

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

KATHLEEN ZIPP, *Applicant*

vs.

**ST HELENA U.S.D., PSI, administered by NORTH BAY SCHOOLS INSURANCE
AUTHORITY, *Defendants***

**Adjudication Number: ADJ12471831
Santa Rosa District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

On August 21, 2023, we issued our Opinion and Order Granting the Petition for Reconsideration (Petition) filed by applicant to allow sufficient opportunity to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the June 13, 2023 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant's psychiatric injury claim was barred by the good faith personal action (GFPA) defense set forth in Labor Code section 3208.3(h).¹ Applicant contends that the WCJ erroneously concluded that many of the factors that contributed to her psychiatric injury were good faith personnel actions, and that, as a result, her claim was not barred by the GFPA defense.

Defendant filed an Answer. The WCJ submitted a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny reconsideration.

We have considered applicant's Petition for Reconsideration, defendant's Answer, and the contents of the WCJ's Report. Based on our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will rescind the WCJ's June 13, 2023 Findings and Order and return this matter to the trial level for further proceedings and a new decision by the WCJ consistent with this opinion.

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

BACKGROUND

Applicant alleged injury arising out of and in the course of employment (AOE/COE) to the psyche and stress² while employed as a teacher by defendant from September 25, 2017 to September 24, 2018.

The matter proceeded to a trial over three days wherein the primary issue was injury AOE/COE to the psyche with defendant raising the affirmative defense of lawful, non-discriminatory, good-faith personnel actions per section 3208.3(h). (Minutes of Hearing and Summary of Evidence (MOH/SOE), May 19, 2021, p. 2.)

During trial, applicant testified that part of her psychiatric injury stemmed from various actions of the school principal, Benjamin Scinto. Applicant stated that, during faculty meetings, Mr. Scinto would sometimes interrupt her and “shut her down.” (MOH/SOE, May 19, 2021, p. 9; MOH/SOE, March 16, 2022, p. 7.) Applicant also referred to a formal personnel evaluation issued by Mr. Scinto in 2016 rating applicant’s performance for the school year 2015-2016. Mr. Scinto gave applicant a “2” rating under a section of the evaluation titled “Development as a Professional Educator.” The lowest score was “1” and the highest was “5.” (Def. Exh. C, Final Evaluation Form 2015-2016.) During trial, Mr. Scinto explained that the “2” rating was due to applicant’s “collaborative issues” within the English Department. (MOH/SOE, March 16, 2022, p. 7.) Applicant testified that the “2” rating felt like a “punch to the stomach” because she “knew that Mr. Scinto did not then view her as a colleague.” (MOH/SOE, May 19, 2021, p. 9.)

On August 23, 2017, Mr. Scinto and the vice principal, Gregory Feters, sent applicant a “Notification of Concern,” stating that she was approximately 2-3 minutes late to her fifth period class, which, pursuant to the St. Helena Teachers Association Collective Bargaining Agreement (CBA), translated to roughly twenty minutes late to work. (Def. Exh. E, Memo from Benjamin Scinto to Kathleen Zipp, August 23, 2017.) The memo stated that if the situation occurred again, the memo would be placed in applicant’s personnel file in addition to a warning letter.

On November 13, 2017, Mr. Scinto and Mr. Feters issued a written warning to applicant, citing her for being 5 minutes late to her first period class in violation of the CBA. (Def. Exh. F, Memo from Benjamin Scinto, Greg Feters, to Kathleen Zipp, November 13, 2017.) Applicant testified that she was tardy due to a traffic accident and that she had explained the situation to Mr.

² We observe that “stress” is not a body part; stress is a cause of injury.

Scinto. Applicant stated that she was upset that Mr. Scinto had issued the warning because tardiness due to situations outside of teachers' control did not violate the CBA. Applicant felt that this reprimand was part of a pattern of harassment by Mr. Scinto because it seemed that he was looking for any opportunity to "tarnish" her reputation in the school district. (MOH/SOE, November 10, 2021, pp. 2-3.)

On January 18, 2018, applicant received a "Notice of Deduction of Pay" from the Chief Academic/Human Resources Officer, Chris Heller, stating that applicant's pay was being deducted 1 hour because she left work early without prior authorization in violation of the CBA. (Def. Exh. H, Memo from Chris Heller to Kathleen Zipp, January 18, 2018.) Applicant testified that she believed that she had complied with the CBA and was very upset by the reprimand. Applicant felt that the reprimand was an abuse of power and done in bad faith as part of a pattern of harassment. (MOH/SOE, November 10, 2021, p. 3.)

Applicant was also investigated for misuse of personal necessity leave when she traveled to Washington D.C. on September 11, 2018 and September 12, 2018 to honor the late senator John McCain and to bereave the events of 9/11. (MOH/SOE, November 10, 2021, p. 4.) After her trip, Mr. Heller met with applicant and a union representative to discuss docking applicant's pay for misuse of personal leave. (MOH/SOE, March 16, 2022, p. 3.) After the meeting, Mr. Heller issued an "Official Letter of Reprimand," notifying applicant that she would be docked 2 days compensation for violating the CBA. (Def. Exh. I, Memo from Chris Heller to Kathleen Zipp, September 24, 2018.) Applicant testified that she had complied with the CBA rules and felt that the reprimand was part of Mr. Heller's "agenda to tarnish her reputation and to make her work environment unbearable." (MOH/SOE, November 10, 2021, p. 7.)

On March 17, 2016, Mr. Scinto sent applicant a "Conference Summary Memo" regarding an incident where applicant was seen lying on a sofa in the faculty lounge during "Access Period," which was held for students seeking additional assistance from their teachers. (Def. Exh. D, Memo from Benjamin Scinto to Kathleen Zipp, March 17, 2016; MOH/SOE, March 16, 2022, pp. 7-8.) The memo summarized an earlier meeting between Mr. Scinto and applicant, where Mr. Scinto explained the importance of availability during Access Period. (Def. Exh. D.)

On December 16, 2016, Mr. Scinto issued a letter to the English Department in response to an email from applicant regarding a hostile work environment. (App. Exh. 12, Benjamin Scinto Letter to English Department Teachers re: New collaborative structure effectively immediately,

December 16, 2016; App. Exhs. 13-14, MOH/SOE, March 16, 2022, p. 7.) Mr. Scinto's letter stated that, due to "existing collaborative challenges" in the English Department, he would be issuing a shared Google Sheet seeking the teachers' input on areas for departmental growth.

At some point between 2016 and 2018, Mr. Scinto also reassigned applicant from teaching 12th to 9th ninth grade English, or "English 12" to "English 9." Applicant testified that she had no understanding why this happened. (MOH/SOE, May 19, 2021, p. 9; MOH/SOE, March 16, 2022, p. 8.)

Applicant also described an incident in 2017 or 2018 when an unidentified colleague made an upsetting comment during a faculty bingo game organized by Mr. Scinto. Applicant testified that this comment made attending faculty meetings even worse for her. (MOH/SOE, May 19, 2021, p. 9.)

Applicant also alleged harassment and bullying by a school employee named Theresa Ely for six years. During two of those years (2015-2017), Ms. Ely was applicant's superior and Chair of the English Department; otherwise, Ms. Ely was applicant's coworker. (MOH/SOE, May 19, 2021, p. 8; MOH/SOE, November 10, 2021, p. 9.) Applicant described Ms. Ely's behavior as follows:

Theresa's mannerisms, including crossing her arms, rolling her eyes and making comments about the applicant's teaching, occurred in front of the applicant and her colleagues. The applicant was also told by colleagues that Theresa Ely was talking about her behind her back....Theresa humiliated the applicant in front of other colleagues. She stated that applicant's curriculum "wasn't up to snuff."

(MOH/SOE, May 19, 2021, pp. 8-9.)

During trial, Ms. Ely denied bullying or harassing applicant and stated that any disagreements were expressed in a professional manner. (MOH/SOE, November 10, 2021, p. 10.) Ms. Ely testified that she did have a habit of rolling her eyes but she could not recall doing so every time applicant spoke. Ms. Ely stated that there was an incident when she was "pretty snippy" with applicant in the work parking lot because Ms. Ely was late to pick up her daughter. (MOH/SOE, November 10, 2021, pp. 8-10.)

Applicant testified that she was depressed as a result of "years of unabated harassment" while working for defendant. Applicant stated that she still has nightmares and dreams of being at work and being "disregarded." (MOH/SOE, March 16, 2022, p. 13.) Applicant also stated that she

developed “mind-numbing” gambling and online shopping habits, which she did not have before working for defendant. (MOH/SOE, May 19, 2021, pp. 9-10.)

Naga Kothapalli, M.D., acted as the Qualified Medical Evaluator (QME) in psychology and issued an initial QME report on August 11, 2020. (App. Exh. 9, QME Kothapalli Initial Report, August 11, 2020.) Dr. Kothapalli concluded: “Based on interview, review of records including deposition, psychological testing, I conclude that the symptoms of adjustment disorder with mixed anxiety and questionable depressive symptoms as well as other unspecified trauma and stress related disorder are due to Ms. Zipp’s reaction to perceived hostility at work, interpersonal issues with co-workers and supervisors, as well as disciplinary action that was taken.” (App. Exh. 9, pp. 27-28.) In his report, Dr. Kothapalli grouped the causative factors into two “incidents”:

1. Incident 1: Tardy a couple times following back surgery in February 2014, a memo was given to her regarding tardiness and she reported that it never happened again for the rest of the year. The next year when she was held up because of a car accident en route to school which blocked the road and she had to reroute, she was written up by Ben Scinto, even though she called the office and let them know about the traffic situation.
2. Incident 2: [P]ersonal days off on September 11, 2018-September 12, 2018 to go to Washington DC and pay respects to Senator John McCain, got tickets for Hamilton, this was her way to commemorating the heroes that helped the 9/11 victims, and showing respect to John McCain who she considers a family member. She was reprimanded and pay docked for 2 days for abusing personal leave for vacation.

(App. Exh. 9, p. 12.)

Dr. Kothapalli also opined that applicant’s psychiatric injury was substantially caused by personnel actions:

Given that this case involves the issue of personnel actions, it is further my opinion, with reasonable medical probability that the issues described including being written up and pay being docked for misuse of personal day off, interpersonal issues with co-workers and supervisors, Ms. Zipp’s reaction to the disciplinary action were a substantial cause, i.e. 35-40% of the Adjustment disorder with mixed anxiety and depressed mood and other unspecified trauma and stress related disorder.

(*Id.* at p. 28.)

On May 24, 2022, the WCJ vacated submission and ordered additional medical-legal evidence regarding specific events of employment and apportionment of causation factors. (Order Vacating Submission for Further Development of the Record, May 24, 2022.)

Counsel for applicant and defendant deposed Dr. Kothapalli on January 24, 2023. During his deposition, Dr. Kothapalli apportioned 35% of applicant's psychiatric injury to the following "personnel actions":

Events listed in "Incident 1" of his initial QME report	(5%)
Events listed in "Incident 2" of his initial QME report	(25%)
Events reported by applicant involving other "players"	(5%)

(Exh. WCAB 1, Deposition of Dr. Kothapalli, January 24, 2023, pp. 14-15, 20.)

Counsel for defendant and applicant asked Dr. Kothapalli to further break down the 5% that he allocated to events involving other players. Out of this 5%, Dr. Kothapalli apportioned 2% to "a couple of instances that happened during when Teresa Ely was...the head of the English Department." (Exh. WCAB 1, p. 21.) Dr. Kothapalli apportioned the remaining 3% as follows:

Mr. Scinto's reassignment of applicant from English 12 to English 9	(0.25%)
"Issues over curriculum"	(0.1%)
Alleged bullying by a coworker, Page Rios	(0.25%)
Applicant's reaction to docked pay in 2018	(1%)

We note that $0.25+0.1+0.25+1 = 1.6\%$, not 3%. As best can be told by Dr. Kothapalli's deposition, the remaining 1.4% was assigned to degradation by Mr. Scinto in front of faculty members and general workplace hostilities. (Exh. WCAB 1, pp. 19-21, 27-29.)

On June 13, 2023, the WCJ issued the disputed F&O, finding that actual events of employment were the predominant cause (51%) of applicant's psychiatric injury. In the appended Opinion on Decision, the WCJ explained that applicant's psychiatric injury was also substantially caused (35%) by good faith personnel actions, rendering applicant's claim barred by the good faith personnel defense in section 3208.3(h). (Opinion on Decision at p. 5.)

Applicant subsequently sought reconsideration of the F&O. Applicant argues that some of the events of employment involving Ms. Ely and other members of the school district were not personnel actions. Applicant contends that, discounting these events, causation did not rise to 35%,

i.e., the minimum threshold for substantial causation. Applicant also contends that, even if the events were personnel actions, defendant did not prove that they were done in good faith. Applicant concludes that, as a result, compensation is not barred by the GFPA defense under section 3208.3(h).

DISCUSSION

Section 3208.3 provides, in relevant part:

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.

(Lab. Code, § 3208.3(b)(1).)

“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]; *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)(1), 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. (*San Francisco Unified School Dist. v. Workers’ Comp. Appeals Bd. (Cardozo)* (2013) 190 Cal.App.4th 1, 9 [75 Cal.Comp.Cases 1251] (writ den.).) This is often referred to as a *Rolda* analysis, based on *Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241 (Appeals

Board en banc).) After considering all the medical evidence and the other documentary and testimonial evidence of record, the WCJ must make the following determinations:

- (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 that requires competent medical evidence;

Where, as here, the good faith personnel action defense was raised, the burden shifts to defendant to establish the following elements in order to avoid liability.

- (3) if actual events of employment were the predominant cause of the psychiatric injury, whether any of the events of employment were personnel actions, a factual/legal determination for the WCJ;
- (4) if so, were any of the personnel actions lawful, nondiscriminatory and in good faith, a factual/legal determination for the WCJ;
- (5) if so, whether the lawful, nondiscriminatory, good faith personnel actions were a “substantial cause” of the psychiatric injury.

(*Rolda, supra*, 66 Cal.Comp.Cases at pp. 245-247; *Cardozo, supra*, 190 Cal.App.4th at p. 9.)

Here, the parties agree that applicant’s psychiatric injury was predominantly caused (51%) by actual events of employment, thus satisfying the first and second steps in *Rolda*. As such, the burden shifts to defendant to prove steps three, four, and five. The parties’ disagreement is primarily focused on the QME’s and WCJ’s determinations that personnel actions by Ms. Ely and other “players” in the school district caused a total of 5% of applicant’s psychiatric injury.

As discussed below, we are not satisfied that the WCJ’s F&O is supported in the record, because Dr. Kothapalli did not adequately address the issue of substantial causation with respect to Ms. Ely and the “other players” involved.

Personnel action(s) by Theresa Ely (2%)

Dr. Kothapalli assigned 2% of applicant’s psychiatric injury to “a couple of instances” involving Ms. Ely that occurred while she was applicant’s superior and Chair of the English Department, as opposed to applicant’s coworker. Dr. Kothapalli testified that events in the former category were “personnel actions” contributing to substantial causation. However, Dr. Kothapalli

was unable to identify said events, stating “I don’t have information as to how long Teresa Ely was a subordinate, how long Teresa Ely was a coworker...” (Exh. WCAB 1, pp. 20-21.)

We first note that, as the medical evaluator, Dr. Kothapalli did not have the authority to determine what events of employment constituted personnel actions because such findings are reserved for the WCJ. (*Rolda, supra*, 66 Cal.Comp.Cases at p. 242.) However, the general principle that “personnel actions” for the purposes of section 3208.3(h) involve conduct by or attributable to management, as opposed to actions by fellow employees, is an accurate one. (*Larch v. Contra Costa County* (1998) 63 Cal.Comp.Cases 831, 834-835 (*Larch*) (Appeals Board Significant Panel Decision).) *Rolda* requires the WCJ to determine whether the actual events of employment were personnel action(s), and if so, whether the personnel action(s) were lawful, nondiscriminatory and in good faith. *Rolda* then requires the WCJ to determine whether those lawful, nondiscriminatory and good faith personnel actions amount to a substantial cause (i.e. 35-40%) of the psychiatric injury – a determination that, of course, must be supported by substantial medical evidence. (*Escobedo v. Marshalls* (2007) 70 Cal.Comp.Cases 604, 620 (Appeals Board en banc), citing Lab. Code, § 5952(d) [“it is well established that any decision of the WCAB must be supported by substantial evidence.”]; *Hegglin v. Workmen’s Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93] [“Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board’s findings if it is based on surmise, speculation, conjecture or guess.”].)

Here, while events of employment that occurred while Ms. Ely was applicant’s superior and Chair of the English Department may well have been personnel actions, Ms. Ely only held this position for 2 out of the 6 years of alleged harassment and bullying. Thus, without evidence of the timing and setting of each event involving Ms. Ely, it is impossible tell whether the event was a personnel action. (*Larch, supra*, 63 Cal.Comp.Cases at p. 833 [“What constitutes a ‘personnel action’ depends on the subject matter and factual setting for each case.”].) Moreover, Dr. Kothapalli’s failure to identify each individual event of employment involving Ms. Ely, and to assess corresponding percentages of causation, precluded a proper substantial causation analysis by the WCJ under *Rolda*.

Thus, the WCJ’s decision regarding the causative factors involving personnel actions by Ms. Ely is not supported by substantial evidence.

Personnel action(s) involving other “players” in the school district (3%)

Dr. Kothapalli also allocated 3% of applicant’s psychiatric injury to “personnel actions” by other “players” in the school district, namely: Mr. Scinto’s decision to reassign applicant from teaching English 12 to English 9; “issues over curriculum”; bullying by a coworker, Page Rios; applicant’s reaction to notice of docked pay; degradation by Mr. Scinto; and general workplace hostilities. (Opinion on Decision at p. 4, citing WCAB Exh. 1, pp. 6-7.) While some or all of these events of employment may have been personnel actions adding up to 3% causation, without additional evidence on the nature and setting of each event, it is impossible to tell. (*Larch, supra*, 63 Cal.Comp.Cases at p. 833.)

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to “ensure substantial justice in all cases.” (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Appeals Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) For the reasons discussed above, Dr. Kothapalli’s report was not *Rolda*-compliant and thus did not constitute substantial medical evidence supporting the WCJ’s conclusion that applicant’s psychiatric injury was substantially caused by good faith personnel actions and barred by the GFPA defense. (Lab. Code, § 3208.3(h).)

Once the individual factors of causation have been identified with specificity, and percentages of causation assigned, the WCJ is then tasked with determining whether any of the actual employment events were personnel actions, as distinguished from administrative actions, actions by coworkers, or general working conditions. (*Larch, supra.*) Thereafter, the WCJ must determine whether those actions were lawful, nondiscriminatory and in good faith and whether such actions reach the substantial cause threshold of 35-40%. (*Rolda, supra*; Lab. Code, § 3208.3(b)(3).)

Accordingly, and for the reasons discussed above, we rescind the F&O and return this matter to the trial for further development of the record and for further proceedings consistent with this opinion. When the WCJ issues a new decision, any aggrieved party may timely seek reconsideration.

Upon return of this matter, we recommend that the WCJ clarify the dates of events of employment involving Ms. Ely, and that thereafter, as appropriate, the medical record can be further developed by way of further opinion from Dr. Kothapalli. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 139, 142 (Appeals Board en banc).) Alternatively, the parties may wish to agree to an agreed medical evaluator or the WCJ may appoint a regular physician pursuant to section 5701.

Based on the foregoing,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the June 13, 2023, Findings and Order issued by the workers' compensation administrative law judge is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



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.

**KATHLEEN ZIPP
LEVITZ LEGAL
MULLEN FILIPPI**

AC/md

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