

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

MARIA GARIBAY, *Applicant*

vs.

COUNTY OF LOS ANGELES, permissibly self-insured, *Defendants*

**Adjudication Number: ADJ8984416
Santa Ana District Office**

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

Applicant seeks reconsideration¹ of the Findings and Award, issued by the workers' compensation administrative law judge (WCJ) on December 28, 2023, wherein the WCJ found that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her psyche, but that applicant's recovery is barred by the good faith personnel action defense of Labor Code section² 3208.3.

Applicant contends that defendant did not meet its burden of establishing the good faith personnel action defense. Although not a model of clarity, it appears that applicant also contends that the WCJ erred in finding her physical injuries barred by the good faith personnel action defense or, in the alternative, that the record should be developed with respect to applicant's cardiovascular condition.

We have not received an answer from defendant. 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 and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons discussed below, we will

¹ A signature is missing from applicant's Petition, Supplemental Petition, and both verifications. In the future applicant's attorney should ensure that they comply with Labor Code section 5902.

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

grant applicant's Petition, rescind the WCJ's December 28, 2023 Findings and Award, substitute new findings, and return the matter to the WCJ for further proceedings consistent with this decision.

BACKGROUND

We will briefly review the relevant facts.

Applicant claimed injury to her psyche and hypertensive cardiovascular disease (or hypertension?) while employed by defendant as a medical secretary, during the period up to January 15, 2013.

On September 10, 2014, the matter trial proceeded to trial on the following issues, WCJ Clift presiding:

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

(Minutes of Hearing and Summary of Evidence (MOH/SOE), September 10, 2014 trial, p. 2.)

Applicant testified at trial (MOH/SOE September 10, 2014 trial, pp. 3-10), as did co-workers Susana Barron (*Id.*, at pp. 10-13) and Sue Rizzo (*Id.*, at pp. 13-16). No other witnesses were called to testify at trial.

The WCJ summarized applicant's testimony as follows:

Since August of '87 applicant testified that she has been employed by Harbor UCLA Medical Center. She began working there as a student worker for six months. In 1988 she was promoted to an intermediate clerk. After this she transferred to neurology for nine years, and after returning to school in 2002 was placed in orthopedic surgery.

When presented with Applicant's Exhibit 1 she states that she has seen it before. It is a yearly evaluation. 2011 was the last year she had an evaluation. She agrees that the exhibit states that overall she was competent at her job duties. She says she has never gotten an evaluation that was anything less than competent.

Currently she is a medical secretary and resident program coordinator. She worked with residents at the hospital processing residents' applications and checking to see if licenses were up to code. She downloaded, printed, and reviewed applicants' applications for residencies, set up interviews with applicants, and coordinated them. She also coordinated an annual alumni event, worked with union representatives, and had other job duties which she does not recall.

When presented with Exhibit 2 applicant acknowledges that that is her signature on the document. Since 2005 she has been the residency coordinator.

(MOH/SOE September 10, 2014 trial, p. 3.)

Francis Sabella was the initial residency coordinator and she was an assistant to her for her duties. Once Frances (sic) Sabella retired, applicant took her position.

She worked with Dr. Kwong and states that in 2008 after becoming full time she had a problem with him. She states that he was in the office less than when he was full time than he was part time, and it took him longer to return items to her that she needed. Her complaint was he wasn't there when she needed him.

She was involved in a meeting with him. She states that when she told this to him he was upset and yelled at her. She feels since 2008 they have had a love/hate relationship. She believes that he was intimidated by her and that she was keeping track of his time and whereabouts.

She describes the relationship with Dr. Kwong as a roller coaster. She never filed a civil claim due to any harassment by him.

She claims that she's also a victim of sexual harassment. She states she submitted a claim of this to her employer. At lunch where Susana and Dr. Kwong and others were present he would make comments about his girlfriend and what he did with her which made her uncomfortable.

She states that in 2012 Dr. Kwong accused her of not performing her duties. She complained to Sue Rizzo about the harassment and states that nothing ever happened. She states that she was contacted by HR.

HR had told her that Susana had reported her for threatening her, and they transferred her to a different department. She talked to Hasan who is the HR department assistant. She was then sent to a different department.

She told the new supervisor, Kathy Taylor, that she just couldn't be there emotionally. She was not well enough to be there at that time and just couldn't be there. She wanted to see a doctor.

She went back to human resources who directed her to see her primary care physician, and it was her primary care doctor who then took her off of work.

Her main complaint was that Dr. Kwong has harassed her since 2008. She went off work for six weeks for psychological issues during this time. Dr. Kwong had a meeting then with program director Daniel Zinar.

(MOH/SOE September 10, 2014 trial, p. 4.)

She states that her relationship with Ms. Rizzo and Ms. Barron is a coworker relationship. She states that around Christmas time Sue was sick and only her and Susana were in the office. They had to work on a Friday.

She states that she agreed with Susana that she would take time off work if Sue came back from sick leave. She states that Sue said she would be back and that she texted Susana and said she would not come in then.

She returned back on January 7th. Sue and Susana were both at work and inquired where she was for the past three days. She states that she went to her desk and worked.

The following week she received a call from HR wherein they had said that Susana had said that applicant had threatened her. Human resources said it would be a two to three week investigation but she has not heard back from them yet.

She states she has been depressed at home, seeing a psychiatrist, and currently takes sleep medications and other pills.

On January 15, 2013 she states this was the day she was transferred. She recalls going to see Dr. Leckart. She is currently treating. As far as she knows she is still employed.

She was a staff assistant in 2002. She states that Francis Sabella was the resident program coordinator in 2005. When she became a resident coordinator, she states that she never received an assistant.

She says in 2008 Dr. Kwong became a full-time employee of the department, that he was part time when he started. Dr. Kwong's duties are that he's the program director. He continues to work in that capacity. He had physician duties and currently still has them.

Daniel Zinar was his supervisor who was also a doctor. Dr. Zinar was chairman of the department. Applicant states Dr. Zinar was demoted from chairman around 2011/2012. Dr. Kwong took his position as an interim chairman. She's not sure of his duties as she did not work with Dr. Zinar.

(MOH/SOE September 10, 2014 trial, p. 5.)

She states that Dr. Kwong did have ongoing physician duties. She believes he specializes in arthritis and knee replacements, and that he also worked in the operating room at the clinics. She states he had clinic two times a week.

(MOH/SOE September 10, 2014 trial, pp. 5-6.)

2008 was the first time that she had a conflict with Dr. Kwong. She states that he wasn't there and she complained, and she also noted he was there more as a part-time employee than when he was full time.

Her regular job hours were 8:00 a.m. to 4:30 p.m. Monday through Friday. She says when Dr. Kwong was not there she would contact him on his cell. She would text him or call him. She states she e-mailed him occasionally if she needed to forward him something and that she could easily reach him if he was needed.

She says between 2008 and 2012 she had some confusion in the department as to who was her supervisor. She believes Sue Rizzo was her supervisor at the time.

In 2011 or 2012 Dr. Kwong became the interim chairman. He was her supervisor that she ultimately was responsible to.

She recalls a meeting in 2012 regarding her job performance. It was the first time she had had a meeting about this subject. She states that Dr. Kwong called the meeting and present were Dr. Zinar, Dr. Kwong, Sue Rizzo, and a union rep. She says nothing came out of the meeting. As a result of it, she states that her relationship with Dr. Kwong became worse and she felt the harassment became stronger.

She states Dr. Kwong's allegations of her not doing certain parts of her job were not true. In 2011 she wrote a letter to Dr. Kwong's supervisor about the relationship and continued working during that time.

She says the specific allegations were that she was not submitting or completing applications to a website. She states that she was not punished as a result of the meeting.

She states that she believes Sue Rizzo is an employee of L.A. Biomed and is a staff assistant. She always believed that Sue Rizzo was her supervisor until that meeting.

She states in January of 2012 that all leave would need to be through Dr. Kwong as he was the supervisor. Dr. Kwong told her to come to him with issues. She states that this was all related to her in a different meeting which was after the first meeting regarding her job performance.

(MOH/SOE September 10, 2014 trial, p. 6.)

She states that Ms. Rizzo was off work just before Christmas of 2012. She states that the Christmas season is not as busy, that it picks up around January 1st. She says November and December around the holidays are a little slower.

(MOH/SOE September 10, 2014 trial, pp. 6-7.)

She states that in January applicants come in for interviews which is why the work increases. In 2013, the second week of January, applicants would be arriving for interviews. She states that the applicants are putting in applications for the residency program and are medical graduate students.

On average she gets about 350 to 400 applications and often the hospital will interview 70 to 75 applicants. The applicants come to Torrance from all over the United States.

As far as a part of her duties in preparing for the interviews she would coordinate the interview schedules and also coordinate with the cafeteria to provide snacks. She states that the interview process is a panel of 12 physicians and states it is very busy before the interviews.

She states on December 26, 2012 she was told that Ms. Rizzo was sick and would be out all week. She says that Susana Barron told her this. She is a staff assistant, and would help Ms. Rizzo. She's not completely sure what her duties were.

Before January of 2013 she states that she had taken vacation time before. She gets six weeks of vacation a year. She said to process a vacation request she would let Sue or Susana know she was taking time off. The longest time she had taken off prior to January 2013 was a week. She had to work her vacations around the busy times there and would often coordinate this with others.

She states that Sue, Susana, or Dr. Kwong could contact her while she was on vacation if something was needed. She states there was no form to fill out for requesting time off.

When asked if the seniority of job duties ran from Dr. Kwong to Ms. Rizzo to her to Ms. Barron she states she is not sure what order to put it in as to seniority. She states that Ms. Barron is Ms. Rizzo's assistant.

(MOH/SOE September 10, 2014 trial, p. 7.)

She states that she spoke to Mrs. Barron on December 26th. She stated that Sue Rizzo had pneumonia and was out. The applicant told Susana Barron that she would be off January 2nd, 3rd, and 4th. She states that on the 2nd, she sent a text message to Susana that she would be off. Monday she came back to work. Sue confronted her when she came back about her absence saying that she didn't tell her that she was going to be off. She stated that Susana had denied having any conversation about any time off with her. She says that Susana was banging on the desk. She stated that Susana denied the conversation. So she went back to her desk and continued to work. She said by Wednesday there was no stress in the air and there were no problems.

That Friday and Saturday she worked 12 hours doing interviews with the new applicants. On Monday, after the interviews, or Tuesday, HR called and asked her to bring them her keys. When she went to HR, she met with Hasan. He stated that Susana told him she was threatened by her, and that she was being transferred to a new department pending an investigation. The investigation was supposed to take two to three weeks. The following day, she was to report to Kathy Taylor. Hasan had said not to go on the 4th floor where Susana worked. Kathy Taylor was located on the 4th floor so she had to go there. Kathy was telling her about the new job duties, and then she

suddenly broke down. She went back to HR, and they told her to go to her doctor. Her doctor said that she had high blood pressure and took her off work for a month.

She said Susana had packed her stuff up at her desk at the end of two weeks. HR told her to go to the 4th floor to pick her stuff up when she contacted them. She states that she did not because she did not want to go to the 4th floor. Her things were sent to HR where she picked them up. She has not heard from the HR department since.

She states that the transfer was because Susana had stated that she had threatened her. She has no knowledge of any other investigations into her performance at the company.

(MOH/SOE September 10, 2014 trial, p. 8.)

She states she did not threaten Susana. From the time period of December 26th, 2012 through January 13th, 2013, she states that she did not go to the doctor. She worked the 26th through 31st, and then she states that she was off until the 7th. She says that Dr. Kwong was not available that week, but she could have contacted him by text or e-mail. The reason that she did not ask him for vacation time was that it was never a custom to let him know. She would just let the other girls in the office know when she was going to be off.

(MOH/SOE September 10, 2014 trial, pp. 8-9.)

She testifies the August 2012 meeting was regarding her job performance, specifically in regards to updating the A.C.G.M.E. website. Her duties were to graduate residents from the program and enter interns that were coming in into the program into the system. There was a time frame that this had to be done by. There were also case logs that were to be submitted during a specified time frame. She coordinated all the entries into the program. She was the only one who understood the process. She also stated if she wasn't there then things would need to wait.

Regarding the vacation procedure, she said there was no written procedure and none that she knew of. Applicant and the other two employees in the office would just tell each other when they were taking time off. These other two individuals were Susana Barron and Sue Rizzo. She states that she did this for ten years.

She states that in regards to the investigation, she was told that in two to three weeks, she would hear something, but it will be almost two years this January since she has heard from HR. She contacted Hasan several times. He told her that the investigation was ongoing. He said that she would have been working at the new location. She had met the supervisor, but she didn't have an opportunity to do the job duties. So she was unsure of what she would be doing. She knew that it was in the physical therapy department.

She stated that she loved her job, and it made her feel important.

(MOH/SOE September 10, 2014 trial, p. 9.)

For her work in the physical therapy department, she was having it explained when she met with the supervisor there who was going to take her to see the other workers. She was also given a binder with guidelines. This is when she felt she couldn't continue, though, and nothing further was given to her about the job.

(MOH/SOE September 10, 2014 trial, pp. 9-10.)

She is currently still on medical leave of absence.

Hasan in HR didn't tell her what the nature of the threat was, and she has no idea what it is.

(MOH/SOE September 10, 2014 trial, p. 10.)

The WCJ summarized the testimony of applicant's co-worker Susana Barron as follows:

Mrs. Barron testified that she works for L.A. County Harbor UCLA Medical Center. Since 2006, she will have been there eight years in October. She works in the orthopedics department in administration. This was her first job and is her job there currently. Lewis Kwong is her supervisor. He is the interim chairman of the orthopedics department. He has worked with her for six years.

She says that on December 26th, she received a text from the applicant. She was at work. She believes the text said that the applicant was not coming to work. She needed to go to the cemetery. She said she didn't come in on the 27th. She said there was no discussion about any time off in January. She said the process for requesting time off would be to let Dr. Kwong know. She said they would have meetings where it could be discussed, and it was put on a calendar. She states that you were supposed to call Dr. Kwong when you were not going to appear. She said that all vacations were scheduled in advance and put on the calendar. She did not have any authority to give the applicant time off from work. Applicant did not ask her for a day off in January. She states that for vacation, she would let Sue know in advance as Sue was her immediate supervisor.

(MOH/SOE September 10, 2014 trial, p. 10.)

She states that she was present for the argument on 1-7-13. The argument was a result of applicant becoming upset that she did not tell Dr. Kwong that she was taking time off. She kept repeating that she should have told him during the confrontation. She states that when applicant returned to work, Sue Rizzo asked her where she was. Applicant then explained, "I told you that you were supposed to let Kwong know." She states that in the discussion, applicant was very upset. Mrs. Barron then complained to the human resources department because she felt verbally attacked. She said the

conversation with applicant lasted approximately five minutes and that she was surprised by the conversation. She reported this to Dr. Kwong and not HR, and she told them that she felt threatened. Dr. Kwong then reported it to HR. She is not sure what the HR process involves. Between January 7th and 15th, she had professional contact with the applicant, and the air was not as tense.

(MOH/SOE September 10, 2014 trial, pp. 10-11.)

During the time that applicant was off, she would have to do her job duties which consisted of reviewing applications, appointment setup, making sure offices were ready for interviews and making sure that faculty would be present.

He (sic) states that Christmas was on a Tuesday of that year that she recalls. She was at work the day after Christmas. The applicant was also there. She told the applicant that Sue Rizzo was out with pneumonia. She doesn't recall any discussion about taking time off. She says she doesn't recall any message from the applicant about taking any time off, and that she worked on New Years Eve. She believes that she was also there at the same time.

She states on New Years Eve there were no conversations with the applicant about any time off after the New Year. The first text from applicant was after the New Year. She didn't tell anyone about the text as it wasn't her job.

She did her job and applicant's job when she was not there on the day she was out.

Regarding the August 2012 meeting about work performance, she testified that, to her knowledge, it was about the updating of the website. She said that the applicant had not entered some information into the website, and that she had to do it herself.

For the method of taking time off, she would submit a form, and Dr. Kwong would sign it. She states that she puts any vacation requests in in advance. Before the interviews are generally the busiest time of the year for the office. She states that the applicant was always taking time off without requesting it properly in advance. She stated before that the applicant has taken two to three days off whether or not it was approved.

(MOH/SOE September 10, 2014 trial, p. 11.)

Dr. Kwong is head of the department. She says the written policy is that the supervisor approves time off from a written form. Sue Rizzo is her immediate supervisor, the office manager. She says that Dr. Kwong is also her supervisor. She has never contacted Dr. Kwong after working hours, and she has never discussed the applicant's time off with Dr. Kwong.

She states that Sue Rizzo was ill around the end of December. She doesn't recall exactly when she came back. She recalls that applicant was gone when Sue Rizzo came back.

She felt threatened by the applicant when the applicant returned to work after being off in January. She says that the applicant didn't tell them she was gone, and the applicant was upset. She felt that the applicant was giving her a hateful look when she returned.

She had felt threatened by her before. There was a prior issue with a printer where applicant yelled at her. She was instructed to install a printer near applicant's desk. Applicant brought the IT guy over and began yelling at her. She reported this to Dr. Zinar. There was a small meeting because of this incident. She states that she stayed away from the applicant for a few months, but that they had different offices then. She felt disrespected by the applicant. She does not know if anyone else felt threatened by her.

She says the printer issue was not resolved to her satisfaction. She states that she did her job and Dr. Zinar encouraged everyone to get along.

She testifies that on January 7th when the applicant returned to work, she was giving her hateful looks and was saying, "I told you so. I told you," in a loud voice. This was reported to Dr. Kwong on the same day that it happened. She did call the Sheriff's department to have an officer escort her to her car that evening.

She did not know there would be an investigation. She stated that HR called her, and she gave them a statement. She was aware that the applicant was transferred to another department, but she was not sure why.

(MOH/SOE September 10, 2014 trial, p. 12.)

Her statement provided to HR was typed.

(MOH/SOE September 10, 2014 trial, p. 13.)

The WCJ summarized the testimony of applicant's co-worker Sue Rizzo as follows:

Ms. Rizzo testified that she is an employee of Harbor UCLA Medical Center in the orthopaedic department. She has worked there for 43 years. She has been working in orthopedics for 18 years. She is an administrative assistant.

She states that she knows the applicant, and that the applicant is the residency coordinator which is a special position and a full-time job.

She states that Dr. Zinar left as a chair because he was also a trauma surgeon, and it was just too much. He has been the Chairman of Emeritus since 2012. Prior to 2012, Dr. Kwong was the Chief of Joint Replacement and Program Director. He has been the program coordinator since 2008.

She states that the applicant reported directly to Dr. Kwong, who was her direct supervisor. The applicant would mention it to her, though, if she was going to be off. If she was going to take time off, she would discuss it with Dr. Kwong. There was a calendar in the office which was used to track employees' days off. There was also a form to request vacation. This was put into effect around 2012. Prior to that, it was just by use of a calendar. The form was given to each employee. Dr. Kwong would sign off on it. The form came into effect the same time Dr. Kwong became the chairman. Mrs. Rizzo states she would fill out the form and give it to Dr. Kwong to sign. Ms. Barron would do this also. It was mentioned many times to the applicant.

(MOH/SOE September 10, 2014 trial, p. 13.)

Regarding the August 2012 meeting, she states she was present, and the meeting was regarding applicant's work performance. It involved entry of residents into the nationwide management program which was very important. This would occur around July when tracking of the residents would begin. There was a question about her performance in entering this in. She states that Dr. Kwong had talked to the managers of the nationwide database. She said that their records were very deficient, and that the program was in jeopardy. She states that Dr. Kwong and Susana sat and then did the entry then and there. She states that the interns weren't entered in a timely fashion, and there were some other delinquency issues, as well. But the main topic was that the interns weren't being logged properly. She states that applicant did present some evidence that she was doing her job, but the national association had said that it was not done and not done correctly.

(MOH/SOE September 10, 2014 trial, pp. 13-14.)

She testifies that around Christmas of 2012, she had pneumonia and was out for two full weeks. Friday, December 28th, the week of Christmas, is when she returned to work. She did talk to the applicant during the last week that she was out and said she felt that she would be able to come back. Applicant told her that she was going to take that Friday off. Mrs. Rizzo said this was okay. She states the form wasn't done in December because she wasn't there to request the form. She doesn't recall if she was there or not on December 31st. On January 2nd, 3rd, and 4th, applicant did not appear for work, and she did not know where she was. Mrs. Barron had a text that was shown to Mrs. Rizzo which stated that applicant was going to the cemetery.

The week applicant was off was the week prior to the interview of the prospective interns. The applications are reviewed by the faculty two times, and the process was currently going on. Mrs. Barron and her had to take over for the applicant when she was gone even though they had their own duties.

On January 7th when applicant returned to work, she had not known where she was. She states that she might have raised her voice out of frustration when she asked where she had been. She says there was no screaming, but the voices were definitely agitated.

The applicant kept saying "I told you so," while she was pointing at Mrs. Barron during the conversation.

She said that Dr. Kwong was frustrated and upset that the applicant had not called in. Dr. Kwong had gone and contacted HR to see how to proceed, but that she didn't know the exact process that HR would go through. She did give HR a statement.

She states that Dr. Kwong was always available 24/7 by phone and e-mail.

(MOH/SOE September 10, 2014 trial, p. 14.)

Sometimes they would text from the office to communicate. It was easier than phoning.

She had assumed that applicant would have returned to work on January 2nd. She states that prior, the applicant had not been diligent about asking for time off. She talked to Dr. Kwong about reporting it to HR, and he said due to county policy, they would wait until applicant was not there for three days.

She says that there was some frustration with the applicant's work performance and some with Susana Barron, also, because she was having to cover for the applicant. She said that Susana Barron likely made her complaint out of frustration. She stated that after three days of non-appearances is when HR would get involved.

She says that any sexual harassment claim had been dropped. She has never heard Dr. Kwong mention anything inappropriate about any of his girlfriends. She states that Susana Barron has excellent performance and is an honest and good worker.

The policy is if you are off work for three days, your absence would be reported to HR if prior authorization was not given. This would be Dr. Kwong's responsibility, and he did this.

She recalls filling out an affidavit about the confrontation. She states that she had not requested and had not had any time off approved for January.

It is the supervisor's duty to report three unauthorized days off to HR.

She has known Dr. Kwong for 18 years. She works with and around him. They have no relationship outside of work. She has no knowledge of him making any comments of a sexual nature in public. She has never heard him comment sexually on any of his patients. She has never heard of or known anyone to complain about Dr. Kwong making any kind of hostile work environment. She stated that he is very professional.

(MOH/SOE September 10, 2014 trial, p. 15.)

She has never heard Dr. Kwong state he wants to get rid of the applicant.

She recalls two meetings with applicant regarding her performance.

She has never heard Dr. Kwong say get her out of my department. She doesn't believe that he has any personal animosity towards her.

She states that applicant is a union member. She states that the department chair has the ability to reassign workers within their department. Dr. Kwong did take steps to do this. On January 14th, human resources directed applicant to report to a new department. Dr. Kwong requested that applicant be temporarily removed from the department that she was in pending the investigation.

In regards to the applicant's office effects being moved, a new attending physician appeared, and her stuff was blocking his office. That is why they had been removed.

(MOH/SOE September 10, 2014 trial, p. 16.)

The WCJ admitted the following exhibits into evidence:

Exhibit 1: Job Description Performance Evaluation, dated 2-2-2007.

Exhibit 2: Employee's Report of Accident, dated 2-11-2013.

Exhibit 3: Report of Kaiser Permanente, Dr. Gordon, dated 1-16-13.

Exhibit X: AME report of Dr. Bruce Leckart, dated February 10, 2014.

(MOH/SOE September 10, 2014 trial, pp. 2-3.)

At the conclusion of trial on September 10, 2014, the matter stood submitted.

(MOH/SOE September 10, 2014 trial, p. 1.)

On December 1, 2014, the WCJ issued a Finding and Order vacating submission, as follows:

FINDINGS

1. The medical record is incomplete. In order to properly evaluate the applicant's claim and render a decision on the issues presented, further medical records are needed.
2. The medical reporting of Dr. Bruce Leckart does not contain a discussion of whether the personal actions by the employer in this case were a substantial cause of applicant's psychological injury as required by the decision in Rolda v. Pitney [B]owes, Inc. (2001) 66 Cal.Comp.Cases 24 and is therefore incomplete.

ORDER

1. The submission of the case is vacated, and the parties are to augment the medical record by obtaining a supplemental report from Dr. Bruce Leckart.

This matter will be reset for trial on notice, following receipt of the requested documents and will be re-submitted at that time, absent a showing of good cause to the contrary.

(Finding and Order, filed December 1, 2014, pp. 1-2.)

On May 4, 2016, defendant filed a declaration of readiness (DOR) on the issue of:

Matter is post-trial. Judge Clift requested a supplemental report from psychiatric AME, Dr. Bruce Leckart. The report has been issued. The assistance of the WCAB is requested to move the case forward.

(May 4, 2016 DOR.)

On August 18, 2016, without further hearing, the WCJ issued a Findings, Order and Opinion on Decision (August 18, 2016 F&O), as follows:

The above entitled matter having been heard and regularly submitted, the Honorable Jeremy Clift, Workers' Compensation Administrative Law Judge, now decides as follows:

FINDINGS OF FACT

1. MARIA GARIBAY born [] while employed during the period 01-15-2012 through 01-13-2013 as a medical secretary at Torrance, California, by COUNTY OF LOS ANGELES, who was PERMISSIBLY SELF-INSURED, sustained injury arising out of and occurring in the course of employment to her psyche.

2. Applicant's recovery is barred by the good faith personnel action defense of Labor Code 3208.3(h).

ORDERS

IT IS ORDERED that the report of Dr. Bruce Leckart of March 17, 2016 is admitted into evidence as Exhibit "Y".

IT IS FURTHER ORDERED that the applicant take nothing.

(August 18, 2016 F&O, pp. 1-2.)

On September 9, 2016, applicant filed a petition for reconsideration.

On November 8, 2016, the WCAB issued an opinion and order granting petition for reconsideration and decision after reconsideration.³

Accordingly, we will grant applicant's Petition; rescind the F&O; and return this matter to the WCJ to develop the record. On return, the parties should

³ Commissioner Sweeney and deputy commissioner Gondak, who were on the panel that granted the previous petition for reconsideration, no longer serve on the Appeals Board. Other panelists have been assigned in their place.

obtain from the AME a report that sets forth what percentage of causation of applicant's injury can be traced to each of the specific workplace incidents that applicant experienced.

(November 8, 2016, Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration, p. 5.)

On December 14, 2017, defendant filed a DOR. The issues were identified as permanent disability, future medical treatment, AOE/COE, and the following:

Matter is post trial. The Workers' Compensation Appeals Board requested additional information from psychiatric AME physician, Dr. Bruce Leckart. Dr. Leckart's cross-examination occurred on March 22, 2017 and December 12, 2017. The assistance of the WCAB is requested to move the case forward.

(December 14, 2017 DOR.)

On February 27, 2018, the matter proceeded to a status conference. The minutes state:

AME Dr. Leckart has failed to address Rolda issues after court order. Court will appoint IME to address psyche issue. Applicant to provide court with list of medicals provided to Dr. Leckart.

(February 27, 2018 minutes, p. 1.)

On April 5, 2018, the WCJ notified the parties by way of letter that Dr. Miguel Alvarez was appointed as a regular physician and applicant was ordered to attend a medical examination on April 10-11, 2018.

On July 30, 2018, defendant filed a DOR on the issue of good faith personnel action defense, stating:

Defendants have obtained the IME report of Dr. Alvarez since June 27, 2018. Defendants seek WCAB assistance in order to meet and confer with applicant attorney to resolve the case in chief. Defendants will hand serve the report of Dr. Miguel Alvarez at time of hearing.

(July 30, 2018 DOR, original in all-caps.)

On August 13, 2018, applicant filed an objection to defendant's DOR.

On September 18, 2018, the WCJ continued the matter and the minutes state that "IME to be deposed Sep 28." (September 18, 2018 minutes, p. 1.)

On November 13, 2018, the WCJ issued minutes that state:

Dr. Alvarez to review records which D is providing. Parties to provide records to Dr. Alvarez upon receipt from Defendant.

(November 13, 2018 minutes, p. 1.)

On July 29, 2020, defendant filed a DOR on the issue of good faith personnel action defense, stating:

Matter is post-trial. The WCAB ordered further development of the record, pursuant (sic) to which Dr. Miguel Alvarez was appointed as IME. Dr. Alvarez has issued a final report, dated 5/28/20. The assistance of the WCAB is requested to move the case forward.

(July 29, 2020 DOR, original in all-caps.)

On September 29, 2020, the WCJ ordered the matter taken off calendar. The minutes state:

Depo of IME Alvarez 10/22. Parties to file DOR for trial date to resubmit on completion.

(September 29, 2020 minutes, p. 1.)

On February 11, 2021, defendant filed a DOR on the issues of AOE/COE and good faith personnel action defense, stating:

Defendants also rely on the report of 4/10/18.

Matter is post-trial. The WCAB ordered further development of the records, pursuant to which Dr. Miguel Alvarez was appointed as IME. Dr. Alvarez has issued a final report, dated 5/28/20, and his cross-examination was completed on 2/5/21. The assistance of the WCAB is requested to move the case forward.

(February 11, 2021 DOR, original in all-caps.)

On February 26, 2021, applicant filed an objection to defendant's DOR, stating in pertinent part:

The Declaration of Readiness to Proceed is premature. At cross-examination Dr. Alvarez indicated that applicant's condition warranted referral to a Panel QME in internal medicine. Further discovery is required.

(February 26, 2021 objection to DOR, p. 1.)

On March 9, 2021, the WCJ continued the matter for trial. The minutes state:

IME report and depo completed; A/A indicates IME has commented on internal. Matter to return to trial calendar for resubmission of IME, WCJ can then determine if further discovery is required.

(March 9, 2021 minutes, p. 1.)

On May 3, 2021, the matter proceeded to trial. It does not appear that testimony was taken.

The minutes state:

Matter resubmitted with the following exhibits admitted into evidence.

Z - Report of Miguel Alvarez 4/10/18

XX - Report of Miguel Alvarez 2/5/21

YY - Deposition Transcript of Dr. Alvarez 2/5/21

(May 3, 2021 minutes, p. 1.)

On August 9, 2021, the WCJ issued an Order vacating submission and setting the matter for hearing, stating as follows:

The order resubmitting case for decision dated May 3, 2021 is hereby ordered vacated for development of the record. Based on the reporting of Dr. Alvarez, the Court finds that the medical record requires further development as to whether or not Applicant's hypertension is related to her claim of psychiatric injury.

In his deposition testimony, Dr. Alvarez testified that there was a medial possibility Applicant's diagnosis of hypertension is related to or exacerbated by her psychological condition. Dr. Alvarez indicates that a determination of such is outside his specialty and defers comment to the appropriate specialist. (Exhibit YY, page 13 line 1).

The record is silent as to any complaints by Applicant of such as the diagnosis of hypertension is a recent diagnosis. As such, the Court believes that this should be addressed by the appropriate medical specialist, and the parties are ordered to appear at Status Conference to be set on August 23, 2021 at 8:30 A.M. so that the Court may discuss the issue further with the parties and that discovery regarding the issue can be expedited.

(August 9, 2021 Order vacating submission and setting the matter for hearing, p. 1.)

The matter was set for trial on September 11, 2023, but trial was further continued. The minutes state that applicant's attorney objects to submission without a hearing. (September 29, 2023 minutes, p. 1.)

On October 2, 2023, the matter proceeded to trial, although the minutes state that applicant's counsel objected to proceeding on the following grounds:

1. Applicant's counsel indicated he wished to offer testimony of two witnesses; however, one has contacted his office and was unavailable to appear as they have contracted COVID.
2. The scope of the trial, as set by the prior Minutes of Hearing and Summary of Evidence on September 10, 2014, and those issues will be addressed in the Court's opinion.
3. The witnesses will offer testimony germane to the issues, and without their testimony Applicant will suffer a due-process violation by not having heard the testimony of the witnesses when weighed against Defendant's objection that the witnesses were not listed under 5502.

(MOH/SOE October 2, 2023 trial, pp. 2-3.)

The following exhibits were admitted into evidence:

LET THE MINUTES REFLECT that the case previously proceeded on the record, and for the development of the record, the Court entered additional exhibits.

LET THE MINUTES FURTHER REFLECT that there was a document previously marked Exhibit Y; therefore, today's exhibits were relabeled as indicated below.

Z: Report of IME Dr. Miguel Alvarez, dated 4-10-2018.

AA: Report of Dr. Miguel Alvarez, dated 5-28-2020.

BB: Report of Dr. Miguel Alvarez, dated 4-21-2023.

CC: Deposition transcript of Dr. Miguel Alvarez, dated 2-5-2021.

DD: Report of AME Dr. Arthur Lipper, dated 11-17-2021.

EE: Supplemental report of Dr. Arthur Lipper, dated 2-1-2023.

(MOH/SOE October 2, 2023 trial, p. 3.)

No testimony was taken at the October 2, 2023 trial and the matter stood submitted.

(MOH/SOE October 2, 2023 trial, pp. 1-3.)

On December 28, 2023, the WCJ issued the following Findings and Award:

FINDINGS OF FACT

1. MARIA GARIBAY born on [] while employed during the period 01-15-2012 through 01-13-2013 as a medical secretary at Torrance, California, by COUNTY OF LOS ANGELES, who was PERMISSIBLY SELF-INSURED, sustained injury arising out of and occurring in the course of employment to her psyche.

2. Applicant's recovery is barred by the good faith personnel action defense of Labor Code 3208.3.

ORDERS

IT IS ORDERED that the applicant take nothing.

(December 28, 2023 Findings and Award, p. 2.)

DISCUSSION

In order to establish that a psychological injury is compensable, an injured worker must show by a preponderance of the evidence that actual events of employment predominantly caused the psychological injury.⁴ (Lab. Code, § 3208.3(b)(1).)

Once the issue of industrial psychiatric (“psyche”) injury has been established, an employer may seek to have the claim barred from compensation by proving that the psyche injury was substantially caused by lawful, nondiscriminatory, good faith personnel actions. (Lab. Code, § 3208.3(h).) The burden of proof rests with the party holding the affirmative of the issue. (*Id.*) Thus, defendant holds the burden of proving the good faith personnel action (GFPA) defense.

When, as here, a psychiatric injury is alleged and the “good faith personnel action” defense has been raised, the WCJ must evaluate the defense according to a multilevel analysis. (*San Francisco Unified School Dist. v. Workers’ Comp. Appeals Bd. (Cardozo)* (2013) 190 Cal.App.4th 1, 9 [75 Cal.Comp.Cases 1251] (writ den.)) This is often referred to as a *Rolda* analysis, base on *Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241. After considering all the medical evidence and the other documentary and testimonial evidence of record, the WCJ must make the following determinations:

First, the [WCJ] must determine whether the alleged psychiatric injury involves actual events of employment and, if so, whether competent medical evidence establishes the required percentage of industrial causation. If these first two conditions are met, the [WCJ] must then decide whether any of the actual employment events were personnel actions. If so, the [WCJ] must next determine whether the personnel action or actions were lawful, nondiscriminatory, and made in good faith. Finally, if all these criteria are met, competent medical evidence is necessary as to causation; that is, whether or not

⁴ “[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].)

the personnel action or actions are a substantial cause, accounting for at least 35 to 40 percent of the psychiatric injury as defined by section 3208.3(b)(3).

(*Cardozo, supra*, at 9; *Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241, 245-247; see also *County of Sacramento v. Workers' Comp. Appeals Bd. (Brooks)* (2013) 215 Cal.App.4th 785 [78 Cal.Comp.Cases 379].)

As a preliminary matter, 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); see also *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687].) A medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, and not merely their conclusions. (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workmen's Comp. Appeals Bd.* (1970) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *Escobedo, supra*.)

Here, clinical psychologist Miguel Alvarez, Ph.D., spent over ten hours examining applicant, taking a detailed history (Alvarez report dated April 10, 2018, Ex. Z, pp. 2-14; Alvarez report dated May 28, 2020, Ex. AA, pp. 11-16) and performing psychological testing (Alvarez report dated April 10, 2018, Ex. Z, pp. 14-15; Alvarez report dated May 28, 2020, Ex. AA, pp. 16-17). Dr. Alvarez also reviewed extensive medical records, including reports and notes from treaters and other experts. (Alvarez report dated April 10, 2018, Ex. Z, pp. 15-26; Alvarez report dated May 28, 2020, Ex. AA, pp. 17-65; Alvarez report dated April 21, 2023, Ex. BB, pp. 18-19). Dr. Alvarez also reviewed the WCJ's summary of the trial testimony of applicant and her co-workers Susana Barron and Sue Rizzo. (Alvarez report dated April 10, 2018, Ex. Z, pp. 19-24.) In his reports, Dr. Alvarez discussed applicant's history and treatment, provided solid underlying basis for his opinions, and set forth the reasoning behind his opinions. (Alvarez report dated April 10, 2018, Ex. Z, pp. 27-32; Alvarez report dated May 28, 2020, Ex. AA, pp. 65-72.) As such, we find Dr. Alvarez's opinions regarding causation to be substantial medical evidence.

When the GFPA defense has been raised, it is often helpful to break the multilevel analysis into discreet elements:

- (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 competent medical evidence;

(3) if actual events of employment were the predominant cause of the psychiatric injury, whether any of the events of employment were personnel actions;

(4) if so, were those personnel actions lawful, nondiscriminatory and in good faith; and

(5) if so, whether the lawful, nondiscriminatory, good faith personnel actions were a “substantial cause” of the psychiatric injury.⁵

Here, it is undisputed that applicant’s psychiatric injury was caused by actual events of employment. Thus, the next step is to determine “whether competent medical evidence establishes the required percentage of industrial causation.” (*Cardozo, supra; Rolda, supra*, at 245-247.) It is the injured worker’s burden to demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury. “[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].)

Here, Dr. Alvarez broke down the percentages of applicant’s psychiatric injury caused by actual events of employment as follows:

50% to difficulties that began with Dr. Kwong once his position became permanent. Dr. Alvarez eventually broke this down further as 10% due to an annual review on August 17, 2012, which note “improvement needed,” and the remaining 40% to the additional conflict applicant was experiencing with Dr. Kwong.

10% to Dr. Kwong’s communications with sexual content.

10% to interactions with co-workers Susana Barron and Sue Rizzo regarding time off work.

25% to interactions with the Human Resources department following the alleged threat made to Susana Barron.

(Alvarez report dated April 10, 2018, Ex. Z, pp. 10, 28-29; Alvarez report dated May 28, 2020, Ex. AA, pp. 67-69.) As these total 95%, applicant met her burden that actual events of employment were the predominant cause of her psychiatric injury. Defendant raised the GFPA defense, which shifts the burden to defendant and requires us to examine steps three, four, and five.

⁵ 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.”

In *Larch v. Contra Costa County*, the Appeals Board defined personnel action as conduct either by or attributable to management, which includes actions taken by someone who has the authority to review, criticize, demote, or discipline an employee. (*Larch (Fleming) v. Contra Costa County* (1998) 63 Cal.Comp.Cases 831, 833 [“conduct attributable to management in managing its business including such things as done by one in authority to review, criticize, demote, transfer or discipline an employee in good faith.”].)

Three witnesses testified at trial: applicant and her co-workers Sue Rizzo and Susana Barron. All three worked at Harbor-UCLA Medical Center. Applicant was a medical secretary and resident program coordinator in orthopedics. (MOH/SOE September 10, 2014 trial, p. 3.) Although applicant was initially uncertain whether she reported to both Dr. Kwong and Sue Rizzo leading up to 2012, Sue Rizzo testified that applicant reported directly to Dr. Kwong, who was applicant’s direct supervisor. (MOH/SOE September 10, 2014 trial, pp. 6, 12.) Sue Rizzo was an administrative assistant in the same department. (MOH/SOE September 10, 2014 trial, p. 13.) Susana Barron worked with them in the same department, reporting directly to Sue Rizzo as her immediate supervisor and then to Dr. Kwong. (MOH/SOE September 10, 2014 trial, pp. 10, 12.) Dr. Kwong did not testify, but all three witnesses testified that he was head of the orthopedics department, taking over as interim chairman of the department around 2011/2012 and then becoming chairman in 2012. (MOH/SOE September 10, 2014 trial, pp. 5, 12-13.) Dr. Kwong was applicant’s supervisor and head of the department. Based on the evidence, Dr. Kwong had authority to review, criticize, demote, transfer, or discipline applicant, whereas Rizzo and Barron did not have this authority.

We will now look at whether defendant established that the actual events of employment that caused applicant psychiatric injury were also personnel actions and, if so, whether they were lawful, nondiscriminatory, good faith personnel actions. To meet their burden, defendant must show that lawful, nondiscriminatory, good faith personnel actions were a “substantial cause” of applicant’s psychiatric injury, i.e., accounting for at least 35 to 40 percent of the psychiatric injury as defined by section 3208.3(b)(3). We note that not every action taken by someone who has the authority to review, criticize, demote, or discipline is necessarily a personnel action.

Difficulties that began with Dr. Kwong once his position became permanent (50%):

After his initial report, Dr. Alvarez reviewed additional information and broke this category down further, attributing 40% to conflict applicant was experiencing with Dr. Kwong and 10%

due to an annual review on August 17, 2012. Although Dr. Alvarez refers to this meeting as an annual review, applicant and Sue Rizzo call it a meeting. It may well have been applicant's annual review, but her personnel file is not in evidence so we cannot corroborate this. As the only evidence we have before us is the testimony of applicant and Sue Rizzo, we will refer to it as a "meeting" rather than an annual review.

Regarding her working relationship with Dr. Kwong generally, applicant testified as follows⁶:

She worked with Dr. Kwong and states that in 2008 after becoming full time she had a problem with him. She states that he was in the office less than when he was full time than he was part time, and it took him longer to return items to her that she needed. Her complaint was he wasn't there when she needed him.

She was involved in a meeting with him. She states that when she told this to him he was upset and yelled at her. She feels since 2008 they have had a love/hate relationship. She believes that he was intimidated by her and that she was keeping track of his time and whereabouts.

She describes the relationship with Dr. Kwong as a roller coaster. She never filed a civil claim due to any harassment by him.

Her main complaint was that Dr. Kwong has harassed her since 2008. She went off work for six weeks for psychological issues during this time. Dr. Kwong had a meeting then with program director Daniel Zinar.

(MOH/SOE September 10, 2014 trial, p. 4.)

With respect to the meeting in 2012, applicant testified as follows:

[Applicant] recalls a meeting in 2012 regarding her job performance. It was the first time she had had a meeting about this subject. She states that Dr. Kwong called the meeting and present were Dr. Zinar,⁷ Dr. Kwong, Sue Rizzo, and a union rep. She says nothing came out of the meeting. As a result of it, she states that her relationship with Dr. Kwong became worse and she felt the harassment became stronger.

She states Dr. Kwong's allegations of her not doing certain parts of her job were not true. In 2011 she wrote a letter to Dr. Kwong's supervisor about the relationship and continued working during that time.

⁶ Other specific events are discussed in greater detail below.

⁷ Dr. Daniel Zinar was the prior chairman of the department. Dr. Kwong became interim chairman when Dr. Zinar stepped away from the position. (MOH/SOE, pp. 5, 13.)

She says the specific allegations were that she was not submitting or completing applications to a website. She states that she was not punished as a result of the meeting.

She testifies the August 2012 meeting was regarding her job performance, specifically in regards to updating the A.C.G.M.E. website. Her duties were to graduate residents from the program and enter interns that were coming in into the program into the system. There was a time frame that this had to be done by. There were also case logs that were to be submitted during a specified time frame. She coordinated all the entries into the program. She was the only one who understood the process. She also stated if she wasn't there then things would need to wait.

(MOH/SOE September 10, 2014 trial, pp. 6, 9.)

With respect to the meeting in 2012, Sue Rizzo testified as follows:

Regarding the August 2012 meeting, she states she was present, and the meeting was regarding applicant's work performance. It involved entry of residents into the nationwide management program which was very important. This would occur around July when tracking of the residents would begin. There was a question about her performance in entering this in. She states that Dr. Kwong had talked to the managers of the nationwide database. She said that their records were very deficient, and that the program was in jeopardy. She states that Dr. Kwong and Susana sat and then did the entry then and there. She states that the interns weren't entered in a timely fashion, and there were some other delinquency issues, as well. But the main topic was that the interns weren't being logged properly. She states that applicant did present some evidence that she was doing her job, but the national association had said that it was not done and not done correctly.

She states that Dr. Zinar left as a chair because he was also a trauma surgeon, and it was just too much. He has been the Chairman of Emeritus since 2012. Prior to 2012, Dr. Kwong was the Chief of Joint Replacement and Program Director. He has been the program coordinator since 2008.

(MOH/SOE September 10, 2014 trial, pp. 13-14.)

Based on the foregoing testimony, defendant has not met their burden of showing that these interactions with Dr. Kwong were personnel actions. To the extent that the 2012 meeting was an annual review, it may have been a personnel action. However, applicant and Sue Rizzo called it a meeting and defendant did not call Dr. Kwong to testify or offer applicant's personnel file as

evidence. As defendant did not establish that these events were personnel actions, we need not consider whether they were lawful, nondiscriminatory, and in good faith.

Dr. Kwong's communications with sexual content (10%):

At trial, applicant was not presented with extensive questions regarding communications with sexual content or potentially offensive or inappropriate comments about Dr. Kwong's girlfriend. Dr. Alvarez questioned applicant about this more extensively, which we will discuss below. Applicant testified as follows:

She claims that she's also a victim of sexual harassment. She states she submitted a claim of this to her employer. At lunch where Susana and Dr. Kwong and others were present he would make comments about his girlfriend and what he did with her which made her uncomfortable.

(MOH/SOE September 10, 2014 trial, p. 4.)

Regarding communications with possible sexual content, Sue Rizzo testified as follows:

She has known Dr. Kwong for 18 years. She works with and around him. They have no relationship outside of work. She has no knowledge of him making any comments of a sexual nature in public. She has never heard him comment sexually on any of his patients. She has never heard of or known anyone to complain about Dr. Kwong making any kind of hostile work environment. She stated that he is very professional.

She says that any sexual harassment claim had been dropped. She has never heard Dr. Kwong mention anything inappropriate about any of his girlfriends.

(MOH/SOE September 10, 2014 trial, p. 15.)

Dr. Alvarez's 2018 report contain further detail based on his interview with applicant as well as his review of her medical records, including the following:

Ms. Garibay reported that there was a small lunchroom within the department where she, Dr. Kwong, and fellow coworkers Suzanna, Sue, and Griselda would often eat together. She stated that Dr. Kwong frequently made inappropriate comments about shaving his female patients' pubic areas and also about sexual activities he engaged in with his girlfriend. She reported that Dr. Kwong often commented on pubic hair designs that he had seen on patients that he was operating on while performing knee replacements and hip replacements. She reported that no one ever told him that his comments were inappropriate.

(Alvarez report dated April 10, 2018, Ex. Z, pp. 7, 18, 28.)

With respect to the trial testimony, even if Sue Rizzo did not find Dr. Kwong's comments about his girlfriend to be inappropriate, that does not necessarily mean they were not of a sexual nature. Additionally, applicant testified that she submitted a claim and Sue Rizzo corroborated this, testifying that "any sexual harassment claim had been dropped." We have no information as to why it was dropped, whether it was investigated, or the circumstances of the claim. However, the issue here is only whether defendant can show that the communications were personnel actions, not whether they were offensive, inappropriate, or sexual in nature. Defendant has not met their burden here. As defendant did not establish that these events were personnel actions, we need not consider whether they were lawful, nondiscriminatory, and in good faith.

Interactions with co-workers Susana Barron and Sue Rizzo regarding time off work (10%):

The testimony here is confusing and occasionally contradictory. The crux of it appears to be that applicant texted Susana Barron that she planned to take days off work and that Susana did not convey this information to Sue Rizzo, who was then wondering about applicant's whereabouts. Applicant testified as follows about her interactions with her co-workers regarding time off work:

She states that her relationship with Ms. Rizzo and Ms. Barron is a coworker relationship. She states that around Christmas time Sue was sick and only her and Susana were in the office. They had to work on a Friday.

She states that she agreed with Susana that she would take time off work if Sue came back from sick leave. She states that Sue said she would be back and that she texted Susana and said she would not come in then.

She returned back on January 7th. Sue and Susana were both at work and inquired where she was for the past three days. She states that she went to her desk and worked.

(MOH/SOE September 10, 2014 trial, p. 5.)

She states on December 26, 2012 she was told that Ms. Rizzo was sick and would be out all week. She says that Susana Barron told her this. She is a staff assistant, and would help Ms. Rizzo. She's not completely sure what her duties were.

(MOH/SOE September 10, 2014 trial, p. 7.)

She states that she spoke to Mrs. Barron on December 26th. She stated that Sue Rizzo had pneumonia and was out. The applicant told Susana Barron that she

would be off January 2nd, 3rd, and 4th. She states that on the 2nd, she sent a text message to Susana that she would be off. Monday she came back to work. Sue confronted her when she came back about her absence saying that she didn't tell her that she was going to be off. She stated that Susana had denied having any conversation about any time off with her. She says that Susana was banging on the desk. She stated that Susana denied the conversation. So she went back to her desk and continued to work. She said by Wednesday there was no stress in the air and there were no problems.

(MOH/SOE September 10, 2014 trial, p. 8.)

She states she did not threaten Susana. From the time period of December 26th, 2012 through January 13th, 2013, she states that she did not go to the doctor. She worked the 26th through 31st, and then she states that she was off until the 7th. She says that Dr. Kwong was not available that week, but she could have contacted him by text or e-mail. The reason that she did not ask him for vacation time was that it was never a custom to let him know. She would just let the other girls in the office know when she was going to be off.

(MOH/SOE September 10, 2014 trial, pp. 8-9.)

Regarding the vacation procedure, she said there was no written procedure and none that she knew of. Applicant and the other two employees in the office would just tell each other when they were taking time off. These other two individuals were Susana Barron and Sue Rizzo. She states that she did this for ten years.

(MOH/SOE September 10, 2014 trial, p. 9.)

Susana Barron testified as follows about her interactions with applicant and Sue Rizzo regarding time off work:

She says that on December 26th, she received a text from the applicant. She was at work. She believes the text said that the applicant was not coming to work. She needed to go to the cemetery. She said she didn't come in on the 27th. She said there was no discussion about any time off in January. She said the process for requesting time off would be to let Dr. Kwong know. She said they would have meetings where it could be discussed, and it was put on a calendar. She states that you were supposed to call Dr. Kwong when you were not going to appear. She said that all vacations were scheduled in advance and put on the calendar. She did not have any authority to give the applicant time off from work. Applicant did not ask her for a day off in January.

She states that she was present for the argument on 1-7-13. The argument was a result of applicant becoming upset that she did not tell Dr. Kwong that she was taking time off. She kept repeating that she should have told him during

the confrontation. She states that when applicant returned to work, Sue Rizzo asked her where she was. Applicant then explained, "I told you that you were supposed to let Kwong know." She states that in the discussion, applicant was very upset.

(MOH/SOE September 10, 2014 trial, p. 10.)

She was at work the day after Christmas. The applicant was also there. She told the applicant that Sue Rizzo was out with pneumonia. She doesn't recall any discussion about taking time off. She says she doesn't recall any message from the applicant about taking any time off, and that she worked on New Years Eve. She believes that she was also there at the same time.

(MOH/SOE September 10, 2014 trial, p. 11.)

She states that Sue Rizzo was ill around the end of December. She doesn't recall exactly when she came back. She recalls that applicant was gone when Sue Rizzo came back.

(MOH/SOE September 10, 2014 trial, p. 12.)

Sue Rizzo testified as follows about her interactions with applicant and Susana Barron regarding time off work:

She states that the applicant reported directly to Dr. Kwong, who was her direct supervisor. The applicant would mention it to her, though, if she was going to be off.

(MOH/SOE September 10, 2014 trial, p. 13.)

She testifies that around Christmas of 2012, she had pneumonia and was out for two full weeks. Friday, December 28th, the week of Christmas, is when she returned to work. She did talk to the applicant during the last week that she was out and said she felt that she would be able to come back.

On January 7th when applicant returned to work, she had not known where she was. She states that she might have raised her voice out of frustration when she asked where she had been. She says there was no screaming, but the voices were definitely agitated. The applicant kept saying "I told you so," while she was pointing at Mrs. Barron during the conversation.

(MOH/SOE September 10, 2014 trial, p. 14.)

Defendant has not shown that any of these interactions involved personnel actions. As discussed above, neither Susana Barron or Sue Rizzo are applicant's supervisors. Based on the

record, to the extent that Dr. Kwong was involved in these interactions, it related to possible interactions with human resources (HR), which is discussed below. Defendant has not met their burden to show that any of these events were personnel actions. As defendant did not establish that these events were personnel actions, we need not consider whether they were lawful, nondiscriminatory, and in good faith.

Interactions with the Human Resources department (25%):

In addition to applicant's interactions with the HR department, we must also examine the basis for the underlying investigation. After sifting through the trial testimony, these are the pertinent facts: applicant was off work January 2-4, 2013 and, although she texted her co-worker Susana Barron that she would be off, applicant did not notify her supervisor Dr. Kwong. (MOH/SOE September 10, 2014 trial, pp. 8, 10-12.) When applicant returned to the office, she was upset that Susana Barron had not conveyed the texts to Sue Rizzo or Dr. Kwong and pointed at her, saying "I told you." (MOH/SOE September 10, 2014 trial, pp. 10-11, 14.) Susana Barron told Dr. Kwong that she felt threatened, but she did not know there would be an investigation. (MOH/SOE September 10, 2014 trial, pp. 12.) She thinks that Dr. Kwong contacted HR, but she herself did not contact HR. (MOH/SOE September 10, 2014 trial, pp. 12.)

Sue Rizzo testified that she might have raised her voice out of frustration when applicant returned, but there was no screaming. (MOH/SOE September 10, 2014 trial, p. 14.) Sue Rizzo testified that Dr. Kwong was frustrated that applicant had not called in and he contacted HR to see how to proceed. (MOH/SOE September 10, 2014 trial, p. 14.) When HR contacted Sue Rizzo, she gave them a statement about the confrontation. (MOH/SOE September 10, 2014 trial, pp. 14-15.)

The week after these events, HR called applicant and asked for her keys. (MOH/SOE September 10, 2014 trial, p. 8.) When she went to HR, she met with Hasan who told her that she was being transferred to a new department pending an investigation. (MOH/SOE September 10, 2014 trial, p. 8.) She was told that the investigation was because Susana said she felt threatened by applicant. (MOH/SOE September 10, 2014 trial, pp. 5, 8.) The investigation was supposed to take two to three weeks, but the investigation was still ongoing over a year later. (MOH/SOE September 10, 2014 trial, pp. 5, 8-9.)

While it is likely that Dr. Kwong did indeed contact HR, defendant presented no evidence regarding the investigation. We do not know why Dr. Kwong contacted HR, was it to report a confrontation, was it because applicant did not report to work for three days, or was it for some

other reason? Without this information, we cannot assess whether his actions were personnel actions and, if so, whether they were lawful, nondiscriminatory, and in good faith. Defendant did not call Dr. Kwong or Hasan to testify. Nor did defendant produce any records regarding the investigation. As defendant did not establish that Dr. Kwong's actions were personnel actions, we need not consider whether they were lawful, nondiscriminatory, and in good faith. If we were inclined to give defendant the benefit of the doubt and assume, *arguendo*, that the HR investigation was a personnel action, there is no evidence of whether it was lawful, nondiscriminatory, and in good faith. In light of applicant's testimony that she was told the investigation would take two to three weeks, but it was still ongoing a year later, we cannot not safely assume that it was lawful, nondiscriminatory, and in good faith.

Based on the record, defendant failed to establish that 95% of the cause of applicant's psychiatric injuries were personnel actions, much less meet their burden of proof that lawful, nondiscriminatory, good faith personnel actions were a "substantial cause" of applicant's psychiatric injury, i.e., accounting for at least 35 to 40 percent of the psychiatric injury.

In accordance with the constitutional mandate, under article XIV, section 4 of the California Constitution, to accomplish substantial justice, the Appeals Board has discretionary authority to develop the record. However, the Appeals Board also has the discretion to decide the employer has had an adequate opportunity to meet its burden of proof and may therefore enter an order based on the record before it. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393 [62 Cal.Comp.Cases 924]; *King v. Workers' Comp. Appeals Bd.* (1991) 231 Cal.App.3d 1640, 1649 [56 Cal.Comp.Cases 408].) If a party fails to meet its burden of proof by obtaining and introducing competent evidence, it does not accomplish substantial justice to rescue the party by ordering the record to be developed. (*San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Telles Transport Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159 [66 Cal.Comp.Cases 1290].)

Here, defendant had ten years to obtain and introduce competent evidence, but it did not meet its burden of proof with respect to the GFPA defense. It does not accomplish substantial justice to rescue defendant by ordering the record to be developed further.

Turning to applicant's physical injuries, the WCJ's reliance on *McCoy* was misplaced as the cases are factually distinguishable. (*County of San Bernardino v. Workers' Comp. Appeals Bd.*

(*McCoy*) (2012) 203 Cal.App.4th 1469 [77 Cal.Comp.Cases 219]. However, because applicant's psychiatric injury is not barred by the GFPFA defense, we need not discuss *McCoy* further.

The fact that applicant's initial claim of injury in 2014 was solely a psychiatric claim should not operate to bar her claim of hypertensive impairment. WCAB Rule 10517 states that "pleadings may be amended by the Workers' Compensation Appeals Board to conform to proof." (Cal. Code Regs., tit. 8, § 10517.) Thus, where the pleadings are incompatible with the evidence, the WCJ has the discretion to conform the pleadings to proof. (*Memorex Corp. v. Workers' Comp. Appeals Bd. (Kraton)* (1977) 42 Cal.Comp.Cases 458 (writ den.) [WCAB properly found cumulative trauma based on evidence, despite pleaded specific injury].) Here, the parties obtained a QME in internal medicine who opined that applicant's hypertensive impairment is industrial. (Report of Arthur E. Lipper, M.D., dated November 17, 2021, Ex. DD, pp., 5-6; supplemental report of Dr. Lipper, dated February 1, 2023, Ex. EE, pp. 2-3.)

As noted above, the Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler, supra*, at 394; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141 (Appeals Bd. en banc).)

Accordingly, we grant applicant's Petition, rescind the December 28, 2023 Findings and Award, substitute new Findings of Fact, and return the matter to the WCJ for further proceedings consistent with this opinion. Upon return to the trial level, we recommend that the WCJ consider what further development of the record is appropriate with respect to applicant's claim of hypertensive impairment.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Award issued by the WCJ on December 28, 2023 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued by the WCJ on December 28, 2023 is **RESCINDED** and the following **SUBSTITUTED** in its place.

FINDINGS OF FACT

1. MARIA GARIBAY born on [] while employed during the period up to January 15, 2013, as a medical secretary at Torrance, California, by COUNTY OF LOS ANGELES, who was PERMISSIBLY SELF-INSURED, sustained injury arising out of and occurring in the course of employment to her psyche.
2. Applicant's claim of injury to her psyche is not barred by Labor Code section 3208.3(h).
3. All other body parts are deferred.
4. All other issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 22, 2024

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

**MARIA GARIBAY
SOLOV AND TEITELL
LAW OFFICES OF STACEY L. TOKUNAGA
MOSES LUNA
SAAM AHMADINIA
NOGALES PSYCHOLOGICAL
USA PHOTOCOPY SERVICE
UNIVERSAL COPY BELLFLOWER
HARBOR UCLA MEDICAL CENTER**

JB/cs

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