WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EDUARDO BARAJAS, ***Applicant***

vs.

REYES FLEET MANAGEMENT, LLC; INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, ***Defendants***

Adjudication Number: ADJ15707231
San Diego District Office

OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on April 11, 2024, wherein the WCJ found in pertinent part that applicant met his burden of establishing that he sustained an industrial injury to his psyche.

Defendant contends that applicant's claim of injury to the psyche is barred by Labor Code section[1] 3208.3(h).

We received an Answer from applicant.

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

We have considered the allegations in the Petition, the Answer, and the contents of the Report with respect thereto. Based on our review of the record, for the reasons stated in the WCJ's Report, which is adopted and incorporated herein, and for the reasons discussed below, we will deny defendant's Petition for reconsideration.

To be compensable, an injury must arise out of and occur in the course of employment (AOE/COE). (Lab. Code, § 3600.) The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (Lab. Code, §§ 3600(a); 3202.5; *South Coast Framing v. Workers' Comp. Appeals Bd*. (*Clark*) (2015) 61 Cal.4th 291 [80 Cal.Comp.Cases 489].) Once an

[1] All statutory references are to the Labor Code unless otherwise stated.

injured worker meets their initial burden by demonstrating that they sustained injury AOE/COE, the burden then shifts to defendant to rebut applicant's evidence or establish an affirmative defense.

A WCJ's decision must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) To be substantial evidence, a medical opinion must be well-reasoned, based on an adequate history and examination, and it must disclose a solid underlying basis for the opinion. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, applicant was examined by Neda Khodaparast, PsyD, Qualified Medical Evaluator (QME) in psychology. Dr. Khodaparast examined applicant, performed diagnostic testing, took a detailed history, reviewed extensive medical records, and articulated a solid basis for her opinions. (Dr. Khodaparast's report, dated June 28, 2022, Ex. AA; Dr. Khodaparast's report, dated October 6, 2023, Ex. X; Dr. Khodaparast's report, dated December 8, 2023, Ex. Y; and Dr. Khodaparast's report, dated January 10, 2024, Ex. Z.) Dr. Khodaparast opined that applicant's psychiatric injuries were predominantly work-related. (Ex. AA, p. 23; Ex. Z, p. 18.)

The WCJ's decision is also based on trial testimony. Applicant testified over multiple days of trial (January 11, 2023, April 10, 2023, May 4, 2023, and June 29, 2023). Other employees also testified at trial: on May 4, 2023, Collin Crenshaw testified and on June 29, 2023, Margaret McWhorter and Joseph Kraus testified.

Based on Dr. Khodaparast's reporting and applicant's testimony, which the WCJ found credible, the WCJ found that applicant met his burden of establishing that he sustained an industrial injury to his psyche. We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witness testimony and judge its veracity. (See *Garza v. Workmen's Comp. Appeals Bd*., *supra*, 318-319.) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id*.)

As the WCJ noted, the matter proceeded to five separate trial dates and defendant did not raise the good faith personnel action (GFPA) defense at any one of these trial dates. Because the issue was not raised at trial, we consider it waived and will not consider it on reconsideration. (See

Lab. Code, § 5502(d)(3); *City of Anaheim v. Workers' Compensation Appeals Bd. (Evans)* (2005) 70 Cal.Comp.Cases 237, 239 (writ den.); *Schultz v. Workers' Comp. Appeals Bd*. (2015) 232 Cal.App.4th 1126, 1134 [80 Cal.Comp.Cases 16].)

We turn to defendant's contention that the Findings and Award must be rescinded because the WCJ did not perform a *Rolda* analysis, i.e., evaluate whether the actual employment events that gave rise to applicant's psychiatric injury were lawful, nondiscriminatory, good faith personnel actions. (Petition, p. 6-7.) When a psychiatric injury is alleged and the GFPA 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.); *Rolda v. Pitney Bowes, Inc*. (2001) 66 Cal.Comp.Cases 241.) If, as here, the GFPA defense was not raised, then the inquiry is limited to whether the alleged psychiatric injury involves actual events of employment and, if so, whether such actual events were the predominant cause of the psychiatric injury.

Accordingly, we deny defendant's Petition for reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 25, 2024

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

EDUARDO BARAJAS
VERDIECK CHAMBERS APC
HANNA, BROPHY, MacLEAN, McALEER & JENSEN, LLP
LAW OFFICE OF PIERRE VAUGHN

JB/*pm*

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

Nature of Petition

Defendant has filed a timely, properly verified petition for reconsideration on recognized statutory grounds of a decision issued April 11, 2024. By that decision, the workers' compensation administrative law judge (WCJ) found in relevant part that applicant had met his burden of establishing that he sustained an industrial injury to his psyche.

Defendant contends the evidence does not justify the Findings of Fact in that the WCJ erred by failing to bar applicant's claim through the application of the Good Faith Personnel Action affirmative defense in Labor Code § 3208.3 (h).

Applicant has filed a response to the petition.

Statement of Facts

Procedurally, this matter proceeded to a Mandatory Settlement Conference (MSC) before WCJ Hawthorne on November 8, 2022.

At that time the only issues set for trial according to the Pre-Trial Conference Statement (PTCS) were injury AOE/COE to applicant's psyche, temporary disability, and need for further medical treatment. There is nothing in the PTCS identifying an affirmative defense.

On the first day of trial on **January 11, 2023**, the issues were narrowed to injury AOE/COE to applicant's psyche and need for further medical treatment only. The WCJ read into the record the stipulations, issues, and evidence of the parties and took testimony. Again, no affirmative defense was placed on the formal record.

The matter then proceeded to three more days of trial on April 10, 2023, May 4, 2023, and June 29, 2023, at which point the matter was submitted.

The WCJ heard from multiple witnesses. The parties provided the WCJ with only one med-legal report as evidence, the report of PQME Khodaparast, dated June 28, 2022 (joint exhibit AA).

Having reviewed the formal record, the WCJ vacated the matter on August 10, 2023. The WCJ in his order vacating pointed out that the report of the PQME was not substantial evidence. The WCJ noted that the PQME was aware that the applicant had been treating for psychotherapy for several months (Joint exhibit AA, page 5, paragraph 4). However, none of the mental health

records were made available to the PQME. The WCJ, in his order specifically noted that without the medical records for review "the doctor's opinion on causation lacks credibility or substantiality."

After obtaining additional medical records from various providers, the parties obtained three additional reports from the PQME.

On **March 14, 2024**, the matter was formally resubmitted with the WCJ taking in the three additional reports from the PQME at that time. Again, there were no changes to the prior stipulations or issues raised previously at trial.

The WCJ thereafter issued his decision on April 3, 2024, finding in relevant part that the applicant had met his burden of establishing injury AOE/COE. The WCJ relied on the reports of the PQME who noted that it was her opinion:

> "that Mr. Barajas did incur a labor disabling psychiatric disorder or need for psychiatric treatment caused by the CT 01/01/2021–12/13/2021 industrial claim during the course of employment as a general manager while working at Reyes Holding Crest Beverage, LLC.". (Joint exhibit AA, page 22).

The PQME based her opinion on the following:

> "Specifically, in my opinion, the following work-related incidents combined to form the predominant cause (greater than 51%) of the applicant's current psychiatric injury: Unrealistic workload assignments from January 2021 to December 2021, alleged racial discrimination against the applicant by his direct supervisor, and disciplinary actions taken in November 2021 by his employer following his performance review assessed by his direct supervisor." (Joint exhibit AA, page 23, fourth paragraph).

In apportioning industrial causation, the PQME further found that:

> "the applicant's psychiatric injury is attributable 40% to the November 2021's disciplinary actions, 40% to unrealistic workload assignments from January 2021 through December 2021, and 20% to the alleged racial discrimination against the applicant by his direct supervisor." (Joint exhibit AA, page 23).

The WCJ in his findings found the applicant has established a work-related injury to his psyche. In his Opinion, the WCJ found credible the allegations of racial discrimination and unrealistic workload assignments which account for 60% of the applicant's psychiatric injury.

Discussion

1. **THE AFFIRMATIVE DEFENSE WAS NOT RAISED ON THE FORMAL RECORD AND IS DEEMED WAIVED**

Defendant contends the applicant's claim is barred by the application Labor Code § 3208.3(h) which states that "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 good faith personnel action defense is an affirmative defense. The failure to raise an affirmative defense amounts to a waiver (see Labor Code § 5409 and Romano v. Kroger, 2013 Cal. Wrk. Comp PD LEXIS 125 (panel decision) which cites Abney v. Aera Energy (2004) 69 CCC 1552 (en banc)).

Here, neither of the parties formally identified the affirmative defense at the time this matter was set for trial. The PTCS signed by WCJ Hawthorne on November 8, 2022, only identifies AOE/COE for psyche and temporary disability as issues (the temporary disability issue was removed on the first day of trial). There is no mention of the affirmative defense that defendant was seeking to bar applicant's claim with the application of Labor Code § 3208.3(h) on the PTCS.

Similarly, on the opening day of trial on January 11, 2023, WCJ Romano, reading from the previously prepared PTCS, identified that the only issues set before the WCJ at that time were AOE/COE and need for further medical treatment.

If it was the intent of the parties that the WCJ address an affirmative defense formally in his findings, it needed to be formally raised on the record.

This matter proceeded to five separate trial dates. It was submitted after the first four trial dates as noted above and thereafter vacated. After the order vacating, the parties again returned formally on the record for the fifth trial date. It is after this fifth trial date that the WCJ issued his opinion.

At any one of these trial dates the parties could have pointed out to the WCJ that the affirmative defense of Labor Code § 3208.3(h) had been previously omitted from the formal record. They did not.

It is quite likely that the parties erroneously believed that the affirmative defense was implicitly raised by virtue of the already existing AOE/COE issue and the medical evidence. However, it is not. It must be formally raised on the record.

Certainly, the WCJ would have allowed the parties to amend the issues if the issue of the affirmative defense had been erroneously omitted by either the parties or the WCJ at any point in time during the trial.

However, by the time of the fifth trial, which was in March of 2024, the WCJ would not remember any discussions informally off the record over a year earlier and instead rely (as he did) on the stipulations and issues raised on the formal record.

It appears then that at no time was the issue raised formally on the record either at the MSC or at trial. It was therefore waived.

2. **THE WCJ APPLIED THE PROPER STANDARD IN ASSESSING WHETHER APPLICANT MET HIS BURDEN OF PROOF**

The WCJ assessed this matter from the standpoint of credibility and whether or not applicant had met his burden of establishing by a preponderance of the evidence an industrial injury to his psyche (51% or more).

Here, the WCJ determined that applicant's injury was established by the credible evidence of applicant's testimony and the weight of the unrebutted, credible opinions of the PQME:

> "Therefore, based on the applicant's testimony and the unrebutted reports of the PQME, the WCJ finds that the applicant has met his burden of establishing an injury to his psyche. He is further awarded the need for additional medical treatment consistent with the June 28, 2022 report of the PQME (joint exhibit AA, page 25)." (Opinion on Decision, last page).

As noted above in the statement of facts, the PQME found that applicant had met his burden of establishing by a preponderance of the evidence an industrial injury to his psyche (see specific citations to the PQME report supra).

The WCJ found both the acts of racial discrimination/harassment and unrealistic workload credible. This amounted to 60% of industrial causation. As this exceeds the preponderance of the evidence standard, applicant met the threshold issue of establishing a work-related injury.

3. **APPLICATION OF THE AFFIRMATIVE DEFENSE WOULD NOT HAVE CHANGED THE OUTCOME OF THE CASE**

Ultimately, to successfully demonstrate that the applicant's claim is barred by the application of Labor Code § 3208.3(h) the employer must demonstrate that a substantial cause of applicant's injury was the result of personnel actions done in good faith.

Defendant failed to do so. Therefore, even if the defendant ***had*** raised the affirmative defense of Labor Code § 3208.3(h) at trial, it would not have affected the result for the following reasons.

The WCJ first notes that racial discrimination and other acts of harassment are neither personnel actions nor performed in good faith. According to the PQME, this accounts for 20% of the applicant's injury. The applicant's credible testimony corroborated this opinion.

Similarly, unrealistic and excessive workloads are neither personnel actions nor performed in good faith. Again, according to the PQME, these acts account for 40% of the applicant's injury. The applicant's credible testimony again corroborated the PQME's opinion.

These two factors alone combine to produce 60% of the applicant's psychiatric injury. There was no evidence of any pre-existing condition.

According to the PQME, the remaining 40% of applicant's injury was due to a single disciplinary action in the form of a poor performance review in November 2021 which resulted from a midyear review in August of 2021.

The WCJ is aware that a disciplinary action ***may*** be a personnel action if conducted in good faith.

In order to prevail, the defendant had to do more than merely raise the defense; the defendant was required to present evidence which affirmatively establishes, among other things, that personnel actions were a substantial cause of applicant's injury, and that the personnel actions were done in 'good faith.'

Here, the PQME indicated that "the applicant's psychiatric injury is attributable 40% to the November 2021's disciplinary actions" which followed the applicant's "mid-year performance review". According to the applicant, whom both the PQME and the WCJ found credible,

> "Mr. Barajas reported receiving his midyear review in **August 2021**. He stated, "It was so disturbing. In the five years that I was a manager, I had never had a bad review." Reportedly, Joe told the applicant, "You will never be as good of a manager as I am." Reportedly, Joe went on and shared a childhood memory with

> the applicant. "When I was younger, I lived in Victorville, Your people would look for me to beat me up," referring to Mr. Barajas's racial background as a Mexican. The applicant stated his performance review consisted of poor performance as he was failing to perform at Joe's desired level. In addition, Joe told him that he needs to let go of his "mexicanism" and "machoism," and "not take things too personally." He stated after the meeting, he was crying on his way home and was very upset. His manager later provided him with a long list of tasks with due dates to improve his performance. (Joint exhibit AA, page 4, fourth paragraph, emphasis added).

Significantly, the August 2021 mid-year review was provided to the WCJ as applicant's evidence, (see applicant's exhibit 1), not by the defendant. The WCJ must assume then, that this evidence was provided to him by the applicant not to corroborate a defense by the defendant, but rather as evidence by the applicant to demonstrate that the disciplinary action was not conducted in food faith.

According to the applicant, "Joseph Kraus conducted the review" (See MOH- SOE, January 11, 2023, page 8, last two lines). This is the same "Joe" who is identified as the "Joe" in the excerpted paragraph above who told applicant to let go of his "mexicanism", who advised applicant that "Your people would look for me to beat me up.". These statements were presented to the applicant during the mid-year review by Mr. Kraus.

Mr. Kraus is the same supervisor who provided the applicant with unrealistic goals and failed to help the applicant even after he asked for additional support.

According to the applicant:

> He reported that in November 2021, the new director visited his facility and was quite unhappy with the facilities' condition. He noted, "He went off on me." Per Mr. Barajas' report, the director and Maggie went to his office and blamed him for the problems at the facility that he did not believe was part of his responsibilities. He noted, "I told them I had done the best I could given the manpower and little support I got from my supervisor."

The applicant had asked Mr. Kraus for more help in managing the shop. Applicant "felt he needed a manager and more technicians/mechanics as well as people to clean up". Instead of providing support, his supervisor told him to "handle it" which left applicant with no alternative but to do the work himself. (See MOH/SOE, January 11, 2023, page 7, paragraphs 4 & 5).

The November 2021 performance review was signed by the applicant and Mr. Kraus. Therefore, had the WCJ been asked to address the affirmative defense of a good faith personnel

action in his decision, the WCJ would have found that neither the mid-year review nor the November 2021 performance review was conducted in good faith.

Consequently, defendant failed to establish any evidence barring applicant's claim pursuant to Labor Code § 3208.3(h). However, because the affirmative defense was not raised at trial, the WCJ did not find it necessary to address and explore the mid- year review and November 2021 poor performance review in his opinion and findings as he has now done in his Report and Recommendation.

Recommendation

For the reasons discussed, the WCJ respectfully recommends that the petition for reconsideration be denied.

Date: May 13, 2024

Mark Romano
WORKERS' COMPENSATION JUDGE