WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KHADIJAH BROWN, *Applicant*

vs.

REGINALD AJAKWE, MD, and RAYMOND TATEVOSSIAN, MD, dba COMPREHENSIVE PAIN CENTER; MID-CENTURY INSURANCE COMPANY administered by FARMERS INSURANCE, *Defendants*

Adjudication Number: ADJ12294911
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact and Order (F&O) issued on January 2, 2025, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed by defendant as a medical assistant during the period of September 11, 2018 through June 13, 2019, applicant did not sustain injury arising out of and occurring in the course of employment (AOE/COE) to her psyche; and (2) there was a good faith personnel action in this matter and no objective evidence of harassment, persecution or other basis which would amount to actual events of employment under Labor Code section 3208.3(b)(l).[1]

The WCJ ordered that applicant take nothing on her application for workers' compensation benefits.

Applicant contends that the WCJ erroneously found that (1) applicant did not sustain injury AOE/COE to her psyche; (2) applicant failed to present objective evidence of harassment, persecution or other grounds to establish that the injury resulted from actual events of employment; and (3) defendant established its good faith personnel action defense.

We received an Answer.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition be denied.

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[1] Unless otherwise stated, all further statutory references are to the Labor Code.

We have reviewed the contents of the Petition, the Answer and the Report. Based upon our review of the record, and for the reasons discussed below, we will grant reconsideration, and, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that applicant sustained injury to her psyche AOE/COE, that the evidence establishes that applicant's injury resulted from actual events of employment, and that the issue of whether defendant established its good faith personnel action defense is deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On April 26, 2022, the matter proceeded to trial of the following relevant issues.

1. Injury arising out of and in the course of employment with the defendant raising a good faith personnel action defense pursuant to Labor Code Section 3208.3(h).

(Minutes of Hearing and Summary of Evidence, April 26, 2022, pp. 2:13-14)

The WCJ admitted the PQME report of Zara Ashikyan, Ph.D., dated September 16, 2021, into evidence. (*Id.,* p. 2:20-21.)

The PQME report of Dr. Ashikyan states:

> Based on the results of the psychological evaluation, mental status examination, psychological testing, and medical history, I find, within reasonable medical probability that the applicant's condition/symptomology meets the criteria for the following The Diagnostic and Statistical Manual of Mental Disorders 4th Edition, Text Revision (DSM-IV-TR) diagnoses: *(this version of the DSM is being used for its inclusion of a GAF rating)*
>
> . . .
>
> *Axis V:*
> *Global Assessment of Functioning*
> GAF: Current: = 83 **(MMI)**
>
> (Joint Ex. 1, PQME report of Zara Ashikyan, Ph.D., dated September 16, 2021, pp. 34-35.)
>
> Ms Brown developed a friendship with Betania Ruiz, another Medical Assistant, outside of work, but Betania didn't know the difference between communicating with her outside of work and at work.
>
> On an unrecalled day on about May or June 2019, Ms. Brown found a note on her computer that stated "little grump ass nigga", that Betania had left her. Ms. Brown experienced significant distress about it and reported the incident to her superiors; she claimed that she felt discriminated against by the note.
>
> . . .

> Ms. Brown was shown several pages of text messages between she and Betania wherein they had used "bad language" including the word "nigga". Her superiors then insinuated that the word "nigga" did not seem to have been used offensively between the two in the texts; however, Ms. Brown explained that she felt differently about it being used in the workplace. The records available for my review included copies of text messages, which presumably were the same presented to the applicant
>
> Ms. Brown's superiors suspended her after this meeting and she developed significant distress (anxiety, worry, frustration, anger, sadness, etc.) after her suspension. She was advised that she was being suspended for violating the company's harassment policy. She felt that she was being treated unfairly . . .
>
> [S]he was terminated from her position on June 17, 2019 while still on suspension, which . . . "shocked" . . . her.
> Ms. Brown's psychological distress symptoms (anxiety, worry, frustration, anger, sadness, etc.) worsened . . .
> (*Id*., pp. 36-37.)
>
> I opine within reasonable medical certainty, that Ms. Brown's psychological injury was predominantly (greater than 50%) the result of the psychological stress stemming from her work environment, leading up to psychological pathology, which she sustained in the course of her employment at Comprehensive Pain Center AKA Comprehensive Spine & Pain Physicians.
> It appears that there are no s*ignificant* non-industrial psychological issues or trauma to which a significant portion of her current psychological symptoms could be attributed.
> (*Id.*, p. 39.)

At trial, applicant testified that she is Native American and African American, and that Ms. Ruiz, another medical assistant in the office, is Hispanic. At work, her laptop was located in the office breakroom, where she worked as a medical assistant. She went to the breakroom and saw a note posted near the laptop camera, stating "lil grump ass nigga," and she recognized the handwriting on the note as Ms. Ruiz's. (Minutes of Hearing and Summary of Evidence, April 26, 2022, pp. 4:11-5:2.)

On cross-examination, applicant further testified that, though she had exchanged text messages with Ms. Ruiz in which the "N word" was used, the note left on her computer was the first occasion Ms. Ruiz directed the word toward her. (Minutes of Hearing and Summary of Evidence (Further), March 16, 2023, pp. 2:22-3:7.)

In the Opinion on Decision, the WCJ states:

INJURY AOE/COE

Applicant Khadijah Brown, age 24, while employed during the period September 11, 2018 through June 13, 2019 as a Medical Assistant by Reginald Ajakwe, M.D., and Raymond Tatevossian, M.D., dba Comprehensive Pain Center claims to have sustained injury arising out of and in the course of employment to her psyche with all other alleged body parts deferred.

. . .

Based on the medical reporting and depositions of the PQME Dr. Zara Ashikyan, Ph.D., (Joint Exhibit 1, Applicant's Exhibit 1, and Defense Exhibit E), which were better reasoned and more persuasive, opined in her initial report dated September 16, 2021 reiterated in her report dated June 5, 2024 (Joint Exhibit 1 and Defense Exhibit E) that her psychological distress/disorder was near completely due to the suspension and termination of her employment at Comprehensive Pain Center (See page 29, Defense Exhibit E). The next question in accordance with Labor Code Section 3208.3 (b)(1) is whether there were "actual events of employment" which would have amounted to a "hostile work environment." In the case of V*erga v. Workers' Compensation Appeals Board*, (2008) 73 Cal. Comp. Cases 63, 159 Cal. App. 4th 174, the Court of Appeals adopted the interpretation that the language added by Labor Code Section 3208.3(b)(l) "can be interpreted" as requiring the employee to establish "objective evidence of harassment, persecution, or other basis for the alleged psychiatric injury."

Here applicant testified extensively regarding a post-it note being left on her work lap top in the break room by a co-worker (Betania Ruiz) in which the note referred to applicant as "nigga". On the other hand, the testimony of the applicant and the defense witness Daisy Tavares, confirmed that both applicant and Betania Ruiz had texted each other during working hours and used that term regularly with each other as well as using other offensive language not only to each other but regarding other co-workers (Defense Exhibit D).

. . .

Even though the post it note was from a co-worker and place[d] on the applicant's lap top, the documentary and testimonial evidence in this matter does confirm that defendants did terminate the applicant due to "violation of the Company Harassment Policy as found in the Employee Handbook." (Defense Exhibit D, bate stamp page 48).

(Opinion on Decision, pp. 3-4.)

In the Report, the WCJ states:

[T]he personnel file (Defense Exhibit D; EAMS DOC ID# 41696937) at pages18 & 19 of the Employee Guidebook (bate stamped pages 98 & 99) notes the Harassment/Bullying Policy Statement of the employer, which includes but is not limited to the following: "Prohibited harassment, disrespectful or unprofessional conduct includes, but is not limited to, the following behavior:

- Verbal conduct such as epithets, derogatory jokes or comments, slurs or unwanted sexual advances, invitations or comments; ...
- Retaliation for reporting or threatening to report harassment; and ...
- Communication via electronic media of any type that includes any conduct that is prohibited by state and/or federal law, or by company policy.

Furthermore after an investigation by the employer/company, it is noted at page 19 of the Guidebook (bate stamp page 99) "If the Company determines that harassment or other prohibited conduct has occurred, effective remedial action will be taken in accordance with the circumstances involved. Any employee determined by the Company to be responsible for harassment or other prohibited conduct will be subject to appropriate disciplinary action, up to, and including termination."

Even though the post it note was from a co-worker and place on the applicant's lap top, the documentary and testimonial evidence in this matter does confirm that defendants did terminate the applicant due to "violation of the Company Harassment Policy as found in the Employee Handbook." (Defense Exhibit D, bate stamp page 48, EAMS DOC ID# 41696937). The applicant also signed an acknowledgment of reading a copy of the Employee Guidebook on December 13, 2018 (Defense Exhibit D, bate stamp page 34, EAMS DOC ID# 41696937). Thus, it appears that there was a good faith personnel action in this matter and no objective evidence of harassment, persecution or other basis which would amount to actual events of employment pursuant to Labor Code Section 3208.3(b)(l).

Overall after reviewing the medical reporting and deposition of the PQME Dr. Zara Ashikyan, Ph.D., (Joint Exhibit 1, Applicant's Exhibit 1, and Defense Exhibit E) EAMS DOC ID#40207178, #40329472 and #54285277 respectively), which were better reasoned and more persuasive, as well as reviewing the entire documentary record submitted, the testimony of the applicant and defense witnesses including assessing their demeanor and credibility, it is found that in accordance with the Appellate decision in *Verga v. Workers' Compensation Appeals Board*, *supra*, applicant did not sustain injury arising out of and in the course of employment to his psyche since there was no objective evidence of harassment, persecution or other basis which would amount to actual events of employment pursuant to Labor Code Section 3208.3(b)(1).
(Report, pp. 3-5.)

DISCUSSION
I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (§ 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part:

(a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.

(b)
(1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on February 11, 2025, and 60 days from the date of transmission is April 12, 2025. The next business day that is 60 days from the date of transmission is Monday, April 14, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, April 14, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on February 11, 2025, and the case was transmitted to the Appeals Board on February 11, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on February 11, 2025.

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

II.

Applicant first argues that the WCJ erroneously found that applicant did not sustain injury AOE/COE to her psyche.

We observe that applicant bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd*. (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; §§ 3600(a); 3202.5.) As to applicant's claim of injury to her psyche, section 3208.3 provides:

> (a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.
> (b) (1) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury.
> . . .
> (h) 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.
> (§ 3208.3(a)-(b)(1) and (h).)

"Predominant as to all causes" for purposes of section 3208.3(b)(1) has been interpreted to mean more than 50 percent of the psychiatric injury was caused by actual events of employment. (*Dept. of Corr. v. Workers' Comp. Appeals Bd*. (*Garcia*) (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356].)[3] The Labor Code does not define "actual events of employment," but the Court of Appeals has defined it as follows:

> First, the factor must be an "event"; i.e., it must be "something that takes place" (American Heritage Dict. (4th ed. 2000) p. 616) in the employment relationship. Second, the event must be "of employment"; i.e., it must arise out of an employee's working relationship with his or her employer.
> (*Pacific Gas & Electric Co. v. Workers' Comp. Appeals Bd.* (*Bryan*) (2004) 114 Cal. App. 4th 1174, 1181 [8 Cal. Rptr. 3d 467, 69 Cal. Comp. Cases 21]; see also *Verga v. Workers' Comp. Appeals Bd*. (2008) 159 Cal.App.4th 174, 186 [73 Cal.

[3] Applicant has not claimed that her psychiatric condition was caused by "being a victim of a violent act or from direct exposure to a significant violent act," which would decrease the causation threshold to "at least 35 to 40 percent of the causation from all sources combined." (§ 3208.3(b)(2)-(3).)

> Comp. Cases 63] [actual events of employment "'can be interpreted' as requiring the employee to establish 'objective evidence of harassment, persecution, or other basis for the alleged psychiatric injury'."].)

Here, the record shows that applicant sustained a mental disorder which causes disability or need for treatment which was diagnosed under the proper criteria and was substantially caused by applicant's suspension and termination. (Joint Ex. 1, PQME report of Zara Ashikyan, Ph.D., dated September 16, 2021, pp. 34-39.) The WCJ's finding that applicant did not sustain injury on the grounds that it could not have resulted from actual events of employment is thus without support. (Opinion on Decision, pp. 3-4.) After all, applicant's suspension and termination constitute actual events of employment. Accordingly, we will substitute a finding that applicant sustained injury AOE/COE to her psyche.

Applicant next argues that the WCJ erroneously found that she did not present objective evidence of harassment, persecution or other grounds to establish that the injury to the psyche resulted from actual events of employment.

In *Verga v. Workers' Comp. Appeals Bd*. (2008) 159 Cal.App.4th 174 [73 Cal. Comp. Cases 63], the Court of Appeals held that the applicant failed to show that she sustained injury to the psyche as result of actual events of employment that were predominant as to all causes combined under section 3208.3(b)(1) because the evidence showed that (1) the applicant's supervisor and co-workers did not harass her; (2) the applicant herself caused her stressful work environment by being demeaning toward other employees; and (3) the applicant then misperceived the disdainful reaction of her co-workers toward her own as harassment.

Here, the WCJ's conclusion that applicant did not present objective evidence of harassment within the meaning of *Verga* lacks support. In our view, applicant's testimony that her co-worker, Ms. Ruiz, directly called her the "N-word" for the first time by placing the racial epithet on a note on her computer where it readily could be seen by their co-workers constitutes harassment; and we are unpersuaded that applicant misperceived this conduct as harassment merely because the epithet had been used in private texts between them. (Minutes of Hearing and Summary of Evidence, April 26, 2022, pp. 4:11-5:2; Minutes of Hearing and Summary of Evidence (Further), March 16, 2023, pp. 2:22-3:7.)

Hence, we conclude that the WCJ erroneously found that applicant did not present objective evidence of harassment, persecution or other grounds to establish that the injury to the psyche resulted from actual events of employment.

Accordingly, we will substitute a finding that applicant's injury to the psyche resulted from actual events of employment, including applicant's suspension and termination and her harassment by a co-worker.

Lastly, applicant argues that the WCJ erroneously found that defendant established its good faith personnel action defense.

Under *Rolda v. Pitney Bowes, Inc*. (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc), a the WCJ's determination of the employer's affirmative defense of a lawful, nondiscriminatory personnel action requires the following multilevel analysis:

> [A]fter considering all the medical evidence, and the other documentary and testimonial evidence of record, [the WCJ] must determine: (1) whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination; (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.
> (*Rolda, supra,* at p. 247.)

Here, as we have explained, PQME Dr. Ashikyan found that applicant's termination and suspension were a substantial cause of applicant's injury, and the WCJ found that Dr. Askikyan's reporting constitutes substantial medical evidence. (Joint Ex. 1, PQME report of Zara Ashikyan, Ph.D., September 16, 2021, pp. 34-39; Report, p. 5.) However, though the WCJ cites various provisions of defendant's employee manual in the Report, the record does not show that the WCJ evaluated whether defendant's personnel actions were lawful, nondiscriminatory and in good faith as required by *Rolda*.

The Appeals Board has the discretionary authority to develop the record when the record is not substantial evidence or when appropriate to fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also

Tyler v. Workers' Comp. Appeals Bd. (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; §§ 5701, 5906.) The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].)

Accordingly, we will substitute a finding that defers the issue of whether defendant established its good faith personnel action defense by showing that the personnel actions of applicant's suspension and termination were lawful, nondiscriminatory and in good faith.

Accordingly, we will grant reconsideration, and, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that applicant sustained injury to her psyche AOE/COE, that the evidence establishes that applicant's injury resulted from actual events of employment, and that the issue of whether defendant established its good faith personnel action defense is deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings of Fact and Order issued on January 2, 2025 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Order issued on January 2, 2025 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. 1.Applicant, age 24, while employed during the period September 11, 2018 through June 13, 2019, as a medical assistant at Burbank, California, by Reginald Ajakwe MD and Raymond Tatevossian MD, dba Comprehensive Pain Center, whose workers' compensation insurance carrier was Mid-Century Insurance Company, administered by Farmers Insurance, sustained injury arising out of and occurring in the course of employment to her psyche.

2. Applicant's injury to the psyche resulted from actual events of employment pursuant to Labor Code Section 3208.3(b)(l).

3. 3.The issue of defendant's good faith personnel action defense is deferred.

4. All other issues are deferred.

IT IS FURTHER ORDERED that this matter is hereby **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSE H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 14, 2025

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

KHADIJAH BROWN
LAW OFFICES OF SOLOV & TEITELL, APC
LAW OFFICES OF SCOTT C. STRATMAN

SRO/*bp*

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