WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JODI VIEIRA, *Applicant*

vs.

KAISER PERMANENTE, PSI, *Defendants*

Adjudication Numbers: ADJ11408575, ADJ14068840
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Workers' Compensation Appeals Board (Appeals Board)[1] issued an Opinion and Order Granting Petition for Reconsideration in these matters on February 5, 2024 (Order Granting) to provide the opportunity for further review of the merits of the Petition for Reconsideration and further reconsideration of the entire record in light of the applicable statutory and decisional law. This is our final Opinion and Decision after Reconsideration.

Defendant sought reconsideration of the October 30, 2023 Findings & Order (F&O)[2] wherein the workers' compensation administrative law judge (WCJ) found in relevant part that in ADJ11408575, applicant sustained injury in the form of stress, psyche, and nervous system while employed by defendant as a registered nurse during the period from January 16, 2018 through July 2, 2018; that defendant did not sustain its burden to establish that applicant's injury claim was barred by the good faith personnel action provision of Labor Code[3] section 3208.3, subdivision (h) (section 3208.3(h)); and that the opinion of the Court of Appeal is not res judicata/collateral estoppel.

Defendant contends that the January 25, 2018 meeting and subsequent corrective actions including termination were personnel actions and that they were lawful, non-discriminatory and in

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[1] Deputy Commissioner Schmitz was on the panel that issued the Order Granting in this matter but is unavailable to serve on the panel at this time. Another panelist has been assigned in her place.

[2] We note that the F&O was issued only in ADJ11408575 and denied applicant's request that ADJ14068840 be included for trial and adjudication. (Minutes of Hearing and Summary of Evidence (MOH), October 19, 2023, p. 2.) The WCJ took ADJ1408840 off calendar.

[3] All further references are to the Labor Code unless otherwise noted.

good faith; that res judicata/collateral estoppel should apply based on the opinion of the Court of Appeal in applicant's civil case; and that the Qualified Medical Evaluator (QME) concluded that personnel actions constituted 60% of the causation of applicant's psychiatric injury, and that 30% was attributed to the January 25, 2018 meeting and 30% was attributed to the termination of July 2, 2018, so that defendant met its burden to show that the actions were a substantial cause of the injury.

We received a Response to Petition for Reconsideration (Answer) from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have conducted our own extensive review de novo of the record in this matter, have read and considered the allegations in the Petition for Reconsideration and the Answer, and have considered the contents of the Report. (See *United States Pipe & Foundry Co. v. Industrial Acci. Com.* (1962) 201 Cal.App.2d 545, 548-549 ["reconsideration fulfills substantially the same function as the new trial in civil proceedings"].) After considerable deliberation and for the reasons set forth below and the reasons set forth in the Report, which we adopt and incorporate herein, it is our decision after reconsideration to affirm the decision of the WCJ.

I.

We incorporate section I from the Order Granting as follows:

> On August 2023, QME Sean Sassano-Higgins, M.D., issued a report following an evaluation of applicant on July 7, 2023. Dr. Sassano-Higgins concluded that applicant's injury to psyche was caused by:
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> > 30% unfair disciplinary action of a root cause analysis meeting 1/25/2018 (industrial);
> > -30% unfair termination 7/2/2018 (industrial);
> > -10% pre-existing depression (non-industrial);
> > -10% prior settled civil case with Los Robles Hospital (non-industrial);
> > -20% applicant's use of ineffective coping strategies for stress (non-industrial).
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> (Exhibit M, p. 29.)
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> Section 3208.3 governs claims for psychiatric injury. "Predominant as to all causes" means that "the work-related cause has greater than a 50 percent share of the entire set of causal factors." (*Dept. of Corrections v. Workers' Comp. Appeals Bd. (Garcia)* (1999) 76 Cal.App.4th 810, 816 [64

Cal.Comp.Cases 1356, 1360]; *Watts v. Workers' Comp. Appeals Bd.* (2004) 69 Cal.Comp.Cases 684, 688 (writ den.).) If the threshold for a compensable psychiatric injury has been met under section 3208.3(b), and the employer has asserted that some of the actual events of employment were good faith personnel actions, the WCJ must determine whether section 3208.3(h) bars applicant's claim. Section 3208.3(h) provides as follows:

> No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. **The burden of proof shall rest with the party asserting the issue.**

(Lab. Code, § 3208.3(h).)

Section 3208.3(b)(3) defines substantial cause as "at least 35 to 40 percent of the causation from all sources combined." (Lab. Code, § 3208.3(b)(3).)

A multilevel analysis is accordingly required when an industrial psychiatric injury is alleged and the employer raises the affirmative defense of a lawful, nondiscriminatory, good faith personnel action. (*Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc).) The required multilevel analysis is, as follows:

The WCJ, after considering all the medical evidence, and the other documentary and testimonial evidence of record, must determine:

> (1) whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination; (2) if so, whether such actual events were the predominant cause of the psychiatric injury, a determination which requires medical evidence; (3) if so, whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith, a factual/legal determination; and (4) if so, whether the lawful, nondiscriminatory, good faith personnel actions were a "substantial cause" of the psychiatric injury, a determination which requires medical evidence. Of course, the WCJ must then articulate the basis for his or her findings in a decision which addresses all the relevant issues raised by the criteria set forth in Labor Code section 3208.3.

(*Id*. at p. 247.)

Here, applicant met her burden to show that her injury was predominantly caused by those events of employment, the second prong of *Rolda*.

In turning to the issue of whether the personnel actions were in good faith, it is important to note preliminarily that the determination under section

> 3208.3(h) is based on a consideration of the industrial causes, and not the non-industrial causes. (*San Francisco Unified School Dist. v. Workers' Comp. Appeals Bd. (Cardozo)* (2013) 190 Cal.App.4th 1 (writ den.).) Therefore, the analysis is whether either of the two actions identified by the QME, the meeting of January 25, 2018 and the termination of July 2, 2018, is a substantial cause under section 3208.3(b)(3). **That is, the substantial cause determination using the QME's conclusions would be based on 50% for the meeting of January 25, 2018 and 50% for the termination of July 2, 2018. Thus, based on the reporting of the QME, defendant would meet its burden of proof if it is able to demonstrate that one of the two identified personnel actions was in good faith.**

(Order Granting, Section I, pp. 2-3, emphasis added.)

Consequently, the question for our consideration in this matter is whether defendant met its burden to establish that either or both of the two actions identified as industrial causes of applicant's psyche injury by the QME was a "lawful, nondiscriminatory, good faith personnel action" pursuant to section 3208.3(h).

II.

A key factor in our review of the evidence in this case involves the specific findings of credibility made by the WCJ in this matter. The WCJ found in favor of the credibility of applicant and against the credibility of defendant's witnesses: applicant's supervisor Bella Berelovich and former Director of Maternal Child Health Nursing Jennifer Astacio. (Opinion on Decision, November 16, 2023, pp. 2-3; MOH, November 30, 2021, p. 2; MOH, March 23, 2022, p. 2.)

> The undersigned found the applicant's testimony at trial to be more credible than that of the defense witnesses.
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> At trial, defense witness Ms. Berelovich appeared to have a poor recollection, and her testimony was contrary to the defendant's written policy and procedure. The undersigned did not find Ms. Berelovich to be a credible witness at trial.
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> At trial, defense witness Ms. Astacio appeared to have a poor recollection, and her testimony was contrary to the defendant's written policy and procedure. The undersigned did not find Ms. Astacio to be a credible witness at trial.

(Opinion on Decision, November 16, 2023, pp. 2-3.)

The WCJ explained the basis for these specific credibility findings in the Report:

> Although the defense witnesses Bella Berelovich and Jennifer Astacio repeatedly testified at trial that it was the applicant's responsibility to label the placentas, the Petitioner did not provide any portion of the policy and procedure manual to support their contention that it was the responsibility of the applicant to label the placentas. It is noted that Jennifer Astacio testified at trial that she did not recall specifically what the policy and procedure for handling of a placenta specimen is, but one is not to put them in a gurney. (MOH, 3/23/22, pg. 7, lines 19-20).
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> According to the defendant's written policy and procedure provided at trial, specimens collected must be labeled appropriately by the individuals that collected the specimen. The labeling is to take place immediately after phlebotomy at the patient's side, and no pre-labeling of tubes is allowed. (Applicant's Exhibit 2, 6th page, §4.7.) The Petitioner argues that this procedure is only regarding the drawing of blood with a needle. In the opinion of the undersigned, in the absence of written policy to the contrary, this policy would also be applicable to the labeling of other specimens, such as a placenta. Also, the Petitioner did not provide any written policy and procedure document to establish that the procedure would have been any different for labeling a placenta specimen.
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> Further, Ms. Berelovich testified that Policy 2414 clearly states that a specimen has to be labeled by whomever collected it. She further testified that she was not aware that the applicant did not witness the collection of the placenta. She also testified that she was not aware that the applicant did not collect the placenta. (MOH, 12/23/21, pg. 5, lines 19-22).
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> In the opinion of the undersigned, the testimony from defense witnesses that it was the applicant's responsibility to properly label a specimen that she did not collect was contrary the to the above written policy and procedure provided at trial (Applicant's Exhibit 2, 6th page, §4.7). In the opinion of the undersigned, if the applicant had labeled the specimen, it would have been contrary to the above written policy and procedure manual provided at trial. (Applicant's Exhibit 2, 6th page, §4.7)
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> The scrub tech Jenny Tobar was at the root cause analysis meeting and admitted that she took the placenta without labeling it or telling the applicant. Yet Ms. Tobar received only Level 3 discipline. (MOH 6/15/21, page 11), and the applicant received a Level 4 discipline and was ultimately terminated.

(Report, pp. 4-5.)

We give great deference to the credibility determinations of the WCJ because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals*

Bd. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505]; also see *Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140-141 (*Meiner*).)[4] Only evidence of considerable substantiality would warrant rejecting the WCJ's credibility determination. (*Garza, supra,* 3 Cal.3d at 318-319.) We find no such evidence in the record of this case.

After our review of the testimony elicited at trial from Ms. Berelovich and Ms. Astacio, we concur with the WCJ that both witnesses had poor recollection of events; could not identify specific policies and procedures violated by applicant resulting in discipline and termination after the root cause meeting; and, testified that applicant was disciplined and consequently terminated for reasons contrary to the only reliable evidence of defendant's policies and procedures produced at trial. (See App. Exh. 2, DMS #PS 2020, Operations, Care of Multiple Gestational in Labor and Delivery; and, DMS #2414, Direct Patient Care/Lab – Specimen & Tests, Specimen collection, Identification, Handling, Processing, and Preservation.) In addition, Ms. Berelovich did not review defendant's policies and procedures to refresh her recollection prior to trial (MOH, December 23, 2021, p. 3), and defendant failed to produce evidence of its policies and procedures to assist the recollection of its witnesses *or* to impeach or rebut applicant's testimony.

It should also be noted that neither Ms. Berelovich nor Ms. Astacio had personal knowledge of the January 16, 2018 incident, i.e., that applicant was the only witness at trial to testify based on personal knowledge of the January 16, 2018 incident. There were two others with personal knowledge of the January 16, 2018 incident, traveling nurse Shannon Spence and certified scrub technician Jenny Tobar; however, these witnesses were not called to testify at trial and no deposition or declaration evidence from either of these eyewitnesses was introduced by defendant to rebut or impeach applicant's testimony. Defendant initially listed Ms. Tobar as a witness (Pre-Trial Conference Statement, March 9, 2020), but thereafter only identified *applicant* in later witness lists (PTCS, October 3, 2023, December 18, 2023). There is no explanation from the eight (8) days of trial for this omission, eg., these witnesses are no longer available, etc., and therefore, we must assume defendant had the opportunity to call these eyewitnesses or to provide declaratory

[4] "The law has long recognized the problem of appellate review in the matter of credibility of witnesses based upon their demeanor, and for that reason the rule has evolved that the trier of facts is the sole and exclusive judge of the credibility of witnesses as determined by their demeanor. A written transcript of testimony is but a pallid reflection of what actually happens in a trial court. ' " 'The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried.' " It resembles a pressed flower.' (*Broadcast Music v. Havana Madrid Restaurant Corp*., 175 F.2d 77, 80.)" (*Meiner*, *supra*, 17 Cal.App.3d at p. 140.)

evidence from them but chose not to do so. (See MOH dated September 22, 2020, January 26, 2021, March 23, 2021, June 15, 2021, November 30, 2021, December 23, 2021, March 23, 2022, and October 19, 2023.)

This matter does not call for further development of the record. (See *Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396 [65 Cal.Comp.Cases 264]; *San Bernardino Community Hospital v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; Civ. Code, § 3527 ["The law helps the vigilant, before those who sleep on their rights."].)

Accordingly, we affirm the WCJ's findings of credibility in this matter in favor of applicant and against defendant's two witnesses, Ms. Berelovich and Ms. Astacio.

III.

Next, although the Legislature expressly assigned the burden of proof to defendant to establish the "good faith personnel action" defense in section 3208.3(h), it did not define "good faith personnel action." (Lab. Code, § 3208.3, subd. (h).) Indeed, there is no "precise definition" or "precise set of rules" in determining whether a personnel action was taken in good faith, and thus, each case must be determined on its own facts. (*City of Oakland v. Workers' Comp. Appeals Bd. (Gullet)* (2002) 99 Cal.App.4th 261, 270 [67 Cal.Comp.Cases 705].)

To guide this determination, the *Gullet* Court approved the Appeals Board's "importation" of the "objective reasonableness" standard of *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, and concluded that the meaning of "good faith personnel action" in section 3208.3 was "meant to furnish an employer a degree of freedom in making its regular and routine personnel decisions (such as discipline, work evaluation, transfer, demotion, layoff, or termination)." (*Gullett*, *supra*, 99 Cal.App.4th at p. 267.)

> If a regular and routine personnel decision is made and carried out with subjective good faith and the employer's conduct meets the **objective reasonableness standard**, section 3208.3's exemption applies."

(*Id*. at p. 267, bold added.)

As explained in more detail in *Larch v. Contra Costa County* (1998) 63 Cal.Comp.Cases 831 (*Larch*) (Appeals Bd. Sign. Panel Dec.):

> As the case law cited in the main text makes clear, **coupling "good faith' with "objectivity' is intended to place the trier of fact in the position of the "reasonable employer' in deciding whether the defendant in a wrongful**

> **termination suit acted responsibly and in conformity with prevailing social norms in deciding to terminate an employee for misconduct."** (Cotran, supra, 69 Cal. Rtpr. 2d at p. 909.) Any analysis of the good faith issue, therefore, must look at the totality of the circumstances, not a rigid standard, in determining whether the action was taken in good faith. To be in good faith, **the personnel action must be done in a manner that is lacking outrageous conduct, is honest and with a sincere purpose, is without an intent to mislead, deceive, or defraud, and is without collusion or unlawful design.** This analysis would be based upon the objective good faith standard as discussed by the Supreme Court in Cotran, supra, 69 Cal. Rtpr. 2d at p. 909.

(*Id.* at p. 837, bold added; accord *Gullet*, *supra*, 99 Cal.App.4th at p. 267.)

We concur with the WCJ that defendant failed to meet its burden of proof to establish that either of the QME's identified industrial causes of applicant's psyche injury (the unfair disciplinary action resulting from the root cause analysis meeting and the termination) was a "lawful, nondiscriminatory, good faith personnel action." (Lab. Code, § 3208.3(h).) Applicant credibly testified to the events of January 16, 2018 based on her personal knowledge, and her testimony was not rebutted nor impeached by defendant:

> On January 16, 2018, at around midnight there was a call from the emergency department with a mother who was going to deliver premature twins. They arrived within minutes. The delivery occurred within about a 10-minute period. She was the primary patient care nurse. She was precepting and training a new nurse who was a traveler. She did not have a shift assignment. Her name was Shannon Spence. When the first baby was delivered, the patient was screaming and was very uncomfortable and out of control. The patient did not use any pain medications. NICU arrived by the time of the second baby. They were both delivered within about 10 minutes. The patient was asking for pain medications. She went out of the room to get pain medications.
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> Her technician, Jenny Tobar, is a certified scrub tech. She helps with surgery and vaginal deliveries and to get the table set up and tears down equipment afterwards and takes care of the placenta.
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> Shannon and the witness were getting ready to take the patient out of the operating room. The scrub tech told her she needed to take the placentas She was thrown back. She's never been responsible for the placentas. The scrub tech is always responsible of the placentas. Jenny was always very aggressive with her. Jenny came and handed her the bucket of placentas and turned around and walked away. One of the babies was having a hard time breathing. Her priority was patient care. Jenny was confrontational. The patient was looking at her like, "What's going on?" It was a very uncomfortable situation. She did the best she could at the time.

> She was pushing the gurney. She put the bucket underneath the shelf where patient belongings normally go. She went across the hall into the recovery room. She took the placenta bucket with her because Jenny refused to take it and had not labeled it, so she could not leave it in the room. After they went in the recovery room, she locked the gurney. Shannon lowered the gurney and it crushed into the bucket and the formalin started spilling out. Before the gurney crushed the bucket, she was not aware that there was formalin there. She had no idea in the five years she was there that they were treating placentas with formalin.

(MOH, March 23, 2021, pp. 5-6.)

Applicant also provided credible, detailed testimony regarding what occurred after the January 16, 2018 incident including but not limited to the fact that although an incident report was prepared, no one took applicant's statement. (MOH, March 23, 2021, p. 7.) Applicant was never provided with a copy of the incident report that was prepared because of "confidentiality." (*Ibid.*) In addition, Ms. Astacio asked applicant to come in early on June 19, 2018, just a few days after the incident to "do some competencies...[o]ne of them was formalin training." (*Ibid.*) "She learned from the formalin training that there were white buckets they were keeping in the white utility room with formalin already in them and how to use the spill kit. Before the training, she was not aware of the white buckets and the formalin." (*Ibid.*)

> On January 20, 2018, she had approximately 16 years [sic] experience as a registered nurse. In her 16 years of experience as a registered nurse, she's not aware of formalin being used to treat placentas. After she completed the training, she did not have a meeting with anyone at work. She worked several shifts that week. She talked to a couple of nurses. Most of them, like her, did not know they were treating the placentas with formalin. She doesn't know when they started. Based on her 16 years of experience, it is not usual and customary to treat placentas with formalin. The hospital that she worked at before never did. They would go in a dry bucket to pathology.

(MOH, March 23, 2021, pp. 7-8.)

Prior to the root cause analysis meeting, Ms. Berelovich told applicant the meeting was to "'figure out how we would do things differently so this type of thing would not happen again.'" (MOH, March 23, 2021, p. 8.) Applicant believed the root cause meeting was to address the Formalin spill. (*Id.*) On the day of the root cause meeting, things went very differently:

> The root cause analysis meeting was January 25th, 2018. Prior to that, she spoke with her union representative again. They came in about five minutes before the meeting was going to start. There were four union representatives and they asked

her to come out of the room. She believes their names were Autumn, Una, Darrell, and there was a secretary she forgot the name. The union representatives told her before the meeting, "Jodi, it doesn't look good. We went in this morning and talked to the staff and you should have labeled your bucket." Prior to that conversation with the union representatives, it was not mentioned to her about labeling by her union or Bella or her charge nurse, by anybody. The union representatives did not talk to her about anything else other than labeling before the meeting. She was told they needed to get in there and that she was thrown off guard. She didn't understand what the label had to do with the chemical spill. She was totally blindsided.

Kaiser's policy regarding obtaining specimens was that when you collect a specimen, you're supposed to have a patient label on it with their name and, she thinks, their medical record number. They are supposed to put on the date and time and our initials if we collect the specimen. She did not label the placenta or specimen because she did not collect the specimen. Whoever collects the specimen would be the one to label it because they identify and make sure it's the correct patient label and that it's coming from that person and they also need the time that it was obtained.

(*Id*. at pp. 8-9.)

At the cause analysis meeting Bella asked her to recite the placenta protocol. There is no placenta protocol. There is one regarding twin deliveries that needs to go to pathology, but there is nothing regarding transportation or handling. She felt the intent of the meeting regarding the placenta protocol was to cause her emotional distress. She did not know what was going on. **It was their intentional interrogatories to her that made her feel fearful. She was told that she had poor critical thinking skills. No one had asked her regarding the labeling.**

Bella accused her of lying when she said she did not know the formalin was in the bucket. They would ask the witness questions but not allow her to answer them. The union representative had to step in several times. **Bella yelled at her and got hostile and would not let her answer questions.** The union representative tried to intervene to let her answer the questions that were posed to her. There were 14 people in the placenta protocol meeting. Bella put her on the spot and asked her to recite the placenta protocol in front of 14 people. She did not know it would be a large meeting. They put her in a difficult position. There were 14 people at the meeting including four union representatives, Jenny and her two representatives, Bella, a woman from HR root cause analysis, a couple of technicians, and a couple of nurses. She cannot remember all of the names right now.

The union representatives spoke with her after the root cause analysis meeting. They asked her if she had cognitive issues, psychiatric anxiety or

> depression. She said she was having major anxiety now and it was very stressful. Bella wanted to fire her or give her a Level 4 discipline so anything she did she could be fired for. She thinks the union representative asked her about learning disabilities because she thinks that Kaiser and the union representative worked together and refused to investigate the incident. They said they would investigate it, but then they said they couldn't. **They said the investigation was done the morning of the root cause analysis meeting.**

(MOH, June 15, 2021, pp. 2-3.)

> The root cause analysis meeting was like two-and-a-half hours. She felt it was directed at her. There were two nurses and two technicians talking. Bella did most of the talking. **Jenny was there and admitted that she took it out without labeling it or telling her. Jenny got a Level 3 disciplinary action.** They had both self-learning modules and live modules where they went over buckets. She received a Level 4 discipline. Level 4 does not mean that you are terminated for it, but by the time of the Level 4, they said they would shred documents and refused to investigate. They said she broke policy and procedure, and they wanted her to retract her statements.

(*Id*. at p. 11, bold added.)

Applicant was thereafter placed on an involuntary psychiatric hold but when released, she requested an opportunity to make a statement about the January 16, 2018 incident as she had never been given the opportunity to do so. (*Id.* at p. 4.) Applicant was told that there would no further investigation until *after* the Level 4 discipline was given. (*Ibid.*) Applicant was then told by union representatives Peter Sidhu and Darrel DeHaas that Ms. Berelovich was leaving her position and therefore the discipline would either be brushed under the rug or Ms. Aparicio would do another investigation. (*Id.* at p. 5.) However, Ms. Aparicio failed to respond to applicant's request that there be further investigation. (*Ibid.*; see MOH, March 23, 2022, p. 7 [Ms. Astacio *admits* she refused to accept any statement from applicant regarding the January 16, 2018 incident].) Therefore, when applicant returned to work on May 2, 2018, she received a Level 4 discipline despite never being able to give a statement about the January 16, 2018 incident. (*Ibid.*)

First, it is undisputed that Jenny Tobar violated defendant's policies and procedures by failing to handle and label the bucket containing the placentas correctly, and applicant credibly testified that Ms. Tobar failed to tell her that the placentas were in Formalin or give her any choice but to take control of the bucket or risk the well-being of the mother and two newborns in her case. Applicant also credibly testified that prior to the training she received *after* the January 16, 2018 incident, she was not aware that placentas were delivered into buckets containing Formalin as it

was the responsibility of the certified scrub technicians, like Ms. Tobar, to handle and label the buckets containing the placentas. (See Report, pp. 3-4 [WCJ determined that the only substantial evidence submitted regarding Formalin training was that applicant received Formalin training *after* the January 16, 2018 incident].) Even so, Ms. Tobar received a less severe discipline level than applicant which we conclude is not the action of a "reasonable employer." This does not appear to be an objectively reasonable imposition of discipline against applicant.

Next, no "reasonable employer" could determine that applicant acted in violation of defendant's policies and procedures sufficiently to warrant the severity of defendant's Level 4 discipline (one step from termination), without a fair and complete investigation. Applicant was unable to provide her statement of events to defendant either for the incident report or at the root cause analysis meeting. Ms. Astacio, who was responsible for imposing the Level 4 discipline, admits that she refused to accept applicant's statement and therefore did not know the background of the January 16, 2018 event. (See MOH, March 23, 2022, p. 7.) Based on the substantial evidence produced in this record, there was no fair investigation of the January 16, 2018 incident and therefore the imposition of the Level 4 discipline was not objectively reasonable.

Also, defendant cannot be found to have "acted responsibly and in conformity with prevailing social norms" in its method or decision to discipline or terminate applicant under the circumstances in this case. (See *Larch*, *supra*, 63 Cal.Comp.Cases at p. 837.) Again, "[t]o be in good faith, the personnel action must be done in a manner that is lacking outrageous conduct..." (*Ibid.*) The conduct of Ms. Berelovich at the root cause analysis meeting was outrageous in that it constituted the bullying of applicant, which is not "in conformity with prevailing social norms..." (See *Larch*, *supra*, 63 Cal.Comp.Cases at p. 837.)

Finally, applicant was terminated because she would not submit to a disciplinary action plan that required her to "take responsibility" for the January 16, 2018 incident despite the lack of a fair investigation; despite the fact that she was bullied during the investigation; despite the fact that she was not properly trained by defendant; and apparently, regardless of what actually happened. (MOH, March 23, 2022, pp. 3, 8.) Even though Ms. Astacio admits that she "did not know the background" which ultimately led to the Formalin spill, Ms. Astacio also refused to accept applicant's Level 4 "last chance agreement" because applicant "did not take responsibility." (*Id*. at p. 7.) Had applicant "taken responsibility," applicant would not have been terminated. (*Ibid.*)

Based on these circumstances, defendant cannot be found to have acted as a "reasonable employer" when it terminated applicant's employment.

Accordingly, there is substantial evidence in the record to support the WCJ's decision that applicant sustained an injury arising out of and in the course of her employment to her psyche and nervous system and in the form of stress, and that defendant failed to meet its burden of proof to establish an affirmative defense pursuant to section 3908.3(h). We therefore affirm the WCJ's decision.

IV.

Finally, we agree with the WCJ that defendant cannot meet its burden of proof to establish its affirmative defense pursuant to section 3908.3(h) through the application of issue preclusion[5] based on the Appellate Court's decision in applicant's civil case against defendant for discrimination and wrongful termination.

> In summary, issue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [272 Cal. Rptr. 767, 795 P.2d 1223]; *Vandenberg*, at p. 828; *Teitelbaum Furs*, *supra*, 58 Cal.2d at p. 604.)

(DKN Holdings, *supra*, 61 Cal.4th at p. 825.)

Defendant contends that "whether there was discrimination and wrongful termination by the employer because of the adverse personnel actions is identical to the issue presented in the third step of the *Rolda* analysis involved in this claim." (Petition for Reconsideration, p. 17.) We disagree.

First, the burden in the civil action was on applicant to establish whether defendant was motived in making or carrying out personnel decisions by *discriminatory animus based on her disability* or based on *her whistleblower activity in reporting defendant to California Occupational Safety and Health Administration*. (See Def. Exh. N., Second District Court of Appeal Opinion (Appeals Court Opinion), pp. 13-14.) In contrast, the burden in this workers' compensation case

[5] In 2015, the California Supreme Court determined that to avoid confusion, the term "issue preclusion" should be used when describing "collateral estoppel." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN Holdings*).) "To avoid future confusion, we will follow the example of other courts and use the terms 'claim preclusion' to describe the primary aspect of the res judicata doctrine and 'issue preclusion' to encompass the notion of collateral estoppel..." (*Ibid*.)

is on defendant to establish that its "regular and routine personnel decision is made and carried out with subjective good faith" *and* that its "conduct meets the objective reasonableness standard..." (*Gullet*, *supra*, 99 Cal.App.4th at p. 267.) It was determined in the civil case as a result of a summary judgment motion, that *applicant* failed to meet her burden to raise a triable issue of fact for trial that defendant acted with discriminatory animus based on her disability or based on her whistleblowing activity. (Def. Exh. N, Appeals Court Opinion, pp. 15-16.) Therefore, no finding was made on the material factual issues necessary for *defendant* to meet its burden in this matter to establish a defense to compensation pursuant to section 3208.3(h), i.e., whether defendant made and carried out its disciplinary actions and/or termination of applicant's employment with "subjective good faith" *and* that its conduct meets an "objectively reasonable" standard.

Further, summary judgment[6] may finally determine whether a party has or has not raised a material issue of fact as to a cause of action or as to a defense *in order to proceed to trial on the merits*, but summary judgment is not permitted in workers' compensation matters. (Cal. Code Regs., tit. 8, § 10515.) In other words, all parties were entitled to proceed to a trial and to present evidence including live testimony. The live testimony in this matter, including the findings of relative credibility, provided the necessary substantial evidence for the WCJ to find that applicant's psychiatric injury arose out of and in the course of her employment, and that defendant failed to meet its burden of proof to defendant compensation under section 3208(h).

Accordingly, defendant cannot rely on issue preclusion based on the Appellate Court's decision in applicant's civil case against defendant for discrimination and wrongful termination to meet its burden of proof under section 3208.3(h).

[6] Summary judgment is commonly referred to as a "trial on paper" as it does not involve the live presentation of evidence, including live witness testimony.

For the foregoing reasons,

IT IS ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings & Order issued on October 30, 2023 by a workers' compensation administrative law judge is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 19, 2025

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

JODI VIEIRA, IN PRO PER
RUSSELL LEGAL GROUP

AJF/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

The Applicant filed a claim alleging to have sustained injury to stress, psyche and nervous system, arising out of and occurring in the course of employment as a nurse at Kaiser during the period January 16, 2018 to and including July 2, 2018. The claim was denied by the defendant.

The matter proceeded to trial before the undersigned regarding the limited issue of injury AOE/COE and the defenses thereto raised by the defendant, including the good faith personnel defense. After the matter was submitted, the undersigned vacated submission to further develop the medical record. Ultimately, the undersigned ordered a replacement psychiatric panel, and the trial was completed on October 19, 2023. At that trial, the defendant raised additional issues regarding collateral estoppel and res judicata based upon a decision that was issued regarding the applicant's civil court case.

Thereafter, the undersigned issued Findings and Order which were served on November 16, 2023, finding that the applicant sustained injury to stress, psyche and nervous system, arising out of and occurring in the course of employment during the period January 16, 2018 to and including July 2, 2018, and that collateral estoppel and res judicata did not apply.

The Defendant filed a timely verified Petition for Reconsideration dated December 5, 2023, alleging that by the order, decision, or award, the Board acted without or in excess of its powers; the evidence does not justify the findings of fact, and the findings of fact do not support the order, decision or award.

The Applicant filed a verified Answer thereto dated December 15, 2023.

II.

DISCUSSION

ROLDA ANALYSIS

The Applicant has filed a claim alleging continuous trauma injury to her psyche, and the defendant has raised the good faith personnel action defense per Labor Code 3208.3(h). Accordingly, the undersigned applied the multilevel analysis required by *Rolda v. Pitney Bowes* (*en banc*) 66 Cal. Comp. Cases 241 as follows:

(1) Whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination.

As per the report from QME Dr. Sean Sassano-Higgins dated August 2, 2023, the applicant sustained psychiatric injury which was apportioned 30% to the root cause analysis meeting on January 25, 2018, and 30% to "unfair termination". (Defense Exhibit M). In the opinion of the undersigned, the meeting and the applicant's termination were actual events of employment.

(2) If so, whether such actual events were the predominant cause of the psychiatric injury, a determination which requires medical evidence.

In the opinion of the undersigned, the root cause analysis meeting and the applicant's termination were the predominant causes of the applicant's psychiatric injury, as per the report from QME Dr. Sean Sassano-Higgins dated August 2, 2023 (Exhibit M).

(3) If so, whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith, a factual/legal determination.

In the opinion of the undersigned, the defendant failed to meet its burden to establish that the root cause analysis meeting and the applicant's termination were good faith personnel actions.

(4) If so, whether the lawful, nondiscriminatory, good faith personnel actions were a "substantial cause" of the psychiatric injury, a determination which requires medical evidence.

In the opinion of the undersigned, the defendant failed to meet its burden to establish that the root cause analysis meeting and the applicant's termination were good faith personnel actions. Accordingly, good faith personnel actions were not a substantial cause of the psychiatric injury.

Based upon applicant's testimony at trial and the medical report of QME Dr. Sean Sassano-Higgins dated August 2, 2023 (Exhibit M), which was found to be the more credible and the more persuasive, it was found that applicant sustained injury to stress, psyche and nervous system, arising out of and occurring in the course of employment during the period January 16, 2018 to and including July 2, 2018.

FORMALIN TRAINING

The applicant testified at trial that before the incident, she had online training, but had no recollection of anything saying there was formalin or to put a placenta into a pre-filled bucket. The applicant testified that she had no recollection of formalin training before the incident, and if there was it was not specifically regarding placenta treatments. (MOH 6/15/2021, page 11, lines 9-11)

The Petitioner asserts that Applicant's Exhibit 35 establishes that the applicant previously received training regarding the proper handling/labeling of placenta specimens on or about July 18, 2017. The title of that document is "Managing Hazardous Chemical Spills in L&D and OR (Formalin)". The title of the document refers to the management of hazardous chemical spills, not to the procedure for handling or labeling placenta specimens, nor does it identify any training in handling formalin. The document does not contain any details regarding the training provided. The document is not signed by anyone. There was no testimony provided by the Petitioner at trial regarding details about the nature and extent of the training provided to the applicant on or about July 18, 2017. In the opinion of the undersigned, Applicant's Exhibit 35 is not substantial evidence to establish that the Applicant had appropriate training in the handling and labeling of the placenta specimen prior to the spill incident.

In contrast, Applicant's Exhibit 4 has information contained therein regarding the training that was provided and it was signed by both the applicant and the trainer. In the opinion of the undersigned, Applicant's Exhibit 4 is the only substantial evidence submitted regarding formalin training. Applicant's Exhibit 4 indicates that the applicant received formalin training on January 19, 2018, which was days after the formalin spill incident. (Applicant's Exhibit 4).

In the opinion of the undersigned, there was no substantial evidence presented at trial to establish that the Applicant was aware that the Petitioner was using formalin to treat placenta specimens before the formalin spill incident, nor that the Applicant received appropriate and adequate training in that regard prior to the formalin spill incident.

LABELING OF SPECIMENS

Although the defense witnesses Bella Berelovich and Jennifer Astacio repeatedly testified at trial that it was the applicant's responsibility to label the placentas, the Petitioner did not provide any portion of the policy and procedure manual to support their contention that it was the responsibility of the applicant to label the placentas. It is noted that Jennifer Astacio testified at trial that she did not recall specifically what the policy and procedure for handling of a placenta specimen is, but one is not to put them in a gurney. (MOH, 3/23/22, pg. 7, lines 19-20).

According to the defendant's written policy and procedure provided at trial, specimens collected must be labeled appropriately by the individuals that collected the specimen. The labeling is to take place immediately after phlebotomy at the patient's side, and no pre-labeling of tubes is allowed. (Applicant's Exhibit 2, 6th page, §4.7.) The Petitioner argues that this procedure is only regarding the drawing of blood with a needle. In the opinion of the undersigned, in the absence of written policy to the contrary, this policy would also be applicable to the labeling of other specimens, such as a placenta. Also, the Petitioner did not provide any written policy and procedure document to establish that the procedure would have been any different for labeling a placenta specimen.

Further, Ms. Berelovich testified that Policy 2414 clearly states that a specimen has to be labeled by whomever collected it. She further testified that she was not aware that the applicant did not witness the collection of the placenta. She also testified that she was not aware that the applicant did not collect the placenta. (MOH, 12/23/21, pg. 5, lines 19-22).

In the opinion of the undersigned, the testimony from defense witnesses that it was the applicant's responsibility to properly label a specimen that she did not collect was contrary the to the above written policy and procedure provided at trial (Applicant's Exhibit 2, 6th page, §4.7). In the opinion of the undersigned, if the applicant had labeled the specimen, it would have been contrary to the above written policy and procedure manual provided at trial. (Applicant's Exhibit 2, 6th page, §4.7)

The scrub tech Jenny Tobar was at the root cause analysis meeting and admitted that she took the placenta without labeling it or telling the applicant. Yet Ms. Tobar received only Level 3 discipline. (MOH 6/15/21, page 11), and the applicant received a Level 4 discipline and was ultimately terminated.

ROOT CAUSE ANALYSIS MEETING

The applicant testified that there were approximately fourteen people present at the root cause analysis meeting, including four union representatives, Jenny Tobar and her representatives, applicant's supervisor Bella, a woman from HR root cause analysis, a couple of technicians, and a couple of nurses. During the meeting, Bella accused her of lying when the applicant said she did not know there was formalin in the bucket. They would not allow the applicant to answer their questions. The applicant was told that she had poor critical thinking skills. The applicant was put on the spot and asked to recite the placenta protocol in front of the fourteen other people. (MOH, 6/15/21, page 2). During the root cause analysis meeting, the applicant was repeatedly blamed for the spill and verbally berated by Ms. Berolovich, and the applicant was told that she did not follow procedures. (Defendant's Exhibit M, pg. 7)

In the opinion of the undersigned, the actions taken by the employer during the meeting such as criticizing, blaming and berating the applicant in front of approximately 14 people including the applicant's co-workers, were not made in good faith.

RES JUDICATA/COLLATERAL ESTOPPEL

In the opinion of the undersigned, the Opinion of the Court of Appeals is not res judicata/collateral estoppel for the AOE/COE issue before this workers' compensation court. The alleged causes of action and burdens of proof in the civil case are different from those utilized in determining injury AOE/COE regarding this workers' compensation claim involving alleged psychiatric injury.

Notwithstanding the foregoing, the workers' compensation claim involved multiple days of trial, with multiple witnesses presented, as opposed to the decision made in civil court which was made based upon a Motion for Summary Judgement. As such, the undersigned does not believe that the Opinion of the Court of Appeals is res judicata/collateral estoppel for the AOE/COE issue before in this workers' compensation court.

In the opinion of the undersigned, the trial testimony of the applicant was more credible than the trial testimony of the defense witnesses, and the Petitioner did not sustain their burden of proof to establish the good faith personnel action defense. In light of the entire record, and based upon the foregoing, it was ordered that it was found that applicant sustained injury to stress, psyche

and nervous system, arising out of and occurring in the course of employment during the period January 16, 2018 to and including July 2, 2018.

III.

RECOMMENDATION

Therefore, it is respectfully recommended that the Petition for Reconsideration be denied.

DATE: December 19, 2023

Robin A. Brown

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE