims to have sustained injury arising out of and in the course employment to her nervous system, stress and psyche.

At the time of injury the employer was legally uninsured and administered by State Compensation Insurance Fund. The employer has furnished some medical treatment.

ISSUES

1. Injury arising out of and in the course employment.
2. Good-faith personnel action defense.

INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

The applicant had the burden of proof since it was denied and must meet the evidentiary burden of proof by a preponderance of evidence. The burden rests with the employee to prove his or her claim and all necessary elements. The employee has the initial burden of proving that the injury arose out of and in the course of the employment. *Wehr v. WCAB* (1985) 50 CCC 165. In short, the applicant had the burden of proving she was injured and her entitlement to all benefits.

The applicant did testify. It is found that the applicant was credible after observing her demeanor, reviewing the entire record of exhibits, hearing testimony, and comparing testimony to medical reporting. The applicant was consistent and credible.

Labor Code 3600 necessitates liability for injury "arising out of" and "in the course of" employment. If both conditions are met, the injury is or may be compensable unless barred by a legal theory.

Employment and the injury must be linked in some causal fashion to be industrial. *Madin v. IAC (Richardson)* (1956) 21 CCC 49, 50; *Maher v. WCAB* (1983) 48 CCC 326, 329; *LaTourette v. WCAB* (1998) 63 CCC 253, 256; *South Coast Framing, Inc. v. WCAB (Clark)* (2015) 80 CCC 489.

Pursuant to Labor Code 5705, "The burden of proof rests upon the party or lien claimant holding the affirmative of the issue." The applicant has the affirmative on proving injury arising out of employment and in the course of employment (AOE/COE). Evidence can be offered in multiple forms. It could be in the form of testimony or documents.

Labor Code 3202.5 requires all parties and lien claimants to meet the evidentiary burden of proof on all issues by a "preponderance of the evidence." This means "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth."

Pursuant to Labor Code 3208.3(b) (1) an employee shall demonstrate by a preponderance of evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury.

David Brendel was the panel QME in psychology. He wrote a response dated June 11, 2020 to a request to produce a Rolda analysis. In this report of June 11, 2020 (Joint Exhibit 13), page 7, Dr. Brendel concluded that the applicant's psychological injury was predominantly cause by her employment. He explained that he found the applicant credible and that his findings were consistent with medical records provided by Kaiser Permanente that indicated the applicant suffered from depression and anxiety.

In the August 10, 2021 report of Dr. Brendel (Joint Exhibit 14), Dr. Brendel broke down causation as follows:

1. 35% to racism
2. 35% to false allegations
3. 15% to being set-up
4. 10% to harassment and disparagement
5. 5% to non-industrial financial concerns

Dr. Brendel amended his causation findings in his August 17, 2022 report (Joint exhibit 17) as follows:

1. 30% to racism
2. 30% to false allegations
3. 15% to being set-up
4. 10% to harassment and disparagement

5. 10% to past industrial claim
6. 5% to non-industrial financial concerns

Based on the credible testimony of the applicant and the opinions of Dr. Brendel, the applicant's psychological injury was predominantly caused by her employment, work environment stress.

It should also be noted that the subpoenaed records from Kaiser (Applicant's exhibit 3) included a report from Errinn Bixby/Western Psychological Network dated 07/22/2019, about 1.5 months before the denial of claim from defendant on 09/06/2019. There is no indication that this report is not admissible. Dr. Bixby concluded that:

...within a reasonable medical certainty, that the patient's work environment (hostility from her subordinates, including yelling at the patient, berating her, and refusing to complete work she assigned, as well as hostility from her supervisors, including Mr. Beardsley treating her differently than the other supervisors, threatening her, and refusing to support her, as well as Mr. Morikawa, speaking negatively about her in front of her subordinates, and refusing to support her) was the predominant (greater than 51 %) factor as to all causes combined of the psychiatric injury.

Dr. Bixby also stated that her psychological injuries are directly related to the events of her employment as described herein and this claim is compensable as the psychological injury occurred in connection with, as a consequence of, and a function of the above described hostile work environment. Elaine Lister was consistent in her testimony and medical reporting.

Based on the reporting of Dr. David Brendel and the reporting of Errinn Bixby/Western Psychological Network dated 07/22/2019, the predominant cause of the applicant's psychiatric injury were the actual events of her employment by a preponderance of evidence.

GOOD FAITH PERSONNEL ACTION DEFENSE

The applicant has the initial burden of proving a psychiatric injury. The burden then shifts to the defendant to establish a good-faith personnel action defense.

In the decision of *Rolda v. Pitney Bowes, Inc.*, (2001) 66 CCC 241 (appeals board en banc), the appeals board enumerated a multilevel analysis for cases in which the employee claims a psychiatric injury and the defense of a lawful, nondiscriminatory, good-faith personnel action has been raised. The process is:

1. The WCJ must determine whether the alleged psychiatric injury involves actual events of employment, and if so,

2. Whether competent medical evidence establishes the required percentage of industrial causation.
3. The WCJ must then decide whether any of the actual employment events were personnel actions. If so,
4. The WCJ must next determine whether the personnel action or actions were lawful, nondiscriminatory and made in good faith.
5. If all the criteria are met, competent medical evidence is necessary regarding causation: whether or not the personnel action or actions are a substantial cause, accounting for at least 35 to 40 percent, of the psychiatric injury.

Using the August 17, 2022 report of Dr. Brendel regarding causation, Dr. Brendel assigned 30% causation to racism. The applicant was consistent with regards to instances that she construed as racism by her supervisor John Beardsley: that Tamir Rice deserved to die after being shot by police, accusing Ms. Lister of selecting a non-qualified applicant for open position (who was African-America), and suggesting the candidate ran away from another state instead of choosing California for treatment of child, and Ms. Lister felt as if they also involved racially motivated comments or suggestions. The actions are construed as actual events of employment. There has also been a finding of the required predominant cause. The actions were by management or person in management, John Beardsley. It is found that the actions by Mr. Beardsley were not objectively reasonable and in good faith.

Dr. Brendel assigned 30% to there being false allegations. Most of the allegations are included in the 01/25/2019 probation report. There were statements that Elaine Lister was overbearing and demanding, feedback from staff was negative, that there were many last minute requests for time off, making unapproved policy changes, failure to de-escalate or diffuse negative situations. Staff and Mr. Beardsley reportedly filed a workplace violence report against her. There was also another incident in which Patton State Hospital was investigated at request of Mr. Beardsley and Ms. Lister was blamed for the unauthorized actions.

These are considered actual events of employment as they were in a probation report or occurred at work and were directly aimed at Ms. Lister. They are personnel actions as they were completed by or pursuant to Ms. Lister's direct supervisor. On the one hand a supervisor should be able to perform functions of being a supervisor such as preparing performance reviews. On the other hand the reports should be authored in a careful and honest manner and be as accurate as

possible. Mr. Beardsley was not considered credible and the statements and assertions in the probation report although appeared lawful, they did not appear nondiscriminatory or in good faith. Elaine Lister was considered credible and her testimony was consistent over the course of 6 days of trial and with the medical records in the case.

Dr. Brendel concluded that the 15% causation of the applicant's psychiatric injury was due to being set up. This was explained as Mr. Beardsley having a ploy of hiring Ms. Lister so that he could deflect hostility from him to her. This would not be considered a personnel action. Mr. Beardsley was found not credible but it cannot be reasonably inferred or concluded that he had this master plan to hire Elaine Lister to deflect anger from him to her.

Dr. Brendel attributed 10% of the cause of the psychiatric claim to harassment and disparagement after being embarrassed. Mr. Beardsley was behind in his work 1.5 years. Elaine Lister helped by getting the backlog tasks completed. Mr. Beardsley was angered and upset and he had growing resentment towards her. This would be considered an event of employment and may have been a personnel action as it was due to action of the supervisor, John Beardsley. This did not appear to constitute lawful, non-discriminatory good faith personnel action.

Dr. Brendel assigned 10% causation to past industrial claim and 5% to non-industrial claims.

The applicant carried the burden of proving that actual events of employment were predominant as to all causes combined (70%). The defendant did not carry the burden of proving that the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel actions. The claim is not barred by LC 3208.3(h).

It was determined that John Beardsley was not credible based on his demeanor, difficulty remembering material facts and the WCALJ observations during trial. Mr. Morikawa had limited knowledge of many of the events. Mr. Morikawa was found not to be credible based on his lack of knowledge and observations of the WCALJ at trial.

SUBSTANTIAL MEDICAL EVIDENCE

The parties jointly offered Panel QME reports from David Brendel Ph.D. as joint exhibits.

Substantial medical evidence is 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 Hospital v. WCAB (Bolton)* (1983) 48 CCC 566, 568; *Teitelbaum*

v. WCAB (Bowen) (1997) 62 CCC 1527; *Insurance Co. of North America v. WCAB (Kemp)* (1981) 46 CCC 913; *Skip Fordyce, Inc. v. WCAB (Barry)* (1983) 48 CCC 904.

A medical report is not substantial evidence unless it offers the reasoning behind the physician's opinion, not merely his or her conclusions. *Granado v. WCAB* (1968) 33 CCC 647, 653; *E.L. Yeager Construction v. WCAB (Gatten)* (2006) 71 CCC 1687, 1691. If a medical report contains no medical history from an injured worker, it will not be considered substantial evidence. *West v. IAC (Best)* (1947) 12 CCC 86.

The reports of psychological panel QME David Brendel are collectively considered substantial medical evidence. He reviewed applicant's deposition transcripts, interviewed and examined her, reviewed medical reporting and took an extensive medical history. The reports of David Brendel and conclusions are reasonable in nature, credible, and of solid value. It is substantial medical evidence. They constitute substantial medical evidence.

CONCLUSION

The applicant had the affirmative of proving injury. The applicant did prove injury arising out of and in the course of employment. The reporting of Panel QME report from David Brendel dated June 11, 2020, August 10, 2011, and August 17, 2022 and the credible testimony of Elaine Lister were more persuasive than the testimony of witnesses John Beardsley and Eric Morikawa. The defendant did not carry the burden of proving that the personnel actions were lawful, nondiscriminatory and made in good faith. Therefore, the WCJ finds that the applicant did carry her burden of proving the actual events of employment were predominant to all causes by a preponderance of evidence.

DATE: 01/25/2024

Eric Thompson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE